

# STUDY HABITS: PROBING MODERN ATTEMPTS TO ASSESS MINORITY OFFENDER DISPROPORTIONALITY

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## I

### INTRODUCTION

W. E. B. DuBois identified the problem of the twentieth century as “the problem of the color line.”<sup>1</sup> Writing at the turn of that century, nearly forty years after the emancipation of the slaves, DuBois foresaw that the battle for racial equality was far from over and was likely to demand the nation’s attention for yet another hundred years. Although prescient, we now know that DuBois’s figure was, if anything, sadly optimistic. Near the close of the twentieth century, despite significant gains achieved by the civil rights movement, studies revealed the following: the country remained profoundly segregated by race;<sup>2</sup> African Americans were more likely than any other racial group to reside in lower quality and prematurely depreciated housing located farther from job opportunities;<sup>3</sup> many of the nation’s minority youth were educated in largely segregated and often overcrowded school systems afflicted by deteriorating buildings, too few textbooks, scarce library resources, obsolete equipment, and inadequately compensated faculties;<sup>4</sup> and persons of color faced a significantly higher probability of being arrested, prosecuted, and incarcerated than did whites.<sup>5</sup> This article limits its focus to this last aspect of the continuing battle for

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I am grateful to Andy Taslitz for inviting me to reflect upon some of the recent state analyses of the disproportionate number of inmates of color. I would also like to thank my colleagues at Moritz College of Law, Ohio State University, in particular Alan C. Michaels, John A. Powell, and Marc Spindelman for their willingness to read earlier drafts and their invaluable suggestions. Thanks are also owed to Jeanne Zeller, my research assistant, for her outstanding research assistance and Michele Whetzel-Newton for her customarily excellent secretarial and administrative support.

1. W. E. B. DUBOIS, *THE SOULS OF BLACK FOLK* 1 (Candace Press 1996) (1903).

2. See DOUGLAS S. MASSEY & NANCY A. DENTON, *AMERICAN APARTHEID* 70–74 (1993) (showing through block-level indices of residential segregation in thirty metropolitan centers that racial segregation hovered around eighty percent in the North and seventy percent in the South).

3. See Eduardo Bonilla-Silva, *The New Racism, in RACE, ETHNICITY, AND NATIONALITY IN THE UNITED STATES* 55, 60 (Paul Wong ed., 1999) (citing studies).

4. See *id.* at 62 (citing studies).

5. See DERRICK BELL, *RACE, RACISM AND AMERICAN LAW* 340–42 (3d ed. 1992); see also *A COMMON DESTINY: BLACKS AND AMERICAN SOCIETY* 457–58 (Gerald David Jaynes & Robin M. Williams, Jr. eds., 1989) (reporting that between 1950 and 1978 the arrest rate for blacks jumped to

racial justice in America, the problem of minority over-representation<sup>6</sup> in criminal justice systems, and the ways in which scholars have tended to study (and mis-study) the dimensions and complexities of that problem.

Three states—Oregon, Washington, and Utah—have recently taken empirical steps to assess the extent to which minorities are over-represented in their respective criminal justice systems and to seek out the root causes of any over-representation observed. The extent to which they failed or succeeded varies dramatically. This article contrasts and critiques the disparate analytical approaches utilized by these three states and offers some thoughts about how we might improve the chances of success of future similar efforts. Part II sets forth an overview of the state research groups' objectives and the wide-ranging questions they attempted to resolve. To enable a more critical look at their disparate study approaches, Part II also discusses the qualitative and quantitative standards developed over time to help researchers avoid analytical error when studying the minority over-representation problem.

Part III applies these conventional standards to the analyses conducted by the three state research groups. This discussion reveals that, despite the availability of a broad body of literature discussing problems of past research efforts and advising researchers to take a uniform approach to the study of minority offender over-representation, the three groups approached their tasks in remarkably different ways, and two of the three state groups took analytical steps widely discouraged in the literature.

Part IV shifts the focus from traditional standards of assessment to a more theoretical look at the three state studies. In this Part, I argue that all three states shared certain theoretical assumptions which caused them to leave unexamined important aspects of the over-representation problem, and which more broadly reflected the current legal tendency to search for signs of racial and ethnic bias under the pointed white hoods of intentionally racist actors.

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approximately 100 arrests for every 1000 blacks, while the arrest rate for whites was 35 arrests for every 1000 whites). The disparity in the incarceration rates of whites and blacks was even more striking. Over the course of three decades, blacks' percentage of the nation's inmate population increased from 29% (1950) to 38% (1960) to 47% (1980), a figure six times that of whites. See A. J. WILLIAMS-MYERS, *DESTRUCTIVE IMPULSES: AN EXAMINATION OF AN AMERICAN SECRET IN RACE RELATIONS: WHITE VIOLENCE* 82 (1995). A disturbing level of minority over-representation has also been a feature of the juvenile justice system. In the closing decade of the twentieth century, prevalence studies of juvenile correctional facilities conducted in sixteen states revealed that African-American youth had the highest prevalence rates in fifteen of the sixteen states studied, and that in 1995, although minorities constituted only 32% of the nation's youth population, they constituted approximately 68% of juvenile population in secure correctional facilities and other institutional environments such as training schools. See MELISSA SICKMUND ET AL., U.S. DEPARTMENT OF JUSTICE, *JUVENILE OFFENDERS AND VICTIMS: 1997 UPDATE ON VIOLENCE* 42 (1997).

