

# **Racial Impact Statements as a Means of Reducing Unwarranted Sentencing Disparities**

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*The extreme racial disparities in rates of incarceration in the United States result from a complex set of factors. Among these are sentencing and drug policies which, intended or not, produce disproportionate racial/ethnic effects. In retrospect, it is clear that many of these effects could have been predicted prior to the adoption of the legislation. In order to reduce the scale of unwarranted disparities, policymakers should address the potential racial impact of proposed legislation prior to enactment, rather than after the fact when any necessary reform is more difficult to achieve. One means of accomplishing this would be through the establishment of “Racial Impact Statements.” Similar to fiscal or environmental impact statements, such a policy would enable legislators and the public to anticipate any unwarranted racial disparities and to consider alternative policies that could accomplish the goals of the legislation without causing undue racial effects.*

## I. INTRODUCTION

One of the hallmarks of the “get tough” movement over the past three decades has been the relative lack of evaluation regarding both the potential and actual effectiveness of harsh criminal justice sanctions in controlling crime. Typically, when new punitive sentencing legislation is enacted there is little funding or attention devoted to assessing its likely effects, both intended and unintended.<sup>1</sup> In addition to limited evaluation of the effects of sentencing policy on crime, there is an even greater gap in addressing concerns relating to the dramatic racial disparities that pervade the criminal justice system.<sup>2</sup> This essay proposes that one way this problem can be addressed is by adopting racial impact statements as a requirement for consideration of new sentencing legislation.

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<sup>1</sup> Alfred Blumstein, *Making Rationality Relevant—The American Society of Criminology 1992 Presidential Address*, 31 *CRIMINOLOGY* 1, 1 (1993) (describing the desire of criminologists to inform public policy being thwarted by “policies that ignore well-founded criminological knowledge”).

<sup>2</sup> MICHAEL TONRY, *THINKING ABOUT CRIME* 221 (2004).

These issues can be most readily understood by examining the adoption of federal mandatory sentencing laws for crack cocaine offenses. Just over twenty years ago, members of Congress gathered in meeting rooms of the House and Senate to pass emergency legislation. The meetings were occasioned by widespread concern over a new drug, crack cocaine, that was beginning to wreak havoc in many communities.<sup>3</sup> Sensational tales of the drug's effect on its users—how quickly they became addicted, how it led to violent behavior—were rampant, and led to a virtual national frenzy over how to cope with this new threat.<sup>4</sup>

The problem, at least as it was perceived, was not a generalized one, but rather a racial one, pertaining to young black men. From the cover of *Newsweek*, to stories on the nightly news, to pronouncements of members of Congress, the image of a dark-skinned inner-city youth was the face of this new and seemingly intractable drug problem.<sup>5</sup> Already emotionally laden, the issue achieved high-profile status in the nation's capital following the tragic death of (black) University of Maryland basketball star Len Bias in June of 1986. Following the NBA draft, at which he had been selected as the number two pick by the Boston Celtics, Bias died of a drug overdose that evening while celebrating with friends. News reports indicated that he had overdosed on crack cocaine, an error that was not repudiated until months later when it was reported that he had in fact died from freebasing powder cocaine.<sup>6</sup>

Bias's death ignited momentum in Congress to "do something" about this new drug scourge.<sup>7</sup> The hastily crafted response called for harsh prison terms, and only harsh prison terms. According to the United States Sentencing Commission, the adoption of the 1986 Anti-Drug Abuse Act "was notable for the speed of its development and enactment."<sup>8</sup> The Act established mandatory prison terms of five years for possession or sale of just five grams of crack cocaine, the weight of about two sugar packets. The same five-year term was also enacted for sale of powder cocaine, but at a threshold of 500 grams, or 100 times the quantity of crack cocaine.<sup>9</sup>

Crack cocaine is derived from powder cocaine and is produced by mixing cocaine with baking soda and then cooking it.<sup>10</sup> Thus, the two drugs are

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<sup>3</sup> Craig Reinerman & Harry G. Levine, *Crack in Context: America's Latest Demon Drug*, in *CRACK IN AMERICA: DEMON DRUGS AND SOCIAL JUSTICE* 1–2 (Craig Reinerman & Harry G. Levine eds., 1997).

<sup>4</sup> Craig Reinerman & Harry G. Levine, *The Crack Attack: Politics and Media in the Crack Scare*, in *CRACK IN AMERICA: DEMON DRUGS AND SOCIAL JUSTICE*, *supra* note 3, at 18.

<sup>5</sup> *Id.* at 19.

<sup>6</sup> U.S. SENTENCING COMMISSION, SPECIAL REPORT TO THE CONGRESS: COCAINE AND FEDERAL SENTENCING POLICY, 122–23 (Feb. 1995).

<sup>7</sup> *Id.* at 121–23.

<sup>8</sup> *Id.* at 121.

<sup>9</sup> *Id.* at 116.

<sup>10</sup> *Id.* at v–vi.

pharmacologically identical, yet crack cocaine offenders are punished far more severely than persons convicted of powder cocaine crimes. While the effects of any form of cocaine on the body are similar, the intensity and duration of the effects differ according to the means of administering the drug. Crack cocaine can only be smoked, but powder cocaine can be snorted, injected, or ingested.<sup>11</sup> Powder cocaine that is snorted takes longer to achieve its maximum effects than crack cocaine, but smoking or injecting powder cocaine produces similar times of onset and effects as crack cocaine.<sup>12</sup> Because crack is generally marketed in small doses, it was initially heavily distributed in many low-income minority neighborhoods.<sup>13</sup> In the twenty years since enactment of the law, more than 80% of crack cocaine sentences have been imposed on African Americans.<sup>14</sup>

Two decades after the fact, there is a great deal of discussion regarding the extreme racial dynamics of the crack cocaine mandatory sentencing laws.<sup>15</sup> The focus of this article will be to propose that we discuss the racial dimensions of public policy *before* new legislation is enacted, rather than after the fact. One means of accomplishing this would be through the establishment of “Racial Impact Statements,” which would obligate policymakers to review data on racial effects prior to adopting new legislation. Such a policy would not prohibit legislators from enacting new laws that might exacerbate existing disparities, but it would serve to focus discussion on these effects as well as to encourage consideration of alternative policies that could accomplish the goals of the legislation without causing undue racial effects. Overall, the goal of such a policy would be to eliminate unwarranted disparity in the criminal justice system while also promoting public safety, goals that should be complementary.

In order to establish the case for such a policy, I will cover the following areas:

- 1) Racial disparities in the criminal justice system are in part a function of differentials in crime rates, but they also reflect disparities in criminal justice processing and decision-making.
- 2) Criminal justice policy is often premised on racial assumptions, whether consciously stated or not, that limit consideration of alternative social policy interventions.

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<sup>11</sup> *Id.* at 14.

<sup>12</sup> *Id.* at 21–22.

<sup>13</sup> MICHAEL TONRY, MALIGN NEGLECT—RACE, CRIME, AND PUNISHMENT IN AMERICA 105 (1995).

<sup>14</sup> U.S. SENTENCING COMMISSION, REPORT TO THE CONGRESS: COCAINE AND FEDERAL SENTENCING POLICY 15–16 (2007), available at [http://www.ussc.gov/r\\_congress/cocaine2007.pdf](http://www.ussc.gov/r_congress/cocaine2007.pdf).

<sup>15</sup> See, e.g., TESTIMONY FROM THE PUBLIC HEARING ON COCAINE SENTENCING POLICY HELD BY THE U.S. SENTENCING COMMISSION (Nov. 2006), available at [http://www.ussc.gov/hearings/11\\_15\\_06/testimony.pdf](http://www.ussc.gov/hearings/11_15_06/testimony.pdf).

- 3) Racial impact statements as a public policy hold the potential for serving as a mechanism to reduce racial disparities while contributing to a more effective public safety response.

## II. OVERVIEW OF RACE AND INCARCERATION

While it now seems commonplace that there are extreme racial disparities in the use of incarceration in the United States, in fact the extent of these disparities has varied significantly over time and place. In his history of the development of Southern prisons, David Oshinsky describes the evolving racial dynamics of imprisonment.<sup>16</sup> Prior to the Civil War, prison populations in the South had been comprised almost entirely of whites for the simple reason that African Americans had been essentially imprisoned as slaves. But once blacks gained their freedom, Southern prisons rapidly became transposed.<sup>17</sup> And under the vicious “convict leasing” system, prison systems leased out the labor of inmates in ways that eerily resembled the days of slavery.<sup>18</sup>

Even in the early decades of the 20<sup>th</sup> century, the black rate of imprisonment was not nearly at the level we see today. In tracing admissions to prison, for example, blacks constituted 21% of admissions in 1926; by 1986 this had doubled to 44%.<sup>19</sup> This is not to suggest that these earlier times were somehow a benign period for race relations, since social mechanisms for repressing blacks were clearly ubiquitous among varied institutions. But the broad-scale use of incarceration, ostensibly as a means of crime control, had not yet become prevalent.<sup>20</sup>

By the early 21<sup>st</sup> century, the scale of incarceration for African Americans had reached dramatic proportions. Projections by the Department of Justice show that if current trends continue, a black male born today has a one in three (32.2%) chance of spending time in state or federal prison in his lifetime. Comparable figures for Latino males are one in six (17.2%) and, for white males, one in seventeen (5.9%).<sup>21</sup> The overall figures for women are lower, but the racial disparities parallel those for men.

