

# The Role of Race in the Criminal Justice System

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**ABSTRACT:** *This essay examines the studied effects of race in several areas within the criminal justice system. It seeks to understand how disproportionate representation of minorities at every level can affect outcomes of trials, what happens in the appeals process, and opportunities for employment upon release. The essay uses existing research, which is at times sparse, to determine the role of race on outcomes. An attempt to determine what steps need to be taken, if any, in diversifying judicial, prosecutorial, or correction officers' representation is discussed. This study also provides suggestions for future research that may allow for more effective and concrete conclusions. Ultimately, the essay explains observances made by several studies regarding the role of race in the criminal justice system and attempts to provide insight into the possible future of the relationship between diverse representation and trial outcomes.*

Race and racism in the United States are at one time many things to different people. There are those who argue that racism and disparate treatment of racial minorities exist only in the minds of some. Ann Coulter, for example, infamously declared that racism is only a problem because politicians and the media focus on it. On the July 21, 2010 episode of the Fox News show *Hannity*, she said, "We're talking about, you know, 70 million people and they can't find one genuine act of racism. . . . It shows you that we don't have racism in America any more. So just knock it off with the charges of racism." Others believe the election of President Obama in 2008 demonstrates how far America has progressed from the days of chattel slavery. Still others maintain racism has not disappeared and that the United States remains a country deeply divided along racial lines (Bonilla-Silva, 2014; Olson, 2008). Arguments supporting the claim of progress away from racism and arguments claiming that American society has a systemic racial problem are both supported and refuted by scholarly studies. Yet, according to the United States Department of Justice Bureau of Justice Statistics (2004), more than 40% of prisoners incarcerated in the United States are non-Hispanic African Americans even though African Americans comprise less than 13% of the total population in the United States. This might seem to provide definitive evidence of a racial bias in the criminal justice system. Assuming that there is a significant racial bias based solely on this comparison, however, is superficial and inaccurate. In reality, the scholarship on the subject, while at times quite limited in breadth, yields inconsistent, inconclusive, and often wildly different conclusions.

## Court Actors Play a Significant Role

Much research exists detailing the racial makeup of prison populations, defendant-victim incidents, and harshness of sentencing, but many studies have inconclusive results due to the lack of sufficient research material on the subject of race and racial bias in the criminal justice system or the reliance on "small, biased, and/or unrepresentative samples" (Stroshine & Brandl, 2011, p. 361). There are several methods for attempting to fill the holes in current research, but none of them can promise accurate or meaningful results. Until the research is more complete, a true picture or clear answer to questions about racial bias may not be available. Additionally, most studies only look at things like the race of defendants and victims. Very few studies include details about the race of jurors or judge, and fewer still include data about the race of the other court actors such as prosecutors, defense attorneys, etc. (Ward, Farrell, & Rousseau, 2009). According to Ward, Farrell, and Rousseau (2009), the race of the prosecutor had a significant impact on the likelihood of incarceration among all defendants, of any race, even more so than did the race of the judges. Under-representation of African Americans in active roles in courts is pervasive throughout the United States, with many federal districts having no representation at all. Even though there is a relationship between the race of the prosecutor and the severity of the sentence, specifically the adherence to federal sentencing guidelines, not enough African American prosecutors exist to have a widespread and constant effect.

African American representation among police officers, judges, prosecutors, and other actors within the criminal justice system are well below the average of the

general population (Stroshine & Brandl, 2011; Ward et al., 2009; Crutchfield, Fernandes, & Martinez, 2010). For example, federal prosecutors range from 0–24% of districts' prosecutors with a national average of 8% (Ward et al., 2009). This is below the average general African American population, but the results are also skewed by districts with nearly no African American residents to districts with a more than 35% African American population (Ward et al., 2009). In almost every district, it seems, there are fewer African American prosecutors as a proportion to all prosecutors than there are African Americans in the district. The districts that have the highest representation of close to 24% also have African American populations over 30%. Federal judges are more in line with minority populations, but minorities are still often under-represented.

Diversification among the judiciary has the appearance of being farther along than it may actually be. High profile nominations and the presence of minorities on some of the most esteemed benches seem to imply that diversity already exists. However, 19 states have yet to seat their first African American to their highest court, according to Goelzhauser (2011). While every state has seated at least one woman to the highest state courts, even that process spanned 80 years. When federal courts seat minorities, this can pressure states to follow suit. For example, Goelzhauser (2011) has shown that states are up to 4.6 times more likely to seat a minority or female justice when one of these high-profile nominations occur. This same effect was not as noticeable when neighboring states chose to seat women and minorities, however. In the same study, Goelzhauser (2011) found that neighboring states show no effect when a female justice is seated and are actually less likely to seat an African American when a neighbor seats an African American justice. This helps explain why so many states have not yet seated an African American justice. Evidence shows that even when an African American judge is presiding, sentencing and likelihood of incarceration among African American defendants is not significantly different than when a Caucasian judge is presiding. Why, then, is it important to have judicial diversity?