6. Over-representation, as the term is used in this article, is defined as "a greater percentage of a particular ethnic group within a community's criminal justice population than that group's percentage within the community's general population." See MULTNOMAH COUNTY PUBLIC SAFETY COORDINATING COUNCIL WORKING GROUP ON MINORITY OVER-REPRESENTATION IN THE CRIMINAL JUSTICE SYSTEM, *ENSURING EQUITABLE TREATMENT IN THE CRIMINAL JUSTICE SYSTEM: ADDRESSING OVER-REPRESENTATION OF RACIAL AND ETHNIC MINORITIES* i (2000) [hereinafter OREGON].

## II

OVERVIEW OF THE STATES' OBJECTIVES AND TRADITIONAL  
PITFALLS OF SIMILAR ANALYTICAL EFFORTS

## A. An Overview of the States' Goals

The three state research groups enlisted members from a wide array of professional, racial, and gendered backgrounds,<sup>7</sup> and, although working independently, each agreed on the basic contours of a definition for the term “minority over-representation.” Over-representation existed, the states concurred, whenever the proportion of minorities processed through the criminal justice system under study exceeded the proportion such groups represented in the general population.<sup>8</sup> This definition can be captured in the following simple equation:

$$\frac{\text{percent of minority defendants in the criminal justice population}}{\text{percent of minorities in the overall population}}^9$$

Whether accepted *ex ante* as a given (as in Utah) or established after analysis (as in Oregon and Washington), each of the states confirmed that the number of minorities within their system did, in fact, out-pace the numbers of minorities in their respective communities. Each then attempted to determine whether those racial and ethnic gaps were the result of discriminatory processing decisions by decision-makers within the systems. To this end, the states asked a number of weighty questions related to over-representation. Do white and non-white offenders convicted of similar crimes receive similar or dissimilar sentences?<sup>10</sup> To the extent that dissimilarities in sentencing do exist, can they be attributed to dissimilarities in the underlying criminal behavior of the sentenced offenders?<sup>11</sup> In an age of sentencing guidelines which simultaneously limit the discretion of sentencing judges while conferring greater outcome-producing power on prosecutors, can similarities or dissimilarities be detected in the

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7. Judges, prosecutors, defense attorneys, corrections officials, and leading members of minority communities were common recruits. See RODNEY L. ENGEN ET AL., WASHINGTON STATE MINORITY AND JUSTICE COMMISSION, THE IMPACT OF RACE AND ETHNICITY ON CHARGING AND SENTENCING PROCESSES FOR DRUG OFFENDERS IN THREE COUNTIES OF WASHINGTON STATE 5, 105–07 (1999) [hereinafter WASHINGTON I]; OREGON, *supra* note 6, at 106; UTAH JUDICIAL COUNCIL'S TASK FORCE ON RACIAL AND ETHNIC FAIRNESS IN THE LEGAL SYSTEM, RACIAL AND ETHNIC FAIRNESS: REPORT ON THE STATE OF THE CRIMINAL AND JUVENILE JUSTICE SYSTEM 2–5 (2000) [hereinafter UTAH].

8. See WASHINGTON I, *supra* note 7, at 3; OREGON, *supra* note 6, at i; UTAH, *supra* note 7, at 19.

9. With sufficient data, this equation can be employed to assess over-representation at any important processing point within a criminal justice system. Thus, as a matter of theory, states would be able to determine whether minorities are disproportionately subject to intrusive action by the police such as stops, frisks, searches, citations, and arrests. Similarly, the decisions of prosecutors to bring charges or extend or withhold a plea bargain could be examined for signs of over-representation, as could the sentencing decisions of judges and the supervisory decisions of parole officers and other corrections personnel.

10. See WASHINGTON I, *supra* note 7, at 5; OREGON, *supra* note 6, at 14.

11. See WASHINGTON I, *supra* note 7, at 51; OREGON, *supra* note 6, at 22.

charging behavior of state prosecutors?<sup>12</sup> Does the race or ethnicity of the offender correlate with utilization or non-utilization of treatment-based alternatives to incarceration?<sup>13</sup> Does the lack of racial and ethnic diversity among pre-sentence investigators contribute to racially-biased sentencing recommendations?<sup>14</sup> Is there agreement or disagreement between pre-sentence investigators' sentencing recommendations, applicable sentencing guidelines, and actual sentences imposed?<sup>15</sup> To the extent that disagreements among these are found, are those disagreements correlated to race?<sup>16</sup> Do race-neutral factors that appear to influence charging or sentencing decisions have a disparate impact on members of racial or ethnic groups?<sup>17</sup>

Each of the state research groups experienced significant obstacles resulting from a lack of available data. While all were stymied to a certain extent by this problem, two of the three groups (Oregon and Washington) were able to gather sufficient data to complete their desired analyses. The remaining state (Utah), however, gave up on its effort to collect the necessary data and consequently doomed its chances of reaching any firm causal conclusions.

