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Racial Impact Statements: A Proactive Approach to Addressing Racial Disparities in Prison Populations

Catherine London†

Introduction

When Congress passed the Anti-Drug Abuse Act of 1986 (ADAA),[1] it ushered in an era of aggressive sentencing policies that fueled racial disparity in prisons throughout the country.[2] Without considering the effect of mandatory minimum drug penalties on racial minorities, lawmakers enacted a crack cocaine policy with profound racial implications: in the decades that followed, over eighty percent of offenders charged for crack cocaine offenses were African American.[3]

Prisons are still struggling with the effects of mandatory minimum drug sentences that contributed to a dramatic expansion of the correctional system and higher rates of minority incarceration.[4] If lawmakers had confronted the potential racial impact of these sentencing policies before enacting the ADAA, they might have considered alternatives that would have prevented the subsequent surge in African American incarceration rates.[5]

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1. Anti-Drug Abuse Act of 1986, Pub. L. No. 99-570, § 1002, 100 Stat. 3207 (codified as amended at 21 U.S.C. § 841 (2006)).

2. *See infra* Part I.B.5.

3. Marc Mauer, *Racial Impact Statements: Changing Policies to Address Disparities*, 23 CRIM. JUST. 16, 17 (2009) (citing U.S. SENTENCING COMM'N, COCAINE AND FEDERAL SENTENCING POLICY app. B, at B-23 (2007)).

4. *See infra* Part I.B.5.

5. *See* Marc Mauer, *Racial Impact Statements as a Means of Reducing Unwarranted Sentencing Disparities*, 5 OHIO ST. J. CRIM. L. 19, 33 (2007) ("[R]equiring racial impact statements . . . encourage[s] 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.").

States have recently started to recognize the importance of identifying the racial effects of proposed legislation.[6] One approach that is gaining momentum is the use of racial impact statements as a means to address racial disparities in the justice system.[7] A racial impact statement is a predictive report summarizing the effects that legislation may have on minority groups.[8] The goal of these statements is to force lawmakers to confront the potential racial consequences of criminal sentencing policies prior to enacting new legislation.[9]

In 2008, Iowa became the first state to pass legislation mandating the use of racial impact statements.[10] The Connecticut legislature passed a bill in 2008 requiring officials to produce similar impact statements.[11] These actions followed Minnesota's initiative in 2007, when its Sentencing Guidelines Commission (MSGC) began preparing statements to address racial disparities in state prisons.[12] These policies reflect a growing trend among states to take proactive measures to reduce racial disparities in the criminal justice system.[13]

The Iowa and Connecticut legislation went into effect in early 2009, but these states continue to grapple with issues concerning the proper scope of racial impact statements and practical procedures for implementing these changes.[14] The current fiscal crisis may provide an impetus to reduce prison populations.[15] However, financial concerns also jeopardize funding for the proposed efforts to effectuate this reduction.[16] Racial impact statements are an important step toward alleviating disparities in

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6. *See infra* Part IV.B.

7. Mauer, *supra* note 3, at 20.

8. *See id.* at 17.

9. *Id.*

10. H.F. 2393, 82d Gen. Assemb., Reg. Sess. (Iowa 2008); *Iowa Considering Racial Impact in Sentencing Laws*, NAT'L PUB. RADIO (May 1, 2008), http://www.npr.org/templates/story/story.php?storyId=90102924 [hereinafter *Iowa Sentencing Laws*].

11. CONN. GEN. STAT. ANN. § 2-24b(a) (West Supp. 2010).

12. Mauer, *supra* note 3, at 18.

13. *See infra* Part IV.B.

14. *See* Mauer, *supra* note 3, at 18–19.

15. *See* JONATHAN P. CAULKINS ET AL., RAND CORP., MANDATORY MINIMUM DRUG SENTENCES: THROWING AWAY THE KEY OR THE TAXPAYERS' MONEY? 62 (1997).

16. *See* TIM WALKER, OR. LEGIS. FISCAL OFFICE, FISCAL ANALYSIS OF PROPOSED LEGISLATION HB 2352, 2009 Reg. Legis. Sess., at 1 (2009) (concluding the cost of preparing racial impact statements is uncertain, given the variable number of bills that could be introduced in a session).

U.S. prisons, but states must consider the procedural difficulties of preparing these statements and select methods that will maximize their effectiveness.[17]

This Article discusses the utility of racial impact statements as well as the possible obstacles to state implementation. Part I describes the current racial imbalances in the American prison system. Part II discusses the far-reaching consequences of these imbalances. Part III explores the various approaches states and policymakers have taken in attempts to alleviate these disparities. Part IV examines the current and proposed legislation surrounding racial impact statements. Finally, Part V identifies potential procedural problems and provides recommendations for preparing racial impact statements, including what data these statements should contain and how to effectively communicate this information to lawmakers.

I. Current State of Racial Disparity in U.S. Prisons

A. *Disproportionate Incarceration Rates*

With approximately 2.3 million people in prisons and jails across the country, incarceration rates are at an all-time high.[18] These rates have contributed to unprecedented racial imbalances in U.S. prisons.[19] A 2007 report prepared by The Sentencing Project[20] examined state-level racial and ethnic disparities in prison and jail populations.[21] The report found that seven states had Black-to-White prison ratios greater than 10-to-1, almost twice the national average of 5.6-to-1.[22]

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17. *See* Mauer, *supra* note 3, at 18–19.

18. As of December 31, 2007, there were 2,293,157 inmates held in custody in state and federal prisons and local jails. HEATHER C. WEST & WILLIAM J. SABOL, BUREAU OF JUSTICE STATISTICS, U.S. DEP'T OF JUSTICE, NCJ 224280, PRISONERS IN 2007, at 6 tbl.8 (2008).

19. *Id.* at 4 (finding the imprisonment rate of Black males to be "6.5 times the imprisonment rate of White males and 2.5 times that of Hispanic males").

20. The Sentencing Project is a national organization that advocates for sentencing reform and alternatives to incarceration. *About Us*, THE SENTENCING PROJECT, http://www.sentencingproject.org/template/page.cfm?id=2 (last visited Dec. 6, 2009).

21. MARC MAUER & RYAN S. KING, THE SENTENCING PROJECT, UNEVEN JUSTICE: STATE RATES OF INCARCERATION BY RACE AND ETHNICITY 2 (2007).

22. The seven states with the greatest racial disparities in 2007 were Iowa, Vermont, New Jersey, Connecticut, Wisconsin, North Dakota, and South Dakota. *Id.* at 10. These findings illustrate that levels of disparity vary throughout the country, but states with the highest disparity rates are concentrated in the Northeast and Midwest. *Id.* at 4–5, 6 tbl.2.

Racially disparate imprisonment rates have a long and complicated history.[23] Extended sentences and the increased use of life sentences without parole have exacerbated racial disproportionality in U.S. prisons.[24] Between 1986 and 1999, average sentences imposed for drug offenses increased from sixty-two to seventy-four months.[25] During these years, the average time served in prison increased from thirty to sixty-six months.[26] In addition to the obvious strain on correctional resources, this trend effectively raised minority incarceration rates.[27]

Statistics indicate, however, that the racial composition of prisons is beginning to shift.[28] Between 2000 and 2007, the percentage of White males in state and federal prisons "increased slightly from 30.2% to 30.8%, while the percentage of black males decreased from 40% to 36.3%."[29] Despite these trends, overall minority incarceration rates remain disproportionate to actual crime commission rates.[30] Notably, arrest and conviction rates for drug-related offenses among different races are highly disproportionate to actual rates of drug use.[31]

Similar patterns have emerged among juvenile populations. From 2002 to 2004, African Americans constituted sixteen percent of youth in the general population but thirty-seven percent of detained youth.[32] The over-representation of minority youth in the

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23. *See* HENRY RUTH & KEVIN R. REITZ, THE CHALLENGE OF CRIME: RETHINKING OUR RESPONSE 27–32 (2003) (documenting the historical progression and steady increase of racial disparities in U.S. prisons between 1880 and 2000).

24. MICHAEL TONRY, MALIGN NEGLECT—RACE, CRIME, AND PUNISHMENT IN AMERICA 166–67 (1995) (explaining that the effects of harsh penalties on Blacks have been compounded: "[M]ore blacks are going to prison, and when they get there, they are being held for longer times.").

25. JOHN SCALIA, BUREAU OF JUSTICE STATISTICS, U.S. DEP'T OF JUSTICE, NCJ 187285, FEDERAL DRUG OFFENDERS, 1999 WITH TRENDS 1984–99, at 1 (2001).

26. *Id.*

27. *See* DOUGLAS C. MCDONALD & KENNETH E. CARLSON, BUREAU OF JUSTICE STATISTICS, U.S. DEP'T OF JUSTICE, SENTENCING IN THE FEDERAL COURTS: DOES RACE MATTER? THE TRANSITION TO SENTENCING GUIDELINES, 1986–90, at 177 (1993) (identifying a disproportionate increase in the length of prison sentences for Blacks from 1986 to 1990).

28. MARC MAUER, THE SENTENCING PROJECT, THE CHANGING RACIAL DYNAMICS OF THE WAR ON DRUGS 5 (2009) (finding that during 1999–2005 the number of African Americans in prison decreased and the number of Whites rose substantially).

29. WEST & SABOL, *supra* note 18, at 4.

30. *See infra* note 61 and accompanying text.

31. *See infra* note 61 and accompanying text.

32. NAT'L COUNCIL ON CRIME & DELINQUENCY, AND JUSTICE FOR SOME: DIFFERENTIAL TREATMENT OF YOUTH OF COLOR IN THE JUSTICE SYSTEM 37 (2007). Black youth are disproportionately detained in almost every offense category. *Id.*

justice system results from many complex factors and has a direct impact on future incarceration trends.[33] Federal legislation[34] requires states to "address juvenile delinquency prevention efforts and system improvement efforts designed to reduce . . . the disproportionate number of juvenile members of minority groups, who come into contact with the juvenile justice system."[35] However, Congress has not passed similar legislation addressing disproportionate adult minority incarceration rates.[36]

B. *Sources of Racial Disparity*

Although overt racial bias may factor into some of the decisions leading to disparate minority imprisonment, it is likely that a number of variables account for current racial imbalances.[37] Each stage of the criminal justice process potentially introduces bias or unfairly impacts minority populations.[38] Disproportionate minority confinement results from the interplay of several factors, including crime commission rates, socioeconomic disadvantages, law enforcement patterns, prosecutorial discretion, and sentencing policies that disparately impact minorities.[39]

1. Crime and Poverty

Minority over-representation in the criminal justice system is partly influenced by the socioeconomic disadvantages of minority populations.[40] In 2007, the poverty rate was 8.2% for Whites and

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at 12, 13 fig.4 (finding that African American youth nationwide are over-represented in every offense category examined—person, property, drug, and public order). In addition, White youth are more likely than Black youth to be placed on probation. *Id.* at 22.

33. *See id.* at 1 (discussing factors influencing the over-representation of minority youth in the juvenile justice system, which include differential police policies and practices, location of offenses, behavior by minority youth, and different reactions of victims to offenses committed by White youth as compared to those committed by minority youth).

34. Juvenile Justice and Delinquency Prevention Act of 1974, 42 U.S.C. §§ 5601–5751 (2006).

35. *Id.* § 5633(a)(22).

36. Legislation is pending that would address this issue. *See* Justice Integrity Act of 2009, S. 495, 111th Cong. (2009).

37. *See* NAT'L COUNCIL ON CRIME & DELINQUENCY, *supra* note 32, at 1.

38. *See generally* CHRISTOPHER HARTNEY & LINH VUONG, NAT'L COUNCIL ON CRIME & DELINQUENCY, CREATED EQUAL: RACIAL AND ETHNIC DISPARITIES IN THE U.S. CRIMINAL JUSTICE SYSTEM (2009).

39. *See* Michael Tonry & Matthew Melewski, *The Malign Effects of Drug and Crime Control Policies on Black Americans*, 37 CRIME & JUST. 1, 20 (2008).

