

The Color of Justice

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A justice system which tolerates injustice is doomed to collapse.

— Leonard Noisette, quoted in *Reducing Racial Disparities in the Criminal Justice System* (2000)

In 1991 in Los Angeles, a bystander videotaped police officers beating Rodney King, a black man, after a car chase. People in the African-American community had long complained of cases of police brutality. At long last, they had clear evidence — a videotape. But at the trial in state court, the jury acquitted the four officers of using excessive force. A major riot erupted in Los Angeles following the verdict.

Although two of the officers were subsequently convicted in federal court, many in the African-American and in other minority communities argue that this case shows how difficult it is for people of color to get justice from the criminal justice system. Racial discrimination, they say, permeates the system.

Critics who claim that racism taints the system have cited its treatment of African-American and Hispanic males. For example, a Bureau of Justice Statistics analysis showed that if current incarceration rates remain unchanged, 32 percent of black males and 17 percent of male Latinos born in 2001 can expect to spend time in prison during their lifetime. This compares to only 6 percent of white males who will go to prison. African-Americans make up 12 percent of the U.S. population, but today compose 40 percent of all prison inmates and 42 percent of those sentenced to death.

The question remains whether these statistics come from racism in the criminal justice system or from other causes. Social scientists and politicians have argued about this question for decades.

In a controversial 1975 article, titled “White Racism, Black Crime, and American Justice,” criminologist Robert Staples argued that discrimination pervades the justice system. He said the legal system was made by white men to protect white interests and keep blacks down. Staples charged that the system was characterized by second-rate legal help for black defendants, biased jurors, and judges who discriminate in sentencing.

A dozen years later, sociologist William Wilbanks rejected the discrimination argument. In his book, *The Myth of a Racist Criminal Justice System*, Wilbanks reviewed scores of studies that showed statistical inequalities between whites and blacks in arrest rates, imprisonment, and other areas of criminal justice. He found that the inequalities came from factors other than racial discrimination, such as poverty and the defendant’s prior record.

Other sociologists, too, have suggested that the apparent inequalities have more to do with poverty than race. Street crimes such as robbery and assault, prominent in the statistics, are usually committed by people from poor backgrounds. Today, about one quarter of all African Americans and Latinos live below the official poverty line. This compares to about 10 percent of all whites.

The connection between poverty and crime has long been noted. During the 1930s, a much larger part of the white population was poor, and whites committed a greater percentage of street crime. Whites then accounted for nearly 80 percent of those in prisons and jails compared to 36 percent today. The question of poverty alone may well account for many of the apparent inequalities in the system.

A RAND Corporation study, however, unearthed some disturbing data. RAND compared the treatment of whites and blacks at key decision points in the criminal justice system. The researchers found that black defendants seemed to be treated more harshly at key points such as sentencing. But the researchers did not identify a cause for these inequalities. Later studies have provided more insight into this data.

Arrest

African Americans accounted for more than a third of the arrests in 2010 for violent crimes. This far surpasses their numbers in the population. Does this disparity come from racial discrimination? Those who say “no” point out that this percentage corresponds to reports from the National Crime Victimization Survey. This survey interviews thousands of victims of crime each year. The percentage of victims who say their perpetrator was black closely matches the percentage of African Americans arrested. A survey of arrest studies concluded, however, that “police are involved in at least some discrimination against members of racial and ethnic minorities.”

African-Americans also have a disproportionately high arrest rate for drug possession and trafficking. Blacks are only 12 percent of the population and 13 percent of drug users, but they constituted almost a third of those arrested in 2010. This may be due in part to the use of “racial profiling.” In many parts of the country, it is alleged that police, using drug courier profiles stop black males for alleged driving violations. A study in New Jersey documenting traffic stops in 1989–91 found that 72 percent of drivers stopped and arrested were African-American, while only 14 percent of cars had a black driver or occupant. State data for the same period showed that blacks and whites had the same rate of traffic violations. A study in Maryland a few years later showed similar results: 17 percent of traffic-code violators were black, but 72 percent of those stopped and searched were black. These types of law enforcement policies may result in blacks acquiring a criminal record more rapidly than whites.