## B. Traditional Empirical Safeguards for Empirical Assessments of the Minority Over-Representation Problem

Before examining the reports more closely and comparing the successes and failures the three states experienced, it may be helpful to consider the body of literature that was available to guide the three research groups as they began their study efforts. Over the course of several decades, social science scholars who have conducted similar analyses of minority offender over-representation in various state systems have identified a number of flaws common to such studies: 1) the adoption of an analytical model that focused on a single rather than multiple decision-making stages in the justice process; 2) the construction of a false dichotomy between "legal" and "extra-legal" variables to test the fairness of minority disproportionality;<sup>18</sup> 3) the failure to incorporate multivariate as well as bivariate analysis; and 4) the failure to include qualitative data in design models. Each of these study defects is discussed more fully below.

### 1. *The Importance of Examining Multiple Decision Stages*

One of the most common flaws identified in over-representation studies was the tendency to analyze only one stage of the justice process at a time. On the whole, early research designers tended to focus somewhat myopically on a single decision-point in a criminal justice system when attempting to determine

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12. See WASHINGTON I, *supra* note 7, at 9, 23–30; OREGON, *supra* note 6, at 14.

13. See WASHINGTON I, *supra* note 7, at 30–34.

14. See UTAH, *supra* note 7, at 86.

15. *Id.* at 86–87.

16. *See id.*

17. See WASHINGTON I, *supra* note 7, at 20, 30–37.

18. See M. A. Bortner & Wornie L. Reed, *The Preeminence of Process: An Example of Refocused Justice Research*, 66 SOC. SCI. Q. 413, 414 (1985).

whether institutional players discriminated against offenders of color.<sup>19</sup> Very few explored multiple junctures in the criminal justice systems studied, and those that did routinely failed to contemplate the fluid influence of decisions made at various process-points. The studies ignored the way in which decisions made at early stages in the process had a tendency to flow forward and limit the options available to decision-makers at later points.

Over time, critics began to call for a broadening of the analytical treatment given to over-representation concerns.<sup>20</sup> Social scientists were urged to trace the entire journey of an offender through the justice process, beginning with the decision to arrest, then moving through a series of critical adjudication decision points (for example, detention decisions, the screening of referrals, decisions to prosecute, and sentencing decisions), culminating with the decision of correctional and parole personnel.<sup>21</sup> Researchers who heeded this advice subsequently confirmed the benefits of such an expanded approach. Small or seemingly insignificant race differentials observed at a single stage in the life of a case, empirical scholars discovered, could turn out to be “quite substantial” when the cumulative effect of those differentials at multiple processing points was taken into account.<sup>22</sup> Thus, future researchers were advised to look along the entire spectrum of justice decisions for evidence of discriminatory decision-making in order to avoid missing possible race effects.

## 2. *The Legal and Extra-Legal Variable Distinction*

Scholars who designed research models to probe the problem of minority over-representation sometimes missed indirect race effects by including in their models independent variables that unintentionally served as proxies for racial or ethnic bias or masked earlier racial or ethnic discrimination within the

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19. Donna M. Bishop & Charles E. Frazier, *The Influence of Race in Juvenile Justice Processing*, 25 J. RES. IN CRIME DELINQ. 242, 243–44 (1988) [hereinafter Bishop & Frazier, *Influence*] (citing examples). For example, some researchers probed only the sentencing decisions of judges respecting minority versus majority offenders as a means of testing the racial fairness of systemic decision-making, while eschewing examination of the actions of earlier decision-makers in the system, such as prosecutors or police officers. See Bortner & Reed, *supra* note 18, at 414. Others scrutinized racial disparities in pre-trial detention or pre-trial release decisions to the exclusion of all else. See *id.* Still others chose to analyze racial disparity at the stage of intake where the decision to proceed formally or informally was made. See *id.*

20. See, e.g., Ronald A. Farrell & Victoria Lynn Swigert, *Prior Offense Record as a Self-Fulfilling Prophecy*, 12 LAW & SOC'Y REV. 437 (1978); Allen E. Liska & Mark Tausig, *Theoretical Interpretations of Social Class and Racial Differentials in Legal Decision-Making for Juveniles*, 20 SOC. Q. 197 (1979). The point was perhaps most eloquently made in the juvenile justice realm by scholars like Professors Bortner and Reed, whose work showed “the inadvisability of focusing exclusively on one juncture of a complex decision-making process, especially final disposition.” Bortner & Reed, *supra* note 18, at 421; see also Bishop & Frazier, *Influence*, *supra* note 19, at 243.

21. See Bortner & Reed, *supra* note 18, at 421.

22. Bishop & Frazier, *Influence*, *supra* note 19, at 243, 258 (reviewing early studies of juvenile justice processing reflecting a tendency to conduct only single-stage analysis). While this more holistic approach was certainly an improvement, it failed to cure all of the ailments plaguing empirical assessments of the disproportionate numbers of minorities processed into state correctional facilities. As I will argue in Part IV, the willingness to look at discrimination across a spectrum of decision-makers is only as helpful as one's definition of “discrimination” allows.

system. The work of Carl Pope and William Feyerherm, two leading social scientists, provides an example of this easily missed flaw.<sup>23</sup> After conducting a literature review of studies of the over-representation of minority youth within juvenile justice systems, Pope and Feyerherm noted that researchers who had found no evidence of discrimination by criminal justice personnel (roughly one-third of the studies they reviewed) had included control variables in their design models such as the offender's "family composition," "stability" of the offender's family, or even prior criminal history, all of which could mask stereotypical decision-making or prior discrimination.<sup>24</sup>