40. *See* Richard S. Frase, *What Explains Persistent Racial Disproportionality in Minnesota's Prison and Jail Populations?*, 38 CRIME & JUST. 201, 263 (2008) ("Social disadvantage, crime, and criminal law enforcement . . . reinforce each

24.5% for Blacks.[41] The median household income was $54,920 for Whites and only $33,196 for Blacks.[42] The correlation of race and class has inspired many scholars to examine the complex association between class and minority involvement in crime.[43]

Early-life disadvantages for African American youth also contribute to increased minority involvement in crime.[44] A greater percentage of Black youth reside in areas of concentrated poverty and face conditions far worse than those faced by their White counterparts.[45] Black children are also more likely to live in single-parent households and have family members in prison.[46] These factors all contribute to disparate involvement in crime and minority over-representation in U.S. prisons.[47]

2. Disparate Offending Patterns

Racial differences in offending patterns also partly account for disparate incarceration rates.[48] Crime statistics have consistently shown that African Americans constitute a large percentage

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other . . . ."); CARMEN DENAVAS-WALT ET AL., U.S. CENSUS BUREAU, INCOME, POVERTY, AND HEALTH INSURANCE COVERAGE IN THE UNITED STATES: 2007, at 6 (2008).

41. DENAVAS-WALT ET AL., *supra* note 40, at 12. The official overall poverty rate at this time was 12.5%. *Id.*

42. *Id.* at 6.

43. *See* CORAMAE RICHEY MANN, UNEQUAL JUSTICE: A QUESTION OF COLOR 91–94 (1993) (reviewing empirical studies performed over recent decades supporting an association between economic status and crime commission while noting that "the question of causation is highly complex").

44. *E.g.*, RUTH & REITZ, *supra* note 23, at 219 (noting that many minority youth perceive the drug trade as a means to acquire money and power and experience group togetherness).

45. One-third of all Black children reside in households below the poverty line as compared to 15.8% of White children. U.S. CENSUS BUREAU, CURRENT POPULATION SURVEY, ANNUAL SOCIAL AND ECONOMIC SUPPLEMENT, AGE AND SEX OF ALL PEOPLE, FAMILY MEMBERS AND UNRELATED INDIVIDUALS ITERATED BY INCOME-TO-POVERTY RATIO AND RACE: 2009 (2010), *available at* http://www.census.gov/hhes/ www/cpstables/032010/pov/new01_100.htm.

46. More than half of all Black children are raised in single-parent homes as compared to twenty-five percent of White children. U.S. CENSUS BUREAU, TABLE 67: FAMILY GROUPS WITH CHILDREN UNDER 18 YEARS OLD BY RACE AND HISPANIC ORIGIN (2007). *See* MINDY HERMAN-STAHL ET AL., INCARCERATION AND THE FAMILY: A REVIEW OF RESEARCH AND PROMISING APPROACHES FOR SERVING FATHERS AND FAMILIES, at 4-1 (2008) ("In 1999, 6.7% of African American children and 2.4% of Latino children had an incarcerated parent, compared to 0.9% of white children.").

47. MARC MAUER, THE SENTENCING PROJECT, RACE TO INCARCERATE 168–69 (1999) (explaining that the interaction of concentrated poverty and lack of family and community supports plays a significant role in the behavioral outcomes of minority youth).

48. *See* TONRY, *supra* note 24, at 128.

of individuals involved in violent crime.[49] Minorities are disproportionately represented among violent offenders and also experience higher rates of violent victimization than Whites.[50] However, differential offending patterns only partially explain the over-representation of minorities in confinement.[51] For non-violent crimes, the minor difference in the rate of commission does not explain the large disparity in the rate of punishment.[52]

3. Law Enforcement Patterns

Arrest is the first stage of the criminal justice system that can lead to increased racial disparities in imprisonment.[53] Researchers have examined the extent to which racial bias operates in police procedures, focusing on racial profiling during traffic stops and drug enforcement.[54] A recent study revealed that Black drivers are three times more likely than White drivers to be searched during the course of a routine traffic stop.[55] Additionally,

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49. *Id.* ("In recent decades, for example, approximately 45 percent of those arrested for the violent crimes of murder, rape, aggravated assault, and robbery have been black . . ., compared with 12 to 13 percent of the general population.").

50. RUTH & REITZ, *supra* note 23, at 37 ("Ninety-four percent of black homicide victims in 1998 were killed by black offenders, and 76 percent of all blacks who were the victims of any violent crime in the 1990s were victimized by black offenders.").

51. One of the most sophisticated studies on this issue was conducted by Alfred Blumstein in 1979. Alfred Blumstein, *On the Racial Disproportionality of the United States' Prison Populations*, 37 J. CRIM. L. & CRIMINOLOGY 1259 (1982). This study examined the extent to which the racial composition of prisons is attributable to arrest rates. *Id.* at 1261. Blumstein determined that nearly eighty percent of the disparity could be attributed to minority involvement in crime, leaving approximately twenty percent unexplained. *Id.* at 1275 tbl.6. Blumstein revisited this study in 1991 and found that "the greatly increased prevalence of drug offenders in prison and the race differences in arresting and imprisoning black offenders for drug offenses combine to make the disproportionality in 1991 worse than in the earlier period." Alfred Blumstein, *Racial Disproportionality of U.S. Prison Populations Revisited*, 64 U. COLO. L. REV. 743, 754 (1993).

52. RUTH & REITZ, *supra* note 23, at 35 ("[T]he black-white differentials for crimes less fearsome than homicide, rape, robbery, and the most serious assaults have not been sizable enough to match the large disparities in incarceration.").

53. *See* TONRY, *supra* note 24, at 65 ("[S]ince 1976, the proportion of blacks among persons arrested for imprisonable crimes has greatly exceeded their 12 to 13 percent share of the general population.").

54. *See, e.g.*, Illya Lichtenberg, *Driving While Black (DWB): Examining Race as a Tool in the War on Drugs*, 7 POLICE PRAC. & RES. 1, 49 (2006).

55. MATTHEW R. DUROSE ET AL., BUREAU OF JUSTICE STATISTICS, U.S. DEP'T OF JUSTICE, CONTACTS BETWEEN POLICE AND THE PUBLIC: FINDINGS FROM THE 2002 NATIONAL SURVEY 10 (2005). *See also* INST. ON RACE & POVERTY & COUNCIL ON CRIME & JUSTICE, MINNESOTA STATEWIDE RACIAL PROFILING REPORT: ALL PARTICIPATING JURISDICTIONS 10, 18–19 (2003), *available at* http://www.irpumn.org/uls/resources/projects/aggregate%20report%2092303.pdf.

evidence shows that the public perceives racial profiling as a common tactic used by police.[56]

Studies have also demonstrated disparate drug enforcement patterns.[57] Police efforts directed at combating drug use have focused "almost exclusively on low-level dealers in minority neighborhoods."[58] Data suggest that drug dealing and purchasing by Blacks is more likely to occur outdoors, in public places and between strangers, whereas drug dealing by Whites generally occurs in private areas and among acquaintances.[59] This difference has resulted in heightened policing in communities of color and inner-city policing strategies that selectively target Black suspects.[60] Consequently, arrest rates for drug-related offenses are disproportionate to the actual rates of drug use among races.[61]

4. Prosecutorial Discretion

Prosecutorial discretion begins after an arrest is made and the prosecutor determines how to charge a defendant.[62] Determinate sentencing[63] informs judicial discretion but prosecutorial decision-making is not similarly restricted,[64] allowing prosecutors to pursue the most serious charges.[65] Empirical studies have docu-

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56. *See, e.g.*, STATE OF WIS., GOVERNOR'S TASK FORCE ON RACIAL PROFILING, at v (2000) ("A diverse population of citizens . . . all complained of some degree of racial profiling.").

57. NAT'L CRIMINAL JUSTICE COMM'N, THE REAL WAR ON CRIME 115 (Steven R. Donziger ed., 1996).

58. *Id.* (emphasis removed).

59. MAUER, *supra* note 47, at 150.

60. MAUER & KING, *supra* note 21, at 16; RUTH & REITZ, *supra* note 23, at 146–57.

61. In 2007, 9.5% of African Americans reportedly engaged in illicit drug use compared to 8.2% of Whites. SUBSTANCE ABUSE AND MENTAL HEALTH SERVS. ADMIN., U.S. DEP'T OF HEALTH AND HUMAN SERVS., RESULTS FROM THE 2007 NATIONAL SURVEY ON DRUG USE AND HEALTH: NATIONAL FINDINGS 25 (2008). African Americans account for only approximately 13% of the U.S. population, HARTNEY & VUONG, *supra* note 38, at 2, but they account for 44.8% of all state prison inmates serving time for drug-related offenses. WEST & SABOL, *supra* note 18, at 21 tbl.10.

62. *See* MANN, *supra* note 43, at 180.

63. Determinate sentencing laws mandate confinement for a fixed period of time and encompass sentencing guidelines and mandatory sentencing policies. MAUER, *supra* note 47, at 136–37.

64. *See* WAYNE MCKENZIE ET AL., VERA INST. OF JUSTICE, PROSECUTION AND RACIAL JUSTICE: USING DATA TO ADVANCE FAIRNESS IN CRIMINAL PROSECUTION 1 (2009) (discussing prosecutors' "unrivaled independence" and the limited outside scrutiny of their decisions).

65. *Id.* Charging decisions are often influenced by a number of factors. *See* MANN, *supra* note 43, at 181–82 (discussing career success as a motivator for prosecutors given that success is arguably dependant on convictions and charges).

mented the correlation between race and charging decisions.[66] This correlation is due in part to the increased likelihood that Black defendants will already have a criminal history.[67] However, regardless of criminal history, studies suggest African Americans are subject to disparate charging decisions by prosecutors.[68]

The caliber of defense counsel appointed to many disadvantaged minority defendants serves as another barrier to fair representation in the criminal justice system.[69] Defendants with publicly-appointed counsel are more likely to be incarcerated than those with private attorneys.[70] Lack of resources and inadequate support for public defenders compromise the quality of legal counsel provided to indigent clients.[71] This fact amplifies the disparity between Blacks and Whites during the pretrial and trial stages, increasing rates of minority confinement.[72]

5. Drug Policies

Drug arrests are often cited as a "principal reason that the proportions of blacks in prison and more generally under criminal justice system control have risen rapidly in recent years."[73] The escalation of the "War on Drugs" (the War) and the inception of mandatory minimum sentences resulted in increased numbers of African Americans in the prison system for longer periods of time.[74] Drug policies enacted during the War continue to exert

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66. *E.g.*, *Developments in the Law: Race and the Criminal Process*, 101 HARV. L. REV. 1472, 1525 (1988) [hereinafter *Developments*] (surveying the empirical research on race and prosecutorial charging decisions).

67. In 1999, seventy percent of Black defendants charged with a federal drug offense had previously been convicted, compared to sixty percent of Whites. SCALIA, *supra* note 25, at 6 fig.5. Professor Richard Frase has posited that prior conviction record is the most important factor contributing "to the higher proportion of Blacks with recommended prison terms" in sentencing guidelines systems. Frase, *supra* note 40, at 249.

68. *See Developments*, *supra* note 66, at 1520–30.

69. *See, e.g.*, NAT'L CRIMINAL JUSTICE COMM'N, *supra* note 57, at 189–90 (describing the problems created by the underfunding of public defender programs).

70. CAROLINE WOLF HARLOW, BUREAU OF JUSTICE STATISTICS, U.S. DEP'T OF JUSTICE, NCJ 179023, DEFENSE COUNSEL IN CRIMINAL CASES 1 (2000) ("Of defendants found guilty in Federal district courts, 88% with publicly financed counsel and 77% with private counsel received jail or prison sentences; in large State courts 71% with public counsel and 54% with private attorneys were sentenced to incarceration.").

71. NAT'L CRIMINAL JUSTICE COMM'N, *supra* note 57, at 189–90.

72. *See id.*; *see also* MANN, *supra* note 43, at 179 ("[M]inorities are disproportionate recipients of 'free' counsel.").

