

Racial Impact Statements

CHANGING POLICIES TO ADDRESS DISPARITIES

BY MARC MAUER

In reaction to a study that found Iowa topped the nation in racial disparity in its prison population, Iowa Governor Chet Culver in April 2008 made history by signing into law the nation's first piece of legislation to require policy makers to prepare racial impact statements for proposed legislation that affects sentencing, probation, or parole policies. In signing the bill, Gov. Culver noted that "I am committed to making sure government at all levels reflects our shared values of fairness and justice." In the following months Connecticut and Wisconsin took similar action.

These policy initiatives come at a moment when the scale of racial disparity within the criminal justice system is truly staggering. One of every nine black males between the ages of 20 and 34 is incarcerated in prison or jail, and one of every three black males born today can expect to do time in state or federal prison if current trends continue. For Hispanic males, the lifetime odds of imprisonment are one in six. Rates for women are lower overall, but the racial/ethnic disparities are similar.

The effects of high rates of incarceration go beyond the experience of imprisonment itself, and have broad consequences for both the offender and the community. A prison term results in challenges in gaining employment, reduced lifetime earnings, and restrictions on access to various public benefits. Families of offenders themselves experience the shame and stigma of incarceration, as well as the loss of financial and emotional support with a loved one behind bars. And for the community at large, the challenges of reentry result in high rates of recidivism and the consequent costs of a burgeoning prison system.

Thus, we are faced with twin problems in the justice system. Clearly, we need policies and practices that can work effectively to promote public safety. At the same time, it also behooves us to find ways to reduce the disproportionate rate of incarceration for people of color. These are not competing goals. If we are successful in addressing crime in a proactive way, we will be able to re-

duce high imprisonment rates; conversely, by promoting racial justice we will increase confidence in the criminal justice system and thereby aid public safety efforts.

Reducing minority rates of confinement is a complex process. These outcomes result from a complex set of factors, including socioeconomic disadvantages, involvement in criminal behavior, resource allocation in the criminal justice system, sentencing policies, limited diversionary options, and biased decision making among practitioners. We can debate the relative contribution of each of these factors, but there are few who would dispute that each plays at least some role.

The premise behind racial impact statements is that policies often have unintended consequences that would be best addressed prior to adoption of new initiatives. In this sense they are similar to fiscal and environmental impact statements. Policy makers contemplating new construction projects or social initiatives routinely conduct such assessments, which are now widely viewed as responsible mechanisms of government.

Racial impact statements are particularly important for criminal justice policy because it is exceedingly difficult to reverse sentencing policies once they have been adopted. The classic example in this regard is the federal crack cocaine mandatory sentencing policies. Adopted in 1986 and 1988, at a time of widespread concern about this new form of cocaine, the laws were hastily passed by Congress with virtually no discussion of their potential racial impact. Two decades later, the results are in and they are very sobering. More than 80 percent of the prosecutions for crack (as opposed to powder cocaine) offenses have been of African Americans, far out of proportion to the degree that they use the drug, and there is broad consensus that the penalties are overly punitive. (U.S. Sentencing Commission, *Cocaine and Federal Sentencing Policy*, May 2007.) But despite the fact that the U.S. Sentencing Commission amended its guidelines for crack offenses in 2007, and bipartisan legislation has been introduced in Congress to scale back the penalties, the mandatory sentencing policies remain in place today.

Reports Offer Hard Numbers

Although in recent years there has been increasing attention to issues of race and criminal justice, two policy

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reports issued in 2007 provided lawmakers with renewed incentive to address these issues. In a study titled “And Justice for Some,” the National Council on Crime and Delinquency found wide racial disparities in the juvenile justice system nationally. (Report available at <http://www.buildingblocksfor youth.org/justiceforsome/jfs.html>.) At the state level, Wisconsin led the nation in the degree of racial disparity among youths in custody, with children of color being detained at more than 10 times the rate of white youth.