Studies have suggested that even if judges, prosecutors, and probation personnel are not directly influenced by racial animus, their decisions and recommendations may nevertheless be indirectly influenced by racial or ethnic considerations. For example, in many systems justice officials make recommendations or decisions based in part on their perceptions of offenders' family circumstances.<sup>25</sup> Thus, a judge's pre-trial detention decision may be affected by the judge's perception of whether an offender's family is capable of providing sufficient supervision or support during the period of pre-trial release. If the judge perceives that the family is unlikely to provide a constructive environment for the offender, she may be more likely to order the offender detained. While, at first glance, this may appear to be an objective, race-neutral determination, it may actually obscure significant race effects if minority families are "generally perceived in a more negative light."<sup>26</sup> This is particularly true in light of findings that pre-trial detention orders may themselves be significantly correlated with negative case outcomes. For this reason, Pope and Feyerherm warned their readers that an unreflective use of such variables could lead to flawed conclusions:

[C]ontrolling for such variables *appears* to reduce the difference in treatment accorded to white and minority youths. However, logically, what has occurred in these studies is the identification of the mechanism by which differences between white and minority youths are created. Whether these type[s] of variables ought to be used in justice system decision-making, and whether they ought to produce the degree of difference between white and minority youths that they appear to produce are issues that must be addressed.<sup>27</sup>

Put slightly differently, while it may be instructive to discover that offenders from families perceived to be less "stable" than the norm—such as those headed by a single parent—are treated more harshly than other offenders, such a finding cannot inexorably lead to the conclusion that the offender has not

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23. See Carl E. Pope & William H. Feyerherm, *Minority Status and Juvenile Justice Processing: An Assessment of the Research Literature*, 22 CRIM. JUST. ABSTRACTS 327 (1990).

24. *Id.* at 334–35.

25. See, e.g., Donna M. Bishop & Charles E. Frazier, *Race Effects in Juvenile Justice Decision-Making: Findings of a Statewide Analysis*, 86 J. CRIM. L. & CRIMINOLOGY 392, 409 (1996) [hereinafter Bishop & Frazier, *Race Effects*] (reporting results of interviews with justice personnel reflecting a shared perception that minority youths were disproportionately detained due to the reality of inadequate family structures, rather than race or ethnicity).

26. *Id.*

27. Pope & Feyerherm, *supra* note 23, at 334–35 (emphasis added).

been racially or ethnically discriminated against. It does, however, expose the unnaturally constricted way in which certain researchers use the term “discrimination.”

A related methodological concern about the proper use of independent variables sometimes discussed in the literature involves the unreflective way in which some researchers perceive the “legal” and “extra-legal” variables most commonly included in design models. Some scholars tend to assume that “legal” variables are invariably objective and race-neutral. Under such an approach, if a study shows a statistically significant correlation between an offender’s prior criminal history and subsequent case disposition, the result will be considered unobjectionable. Conversely, offender treatment or outcomes shown to have been affected by certain “extra-legal” variables such as race, ethnicity, and gender were thought indefensible. The implication of this approach is that legal and extra-legal variables are both separable from and unrelated to each other, even though an ostensibly objective legal variable, such as an offender’s prior record, might itself have been tainted by the offender’s race, gender, or class.<sup>28</sup> The failure to reflect adequately about the possible influence of race or ethnicity (or other purportedly race-neutral variables) in the creation of an offender’s prior record is a flaw common to the vast majority of empirical studies of minority offender disproportionality.

### 3. *The Importance of Multivariate Assessment*

In addition to the foregoing analytical concerns, early over-representation researchers sometimes employed inadequate controls for variables that might help to explain observed race differentials. Further, they sometimes relied exclusively on bivariate analyses which made it impossible to determine whether an offender’s race or some other theoretically relevant variable affected his or her processing outcome.<sup>29</sup> Quantitative analysts avoid these difficulties today by employing multivariate models that enable them to explore the interaction effects of a number of variables and to offer more nuanced explanations for observed racial differentials. Thus, a contemporary multivariate model utilized in the over-representation context will typically include controls for an offender’s prior offense history and the seriousness of the charge pending against her<sup>30</sup> to determine whether over-representation could be explained by “race-neutral” factors.<sup>31</sup> Social variables such as gender and age

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28. See, e.g., John Hagan et al., *Ceremonial Justice: Crime and Punishment in a Loosely Coupled System*, 58 SOC. FORCES 506 (1979).

29. Simple examples of bivariate assessments might include the examination by race of the number of criminal suspects who are arrested versus the number allowed to voluntarily surrender, the number of criminal offenders ordered detained prior to trial versus released on bail, and the number of offenders sentenced to incarceration versus placed on probation.

30. See, e.g., Bishop & Frazier, *Influence*, *supra* note 19, at 245.

31. I am using the term “race-neutral” loosely here purely as a way to describe the analytical process believed to produce the most accurate and defensible empirical conclusions. These ostensibly independent variables may be anything but race-neutral if they are themselves tainted by intentional or unintentional racial bias. See Pope & Feyerhorn, *supra* note 23, at 334–35.

are also typically included. Other multivariate models include additional social factors such as the offender's socio-economic status, family structure, and school performance.<sup>32</sup>

#### 4. *The Importance of Complimentary Qualitative Assessment*

In addition to the need for careful analysis of quantitative data, researchers have long noted that qualitative information should be gathered and assessed to illuminate the social and political context from which the quantitative data is drawn. It is urged that only with a clear appreciation of the surrounding context may quantitative data fully be understood.