73. TONRY, *supra* note 24, at 110.

74. *See* Tonry & Melewski, *supra* note 39, at 23 ("American drug policies are a primary aggravator of racial disparities in imprisonment.").

unintentional and unwarranted effects on minorities.[75] Recent policies such as school zone laws have further contributed to disproportionate imprisonment rates.[76]

President Ronald Reagan launched the War in the mid-1980s, ushering in an era of aggressive policies and harsh penalties.[77] During this time, lawmakers expressed concern over the alleged link between illicit drugs such as cocaine and violent crime.[78] This concern prompted the enactment of "get tough" policies, including the ADAA, which focused on incapacitating drug offenders in order to contain the rising drug trade.[79]

The goals of the War included decreasing drug abuse and accessibility by arresting drug dealers.[80] In actuality, the price of drugs decreased during this time and levels of drug dealing remained steady.[81] Furthermore, research has shown that drug use was already declining prior to the War.[82] As the War escalated, it had the practical effect of increasing minority incarceration at an unprecedented rate.[83] Blacks were imprisoned for drug offenses at rates highly disproportionate to their drug use or trafficking involvement, a trend that continues today.[84]

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75. Professor Michael Tonry suggests that the War "accomplished few if any of its ostensible goals" and "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." TONRY, *supra* note 24, at 81–82. *See also id.* at 94–95 (arguing that the War was intended to benefit White Americans at the foreseeable expense of disadvantaged members of minority groups).

76. *See infra* notes 94–99 and accompanying text.

77. NAT'L CRIMINAL JUSTICE COMM'N, *supra* note 57, at 115.

78. *See* 134 CONG. REC. S17301 (1988) (statement of Sen. Helms) (noting one reason to "single out crack [cocaine] for such severe penalties" is because "crack has been linked to violent crime"); NAT'L CRIMINAL JUSTICE COMM'N, *supra* note 57, at 118 (explaining how the death of basketball player Len Bias from a cocaine overdose in 1986 stunned the nation and politicized the issue of cocaine use).

79. Anti-Drug Abuse Act of 1986, Pub. L. No. 99-570, 100 Stat. 3207.

80. TONRY, *supra* note 24, at 81.

81. *Id.* at 83 (positing that the ostensible goals of the War had already been achieved prior to the inception of harsh drug policies).

82. *E.g.*, U.S. DEP'T OF HEALTH & HUMAN SERVS., MONITORING THE FUTURE: NATIONAL SURVEY RESULTS ON DRUG USE, 1975–2002, at 404 fig.A-2 (2002) (illustrating the declining rates of marijuana and cocaine use among secondary school students beginning in the early 1980s).

83. MCDONALD & CARLSON, *supra* note 27, at 1 (explaining the primary reason Blacks' sentences were longer than Whites' between January 1989 and June 1990: eighty-three percent of all federal offenders convicted for crack cocaine trafficking were Black and the average sentence imposed for crack cocaine was twice as long as the average sentence for powder cocaine).

84. Of the 253,300 state prison inmates serving time for drug offenses in 2005, 44.8% were Black, 20.2% were Hispanic, and 28.5% were White. WEST & SABOL,

As part of the ADAA, Congress implemented the notorious mandatory minimum sentences for crack cocaine possession.[85] Crack, a processed form of powder cocaine, was an easy target of the War.[86] Although pharmacologically similar to the pure form of powder cocaine, crack costs significantly less and is found primarily in low-income, urban areas that are predominantly African American.[87] The ADAA mandated that anyone convicted for possessing crack cocaine receive a mandatory five-year minimum sentence.[88] However, a conviction for possession of powder cocaine carried with it a sentence of no more than one year.[89] Accordingly, "a drug trafficker dealing in crack cocaine [was] subject to the same sentence as one dealing in 100 times more powder cocaine."[90] These policies have had profound racial implications: African Americans comprise over eighty percent of crack cocaine convictions.[91] Efforts are underway to eliminate or at least mitigate this disparity,[92] but African Americans today continue to be arrested and convicted for cocaine-related offenses at rates highly disproportionate to their involvement in cocaine trafficking.[93]

Recently enacted policies have similarly affected minority populations by contributing to sentencing disparities. "School zone" laws that provide enhanced penalties for drug offenses committed near a school have effectively targeted communities of color, disproportionately impacting minorities.[94] As a result,

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supra note 18, at 21 tbl.10.

85. 21 U.S.C. § 841(b)(1)(A) (2006).

86. NAT'L CRIMINAL JUSTICE COMM'N, *supra* note 57, at 119 ("[T]he media trumpeted crack cocaine as a highly addictive drug that had the potential to destroy communities and wreak wanton violence . . . .").

87. TONRY, *supra* note 24, at 188.

88. 21 U.S.C. § 841(b)(1)(B).

89. *Id.* § 844(a).

90. Kimbrough v. United States, 552 U.S. 85, 91 (2007).

91. U.S. SENTENCING COMM'N, SPECIAL REPORT TO THE CONGRESS, COCAINE AND FEDERAL SENTENCING POLICY 152 (1995), *available at* http://www.ussc.gov/crack/exec.htm. Among defendants convicted of simple possession of powder cocaine in 1995, 58% were White, 26.7% were Black, and 15% were Hispanic. *Id.* Among those convicted for crack cocaine possession, 10.3% were White, 84.5% were Black, and 5.2% were Hispanic. *Id.*

92. In August 2010, President Barack Obama signed legislation "[t]o restore fairness to Federal cocaine sentencing." Fair Sentencing Act of 2010, Pub. L. No. 111-220, 124 Stat. 2372 (eliminating mandatory minimum penalties for simple possession of crack cocaine and raising the minimum quantity of crack cocaine that triggers a five-year mandatory minimum sentence).

93. *See supra* note 61 and accompanying text.

94. *See* MAUER & KING, *supra* note 21, at 17 (discussing the racial effects of school zone laws arising from minority housing patterns and areas targeted by this legislation).

minority conviction rates have increased significantly under these policies.[95] This profound racial effect has prompted many legislators to reconsider these policies and scale back school zone perimeters.[96] Similarly, "three strikes" laws mandating twenty-five-year minimum sentences for third felony convictions are another example of the racially disparate application of drug policies.[97] These laws increase the severity of punishment for offenders convicted of their third felony and disproportionately penalize minority defendants.[98] These recent sentencing schemes demonstrate that even allegedly "race neutral" policies often produce "severe racial effects."[99]

II. Consequences of Racial Disparity in the Criminal Justice System

The profound effects of racial disparities in incarceration include collateral consequences for convicts reentering society, community and family instability, felony disenfranchisement, and reduced confidence in the criminal justice system.[100]

The stigma of a felony conviction follows prisoners long after release and imposes an enormous burden on minority populations.[101] High incarceration rates in some areas, particularly low-income African American neighborhoods, have considerable consequences for families and communities.[102] High recidi-

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95. *See, e.g.*, *Massachusetts Drug-Free Zone Law Ineffective, Not Evenly Enforced*, JUST. STRATEGIES, http://www.justicestrategies.org/node/65 (last visited Oct. 5, 2009) (explaining that eighty percent of offenders who have been sentenced under Massachusetts's school zone law are minorities).

96. *See, e.g.*, s.H.B. 6581, 2009 Leg., Jan. Sess. (Conn. 2009) (revising the perimeter near schools, day care centers, and public housing projects where the enhanced penalty for the sale or possession of drug paraphernalia applies).

97. *See* CAL. LEGISLATIVE ANALYST'S OFFICE, A PRIMER: THREE STRIKES—THE IMPACT AFTER MORE THAN A DECADE 1 (2005).

98. *Id.* "African Americans make up 45 percent of the third striker population, which is 15 percent higher than [their representation] in the total prison population." *Id.* at 21.

99. MAUER & KING, *supra* note 21, at 17.

100. Mauer, *supra* note 5, at 34. The collateral consequences associated with incarceration include limited employment prospects, housing difficulties, and prohibitions on access to public benefits, as well as reduced access to college education based on the inability to secure financial aid because of criminal history. *See* Debbie A. Mukamal & Paul N. Samuels, *Statutory Limitations on Civil Rights of People with Criminal Records*, 30 FORDHAM URB. L.J. 1501, 1501–14 (2003).

101. This stigma carries substantial implications for employment and future earning prospects. *See* NAT'L CRIMINAL JUSTICE COMM'N, *supra* note 57, at 126 (employers often refuse to consider applicants with a criminal record).

102. *See* Todd R. Clear, *The Effect of High Incarceration Rates on Communities*, 37 CRIME & JUST. 97, 109–14 (2008) (discussing consequences such as extreme

vism rates further disrupt families, resulting in a dangerous pattern of imprisonment.[103] Harsh sentencing policies and lack of reentry support "harm children and contribute to the intergenerational transmission of offending."[104] Children face a host of challenges stemming from parental imprisonment.[105] Communities, supported by Congress, have confronted this issue by establishing initiatives directed at strengthening family relationships and promoting healthy marriages following reentry, attempting to break the cycle of imprisonment.[106]

Minority groups also face "declining political influence through high rates of felony disenfranchisement."[107] Today, over five million Americans (2.5% of the U.S. population) have lost their right to vote as a result of a criminal conviction.[108] African Americans account for more than one-third of the total disenfranchised population.[109]

Evidence of racial disparities in the criminal justice system breeds public distrust and compromises efforts to safeguard communities.[110] Racial disparities within the system fuel the perception of bias, particularly within minority communities.[111]

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gender imbalances).

103. In state prisons, drug recidivists have a higher likelihood of being a parent than other recidivists. LAUREN E. GLAZE & LAURA M. MARUSCHAK, BUREAU OF JUSTICE STATISTICS, U.S. DEP'T OF JUSTICE, NCJ 222984, PARENTS IN PRISON AND THEIR MINOR CHILDREN 4 (2010).

104. Joseph Murray & David P. Farrington, *The Effects of Parental Imprisonment on Children*, 37 CRIME & JUST. 133, 187 (2008).

105. Parental imprisonment is associated with many negative outcomes in children such as antisocial behavior, mental health problems, drug abuse, unemployment, and school failure. *Id.* at 135.

106. *See, e.g.*, Second Chance Act of 2007, 42 U.S.C. § 17501 (2008) (aiming to "break the cycle of criminal recidivism" by helping communities address the needs of criminal offenders returning home).

107. MAUER & KING, *supra* note 21, at 19. Criminal disenfranchisement laws have historically racist motives. *See* Andrew L. Shapiro, *Challenging Criminal Disenfranchisement Under the Voting Rights Act: A New Strategy*, 103 YALE L.J. 537, 541 (1993) (discussing state practices and policies "disenfranchis[ing] criminals selectively with the intent of disqualifying a disproportionate number of blacks").

108. *Interactive Map*, THE SENTENCING PROJECT, http://www.sentencingproject.org/map/map.cfm (last visited Sept. 29, 2010).

109. Currently, two million of the five million disenfranchised Americans are Black. *Id.*

110. *See* NAT'L CRIMINAL JUSTICE COMM'N, *supra* note 57, at 124–25 (explaining that minority communities are distrustful of law enforcement efforts that they feel contribute to social instability in their inner-city neighborhoods). Disparate application of the law erodes public confidence in law enforcement. *Id.*

111. *Id.* at 125 ("[W]idespread arrests in minority communities have had a negative effect upon the ethic and attitude of the wider community toward the law

This perception results in reluctance to cooperate with law enforcement and undermines the system's ability to protect public safety.[112] By promoting the equitable application of justice, lawmakers "will increase confidence in the criminal justice system and thereby aid public safety efforts."[113]

III. Approaches to Alleviating Racial Disparity

Advocates have proposed a wide range of solutions for remedying racial disparity in prison populations.[114] Reform efforts have targeted nearly every facet of the criminal justice system.[115] These efforts include governmental task forces, community-level programs and initiatives, sentencing reform projects, and community-based alternatives to incarceration.[116]

Task forces and commissions in many states constitute deliberate attempts on the part of politicians and judges to address racial disparity.[117] Wisconsin, for example, established a task force dedicated to studying existing patterns and practices of racial profiling in state law enforcement.[118] The Wisconsin Commission on Reducing Racial Disparities has collected extensive data and recommended steps to alleviate racial disparities in the Wisconsin criminal justice system.[119] These groups have been instrumental in promoting interventions such as court-certified interpreters, data collection, and ongoing cultural competency training.[120]

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and its representatives.").

112. *Id.* at 124–25.