Attempting to maintain a diverse bench simply because it is more representative of the population is too simplistic. While it is important to attempt to mirror the population in order to increase the legitimacy of the court, as is the case in other branches of the government, the most important benefit according to Milligan (2006) and others is the increased awareness of different perspectives that comes from having a diverse bench. Milli-

gan (2006) argues that judicial diversity is beneficial not because of the decisions of a single judge, but because "a diverse judiciary is more likely to comprehend and grapple with the full range of potential resolutions, and thus arrive at better legal answers about political morality" (p. 1210). She argues that when taken in aggregate, judicial diversity leads to a better understanding of multiple facets of political morality and a greater ability to understand multiple viewpoints, not just their own. Diversity can create this effect through panels of judges, but also through interactions among and between individual judges. This will lead to better judicial results, according to Milligan. Evidence from other studies seems to support Milligan's claims, as well (Cox & Miles, 2008; Sisk, Heise, & Morriss 1998). Again, the individual decisions of each judge are not significantly biased, as detailed in Ward et al. (2009) and Goelzhauser's (2011) separate studies, but the decisions in aggregate can benefit from added diversity. The same cannot be said for the decisions of those making the arrests, however.

### **Taking It to the Streets**

One difficult aspect of dealing with the impact of race within the criminal justice system is that there are many opportunities for racial bias to have an impact. Sometimes, the simple act of deciding whether or not to stop a motorist or otherwise to interact with the public can lead to a number of other interactions within the system. That initial decision by an officer, whether or not based on a racial bias, essentially introduces that person into the system. The officer, then, has a significant role in this system as well. Whether it is simply deciding to make a traffic stop, arresting someone in violation of a particular crime while letting an accomplice get away, or choosing to let one adolescent get by with a transgression while arresting another for a similar crime, these officers are the impetus for any courtroom actions that follow. Without the arrest, the actions and biases of the judges and prosecutors that would follow are irrelevant. How does the officer's race affect that initial decision?

Brown and Frank (2007) detail in their research the impetus and results of diversification among police officers. As with judgeships and other areas of the political sphere, diversification was seen as a way to legitimize the police force and perhaps improve relations between police and minority groups. However, the scholarship refutes this idea (Brown & Frank, 2007). Several reasons for this might exist. Some research shows that the types

of people who enter into law enforcement, regardless of race, are not necessarily representative of the minority groups they serve (Smith, 2003). Smith (2003) posits that even though African American officers are thought of as being more knowledgeable of minority communities in general, this is not always the case. Additionally, while many assume that an African American officer will be more lenient on a suspect of the same race, the research shows that the officer is more aggressive and more likely to make an arrest (Brown & Frank, 2007). African American officers are less likely to make an arrest overall, but that is not the case when the suspect is also a minority (Brown & Frank, 2007). Again, multiple reasons could exist for this behavior. One widely held view is that African American officers are more aggressive with regards to confronting and seeking out minority suspects and more likely to arrest or treat a minority suspect harshly in order to keep their loyalty to the establishment intact (Stroshine & Brandl, 2011; Brown & Frank, 2007; Smith, 2003). While some studies (Smith, 2003; Walker & Katz, 2002) show that an officer's behaviors do not depend heavily on race, Brown and Frank (2003) show that there is some significance regarding arrest rates and race.

Making an arrest is the beginning of a potentially long process within the criminal justice system. A much shorter process is based on officer-involved homicides. Smith (2003) details how race may or may not play a role in these fatal encounters. There is a significant gap in available data regarding officer-involved shootings and homicides. There is no national database, and many departments report no data whatsoever to the Bureau of Justice Statistics regarding officer-involved shootings and homicides. While race could very well play a role in officer-involved homicides, the limited research available does not necessarily indicate such bias. Smith's (2003) study shows, in fact, that officer race is essentially unrelated to officer-involved homicides. The more important factors in some instances are officer gender, specifically in cities with populations between 100,000 and 250,000 people, and the proportion of minority citizens within any city (Smith, 2003). In medium-sized cities, female officers are actually more likely to be involved in a homicide, which is the opposite of what Smith (2003) expected. The more African Americans or Blacks there were in any given population, the higher the incidence of officer-involved homicide. It is not the officer's race, then, that might determine the likelihood of homicide, but race does have a significant effect on officer-involved homicide.