To illustrate this point, suppose that a study reveals through quantitative data alone that during a particular time period significantly more minority probationers were ordered confined for failing to meet with their probation officers than non-minority probationers residing in the same jurisdiction. In the absence of qualitative data to understand this probation-breaking statistic, the quantitative data could be used to explain and justify both the judicial orders and the higher incarceration rates. The data would seem to suggest that minority offenders were simply less responsible about abiding by the terms of their conditions of probation. If this was the whole story, the revocation of their grants of probation might appear entirely appropriate.

The addition of qualitative information to the study, however, could lead to a more complete understanding of the probation-breaking behavior. For example, interviews with probation officers or a closer review of case files might show that significantly more minority than non-minority probationers lived in neighborhoods located significantly farther away from the offices of their probation officers. It might also be discovered that they lacked adequate transportation to and from those meetings. This additional information, obtainable only through qualitative data-gathering efforts, raises the possibility that the probationers' non-compliant behavior could be due to structural barriers rather than a lack of responsibility among minority offenders.

### III

#### THE QUANTITATIVE AND QUALITATIVE DESIGNS EMPLOYED

The foregoing insights provide a helpful framework against which to begin to assess whether the methodologies employed by the three state research groups included sufficient quantitative and qualitative safeguards to ensure reliable results. On the quantitative front, I looked at each of the reports to determine whether the state statistical model included data that examined a single leg of the case processing system for racial effects or data that tracked a criminal case from arrest to final disposition. If the report examined multiple decision points, I then asked how comprehensive the decision points considered

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32. See, e.g., Madeline Wordes et al., *Locking Up Youth: The Impact of Race on Detention Decisions*, 31 J. RES. CRIME & DELINQ. 149 (1994).

were relative to the critical judgments made in a typical criminal case. To determine the qualitative strengths and weaknesses of the three state analytical instruments, I reviewed each of the design models to determine whether it employed traditional qualitative methodologies, such as public hearings, personal interviews, survey instruments, and case record reviews, to enable a fuller understanding of the quantitative evidence. Finally, I scrutinized the states' statistical models for evidence of failure to consider the indirect effects of race on chosen variables and their use of multivariate as well as bivariate analysis.

As described more fully below, Utah, Oregon, and Washington each undertook assessments of the over-representation problem, albeit with decidedly mixed results. All three of the state assessments studied data reflecting official action in or around the same time period, ranging from 1998 to 2000.<sup>33</sup> The research groups focused primarily on the same racial and ethnic groups,<sup>34</sup> although the groupings were not identical.<sup>35</sup> The number of cases examined in each study ranged from a high of 42,503 (Oregon) to a mid-range of 294 (Washington) to a low of virtually zero (Utah).<sup>36</sup> Each state employed a similar approach to data collection<sup>37</sup> and reported experiencing data collection problems, in varying degrees.<sup>38</sup>

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33. See WASHINGTON I, *supra* note 7, at 19, 47 (data collected between 1998 and 1999); OREGON, *supra* note 6, at 1 (study commissioned in June 1998 with almost all data from 1998); UTAH, *supra* note 7, at 17, 36 (study commissioned in 1996 with research completed in June 2000).

34. See WASHINGTON I, *supra* note 7, at 47 (white (non-Hispanic), African American, and Hispanic); OREGON, *supra* note 6, at 1 n.3 (white, African American, Hispanic, Native American, Asian, and Pacific Islander); UTAH, *supra* note 7, at 15 (white, African American, American Indian, Asian American, Hispanic, and Pacific Islander).

35. A major question deserving of future scholarly attention is the extent to which the racial categories employed in these and other studies provide an adequate basis for analysis. For the many who now believe that race is socially constructed, troublesome questions arise whenever we choose to rely on such data. See generally, MICHAEL OMI & HOWARD WINANT, *RACIAL FORMATION IN THE UNITED STATES* (1994); see also Ian F. López, *The Social Construction of Race: Some Observations on Illusion, Fabrication, and Choice*, 29 HARV. C.R.—C.L. L. REV. 1 (1994). The dilemma in brief is this: For those who consider racial categories to be socially and not biologically determined, can we legitimately use statistical information gathered upon invalid premises of “race” without promoting the unwanted effects of those racial categories? Social science researchers may downplay the variability and historically contingent nature of racial categories by treating race as a contingent biological fact rather than a social construct. See Robert S. Chang, *Critiquing “Race” and Its Uses: Critical Race Theory’s Uncompleted Argument*, in CROSSROADS, DIRECTIONS, AND A NEW CRITICAL RACE THEORY 90 (Francisco Valdes et al. eds., 2002) (arguing that critical race scholars must “think creatively about how to translate social construction theory to be meaningful to [its] target audiences”). This important question is beyond the scope of this article.

36. See OREGON, *supra* note 6, at 21 (studying arrests in Portland 1998 and three Washington counties); UTAH, *supra* note 7, at 20–21 (describing data challenges which made its task “difficult, time consuming, and at times, ultimately frustrating”). The Task Force contracted with the University of Utah’s Social Research Institute to conduct statistical research on its behalf, and its report includes several recommendations about data collection efforts that should be undertaken in the future. See UTAH, *supra* note 7, at 91–95.