These figures derive not only from the growing proportion of African Americans among the prison population, but also from the unprecedented

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<sup>16</sup> DAVID M. OSHINSKY, *WORSE THAN SLAVERY: PARCHMAN FARM AND THE ORDEAL OF JIM CROW JUSTICE* (1996).

<sup>17</sup> *Id.* at 34.

<sup>18</sup> *Id.* at 34–53.

<sup>19</sup> PATRICK A. LANGAN, BUREAU OF JUSTICE STATISTICS, U.S. DEP’T OF JUSTICE, *RACE OF PRISONERS ADMITTED TO STATE AND FEDERAL INSTITUTIONS, 1926–86*, at 5 (May 1991).

<sup>20</sup> MARC MAUER, *RACE TO INCARCERATE 17–19* (1999).

<sup>21</sup> THOMAS P. BONCZAR, BUREAU OF JUSTICE STATISTICS, U.S. DEP’T OF JUSTICE, *PREVALENCE OF IMPRISONMENT IN THE U.S. POPULATION, 1974–2001*, at 1 (2003), available at <http://www.ojp.usdoj.gov/bjs/pub/pdf/piusp01.pdf>.

expansion of the prison system overall in the past three decades.<sup>22</sup> With sentencing and incarceration policies firmly institutionalized in many respects, reducing racial disparities will require a sustained proactive strategy of policy reform.

### III. ASSESSING THE RISE IN BLACK IMPRISONMENT

If we want to develop policies and practices to reduce the unprecedented rates of imprisonment of African Americans, clearly we need to assess the causes of those trends. This is a complex process, and this analysis will only attempt to provide an overview of those dynamics, with a view toward assessing their implications for criminal justice policy alternatives. The key issues to be examined are:

- Disproportionate crime rates
- Disparities in criminal justice processing
- Overlap of race and class effects
- Impact of “race neutral” policies

#### A. *Disproportionate Crime Rates*

Many people would assume that if African Americans are incarcerated at higher rates than other racial/ethnic groups, this merely reflects greater involvement in crime, and is a natural, if perhaps unfortunate, consequence of that involvement. In fact, crime rates explain some, but only some, of these disparities.

The most sophisticated national estimates of the racial dynamics of incarceration stem from two national studies conducted by criminologist Alfred Blumstein. Comparing imprisonment and arrest rates by offense initially for the 1979 prison population and subsequently for the 1991 population, Blumstein concluded that higher rates of involvement in crime (as estimated by arrest rates) explained 80% of racial disparity in the first study and 76% in the second.<sup>23</sup> According to Blumstein, the unexplained disparity might be a function of a number of factors, including racially biased decision-making in the court system, but also sentencing-relevant factors such as prior criminal histories of offenders. Notably, though, the decline in the crime-involvement explanation for the disparity from 1979 to 1991 was primarily a function of the increasing incarceration of drug offenders.<sup>24</sup> In this regard, Blumstein concluded that due to the racially skewed

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<sup>22</sup> MAUER, *supra* note 20, at 19.

<sup>23</sup> Alfred Blumstein, *On the Racial Disproportionality of United States' Prison Populations*, 73 J. CRIM. L. & CRIMINOLOGY 1259, 1280 (1982); Alfred Blumstein, *Racial Disproportionality of U.S. Prison Populations Revisited*, 64 U. COLO. L. REV. 743, 751 (1993) [hereinafter Blumstein, *Prison Populations Revisited*].

<sup>24</sup> Blumstein, *Prison Populations Revisited*, *supra* note 23, at 750–754.

nature of drug law enforcement, only 50% of the racial disproportionality for drug incarceration was explained by differential arrest rates.<sup>25</sup>

While Blumstein's findings are notable, their national scope may obscure variation among the states. In fact, an assessment of this relationship at the state level finds broad variation in the extent to which higher crime rates among African Americans may explain disproportionate imprisonment. Robert Crutchfield and colleagues' examination of this relationship concluded that at the state level there is a broad variation in the degree to which criminal involvement explains incarceration trends.<sup>26</sup>

As will be discussed later, to the extent that crime rates among African Americans explain some portion of incarceration rates, we should note that this is not necessarily a racial effect, but rather a function of the overlap of race and class. Since African American communities are more likely to be low-income, as well as more likely to experience the disadvantages resulting from concentrated poverty than low-income whites,<sup>27</sup> what may appear to be a race effect is often one of social class.

#### B. Disparities in Criminal Justice Processing

While crime rates explain some degree of variation by race, it is also clear that racism within the criminal justice system, whether conscious or not, contributes to disproportionate incarceration. This is not to suggest that the demonstrable changes within the criminal justice system in recent decades have not been of significance. Indeed, the greater diversity of leadership within the system, the growing attention to issues of racial disparity, and changes in political discourse on race are all welcome developments. Nevertheless, a wealth of scholarship and experience documents that unwarranted racial disparities persist at every level of criminal justice decision-making, albeit sometimes in more subtle ways than in previous eras.<sup>28</sup>

In the area of law enforcement, evidence of widespread racial profiling has been well documented in recent years.<sup>29</sup> In states such as New Jersey and Florida, state troopers and local law enforcement personnel have stopped African American drivers for alleged traffic infractions at far higher rates than white drivers.<sup>30</sup> At the

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<sup>25</sup> *Id.* at 751.

<sup>26</sup> Robert D. Crutchfield, George S. Bridges, & Susan R. Pitchford, *Analytical and Aggregation Biases in Analyses of Imprisonment: Reconciling Discrepancies in Studies of Racial Disparity*, 31 J. RES. CRIME & DELINQ. 166, 179 (1994).

<sup>27</sup> DOUGLAS S. MASSEY & NANCY A. DENTON, *AMERICAN APARTHEID: SEGREGATION AND THE MAKING OF THE UNDERCLASS* 1–14 (1993).

<sup>28</sup> LEADERSHIP CONFERENCE ON CIVIL RIGHTS & LEADERSHIP CONFERENCE EDUCATION FUND, *JUSTICE ON TRIAL: RACIAL DISPARITIES IN THE AMERICAN CRIMINAL JUSTICE SYSTEM* (2000).

<sup>29</sup> *See, e.g.*, DAVID A. HARRIS, *PROFILES IN INJUSTICE: WHY RACIAL PROFILING CANNOT WORK* (2002).

<sup>30</sup> *Id.* at 21–23, 53–60.

national level, research by the Department of Justice reveals that while black drivers may be stopped at similar rates to white drivers, they are three times as likely to be subject to a search after being stopped.<sup>31</sup> Since racial profiling has been intimately tied to the war on drugs,<sup>32</sup> more frequent searches of black drivers will inevitably turn up higher rates of drug infractions, just as would be the case if white drivers were searched more frequently.

Racial profiling has taken place not only on highways, but in black neighborhoods as well. In 1990, the Boston Police Department was cited for unconstitutional stops and searches by the Civil Rights Division of the Massachusetts Attorney General's office.<sup>33</sup> The action came after the police agency had carried out a large indiscriminate policy of searching on sight "known gang members" in the black neighborhood of Roxbury.<sup>34</sup>

At a policy level, the inception of the modern day "war on drugs" in the 1980s inaugurated a wholesale shift in the allocation of law enforcement resources.<sup>35</sup> Over the past two decades, this initiative has been the most significant factor contributing to the disproportionate incarceration of African Americans in prisons and jails, with increasing effects on Latinos as well.<sup>36</sup> This has come about through two overlapping trends. First, the escalation of the drug war has produced a remarkable rise in the number of persons serving sentences or awaiting trial for drug offenses in prisons and jails from about 40,000 in 1980 to nearly a half million by 2005.<sup>37</sup> This represents the combined impact of the tripling of drug arrests from 580,900 in 1980 to 1.8 million in 2005,<sup>38</sup> along with the adoption of mandatory minimum sentencing at the federal and state levels that has produced both more and longer drug offense prison terms.<sup>39</sup>

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<sup>31</sup> MATTHEW R. DUROSE, ERICA L. SCHMITT, & PATRICK A. LANGAN, BUREAU OF JUSTICE STATISTICS, U.S. DEP'T OF JUSTICE, CONTACTS BETWEEN POLICE AND THE PUBLIC: FINDINGS FROM THE 2002 NATIONAL SURVEY 4, 8 (2005), available at <http://www.ojp.usdoj.gov/bjs/pub/pdf/cpp02.pdf>.

<sup>32</sup> See DAVID COLE, NO EQUAL JUSTICE: RACE AND CLASS IN THE AMERICAN CRIMINAL JUSTICE SYSTEM 47 (1999) (noting that "One of the most common rationales for stopping and questioning citizens is the 'drug-courier' profile").

<sup>33</sup> *Id.* at 25–26.

<sup>34</sup> *Id.*

<sup>35</sup> Bruce L. Benson & David W. Rasmussen, *Relationship Between Illicit Drug Enforcement Policy and Property Crimes*, 9 CONTEMP. POL'Y ISSUES 106, 106–07 (1991).

<sup>36</sup> RYAN S. KING & MARC MAUER, THE SENTENCING PROJECT, DISTORTED PRIORITIES: DRUG OFFENDERS IN STATE PRISONS 14 (2002), available at [http://www.sentencingproject.org/Admin/Documents/publications/dp\\_distortedpriorities.pdf](http://www.sentencingproject.org/Admin/Documents/publications/dp_distortedpriorities.pdf).

