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# RACIAL IMPACT STATEMENTS: CONSIDERING THE CONSEQUENCES OF RACIAL DISPROPORTIONALITIES IN THE CRIMINAL JUSTICE SYSTEM

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*Abstract:* The American criminal justice system is currently suffering from a dramatic increase in mass incarceration and staggering rates of racial disproportionalities and disparities. Many facially neutral laws, policies, and practices within the criminal justice system have disproportionate impacts on minorities. Racial impact statements provide one potential method of addressing such disproportionalities. These proactive tools measure the projected impacts that new criminal justice laws and policies may have upon minorities, and provide this information to legislators before they decide whether to enact the law. Four states currently conduct racial impact statements, and other states are considering adopting their own versions. The triggering circumstances and methods of collecting racial impact data differ among states, resulting in a great variety of racial impact statements that are actually completed. This Comment reviews current racial impact statements and suggests three improvements for states that are considering adopting them. First, racial impact statements should attach automatically to legislation without the prompting of legislators' votes. Second, states should consider developing more thorough data collection standards. Finally, more effective racial impact legislation should ensure that lawmakers address racial disproportionalities by requiring legislators to follow additional procedures when disproportionate racial impacts are projected.

## INTRODUCTION

African Americans and Latinos account for fifty-eight percent of the United States prison population—nearly twice their accumulated representation in the general population of thirty percent.<sup>1</sup> The current rates of racial disproportionality in the criminal justice system are staggering. Racial disproportionality exists at many stages within the criminal justice system, from crime commission, to arrest, to conviction, to sentencing.<sup>2</sup> Implicit racial biases affect each of these points in the

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\* The author initiated her research on racial impact statements as an intern with the Washington Defender Association in 2013.

1. E. ANN CARSON & WILLIAM J. SABOL, U.S. DEP'T OF JUSTICE, BUREAU OF JUSTICE STATISTICS, PRISONERS IN 2011, at 37 tbl.4 (2012), available at <http://www.bjs.gov/content/pub/pdf/p11.pdf>.

2. Justin Murray, *Reimagining Criminal Prosecution: Toward a Color-Conscious Professional Ethic for Prosecutors*, 49 AM. CRIM. L. REV. 1541, 1544 (2012); THE SENTENCING PROJECT,

criminal justice system.<sup>3</sup> This Comment focuses on one way to reduce racially discriminatory effects of criminal justice laws: racial impact statements.

Racial impact statements are proactive tools to reduce racial disproportionality in the criminal justice system.<sup>4</sup> These statements project the outcomes of new criminal justice legislation and provide this information regarding potential disparate racial effects to legislators before laws are adopted or amended.<sup>5</sup> Like environmental impact statements and fiscal impact notes, racial impact statements are short reports on the projected effects of legislation in the criminal justice context.<sup>6</sup>

Currently, racial impact statements tend to operate for informational purposes only.<sup>7</sup> Environmental impact statements require certain procedures to be followed when an adverse environmental impact is predicted to ensure decision-makers are adequately considering information and alternatives.<sup>8</sup> In contrast, racial impact statements generally do not require any additional steps upon the prediction of disproportionate impacts on minorities.<sup>9</sup>

Over the past few years, states have begun considering and adopting legislation implementing racial impact statements. Since 2007, Iowa,<sup>10</sup> Connecticut,<sup>11</sup> and Oregon<sup>12</sup> have passed racial impact legislation.

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REPORT OF THE SENTENCING PROJECT TO THE UNITED NATIONS HUMAN RIGHTS COMMITTEE REGARDING RACIAL DISPARITIES IN THE UNITED STATES CRIMINAL JUSTICE SYSTEM 1 (2013), available at [http://sentencingproject.org/doc/publications/rd\\_ICCPR%20Race%20and%20Justice%20Shadow%20Report.pdf](http://sentencingproject.org/doc/publications/rd_ICCPR%20Race%20and%20Justice%20Shadow%20Report.pdf) [hereinafter SENTENCING PROJECT REPORT] (“Racial minorities are more likely than white Americans to be arrested; once arrested, they are more likely to be convicted; and once convicted, they are more likely to face stiff sentences.”).

3. See Tammy Rinehart Kochel et al., *Effect of Suspect Race on Officers' Arrest Decisions*, 49 CRIMINOLOGY 473, 495–98, 490 (2011); Catherine London, *Racial Impact Statements: A Proactive Approach to Addressing Racial Disparities in Prison Populations*, 29 LAW & INEQ. 211, 215 (2011); Marc Mauer, *Racial Impact Statements as a Means of Reducing Unwarranted Sentencing Disparities*, 5 OHIO ST. J. CRIM. L. 19, 24 (2007).

4. London, *supra* note 3, at 212.

5. *Id.*

6. *Id.*

7. See *infra* Part IV.B.1.

8. See generally National Environmental Policy Act of 1969, 42 U.S.C. §§ 4321–4370h (2012).

9. See *infra* Part IV.B.1; but see *infra* Part IV.B.1.d. (discussing Oregon’s notice and comment period for racial impact legislation).

10. IOWA CODE ANN. § 2.56(1) (West, Westlaw through 2014 Reg. Sess.).

11. CONN. GEN. STAT. ANN. § 2.24b (West, Westlaw through 2014 Feb. Reg. Sess. of Conn. Gen. Assemb.).

12. S. 463, 77th Leg. Assemb., Reg. Sess. (Or. 2013).

Minnesota adopted a similar measure through its Sentencing Guidelines Commission.<sup>13</sup> Seven other states have attempted but failed to pass racial impact statement legislation: Texas,<sup>14</sup> Maryland,<sup>15</sup> Arkansas,<sup>16</sup> Mississippi,<sup>17</sup> Wisconsin,<sup>18</sup> Florida,<sup>19</sup> and Kentucky.<sup>20</sup>

This Comment explains how racial impact statements may be able to help address racial disproportionality in the criminal justice system, surveys how current racial impact statements function, and suggests improvements for states considering similar legislation. Part I provides an overview of the history and potential causes of racial disproportionality in the United States criminal justice system. Although the character of racial discrimination in the United States has evolved over time, Part II explains how facially neutral criminal laws and sentencing policies continue to perpetuate racial disproportionality and disparities in the criminal justice system. Part III identifies racial impact statements as one potential way to address these racial disproportionalities by surveying currently adopted racial impact statement legislation and similar bills that have not passed. Finally, Part IV analyzes how current racial impact statements function and suggests improvements to future racial impact statement policies.

This Comment advocates for three major components of effective racial impact statement legislation. The standard for judging effectiveness varies; some advocates suggest the statements are simply designed to raise awareness of disproportionate impacts before criminal justice laws take effect,<sup>21</sup> while others hope the statements can go further and actually mitigate those disproportionalities.<sup>22</sup> Three components

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13. Mauer, *supra* note 3, at 44 n.124.

14. H.R. 930, 81(R) Leg., Reg. Sess. (Tex. 2009) (left pending in subcommittee).

15. S. 679, 430th Leg., Gen. Sess. (Md. 2012) (unfavorable report by the Senate Rules Committee).

16. S. 1093, 89th Gen. Assemb., Reg. Sess. (Ark. 2013) (died in Senate).

17. S. 2561, 2014 Leg., Reg. Sess. (Miss. 2014) (died in committee).

18. S. 538, 2013–14 Leg. (Wis. 2014).

19. H.R. 237, 2014 Leg., Reg. Sess. (Fla. 2014) (died in Government Operations Subcommittee); S. 336, 2014 Leg., Reg. Sess. (Fla. 2014) (died in Judiciary Committee).

20. S. 1819, 2014 Leg., Reg. Sess. (Ky. 2014).

21. See, e.g., David A. Rossi, *Jumping the Gun: Iowa's Swift Adoption of Minority Impact Statement Legislation Points to Other Problems Within the State's Criminal Justice System*, 58 *DRAKE L. REV.* 857, 864 (2010) ("This idea [of racial impact statements] is elegant in its simplicity. By encouraging an open dialogue that addresses the potential disparate impact new legislation might have on a jurisdiction's minority populations, legislators will tailor bills in a more thoughtful manner.").

22. See Mauer, *supra* note 3, at 34.

could help racial impact statements at least achieve the more modest goal. First, racial impact statements should attach automatically to legislation affecting the criminal justice system without requiring the prompting of legislators' votes. Second, states should strive to develop more thorough data collection requirements to define the scope of racial impact statements. Third, more effective racial impact statement legislation should require legislators to follow certain procedures before passing legislation with a predicted significant disproportionate impact. These additional steps could reflect procedures associated with environmental impact statements, such as requiring community outreach through the use of comment periods or obligating decision-makers to seriously consider alternatives.

### I. RACIAL DISPROPORTIONALITY IN THE CRIMINAL JUSTICE SYSTEM

Racial disproportionality and disparity pervade multiple levels of the criminal justice system, including arrest, charging, conviction, incarceration, and sentence severity.<sup>23</sup> This Comment focuses on incarceration rates, which racial impact statements most commonly measure.<sup>24</sup> In 2011, over two million individuals were incarcerated in federal, state, and local prisons and jails,<sup>25</sup> and over sixty percent of these were racial and ethnic minorities.<sup>26</sup> Across all genders and age groups, African Americans and Hispanics were imprisoned at higher rates than their white counterparts.<sup>27</sup> While African Americans constitute 13.2% and Hispanics constitute 17.1% of the American population,<sup>28</sup> they are disproportionately represented in the American prison population at 36.46% and 21.99%, respectively.<sup>29</sup> One in three African American men and one in six Latino men face imprisonment at some

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23. See Murray, *supra* note 2, at 1544; SENTENCING PROJECT REPORT, *supra* note 2, at 1.

24. See *infra* Part IV.

25. LAUREN E. GLAZE & ERIKA PARKS, U.S. DEP'T OF JUSTICE, BUREAU OF JUSTICE STATISTICS, CORRECTIONAL POPULATIONS IN THE UNITED STATES 3, 8 app. tbl.1 (2012).

26. *Racial Disparity*, THESENTENCINGPROJECT.ORG, <http://www.sentencingproject.org/template/page.cfm?id=122> (last visited Nov. 6, 2014).

27. See CARSON & SABOL, *supra* note 1, at 8.

28. *State and County Quick Facts*, U.S. CENSUS BUREAU (July 8, 2014, 6:37 AM), <http://quickfacts.census.gov/qfd/states/00000.html>.

29. E. ANN CARSON & DANIELA GOLINELLI, U.S. DEP'T OF JUSTICE, BUREAU OF JUSTICE STATISTICS, PRISONERS IN 2012: TRENDS IN ADMISSIONS AND RELEASES, 1991–1992, at 37 tbl. 4 (2014), available at <http://www.bjs.gov/content/pub/pdf/p12tar9112.pdf>.

point in their lives, compared with one in seventeen white men.<sup>30</sup> The population of African American males in prison, “[i]f brought together in one incorporated region, . . . would instantly become the twelfth-largest urban area in the country.”<sup>31</sup> Although women represent a much smaller portion of the nationwide prison population,<sup>32</sup> they also demonstrate similar (though not as stark) patterns of racially disproportionate chances of imprisonment.<sup>33</sup>

Although the racial disproportionalities and disparities in the criminal justice system are obvious,<sup>34</sup> the possible sources are not as easy to identify. First, this Comment rebuts two commonly-imagined sources of racial disproportionality. Next, it examines our nation’s history of overt racial discrimination and explains how these past practices have evolved into modern, covert racial biases that continue to influence the criminal justice system.

#### A. *Rebutting Commonly-Imagined Sources of Racial Disproportionality*

Two seemingly likely explanations fail to account for the racial disproportionality in incarceration rates: crime commission rates and explicit biases.

First, differences in crime commission rates do not adequately explain the overrepresentation of minorities in jails and prisons.<sup>35</sup> Individuals, politicians, and the media tend to “overestimate the proportion of crime committed by people of color, and associate people of color with criminality.”<sup>36</sup> Some studies do suggest that minorities commit certain types of crimes at higher rates than whites. For example, African

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

31. DERRICK BELL, SILENT COVENANTS: *BROWN V. BOARD OF EDUCATION* AND THE UNFULFILLED HOPES FOR RACIAL REFORM 183 (2004).

32. CARSON & SABOL, *supra* note 1, at 2.

33. While one in one hundred eleven white women are imprisoned in their lifetime, one in forty-five Latina women and one in eighteen African American women face a likelihood of imprisonment sometime in their lives. BONCZAR, *supra* note 30, at 1.

34. See *supra* notes 25–33 and accompanying text.

35. See London, *supra* note 3, at 217 (noting “differential offending patterns only partially explain the over-representation of minorities in confinement”); Task Force on Race & the Criminal Justice Sys., *Preliminary Report on Race and Washington’s Criminal Justice System*, 47 GONZ. L. REV. 251, 269 (2012).

36. THE SENTENCING PROJECT, RACE AND PUNISHMENT: RACIAL PERCEPTIONS OF CRIME AND SUPPORT FOR PUNITIVE POLICIES 3–4 (2014) [hereinafter RACE AND PUNISHMENT].