37. The Oregon Working Group collected data concerning four “key decision points”: arrest, prosecution, sentencing, and supervision. OREGON, *supra* note 6, at 8. The Working Group collected its data from several local agencies, including the Gresham Police Department, the Multnomah County District Attorney’s Office, the Multnomah County Sheriff’s Office, the Department of Community Justice, and the Multnomah County Court. *Id.* at 4. The Washington Commission collected both qualitative and quantitative data on factors relevant to charging and sentencing decisions. WASHINGTON I,

Across the three research designs, the two most common decision points examined were charging decision<sup>39</sup> and sentencing outcome.<sup>40</sup> Collectively, the three research groups considered a variety of independent variables including certain social and legal characteristics of the offenders, such as race, age, gender, the severity of offenses, and prior records.<sup>41</sup> The research designs employed by Oregon and Washington utilized some form of multivariate design such as log linear or multiple regression analysis,<sup>42</sup> and also included qualitative

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*supra* note 7, at 2. The Commission first conducted in-depth interviews with court officials (judges, prosecutors, and public defenders) involved in the case processing of felony drug offenders. *Id.* The Commission then gathered information from a random sample of prosecutors' case files, including the characteristics of offenders, their actual offending behaviors, and processing decisions from arrest through sentencing. *Id.* Utah's Task Force subcommittees gathered data in a multitude of ways, including both qualitative and quantitative methods. Through a public hearing process the Task Force was able to obtain feedback from community members concerning their perceptions of race relations. UTAH, *supra* note 7, at 45–46. In addition, the Task Force gathered data about the adult criminal justice system through the following: (1) subcommittee research and reports—data collection processes included evaluations, surveys, and focus groups; (2) statistical research by the Social Research Institute (“SRI”)—empirical data was collected from several different criminal justice agencies throughout Utah and surveys of several criminal justice administrators were conducted; and (3) perception research by the SRI—data collection processes included interviews and focus groups with criminal justice personnel throughout Utah. *Id.* at 47–48. Data on the juvenile criminal justice system was collected via an examination of a sample of case files, in addition to focus groups and interviews held with youth and juvenile justice system personnel. *Id.* at 49.

38. The states reported mild-to-severe data-collection problems, primarily the difficulty of retrieving data that was sometimes warehoused haphazardly across a system of diffuse justice agencies. Other problems included the difficulty of drawing comparisons among data gathered inconsistently by justice agency personnel, and missing and unkept data. The Oregon Working Group had difficulties due to the complexity of comparing data collected at different “key decision points” in the criminal justice process and the unavailability of reliable, comparable data from which the Group could draw conclusions. OREGON, *supra* note 6, at 9. The Commission in Washington reported two limitations in its study. First, the data used included only a sample of cases that culminated in felony convictions—arrests that did not result in a formal charge or conviction and files that involved misdemeanors only were not included. Small sample size precluded conducting rigorous analyses concerning the use of alternative sanctions to prison where relatively strong racial and ethnic differences had previously been found could not be conducted. WASHINGTON I, *supra* note 7, at 71. Finally, the Task Force in Utah reported difficulties due to many factors, including the low frequency in which race data was entered in database fields, the questionable reliability of race data in existing databases, the low frequency in which race data was collected, policy changes throughout the state, the size of the Utah population, and the lack of coordination among Utah's criminal justice agencies. UTAH, *supra* note 7, at 20.

39. See WASHINGTON I, *supra* note 7, at 5, 13–15; OREGON, *supra* note 6, at 8, 13.

40. See WASHINGTON I, *supra* note 7, at 5, 15–18; OREGON, *supra* note 6, at 8, 14; UTAH, *supra* note 7, at 85–87.

41. See WASHINGTON I, *supra* note 7, at 5; OREGON, *supra* note 6, at 11–12; UTAH, *supra* note 7, at 45–49.

42. The Oregon Working Group analyzed the outcomes at each of the four decision points for members of each of the subject racial and ethnic groups. When significant variations appeared between a minority group's percentage in the general population and its percentage at one of the key decision points, the Group gathered additional information to determine if the variations were justifiable or the result of bias or discrimination. OREGON, *supra* note 6, at 9. The Washington Commission coded a random sample of 294 drug-related cases from three different counties using a previously developed survey instrument. The information coded by the Commission included basic demographic information about offenders, information about the offense committed, information concerning the circumstances of arrest, and information regarding the charging and sentencing decisions made in the sampled cases. WASHINGTON I, *supra* note 7, at 47–50.

assessments.<sup>43</sup> The research groups' most salient findings and a more detailed description of their methodologies are summarized immediately below.

#### A. The Oregon Report

The Working Group's review of statistical and demographic information within Multnomah County confirmed that minorities were in fact over-represented within the county's criminal justice system. Racial and ethnic disparities were observed at three of the four decision points examined: arrest, prosecution, sentencing, and supervision.<sup>44</sup> The Working Group benefited greatly from having among its members Professor William Feyerherm, one of the nation's leading experts on the construction of a valid quantitative model to assess the minority over-representation problem. With Professor Feyerherm's guidance, it is thus not surprising the group opted to analyze the racial fairness of decisions made by justice personnel at multiple junctures in the county's criminal justice system.