<sup>37</sup> Marc Mauer, *Incarceration Nation*, TOMPAINE.COM, Dec. 11, 2006, [http://www.tompaine.com/articles/2006/12/11/incarceration\\_nation.php](http://www.tompaine.com/articles/2006/12/11/incarceration_nation.php).

<sup>38</sup> TINA L. DORSEY, MARIANNE W. ZAWITZ, & PRISCILLA MIDDLETON, BUREAU OF JUSTICE STATISTICS, U.S. DEP'T OF JUSTICE, DRUGS AND CRIME FACTS 60 (2006), available at <http://www.ojp.usdoj.gov/bjs/pub/pdf/DCF.pdf>.

<sup>39</sup> TONRY, *supra* note 13, at 92–93.

The escalation of drug prosecutions has coincided with a large-scale law enforcement emphasis on drug policing in communities of color. Nationally, African Americans represented 33.9% of drug arrests in 2005,<sup>40</sup> considerably higher than their 14% share of current drug users.<sup>41</sup> Among drug offenders sentenced to prison, 53% are African American.<sup>42</sup> While this figure arguably may incorporate factors such as higher levels of involvement in the drug trade or a more substantial criminal history, scholars such as Michael Tonry have concluded that “[a]lthough disadvantaged young people of all races and ethnicities have been affected by the drug wars, the greatest attention has been on Hispanics and blacks,”<sup>43</sup> and, as a result, the war on drugs “forseeably and unnecessarily blighted the lives of hundreds of thousands of young disadvantaged black Americans and undermined decades of effort to improve the life chances of members of the urban black underclass.”<sup>44</sup>

Unwarranted disparities continue at the level of prosecution, although this area is probably the least analyzed among all criminal justice stages. Nevertheless, research evidence suggests that decision-making at the charging and plea negotiation stages may contribute to racial disparity as well.<sup>45</sup> An assessment of plea bargaining practices in 700,000 criminal cases published by the *San Jose Mercury News* in 1991, for example, concluded that “[a]t virtually every stage of pretrial negotiation, whites are more successful than non-whites.”<sup>46</sup> Of 71,000 adults charged with felonies and with no prior record in the study, one third of whites had charges reduced to misdemeanors or infractions, while only one quarter of blacks and Hispanics received these outcomes.<sup>47</sup>

In the area of sentencing, the most dramatic findings exist in application of the death penalty. Studies by David Baldus and others dating back to the 1980s demonstrate that race of both victim and offender are key components of the difference in sentencing outcomes between the death penalty and life

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<sup>40</sup> FEDERAL BUREAU OF INVESTIGATION, U.S. DEP’T OF JUSTICE, CRIME IN THE UNITED STATES, 2005 tbl.43 (2006), available at [http://www.fbi.gov/ucr/05cius/data/table\\_43.html](http://www.fbi.gov/ucr/05cius/data/table_43.html).

<sup>41</sup> Data calculated from the OFFICE OF APPLIED STUDIES, SUBSTANCE ABUSE AND MENTAL HEALTH SERVICES ADMINISTRATION, DEP’T OF HEALTH AND HUMAN SERVICES, RESULTS FROM THE 2005 NATIONAL SURVEY ON DRUG USE AND HEALTH: NATIONAL FINDINGS 234 tbl.1.28B (2006), available at <http://www.drugabusestatistics.samhsa.gov/nsduh/2k5nsduh/2k5results.pdf>.

<sup>42</sup> PAIGE M. HARRISON & ALLEN J. BECK, BUREAU OF JUSTICE STATISTICS, U.S. DEP’T OF JUSTICE, PRISONERS IN 2005, at 9 tbl.12 (2006), available at <http://www.ojp.usdoj.gov/bjs/pub/pdf/p05.pdf>.

<sup>43</sup> TONRY, *supra* note 13, at 82.

<sup>44</sup> *Id.*

<sup>45</sup> See, e.g., CORAMAE RICHEY MANN, UNEQUAL JUSTICE: A QUESTION OF COLOR (1993).

<sup>46</sup> Christopher H. Schmitt, *Plea Bargaining Favors Whites as Blacks, Hispanics Pay Price*, SAN JOSE MERCURY NEWS, Dec. 8, 1991, at 1A.

<sup>47</sup> *Id.*



imprisonment.<sup>48</sup> In the realm of non-capital sentencing, the research is more complex, but a survey conducted for the National Institute of Justice found that “race and ethnicity do play an important role in contemporary sentencing decisions. Black and Hispanic offenders—and particularly those who are young, male, or unemployed—are more likely than their counterparts to be sentenced to prison.”<sup>49</sup> In recent decades, it is not so much race alone but rather race in combination with other factors, such as gender and employment, that translate into unwarranted racial disparities at the sentencing stage.<sup>50</sup>

Thus, despite progress in creating a more diverse criminal justice system, unwarranted racial disparities still persist and contribute to the overrepresentation of African Americans in the prison system. While there is far less comprehensive data available on Latinos and other minority groups, these dynamics may carry over to these communities as well.

### C. *Overlap Between Race and Class Effects*

It has been suggested by some scholars that the disparities we see in the criminal justice system reflect relative disadvantages associated with social class rather than race. Indeed, the degree of access to resources does play a significant role in determining outcomes in the court system.

This can be seen most prominently in regard to the quality of defense counsel. While many public defenders and appointed counsel provide high quality legal support, in far too many jurisdictions the defense bar is characterized by high caseloads, poor training, and inadequate resources.<sup>51</sup> In an assessment of this situation, the American Bar Association concluded that “[t]oo often the lawyers who provide defense services are inexperienced, fail to maintain adequate client contact, and furnish services that are simply not competent.”<sup>52</sup> Horror stories of indigent defense representation abound, combined with shameless levels of public support. In Virginia, for example, counsel representing persons charged with felonies that can result in a life sentence can receive no more than \$1,096 in fees for the case.<sup>53</sup>

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<sup>48</sup> David C. Baldus, Charles Pulaski, & George Woodworth, *Comparative Review of Death Sentences: An Empirical Study of the Georgia Experience*, 74 J. CRIM. L. & CRIMINOLOGY 661, 707 (1983); Jennifer L. Eberhardt et al., *Looking Deathworthy: Perceived Stereotypicality of Black Defendants Predicts Capital-Sentencing Outcomes*, 17 PSYCHOL. SCI. 383, 384 (2006).

<sup>49</sup> Cassia C. Spohn, *Policies, Processes, and Decisions of the Criminal Justice System, Thirty Years of Sentencing Reform: The Quest for a Racially Neutral Sentencing Process*, 3 CRIM. JUST. 427, 428 (2000), available at [http://www.ncjrs.gov/criminal\\_justice2000/vol\\_3/03i.pdf](http://www.ncjrs.gov/criminal_justice2000/vol_3/03i.pdf).

<sup>50</sup> *Id.* at 461.

<sup>51</sup> A.B.A. STANDING COMM. ON LEGAL AID AND INDIGENT DEFENDANTS, *GIDEON'S BROKEN PROMISE: AMERICA'S CONTINUING QUEST FOR RACIAL JUSTICE* (2004), available at <http://www.abanet.org/legalservices/sclaid/defender/brokenpromise/fullreport.pdf>.

<sup>52</sup> *Id.* at iv.

<sup>53</sup> Editorial, *Justice Denied in Virginia*, WASH. POST, Feb. 10, 2004, at A22.

Access to private resources also plays a role in the quality of justice one receives at various points in the criminal justice process. In regard to pretrial release, for example, owning a telephone is one factor used in making recommendations to release a defendant prior to trial.<sup>54</sup> But if low-income defendants are less likely to have a telephone in the home, this seemingly innocuous requirement becomes an obstacle to pretrial release.

While these dynamics illustrate the interplay among race, class, and criminal justice processing, they do not necessarily lead to the conclusion that social class has replaced race as the determining factor in producing disparities. As we have seen in the case of racial profiling by law enforcement personnel, motorists are not stopped because they are *low-income* African Americans but because they are African American.<sup>55</sup> A black banker wearing blue jeans while driving on the weekend is no more immune to being stopped than is an unemployed wage laborer.

Secondly, black poverty is different than poverty in general. African Americans who are poor are far more likely than whites to live in communities of concentrated poverty and disadvantage. Because of the confluence of racism and segregated housing patterns that persist to this day, low-income blacks are far more likely to live in neighborhoods that are segregated both by race and class.<sup>56</sup> As a result, the disadvantages that accrue from poverty are magnified as well. These include limits on job opportunities and social linkages that develop through informal networks among residents of communities with access to resources.<sup>57</sup>

#### D. Impact of “Race Neutral” Policies

Sentencing and related criminal justice policies that are ostensibly “race neutral” have in fact been seen over many years to have clear racial effects that could have been anticipated by legislators prior to enactment. In some instances, the purported race neutrality has merely been a thin cover for racial intent. In the area of felony disenfranchisement, for example, following the Reconstruction period, some Southern states tailored their statutes with the specific intent of restricting the voting rights of African Americans.<sup>58</sup> The means by which this was accomplished, not coincidentally during the same period in which poll taxes and

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<sup>54</sup> BRIAN A. REAVES & JACOB PEREZ, BUREAU OF JUSTICE STATISTICS, U.S. DEP’T OF JUSTICE, PRETRIAL RELEASE OF FELONY DEFENDANTS, 1992, at 3 (1994), *available at* <http://www.ojp.gov/bjs/pub/pdf/nprp92.pdf> (reporting on the results of a national survey showing that “[a]bout two-thirds of conditional releases included an agreement by the defendant to maintain regular contact with a pretrial program through telephone calls and/or personal visits”).