113. Mauer, *supra* note 3, at 17.

114. *See, e.g.*, *Violent Crime—Prevention and Solutions from the Experts: A Summit on Crime Policy: Hearing on Reducing Racial Disparity in the Criminal Justice System Before the H. Judiciary Subcomm. on Crime, Terrorism and Homeland Security*, 110th Cong. 3 (2007) [hereinafter *Violent Crime Hearing*] (statement of Marc Mauer, Executive Director, The Sentencing Project) (encouraging Congress to provide funding and assistance for establishing task forces to identify racial disparities and engage with local organizations).

115. *See infra* notes 117–132 and accompanying text.

116. *Id.* At the federal level, reforms include initiatives such as the Second Chance Act. *See supra* note 106 and accompanying text.

117. *See, e.g.*, MINN. SUPREME COURT TASK FORCE ON RACIAL BIAS IN THE JUDICIAL SYS., FINAL REPORT S-1 (1993) [hereinafter MINN. TASK FORCE] (conducting a comprehensive review of racial bias in Minnesota courts by examining substantive law, procedural issues, personnel issues, and access to court services).

118. GOVERNOR JIM DOYLE'S COMM'N ON REDUCING RACIAL DISPARITIES IN THE WIS. JUSTICE SYS., FINAL REPORT 7 (2008).

119. *Commission on Reducing Racial Disparities Announces Strategies to Curb Minority Overrepresentation*, OFF. OF JUST. ASSISTANCE, (Sept. 17, 2008), http://oja.wi.gov/section_detail.asp?linkcatid=2534&linkid=1344&locid=97.

120. *See, e.g.*, MINN. TASK FORCE, *supra* note 117, at 65, 69–78.

Local initiatives have attempted to "strengthen communities through justice reinvestment."[121] Given the well-established relationship between crime and areas of concentrated poverty, efforts at community reinvestment have been designed to shift resources from incarceration to community-building by strengthening local institutions.[122]

Proponents of sentencing reform have urged policymakers to ensure that sentencing guidelines protect against overly harsh sentences.[123] The racially disparate effects of drug policies enacted during the War have led many to challenge the efficacy of excessively punitive penalties.[124] These challenges influenced recent legislation altering mandatory minimum cocaine penalties.[125] This legislation has the potential to drastically reduce racial differences in incarceration.[126]

Many commentators have promoted the benefits of drug abuse treatment for low-level, non-violent offenders as an alternative to incarceration.[127] Reentry places a heavy burden upon ex-offenders and parolees, many of whom suffer from substance abuse problems.[128] The need for community-based treatment is underscored by the high recidivism rate of drug offen-

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121. *Violent Crime Hearing*, *supra* note 114, at 4.

122. *Id.* (discussing community allocation of resources that provide "effective parole supervision and services" and that "enhance social and economic opportunit[ies]").

123. *See* Tonry & Melewski, *supra* note 39, at 37 (urging lawmakers to abandon "[d]isparity-[c]ausing [p]olicies").

124. *See* Anthony M. Kennedy, Assoc. Justice, Supreme Court of the U.S., Speech at the American Bar Association Annual Meeting (Aug. 9, 2003) (urging policymakers to revise sentencing guidelines downward and repeal mandatory minimum sentences). Some scholars have proposed controversial approaches such as the use of affirmative action in sentencing and incarceration policy. *See, e.g.*, Paul Butler, *Affirmative Action and the Criminal Law*, 68 U. COLO. L. REV. 841 (1997).

125. Fair Sentencing Act of 2010, Pub. L. No. 111-220, § 3, 124 Stat. 2372.

126. MCDONALD & CARLSON, *supra* note 27, at 2 (projecting that racial differences in cocaine sentences "would not only evaporate but would slightly reverse" with the imposition of identical sentences for "crack and powdered cocaine traffickers").

127. *See* C. Peter Rydell et al., *Enforcement or Treatment? Modeling the Relative Efficacy of Alternatives for Controlling Cocaine*, 44 OPERATIONS RES. 687, 694 (1996).

128. JENNIFER C. KARBERG & DORIS J. JAMES, BUREAU OF JUSTICE STATISTICS, U.S. DEP'T OF JUSTICE, NCJ 209588, SUBSTANCE DEPENDENCE, ABUSE, AND TREATMENT OF JAIL INMATES, 2002, at 2 (2005) finding that over two-thirds of jail inmates meet the standard for substance dependence or abuse). Also, the uninsured rate for Blacks is nearly twice that of Whites, further reducing the availability of treatment services for prisoners reentering communities. *See* DENAVAS-WALT ET AL., *supra* note 40, at 22 tbl.6.

ders.[129] Advocates praise the cost-effectiveness of drug treatment, claiming that treatment programs cost less per prisoner than incarceration and provide crucial resources to prisoners reentering the community.[130] These efforts are premised on the notion that the goal of reducing drug abuse and violence is better achieved through rehabilitation than by sentencing low-level offenders to longer, mandatory prison terms.[131] Therefore, investing in a treatment-centered approach rather than a prison-centered model would achieve economic as well as rehabilitative goals.[132]

Although advocates have presented several models for alleviating the racial disparities in U.S. prisons, the current proposals are reactive rather than proactive.[133] While many proposals have the potential to produce meaningful change and mitigate disproportionate racial representation,[134] there is a clear need for a preventive, proactive approach.

IV. Current and Proposed Legislation Regarding Racial Impact Statements

A few states have recently responded to disproportionate incarceration rates by requiring racial impact statements to accompany proposed legislation affecting sentencing policy.[135] The

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129. PATRICK A. LANGAN & DAVID J. LEVIN, BUREAU OF JUSTICE STATISTICS, U.S. DEP'T OF JUSTICE, NCJ 193427, RECIDIVISM OF PRISONERS RELEASED IN 1994, at 8 tbl.9 (2002) (citing the 66.7% recidivism rate among drug offenders).

130. *See* JONATHAN P. CAULKINS ET AL., RAND CORP., AN OUNCE OF PREVENTION, A POUND OF UNCERTAINTY 53 fig.3.1 (1999) (assessing various cocaine control programs and concluding that treatment is the most cost-effective approach).

131. *Comparing the Cost-Effectiveness of Federal Mandatory Minimum Sentences and Other Federal Enforcement Programs: Testimony Presented to the Subcomm. on Crime of the H. Comm. on the Judiciary*, 106th Cong. 12 (1999) (statement of Peter Reuter & Susan Everingham) ("[I]f reducing consumption or violence is the goal, more can be achieved by spending additional money arresting, prosecuting, and sentencing dealers to standard prison terms than by spending it sentencing (fewer) dealers to longer, mandatory terms." (citing CAULKINS ET AL., *supra* note 15)).

132. *See, e.g.*, JUDITH GREENE & KEVIN PRANIS, JUSTICE STRATEGIES, TREATMENT INSTEAD OF PRISONS: A ROADMAP FOR SENTENCING AND CORRECTIONAL POLICY IN WISCONSIN 70 (2006) (projecting that treating rather than incarcerating low-level, non-violent offenders would reduce the Wisconsin state prison population by 1500 prisoners and generate annual savings up to $43 million).

133. *See supra* notes 114–132.

134. *Id.*

135. *E.g.*, 2008 Conn. Pub. Acts 143 § 5(a) ("[A] racial and ethnic impact statement shall be prepared with respect to certain bills and amendments that could, if passed, increase or decrease the pretrial or sentenced population of the correctional facilities in this state.").

underlying premise of these statements is that lawmakers can predict the effects of many of the policies that disproportionately impact minorities.[136] By forcing legislators to confront the racial implications of proposed legislation, impact statements can elicit discussion of the potential repercussions prior to the enactment of policies with racially disparate effects.[137]

Racial impact statements are modeled on fiscal and environmental impact statements which are widely used and highly influential mechanisms.[138] These impact statements are routinely incorporated into legislative discussion to inform lawmakers of the potentially adverse economic or environmental effects of statutory proposals, thereby subjecting legislation to closer scrutiny.[139] Racial impact statements serve a similar purpose in the legislative process. These statements provide a valuable alternative to current measures that respond to the problem of racial disparities rather than preventing the enactment of policies contributing to such disparities.[140]

A. *Purpose of Racial Impact Statements*

Racial impact statements force lawmakers to confront the complexities of minority over-representation in American prisons.[141] By acknowledging the potential consequences of sentencing policies, legislators may consider alternative approaches that would not exacerbate existing racial disparities.[142] Lawmakers may look more favorably upon policy proposals that would reduce minority confinement or be forced to justify policies

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136. TONRY, *supra* note 24, at 104 (suggesting that the disparities caused by drug policies were foreseeable and policymakers behind the War should be held morally accountable).

137. *See* Mauer, *supra* note 5, at 31–32.

138. *See Background on Cost Estimates*, CONG. BUDGET OFFICE, http://www.cbo.gov/costestimates/CEBackground.cfm (last visited Dec. 6, 2009) ("CBO's [fiscal] cost estimates have become an integral part of the legislative process, and committees increasingly refer to them at every stage of drafting bills."); *see also* RUTH & REITZ, *supra* note 23, at 115 ("On numerous occasions, state legislatures have tabled or modified punitive sentencing proposals when informed of their expected effects on prison growth and the state treasury.").

139. *See, e.g.*, N.Y. ENVTL. CONSERV. LAW § 8-0109 (2005) (requiring preparation of "environmental impact statement[s]" for projects that "may have a significant effect on the environment").

140. *See* Frase, *supra* note 40, at 265 ("[I]t is not enough to recognize a disparate impact after it has occurred; the identification of such impacts and reexamination of underlying policies should occur before the policies are implemented.").

141. *See* Mauer, *supra* note 5, at 31–33.

142. *Id.* at 33.

that could worsen these disparities.[143] For example, the purpose of Minnesota's racial impact statements is described as:

> [The] MSGC seeks to enrich the discussion on how minorities in Minnesota are affected by changes in sentencing policy. If a significant racial disparity can be predicted before a bill is passed, it may be possible to consider alternatives that enhance public safety without creating additional disparity in Minnesota's criminal justice system. . . . [T]he agency does not intend to comment on whether or not a particular bill should be enacted. Rather, it is setting out facts that may be useful to the Legislature, whose members frequently express concerns about the disparity between the number of minorities in our population and the number in our prisons.[144]

This purpose also acknowledges the overarching goals of any criminal justice policy—enhancing public safety while ensuring fair and equal application of the law.[145] Marc Mauer, Executive Director of the Sentencing Project and a strong proponent of racial impact statements, has described the interconnected policy goals of reducing unwarranted racial disparities and promoting public safety.[146] According to Mauer, these goals are interrelated in the sense that policies that contribute to mounting racial disparities also "contribute to a lack of confidence in the criminal justice system in many African American communities."[147] Therefore, law enforcement and policymakers must work to build trust in these communities to produce public safety.[148]

B. Current Policies and Legislation Mandating the Use of Racial Impact Statements

In 2008, Iowa became the first state to adopt legislation mandating the use of racial impact statements.[149] The Minority Impact Statement Bill[150] was enacted in response to a study indicating that Iowa's prisons led the nation in racial disparities with a 13.6:1 ratio[151] of Black to White prisoners.[152] Iowa governor

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143. Mauer, *supra* note 3, at 18–19.

144. MINN. SENTENCING GUIDELINES COMM'N, RACIAL IMPACT FOR HF 3175: ROBBERY—INCREASED PENALTIES (2008); *see infra* app.

145. Mauer, *supra* note 5, at 21.

146. *Id.* at 33–34.

147. *Id.* at 34.

148. *Id.*

149. *Iowa Sentencing Laws*, *supra* note 10.

150. H.F. 2393, 82d Gen. Assemb., Reg. Sess. (Iowa 2008).

151. MAUER & KING, *supra* note 21, at 10 tbl.5. Iowa's incarceration rate for Whites is 309 per 100,000 residents, compared to 4200 for Blacks, meaning that 4.2% of all Blacks in the state are incarcerated, compared to 0.3% of Whites. *Id.* at 6 tbl.2.