##### 1. Arrest

Beginning with the stage of arrest, the Working Group's analysis of statistical and demographic data showed that racial and ethnic minorities were disproportionately represented in most of the crime categories examined. The results differed slightly, however, in the two major cities studied within the county, Portland and Gresham.

In Portland, African Americans, Hispanics, and Native Americans were found to comprise a higher percentage of 1998 aggregated arrests than their numbers in the general population would have predicted. African Americans, who constituted only 8% of Portland residents, made up 25% of the arrests in that year, a rate greater than three times their percentage in the general population. Nine percent of the total arrests made that same year involved Hispanics, despite the fact that Hispanics comprised only 4% of Portland residents, a rate more than two times their percentage in the general population. By contrast, whites, who comprised 83% of the Portland population, represented only 62% of the total arrests, a figure well below what their numbers would have predicted. Similarly, Asians, who comprised 6% of Portland residents, represented only 2% of the total arrests.<sup>45</sup>

The aggregate arrest disparities uncovered by the Gresham study were less severe, perhaps owing in part to the different demographics of the city. His-

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43. See WASHINGTON I, *supra* note 7, at 2, 19–46; UTAH, *supra* note 7, at 45–49.

44. The group noted that it would have liked to study possible racial effects at additional points, such as pre-trial detention, pre-trial release decisions, or the negotiation of plea agreements. Likewise, it would have preferred to consider whether the race of the victim or the appointment of publicly funded versus privately retained counsel had an effect on outcome correlated with race. The data needed to complete this additional analysis, however, was either unavailable, inadequate, or insufficiently cost-effective to gather. See OREGON, *supra* note 6, at iv.

45. See *id.* at 12. The sample of Native Americans was quite small. Native Americans represented 1% of the Portland residents and 2% of the 1998 Portland arrests.

panics comprised the greatest percentage of the city's minority population (10%) and were arrested only slightly more (11%) than that percentage would have predicted. Although African Americans constituted only a very small percentage of the Gresham population (only 2%), they fared worse than Hispanics. Five percent of the total arrests made that year involved members of this minority group, more than twice their proportion of the general population. On the other hand, Native Americans were arrested less often than their numbers would have predicted (they comprised 2% of the Gresham population, but only 1% of the arrests),<sup>46</sup> as were Asians (constituting 2% of total arrests while making up 4% of the general population), while the arrest rates for whites matched their percentage in the population identically (82%).

After completing its analysis of aggregate arrest rates, the Working Group examined the arrest data more closely to detect disparities related to particular crimes and to reveal race differentials based on arrest localities that were either not apparent or less dramatic than when the data were aggregated to include arrests for all crimes and geographical districts.<sup>47</sup> This closer look at the data illuminated additional cause for concern. An examination of arrests made in the central business district of Portland, where smaller numbers of minorities resided than in the larger Portland community, revealed that minorities were in fact over-represented at arrest in numbers even greater than the aggregate arrest data suggested. African Americans constituted only 2% of that district's population but represented 25% of the district's arrests. Hispanics constituted only 3% of the district's residential population, but made up 10% of those arrested there, and Native Americans constituted scarcely 1% of the district's population, but 4% of the district's arrestees. Thus, a deeper, disaggregated look at the arrest data revealed not only over-representation at arrest for certain minorities, but an especially heightened risk of arrest for minorities present in the city's vibrant metropolitan center.

When the Working Group disaggregated the Portland arrest rates to examine whether the rates varied by nature of the offense, further disparities appeared. African Americans were hit particularly hard with respect to arrests for drug and trespass offenses, though they fared poorly in most other crime categories as well.<sup>48</sup> While comprising only 8% of Portland's overall population, African Americans constituted 25% of its overall arrests, 36% of its arrests for robbery, 37% of its total drug arrests, and 39% of its trespass arrests. Hispanics made up 4% of the overall population of Portland, but were 9% of its overall arrests, 27% of its prostitution-related arrests, 11% of its drug arrests, and experienced disproportionate arrest rates for alcohol and traffic-related

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46. *See id.*

47. *See id.* at 19 (explaining that "looking at offenders by crime category could reveal inequitable treatment not readily apparent at the aggregate level").

48. *See id.* at 12, 21 ("[E]ven if the crimes of drug and trespass, where African Americans are greatly over-represented in arrests, are not included in the total over-representation figures, African Americans are still greatly over-represented.").

offenses (14% of all DUI arrests, 12% of arrests under alcohol laws, and 12% of all traffic offenses).<sup>49</sup>

## 2. Prosecution

The Working Group observed less racial and ethnic variation at key points in the prosecution process. In this part of its quantitative analysis, the Working Group probed possible racial differentials related to rates of prosecution, dismissals, and guilty or not guilty verdicts. All of these stages of the prosecution process showed fairly consistent treatment of offenders across racial and ethnic lines. The data revealed that the District Attorney brought charges in 75% of cases referred to it and obtained convictions by plea or guilty verdict in 71% of those cases.<sup>50</sup> While Hispanic defendants were slightly over-represented in these categories (charges filed in 79% of cases involving Hispanics; convictions obtained in 77%), all other racial groups were very close to, if not below, the average.<sup>51</sup> It was noted, however, that some crimes were prosecuted at higher rates than other crimes, which the Working Group surmised could indirectly contribute to the over-representation problem.