<sup>55</sup> COLE, *supra* note 32, at 36 (noting that “[m]any black professionals tell of being stopped simply because they were black and driving a fancy car”).

<sup>56</sup> MASSEY & DENTON, *supra* note 27 at 1–14.

<sup>57</sup> *Id.*

<sup>58</sup> Marc Mauer, *Mass Imprisonment and the Disappearing Voters*, in *INVISIBLE PUNISHMENT: THE COLLATERAL CONSEQUENCES OF MASS IMPRISONMENT* 50, 51–52 (Marc Mauer & Meda Chesney-Lind eds., 2002).

literacy requirements were being adopted, was to disenfranchise persons convicted of crimes believed to be committed disproportionately by blacks, while not taking away the right to vote for persons convicted of offenses believed to be committed by whites.<sup>59</sup> As a result, an Alabama man convicted of beating his wife would lose the right to vote, while a man convicted of killing his wife would not.<sup>60</sup> Such was the racial logic of the day. Lest we think that these laws were just a relic of 19<sup>th</sup> century Southern racism, we should note that these policies were in place for nearly one-hundred years until finally being struck down by the U.S. Supreme Court in 1985.<sup>61</sup>

Recent research on the development of punitive sentencing policies sheds light on the relationship between harsh sanctions and public perceptions of race. In a study of the relationship between public attitudes and sentencing policies, Ted Chiricos and colleagues found that among whites, support for harsh sentencing policies was correlated with the degree to which a particular crime was perceived to be a “black” crime.<sup>62</sup>

A variety of sentencing policies now have unmistakable racial impacts despite being race neutral on the surface.

### 1. Crack Cocaine Sentencing Laws

The federal mandatory sentencing laws enacted for crack cocaine offenses in 1986 and 1988 do not, of course, directly target African Americans for severe punishment. But as has been well documented, this has clearly been the outcome over time, with more than 80% of crack defendants being African American—well above their proportion of users of the drug—and subject to harsh prison terms.<sup>63</sup>

### 2. School Zone Drug Laws

A number of states and the federal government have adopted policies that penalize drug offenses that take place near a school zone more harshly than other drug crimes.<sup>64</sup> Under the goal of protecting children from the drug trade, these laws have also had severely disproportionate racial impacts, due to residential

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<sup>59</sup> *Id.*

<sup>60</sup> *Id.* at 52.

<sup>61</sup> *Hunter v. Underwood*, 471 U.S. 222 (1985).

<sup>62</sup> Ted Chiricos, Kelly Welch, & Marc Gertz, *Racial Typification of Crime and Support for Punitive Measures*, 42 *CRIMINOLOGY* 359, 374 (2004).

<sup>63</sup> U.S. SENTENCING COMMISSION, *supra* note 14, at 15–16.

<sup>64</sup> For an overview of these laws, see JUDITH GREENE, KEVIN PRANIS & JASON ZIEDENBERG, JUSTICE POLICY INSTITUTE, *DISPARITY BY DESIGN* 5 (2006), available at [http://www.justicepolicy.org/images/upload/06-03\\_REP\\_DisparitybyDesign\\_DP-JJ-RD.pdf](http://www.justicepolicy.org/images/upload/06-03_REP_DisparitybyDesign_DP-JJ-RD.pdf).

housing patterns.<sup>65</sup> Typically, such laws target drug transactions that take place within 1,000 or 1,500 feet of a school zone.<sup>66</sup> States such as New Jersey have gone further, passing legislation that provides enhanced penalties for drug transactions near public housing, libraries, and museums as well.<sup>67</sup> Since urban areas are more densely populated than suburban or rural areas, city residents are much more likely to be within a short distance of a school or public housing site during much of the day. And since African Americans are more likely to live in urban neighborhoods than are whites, African Americans convicted of a drug offense are subject to harsher punishments than whites committing the same offense in a less populated area.<sup>68</sup> A state commission analysis of the New Jersey law documented that nearly all (96%) of the persons serving prison time for drug free zone offenses were African American or Hispanic.<sup>69</sup>

### 3. Habitual Offender Laws

Sentencing policies, such as habitual offender and “three strikes” laws that penalize repeat offenders more harshly, also produce racially disparate effects even though not expressly conceived to do so. These policies are premised on the idea that persons with prior criminal histories shall receive harsher punishments. In itself, this is not necessarily objectionable since many sentencing frameworks and philosophical approaches endorse such a system. But the current generation of harsher sentencing policies based on prior record will clearly have a racially disproportionate effect, and one that is likely to be far more severe than in previous times. This racial impact is due to the fact that African Americans are more likely to have a criminal record than other groups.<sup>70</sup> Some believe that this is due to greater involvement in criminality,<sup>71</sup> others that it is due to greater scrutiny and racist behavior by actors in the justice system.<sup>72</sup> Regardless of the cause, though, an African-American defendant being sentenced is more likely than a white defendant to have a substantial criminal record, and therefore receive a harsher punishment.

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<sup>65</sup> *Id.* at 14 (showing that ninety-six percent of persons serving terms for school zone drug law violations in New Jersey are African American or Hispanic).

<sup>66</sup> *Id.* at 1, 5.

<sup>67</sup> *Id.* at 22.

<sup>68</sup> *Id.* at 4.

<sup>69</sup> THE NEW JERSEY COMMISSION TO REVIEW CRIMINAL SENTENCING, REPORT ON NEW JERSEY'S DRUG FREE ZONE CRIMES AND PROPOSAL FOR REFORM 23 (2005), available at [http://sentencing.nj.gov/dfz\\_report\\_pdf.html](http://sentencing.nj.gov/dfz_report_pdf.html).

<sup>70</sup> As of 2001, 16.6% of African American males had served time in state or federal prison, compared to 4.9% for white males and 7.7% for Hispanic males. Similar disparities exist for women as well. BONCZAR, *supra* note 21, at 1.

<sup>71</sup> John J. DiIulio, *My Black Problem, and Ours*, CITY JOURNAL, Spring 1996, at 14.

<sup>72</sup> HARRIS, *supra* note 29, at 21.

While the impact of a criminal record has affected sentencing practice over time, with policies such as “three strikes” these effects are magnified substantially. In California, African Americans represent 31.3% of the inmate population but 44% of persons serving three strikes sentences.<sup>73</sup> Persons convicted of such offenses in California prisons include a man serving a term of twenty-five years to life for stealing golf clubs and another serving a term of fifty years to life for stealing videotapes.<sup>74</sup> Thus, the “race neutral” penalty is increasingly prominent over time as sentencing polices become more severe.

Similar effects may be seen in regard to changes in parole policies as well. In recent years, many states have adopted more restrictive parole release policies, particularly for long-term and life-sentenced prisoners. Whereas life sentences in most states previously permitted the possibility of parole release, states such as Pennsylvania, Louisiana, and Michigan have now adopted “life means life” policies, essentially eliminating this possibility.<sup>75</sup> In this area as well, while there is no stated racial intent in the new policies themselves, there will almost inevitably be a racial outcome. This comes about because African Americans are disproportionately incarcerated for violent offenses,<sup>76</sup> and thus will comprise a disproportionate degree of lifers. As will be discussed later, one may or may not think that such an outcome is problematic when talking about violent offenses, but it is nonetheless a contributor to racial disparity.

#### IV. RACIAL IMPACT STATEMENTS AS A MEANS OF CONTROLLING DISPARITY

##### A. *Impact Statements*

As we have seen, to at least some extent unwarranted racial disparities in the criminal justice system result from policy initiatives of recent years. In regard to some of these initiatives, such as mandatory sentencing laws pertaining to crack cocaine or school zone drug laws, the racial impact could easily have been foreseen had policymakers undertaken an analysis prior to adoption of the law.<sup>77</sup> Because of this potential for addressing disparities in a proactive way, the adoption of racial impact statements offers a means by which policymakers can avoid some

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<sup>73</sup> RYAN S. KING & MARC MAUER, THE SENTENCING PROJECT, AGING BEHIND BARS: THREE STRIKES SEVEN YEARS LATER 13 (2001), available at [http://www.sentencingproject.org/Admin/Documents/publications/inc\\_aging.pdf](http://www.sentencingproject.org/Admin/Documents/publications/inc_aging.pdf).

<sup>74</sup> Erwin Chemerinsky, *Life in Prison for Shoplifting: Cruel and Unusual Punishment*, A.B.A. HUM. RTS. MAG., Winter 2004, available at <http://www.abanet.org/irr/hr/winter04/shoplifting.html>.

<sup>75</sup> MARC MAUER, RYAN S. KING & MALCOLM C. YOUNG, THE SENTENCING PROJECT, THE MEANING OF “LIFE”: LONG PRISON SENTENCES IN CONTEXT 6–7 (2004), available at [http://www.sentencingproject.org/Admin/Documents/publications/inc\\_meaningoflife.pdf](http://www.sentencingproject.org/Admin/Documents/publications/inc_meaningoflife.pdf).

<sup>76</sup> In 2003, African Americans constituted 562,100 (44.7%) of the 1,256,400 persons incarcerated for a violent offense in state prisons. HARRISON & BECK, *supra* note 42, at 9 tbl.12.

<sup>77</sup> TONRY, *supra* note 13, at 104–15.

of the mistakes of the past and develop crime policy that is both constructive and fair.