Chet Culver stated that the bill would allow members of the General Assembly and executive branch to consider legislation with a "better understanding of the potential effects, both positive and negative, on Iowa's minority communities."[153] The legislation went into effect in January 2009.[154] The statements are prepared by the Legislative Services Agency, which "may request the cooperation of any state department or agency or political subdivision in preparing [a statement]."[155] Iowa issued ten minority impact statements during the 2009 legislative session.[156]

Connecticut recently passed similar legislation requiring that a racial and ethnic impact statement[157] accompany any bill that could potentially affect the population of state correctional facilities.[158] The bill went into effect in 2009 as an attempt to advance fairness[159] and transparency in Connecticut's criminal justice system.[160] The statements are prepared by the Office of Legislative Research and the Office of Fiscal Analysis and must be attached to the legislation they assess.[161] Committee members may request a racial and ethnic impact statement analyzing any proposed bills which "would increase or decrease the pretrial or sentenced population of [state] correctional facilities."[162] Connecticut has only produced one impact statement to date.[163]

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152. The lowest ratio, Hawaii, was 1.9:1. *Id.* at 10 tbl.5.

153. *Iowa Sentencing Laws*, *supra* note 10.

154. IOWA CODE ANN. § 2.56 (West Supp. 2010).

155. *Id.* § 2.56(3)–(4).

156. E-mail from Beth Lenstra, Senior Analyst, Iowa Legislative Services Agency, to author (Oct. 29, 2009) (on file with author).

157. It is important to note that the titles of these statements differ by state. Iowa terms their projections "minority impact statement[s]," H.F. 2393, 82d Gen. Assemb., Reg. Sess. (Iowa 2008), while Connecticut refers to "racial and ethnic impact statement[s]," CONN. GEN. STAT. ANN. § 2-24b(a) (West Supp. 2010).

158. CONN. GEN. STAT. ANN. § 2-24b(a).

159. Prior to this legislation, African Americans in Connecticut were confined to state prisons at twelve times the rate of their White counterparts. *See* MAUER & KING, *supra* note 21, at 10 tbl.5.

160. *House Session Transcript for 01/07/2009*, Gen. Assemb., 2009 Sess. (Conn. 2009) (statement of Rep. O'Neill).

161. CONN. GEN. ASSEMB. OFFICE OF LEGIS. MGMT., CONNECTICUT LEGISLATIVE GUIDE, 2010 Sess., at 238, *available at* www.cga.ct.gov/olm/guides/guide/guide.pdf.

162. *Id.*

163. CHRISTOPHER REINHART & DANIEL DUFFY, DRUG ZONE MAPS FOR SHB 6581 RACIAL AND ETHNIC IMPACT STATEMENT (2009), *available at* http://www.cga.ct.gov/2009/rpt/2009-R-0184.htm (concerning amendments to the state's law enhancing penalties for drug activity near schools, day care centers, and public housing projects).

In Minnesota, racial impact statements have taken a different form.[164] In 2007, the MSGC responded to the state's 9.1:1 racial disparity in its prisons[165] by voluntarily producing racial impact statements to accompany fiscal impact statements.[166] The MSGC is responsible for regularly monitoring offender-based data and sentencing practices and routinely prepares reports to legislators concerning criminal justice programs and policies.[167] Thus, when the MSGC implemented the policy requiring racial impact statements, it had already collected extensive data on the demographic composition of Minnesota prisons.[168] The MSGC has produced seven racial impact statements that present information on the racial composition of state prisons alongside the projected impact of proposed legislation on the state's offender population.[169]

Similar legislation is pending elsewhere throughout the country. Oregon was the first state to propose legislation of this kind, but the bill has not yet passed.[170] At the federal level, the Justice Integrity Act[171] was introduced in 2008 and reintroduced in 2009 as a bipartisan effort to increase public confidence in the criminal justice system by reducing the perception of bias.[172]

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164. In contrast to Iowa and Connecticut, which legislatively mandated impact statements, the MSGC began voluntarily producing racial impact projections in 2007 as the result of an internal agency decision. *See* Mauer, *supra* note 3, at 18.

165. MAUER & KING, *supra* note 21, at 11 tbl.6. According to U.S. Census data from 2007, approximately 88% of Minnesota's population was White and 4.4% was Black. U.S. CENSUS BUREAU, *2006–2008 American Community Survey 3-Year Estimates: Minnesota Fact Sheet*, http://factfinder.census.gov (search "Get a Fact Sheet" for "Minnesota") (last visited Oct. 9, 2010). As of 2008, 56.6% of Minnesota's prison population was White and 33.1% was Black. MINN. DEP'T OF CORR., ADULT INMATE PROFILE AS OF 01/01/2008, at 2 (2008).

166. The racial impact statements are meant to be reviewed in conjunction with the fiscal notes completed by the MSGC. E-mail from Jill Payne, Senior Research Analyst, Minnesota Sentencing Guidelines Commission, to author (Sept. 17, 2009) (on file with author).

167. MINN. SENTENCING GUIDELINES COMM'N, AGENCY PROFILE 1 (2009), *available at* http://www.msgc.state.mn.us.

168. The MSGC has collected and published some of the most complete data on felony sentencing that is available in any state. Frase, *supra* note 40, at 268.

169. E-mail from Jill Payne, *supra* note 166; *see* MINN. SENTENCING GUIDELINES COMM'N, *supra* note 144. Although several statements have been produced, "none has had any observable effect on political debate." Kevin R. Reitz, *Demographic Impact Statements, O'Connor's Warning, and the Mysteries of Prison Release: Topics from a Sentencing Reform Agenda*, 61 FLA. L. REV. 683, 694 (2009).

170. H.B. 2933, 74th Leg. Assemb., Reg. Sess. (Or. 2007) ("[H.B.2933] requires preparation of racial and ethnic impact statements that assess impact of prison-related legislation and certain prison-related rulemaking on racial and ethnic profile of prison population.").

171. Justice Integrity Act of 2009, S. 495, 111th Cong. § 3 (2009).

172. This bill establishes a pilot program to examine racial disparities in the

The American Law Institute (ALI)[173] first proposed the use of impact statements to address racial disparities in the criminal justice system.[174] The revised Model Penal Code (MPC) contains a provision requiring sentencing commissions to generate "Demographic Impact Statements" projecting future gender, racial, and ethnic patterns in sentencing.[175] These projections are designed to engage lawmakers in discussions concerning the potential impact of proposed legislation and thereby ensure legislative accountability.[176] The revised MPC envisions a "correctional-population forecasting model" applicable to existing legislation as well as to newly-introduced bills and amendments or sentencing guidelines proposals.[177]

C. *Content of Racial Impact Statements*

The existing racial impact statements range from simple descriptive statistics on the racial composition of offender populations to sophisticated analyses presented in multiple forms.[178] Iowa's impact statements represent a simple approach.[179] The state's fiscal notes and minority impact statements are collapsed into one document that opens with an introductory paragraph

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federal justice system by creating advisory groups "responsible for gathering data on the presence, cause and extent of racial and ethnic disparities at each stage of the criminal justice system . . . then recommend[ing] a plan, specific to each district, to ensure progress toward racial and ethnic equality." *Racial Disparities in the Criminal Justice System: Hearing Before the Subcomm. on Crime, Terrorism and Homeland Security of the H. Comm. on the Judiciary*, 111th Cong. 9 (2009) (testimony of Rep. Steve Cohen).

173. ALI is an independent organization involved in the development of model statutory formulations, including the Model Penal Code (MPC). AM. LAW INST., ABOUT THE AMERICAN LAW INSTITUTE 1, *available at* http://www.ali.org/doc/thisIsALI.pdf.

174. ALI developed the idea of demographic impact statements in 2002. The first draft of the revised MPC described one of the general purposes of the provisions on sentencing as "ensur[ing] that unjustified racial and ethnic disparities in sentencing are reduced or eliminated, and that reasonable steps are taken to forecast and prevent such unjustified disparities when laws and guidelines affecting sentencing are proposed, revised, or enacted." MODEL PENAL CODE: SENTENCING § 1.02(2)(e) (Preliminary Draft No. 1, 2002).

175. ALI approved this section in 2007. MODEL PENAL CODE § 6A.07 (2007).

176. Reitz, *supra* note 169, at 691–92.

177. MODEL PENAL CODE § 6A.07(1) (2007).

178. *See, e.g.*, BETH LENSTRA, LEGISLATIVE SERVS AGENCY, FISCAL NOTE FOR HF 767: OBSCENITY AND POSSESSION OF CHILD PORNOGRAPHY (2009) (providing simple racial composition statistics); REINHART & DUFFY, *supra* note 163 (including "drug zone maps" to demonstrate "the bill's impact on towns of different sizes in terms of population and geography").

179. LENSTRA, *supra* note 178.

describing the proposed legislation.[180] The statement then presents "Correctional and Fiscal Information," which includes the average costs to the court system associated with prosecuting and imprisoning offenders for the given offense, as well as offender statistics for the previous year.[181] The next section, entitled "Minority Data Information," breaks down the state's overall prison population by gender and race.[182] The analysis then presents assumptions and concludes with probable correctional, fiscal, and racial minority effects of the legislation.[183]

Similarly, Minnesota's impact statements open with data illustrating the current demographic breakdowns of the state's general population, felony offender population, and total prison population.[184] The statement then presents the imprisonment rates for minority offenders convicted under the relevant policy, projecting whether the bill will have a disparate racial impact.[185] The Minnesota statements are brief—generally one to two pages in length.[186]

By contrast, Connecticut's racial and ethnic impact statement exemplifies a more comprehensive approach.[187] The statement opens with a summary of the proposed legislation and the statutory basis for incorporating the racial impact statement.[188] The data is aggregated from a variety of sources and presented in

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180. *Id.*

181. *Id.* For example, a statement for a bill amending the crime of sexual exploitation of a minor specifies the average length of stay in prison under the current law, the marginal cost to the state prison system per day, and "the average cost to the court system for a misdemeanor bench trial." *Id.*

182. *Id.* The statement notes that in 2008, 8740 offenders were held in Iowa's prisons, 91.3% of whom were men. *Id.* The statement also indicates that "the racial composition of the prison system was: 72.3% white; 25.2% black; 0.8% Asian or Pacific Islander; and 1.6% American Indian or Alaska Native; and 0.1% was unknown." *Id.*

183. *Id.*

184. This information is presented in the text and in the form of a bar chart comparing the racial composition among populations. MINN. SENTENCING GUIDELINES COMM'N, *supra* note 144.

185. For example, one impact statement projects the average increase in sentence length for individuals convicted of attempted aggravated robbery to be "8 months for white offenders, 10 months for black offenders, 15 months for American Indian offenders, and 23 months for Hispanic offenders." *Id.*

186. For example, Minnesota's impact statement on proposed legislation regarding attempted aggravated robbery is just over one page long. *See id.*

187. OFA/OLR RACIAL AND ETHNIC IMPACT STATEMENT, SHB 6581, FILE NO. 732, at 11–16 (2009), *available at* http://search.cga.state.ct.us/2009/FC/pdf/2009HB-06581-R000732-FC.pdf.

188. *Id.* at 11.

tables and charts.[189] The statement delineates the racial composition of overall state and prison populations alongside criminal sentencing statistics.[190] This information enables state lawmakers to consider the resulting impact of legislation based on accurate and extensive data.[191]

V. Issues Surrounding Racial Impact Statements and Suggested Solutions

A. *Challenges of Preparing Racial Impact Statements*

Although many jurisdictions have the financial and technical resources necessary to prepare racial impact statements, others may encounter difficulties when attempting to implement procedures for producing these statements.[192] Logistical, fiscal, and political concerns present potential challenges.[193] However, these challenges should not impede a state's ability to develop racial impact statements.[194]

1. Data Collection and Analytical Capability

Significant variation exists among states in terms of data collection capability.[195] States without robust data management systems may only be able to produce approximations of a bill's projected racial impact.[196] However, many jurisdictions have the technological capacity to assemble accurate and reliable data on the criminal justice system.[197] Forty-seven states currently collect incident-based data[198] on criminal offenses through Uniform Crime

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189. Researchers used "data from the Department of Correction (DOC), Judicial Branch, and U.S. Census." *Id.* at 11–16.

190. *Id.*

191. *See supra* notes 141–143 and accompanying text.

192. *See* E-mail from Marc Mauer, Exec. Dir., The Sentencing Project, to author (Oct. 2, 2009) (on file with author).

