

# Is Justice Really Blind? Nondominant Groups in the American Justice System

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*J Am Acad Psychiatry Law* 46:416–18, 2018. DOI:10.29158/JAAPL.003785-18

From the beginning, America has prided itself on an image of its justice system as fair and impartial despite wealth, religion, race, or ethnicity. There are certainly those who assert that the belief that our criminal justice system is indeed fair and that the assertion that the system is racist is a myth.<sup>1</sup> While perception is always shaded by perspective and belief (see, for example, Wilbanks<sup>2</sup> and Weitzer<sup>3</sup>), it is important to review data on the elements of our justice system to determine the degree to which we can affirm fairness or need to challenge the status quo. I would like to assert that there is, as yet, extraordinary opportunity for improvement in virtually every step of our system. Let's briefly review the system, in sequence, from the perspective of nondominant groups—particularly black Americans—at risk of discriminatory behavior with adverse consequences.

## Initial Contact by Law Enforcement

Profiling, the practice of law enforcement personnel stopping individuals on the basis of appearance rather than behavior, has been a concern recognized and repeatedly discussed. It also creates a self-fulfilling prophecy, as the more often a group is stopped, the more often subsequent arrests will be made. This issue exists not only for adults, but notably for juveniles. One recent study utilizing data from the National Incident-Based Reporting System (NIBRS)

examined the potential role of ethnicity and race on the management of juvenile cases following arrest.<sup>4</sup> While severe criminal charges did not reflect an observed bias, Hispanic and minority youth facing less serious charges were more likely to become involved in the justice system.

As will be noted in the following, small incremental disparities may have a substantial cumulative effect. Consistent with the NIBRS study, racial disparity in the incidence of arrest was also observed in another juvenile population.<sup>5</sup> Data from 331 8th-grade students reflected that black students were almost twice as likely as white students to report a police contact, and the disparity was increased when a parent had been arrested, a sibling had a history of criminal activity, or the youth knew adults with a history of substance abuse or criminality. All of this reflects the social context for increased justice involvement.

## Use of Force

One area that has come to prominent (sometimes fulminant) national attention is the perception of racial bias in the use of lethal and non-lethal force by police. One recent study documented substantial differences, even when police acknowledge that the civilian was compliant and no arrest has been initiated. In that context, black individuals were at 21 percent greater risk of experiencing some use of force than were white individuals.<sup>6</sup> Those with mental illness are well-documented to be at greater risk of being exposed to force during police encounters, notably lethal force. In a recent large study, even in this subpopulation, those who were black and mentally ill were 2.6 times as likely as white individuals with

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Disclosures of financial or other potential conflicts of interest: None.

mental illness to die from lethal force in police encounters.<sup>7</sup>

### Likelihood of Arrest

While white and black individuals are equally as likely to use illicit drugs,<sup>8</sup> black suspects are arrested on such charges at a much higher rate. In the 1990s, black people were five times more likely to be arrested for drugs than were white people. More recently, national arrests rates for marijuana possession<sup>9</sup> were 3.7 times greater for black people than for white people (716 arrests per 100,000 black residents compared with 192 arrests per 100,000 white residents). In another national sample, despite the finding that black adolescents were less likely than white adolescents to have engaged in drug use or drug selling, they were still more likely to have been arrested.<sup>10</sup> Another meta-analysis of 27 independent data sets consistently found that minority suspects are more likely to be arrested than white suspects, with an effect size between 1.32 and 1.52.<sup>11</sup>

### Bail or Detention?

My 18 years of experience from working with a statewide correctional health care system is that those from nondominant groups are far more likely to be unable to pay even modest amounts of bail to remain in the community during the adjudication of any charges. This leads to detention in jail, separation from family and social support, and limitation on access to legal counsel compared with those in the community. The latter issue in particular leads to increased likelihood of conviction and longer periods of confinement. When it comes to entirely being denied the option of bail, this also applies to nondominant groups quite clearly.<sup>12</sup> Multiple studies in a variety of settings have demonstrated that black defendants are more likely to be denied bail than white defendants,<sup>12,13</sup> although some findings suggest that this may not hold in all settings and jurisdictions.<sup>14</sup>

### Sentencing

Racial differences in sentencing have been documented repeatedly, whether in capital crimes or drug cases.<sup>15,16</sup> By one estimation, the risk of incarceration in 2008 for black men compared with white men was 7.8 times greater.<sup>17</sup> In the vast majority of cases, those in nondominant racial and ethnic groups

(black and Hispanic in particular) suffer a significant bias. While there are some data to suggest that the role of race varies across jurisdictions, poverty and level of educational attainment appear to be substantial moderators even there.<sup>16</sup>

Of particular note is the additional gender bias that exists. While men are incarcerated at greater rates than women, the incarceration rate of women has increased dramatically in the past two decades. In that context, black women are incarcerated at a rate approaching four times that of comparable white women: an incarceration rate of 190 per 100,000 versus 50 per 100,000 for all crimes. Similar proportionate bias exists when the data are examined by category of crime as well.<sup>18</sup>

### Belief, Bias, and Cumulative Disadvantage

The data and findings are compelling: we have a system that produces decisions and consequences that are biased against black individuals in particular and other nondominant groups in general. The challenge we face is what to do with this knowledge. From all of the accumulated knowledge, we know that the criminal justice system is a reflection of our individual and collective cultural biases.<sup>19</sup> The term “cumulative disadvantage” has been applied to the significant and incremental contributions of bias against nondominant members of society at each stage of contact with law enforcement and judicial processes.<sup>20,21</sup> When looking at over 185,000 criminal cases tracked by the New York County District Attorney’s office, findings reflected biases at each discretionary point: black and Latino defendants were more likely than white defendants to be detained, to receive a custodial plea offer, and to be incarcerated.<sup>21</sup>

This approach is almost the antagonistic mirror image of the affirmative “sequential intercept model” being applied to criminal justice involvement of persons with mental illness.<sup>22</sup> In this approach, each stage of law enforcement or justice contact is targeted with opportunities to intervene on behalf of affected individuals to divert them from the justice system into therapeutic programs. What if we take a similar approach to addressing racial and ethnic bias? Since the challenge exists at each discretionary point, it makes sense to unpack the overall problem into more manageable elements. I strongly believe that we have the resources and the will to address these challenges in the same way we advise our patients to deal with

the setting of life goals: one achievable step at a time, all the while keeping the goal in focus. We can build coalitions to address some of the underlying social determinants; address police beliefs and biases while supporting community safety efforts; develop legislative efforts toward bail reform and reasonable sentencing guidelines; and work with the judiciary to address prejudicial racial and ethnic beliefs. None of this is easy, but all of it is crucial to developing a just society.

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