In many jurisdictions, more blacks than whites are released after arrest. This is particularly true for less serious offenses such as prostitution, gambling, and public drunkenness. What this means is unclear. Some say it means that police and

prosecutors are more likely to treat African Americans leniently. Others say it means that blacks are more likely to be arrested on insufficient evidence or harassed by police.

The release rate also varies according to neighborhood. If blacks are arrested in largely minority neighborhoods, they are more likely to be released than whites. But there is no difference in integrated neighborhoods.

Plea Bargaining

More than 90 percent of all criminal cases never go to trial. The defendant pleads guilty, often after the prosecutor and defense attorney negotiate. A 1990 study of about 1,000 cases by the U.S. Sentencing Commission found that whites did better in plea bargains. Twenty-five percent of whites, 18 percent of blacks, and 12 percent of Latinos got their sentences reduced through bargaining. The reason for the disparity was not determined.

The *San Jose Mercury News* conducted a massive study of 700,000 California legal cases over a 10-year period. The paper reported in December 1991 that a third of the white adults who were arrested, but had no prior record, were able to get felony charges against them reduced. Only a quarter of the African-Americans and Latinos with no prior records were as successful in plea bargaining.

The *Mercury News* study did not blame intentional racism for these inequalities. It did, however, suggest that subtle cultural fears and insensitivity contributed to the problem. The study noted that more than 80 percent of all California prosecutors and judges are white, while more than 60 percent of those arrested are non-white.

Jury Verdicts

In 1985, Cornell law professor Sheri Lynn Johnson reviewed a dozen mock-jury studies. She concluded that the “race of the defendant significantly and directly affects the determination of guilt.” In these studies, identical trials were simulated, sometimes with white defendants and sometimes with African Americans. Professor Johnson discovered that white jurors were more likely to find a black defendant guilty than a white defendant, even though the mock trials were based on the same crime and the same evidence.

Professor Johnson also found that black jurors behaved with the reverse bias. They found white defendants guilty more often than black defendants. Furthermore, the race of the **victim** in the case affected both groups. If the victim was black, white jurors tended to find a white defendant less blameworthy. In the same way, if the victim was white, black jurors found black defendants less blameworthy.

According to these mock-jury experiments, both white and black jurors seem to discriminate. Professor Johnson did not, however, think the juror bias was intentional. “Because the process of attributing guilt on the basis of race appears to be

subconscious,” Johnson says, “jurors are unlikely either to be aware of or to be able to control that process.”

The mock trials did have one encouraging result. When white and black mock jurors met together, as many real juries do, the effect of race tended to disappear. This result seems to indicate that the best way to eliminate racial bias in verdicts is to select racially mixed juries.

A study published in the *Quarterly Journal of Economics* in 2012 seemed to confirm much of Johnson’s research. It examined data from felony jury trials in Florida from 2000 to 2010. The researchers found that

(i) juries formed from all-white jury pools convict black defendants significantly . . . more often than white defendants, and (ii) this gap in conviction rates is entirely eliminated when the jury pool includes at least one black member.

The U.S. Supreme Court has moved to promote racially mixed juries by prohibiting prosecutors and defense lawyers from using peremptory challenges to remove potential jurors based on race. (See *Batson v. Kentucky*, 1986, and *Georgia v. McCollum*, 1992.) Justice Thurgood Marshall went even further and called for ending the use of peremptory challenges altogether. Only by banning peremptory challenges, Justice Marshall said, can racial discrimination in jury selection be ended (*Batson v. Kentucky*).

More than twenty years later, there is growing evidence that the rulings in *Batson* and *McCollum* are difficult to enforce. Studies of cases in many states show that both prosecutors and defense lawyers often continue to rely on race-based stereotypes in selecting juries. In 2005 in *Miller-El v. Dretke*, the Supreme Court reviewed a case involving a black Texas death-row inmate. Miller-El was tried in 1986 for the death of a clerk during a robbery at a Holiday Inn in Dallas. At the trial, the prosecutors had used peremptory challenges to remove 10 of 11 potential black jurors. The Supreme Court found clear evidence that the prosecutors’ decision was the result of racial bias and overturned the conviction. The majority stated that allowing discrimination in jury selection “invites cynicism respecting the jury’s neutrality” and undermines public confidence in the courts. In a concurring opinion, Justice Stephen Breyer echoed Justice Marshall and suggested that the whole system of peremptory challenges should be reconsidered.