Another long-lasting effect, which sometimes takes a tremendous amount of time to complete, is the execution of suspects convicted of heinous crimes and sentenced to death. Petrie and Coverdill (2010) explore the effect of race on death row inmates in terms of their likelihood of actually being executed or being granted sentence relief. Other studies have sought to determine if race is a determinant of being sentenced to death, but most don't include the potential for sentence relief, whereby a prisoner might be allowed to leave death row while still carrying out a life sentence or some other alternative (Petrie & Coverdill, 2010). Race of the victim is important, as well, as suspects convicted of murder are more likely to receive the death penalty if their victim is White (Petrie & Coverdill, 2010). The authors hypothesize that an African American or Hispanic convict is less likely to receive sentence relief and more likely to be executed. However, other studies show that because the death penalty is pursued more often in cases involving a minority suspect (e.g., the death penalty is pursued in one case of a particular crime with a Black suspect whereas a similar case with a White suspect is only tried with the potential for life in prison), there is a greater opportunity for minorities to win in an appeals process (Paternoster, Brame, & Bacon, 2008). Petrie and Coverdill (2010) understand that potential, and their findings were somewhat split. While race did not have a significant impact on who was actually executed, their results did support the idea that minorities were less likely to receive sentence relief (Petrie & Coverdill, 2010). They found also that minorities have a lower likelihood of execution altogether, but this is due to longer stays on death row rather than sentence relief. The end result was usually the same as other death row inmates, in that execution was more likely than sentence relief. The longer periods on death row could be a function of quality or lack of quality of representation throughout the appeals process. The results of their research indicate that the appeals process could take longer for those cases involving minorities.

## **Jury of Peers**

There is one role in the criminal justice system that has a profound impact in the system, but is perhaps the most inexperienced group in it. Juries are comprised of citizens within a county, precinct, or district who are often uninvolved in the legal system otherwise. However, this group of "everyday" men and women can very of-

ten have a significant and lasting impact on the lives of many. Juries are the subject of much research but oftentimes for the purpose of providing advice and options to trial counsel during jury selection (Ashton, 2012). The studies done to determine how the jury responds to race and what racial biases they may have are somewhat limited. Brewer (2004) and Levinson (2007) provide insight into the impact of the race of each juror or the racial makeup of the jury together. Levinson finds that racial biases are often present, albeit in the subconscious. A juror might explicitly state that he is for equal treatment regardless of race, but his actions or decisions implicitly show that bias exists (Levinson, 2007). Brewer (2004) shows that race has a significant impact on a juror's receptivity to mitigating factors within a case. For example, if a person has been convicted of a crime, and is awaiting a sentence of either life in prison or the death penalty, minority jurors are more likely to consider mitigating factors and treat them with some importance. That is not to say, however, that African American jurors are less likely to favor the death penalty, but research shows that they do so having given more consideration to the mitigating evidence (Brewer, 2004). Caucasian jurors, according to research, are less likely to give merit to mitigating evidence. Regardless of race, it seems that many jurors have a predisposition to a certain verdict that they choose very early on, and even in circumstances where there are opportunities to change their opinion, most jurors do not.

Levinson's (2007) research on bias of jurors shows that regardless of race, most people adhere to certain implicit biases. For example, a juror might misremember a certain fact about a case in a way that lends itself to a bias such as source attribution errors in which an aggressive act is attributed to an African American rather than a Caucasian suspect (Levinson, 2007). This may happen even when the juror is African American himself. How does this happen? What can be done to combat implicit bias? Levinson (2007) argues that trying to control and change implicit bias is extremely difficult, and sometimes impossible. Levinson's study demonstrated that when the same story involving an altercation is told in multiple ways with the only change being the race of the main character, it was easier for all participants, regardless of race, to successfully remember aggressive actions when they were performed by an African American character (Levinson, 2007). This indicates that people on a diverse jury may misremember things in specific, systematic ways. If the jury is to be charged with deciding the accused's fate, and they do so with a litany of incorrect information, how can

justice be served? Levinson (2007) also shows that group decision-making processes do not necessarily change individual decisions, but he does contend that a diverse jury is more likely to overcome implicit memory biases than homogeneous juries. Levinson (2007) cites research that shows in mock juries, heterogeneous juries are more likely to remember facts correctly, and they are also more willing to correct errors than homogeneous juries. Levinson (2007) argues that "so long as implicit biases go unchecked in legal decisionmaking, it is hard to be confident that social justice is at hand" (p. 421). His point is supported by research, but his research offers no real solution.