American males may commit higher rates of violent and property crimes than other racial groups,<sup>37</sup> “[i]n large part because African Americans are more likely to experience concentrated urban poverty.”<sup>38</sup> However, not all of these studies are reliable, as crime commission rates are difficult to study.<sup>39</sup> Some studies conflate crime commission with arrest rates, resulting in an over-exaggeration of African American crime commission rates.<sup>40</sup> In addition, even these suggested differential crime commission rates do not account for the higher disproportionality in arrest and conviction rates.<sup>41</sup> For example, “arrest and conviction rates for drug-related offenses among different races are highly disproportionate to actual rates of drug use.”<sup>42</sup> While data suggests minorities may commit a disproportionately large percentage of street crime, the disproportionalities are not as clear when other crimes (such as white collar crime) are taken into account.<sup>43</sup>

Second, racial disproportionality is not simply a product of overtly racist policies or decision-makers. Obvious, intentional racism is not as common today as it once was; as one scholar notes, “conscious and overt prejudice has declined considerably since the end of Jim Crow.”<sup>44</sup> Laws in a wide variety of contexts outlaw racial discrimination, and our society generally condemns and discredits overt racism.<sup>45</sup> Instead, as the following section explains, our nation’s history of overt discrimination has evolved into a system of implicit biases and structural racism that influences racial disparities in today’s criminal justice system.

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37. David COLE, NO EQUAL JUSTICE: RACE AND CLASS IN THE AMERICAN CRIMINAL JUSTICE SYSTEM 41–42 (1999); SENTENCING PROJECT REPORT, *supra* note 2, at 3.

38. RACE AND PUNISHMENT, *supra* note 36, at 20. Other potential reasons include: inadequate schools, family support, and health care. Paul Butler, *One Hundred Years of Race and Crime*, 100 J. CRIM. L. & CRIMINOLOGY 1043, 1059 (2010).

39. Murray, *supra* note 2, at 1553–54 n.74 (“Developing accurate methods for calculating real offense rates is challenging, in part because the potential measures for which data is most readily available—such as arrest data—are likely to be distorted by the same racial biases that influence the ultimate incarceration disparity.”); *see also* Task Force on Race & the Criminal Justice Sys., *supra* note 35, at 259 (noting “crime commission rates cannot be known directly and can only be estimated”).

40. Task Force on Race & the Criminal Justice Sys., *supra* note 35, at 265.

41. SENTENCING PROJECT REPORT, *supra* note 2, at 3; RACE AND PUNISHMENT, *supra* note 36, at 22.

42. London, *supra* note 3, at 214.

43. Murray, *supra* note 2, at 1554.

44. *Id.*

45. R. Richard Banks et al., *Discrimination and Implicit Bias in a Racially Unequal Society*, 94 CAL. L. REV. 1169, 1169 (2006).

*B. History of Overt Racism, Current Implicit Biases, and their Impact the Criminal Justice System*

Although the character of racial discrimination has changed over time,<sup>46</sup> America's history of racial discrimination and current implicit racial biases continue to impact the criminal justice system today.<sup>47</sup> As Professor Higginbotham summarizes, "[i]n a long history of racial oppression motivated by white desires for economic exploitation and justified by false perceptions of inferiority, blacks were enslaved until 1865, were separated and victimized by law until 1954, and are separated and victimized by practice still."<sup>48</sup> It is outside the scope of this Comment to fully address our nation's long and complex history of racial discrimination.<sup>49</sup> But this section aims to provide a brief overview of major examples of historical discrimination and how those trends continue to impact our current society, particularly the modern criminal justice system.

Throughout "most of American history, racial discrimination was legally permissible and racial bias was openly espoused."<sup>50</sup> Even before the United States became a nation, early "slave codes," which created different standards and punishments for white servants and African American servants, influenced facially discriminatory laws that persisted well into this country's establishment.<sup>51</sup> Overt racial discrimination thrived at the time of our country's founding, perhaps most notably through systems of race-based slavery that our Constitution implicitly permitted.<sup>52</sup> Slavery initiated a system of separating blacks through labor, housing, and the denial of personal rights.<sup>53</sup> Various state laws denied slaves any rights to property and basic human rights.<sup>54</sup> Slave

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46. See *infra* notes 84–104 and accompanying text.

47. See Murray, *supra* note 2, at 1547–48 ("Classic racial stereotypes are alive and well at the subconscious level.").

48. F. MICHAEL HIGGINBOTHAM, *GHOSTS OF JIM CROW* 25 (2013).

49. For a more detailed discussion, see *id.*

50. Banks et al., *supra* note 45, at 1169.

51. See Sahar Fathi, *Race and Social Justice as a Budget Filter: The Solution to Racial Bias in the State Legislature?*, 47 GONZ. L. REV. 531, 536 (2012); HIGGINBOTHAM, *supra* note 48, at 47 ("[W]ell before the founders agreed to the 'Great Compromise' at the Constitutional Convention, legally sanctioning black slavery, white colonists had already laid the groundwork by assigning social rights, responsibilities, and punishments on the basis of race.").

52. HIGGINBOTHAM, *supra* note 48, at 37 (citing U.S. CONST. art. I, §§ 2 & 9; U.S. CONST. art. IV, § 2).

53. *Id.*

54. CARTER A. WILSON, *RACISM: FROM SLAVERY TO ADVANCED CAPITALISM* 53 (1996).



owners were “free to engage in any measure of oppressive practice” against slaves, such as harsh labor, physical violence, inadequate provisions of food and shelter, and separating families.<sup>55</sup> State laws, such as those prohibiting the education of slaves, further solidified slaves’ subjugation and disparate treatment.<sup>56</sup>

Outside of slavery, “free” African Americans also experienced harsh treatment throughout the nineteenth century.<sup>57</sup> For example, they were denied political, social, and economic rights, excluded from education, employment, and property ownership, and restricted from travelling, just to name a few broad instances.<sup>58</sup> In *Dred Scott v. Sandford*,<sup>59</sup> the Supreme Court reinforced freed African Americans’ inferiority. The Court declared that African Americans, whether slaves or citizens of free states, belonged to an inferior and “unfortunate race” and could not be considered United States citizens.<sup>60</sup>

Following the Civil War, emancipation and the Thirteenth, Fourteenth, and Fifteenth Amendments (the “Reconstruction Amendments”) ushered in new hope for racial equality.<sup>61</sup> But these hopes were soon quelled by cases narrowing the new constitutional rights and laws promoting “race-based segregation and discrimination designed to maintain the antebellum status quo.”<sup>62</sup> The judicial branch limited the reach of the Reconstruction Amendments in cases like *The Slaughter-House Cases*,<sup>63</sup> *United States v. Cruikshank*,<sup>64</sup> *United States v. Reese*,<sup>65</sup> and *The Civil Rights Cases*.<sup>66</sup>

Meanwhile, political and social sentiment followed suit: “[p]olitics and public opinion had turned decisively against the Reconstruction

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55. HIGGINBOTHAM, *supra* note 48, at 55.

56. Prior to the Civil War, all southern states except Tennessee had prohibited educating slaves. *Id.* at 56.

57. *Id.* at 48–49.

58. *Id.*

59. 60 U.S. 393 (1856).

60. *Id.* at 407.

61. HIGGINBOTHAM, *supra* note 48, at 36.

62. *Id.*

63. 83 U.S. 36 (1872) (severely limiting the reach of the Fourteenth Amendment’s Privileges or Immunities Clause).

64. 92 U.S. 542 (1875) (restricting the federal government’s enforcement power under the Fourteenth Amendment).

65. 92 U.S. 214 (1875) (narrowly construing the Fifteenth Amendment and limiting Congress’s power to prohibit poll taxes used to exclude black voters).

66. 109 U.S. 3 (1883) (holding Congress had no authority under the Fourteenth Amendment to restrict discrimination by private actors and individuals).

commitment to equal protection.”<sup>67</sup> States created poll taxes, literacy tests, grandfather clauses, and other measures to disenfranchise African American voters and maintain political power.<sup>68</sup> Jim Crow segregation laws developed to secure physical separation of blacks in areas such as “housing, education, public accommodations, and social activities.”<sup>69</sup> The Supreme Court endorsed these laws through its infamous “separate but equal”<sup>70</sup> decision in *Plessy v. Ferguson*.<sup>71</sup> After *Plessy*, state and local laws greatly expanded segregation and discrimination into a variety of new contexts for multiple racial groups.<sup>72</sup> Jim Crow laws and practices instilled segregation in housing,<sup>73</sup> education,<sup>74</sup> employment,<sup>75</sup> restaurants, prisons, hospitals, cemeteries, school books, toilets, drinking fountains, and more.<sup>76</sup> In reality, these separate accommodations were far from equal.<sup>77</sup> Those who challenged Jim Crow laws were frequently and severely punished,<sup>78</sup> resulting in “sharply increased incarceration rates” for African Americans.<sup>79</sup>

In 1954, the Supreme Court began the dismantling of legal, *de jure* segregation in the public school context in *Brown v. Board of Education*, recognizing that “[s]eparate educational facilities are inherently unequal.”<sup>80</sup> This decision signaled the end of “separate but equal” laws

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67. Benno C. Schmidt, Jr., *Principle and Prejudice: The Supreme Court and Race in the Progressive Era. Part 1: The Heyday of Jim Crow*, 82 COLUM. L. REV. 444, 466 (1982).

68. Emma Coleman Jordan, *Taking Voting Rights Seriously: Rediscovering the Fifteenth Amendment*, 64 NEB. L. REV. 389, 397 (1985).

69. HIGGINBOTHAM, *supra* note 48, at 37.

70. Although the case does not explicitly use the phrase “separate but equal,” it is frequently cited as supporting this doctrine. See, e.g., Daniel R. Gordon, *One Hundred Years After Plessy: The Failure of Democracy and the Potentials for Elitist and Neutral Anti-Democracy*, 40 N.Y.L. SCH. L. REV. 641, 641 (1996) (“*Plessy* validated the separate but equal doctrine.”).

71. 163 U.S. 537 (1896).

72. HIGGINBOTHAM, *supra* note 48, at 37–38; Schmidt, Jr., *supra* note 67, at 472 (“The victory of Jim Crow on the trolleys of cities across the South set the stage for rigid, ubiquitous segregation.”).

73. HIGGINBOTHAM, *supra* note 48, at 92–95.

74. *Id.* at 95–97.

75. *Id.* at 99–102.

76. Schmidt, Jr., *supra* note 67, at 473.

77. *Id.* (“The doctrine of racial separation was coupled with the principle of equality only in the verbal tissue of statutes and judicial apologetics; equality was no concern of the law of racial separation in life.”).

78. HIGGINBOTHAM, *supra* note 48, at 109–12.

79. *Id.* at 110.

80. *Brown v. Bd. of Educ. of Topeka, Shawnee Cnty., Kan.*, 347 U.S. 483, 495 (1954), *supplemented sub nom. Brown v. Bd. of Educ. of Topeka, Kan.*, 349 U.S. 294 (1955).

in other contexts,<sup>81</sup> although the changes that *Brown* initiated took decades to implement.<sup>82</sup> The Civil Rights Movement of the 1960s also signaled progress toward racial equality.<sup>83</sup>

But while “[e]xplicit, governmentally enforced racial classification largely ended with Jim Crow,”<sup>84</sup> the legacy of our racially discriminatory history<sup>85</sup> continues to thrive through unconscious and covert racial prejudice.<sup>86</sup> Similarly, many “race and crime” problems of the last century have diminished,<sup>87</sup> but the criminal justice system continues to exhibit racial disparities and disproportionalities.<sup>88</sup> Social scientists describe two major types of modern manifestations of racial bias: implicit racial biases that individuals harbor and structural racism perpetuated by society and institutions.<sup>89</sup> Through these two systems,<sup>90</sup> the historical legacy of racial discrimination in America continues to

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81. Gabriel J. Chin, *Jim Crow's Long Goodbye*, 21 CONST. COMMENT. 107, 122 (2004).

82. *Id.* at 121 (“Unlike some legal regimes, Jim Crow did not end with a disjuncture; there was no single moment of structural change, even as a matter of constitutional doctrine. . . . Instead, Jim Crow trailed off, fading away over a period of decades as the courts and Congress defined the obligations of the law, case by case, detail by detail.”).

83. John A. Powell, *An Agenda for the Post-Civil Rights Era*, 29 U.S.F. L. REV. 889, 889–90 (1995).

84. Murray, *supra* note 2, at 1551; *cf.* Chin, *supra* note 81, at 111–12 (pointing to Jim Crow laws that are still on the books in some southern states).

85. *See, e.g.*, Roy L. Brooks, *Making the Case for Atonement in “Post-Racial America,”* 14 J. GENDER RACE & JUST. 665, 666 (2011) (arguing that “the great majority of blacks today, including those who were born after the Jim Crow Era, are victims of both slavery and Jim Crow”).

86. *See* John O. Calmore, *Race/ism Lost and Found: The Fair Housing Act at Thirty*, 52 U. MIAMI L. REV. 1067, 1068 (1998); John A. Powell, *Structural Racism: Building upon the Insights of John Calmore*, 86 N.C. L. REV. 791, 795 (2008) (describing the shift from the traditional understanding of racism as a product of individuals’ prejudiced beliefs to a more contemporary understanding of racism as “institutional practices and cultural patterns [that] can perpetuate racial inequity without relying on racist actors”).