193. *Id.*

194. *Id.*

195. *Id.*

196. *Id.*

197. *See Status of NIBRS in the States*, JUST. RES. & STAT. ASS'N, http://www.jrsa.org/ibrrc/background-status/nibrs_states.shtml (last visited Sept. 28, 2010) (summarizing the status of incident-based data collection systems in each state). Incident-based reporting is a comprehensive strategy by which agencies maintain a database containing extensive details of criminal offenses. JUSTICE RESEARCH & STATISTICS ASS'N, JRSA'S INCIDENT-BASED REPORTING RESOURCE CENTER, *available at* http://www.jrsa.org/ibrrc/fact_sheet.pdf.

198. *Availability of IBR Data*, JUST. RES. & STAT. ASS'N, http://www.jrsa.org/ibrrc/using-data/availability_data.shtml (last visited Oct. 21, 2010).

Reporting Departments.[199] States with sentencing guidelines commissions also possess the requisite technology for assembling data to project statistics for impact assessments.[200] To prepare racial impact statements, these agencies could expand their capabilities to meet legislative demands.[201]

Many states already conduct assessments comparable to those required for racial impact statements.[202] Pursuant to the Juvenile Justice and Delinquency Prevention Act of 1974 (JJDPA), several states implemented procedures for evaluating minority youth involvement in the criminal justice system.[203] Under the JJDPA, states must assess disproportionate minority involvement in the juvenile justice system and make efforts to reduce this over-representation.[204] States that have complied with the provisions of this Act may have established mechanisms that could apply to adult prisoners as well.

Small jurisdictions may lack sophisticated systems for performing the complex analyses required to produce racial impact statements.[205] Agencies in these states should begin by establishing a framework for measuring relevant indicators and recording data across multiple variables.[206] For example, data relating to prosecutorial discretion could focus on "case screening, charging, plea offers, and final disposition."[207] States without existing data management systems will have to develop methods for assembling this information from a variety of sources.[208]

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199. This process results in a "multilevel file" which includes "incident, offense, victim and arrestee" characteristics. *Id.*

200. *See* MASS. SENTENCING COMM'N, REPORT TO THE GENERAL COURT 78–79 (1996) (outlining the methodology used by the state sentencing commission to project future estimates of the county correctional populations, parole populations, and admissions streams).

201. *See* Frase, *supra* note 40, at 265.

202. *See* PEW CHARITABLE TRUSTS, PUBLIC SAFETY, PUBLIC SPENDING: FORECASTING AMERICA'S PRISON POPULATION 2007–2011, at 9–12, *available at* http://www.jfa-associates.com/publications/ppsm/pspp_prison_projections_0207.pdf.

203. Juvenile Justice and Delinquency Prevention Act of 1974, 42 U.S.C. §§ 5601–5751 (2006). This Act provides federal funding to states for evaluating the extent to which minority youth are over-represented in prisons and detention facilities and funds the implementation of measures designed to lessen these disparities.

204. *Id.* § 5633(a)(22).

205. E-mail from Marc Mauer, *supra* note 192.

206. *See, e.g.*, MCKENZIE ET AL., *supra* note 64, at 1 (acknowledging that some District Attorneys' offices have begun tracking prosecutorial decision-making).

207. *Id.* at 2.

208. *See, e.g.*, s.H.B. 6581, 2009 Leg., Jan. Sess. (Conn. 2009) (aggregating data from multiple sources to create an impact statement).

Aggregating data, however, presents important limitations. Data from various stages in the criminal justice system often include differing racial categories, making comparison difficult.[209] Notably, Hispanics are not adequately represented in sentencing figures and are often categorized as White or "other," impacting the reliability of racial statistics.[210] To avoid such limitations, states must bolster data collection strategies to ensure the compilation of accurate and reliable information.[211]

2. Fiscal Implications of Preparing Racial Impact Statements

The costs associated with preparing racial impact statements will undoubtedly differ among states, depending on existing resources and access to data.[212] Many states could easily modify existing mechanisms for projecting the fiscal or correctional impact of legislation to reflect attendant racial effects.[213] In Minnesota, the MSGC used its existing database and research analysts to prepare impact statements, incurring minimal costs.[214] Such an approach would introduce a racial element into the legislative discussion without requiring exhaustive efforts on the part of overburdened agencies.[215]

Drug-related sentencing policies that establish mandatory minimum prison terms for low-level, non-violent offenders have driven up correctional costs while contributing to disproportionate

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209. Frase, *supra* note 40, at 269.

210. *Id.* ("Persons of Hispanic (or Latino) ethnicity are sometimes put in a separate nonoverlapping category (i.e., they are excluded from racial categories), whereas in other data Hispanics are included within racial categories even if their total is also reported separately."). Connecticut's racial and ethnic impact statement contains information from several different sources while noting the limited precision of its data comparison due to inconsistent definitions of racial categories. OFA/OLR RACIAL AND ETHNIC IMPACT STATEMENT, *supra* note 187, at 11.

211. *See* Frase, *supra* note 40, at 269–70 (detailing areas of inconsistencies that states should account for when comparing data).

212. For example, Oregon's fiscal analysis projecting the costs of enacting racial impact statement legislation "estimate[d] that it would require one Economist . . . to prepare the racial and ethnic impact statements during a typical [legislative] session." TIM WALKER, OR. LEGIS. FISCAL OFFICE, FISCAL ANALYSIS OF PROPOSED LEGISLATION HB 2352 (2009).

213. *See* Frase, *supra* note 40, at 265 ("[Sentencing guidelines] commissions can and should adapt their resource-impact projection models so that they also show the predicted racial and ethnic impact of current and proposed sentencing policies.").

214. Telephone Interview with Suzanne Alliegro, Exec. Dir., Minn. Sentencing Guidelines Comm'n (Jan. 27, 2010).

215. *See* Frase, *supra* note 40, at 265.

rates of imprisonment.[216] A 2006 Wisconsin study indicated that state prison admissions for non-violent drug offenders increased twenty percent between 1998 and 2003 and found that the 2900 prisoners serving time for these offenses produced costs of more than $83 million per year.[217] Legislation modifying penalties for non-violent drug offenses limits the number of people that fall within the sentencing parameters and thereby reduces the existing disparity between the overall population and prison population.[218] By drawing attention to sentencing disparities for non-violent, low-level offenses, states may reap the benefits of reduced racial inequities and lowered correctional costs without sacrificing public safety.[219]

"In 1987, the states collectively spent $10.6 billion of their general funds . . . on corrections."[220] This number quadrupled over the next two decades, resulting in patterns of unsustainable growth.[221] The current fiscal crisis may provide the impetus for state legislators to consider novel mechanisms, such as racial impact statements, to reduce costs and stabilize prison populations.[222]

B. Entities Responsible for Preparing Racial Impact Statements

A number of state governmental agencies are well equipped to collect information and perform the complex analysis required to produce impact statements. According to the Justice Research and Statistics Association, several states maintain active databases containing descriptive offender characteristics.[223] These

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216. *See supra* Part I.B.5.

217. GREENE & PRANIS, *supra* note 132, at 6–7.

218. *See* s.H.B. 6581, 2009 Leg., Jan. Sess. (Conn. 2009).

219. Mauer, *supra* note 5, at 45. Reducing mandatory sentencing and lengthy prison terms that disparately affect minorities would ultimately save tax dollars. *The Nat'l Drug Control Strategy: Hearings before the Legislation and Nat'l Sec. Subcomm. and Joint Hearing before the Legislation and Nat'l Sec. Subcomm. and Gov't Info., Justice and Agric. Subcomm. of the H. Comm. on Gov't Operations*, 101st Cong., 358 (1990) (statement of Marc Mauer, Assistant Dir., The Sentencing Project).

220. PEW CTR. ON THE STATES, ONE IN 100: BEHIND BARS IN AMERICA 2008, at 4 (2008). In 1996, the national average annual operating expenditure was $20,100 per inmate. *Id.* at 19.

221. *Id.*

222. *See* Michael P. Jacobson, *Crisis and Opportunity in California's Prison System*, 13 BERKELEY J. CRIM. L. 319, 325 (2008) ("Budget crises can be vehicles for changes that would not otherwise be politically possible.").

223. Most states have Statistical Analysis Centers (SACs) charged with collecting, assessing, and disseminating justice data. *Statistical Analysis Centers*

state-level agencies and commissions are responsible for performing statistical services as well as analyzing and evaluating proposed policy initiatives.[224] There are a few entities in particular that are equipped with readily adaptable information systems that could be used to prepare racial impact statements.

Sentencing guidelines commissions could serve as the primary sources of information on the composition of state prison populations.[225] These entities play a vital role in assessing and shaping criminal sentencing policy.[226] At the federal level, the U.S. Sentencing Guidelines Commission maintains statistics on a broad array of issues pertaining to federal crime and sentencing.[227] State sentencing commissions assemble and analyze information on state sentencing trends.[228] With mechanisms already in place, these commissions could effectively create racial impact statements.[229] However, only a limited number of states have sentencing commissions.[230] States without commissions must consider other governmental entities that are well suited to produce impact statements.[231]

(SACs), JUST. RES. & STAT. ASS'N, http://www.jrsa.org/ sac/index.html (last visited Oct. 9, 2010) ("[SACs] contribute to effective state policies through statistical services, research, evaluation, and policy analysis."). SACs also use data and "information from all components of criminal justice systems to conduct objective analyses of statewide and systemwide policy issues." *What Are SACs?*, JUST. RES. & STAT. ASS'N, http://www.jrsa.org/ sac/aboutsacs.html (last visited Nov. 18, 2010).

224. For instance, Minnesota's SAC "[s]erve[s] as a clearinghouse of criminal justice information" used to "assist[ ] policy makers . . . to identify emerging critical issues and to improve the effectiveness of Minnesota's justice system." *Statistical Analysis Center: About Us*, OFF. OF JUST. PROGRAMS, http://www.ojp.state.mn.us/cj/ (last visited Oct. 9, 2010).

225. Sentencing commissions generally function as bodies charged with maintaining databases and promulgating state sentencing schemes. *See* NEAL B. KAUDER & BRIAN J. OSTROM, NAT'L CTR. FOR STATE COURTS, STATE SENTENCING GUIDELINES: PROFILES AND CONTINUUM 3 (2008).

226. *See id.*

227. U.S. SENTENCING COMM'N, AN OVERVIEW OF THE UNITED STATES SENTENCING COMMISSION 1 (2009), *available at* http://www.ussc.gov/general/ USSC_Overview_200906.pdf.

228. *See, e.g.*, MINN. SENTENCING GUIDELINES COMM'N, *supra* note 167, at 1 (describing MSGC's functions, which include "collecting, cleaning, and storing data on all felony sentences").

229. *See* Frase, *supra* note 40, at 265 (explaining that sentencing commissions can easily prepare racial impact statements "because [sentencing] guidelines make sentences predictable, and sentencing commissions are already using that greater predictability to model their systems and project future resource needs.").

230. Twenty states and the District of Columbia have sentencing guidelines, and some states with guidelines lack commissions. KAUDER & OSTROM, *supra* note 225, at 4.

231. *See infra* notes 232–235 and accompanying text.

State departments of corrections (DOCs) are one such government agency. DOCs maintain comprehensive databases to monitor prison populations and offender statistics and routinely provide information to legislative agencies for fiscal and correctional impact statements.[232] DOC staff could potentially augment collection methods to project figures for racial impact statements as well.

Other administrative agencies could also prepare racial impact statements. Some state agencies serve as comprehensive repositories for criminal justice data. For example, Iowa's Justice Data Warehouse is the "central repository of key criminal and juvenile justice information," allowing the state to assess the extent to which minorities are over-represented in prisons.[233] This entity has compiled information on case filings, convictions, disposed charges, and corrections—data that would be integral to the preparation of racial impact statements.[234] In addition, many of the agencies responsible for producing fiscal impact statements have readily adaptable formats and processes in place for preparing similar projections.[235]

Alternatively, Oregon's proposed bill establishes a specialized commission to serve as a clearinghouse for data relating to the prison system.[236] Creating an entirely new agency responsible for disseminating information may be less desirable for states with limited resources. However, the majority of states have agencies already conducting comparable analyses.[237] The burden, then, may not be as significant as some perceive it to be, especially since agencies can exercise considerable discretion when establishing racial impact statement procedures and developing protocols.[238]

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232. *See, e.g.*, *About the Department of Corrections: Statistics*, MINN. DEP'T OF CORR., http://www.doc.state.mn.us/aboutdoc/stats/Default.htm (last visited Sept. 30, 2010) (publishing inmate profile statistics); *Reports and Publications*, MINN. DEP'T OF CORR., http://www.doc.state.mn.us/publications/default.htm (last visited Sept. 30, 2010) (publishing legislative reports, *inter alia*).