Before discussing a proposed framework for the use of racial impact statements, it is useful to conduct a brief review of the ways in which impact statements have become incorporated as a standard means of assessing both the intended and unintended effects in other areas of public policy. Environmental impact statements, for example, have been required by law since the adoption of the National Environmental Policy Act (NEPA) of 1969. Under NEPA, federal agencies are required to prepare an environmental impact statement for “proposals for legislation and other major Federal actions significantly affecting the quality of the human environment.”<sup>78</sup> Not only must the statement include an assessment of the environmental impact and any adverse impacts which may ensue, but it must also examine alternatives to the proposed action.<sup>79</sup> The Act has become a standard component of federal environmental policy; in 2005, the U.S. Forest Service alone prepared 153 impact statements, with many others prepared by the Army Corps of Engineers, Federal Highway Administration, National Park Service, and other agencies.<sup>80</sup>

Other types of pro-active assessments are now routine in public policy consideration as well. For example, fiscal cost estimates are prepared by the Congressional Budget Office (CBO) for every bill reported by committee. The CBO assessment of HR 5, the College Student Relief Act of 2007, for example, concluded that the bill’s provisions regarding interest rates and fees on lenders would reduce direct spending by \$65 million over the 2007–2012 period and by \$7.1 billion over the 2007–2017 period.<sup>81</sup>

In other nations, Health Impact Assessments are common as well, focusing on the possible health effects of new initiatives and related costs. For example, the British National Health Service describes the goal of these assessments as considering “potential health impacts before a policy is implemented—and thus making adjustments that will maximize the beneficial effects and minimize any harmful effects on health.”<sup>82</sup>

There are also areas in which data analysis is used to assess the effects of criminal justice policy retrospectively that are instructive. Due to increasing concern over racial profiling by law enforcement agencies in the 1990s, a number of jurisdictions have adopted practices of compiling data on traffic stops and other

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<sup>78</sup> 42 U.S.C. § 4332(c) (2007).

<sup>79</sup> *Id.*

<sup>80</sup> Council on Environmental Quality, *Calendar Year 2005 Filed EISs—552 Total*, [http://ceq.eh.doe.gov/nepa/EIS/Filed\\_%20EIS\\_2005\\_by\\_Agency.pdf](http://ceq.eh.doe.gov/nepa/EIS/Filed_%20EIS_2005_by_Agency.pdf) (last visited Sept. 10, 2007).

<sup>81</sup> College Student Relief Act, H.R. 5, 110th Cong. CONGRESSIONAL BUDGET OFFICE, <http://www.cbo.gov/showdoc.cfm?index=7729&sequence=0> (last visited Sept. 10, 2007).

<sup>82</sup> NHS EXECUTIVE LONDON, A SHORT GUIDE TO HEALTH IMPACT ASSESSMENT: INFORMING HEALTHY DECISIONS 5 (2000), available at [http://www.nice.org.uk/media/hiadocs/Copy\\_of\\_Londons\\_SHORT\\_GUIDE\\_TO\\_HIA%20.pdf](http://www.nice.org.uk/media/hiadocs/Copy_of_Londons_SHORT_GUIDE_TO_HIA%20.pdf).

police encounters by race in an effort to monitor inappropriate actions.<sup>83</sup> And in the area of the death penalty, the state of Kentucky adopted the Racial Justice Act in 1998, which permits defendants to challenge their prosecution on a capital charge if it can be demonstrated that race played a role in seeking the death penalty.<sup>84</sup> Racial analyses, therefore, are not new concepts for assessment within the justice system, but offer the possibility of deliberation on potential racial effects prior to, not after, the implementation of policy initiatives.

### B. Goals and Scope of Racial Impact Statements

The public policy goal of requiring racial impact statements is quite direct: to encourage lawmakers to examine the racial effects of changes in sentencing and related policy that affect prison populations, and when necessary, to consider alternative means of achieving public safety goals without exacerbating unwarranted racial disparities.

The use of racial impact statements by policymakers should be guided by two principles: reducing unnecessary racial disparities in the use of incarceration and promoting public safety. While these goals will appear unobjectionable in themselves to most people, their synergistic relationship may be less obvious to some. Specifically, why will reducing unwarranted racial disparities—a worthy goal in itself—also contribute to public safety? Two factors stand out in particular.

First, law enforcement and sentencing policies that exacerbate unwarranted racial disparities are generally also ineffective in contributing to public safety goals. The evidence on racial profiling is now clear that not only are such practices racist and unfair, but they do not produce good results for crime control.<sup>85</sup> Law enforcement agents produce better results when they rely on investigative techniques that yield information about specific individuals engaged in illegal activity. As David Harris notes, “They’re [police] focusing on appearance when they should be focusing on behavior. When they’re not distracted by race, they’re actually doing a more accurate job” of picking out the right people.<sup>86</sup>

Similarly, the federal crack cocaine penalties have resulted in thousands of prosecutions of lower-level African-American defendants, yet have produced no demonstrable effects on substance abuse or sales. As noted by the United States

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<sup>83</sup> See, e.g., Racial Profiling Data Collection Resource Center at Northeastern University, *Background and Current Data Collection Efforts*, <http://www.racialprofilinganalysis.neu.edu/background/jurisdictions.php> (last visited Sept. 10, 2007).

<sup>84</sup> Racial Justice Act, KY. REV. STAT. ANN. §532.300 (West 2007), available at <http://www.deathpenaltyinfo.org/article.php?scid=5&did=255>.

<sup>85</sup> HARRIS, *supra* note 29, at 12–14.

<sup>86</sup> Kim Zetter, *Why Racial Profiling Doesn’t Work*, SALON, Aug. 22, 2005, available at [http://dir.salon.com/story/news/feature/2005/08/22/racial\\_profiling/index.html](http://dir.salon.com/story/news/feature/2005/08/22/racial_profiling/index.html) (quoting HARRIS, *supra* note 29).

Sentencing Commission, an analysis of cocaine price trends “appears inconsistent with a finding that federal cocaine penalties established under the 1986 Act and incorporated into the guidelines have had a deterrent effect on cocaine trafficking,” and that “it is unlikely that the federal cocaine sentencing policy had a significant deterrent effect on users.”<sup>87</sup>

Second, growing racial disparities contribute to a lack of confidence in the criminal justice system in many African American communities. Law enforcement and prosecution can only be effective when they work in concert with communities, and so building trust is a key ingredient in producing overall safety.<sup>88</sup> Judge Reggie Walton, a former high ranking official in the Office of National Drug Control Policy, describes the perceived injustice of the crack cocaine laws as having a “coercive impact on the respect many of our citizens have about the general fairness [of] our nation’s criminal justice system,” and that

some people desire not to serve on juries when crack cocaine is involved because of the negative attitudes they have about the crack and powder cocaine sentencing disparity or have refused to convict crack offenders, despite the quality of the government’s evidence, because of their attitudes about the current sentencing structure.<sup>89</sup>

As applied to policy changes that would directly affect the number of people in prison, racial impact statements could be applied to the following:

- Sentencing statutory changes
- Sentencing guidelines adjustments
- Legislation creating new substantive crimes
- “Truth in sentencing” policies
- Parole release policies
- Parole revocation policies
- “Early” release policies, such as participation in drug treatment or other programming

### *C. Preparation of Racial Impact Statements*

The government agency charged with preparing racial impact statements will vary by jurisdiction, but in virtually all states, as well as in the federal system, mechanisms already exist to incorporate this function. Essentially, the agency charged with analyzing data and estimating prison capacity needs will generally be

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<sup>87</sup> REPORT TO THE CONGRESS: COCAINE AND FEDERAL SENTENCING POLICY, U.S. SENTENCING COMMISSION 72 (2002), available at [http://www.ussc.gov/r\\_congress/02crack/2002crackrpt.pdf](http://www.ussc.gov/r_congress/02crack/2002crackrpt.pdf).

<sup>88</sup> TESTIMONY OF REGGIE B. WALTON, THE UNITED STATES SENTENCING COMMISSION ON SENTENCING DISPARITY FOR CRACK AND POWDER COCAINE OFFENSES 7–8 (Nov. 14, 2006), available at [http://www.ussc.gov/hearings/11\\_15\\_06/JudgeWalton-testimony.pdf](http://www.ussc.gov/hearings/11_15_06/JudgeWalton-testimony.pdf).

<sup>89</sup> *Id.*



the most appropriate one to perform this analysis. These agencies would include the following:

### 1. Sentencing Commissions

In the federal system, sentencing policy development and oversight falls under the jurisdiction of the United States Sentencing Commission.<sup>90</sup> At the state level, twenty-one states and the District of Columbia have a sentencing commission as well.<sup>91</sup> These agencies maintain sophisticated databases of sentencing data, trends, and policy impacts, and generally incorporate relatively complete data on race, gender, and offense demographics.<sup>92</sup> Since prison populations are essentially a function of the number of people sentenced to prison and their length of stay, projecting impacts of particular policy changes by race will usually fall well within the parameters of these systems' capabilities.