87. Paul Butler, *One Hundred Years of Race and Crime*, 100 J. CRIM. L. & CRIMINOLOGY 1043, 1053 (2010) (“Lynching is no longer a significant concern. Formal legal impediments, like the exclusion of African Americans from juries, have been removed. Thanks to the Supreme Court, accused people have many more rights, importantly including the right to a lawyer. The Court has also declared unconstitutional some laws, like some anti-loitering statutes, that allowed police to abuse their discretion. . . . There are many minority actors in the criminal justice system, including police officers, prosecutors, defense attorneys, jurors, judges, and significantly, lawmakers.” (citations omitted)).

88. *Id.* at 1045 (noting the high African American prison population and stating “[t]he major race and crime problems of our time are the mass incarceration of African Americans and the extraordinary disparities between blacks and whites in the criminal justice system”).

89. Mona Lynch, *Institutionalizing Bias: The Death Penalty, Federal Drug Prosecutions, and Mechanisms of Disparate Punishment*, 41 AM. J. CRIM. L. 91, 100–03 (2013).

90. For a more thorough discussion of the distinction between implicit racial biases and structural racism, and a model that proposes to harmonize the two, see *id.*

permeate modern society,<sup>91</sup> particularly the criminal justice system.<sup>92</sup>

Implicit racial biases affect all levels of the criminal justice system.<sup>93</sup> Most Americans, despite sincerely believing in racial equality, tend to implicitly harbor stereotypes that associate minorities (particularly African Americans) with negative characteristics,<sup>94</sup> “including the propensity for violence and crime.”<sup>95</sup> Although the effects of implicit biases are subtle,<sup>96</sup> they can have widespread impacts, particularly in the criminal justice system.<sup>97</sup> From lawmakers and law enforcement officers to prosecutors, judges, and juries, multiple actors in the criminal justice system harbor implicit racial biases that may impact their decisions.<sup>98</sup> This remains true even when other factors are controlled.<sup>99</sup>

Beyond the level of individual biases, “structural racism” or “institutional racism” more broadly impacts the criminal justice system.<sup>100</sup> Institutional racism is characterized by systems of implicit biases, laws, and policies that work to benefit whites to the detriment of racial minorities, including residual impacts from state-sponsored policies of discrimination that still impact racial inequalities.<sup>101</sup> Thus, the

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91. HIGGINBOTHAM, *supra* note 48, at 30 (2013) (“[T]he lingering effects of our racial paradigm continue to harm blacks and society as a whole.”).

92. *See generally* MICHELE ALEXANDER, *THE NEW JIM CROW: MASS INCARCERATION IN THE AGE OF COLORBLINDNESS* (2010).

93. *See* Tammy Rinehart Kochel et al., *Effect of Suspect Race on Officers’ Arrest Decisions*, 49 *CRIMINOLOGY* 473, 495–98, 490 (2011) (finding race has an impact on officers’ decisions to arrest minority suspects, even after controlling for factors such as “demeanor, offense severity, presence of witnesses, quantity of evidence at the scene, the occurrence or discovery of a new criminal offense during the encounter, the suspect being under the influence of drugs or alcohol, prior record of the suspect, [and] requests to arrest by victims”); London, *supra* note 3, at 215; Mauer, *supra* note 3, at 24.

94. *See generally* Kelly Welch, *Black Criminal Stereotypes and Racial Profiling*, 23 *J. CONTEMP. CRIM. JUST.* 276 (2007).

95. Murray, *supra* note 2, at 1554; *see* Justin D. Levinson et al., *Guilty by Implicit Racial Bias: The Guilty/Not Guilty Implicit Association Test*, 8 *OHIO ST. J. CRIM. L.* 187, 207 (2010).

96. Murray, *supra* note 2, at 1559 (noting that “[t]here is nothing intentional or malicious about this psychological process”).

97. *Id.* at 1563–64 (“Because whites generally still control the levers of power in American society, most of the criminal laws and punishments that are imposed upon black individuals and communities are devised by people who harbor subconscious attitudes of hostility and lack of empathy toward them.”).

98. *Id.* at 1544 (“[I]mplicit bias against blacks influences legislators in choosing what (or whom) to criminalize, police in deciding whom to stop and arrest, prosecutors in electing whom to indict, and jurors in deliberating about whom to convict.”).

99. RACE AND PUNISHMENT, *supra* note 36, at 16–19.

100. *See* Powell, *supra* note 86, at 795–96 (describing structural racism from a systems theory approach).

101. *See* Eduardo Bonilla-Silva, *Rethinking Racism: Toward a Structural Interpretation*, 62 *AM.*

“historical pattern of white domination, established in part through the accretion of economic, cultural, political, and legal power” continues to perpetuate new racially discriminatory policies and practices designed to maintain those “hierarchical arrangements.”<sup>102</sup> In the context of criminal justice, the structural racism theory shifts the focus away from individuals within the criminal justice system acting on their own implicit biases and instead analyzes the consequences and outcomes of a broader racially biased system. For instance, implicit bias research helps us understand how law enforcement officers, prosecutors, judges, and jurors who claim to believe in racial equality may still act in a discriminatory manner based on unconscious biases and stereotypes. In contrast, structural racism proponents may recognize that implicit biases and other factors help cause racial discrimination, but “[t]he key issue is *result, not intent*.”<sup>103</sup> This perspective helps us understand how minority communities are impacted by individual biases, laws, and institutions within the criminal justice system.<sup>104</sup>

These unconscious biases and structural patterns continue to shape criminal justice laws and policies today, which may play a role in the high rates of racial disproportionality in the criminal justice system.<sup>105</sup>

## II. EVOLUTION OF SENTENCING POLICIES AND CRIMINAL LAWS WITH RACIALLY DISCRIMINATORY IMPACTS

Within the last forty years, the United States has experienced what has been described as an “incarceration explosion.”<sup>106</sup> Prison

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SOC. REV. 465, 469 (1997).

102. Lynch, *supra* note 89, at 102.

103. Murray, *supra* note 2, at 1564 & n.147 (emphasis in original) (quoting D. Georges-Abeyie, *Criminal Justice Processing of Non-White Minorities*, in RACISM, EMPIRICISM AND CRIMINAL JUSTICE 28 (B.D. MacLean & D. Milovanovic eds., 1990)).

104. See ALEXANDER, *supra* note 92, at 2 (explaining how the criminal justice system perpetuates a “racial caste system” that mimics the Jim Crow era); *id.* at 185–95 (analogizing the operation and effects of slavery, de jure segregation, and mass incarceration); Dorothy E. Roberts, *The Social and Moral Cost of Mass Incarceration in African American Communities*, 56 STAN. L. REV. 1271, 1300 (2004) (explaining that poor, inner-city African Americans are marginalized from political and social citizenship, and stating that “[m]ass incarceration is the most effective institution for inscribing these barriers in contemporary community life and transferring racial disadvantage to the next generation”).

105. See Murray, *supra* note 2, at 1567 (describing a cycle in which racially disproportionate incarceration “tends to reproduce itself by validating and intensifying the conscious and unconscious racist attitudes that help create disparate criminal-justice outcomes”).

106. Douglas A. Berman, *Reorienting Progressive Perspectives for Twenty-First Century Punishment Realities*, 3 HARV. L. & POL’Y REV. ONLINE 1, 3 (2008), [http://web.archive.org/web/20120625051547/http://www.hlpronline.com/Berman\\_HLPR\\_120808.pdf](http://web.archive.org/web/20120625051547/http://www.hlpronline.com/Berman_HLPR_120808.pdf).

populations grew 628% between 1975 and 2005.<sup>107</sup> This dramatic increase in prison population has disproportionately impacted African American males, as the percentage of white prisoners has “steadily decreased” over time.<sup>108</sup> Scholars suggest that conservative backlash to the Civil Rights Movement drove the racially-charged “war on crime” and “war on drugs” movements that led to this increasing criminalization of African Americans.<sup>109</sup> Although a variety of factors can help explain the rising mass incarceration of African Americans, the interactions between three major developments in criminal justice laws and policies are particularly salient: the rise of facially neutral criminal laws with racially discriminatory impacts, the growth of mandatory minimum penalties, and waning judicial discretion under sentencing policies. Although racial impact statements are currently only conducted at the state level, this section focuses more on federal laws for the sake of uniformity.<sup>110</sup> Many states have followed these federal trends,<sup>111</sup> but sentencing policies differ by state.

#### A. *Laws with Racially Discriminatory Effects*

Although the criminal justice system has moved away from explicit racial classifications,<sup>112</sup> modern facially neutral criminal laws still result

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107. DON STEMEN, VERA INST. OF JUSTICE, RECONSIDERING INCARCERATION: NEW DIRECTIONS FOR REDUCING CRIME 1 (2007), available at [http://www.vera.org/sites/default/files/resources/downloads/veraincarc\\_vFW2.pdf](http://www.vera.org/sites/default/files/resources/downloads/veraincarc_vFW2.pdf); see also THE PEW CTR. ON THE STATES, PUBLIC SAFETY PERFORMANCE PROJECT, ONE IN 100: BEHIND BARS IN AMERICA 2008 (2008), available at [http://www.pewcenteronthestates.org/uploadedFiles/8015PCTS\\_Prison08\\_FINAL\\_2-1-1\\_FORWEB.pdf](http://www.pewcenteronthestates.org/uploadedFiles/8015PCTS_Prison08_FINAL_2-1-1_FORWEB.pdf).

108. Walker Newell, *The Legacy of Nixon, Reagan, and Horton: How the Tough on Crime Movement Enabled a New Regime of Race-Influenced Employment Discrimination*, 15 BERKELEY J. AFR.-AM. L. & POL'Y 3, 6–7 (2013).

109. See, e.g., *id.* at 12.

110. Many states have similar policies and/or are impacted by these federal criminal laws and trends, but it is outside the scope of this Comment to individually assess state laws and practices. The federal laws and policies are provided as examples and constitute background information regarding the landscape of criminal justice laws and policies with racially discriminatory impacts.

111. See RAM SUBRAMANIAN & RUTH DELANEY, VERA INST. OF JUSTICE, PLAYBOOK FOR CHANGE? STATES RECONSIDER MANDATORY SENTENCES 24 nn.19–20 (2014), available at <http://www.vera.org/sites/default/files/resources/downloads/mandatory-sentences-policy-report-v2b.pdf> (discussing states' use of determinate sentencing schemes and the growth of state sentencing commissions); Norman L. Reimer & Lisa M. Wayne, *From the Practitioners' Perch: How Mandatory Minimum Sentences and the Prosecution's Unfettered Control over Sentence Reductions for Cooperation Subvert Justice and Exacerbate Racial Disparity*, 160 U. PA. L. REV. PENNUMBRA 159, 161 (2011) (“Most states have followed suit [with federal trends of increasing codification of crimes and mandatory minimum sentences], enacting mandatory guidelines, specific mandatory minimums, and determinate sentences without the possibility of early release.”).

112. See Fathi, *supra* note 51, at 537.

in racial disproportionalities based on the conduct they prohibit and the resulting punishments imposed. The next sections will detail how sentencing policies contribute to racial disparities in incarceration rates. But first, this section illustrates how modern facially neutral laws can have discriminatory impacts.

According to Marc Mauer, Director of the Sentencing Project, the “war on drugs” has been “the most significant factor contributing to the disproportionate incarceration of African Americans in prisons and jails, with increasing effects on Latinos as well.”<sup>113</sup> The differential sentencing laws for crack versus powder cocaine offenses enacted in the 1980s constitute one of the most egregious and well-known examples.<sup>114</sup> Although the chemical makeup of the two drugs is virtually identical, penalties for crack cocaine were much harsher than those for powder cocaine.<sup>115</sup> Notably, over eighty percent of those sentenced for crack-cocaine were African American.<sup>116</sup>

School zone drug laws may also result in significant racial disproportionalities.<sup>117</sup> These laws impose penalties for drug transactions that occur within a certain distance of a school zone, usually 1000 or 1500 feet.<sup>118</sup> In New Jersey, where the law extends to museums, libraries, and public housing, almost all individuals incarcerated for violating these laws (ninety-six percent) are African American or Hispanic.<sup>119</sup> Marc Mauer suggests that these disparities may be explained by residential housing patterns.<sup>120</sup> Because “urban areas are more densely populated than suburban or rural areas,” and “African Americans are more likely to live in urban neighborhoods than are whites, African Americans convicted of a drug offense are subject to harsher punishments than whites committing the same offense in a less populated area.”<sup>121</sup>

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113. Mauer, *supra* note 3, at 25 (citing RYAN S. KING & MARC MAUER, THE SENTENCING PROJECT, DISTORTED PRIORITIES: DRUG OFFENSES IN STATE PRISONS (2002), available at [http://www.sentencingproject.org/doc/File/Drug%20Policy/dp\\_distortedpriorities.pdf](http://www.sentencingproject.org/doc/File/Drug%20Policy/dp_distortedpriorities.pdf)).

114. *Id.* at 29.

115. *Id.* at 20–21.

116. *Id.* at 21 (citing U.S. SENTENCING COMM’N, REPORT TO THE CONGRESS: COCAINE AND FEDERAL SENTENCING POLICY 15–16 (2007)).

