Racial Disparities in Incarceration Rates

Shantae Golen-Marquardt, Philosophy of Law
Dr. Maria Stalzer Wyant Cuzzo, Professor of Legal Studies

ABSTRACT
My research aims to explore how local justice system professionals are currently experiencing and understanding the impact of sentencing guidelines on different groups of people. Through interviews, the on-the-ground effects of sentencing guidelines can be analyzed and explored. The research methodology that I used for my research project is qualitative. To get a better understanding of how the guidelines impact both states, I talked to legal professionals from both MN and WI. Scholars believe these disparities are the result of the federal sentencing guidelines, mandatory minimums, and judicial and prosecutorial discretion. As research continues, judicial discretion appears to have less of an effect than previously hypothesized. My research has led to the conclusion that this is a systemic issue. Almost all of my interviews concluded that these problems are much bigger than the legislation. We need to look closer at the factors that put people in front of judges in the first place. We need to see if there is a connection between the areas that are being policed and why there is such a large police presence.

Introduction
The presence of racial disparity in the criminal justice system is growing in the public and within the justice system itself. Many scholars in the field agree that African Americans are arrested at disproportionate rates. Federal and state sentencing guidelines were enacted to
prevent the increase in racial disparity in sentencing, but they were counterproductive. Changing these guidelines to advisory has not had the dramatic effect that was hypothesized.

My research aims to explore how local justice system professionals are currently experiencing and understanding the impact of sentencing guidelines on different groups of people. Through interviews, the on-the-ground effects of sentencing guidelines can be analyzed and explored. Minnesota must abide by the sentencing guidelines. Their judges have very little room to impact the sentence applied to each individual. Conversely, Wisconsin made their guidelines advisory; therefore, their judicial professionals have greater discretion with their sentencing. I will analyze how the application of sentencing guidelines, mandatory versus advisory, effects African Americans in both states. In addition, I will explore what recommendations these legal professionals have for how to decrease this disparity.

My initial research makes the assumption that changes to sentencing guidelines will alleviate this disparity. While certain legislation, such as the guidelines, are one of the factors that causes racial disparities in incarceration rates, my interviews with these legal professionals lead me to the wider conclusion that this problem is systemic. Over-policing, over-prosecuting, and over-incarceration are also major factors that have played a considerable role to these disparities.

**Literature Review**

Most scholars agree that African Americans are arrested at disproportionate rates (Rehavi & Starr 2013, Tonry 2010, Mauer 2011). Starr and Rehavi (2013) state that black men make up six percent of the adult population and 35 percent of the prison population. They are incarcerated six times more than white men. Tonry (2010) agrees and finds that imprisonment
rates for African Americans are five to seven times higher than those for white people. Tonry (2010) and Starr and Rehavi (2013) suggest that disparities between African American male arrestees receive more prison time than their white counterparts.

Many scholars analyzing this problem believe that there is a need for sentence reform (Fischman & Schanzenbach 2012, Mauer 2011, Mitchelle 2017, Tonry 2010). They argue that some of the bigger reasons for this disparity are the sentencing guidelines, mandatory minimums, and judicial discretion (Tonry 2010, Mauer 2011). Harmon (2012) conducts a study looking into the possible effects that sentencing reforms have on racial disparity. He concludes that his, “results indicate that ‘fixed’ sentencing reforms do indeed increase imprisonment rates and racial disparities over time”.

Silton (2002) agrees with Tonry (2010) and explains some of the biggest factors that explain the racial disparity in prisons are the United States War on Drugs and the legislation that came along with it. The War on Drugs gave birth to laws such as sentencing guidelines and mandatory minimums (Silton 2002). Tonry (2010) and Silton (2002) agree that sentencing guidelines must be reformed and argue that this is a systemic issue and the United States needs laws that isolate racial profiling and treat drug criminals instead of rushing to incarcerate them.

Mitchell (2017) explains that, “in the late 1970s there was a movement towards the development of sentencing guidelines as a standard practice to establish rational and consistent sentencing practices”. Harmon (2012) explains, that prior to 1975, the criminal justice system relied on judicial discretion in the degree and type of sentence. Legislators at both the state and federal level established loose and wide sentencing ranges which contained any combination of jail and probation. Judges were allowed to select a sentence within a relatively wide range and establish minimum and maximum sentencing lengths (Harmon 2012). The enactment of
sentencing guidelines and mandatory minimums removed this power from judges (Harmon 2012).