Some states, including North Carolina and Virginia, maintain legislative requirements that their sentencing commissions produce impact statements for legislation that may affect the size of the prison population.<sup>93</sup> The North Carolina Sentencing and Policy Advisory Commission offers a model of how such a process might work.<sup>94</sup> By law, the Commission is mandated to produce a fiscal impact assessment of any bill with possible court or correctional impact on appropriations.<sup>95</sup> The fiscal impact is related to an assessment of changes to time served in prison. Thus, this could include sentencing enhancements, parole release policies, or programmatic diversions from prison.<sup>96</sup> Additional costs, such as court or community corrections costs, are added to the final impact statement by other state agencies.<sup>97</sup>

The North Carolina commission generally produces a report at the request of the legislature's fiscal research staff when a proposed bill has been sent to that office. The Commission employs a sophisticated simulation model that

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<sup>90</sup> United States Sentencing Commission, *An Overview of the United States Sentencing Commission*, [http://www.ussc.gov/general/USSCoverview\\_2005.pdf](http://www.ussc.gov/general/USSCoverview_2005.pdf) (last visited Sept. 10, 2007).

<sup>91</sup> National Association of State Sentencing Commissions, *Contact List*, <http://www.ussc.gov/states/nascaddr.htm> (last visited Sept. 10, 2007).

<sup>92</sup> NEAL B. KAUDER ET AL., STATE SENTENCING POLICY AND PRACTICE RESEARCH IN ACTION PARTNERSHIP, SENTENCING COMMISSION PROFILES (1997), available at [http://www.ncsconline.org/WC/Publications/KIS\\_SentenSenCommProfiles.pdf](http://www.ncsconline.org/WC/Publications/KIS_SentenSenCommProfiles.pdf).

<sup>93</sup> N.C. GEN. STAT. § 164-43 (2007); VA. CODE ANN. § 30-19.1:4 (2007).

<sup>94</sup> Email from Susan Katznelson, Executive Director, North Carolina Sentencing and Policy Advisory Commission, to Marc Mauer, Executive Director, The Sentencing Project (Nov. 3, 2006, 11:46 a.m. EST) (discussing North Carolina approach) (on file with author); Telephone Interview with Susan Katznelson, Executive Director, North Carolina Sentencing and Policy Advisory Commission (Nov. 16, 2006) (discussing North Carolina approach) (on file with author).

<sup>95</sup> *Id.*

<sup>96</sup> *Id.*

<sup>97</sup> *Id.*

incorporates case-based data on convictions and sentencing to produce a fiscal impact statement that projects out for ten years.<sup>98</sup>

## 2. Departments of Correction

Both state and federal corrections agencies track current and projected prison populations on an ongoing basis, and generally have a range of available data broken down by race and offense.<sup>99</sup> These projections are typically used to forecast budget and prison space needs and, given the necessary data, could be applied to produce racial impact statements as well.

## 3. Budget and Fiscal Agencies

In jurisdictions where either a sentencing commission or corrections agency may not be positioned to conduct the impact analysis, other governmental agencies may have the capacity to do so. Fiscal staff of legislative bodies regularly produce various types of analyses for legislative initiatives, and with proper guidance and support could be delegated to produce a racial impact statement as well.

### D. *Components of Racial Impact Statements*

Policy initiatives establishing a process for producing racial impact statements could use the following as a guide for the parameters of the statements: racial impact statements shall be prepared for sentencing or corrections legislation or policy initiatives that may affect the number of the incarcerated population. As noted above, the process would be triggered primarily by proposed sentencing legislation or policy changes that would affect time served in prison, including parole release policies.

Let us consider two instances of legislative proposals that would be subject to a racial impact statement in order to focus on the issues involved in evaluating “disparity.” The first case would be the classic one of the crack cocaine sentencing laws. Had Congress required that an impact statement be produced, it would have demonstrated that an estimated 4000 defendants a year would be sentenced to five and ten-year mandatory prison terms,<sup>100</sup> 80% of whom would have been African American.<sup>101</sup> A modest amount of additional data from government agencies

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<sup>98</sup> *Id.*

<sup>99</sup> See, e.g., PATRICIA A. BIGGS ET AL., KANSAS DEPARTMENT OF CORRECTIONS, STATISTICAL PROFILE: FY 2002 OFFENDER POPULATION (2002), available at [http://www.dc.state.ks.us/research/StatProfile/Stat\\_Profile\\_2002.pdf](http://www.dc.state.ks.us/research/StatProfile/Stat_Profile_2002.pdf).

<sup>100</sup> During Fiscal Year 2003, for example, 4170 defendants convicted of a crack cocaine offense received either a five-year or ten-year mandatory minimum sentence. See UNITED STATES SENTENCING COMMISSION, 2003 SOURCEBOOK OF FEDERAL SENTENCING STATISTICS 88 tbl.43 (2003), available at <http://www.ussc.gov/ANNRPT/2003/table43.pdf>.

<sup>101</sup> *Id.* at 79 tbl.34.

would have documented that these rates were far higher than the black proportion of crack users or sellers in the general population. The question for policymakers would then have been whether the disparity was “unwarranted” because of the racial effects or “warranted” due to the need to provide public safety resources for the African-American community.

A second type of case would further the discussion of warranted and unwarranted disparities. Suppose that a state legislature was considering a proposal to impose a mandatory minimum prison sentence for third-time auto theft. Under current sentencing laws and practices, let us assume that there are 100 such convictions annually, 70 of which result in a prison sentence (see table below). Of this population, 35 are black, 30 are white, and 5 are Latino. Under the proposed legislation, all 100 offenders would be sentenced to prison; of these, 45 would be black, 45 white, and 10 Latino.

| Race/Ethnicity | Current<br>Prison Sentences |     | New Law Prison<br>Sentences |     | Rate of<br>incarceration, all<br>offenses (per<br>100,000) |         |
|----------------|-----------------------------|-----|-----------------------------|-----|--|---------|
|                | #                           | %   | #                           | %   | Current law  | New law |
| <b>Black</b>   | 35                          | 50% | 45                          | 45% | 1750   | 1760    |
| <b>White</b>   | 30                          | 43% | 45                          | 45% | 250  | 265     |
| <b>Latino</b>  | 5                           | 7%  | 10                          | 10% | 750  | 755     |
| <b>TOTAL</b>   | 70                          |     | 100                         |     |  |         |

How, then, to evaluate the disparity issues here? Here are two ways to consider this:

#### 1. Proportional Disparity

As a proportion of the current prison population for this offense, blacks represent 50%, whites 43%, and Latinos 7%. Under the proposed legislation, this would change to 45% black, 45% white, and 10% Latino. Thus, one might say that the change would disproportionately disadvantage Latinos (and whites to a small extent), but “benefit” blacks due to a declining share of the incarcerated population.

#### 2. Population Disparity

In comparison to the proportional disparity which shows blacks with a declining *share* of the incarcerated population for auto theft, an overall population analysis demonstrates that high *rates* of incarceration of blacks overall would become even higher under the proposed change (along with increases for both

white and Latino rates as well). Thus, the black rate of incarceration of 1750 per 100,000 would increase to 1760 per 100,000 under the new law. While in itself not a dramatic change, the overall rate (seven times that of the white rate) would be exacerbated under the proposal. Therefore, one could say that based on this measure, minorities would be harmed by escalating rates of incarceration.

People of good will might disagree about which of the above methods is a more appropriate tool for analysis, but the point is that they provide a context for assessing racial and ethnic impacts. And as such analyses are developed, policymakers can begin to determine the relative advantages of each method for their goals of public safety and fairness. In addition, to the extent that impact statements received public attention, they would facilitate a broader conversation among policymakers and their constituents regarding proposed policies and their implications.

#### E. *Technical Issues*

While the process of producing racial impact statements is theoretically straightforward, there will be challenges in developing such systems. These include the following:

##### 1. Limited Data

In some situations current sentencing data may not exist. For example, a legislative change that would make certain types of domestic assaults felonies rather than misdemeanors would prove to be a challenge for sentencing forecasts. Many states will not have sophisticated data on case processing and sentencing for misdemeanor cases.<sup>102</sup> It will also be necessary to develop assumptions regarding the proportion of current cases that would be charged as felonies under a proposed law. One means of developing such an analysis is the model used by the North Carolina Sentencing and Policy Advisory Commission, in which state analysts survey prosecutors to develop reasonable assessments of how case processing would change under proposed legislation.<sup>103</sup>

##### 2. Availability of Racial/Ethnic Data

While most states maintain reasonably good data on sentencing and incarceration by race, there is a broad range of comprehensiveness in terms of the

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<sup>102</sup> For example, national datasets of the Bureau of Justice Statistics only report on felony offenses in detail. See Bureau of Justice Statistics, U.S. Dep't of Justice, *State Court Sentencing of Convicted Felons—Statistical Tables*, <http://www.ojp.usdoj.gov/bjs/abstract/scscfst.htm> (last visited Sept. 10, 2007).

<sup>103</sup> Telephone Interview with Susan Katznelson, *supra* note 94.

availability of ethnic data on Latinos.<sup>104</sup> Some states have produced reasonably accurate counts in this regard, while others categorize Latinos as “other” or significantly undercount this population.<sup>105</sup> Such gaps are problematic not only for producing racial/ethnic impact statements, but for assessing criminal justice processing issues overall. In addition, while racial data are often fairly complete for blacks and whites, there is also broad variation in the degree of accuracy for Native Americans, Asian Americans, and other racial groups.<sup>106</sup> These gaps are problematic not only for the preparation of racial impact statements, but also for assessment of criminal justice policy overall, and so clearly need to be addressed for a variety of reasons.