State officials responded to the report with alarm, leading Governor Jim Doyle to establish a broad-based Governor’s Commission on Reducing Racial Disparities in the Wisconsin Justice System. The commission reviewed policies, analyzed data, and heard citizen testimony over the course of the year, and then issued a comprehensive report with recommendations for reducing disparities at each stage of the system. Following that release, in April 2008 Governor Doyle issued a sweeping executive order calling on all relevant state agencies to track decision making by race, to create an oversight commission charged with advocating for policies to reduce disparities, and to support a range of practices regarding reentry and alternatives to parole revocation.

A second report, “Uneven Justice,” produced by The Sentencing Project, analyzed racial and ethnic disparities in the adult criminal justice system. (“Uneven Justice” available at http://www.sentencingproject.org/Admin/Documents/publications/rd_stateratesofincbyraceandethnicity.pdf.) The report found that nationally, African Americans were nearly six times as likely as whites to be incarcerated, but that there was a broad variation in this ratio among the states. States in the upper Midwest and in the Northeast generally had the highest rates of disparity, representing a combined effect of higher than average black rates of incarceration along with lower than average white rates. The State of Iowa led the nation with a black/white ratio of more than 13 to 1.

The public and political response to the findings in Iowa was substantial. The report received front-page coverage and subsequent editorials in the *Des Moines Register*, and statements of concern from Gov. Culver. The legislative response was led by Rep. Wayne Ford, the longest serving African-American lawmaker in the state, who in 2008 introduced racial impact legislation. The bill quickly received broad support and was adopted almost unanimously. The legislation requires that in addition to preparing a correctional impact statement for proposed policy changes, the legislative services agency should also conduct a racial impact analysis that examines the impact of sentencing or parole changes on racial and ethnic minorities.

Concurrently, in Connecticut, Rep. Michael Lawlor,

chair of the state’s House Judiciary Committee and a longtime leader in justice reform, introduced a similar measure. The bill called for racial and ethnic impact statements to be prepared for bills and amendments that would increase or decrease the pretrial or sentenced populations of state corrections facilities. This legislation also received bipartisan support and was signed into law by Gov. Jodi Rell in June 2008.

The racial impact legislation adopted in Iowa and Connecticut will go into effect in 2009, but we already have a model in place that provides some guidance as to how these mechanisms can aid policy makers. In 2008, the Minnesota Sentencing Guidelines Commission began to conduct such inquiries for a proposed new sentencing policy. In their overview of the process, the commissioners noted their policy goals:

If a significant racial disparity can be predicted before a bill is passed, it may be possible to consider alternatives that enhance public safety without creating additional disparity in Minnesota’s criminal justice system. Just as with the Commission’s fiscal impact notes, the agency does not intend to comment on whether or not a particular bill should be enacted. Rather, it is setting out facts that may be useful to the Legislature, whose members frequently express concerns about the disparity between the number of minorities in our population and the number in our prisons.

(*Racial Impact for H.F. 2949*, Minnesota Sentencing Guidelines Commission, February 27, 2008.)

Thus, for one bill designed to increase penalties for robbery, the commission’s analysis found that “[m]inorities are even more over-represented among persons sentenced to prison for attempted aggravated robbery than non-minorities and their sentences would be increased if this bill were to be adopted. . . . The average increase in sentence length for those offenders would be 8 months for white offenders, 10 months for black offenders, 15 months for American Indian offenders, and 23 months for Hispanic offenders.” But for another bill, designed to defer judgment for certain controlled substance offenses, the commission concluded that it would have no impact on racial disparity in prisons since the legislation did not provide an option for diversion for those repeat drug offenders sentenced to imprisonment.

In considering the utility of such policies, lawmakers will need to consider the scope and procedures involved in establishing such mechanisms, including the following issues. (For greater detail, see Marc Mauer, *Racial Impact Statements as a Means of Reducing Unwarranted Sentencing Disparities*, 5 (No. 1) OHIO STATE J. CRIM. L. (Fall 2007).)