233. *Justice Data Warehouse (JDW)*, IOWA DIVISION OF CRIM. & JUV. JUST. PLAN., http://www.iowa.gov/dhr/cjjp/jdw/index.html (last visited Oct. 2, 2009).

234. *Criminal Justice Data*, IOWA DIVISION OF CRIM. & JUV. JUST. PLAN., http://www.humanrights.iowa.gov/cjjp/adult_data/index.html (last visited Sep. 30, 2010).

235. For instance, Iowa's Legislative Services Agency is charged with producing fiscal and minority impact statements, which are incorporated into the same analysis. *See* IOWA CODE ANN. § 2.56(5) (West Supp. 2010).

236. H.R. 2933, 74th Leg. Assemb., Reg. Sess. (Or. 2007).

237. Most states have SACs and/or sentencing guidelines commissions. *See supra* notes 223, 230 and accompanying text.

238. States have developed racial impact statement requirements through internal agency decisions or legislation. *See supra* note 164.

States should also encourage collaborative efforts among government departments to alleviate the burden on individual agencies and to promote comprehensive assessments.[239]

Data collection at the judicial level would facilitate the process of compiling information for use in racial impact statements.[240] This measure would allow states to extract valuable data at various points during case processing.[241] Such information could, for example, offer insight into which charges prosecutors pursue for particular categories of defendants and allow state policymakers to detect patterns of institutional bias in the courts.[242] State legislators may be hesitant to require overburdened judicial systems to implement costly or time-consuming data collection methods, but this endeavor would enhance the quality of criminal data used to prepare racial impact statements and alleviate unnecessary burdens later in the process.[243]

C. *Proposed Content of Racial Impact Statements*

The scope and content of racial impact statements require careful consideration by lawmakers. The statements must clearly identify and define relevant populations. For example, Iowa's impact statements incorporate data estimating the projected impact of legislation on individuals with disabilities.[244] Other projections focus solely on racial and ethnic minorities.[245] These elements should be defined with reasonable specificity to guide agency discretion. States should also determine the temporal

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239. Iowa's Legislative Services Agency may "request the cooperation of any state department or agency or political subdivision." IOWA CODE ANN. § 2.56(4).

240. *See* Frase, *supra* note 40, at 245 ("More precise comparison of disparities at the arrest and conviction stages cannot be done without collecting race-specific data on how arrests are initially charged by prosecutors, and how these charges change between filing and conviction.").

241. Pennsylvania uses Sentencing Guidelines Software, which enables courts and lawmakers to collect information on convictions and sentencing trends. *About SGS Web*, PA. COMM'N ON SENTENCING, http://pcs.la.psu.edu/sgs-web (last visited Sep. 30, 2010).

242. MINN. TASK FORCE, *supra* note 117, at 1. This report collected data using a variety of methodologies to detect bias in Minnesota judicial system policies, practices, and procedures. *See id.*, at S-1 to S-3.

243. *See* Marc L. Miller, *A Map of Sentencing and a Compass for Judges: Sentencing Information Systems, Transparency, and the Next Generation of Reform*, 105 COLUM. L. REV. 1351, 1376 (2005) (discussing the advantages of sentencing information systems as a policymaking tool).

244. *See* LENSTRA, *supra* note 178 (describing the number of Iowa offenders with a disability that would be convicted under the bill in question).

245. *See* REINHART & DUFFY, *supra* note 163.

extent of the statement's predictions.[246] Fiscal impact statements prepared by the Congressional Budget Office project the budgetary implications of proposed federal legislation for the upcoming ten years.[247] Racial impact statements should similarly forecast the long-term and short-term effects of policies that could increase minority over-representation in the criminal justice system.[248]

A coherent racial impact statement must incorporate a few essential elements in order to be effective. First, the statement should open with a description of the proposed legislation or sentencing policy followed by the demographic composition of the state's general population.[249] Second, the statement should include information on the size and demographic composition of the current prison population.[250] These data are easily contrasted with the racial composition of the state's general population, revealing disproportionate minority confinement rates.[251] This essential background information provides the foundation for the ensuing analysis.

The racial impact statement must then identify any disproportionate effects on minority groups that would result from enactment of the legislation at issue.[252] Data should include imprisonment rates and disparity ratios to contextualize the racial effect of legislative proposals.[253] Marc Mauer refers to these representations as "[p]roportional [d]isparit[ies]" and "[p]opulation [d]isparit[ies]."[254] The former term relates to whether a law would disproportionately disadvantage a minority group by increasing the group's representation among the incarcerated population for

246. Many states already have advanced simulation models projecting state prison populations to produce ten-year forecasts of admission patterns and inmate lengths of stay. PEW CHARITABLE TRUSTS, *supra* note 202, at 13–17.

247. *See, e.g.*, CONG. BUDGET OFFICE, COST ESTIMATE: COLLEGE STUDENT RELIEF ACT OF 2007, H.R. 5, 111th Cong., *available at* http://www.cbo.gov/showdoc.cfm?index=7729&sequence=0 (last visited Dec. 8, 2009).

248. The correctional system may soon feel the effects of modified penalties for minor offenses while the system may not see the impact of sentencing policy changes for more serious crimes for several years. Telephone Interview with Linda Holt, Research Dir., Mass. Sentencing Comm'n (Jan. 27, 2010).

249. *See supra* Part IV.C.

250. This information is often accessible through the DOC. *See* MINN. DEP'T OF CORR., *supra* note 165, at 2.

251. *See, e.g.*, NAT'L COUNCIL ON CRIME & DELINQUENCY, *supra* note 32, at 36 (providing data on African Americans' representation in the general population versus in state prisons).

252. *See* Mauer, *supra* note 5, at 45.

253. *See id.* at 37–38 (discussing ways to evaluate racial disparities).

254. *Id.* at 37.

a given offense.[255] "Population disparity" pertains to the effect of legislation on overall minority rates of incarceration.[256] Each method provides a useful framework for considering the impact of proposed legislation.[257] Jurisdictions should include both sets of data conveyed in the form of graphs and charts to clearly present this information to lawmakers.[258]

States should also consider whether to include historical trends in sentencing and imprisonment, as well as comparisons to other states or the nation as a whole, to provide a useful context for readers.[259] Additionally, statements could contain alternatives to proposed legislation or measures to minimize any disparate impact on racial minorities. Environmental impact statements routinely suggest purposeful action which could offset a bill's projected adverse environmental effects.[260] Such a function may be warranted, but whether or not this information is included in a racial impact statement, the result will be the same—the ensuing discussion will force lawmakers to consider alternative options to effectuate policy goals without "exacerbating racial disparities."[261]

D. Form of Racial Impact Statements

States must consider the implications of voluntary and statutory implementation of racial impact statements and decide which approach is more appropriate. Minnesota provides the model for a voluntary agency response to the issue of racially disparate imprisonment rates, whereas Iowa and Connecticut enacted legislation to address racial disparity.[262]

Legislative action would serve as a "sign of support" for racial

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255. In this case, the proportion of Blacks directly affected by the proposed change would be greater than their proportion in the general population. *Id.* An example appears in Connecticut's racial and ethnic impact statement, which identifies "disparities between the demographics of the general population and the demographics of offenders incarcerated for the crimes affected by the bill." OFA/OLR RACIAL AND ETHNIC IMPACT STATEMENT, *supra* note 187, at 11.

256. For example, this measure would indicate whether the proposed policy would increase the rate of incarceration of Blacks from 1000 per 100,000 residents to 1050 per 100,000. *See* Mauer, *supra* note 5, at 37–38.

257. *See id.* at 38.

258. *See* s.H.B. 6581, 2009 Leg., Jan. Sess. (Conn. 2009) (providing a comparison chart of the racial and ethnic composition of incarcerated drug offenders).

259. *See* Reitz, *supra* note 169, at 695.

260. National Environmental Policy Act of 1969 (NEPA), § 102, 42 U.S.C. § 4332 (C)(ii)–(iii) (2006) (mandating that every environmental impact statement include a discussion of unavoidable "adverse environmental effects" as well as "alternatives to the proposed action").

261. *See* Mauer, *supra* note 5, at 33.

262. *See supra* note 164.

impact statements but may require significant efforts from lawmakers.[263] For states without established sentencing guidelines commissions, legislation would provide direction to officials charged with preparing racial impact statements.[264] This could be achieved by modifying existing legislation mandating the use of other similar projections.[265] For example, Iowa amended its statute governing fiscal and correctional impact statements to include minority impact data as well.[266] In Connecticut, committee members considered the issue and later inserted relevant guidelines for implementing the policy in the state's legislative rules.[267] Thus, statutory implementation could underscore the importance of these measures while leaving a great deal of discretion to the agencies charged with preparing racial impact statements.[268]

State-level action may be more practical than federal action given that the mechanisms for producing racial impact statements will be largely jurisdiction-specific.[269] State-level policies would permit jurisdictions to draw upon existing resources and procedures to prepare racial impact statements while allowing greater agency discretion.[270] However, the federal government could develop national policies and priorities toward this end.[271] Federal involvement could provide direction, support, and oversight through grant programs assisting states with planning and coordinating effective strategies.[272]

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263. E-mail from Marc Mauer, *supra* note 192.

264. *Id.*

265. *See id.* (suggesting that states that do not have established sentencing guidelines commissions could develop "ballpark" estimates based on the information they have).

266. IOWA CODE ANN. § 2.56 (West Supp. 2010).

267. *House Session Transcript for 04/07/2009*, Gen. Assemb., 2009 Sess. (Conn. 2009) (statement of Rep. Godfrey).

268. *Cf. id.* (illustrating the discretion given to the committee charged with developing the rules implementing the Connecticut statute).

269. Given the variety of sentencing schemes throughout the United States, state-level action would allow states to tailor impact statements to reflect the needs of each individual criminal justice system. *See, e.g.*, IOWA CODE ANN. § 2.56(5) (requiring the state's "legislative services agency, in cooperation with the division of criminal and juvenile justice planning of the department of human rights, [to] develop a protocol for analyzing the impact of the legislation on minorities").

270. *See id.*

271. *See* E-mail from Marc Mauer, *supra* note 192 (suggesting the utility of federal legislation in promoting the development of racial impact statements).

272. *See supra* note 203 and accompanying text.

E. Quantity and Frequency of Racial Impact Statements

Many bills could conceivably impact minority imprisonment rates.[273] States must establish a method to determine which bills require an analysis of projected racial consequences.[274] The quantity and frequency of racial impact statements largely depend on the availability of resources and comprehensiveness of the statements.[275] Jurisdictions will vary significantly in their willingness to require impact statements to accompany legislation.[276] Connecticut has explicitly emphasized a selective, discretionary approach.[277] State lawmakers anticipated a "very limited number of circumstances under which this kind of an impact statement would be requested," seeking to ensure the quality of the impact statements while preserving resources.[278]

Ideally, these projections will be prepared for legislative proposals as well as pre-existing policies. A report by the American Bar Association's (ABA) Justice Kennedy Commission[279] suggested that legislatures should be required to evaluate the

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273. *See* Mauer, *supra* note 5, at 28–31 (discussing examples of legislation that might have been reconsidered had racial impact statements been developed in conjunction with the legislation).

274. E-mail from Marc Mauer, *supra* note 192 ("Given the large number of bills introduced in each session, most of which don't go very far, legislators will need to develop a policy to determine in which cases an impact statement is produced.").

275. *See* Mauer, *supra* note 5, at 39 (recognizing that not all states can produce racial impact statements for all relevant bills).

276. *Compare* IOWA CODE ANN. § 2.56(1) (West Supp. 2010) (requiring the production of a racial impact statement as an "attach[ment] to any bill, joint resolution, or amendment which proposes a change in the law which creates a public offense, significantly changes an existing public offense or the penalty for an existing offense, or changes existing sentencing, parole, or probation procedures"), *with* CONN. GEN. STAT. ANN. § 2-24b(a) (West Supp. 2010) ("[A] racial and ethnic impact statement shall be prepared with respect to certain bills and amendments that could, if passed, increase or decrease the pretrial or sentenced population of the correctional facilities in [Connecticut].").