### 3. Quantity of Impact Statements to be Produced

In a given year, dozens of sentencing bills may be introduced in a state or federal legislative body. Most will never receive a committee hearing, let alone a vote by the full House or Senate.<sup>107</sup> Therefore, should racial impact statements be required for all such proposals? In at least one state, North Carolina, there are sufficient staff resources to permit a sentencing impact analysis to be made for all relevant legislative proposals, with the idea being that one cannot know in advance which bills are most likely to receive serious consideration.<sup>108</sup> But in jurisdictions in which such a practice is not feasible, an alternative process could be to produce a racial impact analysis for any sentencing legislation that has been passed out of committee and prior to floor consideration.

### 4. Racial Impact as a Result of Multiple Decision-Making Points

In the case of the crack cocaine legislation, the racial disparities that have ensued are the result not only of the sentencing provisions but of law enforcement practices as well, which have disproportionately targeted low-income minority

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<sup>104</sup> See, e.g., PAIGE M. HARRISON & ALLEN J. BECK, BUREAU OF JUSTICE STATISTICS, U.S. DEP’T OF JUSTICE, PRISON AND JAIL INMATES AT MIDYEAR 2005 11, tbl.14 (2006) (documenting that eleven states do not report data on the number of incarcerated Hispanics), available at <http://www.ojp.usdoj.gov/bjs/pub/pdf/pjim05.pdf>.

<sup>105</sup> *Id.*

<sup>106</sup> For example, in regard to Native Americans, the Bureau of Justice Statistics reports that “representative statistical data about Native Americans are difficult to acquire and use,” and that such limitations “severely circumscribe the depth and generalizability of data on American Indians and inhibit the Nation’s ability to know much of the details about victims, offenders, and the consequences of crime for both.” LAWRENCE A. GREENFELD & STEVEN K. SMITH, BUREAU OF JUSTICE STATISTICS, U.S. DEP’T OF JUSTICE, AMERICAN INDIANS AND CRIME 34 (1999), available at <http://www.ojp.usdoj.gov/bjs/pub/pdf/aic.pdf>.

<sup>107</sup> Glen S. Krutz, *Issues and Institutions: ‘Winnowing’ in the U.S. Congress*, 49 AM. J. POL. SCI. 313 (2005).

<sup>108</sup> Telephone Interview with Susan Katznelson, *supra* note 94.

communities for drug law enforcement.<sup>109</sup> Thus, a racial impact statement would try to assess these dynamics, in the process incorporating available research on law enforcement in this area. Following that, a policy discussion should incorporate an analysis of the relative degree to which the crack cocaine sentencing disparity was the result of law enforcement or sentencing policy, an analysis that would both inform the sentencing discussion but also point toward other means of addressing disparities in the justice system.

### 5. Courtroom Dynamics

In the hypothetical auto theft legislation described above, the dynamics of mandatory sentencing virtually assure that, in certain cases, courtroom personnel will engage in decision-making designed to avoid imposing the mandatory sentences called for by the proposed statute whether out of concern for managing court dockets, through the dynamics of plea negotiations, or because of prosecutorial assessments of the inappropriateness of the penalty in selected cases. Therefore, a sophisticated sentencing forecast model needs a means of incorporating such processes into its estimates.

### 6. Limitations on Projections

While some state sentencing commissions or other bodies can produce sophisticated projections over a period of ten years or more, other states do not yet have this capability.<sup>110</sup> This should not be a major impediment to the development of racial impact statements, though. In such cases, state policymakers can rely on current sentencing data to produce descriptive analyses of proposed policy changes. For instance, in the auto theft example described above, a simple description of the racial/ethnic composition of persons convicted of this crime would yield a ballpark estimate of the overall impact of changes in sentencing or corrections policy.

These issues are all challenging ones, but the key point is that analysts in various states have been assessing these issues for a number of years and have developed reasonable means of incorporating their assessments into prison and fiscal projections. Once such a model is established, software used by the state or federal agency can generally incorporate sentencing and corrections data on race and ethnicity in addition to other information in order to produce a racial impact analysis.

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<sup>109</sup> TONRY, *supra* note 13, at 105–06.

<sup>110</sup> Telephone Interview with Barbara Tombs, Director of the Center of Sentencing and Corrections, Vera Institute of Justice (Nov. 7, 2006).

### F. *Implementing Racial Impact Statements*

After a racial impact statement is prepared, a legislative body would receive it prior to a vote by committee or consideration in a floor vote, depending on the means by which the implementing legislation is drafted. Let us assume that a committee is considering a sentencing enhancement bill and is informed by the racial impact statement that it will result in a disproportionate effect on African Americans. How will the legislative process be affected by such a finding?

Committee consideration of such data should be guided by two questions. First, do the crime control benefits of such a policy outweigh the consequences of heightened racial disparity? And second, are there alternative policy choices that could address the problem at hand without such negative effects?

In the case of school zone drug laws, for example, the public safety question becomes whether such laws contribute to public safety—reducing drug selling to schoolchildren—more than existing statutes already do.<sup>111</sup> In this regard, policymakers would want to note not only the current statute, but how it is implemented as well. Consider two scenarios in a jurisdiction that does not have school zone drug laws, for example. In the first case, a drug seller has been convicted of a drug sale to a consenting adult at 2 a.m. in a school yard. In the second, a seller has been found guilty of selling to a high school student on the school playground during lunch recess. Is there a judge in the country who would not treat the high school case more seriously than the middle of the night sale to an adult?

Therefore, in such a case, a legislative body might decide to leave current penalties intact or else to define the new statute in a more targeted way. Such targeting could include focusing the legislation on direct sales to children, selling during school hours, or selling directly on (as opposed to near) school property. Any such priorities would both direct sentencing policy more specifically toward the area of concern and would almost inevitably reduce the racial disparities that would ensue under the expanded concept of “school zone.”

In the notorious case of the federal crack cocaine sentencing laws, imagine that Congress had required the preparation of an impact statement prior to consideration of the legislation in 1986 and 1988. It is possible that a finding that 80% of the affected population would be African American would not have affected eventual passage of the legislation. Some lawmakers no doubt would still have argued that harsh penalties imposed on black offenders would be of great value to “law-abiding” members of the black community. But it is also possible that such a finding might have encouraged the exploration of other issues, including: was a five-gram threshold for prosecution of crack cocaine offenses appropriate for federal courts, as opposed to being handled under state

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<sup>111</sup> GREENE ET AL., *supra* note 64, at 44 (concluding that “[a] substantial body of evidence from research and policy studies indicates that drug-free zone laws, as they are typically configured, are not effective in reducing the sale or use of drugs, or in protecting school children”).

jurisdiction?; was there an appropriate mix of supply-side—interdiction and enforcement—approaches, and demand-side—prevention and treatment—initiatives, to the emerging crack problem?;<sup>112</sup> and, was the perceived association of crack cocaine with violent behavior a function of the drug itself or the new markets emerging with the drug?

In the case of crack cocaine laws, the impact of a policy change on racial disparities would have been very substantial. A recent assessment of potential policy change examined the race and incarceration impacts of eliminating the 100:1 quantity disparity, essentially sentencing crack cocaine offenders as if they had been convicted as powder cocaine offenders. Using data from a 1997 survey of federal prison inmates, Eric Sevigny concluded that such a change would have averted a cumulative total of 24,000 prison years imposed, 90% of which would have benefited African Americans.<sup>113</sup>

A more problematic case would be sentencing enhancement legislation for persons convicted of violent offenses. This might include sentencing commission proposals to raise the grid level for armed robbery to include more time in prison or legislation designed to restrict release from prison for those convicted of a violent offense. At current rates, African Americans are disproportionately incarcerated for violent offenses, representing about 45% of persons incarcerated in state prisons for this category.<sup>114</sup> Therefore, any proposed increases in sentencing for violent offenses would be likely to have a disproportionate effect.

In such a case, policymakers might well decide that the hoped for reductions in violent offending would take priority over the goal of reducing disparity, and that the disparity is a “warranted” one. But it is also conceivable that the racial analysis could contribute to a broader discussion of the effect of sentence length on deterrence. In fact, there is a good deal of research suggesting that deterrent effects are much more a function of certainty than severity of punishment.<sup>115</sup>

In other areas of social policy, impact statements are often required to include alternative options that would provide fewer harmful effects on the social indicator of concern. Environmental impact statements, for example, frequently include an assessment of loss of habitat or farmland resulting from proposed development

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<sup>112</sup> Blumstein, *supra* note 1, at 9, (stating that “basic observation about drug markets is that they are inherently demand driven. As long as the demand is there, a supply network will emerge to satisfy that demand”).

<sup>113</sup> Eric L. Sevigny, *The Tyranny of Quantity: How the Overemphasis on Drug Quantity in Federal Drug Sentencing Leads to Disparate and Anomalous Sentencing Outcomes* 138 (2006) (unpublished Ph.D. thesis, University of Pittsburgh), *available at* [http://etd.library.pitt.edu/ETD/available/etd-07182006-154904/unrestricted/sevignyeric1\\_etdPitt2006.pdf](http://etd.library.pitt.edu/ETD/available/etd-07182006-154904/unrestricted/sevignyeric1_etdPitt2006.pdf).

<sup>114</sup> HARRISON & BECK, *supra* note 42, at 9 tbl.12.