The goal of these guidelines was to produce more uniformity and proportionality in sentencing. Minnesota was the first state to enact sentencing guidelines in 1980 (Mitchell 2017). Mitchell (2017) explains that “since then, multiple states, the federal government, and Washington, D.C., have followed suit” (Mitchell 2017). She also explains that “In order to achieve greater uniformity and proportionality in sentencing against a backdrop of overlapping and duplicative federal statutes, the U.S. Sentencing Commission chose to construct a guidelines system that started with the charged offense and then layered on real offense elements to arrive at the recommended sentence” (Mitchell 2017).

This guideline sentencing is conducted using a “258-box grid called the ‘Sentencing Table.’ The vertical axis of the grid ranks the severity of the offense and the horizontal axis ranks the severity of the offender’s criminal history. Criminal history is calculated by adding the points allotted for each prior offense—the higher the number, the longer the sentence” (Brooks 2008).

Starr and Rehavi’s (2014) research suggest that recent sentencing disparities have occurred in cases where judges have had the least sentencing discretion. Starr and Rehavi (2014) also express concerns about the proposals to respond to sentencing disparities by restoring tighter constraints on sentencing. They note that sentencing law changes that increase severity have an adverse impact on black men.

Baumer (2013) stresses the importance of improving and expanding current research on race and sentencing and advises that it will take a larger concentration of scholars that are interested in uncovering whether, why, and where racial disparities may be present in the
criminal justice system. Silton (2002) and Starr & Rehavi (2014) also agree that further research would be helpful and that sentencing guidelines must be reformed.

**History/Background**

The War on Drugs that began in the 1970s and continued into the 1980s dramatically effected incarceration rates. As a result of the laws passed during this period, there was a significant increase in both drug arrests and prosecutions of minorities. The number of drug arrests nearly tripled from 581,000 in 1980 to 1,663,000 by 2009 (Mauer 2011). As a result, the number of incarcerated drug offenders increased over the same time period from 41,000 in prison or jail to nearly 500,000 by 2003 (Mauer 2011).

The War on Drugs began with President Nixon. He drastically increased the size and presence of federal drug control agencies (DP.org). In 1994, a top Nixon aide, John Ehrlichman, admitted in an interview after the fact, “You want to know what this was really all about. The Nixon campaign in 1968, and the Nixon White House after that, had two enemies: the antiwar left and black people. You understand what I’m saying. We knew we couldn’t make it illegal to be either against the war or black, but by getting the public to associate the hippies with marijuana and blacks with heroin, and then criminalizing both heavily, we could disrupt those communities. We could arrest their leaders, raid their homes, break up their meetings, and vilify them night after night on the evening news. Did we know we were lying about the drugs? Of course we did” (DP.org).

During the 1970s the hysteria surrounding the War on Drugs fizzled out. It was reawakened during President Ronald Reagan’s term. In the mid-to-late 1980s, zero tolerance policies led to political hysteria about drugs and gave way to the passage of severe penalties in Congress and
state legislatures that lead to a rapidly increasing prison population (MM). Only two to six percent of Americans polled in 1985 thought drug abuse was the number one problem in America compared to 65 percent in September 1989 (MM). Within less than a year that number plunged to less than 10 percent (MM). The harsh laws passed during this uproar remained in place and continued to cause escalating levels of arrests and incarceration. The number of people incarcerated for nonviolent drug law offenses went from 50,000 in 1980 to over 400,000 by 1997 (DP.org).

The Sentencing Reform Act of 1984 lead to the development of sentencing guidelines for federal judges. The sentencing guidelines “had a near-mandatory quality and provided sentences for drug quantities greater than the minimum trigger quantities in the drug statute (12 U.S.C. 841 (b)(1)) and provided for sentences longer than the mandatory minimum sentence for that drug.” This removed the Judge’s traditional authority to include the actual circumstances of the crime and the characteristics of the individual defendant when imposing a sentence. Federal drug laws (revised by the Anti-Drug Abuse Act of 1986) carry very long maximum sentences (up to 40 years or life depending on the quantity). This Act also requires minimum sentences of 5 years for drug offenses that involved 5 grams of crack, 500 grams of cocaine, 1 kilogram of heroin, 40 grams of a substance with a detectable amount of fentanyl, 5 grams of methamphetamine, 100 kilograms or 100 plants of marijuana, and other drugs (21 U.S.C. 841 (b)(1)(B), P.L. 99-570). This law also required a minimum of 10 years for involved 50 grams of crack, 5 kilograms of cocaine, 1 kilogram of heroin, 400 grams of a substance with a detectable amount of fentanyl, 50 grams of methamphetamine, 1000 kilograms or 1000 plants of marijuana, and other drugs (Id., P.L. 99-570).
These guidelines did not remain mandatory for all states. My research compares two states with opposite laws regarding the guidelines. In Minnesota, sentencing guidelines are mandatory. The purpose of the Minnesota sentencing guidelines are to “establish rational and consistent sentencing standards that promote public safety, reduce sentencing disparity, and ensure that the sanctions imposed for felony convictions are proportional to the severity of the conviction offense and the offender’s criminal history” (Minnesota Sentencing Guidelines, p. 1). According to these guidelines, “Sentencing should remain neutral with respect to race, gender, social, or economic status of convicted felons” (MSG, p. 1). Conversely, in Wisconsin, the guidelines are advisory. Legal professionals in Wisconsin only have sentencing guidelines for DUI and sex offender cases and they are not mandatory.

