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Clair, Matthew and Winter, Alix S., "How Judges Can Reduce Racial Disparities in the Criminal-Justice System" (2017). *Court Review: The Journal of the American Judges Association*. 598.
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How Judges Can Reduce Racial Disparities in the Criminal-Justice System

Matthew Clair & Alix S. Winter

For decades, researchers and policymakers have been concerned about the disproportionate presence of blacks and Latinos in the criminal-justice system.¹ While a fairly substantial proportion of these racial disparities can be explained by greater criminal involvement among blacks and Latinos in certain crimes,² researchers continue to find that, even 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.³ 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,⁴ 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. We sought to interview judges from a range of professional, racial, and gender backgrounds since existing literature has found these characteristics to be relevant in explaining judges' vary-

ing philosophies, views of defendants,⁵ and observed decision making.⁶ We continued recruiting respondents until we no longer obtained novel information from our interviews.⁷ For additional insight, we also interviewed prosecutors, public defenders, and private attorneys, and we did fieldwork within upper and lower courthouses across the state. Our interviews focused on court officials' decision making from arraignment to sentencing. A thorough analysis of our findings is presented in a peer-reviewed journal article published in an academic criminology journal.⁸ In this article, we summarize the key takeaways for judges from this study.

JUDGES' EXPLANATIONS OF RACIAL DISPARITIES

A nontrivial number of the judges we interviewed (13 of 55, 24%)⁹ attributed racial disparities to differences in criminal offending rates alone, often highlighting the roles of poverty and family dysfunction in shaping defendants' criminal trajectories before contact with the criminal-justice system. These judges attributed 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. As one judge noted, "[T]here seems to be almost like a self-fulfilling prophecy for a lot of young black men . . . that it is OK to go to [jail], that it is a badge of honor. . . . Sometimes they want to go because that's where their best friend is."

Perhaps surprisingly, however, the majority of judges in our sample (42 of 55, 76%) attributed racial disparities, at least in

Footnotes

1. JEREMY TRAVIS, BRUCE WESTERN & STEVE REDBURN, *THE GROWTH OF INCARCERATION IN THE UNITED STATES: EXPLORING CAUSES AND CONSEQUENCES* (2014).
2. Robert J. Sampson & Janet L. Lauritsen, *Racial and Ethnic Disparities in Crime and Criminal Justice in the United States*, 21 *CRIME & JUSTICE* 311–74 (1997); MICHAEL TONRY, *MALIGN NEGLECT: RACE, CRIME, AND PUNISHMENT IN AMERICA* (1995).
3. Cassia Spohn, *Racial Disparities in Prosecution, Sentencing, and Punishment*, in *THE OXFORD HANDBOOK OF ETHNICITY, CRIME, AND IMMIGRATION* (Sandra M. Bucerius and Michael Tonry eds., 2013); Michael Tonry & Matthew Melewski, *The Malign Effects of Drug and Crime Control Policies on Black Americans*, 37 *CRIME & JUSTICE* 1–44 (2008).
4. Jeffrey J. Rachlinski, Sheri Lynn Johnson, Andrew J. Wistrich & Chris Guthrie, *Does Unconscious Racial Bias Affect Trial Judges?* 84 *NOTRE DAME L. REV.* 1195–246 (2009); Darrell Steffensmeier, Jeffery Ulmer & John Kramer, *The Interaction of Race, Gender, and Age in Criminal Sentencing: The Punishment Cost of Being Young, Black, and Male*, 36 *CRIMINOLOGY* 763–798 (1998); Jeffery T.

Ulmer, *Recent Developments and New Directions in Sentencing Research*, 29 *JUSTICE Q.* 1–40 (2012).

5. CASSIA C. SPOHN, *HOW DO JUDGES DECIDE? THE SEARCH FOR FAIRNESS AND JUSTICE IN PUNISHMENT* (2009).
6. Brian D. Johnson, *The Multilevel Context of Criminal Sentencing: Integrating Judge- and County-Level Influences*, 44 *CRIMINOLOGY* 259–98 (2006).
7. Mario Luis Small, "How many cases do I need?" *On Science and the Logic of Case Selection in Field-Based Research*, 10 *ETHNOGRAPHY* 5–38 (2009).
8. Matthew Clair & Alix S. Winter, *How Judges Think about Racial Disparities: Situational Decision-Making in the Criminal Justice System*, 54 *CRIMINOLOGY* 332–59 (2016).
9. Although we interviewed 59 judges in total, our interview guide evolved during data collection; consequently, some judges were not asked all of our questions about racial disparities. These judges were removed from our analysis, resulting in a sample of 55 judges with respect to beliefs about the causes of racial disparities and 48 judges with respect to strategies for dealing with disparities.

part, to differences in treatment by court officials or police officers at some point along the criminal-justice process. Many of these judges believe that court and law-enforcement officials, including themselves, might have implicit biases against people of color. As one judge noted, “We’re all vulnerable to prejudice.” These judges also attributed disparities to what they believed to be police officers’ and departments’ differentially harsh enforcement of laws in majority-minority neighborhoods.