Scope of racial impact statements

While proposed changes in sentencing policies are the most obvious decision-making point at which unwarranted racial disparities might emerge, a host of policy decisions at other stages of the criminal justice system can affect the racial/ethnic demographics of the prison population as well. These include adjustments to sentencing guidelines, “truth in sentencing” and other policies that affect length of stay in prison, parole release and revocation policies, and “early” release mechanisms, such as participation in drug treatment or other programs. Conceivably, a racial impact statement policy could cover one or more of these decision-making points.

Preparation of racial impact statements

Depending on the jurisdiction, there are a variety of mechanisms and agencies that could be charged with preparing racial impact statements. These would include:

- *Sentencing Commissions*—In addition to the federal system, 21 states and the District of Columbia currently have a sentencing commission that in most cases should be capable of producing racial impact statements. Generally, these bodies have relatively sophisticated databases of sentencing data and trends, and usually contain relatively complete information on race, gender, and offense demographics. Some states, including North Carolina and Virginia, already maintain legislative requirements that their sentencing commissions produce impact statements to project any effects of new policy on the size of the prison population. And as described above, the Minnesota commission has begun to produce racial impact assessments as an outgrowth of an internal policy decision.
- *Budget and Fiscal Agencies*—Many state legislative analysts routinely produce fiscal and other analyses of legislative initiatives, and could be delegated to produce racial impact statements as well.
- *Departments of Correction*—State and federal corrections agencies now generally have sophisticated analytical tools with which they can produce detailed forecasts of changes in prison populations based on sentencing data and trends. To the extent that their databases contain information on race and ethnicity, it is likely that they could produce racial impact statements as well.

Policy implementation

Racial impact statements should be viewed as a mechanism to help guide the development of sound and fair policy, but they are not an impediment to enacting

changes in the law. That is, they represent one component of the discussion regarding sentencing policy, but only in conjunction with other relevant considerations. In some cases, lawmakers might receive analyses indicating that African Americans or other racial/ethnic groups would be disproportionately impacted by a proposed sentencing change, but conclude that public safety concerns override these considerations.

In order to see how this might play out in the legislative arena, consider two types of proposed changes. In the first example, legislators are contemplating a sentencing enhancement to school zone drug laws that penalize conduct committed within a certain distance of a school. The racial impact statement provides data indicating that African Americans would be disproportionately affected by such a change, most likely as a result of the disproportionate effect of these policies on the densely populated urban areas where African Americans are more likely to reside. If so, then lawmakers need to assess the concern about exacerbating racial disparity with the goal of providing greater public safety.

A key aspect of formulating policy in this regard relates to the breadth and effectiveness of the school zone law. Certainly, no one wants drug dealers peddling narcotics to school children on the playground during recess. But in some states, these laws also provide for additional penalties for drug transactions between consenting adults that take place in the middle of the night. Clearly, these drug sales are illegal, but should penalties be enhanced if they will disproportionately affect African Americans?

Using the public safety framework, legislators might decide that they could avoid exacerbating racial disparity and promote better public safety by tailoring the law itself rather than the punishment. For example, they could define the statute in a more targeted way, specifically focusing on selling drugs to children on school property. Such a policy could address legitimate concerns of the public while also delineating distinctions in penalties that would not adversely affect minority defendants.

In a second example, consider a legislative proposal to enhance mandatory sentences for robbery convictions. An impact statement produced for such a proposal might demonstrate that African Americans would be disproportionately affected by such a change as a result of greater involvement in the crime. After reviewing such documentation, many policy makers would be likely to place the concern for public safety above the objective of reducing racial disparity, and proceed with adopting the initiative. But it is also conceivable that legislators could use this analysis as an occasion to explore overall investments in public safety. For example, extending the length of time that persons convicted of robbery stay in prison clearly

provides some incapacitation benefits in crime control. But as offenders age in prison, their risk of recidivism generally declines, so at a certain point the additional cost of incarceration may not provide cost-effective approaches to producing public safety. For policy makers the question then becomes how to evaluate the degree of public safety produced through additional years of imprisonment compared to investing those funds in community policing, drug treatment, preschool programs, or other measures believed to be effective interventions. Reasonable people may disagree on how to answer this question, but it should frame the relevant questions.