117. *Id.* at 29–30.

118. *Id.*

119. THE N.J. COMM’N TO REVIEW CRIMINAL SENTENCING, REPORT ON NEW JERSEY’S DRUG FREE ZONE CRIMES AND PROPOSAL FOR REFORM 10, 23 (2005), available at [http://sentencing.nj.gov/dfz\\_report.pdf.html](http://sentencing.nj.gov/dfz_report.pdf.html).

120. Mauer, *supra* note 3, at 29–30 (2007) (citing JUDITH GREENE ET AL., JUSTICE POL’Y INST., DISPARITY BY DESIGN (2006), available at [http://www.justicepolicy.org/uploads/justicepolicy/documents/06-03\\_rep\\_disparitybydesign\\_dp-jj-rd.pdf](http://www.justicepolicy.org/uploads/justicepolicy/documents/06-03_rep_disparitybydesign_dp-jj-rd.pdf)).

121. *Id.* at 30.

Similar reasoning may apply to laws outside the drug context. That is, other laws that significantly affect individuals living in concentrated urban areas may disproportionately impact African Americans.<sup>122</sup> In addition, the overlap between race and class generally suggests laws that impact low-income individuals will have disproportionately higher impacts on African Americans.<sup>123</sup> However, Mauer explains that “social class has [not necessarily] replaced race as the determining factor in producing disparities.”<sup>124</sup> To illustrate this point, he notes that racial profiling in traffic stops is based on race rather than class, and that “the disadvantages that accrue from poverty are magnified” for African Americans, who often live in areas of more “concentrated poverty” with fewer opportunities.<sup>125</sup>

### B. *Mandatory Minimum Penalties*

Mandatory minimum penalties are one of the primary driving forces of the dramatic increase in incarceration rates<sup>126</sup> and racial disparities<sup>127</sup> in the criminal justice system. These laws, as their name implies, “require the judge to impose a given minimum sentence upon conviction under a specified charge.”<sup>128</sup> Mandatory minimum laws have existed since our nation’s founding,<sup>129</sup> but they emerged with greater force in the “tough on crime” era.<sup>130</sup> Although these new mandatory minimums applied in a number of contexts, among the most common were drug offenses, firearm enhancements, and child sexual exploitation statutes.<sup>131</sup> These penalties grew in strength and force by increasing in length and

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122. See Murray, *supra* note 2, at 1554 (“America is still, as a factual matter, a segregated society.”).

123. London, *supra* note 3, at 215–16 (noting differential poverty rates between races and concluding “[m]inority over-representation in the criminal justice system is partly influenced by the socioeconomic disadvantages of minority populations”).

124. Mauer, *supra* note 3, at 28.

125. *Id.*

126. U.S. SENTENCING COMM’N, MANDATORY MINIMUM PENALTIES IN THE FEDERAL CRIMINAL JUSTICE SYSTEM 94 (2011), available at <http://www.ussc.gov/news/congressional-testimony-and-reports/mandatory-minimum-penalties/report-congress-mandatory-minimum-penalties-federal-criminal-justice-system> [hereinafter MANDATORY MINIMUM PENALTIES].

127. *Id.* at 101–02.

128. Stephen J. Schulhofer, *Rethinking Mandatory Minimums*, 28 WAKE FOREST L. REV. 199, 202 (1993).

129. MANDATORY MINIMUM PENALTIES, *supra* note 126, at 7.

130. Newell, *supra* note 108, at 21.

131. MANDATORY MINIMUM PENALTIES, *supra* note 126, at 22.



expanding to new categories of crimes.<sup>132</sup>

Mandatory minimums became a major tool in “the war on drugs” throughout the 1980s and 1990s.<sup>133</sup> Low-level drug offenses were suddenly subjected to harsh penalties,<sup>134</sup> which were significantly and disproportionately imposed on African Americans.<sup>135</sup> As a result, African Americans’ average sentence lengths “radically increased” compared to other racial groups.<sup>136</sup>

A few recent events may suggest some pushback toward the reigning scheme of prolific mandatory minimum sentencing. For instance, in 1994, Congress passed a “safety valve” law that allows limited downward departures from mandatory minimums.<sup>137</sup> Advocates are currently calling for a stronger version, though Congress has thus far refused.<sup>138</sup> In a stronger showing of movement away from federal mandatory minimum policies, the 2010 Fair Sentencing Act repealed and amended crack-cocaine laws (discussed further in Section II.A.).<sup>139</sup> In addition, the United States Attorney General Eric Holder asserted in a 2013 address to the American Bar Association’s House of Delegates that it is time to begin “fundamentally rethinking the notion of mandatory minimum sentences for drug-related crimes.”<sup>140</sup> The Sentencing Commission adopted Holder’s proposal in 2014, voting unanimously to lower sentences for most drug offenders.<sup>141</sup> At the state

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132. *Id.*

133. SUBRAMANIAN & DELANEY, *supra* note 111, at 5 (“In the 1980s and 1990s, policymakers viewed mandatory sentences as one of their most effective weapons in combating crime—particularly in the ‘war on drugs.’”).

134. THE SENTENCING PROJECT, FEDERAL CRACK COCAINE SENTENCING 1–2 (2010), available at [http://sentencingproject.org/doc/publications/dp\\_CrackBriefingSheet.pdf](http://sentencingproject.org/doc/publications/dp_CrackBriefingSheet.pdf).

135. See generally Jamie Fellner, *Race, Drugs, and Law Enforcement in the United States*, 20 STAN. L. & POL’Y REV. 257 (2009).

136. Paul J. Hofer, *The Commission Defends an Ailing Hypothesis: Does Judicial Discretion Increase Demographic Disparity?*, 25 FED. SENT’G REP. 311, 313 (2013).

137. See Violent Crime Control and Law Enforcement Act of 1994, § 80001, Pub. L. No. 103-322, 108 Stat. 1796 (codified at 18 U.S.C. § 3553(f) (2012)).

138. See, e.g., Justice Safety Valve Act of 2013, S. 619, 113th Cong. (2013).

139. Fair Sentencing Act of 2010, Pub. L. No. 111-220, 124 Stat. 2372 (2010) (codified at 21 U.S.C. § 801 (2010)).

140. Eric Holder, U.S. Atty. Gen., Remarks at the Annual Meeting of the American Bar Association’s House of Delegates (Aug. 12, 2013) (transcript available at *Attorney General Remarks at the Annual Meeting of the American Bar Association’s House of Delegates*, U.S. DEP’T OF JUST. (Aug. 12, 2013), <http://www.justice.gov/iso/opa/ag/speeches/2013/ag-speech-130812.html>).

141. *News Release: U.S. Sentencing Commission Unanimously Votes to Allow Delayed Retroactive Reduction in Drug Trafficking Sentences*, U.S. SENT’G COMM’N (July 18, 2014), [http://www.ussc.gov/sites/default/files/pdf/news/press-releases-and-news-advisories/press-releases/20140718\\_press\\_release.pdf](http://www.ussc.gov/sites/default/files/pdf/news/press-releases-and-news-advisories/press-releases/20140718_press_release.pdf).

level, some states are beginning to more actively retreat from mandatory minimums.<sup>142</sup>

### C. *Discretion Under the Sentencing Guidelines*

Although mandatory minimum sentences (along with their counterpart, statutory maximum sentences) establish a set range of penalties for certain offenses, these minimums initially left judges with a significant amount of discretion, resulting in “an unjustifiably wide range of sentences to offenders convicted of similar crimes.”<sup>143</sup> In response, Congress passed the Sentencing Reform Act, creating a commission to establish more specific and consistent sentencing guidelines in 1984.<sup>144</sup> These guidelines set a range of penalties for federal judges to apply when sentencing criminal defendants based upon the offender’s criminal history and the seriousness of the crime, which includes an assessment of a number of specific factors.<sup>145</sup>

The birth of the Sentencing Commission had an enormous impact,<sup>146</sup> and has been called “one of the most significant modern developments in criminal law.”<sup>147</sup> Although the original Sentencing Reform Act required federal judges to follow the guidelines absent some special aggravating or mitigating circumstance, the Supreme Court in *United States v. Booker*<sup>148</sup> declared that such mandatory sentencing violated the Sixth Amendment.<sup>149</sup> However, *Booker* and subsequent cases have still essentially required federal courts to begin their analysis by considering

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142. See Rachel E. Barkow, *Panel Four: The Institutional Concerns Inherent in Sentencing Regimes, Federalism and the Politics of Sentencing*, 105 COLUM. L. REV. 1276, 1285 (2005); SUBRAMANIAN & DELANEY, *supra* note 111, at 24 nn.19–20 (report stating that twenty-nine states have taken some step to reduce mandatory minimum sentences since 2000, many in the last five years).

143. MANDATORY MINIMUM PENALTIES, *supra* note 126, at 37 (quoting S. Rep. No. 97-307, at 955 (1981)) (“Prior to the Sentencing Reform Act, federal judges possessed almost unlimited authority to fashion an appropriate sentence within a broad statutorily prescribed range and ‘decided [] the various goals of sentencing, the relevant aggravating and mitigating circumstances, and the way in which these factors would be combined in determining a specific sentence.’”).

144. See Sentencing Reform Act of 1984, Pub. L. No. 98-473, 98 Stat. 1987.

145. See Joshua B. Fischman & Max M. Schanzenbach, *Racial Disparities Under the Federal Sentencing Guidelines: The Role of Judicial Discretion and Mandatory Minimums*, 9 J. EMPIRICAL LEGAL STUD. 729, 731 (2012).

146. Lynch, *supra* note 89, at 93–94 (stating that “the Guidelines fundamentally transformed the federal criminal justice system and came to represent a new paradigm of criminal sentencing”).

147. Rachel E. Barkow & Kathleen M. O’Neill, *Delegating Punitive Power: The Political Economy of Sentencing Commission and Guideline Formation*, 84 TEX. L. REV. 1973, 1974 (2006).

148. 543 U.S. 220 (2005).

149. *Id.* at 244.

the guideline range, and frequently look skeptically upon departures from the guidelines.<sup>150</sup>

Following the adoption of the federal sentencing guidelines, almost half of all states similarly developed their own sentencing guidelines and commissions.<sup>151</sup> Like the federal guidelines, most states tend to sentence within the guidelines.<sup>152</sup>

These fairly drastic changes to the criminal justice system in a relatively short period of time have sparked a debate over the costs and benefits of mandatory (or almost mandatory, like the sentencing guidelines) sentences compared to discretion. Both mandatory minimums and the sentencing guidelines tend to shift discretionary power from judges to prosecutors.<sup>153</sup> Proponents of determinative sentencing point out that the guidelines were created following an era of great racial discrimination<sup>154</sup> and note that at least one “driving force of the guidelines movement” was “[a] concern with racial disparities.”<sup>155</sup> By significantly reducing judicial discretion, the guidelines allow for acts involving similar circumstances to be treated more consistently,<sup>156</sup> and they also reduce the possibility of human judgment playing a role in implicit or explicit racial bias in sentencing.<sup>157</sup> However, opponents point out that increased judicial discretion may reduce racial disparities.<sup>158</sup> Some opponents argue that that the guidelines have simply

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150. MANDATORY MINIMUM PENALTIES, *supra* note 126, at 39 n.246.

151. Barkow & O’Neill, *supra* note 147, at 1973.

152. See Rachel E. Barkow, *Sentencing Guidelines at the Crossroads of Politics and Expertise*, 160 U. PA. L. REV. 1599, 1621 (2012) (citing about an eighty percent compliance rate for most states).

153. Lynch, *supra* note 89, at 93–94.

154. See Fischman & Schanzenbach, *supra* note 145, at 729–30 (noting that liberal politicians and interest groups advocated in favor of the Sentencing Reform Act to help reduce racial disparities).

155. See Barkow, *supra* note 152, at 1601, 1609; Steven Nauman, Brown v. Plata: *Renewing the Call to End Mandatory Minimum Sentencing*, 65 FLA. L. REV. 855, 864 (2013) (“[A]t least twenty-one states have enacted general sentencing guidelines that mirror—or at least function in the same manner as—the Federal Sentencing Guidelines.”).

156. See Rachel E. Barkow, *Administering Crime*, 52 UCLA L. REV. 715, 717 (2005) (noting sentencing commissions “were founded on the belief that experts could develop rational sentencing policy more effectively than politicians or courts”); MANDATORY MINIMUM PENALTIES, *supra* note 126, at 85.

157. See, e.g., Ngozi Caleb Kamalu et al., *Racial Disparities in Sentencing: Implications for the Criminal Justice System and the African American Community*, 4 AFR. J. CRIMINOLOGY & JUST. STUD. 1 (2010).