**Data/Methodology**

The research methodology that I used for my research project is qualitative. To get a better understanding of how the guidelines impact both states, I talked to legal professionals from both MN and WI. I conducted interviews with five legal professionals, two from the state of MN and three from the state of WI. I interviewed an attorney and judge from MN, a WI attorney, and two judges from WI. Through these interviews, I was able to see the on-the-ground effects of sentencing guidelines, and how the lack of guidelines impacts their practices on a daily basis.

When asked how they are used in their daily work, the Minnesota legal professionals, explained that the guidelines impact their work daily. The MN Attorney explained that, “MN sentencing guidelines only cover felonies, not misdemeanors or gross misdemeanors.” Misdemeanors are up to 90 days jail time, and gross misdemeanors are up to a year. If a client
is charged with a felony in Minnesota, legal professionals are required to go to the guidelines. Guidelines provide uniformity, guidance, and predictability. There are three types of guidelines or grids in MN. There is the drug grid, sex offender grid, and the standard grid which covers crimes against people such as violence, murder, and assault. Both MN legal professionals explained that the drug grid uses the client’s criminal history score and compares it to the severity level of conviction offense. While the guidelines are mandatory, each section on the grid provides a little leeway for judges to sentence actual time in prison or on parole (Figure 1). Both MN legal professionals agree that these guidelines help provide a certain uniformity and guidance towards sentencing practices. The grid allows for more predictability in sentencing.

Minnesota drug sentencing laws were changed with the 2016 Drug Reform Act. The MN attorney explained that this act shifted the shaded region which decreased the punishment for first time nonviolent offenders. It also eliminated some mandatory minimums. These new reforms overhauled some of the existing laws and provided help for addicts. History and research show that “harsh sentencing for drug-related crimes help contribute to the high per capita incarceration rate. The so-called ‘war on drugs’ has not reduced the number of drug users but instead made for-profit prisons lots of money” (Keller 2018).

Changes to the grid included the lowering of first- and second-degree offenses down to a severity level which lead to reduced prison sentence for these offenders. Nonviolent offenders were given more lenient sentencing guidelines compared to violent criminals which means lower-level offenders are more likely to be eligible for conditional or early release and will not automatically receive lengthy prison sentences (Keller 2018).

In addition to these changes, this Act changes certain thresholds for various drugs:
- Increased threshold for cocaine and meth from 10 to 17 grams for a first-degree crime
- Decreased threshold for marijuana from 50 to 25 kilograms for a first-degree crime
- Mandatory minimum prison sentence of 86 months if first-degree crimes involve a firearm
- Abolishes mandatory minimum sentences for fifth, fourth, or third-degree convictions
- Allows nonviolent fifth or fourth-degree offenders to be released early” (Keller 2018)

The only real sentencing guidelines in WI are for DWI cases. The WI legal professionals explained that these guidelines look at how many prior offenses the defendant has, what the defendants blood alcohol content (BAC), aggravating circumstances, if they caused an accident, or if their driving was particularly reckless or bad. WI has mandatory minimums but only for child pornography and drunk driving offenses (beyond the first one).

With the lack of guidelines to follow for sentencing individuals for drug crimes, the WI judges explained the three factors they consider for every case. They are as follows: 1.) seriousness or gravity of the offense, 2.) character of the offender, and 3.) the need to protect the public. Both judges explain that race is never a factor and expressed concern if other judges are using it as a factor either implicitly or explicitly.