Perhaps one solution is working harder to understand from where the implicit biases come. What is the origin of such biases, and can understanding that origin improve the likelihood of eliminating them? Saperstein and Penner (2010) address the issue of race as a changeable state. They claim that incarceration in or interaction with the criminal justice system can color race and alter it, changing even one's own self-perception. The authors assert that African Americans have been wildly overrepresented in prison populations for more than a century, and Crutchfield, Fernandes, and Martinez (2010) imply in their research that this could be based on the absence of slavery post-bellum. Especially in the South, it is absolutely the case that African Americans were incarcerated at a much higher rate after the Civil War (Crutchfield et al., 2010). During slavery, most Blacks were slaves, and to incarcerate a slave was to punish his master by removing his property. For this reason, most punishment of slaves was left up to their masters. After the Civil War and the Emancipation Proclamation, the southern economy needed a way to replace the incredible amount of free labor they lost. One way to do this was to incarcerate African Americans and force them to work on the same plantations that were worked by slaves. The state justified this action by creating leases for plantation owners to purchase in order to farm out this prison workforce. According to Saperstein and Penner (2010), this early incarceration could lend itself to future racial biases and the "darkening" of a specific group of people. Tying this to Levinson's (2007) research, then, it is understandable that implicit biases exist to support the societal hierarchy of today.

### **The War on Blacks?**

The existing societal hierarchy lends itself to continued overrepresentation of African Americans in prisons today. Crutchfield et al. (2010) find that in every single

state, African Americans are grossly overrepresented in penitentiaries. Studies cited by Crutchfield et al. (2010) and their own research confirm that 80% of this overrepresentation seems to be justified due to a greater likelihood of African Americans' participation in criminal acts, although the reasons for this increased likelihood is not discussed in detail. However, there are some exceptions. The war on drugs is cited as one potential avenue for extreme disparity due to race. Both Latinos and African Americans are 50% more likely to be searched for contraband without having any greater likelihood of actually having contraband compared to Whites (Crutchfield et al., 2010, p. 921). Fellner (2009) focuses on the effects of the war on drugs and the disparity of arrests by race. He shows that although African Americans are estimated to account for 13–20% of drug offenders, they are three to five times more likely to be arrested for drug charges than their White counterparts.

As the other studies showed, once stopped, once searched, minorities are also at a higher probability of being arrested. In prison, the disproportionate representation seems only to be within the prison population. Only 13% of prison wardens are African American, nationwide, which is actually fairly representative of the general population, but it is well below the representation of minorities within the prison system (Hickman & Reaves, 2006). Prison guards are also less likely to be fairly represented. However, this varies heavily depending on the location of the facility. The variation is heavily dependent on the number of African American residents as a percentage of the total population. In areas where there is a greater representation of African American officers, guards, judges, and wardens, there is usually a significantly higher representation of African Americans within the total population of those areas. The effect of this is that even in communities with a large number of African American residents, there is still underrepresentation in key roles within the criminal justice system (Stroshine & Brandl, 2011; Crutchfield et al., 2010; Farrell et al., 2009; Hickman & Reaves, 2006). Overall, with both corrections officers and police officers, women and minorities are underrepresented in most populations. Nationwide averages are around 15% representation by

racial and ethnic minorities and 15% by women (Hickman & Reaves, 2006). Diversification in guards or wardens, however, will not alleviate the problem of implicit bias or erase the 20% of overrepresentation that cannot be justified by increased participation in crime by African Americans or other minorities.

## **Going Forward**

As studies show, diversity within the courtroom, be it judges, attorneys, or jurors, can provide decision makers with a greater opportunity to make good decisions with more facts relevant to cases (Hirschman & Greeley, 2009). Implicit biases still exist though, and other research confirms that even when juries are given a chance to change their opinions, they often do not change them (Levinson 2007). Perhaps the best way to work toward eliminating implicit biases is to work more closely with ethnic and racial minorities and work to understand them and their perspectives better. As Levinson (2007) shows in his research, working to understand the “out-group members” will lead to less prejudice overall, and this is not a temporary effect. When working with people from backgrounds and perspectives unfamiliar to your own, a greater understanding will occur. According to Levinson (2007), “this work reaffirms that exposure to people across groups acts to reduce biases, particularly under optimal conditions” (p. 416). Human nature is impossible to change, and for centuries, part of that nature was the subjugation and mistreatment of minorities, including women. The only way to truly eliminate that implicit bias is to continue to work to better understand every group on earth, no matter how different they are. Perhaps at that point, we can check those implicit biases in legal decision-making and be confident that social justice is at hand.

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