Growing Movement to Address Disparity

Interest in the concept of racial impact statements is growing rapidly, both in the legal community and among policy makers. Within the ABA, in 2004 the Justice Kennedy Commission recommended a sweeping policy that legislatures “conduct racial and ethnic disparity impact analyses to evaluate the potential disparate effects on racial and ethnic groups of *existing statutes* and proposed legislation; . . . and propose legislative alternatives intended to eliminate predicted racial and ethnic disparity at each stage of the criminal justice process (emphasis added).” The policy was approved by the House of Delegates later that year.

Local initiatives highlight ways to address the issue in a collaborative way.

In 2007, as part of its revision to the Model Penal Code, the American Law Institute called for sentencing commissions to prepare projections to quantify “demographic patterns,” along with correctional resource projections. The ALI noted that “The provision does not dictate the policy decisions that will result. Rather, the provision treats numerical disparities in punishment as an important societal cost that must be considered along with other factors when the existing sentencing structure is assessed, or when changes within the system are contemplated.” (American Law Institute, “Model Penal Code: Sentencing,” 2007, p. 138.)

Policy makers and practitioners are also creating a range of mechanisms to address unwarranted disparities. In 2007, the Delaware Supreme Court, in conjunction with the Delaware Criminal Justice Council, convened a two-day Racial and Ethnic Fairness Summit. The meeting involved 75 key policy makers, practitioners, and community leaders in a frank discussion of how to promote policies that were both fair and *perceived* to be fair by all members of the community. The summit produced a working document of recommendations that is guiding the work of the Council in these areas.

Initiatives at the local level have highlighted ways in which jurisdictions can address issues of disparity in a collaborative way. In 2001, the mayor’s office in Bloomington, Indiana, convened a task force to address concerns about racial disparity raised by community groups. Over a two-year period, aided by researchers at Indiana University, the group analyzed a wealth of local data regarding arrests, charging, prosecution, and sentencing in order to aid policy makers in assessing what changes in policy or practice could reduce unwarranted disparities.

An ongoing project of the Vera Institute of Justice provides a means of developing practical approaches to addressing disparities within the prosecution function. The multiyear project is working with prosecutors in three jurisdictions—Milwaukee, Mecklenberg County (Charlotte), N.C., and San Diego—to collect and analyze data regarding decision making in prosecutors’ offices. Based on their findings, the project staff will aid prosecutors in adapting case management systems to collect data on racial dynamics, develop protocols for ongoing review of data, and implement corrective policies and procedures.

At the federal level, bipartisan legislation introduced in the 110th Congress by Sen. Joseph Biden (D-Del.) and Sen. Arlen Specter (R-Pa.) was focused on providing federal prosecutors with a mechanism by which they could engage

a broad segment of the community in assessing the racial dynamics of prosecution. The Justice Integrity Act of 2008 called for establishing broad-based task forces in 10 U.S. attorney districts, comprised of leaders from the jurisdiction’s federal and state justice systems, as well as community representatives. The task forces would be charged with producing racial and ethnic fairness plans that analyze data on prosecutorial decision making, assessing whether disparities are explained by relevant legal variables, and recommending policies and practices to reduce any unjustified disparities. It is expected that the bill will be reintroduced in 2009.

Conclusion

Issues of race and justice permeate American society, but nowhere are they as profound as in the criminal justice system. Racial and ethnic disparities result from a complex set of factors, many beyond the purview of the criminal justice system. But criminal justice leaders have an opportunity, and an obligation, to ensure that their policies and practices at the very least do not exacerbate any unwarranted disparities. Racial impact statements offer one means by which policy makers can begin to engage in a proactive assessment of how to address these challenging issues in a constructive way. ■