The first factor, gravity of the offense, looks at the crime itself. For example, sex assault versus disorderly conduct. This examines the nature of the offense, the seriousness, the potential
penalties, and mitigating and aggravating circumstances when the crime was committed. Both WI judges explained that they have to consider all the factors. They also take into consideration the circumstances surrounding the crime. For example, there is a difference between a sexual assault case involving a 15-year-old and 60-year-old versus a 15-year-old and their 19-year-old significant other. Both situations are technically the same crime, but the circumstances surrounding both cases are different, and the latter would not be considered a prison case, whereas the first one would be.

The second factor these judges consider is the character of the offender. They look at their age, prior criminal history (1st time in the system vs 25 years of crimes), is this someone that has alcohol and/or drug issues, are they remorseful, have they maintained employment, educated, or are they a career criminal. The third factor ties into the other two. They have to consider their need to protect the public. They explained that they have a responsibility to protect the public. Their jobs are to look at the nature of the offense and consider whether this is someone that needs to be locked up for treatment and rehabilitation.

Wisconsin judges can order a pre-sentence investigation report from the department of corrections probation office. This office will do a full examination of the defendant. They take a look at the defendant’s prior criminal history, employment, education, family relationships, and, in relevant case, speak with victims and offenders. They turn this information over to the judges, who are then responsible for formulating a fair, just, and appropriate sentence under the circumstances. This gives a lot of discretion for judges. They are only limited by a maximum which is very different from MN. One WI judge explained that despite this discretion, the judges aren’t just free to sentence at will. They have to set forth reason and rationale for the sentence. They have to go through what info was used and also consider aggravating and mitigating
factors. They may also receive additional info from the defendant, their attorney, letters of
support from victim or victim’s family or friends, and victim impact statement.

After looking at how these legal professionals sentencing or recommend sentencing, I
turned my attention back to the problem of racial disparities in incarceration rates. When asked
what their perceptions are on how the public views racial disparities in incarceration rates, the
MN judge and WI attorney agree that the biggest problem is that the public is not paying
attention or simply does not care. It is not an issue that they deal with in daily life and therefore
it doesn’t exist to them. When asked about it, the WI attorney said, “I think there is a mentality-
don’t do the crime if you can’t do the time. It is a very simplistic view of law society and the
criminal justice system.” There is a lot of evidence that the public does not care. We need to
shine a light on the problem, unfortunately, a lot of people do not care even when they are
confronted with the statistics. They don’t want to believe it’s true or believe it is “their” fault.

These two legal professionals agree that part of the problem is the way our country elects
certain individuals to office. These judges, attorneys, and politicians run on a platform declaring
they will be “tough on crime”. A WI attorney said he believes that, “as a society, we are over-
policed, over-prosecuted, and over-incarcerated, and the burden falls disproportionately on
blacks.” He goes on to explain that if you compare the US to other western democracies like
Europe, Canada, Australia, and New Zealand, we lock up our people at a rate of 5 to 10 times
more. If you compare us to ourselves, the incarceration rate was flat for the 100 years prior to
MN and WI have comparable crime rates and used to have comparable incarceration rates. Now
WI incarcerates more than two times MN, but nothing has changed in crime rates. The media
glorifies crime to make it seem like there is still a large crime epidemic, when in reality, crime is
going down across the board regardless of incarceration rates. This suggests that the over policing is not solving the problem and, in some cases, is making it worse.

The War on Crime and the War on Drug disproportionately impact poor people and minorities. One WI judge, the MN judge, and the WI attorney agree that it’s a systemic issue. A few of those interviewed agree that suburban white areas are not as heavily policed as those areas where the poor and minorities live. There is a stereotype that these areas have more drug and violence than these suburban areas, but it is just not true. More people are “busted” in these areas because of the heavy police presence. The WI attorney explains that the percentage of white vs black people that smoke or possess weed are about the same. However, if you compare those to the number of both races that are arrested and charged for smoking and having weed, the numbers do not line up, both in WI and nationally. Another good example of how the law is not color blind is the crack cocaine disparity. Under this law, the ratio for crack to cocaine was 100 to 1, meaning you could possess 100 times the amount of cocaine than you could crack. Crack was seen as the poor black drug whereas powdered cocaine was seen as the white party drug.

Conclusion

The implementation of the sentencing guidelines has led to an increase in racial disparity among the sentences of African Americans and their white counterparts. The goal of the sentencing guidelines was to decrease the racial disparity among those incarcerated. Research has shown that these guidelines have had an opposite effect.