Sentencing

The RAND Corporation study found that convicted African-Americans were more likely than whites to go to prison. And their sentences were longer. “This disparity,” the study concluded, “suggests that probation officers, judges, and parole boards are exercising discretion in sentencing or release decisions in ways that result in de facto discrimination against blacks.” **De facto** means the discrimination exists in fact, but without legal authority. It may not be intentional.

Unintended discrimination can occur at many points in the legal process. Probation officers often prepare pre-sentencing reports for a judge. The judge uses the reports to help make sentencing decisions. Reports include information on the criminal's prior record, family background, education, marital status, and employment history. Many African-Americans convicted of crimes come from deprived backgrounds. They may have things in their record — unemployment, trouble in school, family problems — that judges, who largely come from middle-class backgrounds, cannot relate to. This may sway some judges to treat them more harshly in sentencing.

In a 1999 survey of studies on discrimination in the justice system, researcher Christopher Stone found that much of the disparity in sentencing could be traced to differences in arrest charges and prior records of those convicted. He concluded: "There is no evidence of disparity that stretches across the justice system as a whole But studies of individual jurisdictions and specific parts of the court process do find some evidence of race bias in a significant number of cases."

Stone considered drug offences separately. Some federal mandatory sentences have come under fire for discriminating against minorities. Critics point to different sentences mandated for crack cocaine, a drug popular in poor minority communities, and powder cocaine, a drug used in wealthier communities. Under federal law, dealing 28 grams of crack gets a first-time offender a mandatory minimum sentence of five years. To receive a similar mandatory minimum sentence for trafficking in powder cocaine, an offender must possess 500 grams. Stone stated: "Whatever one believes about the rationality of the decision to create special, harsher penalties for crack cocaine, the concentration of these sentences on black defendants is striking." (See pages xxxx–xxxx for details on crack and powder cocaine sentencing.)

States often have similar disparities in drug sentencing laws. In a 1996 study of California drug sentencing laws, researchers found that possession of crack cocaine and heroin, more commonly used by minorities, carried stiffer penalties than possession of methamphetamines, more commonly used by whites.

Death Penalty

University of Iowa law professor David Baldus studied 2,000 murder cases prosecuted by the state of Georgia during the 1970s. The Baldus study showed that defendants convicted of killing whites were more than four times more likely to receive the death penalty than those convicted of murdering blacks. The study also revealed that black defendants who murdered whites had by far the greatest chance of being sentenced to death.

A Georgia black man who had been sentenced to death in 1978 for killing a white police officer used this study in his appeal to the U.S. Supreme Court. He claimed that the Baldus study proved that Georgia's jurors and judges discriminated against African-American defendants. In a 5–4 decision, the Supreme Court accepted the results of the study, but ruled that it did not prove discrimination. Writing for the majority, Justice

Lewis F. Powell concluded that the study failed to “demonstrate a constitutionally significant risk of racial bias affecting the Georgia capital sentencing process.” (*McCleskey v. Kemp*, 1987.)

While the Baldus study showed a big disparity in death penalty verdicts depending on the race of the victim, it found that black defendants were only 1.1 times more likely to receive the death penalty than white defendants. A Government Accounting Office report in 1990 also found no clear statistical data showing that the race of a defendant affected the determination of a death sentence. (The report did find, however, that the defendant was much more likely to be sentenced to death if the victim was white than if the victim was non-white.)

A more recent study, however, showed that race-of-defendant bias seems to plague the federal system. A Department of Justice study of the federal system between 1995 and 2000 found that of 159 cases that federal attorneys approved for death-penalty prosecution, 72 percent involved minority defendants. The study also found that many more white defendants received pretrial waivers for the death penalty in a plea agreement than did blacks and Latinos. An earlier congressional report reviewed cases involving people convicted under a drug kingpin law between 1988 and 1994. That report found that while only 24 percent of those convicted under the law were black, the prosecutors chose to pursue the death penalty much more frequently against blacks than whites (78 percent of death penalty defendants were black, and only 11 percent were white and 11 percent Latino).