158. Fischman & Schanzenbach, *supra* note 145, at 729–30 (“We find that racial disparities were generally lower during periods when judges had wider discretion, suggesting that judges exercise discretion in a manner that mitigates disparity.”).

shifted the discretionary function from the judge to the prosecutor, who exercises significant leeway in charging (and therefore influencing which categories of penalties will even apply).<sup>159</sup> Other opponents take issue with the broader idea of “one-size-fits-all” uniformity<sup>160</sup> and note its ultimate impact on disparity<sup>161</sup> and the potential benefits from individualized sentencing.<sup>162</sup>

Although it is outside the scope of this Comment to advocate for or against mandatory minimums and sentencing guidelines, the reality is that the current system has resulted in staggering rates of mass incarceration and racial disproportionality. The “most serious criticism” of the Federal Sentencing Guidelines is their failure to eliminate racial discrimination and disparities in the criminal justice system.<sup>163</sup> Since the increase in mandatory minimum penalties,<sup>164</sup> initiation of federal sentencing guidelines,<sup>165</sup> and a large increase in the sheer number of federal crimes,<sup>166</sup> the federal prison population has increased dramatically in a relatively short period of time.<sup>167</sup> The number of federal inmates has jumped from approximately 25,000 in 1980 to over

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159. See, e.g., Barkow, *supra* note 152, at 1622 (“This is the story of sentencing reform: as judges and parole officials have lost discretion, prosecutors have gained it.”); David Bjerk, *Making the Crime Fit the Penalty: The Role of Prosecutorial Discretion Under Mandatory Minimum Sentencing*, 48 J.L. & ECON. 591, 622 (2005); Jeffrey T. Ulmer et al., *Prosecutorial Discretion and the Imposition of Mandatory Minimum Sentences*, 44 J. RES. CRIME & DELINQ. 427, 451 (2007) (“Our findings support the long-suspected notion that mandatory minimums are not mandatory at all but simply substitute prosecutorial discretion for judicial discretion.”).

160. MANDATORY MINIMUM PENALTIES, *supra* note 126, at 90 (quoting Prepared Statement of Jay Rorty, American Civil Liberties Union, to the United States Sentencing Guidelines Commission at 5 (May 27, 2010)) (citation omitted).

161. See James E. Felman, Am. Bar Ass’n, Prepared Statement to the United States Sentencing Commission 10 (May 27, 2010); BUREAU OF JUSTICE ASSISTANCE, U.S. DEP’T OF JUSTICE, NATIONAL ASSESSMENT OF STRUCTURED SENTENCING 127 (1996) (“It is clear from the experiences of many States that the increased use of mandatory minimum penalties is interfering with achievement of the dual goals of reducing disparity and controlling correctional population growth.”).

162. See JUSTICE KENNEDY COMM’N, AM. BAR ASS’N, REPORTS WITH RECOMMENDATIONS TO THE ABA HOUSE OF DELEGATES 26–27 (2004), available at [http://www.americanbar.org/content/dam/aba/publishing/criminal\\_justice\\_section\\_newsletter/crimjust\\_kennedy\\_JusticeKennedyCommissionReportsFinal.authcheckdam.pdf](http://www.americanbar.org/content/dam/aba/publishing/criminal_justice_section_newsletter/crimjust_kennedy_JusticeKennedyCommissionReportsFinal.authcheckdam.pdf).

163. Susan R. Klein & Jordan M. Steiker, *The Search for Equality in Criminal Sentencing*, 2002 SUP. CT. REV. 223, 237 (2002).

164. See MANDATORY MINIMUM PENALTIES, *supra* note 126, at 71 (“Since 1991, the number of [federal] mandatory minimum penalties has more than doubled.”); *supra* Part II.B.

165. Klein & Steiker, *supra* note 163, at 237.

166. MANDATORY MINIMUM PENALTIES, *supra* note 126, at 63–66 (discussing the transformation of many traditionally state and local crimes into federal offenses during the 1990s).

167. See *id.* at 63.

219,000 in 2013.<sup>168</sup> State prison systems also expanded during this period, although less dramatically,<sup>169</sup> and reflected similar changes to sentencing policies.<sup>170</sup> The effects on racial minorities have been particularly significant.<sup>171</sup> It is time for lawmakers to think more critically about the discriminatory impacts of criminal justice laws.

### III. RACIAL IMPACT STATEMENTS

#### A. *Overview of Racial Impact Statements*

Racial impact statements are reports that predict the effect that proposed criminal justice laws or policies may have upon racial minorities.<sup>172</sup> Marc Mauer, one of the leading advocates of racial impact statements, explains the statements in relation to fiscal impact statements and environmental impact statements.<sup>173</sup> Many states have recognized that new legislation can have a negative impact upon states' budgets or environmental quality. In response, states have implemented fiscal impact statements or environmental statements, which help predict the impact a certain bill or action would have upon the budget or environment, respectively.<sup>174</sup>

Although racial impact statements operate slightly differently in various states, the following example illustrates how a typical impact statement may work. When a legislator proposes a new bill impacting the criminal justice system (for instance, a law adding or amending a crime), a designated state agency will prepare a racial impact statement. The agency will estimate the new law's effects. The type of effects measured vary by state and availability of data, but the statements commonly include estimates on how the bill will change the state's prison population and whether the new crime will disproportionately

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168. NATHAN JAMES, CONG. RESEARCH SERV., THE FEDERAL PRISON POPULATION BUILDUP: OVERVIEW, POLICY CHANGES, ISSUES, AND OPTIONS 1 (2014), available at <http://fas.org/sgp/crs/misc/R42937.pdf>.

169. Lynch, *supra* note 89, at 95 ("While states' use of imprisonment also rapidly expanded over the same period, the federal rate of growth far surpassed that of the states. In the twenty-five years between 1985 and 2010, the federal-prison population grew nearly six-fold, while the state-prison population tripled." (citations omitted)).

170. *See, e.g.*, Newell, *supra* note 108, at 21.

171. *See* Lynch, *supra* note 89, at 96; Marc Mauer, *The Impact of Mandatory Minimum Penalties in Federal Sentencing*, 94 JUDICATURE 6, 7 (2010).

172. *See* London, *supra* note 3, at 212.

173. Mauer, *supra* note 3, at 32.

174. *See infra* Part IV.B.3.

impact minorities.<sup>175</sup>

Like environmental and fiscal impact statements, the purpose of racial impact statements is to provide information to help legislators predict and evaluate potential consequences “before new legislation is enacted, rather than after the fact.”<sup>176</sup> Advocates of racial impact statements hope that providing the information to legislators will help bring to light racial disproportionalities that “could easily have been foreseen had policymakers undertaken an analysis prior to the adoption of . . . law[s],”<sup>177</sup> such as those associated with school zone drug laws or crack-cocaine sentencing.<sup>178</sup>

## B. *Racial Impact Statements by State*

Since 2007, three states—Iowa,<sup>179</sup> Connecticut,<sup>180</sup> and Oregon<sup>181</sup>—have passed racial impact legislation, and Minnesota has adopted a similar measure through its Sentencing Guidelines Commission.<sup>182</sup> As of September 2014, seven other states have attempted but failed to pass racial impact statement legislation: Texas,<sup>183</sup> Maryland,<sup>184</sup> Arkansas,<sup>185</sup> Mississippi,<sup>186</sup> Wisconsin,<sup>187</sup> Florida,<sup>188</sup> and Kentucky.<sup>189</sup>

### 1. *States That Have Adopted Racial Impact Statements*

#### a. *Minnesota*

In 2007, Minnesota became the first state to begin collecting racial impact data and making that information available before certain new

175. *See infra* Part IV.A.2.

176. Mauer, *supra* note 3, at 21 (emphasis omitted).

177. *Id.* at 31.

178. *See supra* Part II.A.

179. IOWA CODE ANN. § 2.56(1) (West, Westlaw through 2014 Reg. Sess.).

180. CONN. GEN. STAT. ANN. § 2-24b (West, Westlaw through 2014 Reg. Sess.).

181. Act of July 1, 2013, ch. 600, 2013 Or. Laws 1.

182. *See Mauer, supra* note 3, at 24.

183. H.R. 930, 81st Leg., Reg. Sess. (Tex. 2009) (left pending in subcommittee).

184. S. 679, Gen. Assemb., 430th Sess. (Md. 2012) (unfavorable report by the Senate Rules Committee).

185. S. 1093, 89th Gen. Assemb., Reg. Sess. (Ark. 2013) (died in Senate).

186. S. 2561, 2014 Leg., 129th Reg. Sess. (Miss. 2014) (died in committee).

187. S. 538, 2013–2014 Leg., 101st Reg. Sess. (Wis. 2014) (died in Senate).

188. H.R. 237, 2014 Leg., 116th Reg. Sess. (Fla. 2014) (died in Government Operations Subcommittee); S. 336, 2014 Leg., 116th Reg. Sess. (Fla. 2014) (died in Judiciary Committee).

189. S. 240, 2014 Leg., Reg. Sess. (Ky. 2014) (last noted as pending in Senate).

criminal justice laws take effect.<sup>190</sup> In addition to being the first, Minnesota is also unique among states using racial impact statements because it is the only state where the Minnesota Sentencing Guidelines Commission (MSGC), not the legislature, initiated the idea of racial impact statements and conducts the process.<sup>191</sup>

For proposed crime bills, the MSGC collects information on the predicted impact upon racial minorities and provides this information to the legislature alongside the fiscal impact note.<sup>192</sup> The Commission summarizes its work on racial impact statements in its annual reports.<sup>193</sup> Since 2009, the MSGC has prepared nine racial impact notes.<sup>194</sup> For example, in 2013, a racial impact note was prepared for a bill that was proposed to amend the list of “crimes of violence.”<sup>195</sup> The note predicted that the new law would increase racial disparity in the state prison population because it added crimes for which a disproportionate number of offenders sentenced in the past have been African American and American Indian.<sup>196</sup> Like all of Minnesota’s racial impact statements, this note was for informational purposes only, and did not comment on whether the bill should have been enacted and does not require the legislature to take any additional steps upon the prediction of a disparate impact.<sup>197</sup>

*b. Iowa*

Iowa was the first state to adopt racial impact statements through the legislative process.<sup>198</sup> The legislation passed in 2008 requires a “correctional impact statement” to be attached 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

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190. See Mauer, *supra* note 3, at 24.

191. Cf. CONN. GEN. STAT. ANN. § 2-24b (West, Westlaw through 2014 Reg. Sess.); IOWA CODE ANN. § 2.56 (West, Westlaw through 2014 Reg. Sess.); Act of July 1, 2013, ch. 600, 2013 Or. Laws 1.

192. MINN. SENTENCING GUIDELINES COMM’N, REPORT TO THE LEGISLATURE 1, 14 (2009).

193. See, e.g., *id.*

194. Minnesota refers to racial impact statements as “notes,” while most other states use the term “statement.”

195. H.R. 285, 2013 Leg., 88th Sess. § 3 (Minn. 2013) (proposed to amend MINN. STAT. § 624.712); see MINN. SENTENCING GUIDELINES COMM’N, 2014 MINN. SENTENCING GUIDELINES COMMISSION REPORT TO THE LEGISLATURE 1, 33.

196. MINN. SENTENCING GUIDELINES COMM’N, *supra* note 195 at 33.

197. *Id.* at 14.

198. Act of Apr. 17, 2008, ch. 1095, 2008 Iowa Acts 312.

or the penalty for an existing offense, or changes existing sentencing, parole, or probation procedures.”<sup>199</sup>

The legislative services agency, along with any other departments or agencies from which it may request help,<sup>200</sup> is responsible for collecting three major types of data when the impact statements are triggered: correctional, fiscal, and minority impacts. Each impact statement summarizes the current data along with estimates of the legislation’s impact on correctional institutions (i.e. prison capacity), financial concerns, and minority persons.<sup>201</sup>

This information must be attached to the relevant bill or amendment before floor debates take place.<sup>202</sup> Although the legislative services agency is responsible for making the initial determination as to whether a correctional impact statement is required,<sup>203</sup> “a member of the general assembly” may also initiate the statement by submitting a request to the agency.<sup>204</sup> Iowa has conducted more racial impact statements than any other state so far, with forty-five through 2013.<sup>205</sup>

*c. Connecticut*

Connecticut adopted racial impact statement legislation shortly after Iowa in 2008.<sup>206</sup> The initial legislation was much less detailed than Iowa’s racial impact legislation. It provided that “racial and ethnic impact statements shall be prepared,”<sup>207</sup> but did not specify how or when. Instead, it delegated authority to the Joint Standing Committee of the General Assembly on Judiciary to recommend the procedures and contents of the statements.<sup>208</sup> Although the initial legislation did specify that the impact statements must be prepared for “*certain* bills and amendments that could, if passed, increase or decrease the pretrial or

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199. *Id.* § 1.

200. IOWA CODE ANN. § 2.56(3)–(4) (West, Westlaw through 2014 Reg. Sess.).

201. Including “the estimated number of criminal cases per year that the legislation will impact . . . the impact of the legislation on minorities, the impact of the legislation upon existing correctional institutions, community-based correctional facilities and services, and jails, the likelihood that the legislation may create a need for additional prison capacity, and other relevant matters.” *Id.* § 2.56(1).

202. *Id.*

203. *Id.* § 2.56(2)(b).

204. *Id.* § 2.56(2)(c).

205. Author’s collection of racial impact statements from Iowa.

206. CONN. GEN. STAT. ANN. § 2-24b (West, Westlaw through 2014 Reg. Sess.).

207. *Id.* § 2-24b(a).