The legal professionals that I interviewed that are affected by the guidelines in MN agreed that they are helpful as they promote uniformity and do not give judges too much leeway to impose harsher sentences. One MN official believes that the best application would be a
mixture of mandatory and advisory guidelines. They believe that this happy medium could produce better results as it gives judges the power to consider the circumstances around each case but still believes that the guidelines are a good way to ensure uniformity and stability.

The judges in WI appreciate their discretion. They believe that the ability to consider all of the factors and circumstances of each case helps them make a fair decision. They are also given a lot of background information from the sentencing recommendation report from the probate and parole department which enables them to make a decision based on persons’ complete profile and not just numbers on a grid. All of the legal professionals that I interviewed agree that there is a difference between two cases based on certain factors, and it is not fair to charge these two individuals the same in these situations. Judicial discretion allows judges to make these decisions and ensure a just sentence.

There is no question that racial disparities exist in the criminal justice system. The problem is figuring out why they exist and how to eliminate them. Scholars believe these disparities are the result of the federal sentencing guidelines, mandatory minimums, and judicial and prosecutorial discretion. As research continues, judicial discretion appears to have less of an effect than previously hypothesized. Attention is slowly being drawn to the actual process that places these certain defendants in front of the judges. The legislation is part of the problem, but it does not explain why more African American end up in front of these judges in the first place.

Most of the legal professionals that I interviewed agree that the problem is systemic and a result of the voting public. The public must call for more relaxed policing and policies. The media focuses on how “bad things are” and then elected officials use that to get votes. Judges, prosecutors, district attorneys, trial court judges, and politicians are all elected by the public and therefore run on a platform to “give the public what they want”. Until the citizenry says, “we
don’t want that anymore,” change is not possible. To keep the public vote, there is big pressure on these elected officials to get and maintain the system of over policing, over prosecuting, and over incarcerating which has a disparate impact on the African American community.

**Future Research Suggestions**

My research has concluded that this is a systemic issue. The factors that have led to racial disparities in incarceration rates have to do less with the legislation and more with the ways in which these individuals find themselves in front of the judges. As a society, we need to look into why African Americans are stopped and arrested at greater rates than their white counterparts. As a society, we need to ask ourselves why we are continuing to over police despite the fact that crime rates have dropped despite the increase in jail populations. Wisconsin and MN have similar crime rates, but WI incarcerates 2 times more than MN. This shows that an increase in incarceration has not had such a dramatic impact on the crime rates.

Future research should concentrate on what factors do lead to the decrease in crime rates, whether that is an increase in employment or education opportunities or an increase in affordable housing. Almost all of my interviews concluded that these problems are much bigger than the legislation. We need to look closer at the factors that put people in front of judges in the first place. We need to see if there is a connection between the areas that are being policed and why there is such a large police presence. We need to look closer on whether racial profiling exists and if so, how do we eradicate it? Research into public opinion and the effect that has on over-policing and over-incarceration is necessary. If these high incarceration rates do not decrease crime and only increase racial disparities, why is the public not hearing about this? Why is the
media focused on the crime that is happening, while failing to mention that overall crime rates are down? This misplaced attention in the media leads to public officials running on platforms that are “tough on crime,” but this obsession with over-policing and prosecuting just leads to the over-incarceration of African Americans. Future research needs to cover these systemic issues that are painting this bigger, bleak picture.
The shaded grey area represents probation and the white area means the client must go to prison for any number in the range in the box. D9 are the most severe crimes, D1 are the least. People with prior felony convictions get certain points for certain offenses: 1 point for aggravated, 1 point for certain misdemeanors.

References


Appendix

Interview Questions

1. What are the state sentencing guidelines that you use in your daily work?
2. How do these sentencing guidelines affect your work?
3. Do you work with mandatory minimum sentences in your work? How so? What effect have mandatory minimums had on your work?
4. What are your perceptions of how the public views racial disparity in sentencing and what steps might help inform the public view on this topic? What might be three facts that, if known by the public, could change their view?
5. What is it you as a professional observe about racial disparity in the justice system?
6. What results did you expect the sentencing guidelines to produce in the field of law and justice? Did the use of sentencing guidelines produce the results you expected?
7. Have you noticed an impact on racial disparity outcomes linked to sentencing guidelines?
   a. If yes, please describe what you’ve noticed.
8. Have you noticed an impact on racial disparity outcomes linked to mandatory minimums?
   a. If yes, please describe what you’ve noticed.
9. What are your greatest concern about racial disparity and sentencing practices as a law and justice professional?