277. *House Session Transcript for 01/07/2009*, Gen. Assemb., 2009 Sess. (Conn. 2009) (statement of Rep. Lawlor) ("[I]n order to ensure the quality, we have to be selective."). This discretionary approach differs from some fiscal impact statement policies that mandate preparation of a fiscal note to accompany any proposed change in state law "that could increase or decrease [government] expenditures." N.C. GEN. STAT. ANN. § 120-30.45(a) (Lexis 2009).

278. *House Session Transcript for 01/07/2009*, Gen. Assemb., 2009 Sess. (Conn. 2009) (statement of Rep. O'Neill). State lawmakers expressed concern that staff would be overwhelmed with requests for impact statements. *Id.* (statement of Rep. Lawlor).

279. The ABA established the Justice Kennedy Commission to "review[ ] and make recommendations on" reforming the criminal justice system. News Release, Am. Bar Ass'n, ABA Forms New Commission to Review Mandatory Minimum Sentences, Prison Conditions and Pardons (Oct. 6, 2003), *available at* http://www.abanet.org/media/oct03/100603_1.html.

disparate racial effects of current and proposed statutes.[280] However, many states will be reluctant to burden state agencies by requiring such comprehensive assessments.[281] A more conservative approach would leave the decision to the discretion of the committee examining the legislative proposals.[282] Connecticut adheres to this approach, permitting a majority of committee members to request preparation of a racial impact statement prior to a committee vote.[283] The state further stipulates that if an "amendment is substantially similar to a favorably reported bill for which a[n] . . . impact statement was prepared, [a statement] may then be included in the fiscal note on the amendment."[284]

Racial impact statements could potentially address a wide range of policy decisions beyond legislation and sentencing. These projections could apply to parole release and revocation policies as well as state and federal funding for programs and activities.[285] Such measures could provide valuable information to inform government decisions at all levels.

F. Legislative Response to Racial Impact Statements

One of the central challenges presented by racial impact statements is determining how a legislative body should respond to the information contained in such projections.[286] Specifically, when faced with an otherwise viable law, how should a legislature react to a report indicating that the law has a potentially disproportionate impact on minorities?

In certain instances, a racial impact statement could provide the impetus to encourage a bill's enactment.[287] For instance, a

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280. A.B.A. JUSTICE KENNEDY COMM'N, REPORT TO THE HOUSE OF DELEGATES 21 (2004), *available at* http://www.abanet.org/media/kencomm/rep121b.pdf.

281. *See* Mauer, *supra* note 5, at 38–39 (indicating that a lack of government resources presents a challenge to the adoption of racial impact statements by some jurisdictions).

282. *See House Session Transcript for 01/07/2009*, Gen. Assemb., 2009 Sess. (Conn. 2009) (statement of Rep. Lawlor).

283. *Id.*

284. *Id.*

285. Iowa's legislation, for example, mandates that "[e]ach application for a grant from a state agency shall include a minority impact statement." IOWA CODE ANN. § 8.11(1) (West 2008). Requests for funding must indicate whether proposed grant programs could have a disproportionate impact on minorities, describe the anticipated impact, and give an indication of which groups will be impacted. *Id.* § 8.11(1)(a)–(c).

286. *See* Mauer, *supra* note 5, at 44 (asserting that policymakers will have a wide range of options for using the information contained in racial impact statements).

287. *See id.* at 44–45 (discussing how racial impact statements may spur

statement may be prepared for proposed legislation that would restrict the scope of a policy that has historically disparate enforcement patterns. Informed legislators may be more inclined to consider the relative advantages of such a proposal when faced with information regarding its projected racial effects.[288] Consider a bill scaling back penalties for attempted robbery: an accompanying statement would indicate that the proportion of Blacks convicted for the offense is greater than the proportion of Blacks in the general population.[289] By specifying that a significant number of these offenders may be eligible for reduced sentences under the new policy, the projection would underscore the advantages of such legislation. This bill could receive greater support from lawmakers eager to reduce minority over-representation among inmates sentenced for attempted robbery.

Conversely, legislation escalating penalties and increasing racial disparities may receive closer scrutiny.[290] For instance, consider if lawmakers in Massachusetts, prior to enacting that state's school zone law,[291] had received a racial impact statement projecting that eighty percent of those convicted under the law would be minorities. Some legislators might still have considered the measure warranted as a means to protect public safety.[292] But such a finding might have prompted other lawmakers to reconsider the boundaries specified in the bill and reformulate the scope of the legislation as many states have recently done.[293] Regardless of the projected effect of proposed legislation, a statement would not be fatal to a bill but would inform policy decisions by providing information to lawmakers prior to the legislation's enactment.[294]

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additional discussion regarding the adoption or rejection of a bill).

288. *See id.* at 45 (suggesting that legislators will use racial impact statements "to reduce unwarranted disparities while producing better public safety outcomes").

289. In Minnesota, for example, Blacks are over-represented among persons sentenced to prison for attempted aggravated robbery. MINN. SENTENCING GUIDELINES COMM'N, *supra* note 144.

290. *See* Mauer, *supra* note 5, at 21.

291. *See supra* note 95.

292. *See* Mauer, *supra* note 3, at 19.

293. *Violent Crime Hearing*, *supra* note 114, at 2 (indicating that Connecticut has already reformed its school zone drug law and numerous jurisdictions are considering similar reforms).

294. *See* Press Release, Conn. State Rep. Michael P. Lawlor, Judiciary Committee Approves New Rule Regarding Racial and Ethnic Disparity Impact Statements (Jan. 6, 2009), *available at* http://www.housedems.ct.gov/lawlor/pr099-09.asp# 010609 ("We need to consider all the possible consequences—and not just the fiscal ones—before we pass a law that may be well-intended but which has unintended consequences down the road.").

Some commentators have expressed concern that racial impact statements may compromise important legal or legislative objectives and "stir up the hot-button issue of race and punishment with every proposed guideline or sentencing law."[295] Lawmakers may be reluctant to examine issues surrounding race and crime that would call attention to the existing disparities in the justice system.[296] An increase in the severity of punishment that would exacerbate these disparities "could fuel allegations of racist motivation behind the proposed law."[297] But this criticism overlooks an important purpose of racial impact statements: to ensure legislative accountability.[298] This accountability often requires an informed legislature to examine these uncomfortable issues in the important early stages of the legislative process.[299]

Legislators must give careful consideration to the circumstances under which they will be willing to tolerate a projected racial disparity.[300] One approach would treat an estimated increase in punishment disparities "as a negative factor that can be overridden if the policy justifications for the law are sufficiently compelling."[301] For instance, a racial impact statement for a violent crime such as aggravated assault may indicate that Blacks are twice as likely as Whites to be victims of the crime.[302] The intraracial nature of the offense illustrates the complexity of minority over-representation in crime.[303] In this case, reducing

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295. Reitz, *supra* note 169, at 692 (explaining that many commentators on the revised MPC anticipated that state officials would never adopt these impact statements because of the potential to incite racially charged debate with each new guideline proposal).

296. *See id.*

297. *Id.*

298. *See id.* at 691.

299. *See id.* ("The goals of [racial impact statements] are to bring to light sensitive information when it matters the most, [and] provoke debate before new laws are passed . . . .").

300. *See* RUTH & REITZ, *supra* note 23, at 116. The authors recommended that "the policy formula for these decisions [inquire:] (1) whether the expected disparities in punishment reflect actual disparities in crime commission, including offenders' prior criminal records, (2) whether the crimes in question involve serious victimizations and the future risk of serious victimizations, and (3) whether the proposed changes in punishment laws are an efficacious means to address such problems." *Id.*

301. *Id.*

302. *See* ERIKA HARRELL, BUREAU OF JUSTICE STATISTICS, U.S. DEP'T OF JUSTICE, NCJ 214258, BLACK VICTIMS OF VIOLENT CRIME 3 (2007).

303. CALLIE RENNISON, BUREAU OF JUSTICE STATISTICS, U.S. DEP'T OF JUSTICE, NCJ 176354, VIOLENT VICTIMIZATION AND RACE, 1993–98, at 2 tbl.1 (2001) (finding that African Americans are victimized at a rate of 14.4 per 1000 compared to 9.4 per 1000 for Whites).

violent crime and minority victimization may take priority over the potential reduction of racial disparity in prison populations.

The true challenge for a legislature will be to strike a balance between "promot[ing] public safety" and "reducing the disproportionate rate of incarceration for [racial minorities]."[304] Occasionally, public safety concerns may prevail.[305] However, the process may encourage lawmakers to consider ways to offset the adverse effects of proposed legislation.[306] In this way, racial impact statements provide a mechanism for identifying policies that warrant heightened scrutiny and holding policymakers accountable for the foreseeable effects of legislation.

Conclusion

One out of every nine Black men between the ages of twenty and thirty-four is presently incarcerated.[307] If the current trend continues, one-third of all Black males born today will serve time in prison.[308] The over-representation of minorities in the criminal justice system is due in part to sentencing policies that have a disproportionate effect on minorities.[309] This imbalance reflects the need for drastic revision of current policies and practices.

Addressing and reducing racial disparity in U.S. prisons requires a proactive approach.[310] Racial impact statements offer an innovative solution that encourages discussion of the potential consequences of legislation affecting criminal sentencing policy.[311] Lawmakers must consider the options for incorporating these statements into the legislative process and select an approach that aligns government efforts with intended goals.[312] Legislators face considerable challenges, but the benefits of adopting racial impact statements vastly outweigh the potential burdens.[313]

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304. Mauer, *supra* note 3, at 17.

305. *Id.* at 19.

306. *See* Mauer, *supra* note 5, at 41–42.

307. PEW CTR. ON THE STATES, *supra* note 220, at 3.

308. THOMAS P. BONCZAR, BUREAU OF JUSTICE STATISTICS, U.S. DEP'T OF JUSTICE, NCJ 197976, PREVALENCE OF IMPRISONMENT IN THE U.S. POPULATION, 1974–2001, at 1 (2003).

309. *See* Mauer, *supra* note 5, at 31 ("As we have seen, to at least some extent unwarranted racial disparities in the criminal justice system result from policy initiatives of recent years.").

310. *Id.* at 31–32.

311. *Id.* at 46.

312. *See id.* (suggesting that the promotion of public safety does not have to contradict the obligation to promote fairness in the justice system).

313. *See* RUTH & REITZ, *supra* note 23, at 117 (discussing "predictable . . . costs" associated with "incarceration stability or growth").

Appendix

Racial Impact for HF3175: Robbery—Increased Penalties Minnesota Sentencing Guidelines Commission February 29, 2008

Racial Impact

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

According to the U.S. Census population estimates for July 1, 2006 (the most current estimates available at this time), approximately 86 percent of Minnesota's population is white. The composition of the remaining 14 percent is as follows: 4.3 percent black; 3.8 percent Hispanic; 3.5 percent Asian; 1.1 percent American Indian; .04 percent Native Hawaiian/Pacific Islander; and roughly 1.4 percent who identify themselves with two or more races.

In contrast, MSGC monitoring data shows the following racial make-up of the 2006 felony offender population: 61.6 percent white; 25.0 percent black; 5.9 percent American Indian; 5.5 percent Hispanic; 2.0 percent Asian; and .02 percent unknown/other.

According to the Minnesota Department of Corrections, the racial composition of the prisons on July 1, 2006 was as follows: 50.9 percent white; 32.1 percent black; 7.8 percent American Indian; 6.9 percent Hispanic; 2.2 percent Asian; and .02 percent unknown/other.

Minorities are even more over-represented among persons sentenced to prison for attempted aggravated robbery than non-minorities and their sentences would be increased if this bill were to be adopted. Among offenders sentenced to prison for attempted aggravated robbery in 2006, 25.9 percent were white, 61.1 percent were black, 9.3 percent were American Indian, and 3.7 percent were Hispanic. The average increase in sentence length for those offenders would be 8 months for white offenders, 10 months for black offenders, 15 months for American Indian offenders, and 23 months for Hispanic offenders.

[Chart omitted.]