208. *Id.* § 2-24b(b).



sentenced population,”<sup>209</sup> it did not specify which bills, and again left this to the judiciary committee.<sup>210</sup>

Based on the committee’s recommendation,<sup>211</sup> which has been adopted into the current Joint Rules for the Senate and the House of Representatives,<sup>212</sup> the scope of racial and ethnic impact statements in Connecticut is now clearer. The statements can take one of three forms: (1) a racial impact statement including the estimated disparate impact on the correctional facility population and explaining that impact, (2) a statement that the information cannot be determined, or (3) a statement that the information cannot be determined within the requisite amount of time.<sup>213</sup>

Racial impact statements are not automatically attached to certain types of legislation in Connecticut.<sup>214</sup> Instead, the statements are only conducted when “a majority of the committee members present” request a statement to be prepared for a bill that may affect the “population of correctional facilities in the state.”<sup>215</sup>

Each racial impact statement in Connecticut must disclose the statement’s limited informational purpose. The Joint Rules specify that this disclaimer must read: “The following Racial and Ethnic Impact Statement is prepared for the benefit of the members of the General Assembly, solely for purposes of information, summarization and explanation and does not represent the intent of the General Assembly or either chamber thereof for any purpose.”<sup>216</sup> Although all states that currently have racial impact legislation, as well as Minnesota’s Sentencing Guidelines Commission policy, use racial impact statements for informational purposes only, Connecticut is the only state that requires a disclaimer announcing this purpose. As of December 2014, Connecticut has only conducted one racial impact statement.<sup>217</sup>

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209. *Id.* § 2-24b(a) (emphasis added).

210. *Id.* § 2-24b(b).

211. S.J. Res. 1, 2009 Gen. Assemb., Reg. Sess. (Conn. 2009).

212. Conn. Joint Rules of the Senate and the House of Representatives § 15(c)(2) (2013–2014), available at <http://www.cga.ct.gov/hco/joinrules.htm>.

213. *Id.*

214. Compare *id.*, with IOWA CODE ANN. § 2.56 (West, Westlaw through 2014 Reg. Sess.).

215. Conn. Joint Rules of the Senate and the House of Representatives § 15(c)(2).

216. *Id.*

217. 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>; see also London, *supra* note 3, at 229; Email from Christopher Reinhart, Senior Attorney, Connecticut Office of Legislative Research, to author (Sept. 22, 2014, 6:03 AM) (on file with author) (confirming that Connecticut has only conducted one racial impact statement and

*d. Oregon*

Oregon became the most recent state to pass racial impact legislation in 2013.<sup>218</sup> In 2009, a version of the bill that ultimately failed would have required “a racial and ethnic impact statement” to accompany “any legislation that may, if enacted, affect the racial and ethnic composition of the criminal offender population.”<sup>219</sup> The version that passed in 2013 instead only allows for the statements to be provided upon written request of at least one legislator from each major political party.<sup>220</sup> The 2013 version was also amended to add a sunset provision taking effect in 2018.<sup>221</sup>

Racial impact statements in Oregon are prepared by the Oregon Criminal Justice Commission.<sup>222</sup> The statements include a section on the methods and assumptions<sup>223</sup> and an estimate of the legislation’s impact on “the racial and ethnic composition of the criminal offender population,”<sup>224</sup> and upon crime victims who may be affected.<sup>225</sup> Oregon is so far the only state to consider racial impact on crime victims as well as criminal offenders.

Both policymakers and the public have the opportunity to be involved in racial impact statements in Oregon. All statements that are prepared must be available to the public.<sup>226</sup> In addition, the Secretary of State is responsible for providing statewide notice and holding a hearing where “any person may submit suggested changes or other information.”<sup>227</sup> The commission must consider information submitted both before and during the hearing<sup>228</sup> and has the opportunity to revise the final statement.<sup>229</sup>

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cannot conduct another until at least 2015).

218. S. 463, 77th Leg., Reg. Sess. § 1(2) (Or. 2013).

219. H.R. 2352, 75th Leg., Reg. Sess. (Or. 2009).

220. S. 463, 77th Leg., Reg. Sess. § 1(2) (Or. 2013); Act of July 1, 2013, ch. 600, § 1(2), 2013 Or. Laws 1.

221. Or. S. 463 § 5; Act of July 1, 2013 § 5.

222. Act of July 1, 2013 § 3.

223. *Id.* § 1(3)(b).

224. *Id.* § 1(3)(a).

225. *Id.* § 1(3)(c).

226. *Id.* § 3(7).

227. *Id.* § 3(4).

228. *Id.* § 3(4).

229. *Id.* § 3(5).

## 2. *States That Have Proposed, But Not Passed, Racial Impact Statements*

Other states have proposed racial impact legislation that ultimately failed or has not passed as of September 2014.<sup>230</sup> Four states proposed legislation with “informational-only” racial impact statements,<sup>231</sup> similar to all states that currently have racial impact statements.<sup>232</sup> Two of those states would have allowed the public to comment on racial impact statements, but would not require lawmakers to respond to projected racially disparate impacts.<sup>233</sup> But three other states took a more aggressive stance by suggesting that lawmakers should take additional steps when a racial impact statement predicts that a bill will have disparate impacts.<sup>234</sup> This section first analyzes the informational-only bills that failed in Texas, Maryland, Mississippi, and Florida, then describes the more far-reaching legislation that failed in Arkansas, Wisconsin, and Kentucky.

### a. *Texas*

In 2009, Texas proposed legislation requiring a “criminal justice policy impact statement” for every resolution that changes adult felony sanctions.<sup>235</sup> The proposed impact statements would have included information on the estimated number of affected criminal cases per year, the fiscal impact, the impact on racial and ethnic minorities, the impact on correctional facilities and prison capacity, and “any other matter the [Legislative Budget Board]<sup>236</sup> determines relevant.”<sup>237</sup> The bill never made it out of committee.<sup>238</sup>

### b. *Maryland*

Maryland proposed legislation adopting “criminal justice policy

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230. Texas, Maryland, Arkansas, Mississippi, Wisconsin, Florida, and Kentucky.

231. Texas, Maryland, Mississippi, and Florida.

232. *See supra* Part III.B.1.

233. *See* H.R. 237, 2014 Leg., 116th Reg. Sess. (Fla. 2014) (died in Government Operations Subcommittee); S. 336, 2014 Leg., 116th Reg. Sess. (Fla. 2014) (died in Judiciary Committee); S. 2561, 2014 Leg., Reg. Sess. (Miss. 2014) (died in committee).

234. Arkansas, Wisconsin, and Kentucky.

235. H.R. 930, 81st Leg., Reg. Sess. (Tex. 2009) (left pending in subcommittee).

236. TEX. GOV. CODE § 314.001 (2009).

237. Tex. H.R. 930.

238. *Id.*

impact statements” in 2012.<sup>239</sup> The statements would have attached to bills that create or significantly alter criminal offenses, penalties, sentencing procedures, parole, or probation.<sup>240</sup> The scope of the statements would have included similar information to Texas’s failed legislation, but without the catch-all “any other matter” provision.<sup>241</sup> Although the statements would not have required any additional resources and could have been incorporated into existing fiscal and policy notes,<sup>242</sup> the legislation did not pass.

*c. Mississippi*

Mississippi’s proposed “racial and ethnic impact statement” legislation failed in early 2014.<sup>243</sup> Similar to Connecticut’s, Mississippi’s legislation would have required one member of each political party to request a racial impact statement; they would not be prepared automatically for certain types of legislation.<sup>244</sup> The statements would be required to describe the proposed legislation’s impact on the “composition of the criminal offender population” for racial and ethnic groups where data is available, and provide a statement of methodologies and assumptions.<sup>245</sup> Like Oregon, Mississippi considered including the legislation’s projected effects on the racial and ethnic composition of crime victims in the impact statements.<sup>246</sup> The bill offered the opportunity for public comments and suggestions, similar to Oregon’s legislation, for impact statements attached to state ballot measures.<sup>247</sup> However, the comment period would only be available if time allowed, and failure to “prepare, file, or certify” a racial impact statement would not “prevent inclusion of the measure in the voters’ ballot.”<sup>248</sup> Mississippi failed to pass this legislation in the 2014 term.

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239. S. 679, 2012 Gen. Assemb., 430th Gen. Sess. (Md. 2012) (unfavorable report by the Senate Rules Committee).

240. *Id.*

241. *Id.*; *see also* Tex. H.R. 930.

242. Md. S. 679.

243. S. 2561, 2014 Leg., Reg. Sess. (Miss. 2014) (died in committee).

244. *Id.* § 3.

245. *Id.* § 4(a)–(b).

246. *Id.* § 4(c).

247. *Id.* § 6.

248. *Id.* § 9.

*d. Florida*

Florida failed to pass both house<sup>249</sup> and senate<sup>250</sup> versions of proposed racial impact statement legislation. The two versions had slightly different titles but no substantive differences. Florida's proposed racial impact legislation was very similar to Mississippi's legislation that failed a few months earlier.<sup>251</sup> Like Mississippi's legislation, Florida's legislation would not have required the automatic preparation of racial impact statements for certain types of legislation. Instead, a legislator must request an impact statement for proposed legislation or amendments to the state constitution.<sup>252</sup> The type of data collected would have also been similar to Mississippi's proposed racial impact statements.<sup>253</sup> The statements would have been required to include, where the information was available, the racial and ethnic composition of the criminal offender population, human services recipients, crime victims, and a statement of methodologies and assumptions.<sup>254</sup> Florida also would have included the opportunity for public comments on racial impact statements prepared for state constitutional amendments,<sup>255</sup> but this notice and comment period was not mandatory.<sup>256</sup> Both the house and senate versions failed in 2014.

*e. Arkansas*

Other states have proposed more far-reaching legislation that would have required lawmakers to respond to a racial impact statement that predicted a disparate impact for a particular bill. In 2013, Arkansas became the first state to propose such legislation.<sup>257</sup> Like Maryland, the statements would have attached to bills that create or significantly alter criminal offenses, penalties, sentencing procedures, parole, or

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249. H.R. 237, 2014 Leg., Reg. Sess. (Fla. 2014) (died in Government Operations Subcommittee).

250. S. 336, 2014 Leg., Reg. Sess. (Fla. 2014) (died in Judiciary Committee).

251. *See* Miss. S. 2561.

252. Fla. H.R. 237 § 2; Fla. S. 336 § 2.

253. *Compare* Fla. H.R. 237 § 2, *and* Fla. S. 336 § 2, *with* Miss. S. 2561 § 4.

254. Fla. H.R. 237; Fla. S. 336 § 2.

255. Fla. H.R. 237 § 3; Fla. S. 336 § 3.

256. Fla. H.R. 237 § 3(a)–(b) (imposing timing requirements); Fla. S. 336, 2014 Leg., Reg. Sess. § 3(a)(b) (same); Fla. H.R. 237 § 3(d) (“Failure to prepare, file, or certify a racial and ethnic impact statement pursuant to this section does not prevent inclusion of the proposed amendment to the State Constitution on the ballot.”); Fla. S. 336 § 3(d) (same).

257. S. 1093, 89th Gen. Assemb., Reg. Sess. (Ark. 2013) (died in Senate).

probation.<sup>258</sup> The bill assigned data collecting responsibilities to a state agency, the Office of Economic and Tax Policy, along with a criminal justice division of the University of Arkansas at Little Rock, the Department of Criminal Justice.<sup>259</sup> For bills that also have a predicted impact upon minors, the Arkansas Coalition for Juvenile Justice was also assigned to help prepare the statements.<sup>260</sup> Under the proposed legislation, the statements must include, “without limitation,” estimated information on the number of criminal cases per year affected, the impact on minorities, the impact on correctional services and capacity, and “other matters deemed relevant to the bill at issue.”<sup>261</sup>

The Arkansas bill contained a unique provision requiring further action for racial impact statements that “indicate[] a disparate impact on a minority.”<sup>262</sup> In such situations, “the sponsor of the bill shall consider whether the bill may be amended to achieve its purpose with a lessened impact upon minorities.”<sup>263</sup> The bill’s sponsor is then given three choices: (1) withdraw the bill,<sup>264</sup> (2) amend the bill and explain how the amendment will decrease the impact on minorities,<sup>265</sup> or (3) submit the bill with a written statement explaining the reasons for disregarding the minority impact.<sup>266</sup> Although the legislation failed in Arkansas, bill sponsors are planning to reintroduce the legislation in the 2015 legislative session.<sup>267</sup>

*f. Wisconsin*

Wisconsin more recently failed to pass racial impact statement legislation requiring lawmakers to take action upon the prediction of racial disparities in racial impact statements. The Wisconsin bill would have required a racial impact statement for “[a]ny bill that creates a new crime, modifies an existing crime, or modifies the penalty for an existing crime.”<sup>268</sup> The Joint Review Committee on Criminal Penalties, along

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258. *Id.* § 1(a)(1).

259. *Id.* § 1(b)(1)(A).

260. *Id.* § 1(b)(1)(B).

261. *Id.* § 1(b)(2).

262. *Id.* § 1(c)(1)(A).

263. *Id.*

264. *Id.* § 1(c)(2)(A).

265. *Id.* § 1(c)(1)(B).

266. *Id.* § 1(c)(2)(B).

267. Interview with Adjoa A. Aiyetoro, Associate Professor of Law at University of Arkansas at Little Rock, July 29, 2013.