While racial disparities continue to exist in the American criminal justice system, commentators differ over the cause. Supreme Court decisions since 1960 have rooted out many overtly racist practices, such as in jury selection, but it is more difficult to address unintentional racist factors. Because these factors come from subtle assumptions and fears deeply ingrained in the wider society, only when society changes will they disappear.

Critics of the system, however, insist that inequalities, regardless of their basis, should not be swept under the rug. They must be paid attention to and any discrimination found must be eliminated. Policies that lead to discriminatory results must be re-examined. Many critics believe that the disparities in the system would be easier to accept as unbiased if more decision makers — police, prosecutors, judges, and juries — were people of color.

For Discussion

1. Describe the disparities between white and black defendants at each of the following key decision points: arrest, plea bargaining, jury verdicts, sentencing, and death penalty.
2. What do you think accounts for these disparities? Explain.

3. According to Andrew Hacker, author of *Two Nations, Black and White, Separate, Hostile, Unequal*, “The feeling persists that a black man who rapes or robs a white person has inflicted more harm than black or white criminals who prey on victims of their own race.” Do you agree with this statement? Why or why not?

Class Activity: Toward a Colorblind Justice System

Various proposals have been put forward to prevent discrimination in arrests, plea bargaining, jury verdicts, sentencing, and the death penalty. In this activity, students evaluate a few of these and come up with suggestions of their own.

1. Form small groups. Each group should focus on one of the five policy areas below and should:

- a. Read its policy, evaluate it, and report back to the class.
- b. To evaluate the policy, answer the following questions:

- (1) What problem is the policy designed to address? Does it address the problem? Why or why not?
- (2) Who might support the policy? Who might oppose it? Why?
- (3) What benefits might come from the policy?
- (4) What costs might result from the policy?
- (5) What other policies might address the problem? Are they better? Why?
- (6) What policy should be adopted? Why?

2. The groups should report back. Conclude the activity with a discussion using the debriefing questions on page xxxx.

I. Arrests

Policy: Police should collect data on the race and release records of every person they arrest.

Pros: This will enable departments to track officers who arrest minorities without sufficient cause.

Cons: Police have too much paperwork already and the statistics collected will be meaningless.

II. Plea Bargaining

Policy: Plea bargaining should be abolished.

Pros: It will do away with an informal process subject to abuse because the courts do not review it. It will ensure that all defendants have their day in court.

Cons: Doing away with plea bargaining will clog the courts with cases awaiting trial, resulting in increased court costs.

III. Jury Verdicts

Policy: Peremptory challenges should be abolished. (Peremptory challenges allow attorneys to exclude a limited number of prospective jurors for any reason except race and gender.)

Pros: Even though they are not supposed to, attorneys still use peremptory challenges to exclude jurors on account of race. This will end the practice.

Cons: It is already illegal to exclude jurors on account of race. Doing away with peremptory challenges is too extreme. These challenges help both the prosecution and defense exclude jurors who they feel might not be impartial.

IV. Sentencing

Policy: Federal law should not make first-time drug offenders face mandatory sentences. Judges should be allowed more discretion in sentencing these drug offenders.

Pros: Mandatory minimum sentences cause first-time offenders, mostly minorities, to go into an already overcrowded prison system.

Cons: Mandatory minimum sentences are needed to show we are serious in our war on drugs.

V. Death Penalty

Policy: Congress should reverse the decision in *McCleskey*. If statistical studies show racial disparities in a state's imposition of the death penalty, then minority defendants should not be sentenced to death in that state.

Pros: Race should play no role in whether or not a person receives the death penalty. The death penalty should be limited to aggravated cases where whites and blacks receive the same treatment.

Cons: Mere discrepancies in statistics should not invalidate the death penalty. A defendant should have to show discrimination in the particular case or that the state intended to discriminate.

Debriefing Questions

1. Which policies garnered the most support? The least support? Why?
2. What other policies did you think of that could prevent racial discrimination in the criminal justice system? Do you think they would work? Why or why not?
3. Why is it important that the criminal justice system not be perceived as racially biased?