JUDGES’ STRATEGIES FOR DEALING WITH RACIAL DISPARITIES

Judges reported 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 biases and potential 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. At this stage, judges employing a noninterventionist strategy often feel that prosecutors and defense attorneys have more information about the case than they do and it would, therefore, be “out of line” to “weigh in,” as one judge told us. 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. Through such interventionist strategies at arraignment, judges seek to ensure that “people [from different racial/ethnic groups] are treated equally.”

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

At arraignment, judges reported keeping records of the types of situations/defendants attached to particular charges. Based on these records, judges reported actively inquiring into disparities in charging decisions.

At bail hearings, judges reported 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 reported keeping records of the types of situations/defendants typically attached to particular dispositions. Based on these records, judges reported actively inquiring into the nature of agreed-on pleas that appeared disparately punitive.

At jury selection, judges reported 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 preemptory strike of a minority juror.

Judges reported choosing a minority juror as the foreperson of the jury when possible, especially when the defendant is a minority.

At sentencing, judges reported considering the merits of a “social adversity” defense,¹⁰ 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 reported 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 examined, only a small number of judges in our sample reported

TABLE 1. NUMBER OF JUDGES EMPLOYING EACH STRATEGY CATEGORY, BY STAGE (N=48)

	ARRAIGNMENT	PLEA HEARING	JURY SELECTION	SENTENCING
Interventionist	12	7	13	7
Noninterventionist	36	41	35	41

Source: Matthew Clair & Alix S. Winter, *How Judges Think about Racial Disparities: Situational Decision-Making in the Criminal Justice System*, 54 *CRIMINOLOGY* 332-359 (2016).

10. See Richard Delgado, “Rotten social background”: *Should the Criminal Law Recognize a Defense of Severe Environmental Deprivation?*,

3 *LAW & INEQUALITY* 9–90 (1985).

TABLE 2. JUDGES BY NUMBER OF STAGES AT WHICH THEY EMPLOY AN INTERVENTIONIST STRATEGY (N=48)

INTERVENTIONIST AT 0 STAGES	INTERVENTIONIST AT 1 STAGE	INTERVENTIONIST AT 2 STAGES	INTERVENTIONIST AT 3 STAGES	INTERVENTIONIST AT 4 STAGES
23	15	7	2	1

Source: Matthew Clair & Alix S. Winter, *How Judges Think about Racial Disparities: Situational Decision-Making in the Criminal Justice System*, 54 *CRIMINOLOGY* 332-359 (2016).

employing interventionist strategies that would mitigate possible differential treatment by other criminal justice officials (Table 1). Indeed, a plurality of judges in our sample (23 of 48, 48%) did not employ interventionist strategies at any of the four stages of court processing we examined (Table 2).

IMPLICATIONS: HOW MIGHT JUDGES CONTRIBUTE TO RACIAL DISPARITIES?

The judges we spoke with did not express explicitly racist attitudes, at least not in the interview setting or in courthouse observations. This finding stands in contrast to qualitative research on judges conducted in the 1980s¹¹ and in contemporary court systems in some states.¹² Moreover, many judges acknowledged that they may have racial and class biases that may contribute to racial disparities. And as noted earlier, most judges in our sample believed that racial disparities arise from at least some form of differential treatment by criminal-justice officials.

Although most judges in our sample exhibit well-intentioned judging, the overwhelming use of noninterventionist strategies by these judges (Tables 1 and 2) likely contributes to racial disparities. Most judges in our sample found 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 before contact with the criminal-justice system (interventionist). By deferring to other actors in the sys-

tem, 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.



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11. See e.g., George S. Bridges, Robert D. Crutchfield, & Edith E. Simpson, *Crime, Social Structure and Criminal Punishment: White and Nonwhite Rates of Imprisonment*, 34 *SOCIAL PROBLEMS* 345-61 (1987).

12. See, e.g., NICOLE GONZALEZ VAN CLEVE, *CROOK COUNTY: RACISM AND INJUSTICE IN AMERICA'S LARGEST CRIMINAL COURT* (2016).

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