268. S. 538, 2013–2014 Leg. § 1(1) (Wis. 2014).

with any agency from which it seeks assistance, would have been responsible for preparing the racial impact statements.<sup>269</sup> The statement would have included information such as the estimated number of criminal cases per year that the bill would affect, the impact on racial minorities, the effect on correctional institutions, and other matters that the Committee decided to include.<sup>270</sup> The statement would have been required to explicitly state whether the bill was predicted to have a disparate impact on minorities.<sup>271</sup> Similar to Arkansas's failed bill, the Wisconsin bill would have required additional action before a bill with anticipated racially disparate effects could pass.<sup>272</sup> Upon the prediction of disproportional impacts, the bill's author would have been required to either offer an amendment and describe in writing how the amendment will reduce the disparate impact,<sup>273</sup> or provide a written justification for advancing the bill despite the disparate impact.<sup>274</sup> But this legislation failed in April 2014.<sup>275</sup>

*g. Kentucky*

In 2014, Kentucky introduced racial impact statement legislation, which has not received a vote at the time of the writing of this Comment. The bill would require a racial impact statement for “*any* bill filed in the General Assembly.”<sup>276</sup> The statement must be attached to a bill before the committee could hear a bill, and a bill requiring a racial impact statement cannot pass without the statement.<sup>277</sup> The Kentucky Human Rights Commission and state agencies would prepare racial impact statements, along with assistance from the Department of Juvenile Justice for bills impacting minors.<sup>278</sup> The racial impact statements would include, “without limitation,” the estimated impact on the number of criminal cases per year, minorities,<sup>279</sup> correctional services and facilities,

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269. *Id.* § 1(2).

270. *Id.* § 1(3).

271. *Id.*

272. *Id.* § 1(5).

273. *Id.* § 1(5)(a).

274. *Id.* § 1(5)(b).

275. S. 538, 2013–2014 Leg. (Wis. 2014).

276. S. 240, 2014 Leg., Reg. Sess. § 1(1) (Ky. 2014) (emphasis added).

277. *Id.* § 1(2), (9).

278. *Id.* § 1(2), (3).

279. Defined as: “American Indian; Alaskan native; African-American; Hispanic, including persons of Mexican, Puerto Rican, Cuban, and Central or South American origin; Pacific islander; or other ethnic group underrepresented on state boards and commissions.” KY. REV. STAT. ANN.

government-operated programs, and other relevant matters.<sup>280</sup> Like the bills in Arkansas and Wisconsin, Kentucky's bill would require additional steps upon prediction of a disparate impact on minorities. A bill's sponsor may amend the bill and explain in writing how the amendment reduces impacts on minorities,<sup>281</sup> withdraw the bill,<sup>282</sup> or identify in writing the reasons for "proceeding with the bill despite the disparate impact."<sup>283</sup> If an amended bill still indicates a disparate impact (even if reduced), the sponsor must withdraw the bill or explain the reasons for proceeding despite the impact.<sup>284</sup>

#### IV. EFFECTIVE RACIAL IMPACT STATEMENTS SHOULD (1) INITIATE AUTOMATICALLY, (2) CONSIDER STANDARDS FOR DATA COLLECTION, AND (3) REQUIRE FURTHER ACTION UPON THE PREDICTION OF RACIAL DISPROPORTIONALITY

Although only four states have adopted racial impact legislation or policies so far, the scope and procedures of these statements vary across states. This Part first analyzes three major components of racial impact statements, including their initiation, data collection standards, and requirements upon the prediction of racial disproportionality. States collecting this information are taking steps in the right direction toward encouraging lawmakers to consider racial disproportionalities before new criminal justice legislation takes effect. This Comment proposes recommendations for states to implement more effective racial impact legislation based on the three components analyzed. First, racial impact statements should automatically attach to laws affecting the criminal justice system. Second, states should consider more concrete standards for data collection. Finally, effective racial impact legislation should require legislators to take additional action to seriously consider laws with a predicted disproportionate impact.

##### A. *Analysis of Racial Impact Statements*

Racial impact statements serve a similar purpose throughout all

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§ 12.070 (West, Westlaw through 2014 legislation).

280. Ky. S. 240 § 1(5).

281. *Id.* § 1(6)–(7).

282. *Id.* § 1(8)(a).

283. *Id.* § 1(8)(b).

284. *Id.* § 1(8).



states—to collect information on the estimated impact new criminal justice legislation might have upon minorities. However, there are differences both in the legislation itself and the way the statements are carried out in the various states. This section compares the approaches of currently adopted racial impact statements based on three major categories: (1) how the statements are initiated, (2) what information is collected, (3) and what steps (if any) lawmakers must take to respond to the statements.

### 1. *Initiation of Impact Statements*

First, the way racial impact statements are initiated varies. The first two states to begin issuing such statements, Minnesota<sup>285</sup> and Iowa,<sup>286</sup> have policies that automatically require racial impact statements upon certain conditions. In Minnesota, the Sentencing Guidelines Commission automatically prepares racial impact statements and attaches them to proposed crime bills alongside fiscal impact statements if a disparate impact is predicted.<sup>287</sup> Similarly, in Iowa, racial impact statements must accompany criminal justice legislation.<sup>288</sup> In contrast, racial impact statements in Connecticut and Oregon do not automatically accompany legislation; rather, the appropriate legislators must request the statements before they are prepared.<sup>289</sup> Five states that failed to pass racial impact statements proposed legislation that would have made the statements automatic and mandatory, like those policies of Minnesota and Iowa,<sup>290</sup> while two states failed to pass legislation like that of Connecticut and Oregon requiring legislators to request the statements.<sup>291</sup>

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285. *See, e.g.*, MINN. SENTENCING GUIDELINES COMM'N, *supra* note 192, at 14.

286. IOWA CODE ANN. § 2.56 (West, Westlaw through 2014 Reg. Sess.).

287. *See, e.g.*, MINN. SENTENCING GUIDELINES COMM'N, *supra* note 192, at 14.

288. *See supra* Part III.A.2.

289. In Connecticut, the statements must be requested by a majority of present committee members. Conn. Joint Rules of the Senate and the House of Representatives § 15(c)(2) (2013–2014), *available at* <http://www.cga.ct.gov/hco/joinrules.htm>. In Oregon, the statements must be requested by at least one legislator from each major political party. Act of July 1, 2013, ch. 600, § 3(1), 2013 Or. Laws 1.

290. *See* S. 1093, 89th Gen. Assemb., Reg. Sess. (Ark. 2013) (died in Senate); S. 240, 2014 Leg., Reg. Sess. (Ky. 2014); S. 679, 2012 Gen. Assemb., 430th Sess. (Md. 2012) (unfavorable report by the Senate Rules Committee); H.R. 930, 81st Leg., Reg. Sess. (Tex. 2009) (left pending in subcommittee); S. 538, 2013–2014 Leg. (Wis. 2014).

291. *See* H.R. 237, 2014 Leg., 116th Reg. Sess. (Fla. 2014) (died in Government Operations Subcommittee); S. 336, 2014 Leg., Reg. Sess. (Fla. 2014) (died in Judiciary Committee); S. 2561, 2014 Leg., Reg. Sess. (Miss. 2014) (died in committee).

## 2. *Scope of Data Collected*

Second, the type of information collected and reported in the racial impact statements differs among states. All statements include some sort of estimate on the impact a proposed bill will have upon minority populations.<sup>292</sup> Some states explicitly define the term “minority,”<sup>293</sup> while others leave it up to the agency collecting the information to define the scope and categories of data collection.

Although the statutory language generally describing the information included in racial impact statements is somewhat similar across states, the lack of specific data collection requirements contributes to quite different resulting information. For example, Iowa’s racial impact statements (or “notes”) tend to include background information on the legislation and current populations, assumptions regarding the proposed legislation, and predicted fiscal, correctional population, and minority impacts.<sup>294</sup> Similarly, Connecticut summarizes the bill and assumptions, then reports the projected impact upon minorities based on current populations (both general and correctional) and past conviction rates for similar offenses.<sup>295</sup> When the information is available, Connecticut also includes maps to show how the bill may affect different towns.<sup>296</sup> The most recent racial impact statement legislation, which was passed by Oregon in 2013, added a provision requiring a new type of data to be collected that other states had not considered in the past: projected impacts upon crime victims.<sup>297</sup>

The scope of data collected also varies based on how mandatory the data collection is deemed to be. Arkansas’s and Kentucky’s proposed legislation may have provided stricter terms, requiring four categories of data (including predicted impacts on minorities) to be collected “without limitation.”<sup>298</sup> In contrast, Connecticut allows the option of reporting either that the disparate racial and ethnic impact “cannot be determined,” or that the information cannot be determined within a specified period of

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292. CONN. GEN. STAT. ANN. § 2-24b (West, Westlaw through 2014 Reg. Sess.); IOWA CODE ANN. § 2.56 (West, Westlaw through 2014 Reg. Sess.); Act of July 1, 2013, ch. 600, 2013 Or. Laws 1; *see also* all proposed but not passed bills: Ark. S. 1093; Fla. H.R. 237; Fla. S. 336; Ky. S. 240; Md. S. 679; Miss. S. 2561; Tex. H.R. 930.

293. Ark. S. 1093 § 1(b)(2)(B) (citing ARK. CODE ANN. § 1-2-503); *see also* Ky. S. 240 § 5(b); Act of July 1, 2013 § 4(5)(a) (defining “minority” in a different section of the same bill).

294. *See, e.g.*, IOWA LEG. SERV. AGENCY, FISCAL NOTE FOR HF 2390 (2012).

295. *See, e.g.*, Reinhart & Duffy, *supra* note 217.

296. *Id.*

297. Act of July 1, 2013, ch. 600, § 1(3)(c), 2013 Or. Laws 1, 1.

298. Ark. S. 1093 § 1(b)(2); Ky. S. 240 § 1(5).

time.<sup>299</sup>

### 3. *Next Steps*

Third, what legislators must do with the data varies. All states that currently conduct racial impact statements<sup>300</sup> use them for informational purposes only, and do not require legislators to take any action even if there is a predicted disparate impact on minorities. Connecticut is the only state that makes this informational purpose explicit by requiring a disclaimer on every racial impact statement that the statement is to be used “solely for purposes of information, summarization and explanation and does not represent the intent of the General Assembly or either chamber thereof for any purpose.”<sup>301</sup>

Oregon is the only state that requires an additional step beyond collecting the racial impact data and attaching it to the relevant bill. After an initial racial impact statement is prepared in Oregon for a state measure, the public must be informed of the statement and have the ability to comment in writing and at a hearing.<sup>302</sup> The commission is required to consider the public comments, even if they are not ultimately incorporated.<sup>303</sup> These requirements are procedural only, and allow bills with predicted racial disparities to move forward without any further action or justification.

Arkansas, Wisconsin, and Kentucky recently failed to pass more demanding racial impact statement legislation that would have required additional steps upon the prediction of racial disparity.<sup>304</sup> This legislation would not have completely prohibited legislation with predicted racial disparities from being passed. In Arkansas, it would have required legislators to consider alternatives and then justify their ultimate choice.<sup>305</sup> In Wisconsin and Kentucky, the bill’s sponsor could either propose an amendment that reduced the racially disparate impact or

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299. S.J. Res. 1 § 15(c)(2)(B)–(C), 2009 Gen. Assemb., Reg. Sess. (Conn. 2009).

300. Minnesota, Iowa, Connecticut, and Oregon.

301. Conn. Joint Rules of the Senate and the House of Representatives § 15(c)(2) (2013–2014), available at <http://www.cga.ct.gov/hco/joinrules.htm>.

302. Act of July 1, 2013, ch. 600, § 3(4), 2013 Or. Laws 1, 1.

303. *Id.* § 3(5).

304. S. 1093, 89th Gen. Assemb., Reg. Sess. § 1(c)(1) (Ark. 2013) (died in Senate); S. 240, 2014 Leg., Reg. Sess. § 1(6) (Ky. 2014); S. 538, 2013–2014 Leg. § 1(5) (Wis. 2014).

305. Ark. S. 1093 § 1(c); *see supra* Part III.B.2.e (the bill’s sponsor is then given three choices: amend the bill and explain how the amendment will decrease the impact on minorities, or choose not to amend the bill and either withdraw it or proceed with a written explanation for disregarding the minority impact).

justify the decision to advance the bill despite the disparate impact in a written appendix.<sup>306</sup>

*B. Recommendations for More Effective Racial Impact Statements*

Determining the effectiveness of racial impact statements depends upon the purported goals of the statements. To some advocates, racial impact statements are simply tools to provide information that allows legislators to at least recognize, even if they do not act upon, the predicted impact on minorities before new criminal justice legislation takes effect.<sup>307</sup> Others see them as a more aggressive tool with the capacity to require legislators to seriously consider and justify policy choices likely to increase racial disparities.<sup>308</sup> The following analysis identifies where current racial impact statements fall short of these respective goals and suggests improvements for future racial impact statement legislation. Effective racial impact statements should attach automatically to legislation, include more specific standards for data collection, and require legislators to take additional steps to address a predicted disproportionate impact.