<sup>115</sup> *See, e.g.*, Daniel S. Nagin & Greg Pogarsky, *Integrating Celerity, Impulsivity, and Extralegal Sanction Threats into a Model of General Deterrence: Theory and Evidence*, 39 CRIMINOLOGY 865 (2001).



projects along with proposals to permit development in ways that are less harmful.<sup>116</sup>

Such a goal might or might not be included as an element of criminal justice legislation, but the policy discussion related to alternative measures could certainly be stimulated by the preparation of impact statements. In the challenging area of sentencing for violent offenders, for example, an assessment could be completed regarding the efficacy of various measures of reducing violence. Suppose that a proposed penalty for armed robbery were to be increased from five years to ten years in prison. For each offender subject to this provision, the state would spend about \$125,000, assuming an estimated annual incarceration cost of about \$25,000. Multiplying this by the number of offenders subject to such a penalty would produce a figure for the total state investment in addressing crime through such an initiative. That could then lead to a discussion of the crime control impact (whether through incapacitation or deterrence) of the additional five years in prison per offender, compared to projected public safety impacts through investing a similar sum in policing, drug treatment, preschool programs, or any other intervention believed to be effective in this regard.

While such a process might seem to some to be wishful thinking in the current world of public policy, the Washington state legislature has created just such an institutional mechanism for permitting comparisons of this type. The Washington State Institute for Public Policy is a legislative agency that prepares assessments of the effects of various policy initiatives.<sup>117</sup> In the area of crime control, the agency produces periodic assessments of the cost-effectiveness of a range of program interventions designed to address crime and violence.<sup>118</sup> A 2006 Institute publication, for example, assessed the potential of using intervention programs, prevention programs, and sentencing options as a means of reducing the need for future prison construction.<sup>119</sup> Using meta-analysis techniques the institute concluded that programs such as vocational education in prison produced cost benefit savings of more than \$13,000 per program participant, while Scared Straight programs had negative cost benefits of more than \$14,000.<sup>120</sup> Such evidence-based assessments hold the potential for rational development of public policy and more effective crime control programming.

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<sup>116</sup> See the enabling statute of the National Environmental Policy Act, 40 C.F.R. § 1502.1 (2007), available at <http://www.nepa.gov/nepa/regs/ceq/1502.htm>.

<sup>117</sup> The Institute “conducts research using its own policy analysts and economists, specialists from universities, and consultants. Institute staff work closely with legislators, legislative and state agency staff, and experts in the field to ensure that studies answer relevant policy questions.” Washington State Institute for Public Policy, <http://www.wsipp.wa.gov/> (last visited Sept. 10, 2007).

<sup>118</sup> *Id.*

<sup>119</sup> STEVE AOS, MARNA MILLER & ELIZABETH DRAKE, WASHINGTON STATE INSTITUTE FOR PUBLIC POLICY, EVIDENCE-BASED PUBLIC POLICY OPTIONS TO REDUCE FUTURE PRISON CONSTRUCTION, CRIMINAL JUSTICE COSTS, AND CRIME RATES 2 (2006), available at <http://www.wsipp.wa.gov/rptfiles/06-10-1201.pdf>.

<sup>120</sup> *Id.* at 9.

## VI. EXPANDING THE USE/SCALE OF RACIAL IMPACT STATEMENTS

Policymakers adopting the use of racial impact statements would have before them a range of options by which to make use of the data analysis prepared for sentencing legislation. At the most basic level this would include an assessment of the degree to which any unwarranted racial disparities are exacerbated by proposed legislation. But the statements offer a tool for further analysis as well.

In recent years, for example, lawmakers have enacted a host of bills that extend the range of collateral consequences that result from a felony conviction, with many of these applying specifically to drug offenses.<sup>121</sup> Persons applying for federal financial aid for higher education, for example, are excluded from access to funds if they have been convicted of a drug felony while receiving aid in college.<sup>122</sup> Here, too, a seemingly race neutral policy clearly has differential social class, and likely racial, effects. Wealthy persons with a drug conviction are unlikely to need financial aid to attend college, but low-income students certainly will. And to the degree that people of color are disproportionately represented among the low-income population, there will be a racial effect as well. Thus, expanding the use of racial impact statements to other areas of social policy related to sentencing could help to alleviate the expansion of racial disparities to these collateral penalties.

Lawmakers might also want to consider adopting a model of policy tradeoffs to neutralize the effects of initiatives that might exacerbate disparities. Such a process has parallels in other policy areas. On environmental issues, the Kyoto Protocol established provisions for “carbon trading,” whereby industrial companies that reduce their production of greenhouse gases can sell the “rights” to emit quantities that exceed permissible limits to other firms.<sup>123</sup> The process, while criticized by many environmental groups,<sup>124</sup> nonetheless represents a means of addressing a critical policy concern through incentives and tradeoffs.

One can envision such tradeoffs in sentencing policy, resulting in part from racial impact statements. The model in this regard relates to the operating assumptions of most sentencing commissions. Guided by a concern for the effective use of prison resources, these commissions place a priority on using

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<sup>121</sup> Mauer, *supra* note 58, at 5.

<sup>122</sup> *Id.*

<sup>123</sup> United Nations Framework Convention on Climate Change, *Emissions Trading*, [http://unfccc.int/kyoto\\_protocol/mechanisms/emissions\\_trading/items/2731.php](http://unfccc.int/kyoto_protocol/mechanisms/emissions_trading/items/2731.php) (last visited Sept. 10, 2007).

<sup>124</sup> Jeff Goodell, *Capital Pollution Solution?*, N.Y. TIMES MAG., July 30, 2006, available at <http://www.nytimes.com/2006/07/30/magazine/30carbon.html?ex=1311912000&en=7a1aac348e ad298b&ei=5088&partner=rssnyt&emc=rss>. (“Commissions in Minnesota, Oregon, and Washington intended to reduce imprisonment sentences for property offenders and increase them for violent offenders.”)

prison space for people convicted of violent offenses while encouraging the use of community sanctions for people convicted of non-violent offenses.<sup>125</sup>

In the realm of race and sentencing dynamics, suppose that a sentencing commission believed it necessary to enhance prison terms for violent offenses and concluded that doing so would have disproportionate racial effects. Such a finding might trigger a search for ways of offsetting that impact. Might there be a set of offenses for which a reduction in prison time would be appropriate and would disproportionately advantage minority offenders? Just to be clear, such a discussion should not be undertaken if it conflicts with public safety concerns regarding the utility of incarceration for a given set of offense and offender characteristics. But as a catalyst for such a discussion, a legislative body or sentencing commission might find a periodic assessment of sentencing policies that incorporates such an analysis to be a useful policy tool. And given the massive scale of incarceration in the United States at present,<sup>126</sup> it is not unlikely that a serious consideration of sentence lengths for various offenses might produce constructive options for change.

## VII. CONCLUSION

While some might argue that racial impact statements are “injecting race” into considerations of public policy, in fact they merely bring to light data on the already existing racial dynamics of criminal justice policy. By doing so, they create the possibility of a policy dialogue on race that acknowledges the complexity of issues of race and justice, but provides a way to reduce unwarranted disparities while producing better public safety outcomes.

Far from being just a visionary notion, the concept of racial impact statements has received support from distinguished quarters. Sentencing scholar Michael Tonry has called for all sentencing proposals to be “accompanied by or subjected to impact analyses that project their differential effects for women and for nationality and ethnic groups.”<sup>127</sup> The American Bar Association’s Justice Kennedy Commission has gone further in recommending that government bodies conduct racial and ethnic disparity impact analyses not only of proposed legislation but of existing statutes as well, along with a call for policymakers to “propose legislative alternatives intended to eliminate predicted racial and ethnic disparity at each stage of the criminal justice process.”<sup>128</sup> And in at least one state, Oregon, a

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<sup>125</sup> E.g., DALE PARENT ET AL., NATIONAL INSTITUTE OF JUSTICE, U.S. DEP’T OF JUSTICE, KEY LEGISLATIVE ISSUES IN CRIMINAL JUSTICE: THE IMPACT OF SENTENCING GUIDELINES 4 (1996) available at <http://www.ncjrs.gov/pdffiles/sentguid.pdf>.

<sup>126</sup> The United States has become the world leader in its rate of imprisonment. MAUER, *supra* note 20, at 9.

<sup>127</sup> TONRY, *supra* note 2, at 221.

<sup>128</sup> A.B.A. JUSTICE KENNEDY COMMISSION, REPORT TO THE HOUSE OF DELEGATES 1 (2004), available at <http://www.abanet.org/media/kencomm/rep121b.pdf>.

legislative proposal to require the preparation of “racial and ethnic impact statements that assess impact [sic] of prison-related legislation . . . on racial and ethnic profile of prison population” has been introduced.<sup>129</sup>

The rate of incarceration for African Americans in the United States is now at a level that is seriously affecting life prospects for the generation of black children growing up today. In addition, the ripple effects of current policy now extend the impact of incarceration beyond just the individual in prison, but to families and communities as well.<sup>130</sup> While the criminal justice system has an obligation to promote public safety, there is also an obligation to promote fairness and justice. There should not be any inherent contradiction in promoting effective crime control policies while reducing unwarranted racial disparity, and, in fact, the two goals are best addressed simultaneously. Racial impact statements provide a tool for policymakers and the general public to begin to grapple with how to develop public policy that can be both effective and fair. One would hope that such a policy would be embraced by all concerned policymakers.

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<sup>129</sup> H.B. 2933, 74th Leg. Reg. Sess. (Or. 2007), <http://www.leg.state.or.us/07reg/measpdf/hb2900.dir/hb2933.intro.pdf> (last visited Sept. 10, 2007).

<sup>130</sup> Mauer, *supra* note 58, at 1–12.