*1. Initiation: Racial Impact Statements Should Automatically Attach to All Relevant Legislation*

Despite the seemingly broad language in statutes and policies providing for racial impact statements, relatively few statements have actually been produced. States that require racial impact statements to be conducted for certain types of bills (generally, those impacting the criminal justice system) tend to conduct many more racial impact statements than Connecticut, which only produces the statements upon the request of a majority of committee members. For instance, Connecticut has only produced one racial impact statement, and Minnesota has conducted nine through its Sentencing Guidelines Commission. In stark contrast, Iowa has conducted forty-five racial

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306. Ky. S. 240 §§ 7–8; S. 538, 2013–2014 Leg. § 5 (Wis. 2014).

307. See, e.g., Rossi, *supra* note 21, at 864 (“This idea [of racial impact statements] is elegant in its simplicity. By encouraging an open dialogue that addresses the potential disparate impact new legislation might have on a jurisdiction’s minority populations, legislators will tailor bills in a more thoughtful manner.”).

308. See, e.g., Mauer, *supra* note 3, at 33 (“The public policy goal of requiring racial impact statements is quite direct: to encourage lawmakers to examine the racial effects of changes in sentencing and related policy that affect prison populations, and when necessary, to consider *alternative means* of achieving public safety goals without exacerbating unwarranted racial disparities.” (emphasis added)).

impact statements through 2013.<sup>309</sup>

Even for the more minimal view of racial impact statements, which sees the purpose as to promote legislative information and discussion, the frequency of the statements is significant. If a state only conducts one racial impact statement in a period of five years,<sup>310</sup> the statements likely do not prompt much discussion or consideration of racial impacts in the legislature. It is too soon to know whether Oregon's approach requiring one legislator from each party to request the statement will be more successful in initiating racial impact statements than Connecticut's. But based on the current legislation, the states that automatically trigger racial impact statements for criminal justice bills prepare the statements much more frequently than the state that requires legislators to request the statements. States considering adopting racial impact legislation should ensure that the statements automatically attach to criminal justice legislation—without requiring the prompting of legislators' votes—so that this important information about potential racially discriminatory impacts is available for all relevant legislation.

## 2. *Scope of Data: States Should Develop More Thorough Standards*

As noted in Part IV.A.2, the general scope of racial impact statements is broad among the states that currently collect this information. Because the legislation uses general terms to describe the data to be collected, the agencies and groups collecting this information may have a fair amount of discretion in determining exactly what sort of information to collect and how to present it.

Some scholars advocate for specific types of information to be included in racial impact statements. One article suggests three major components of racial impact statements: a background section including a description of the bill and the state's current population, a comparison of this data with prison populations to show any "disproportionate minority confinement rates," and data on disproportionate imprisonment rates and disparities predicted from the legislation.<sup>311</sup> Marc Mauer further suggests two specific types of disparities that should be measured: proportional disparities, which indicate if the bill is predicted to increase minority prison representation for a given offense,<sup>312</sup> and

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309. Author's collection of racial impact statements from Iowa.

310. See Connecticut, which has only conducted one racial impact statement as of December 2014.

311. London, *supra* note 3, at 240.

312. Mauer, *supra* note 3, at 37.

population disparities, which describe the overall impact on minority incarceration rates.<sup>313</sup> Other suggestions include more specifically defining the term “minority” (or its appropriate synonym, depending upon the bill) and requiring an analysis of both short-term and long-term impacts.<sup>314</sup>

Although stricter requirements as to the scope and presentation of data may be more helpful to informed legislative decision-making, states face a number of barriers to such comprehensive mandates. For example, states may face challenges based upon current data collection and analysis capabilities,<sup>315</sup> capacity of state agencies to distill and process this information,<sup>316</sup> and costs of imposing additional duties on existing agencies<sup>317</sup> or creating a new agency to collect the information.<sup>318</sup> Therefore, while states should strive to develop stricter requirements to make racial impact statements more comprehensive and helpful to legislators, the requirements should be reasonably assessed in light of each individual state’s relative data collection capabilities and limitations.

### *3. Next Steps: Legislation with Predicted Racial Disparities Should Require Further Action*

Regardless of the frequency at which racial impact statements are conducted or the type or amount of information contained in them, their efficacy is still limited because they allow the bill to pass through the legislature without further scrutiny. Proponents of racial impact statements point out that the statements help promote informed policy decisions and legislative accountability.<sup>319</sup> To the extent that these statements provide legislators more information regarding potential racial disparities, this is true. However, the fact that the information is available does not mean legislators will discuss or even consider the information when making policy choices.

This Comment proposes to increase the effectiveness of racial impact statements by requiring further legislative scrutiny upon the prediction of racial disproportionalities. The rationale for requiring further scrutiny

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313. *Id.* at 37–38.

314. London, *supra* note 3, at 239–40.

315. *Id.* at 233–35.

316. *Id.*

317. *Id.* at 235–36.

318. *Id.* at 238.

319. *Id.* at 246.

mirrors the contrast between fiscal impact statements, which more closely align with current racial impact statements, and environmental impact statements, which this Comment proposes as a more effective model. While fiscal impact statements tend to be informational only without requiring any further scrutiny,<sup>320</sup> environmental impact statements have more detailed procedures including consideration of alternatives and public comment periods. Effective racial impact statements should more closely resemble environmental impact statements because they require more significant and serious consideration of impacts than fiscal impact statements.

Fiscal impact statements, or fiscal impact notes, describe the projected financial impact of a bill,<sup>321</sup> initiative,<sup>322</sup> or referendum<sup>323</sup> that may increase or decrease government expenditures.<sup>324</sup> Because they are prepared quite frequently in the jurisdictions that use them, they are often fairly brief.<sup>325</sup> Fiscal impact notes estimate the cost of a proposed measure and describe its impact on the state budget.<sup>326</sup> Like current racial impact statements, fiscal impact statements are generally informational only and do not require any further scrutiny of legislation that is predicted to impact the budget.<sup>327</sup>

Environmental impact statements report the anticipated environmental effects of certain proposals.<sup>328</sup> Although they are used by agencies

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320. *See, e.g.*, ARK. CODE ANN. § 10-2-127 (West, Westlaw through 2014 2d Extraordinary Sess.).

321. *E.g.*, N.C. GEN. STAT. ANN. § 120-30.45(a) (West, Westlaw through ch. 1-117, 2014 Reg. Sess.).

322. Thirteen states require fiscal impact statements to be drafted for initiatives that “will have a monetary effect on the state’s budget.” *Preparation of a Fiscal Analysis*, NAT’L CONF. OF ST. LEGISLATURES, <http://www.ncsl.org/research/elections-and-campaigns/fiscal-impact-statements.aspx> (last visited Oct. 20, 2014).

323. *E.g.*, WASH. REV. CODE § 29A.72.025 (2012).

324. Todd Haggerty & Erica Michel, *The Role of Fiscal Notes in the Legislative Process*, 21 LEGISBRIEF 1, 1 (2013).

325. *See, e.g.*, *Fiscal Notes*, COLO. LEGIS. COUNCIL, <http://www.colorado.gov/cs/Satellite/CGA-LegislativeCouncil/CLC/1200536133924> (last visited Oct. 24, 2014) (“As required by law, the fiscal notes section provides the members of the General Assembly with a *brief* statement of the estimated fiscal impact of a bill or concurrent resolution.” (emphasis added)).

326. Haggerty & Michel, *supra* note 324; *see, e.g.*, WASH. REV. CODE § 29A.72.025.

327. *See, e.g.*, WASH. REV. CODE § 29A.72.025 (requiring fiscal impact statements for certain state ballot measures but not requiring any further action beyond the preparation and inclusion of the statement in the ballot); ARK. CODE ANN. § 19-1-303 (West, Westlaw through 2014 2d Extraordinary Sess.) (requiring that fiscal impact statements be prepared and distributed to Senate members for certain Senate bills, but not requiring any further action for bill passage).

328. *See, e.g.*, 40 C.F.R. § 1502.1 (2013).

instead of legislatures,<sup>329</sup> they still serve as a model of a type of impact statement that requires further scrutiny upon the prediction of adverse impacts. In addition to requiring a statement of predicted environmental impacts,<sup>330</sup> environmental impact statements must also include a list of “alternatives to the proposed action.”<sup>331</sup> The national act requiring environmental impact statements, along with some state versions, include public notification and comment periods and require the statements to be revised after such comment periods.<sup>332</sup> Although the agency conducting the statements must follow all of these steps and consider alternatives,<sup>333</sup> the agency is still free to reach its own conclusion as to which proposal to adopt. The act requiring environmental impact statements has thus been described as procedural, not substantive.<sup>334</sup> In other words, it does not require a particular policy to be adopted, but rather ensures that the agency has at least made a well-informed decision by forcing it to consider information and alternatives.<sup>335</sup>

Not all aspects of the environmental impact statement model are well-suited for the legislative process accompanying racial impact statements. For example, environmental impact statements often require in-depth research, very detailed findings, and a revision process, which together can last for months or even years.<sup>336</sup> However, some of the essential elements can be adopted into the legislative realm for racial impact statements, as two bills suggest.

First, Oregon’s recently-passed racial impact statement legislation adopts a notice and comment period to involve the public in the process for state measures.<sup>337</sup> The Oregon Criminal Justice Commission must consider public input and has an opportunity to revise the statement following a public comment period.<sup>338</sup> Like environmental impact statements, public comment periods for racial impact statements could

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329. National Environmental Policy Act of 1969 § 102, 42 U.S.C. § 4332(2) (2012) (requiring “all agencies of the Federal Government” to comply with the statute).

330. *Id.* § 4332(C)(ii).

331. *Id.* § 4332(C)(iii); 40 C.F.R. § 1502.14.

332. 40 C.F.R. § 1503.

333. *Id.* § 1500.3 (regulations are binding on all federal agencies).

334. CHRISTINE A. KLEIN ET AL., NATURAL RESOURCES LAW: A PLACE-BASED BOOK OF PROBLEMS AND CASES 157 (Vicki Been et al. eds., 2d ed. 2009).

335. *Id.*

336. *Id.* at 122–33.

337. Act of July 1, 2013, ch. 600, § 3, 2013 Or. Laws 1, 1.

338. *Id.* § 3(5).



help increase accountability by requiring consideration of additional information before a decision is made.

Second, similar to the alternatives required in environmental impact statements, proposed bills in Arkansas, Wisconsin, and Kentucky would have required lawmakers to consider amendments and explain a course of action when racial disparities were predicted.<sup>339</sup> Like environmental impact statements, there was no requirement that lawmakers choose a certain course of action. However, those bills did impose procedural requirements to ensure that lawmakers actually noticed and considered the impact that proposed legislation might have.<sup>340</sup>

There is no provision in current racial impact statement legislation that can “force lawmakers to consider alternative options to effectuate policy goals without ‘exacerbating racial disparities,’” contrary to proponents’ hopes.<sup>341</sup> Although current racial impact statements have the benefit of making information available to lawmakers, there is no guarantee they will actually consider that information in making a decision that impacts the criminal justice system.

Like environmental impact statements, racial impact statements need an additional component (beyond informational-only fiscal impact notes) that requires decision-makers to confront the information at hand, preferably in comparison to alternative actions. Fiscal impact statements arguably do not need such a provision because lawmakers are already predisposed to consider financial ramifications of their decisions, and to consider them seriously. In contrast, more politically sensitive issues like the environment, crime control, and race may be easier to overlook.<sup>342</sup> In order to ensure lawmakers are at least considering, if not acting upon, racial disparities in the criminal justice system, racial impact statement legislation should require lawmakers to take a hard look at that information, whether through public comment, comparison with alternatives, or other appropriate means.

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339. S. 1093, 89th Gen. Assemb., Reg. Sess. § 1(c)(1)–(2) (Ark. 2013) (died in Senate); S. 240, 2014 Leg., Reg. Sess. § 1(6)–(8) (Ky. 2014); S. 538, 2013–2014 Leg. § 1(5) (Wis. 2014).

340. See, e.g., Ark. S. 1093 § 1(c)(1) (requiring lawmakers to consider whether an amendment would lessen the disparate impact); Ky. S. 240 § 6 (same); Wis. S. 538 § 5 (requiring bill sponsor to provide written explanation for advancing bill despite the disparate impact).

341. London, *supra* note 3, at 241.

342. See Paul Butler, *Racially Based Jury Nullification: Black Power in the Criminal Justice System*, 105 YALE L.J. 677, 681 (1995) (noting that “Americans seem reluctant to have an open conversation about the relationship between race and crime” and that “[l]awmakers ignore the issue, judges run from it, and crafty defense lawyers exploit it”).

## CONCLUSION

Racial discrimination continues to pervade the modern United States criminal justice system. Facially neutral laws and sentencing policies can result in disproportionate impacts on minorities. Racial impact statements can help estimate how a new law may disproportionately impact minorities and raise this awareness before the law takes effect. A few states have started implementing this approach, to varying degrees of success. Based on a survey of currently enacted racial impact legislation and policies, effective racial impact statements should attach automatically to all legislation affecting the criminal justice system without requiring the prompting of legislators' votes. States should also strive to develop more thorough data collection standards to define the scope of racial impact statements. Finally, effective racial impact statement legislation should require legislators to follow certain procedures before passing legislation with a predicted disproportionate impact.