## 3. Sentencing

The Working Group observed a disparity between minority and non-minority offenders at the point of sentencing. Review of the available data showed that African Americans and Hispanics routinely received harsher sentences than whites for crimes of equivalent severity. In addition, sentencing courts in the county offered “lenient options” more often to white and Asian defendants than to African-American, Hispanic, and Native-American defendants.

To analyze the sentencing decision-point, the Working Group separated the available sentencing options into three basic categories: probation, jail (short-term incarceration in a local correctional facility), and prison (longer-term incarceration in a state facility). The data revealed that Asian, African-American, and Hispanic defendants faced a higher probability of being sentenced to prison than white defendants.<sup>52</sup> Likewise, African-American, Hispanic, and Native-American defendants faced a higher than average probability of jail

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49. See OREGON, *supra* note 6, at 21 (concluding that further research focusing on these differential arrest rates by category might be useful, though it was “unlikely to tell the whole story of over-representation”).

50. *Id.* at 13.

51. Charges were filed in 76% of all cases involving African-American and Native-American defendants, but convictions obtained in only 70% and 73% of those cases, respectively. Asian defendants were charged 75% of the time, and white defendants 73% of the time; they were convicted in 71% (Asians) and 70% (whites) of those cases. See *id.* at 13.

52. Asian and Hispanic defendants were sentenced to prison 18% of the time. When only felony convictions were considered, the percentage grew even larger (Asians received prison sentences in 41% of the cases and Hispanics in 33% of the cases). African-American defendants were sentenced to prison in 16% of the cases, and in 30% of the felony cases. By contrast, white defendants were sentenced to prison in 14% of all cases, and in 27% of felony cases. See OREGON, *supra* note 6, at 14.

time than other defendants,<sup>53</sup> while Asian and white defendants enjoyed a higher-than-average probability of being sentenced to a term of probation rather than incarceration.<sup>54</sup> The Working Group attempted to determine whether these sentencing disparities could have been the result of different offense levels by breaking down the probation, jail, and prison data, and found that the same patterns observed in the overall sentencing data were present when felony and misdemeanor convictions were examined separately.<sup>55</sup>

To further assess the possibility that offense category or prior record might explain the observed sentencing disparities, the Working Group considered additional data reflecting the range of sentencing discretion available to the sentencing judges in a select group of felony cases. Like many other jurisdictions, Oregon has adopted sentencing guidelines that severely limit the options available to sentencing judges. The Working Group analyzed a group of felony cases in which the presiding judges retained the option to impose either probation or a term of imprisonment under the applicable guidelines (“optional probation cases”) and found that when both probation and jail time were available, sentencing judges were far more likely to sentence white offenders to probation than Hispanic or African-American offenders.<sup>56</sup>

The optional probation felony cases fell into one of two categories: those in which prison was the presumptive sentence, or those in which probation was the presumptive sentence. In both categories, white offenders fared far better than African-American and Hispanic offenders.<sup>57</sup> In the group of felony cases in which prison was the presumptive sentence, sentencing judges imposed prison terms on only 21% of white defendants, whereas African Americans in the same presumptive category received prison sentences almost 43% of the time, and Hispanics almost 60% of the time.<sup>58</sup> Put slightly differently, white offenders whose crimes presumptively called for some term of imprisonment were instead sentenced to probation twice as often as African Americans, and nearly three times as often as Hispanics.

In the group of felonies for which probation was presumptively the appropriate sentence, judges sentenced whites to probation in 48% of the cases, but sentenced African Americans to probation in only 36% of the cases. Hispanics

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53. African-American defendants received a jail sentence in 52% of all cases studied, Hispanics in 50%, and Native Americans in 55%, whereas white defendants were sentenced to jail in 47% of the cases and Asian defendants in only 27%. In felony cases, the gap was even wider. Asians and whites received jail sentences in 23% and 35% of the felony cases, respectively, while the chances of a jail term for the African Americans (42%), Hispanics (46%), and Native Americans (56%) was much higher. *See id.*

54. Asian defendants stood a 55% chance of being sentenced to probation in all cases studied, whites a 40% chance, Native Americans a 34% chance, and African Americans and Hispanics each a 32% chance. *See id.*

55. *See id.*

56. *See id.* at 23.

57. The number of cases fitting this description for Asian and Native Americans was too small to enable statistically reliable conclusions to be drawn. *See id.* at 22.

58. *See id.* at 22–23.

fares even worse. Despite the presumption in their favor, judges sentenced Hispanics to probation only 11% of the time.<sup>59</sup>

In short, notwithstanding the goal of sentencing guidelines to decrease arbitrariness and increase uniformity of treatment at sentencing, the Oregon Working Group's analysis of the sentencing data revealed fairly dramatic and disturbing variances in sentencing across racial and ethnic lines. Minorities were sentenced more harshly and whites more leniently. Moreover, by utilizing a multivariate approach, the Working Group was able to conclude that the over-representation observed in the sentencing data could not "be explained away by reference to the offense category charged or to the prior record of the individuals involved because the particular groups analyzed [were] similar with respect to" both.<sup>60</sup>

#### 4. Supervision

For African-American offenders, racial disparities continued even beyond the sentencing stage. The Working Group's quantitative analysis revealed that African-American prisoners in Multnomah County were far more likely than other minority prisoners to be subject to post-verdict supervision by the Department of Community Justice,<sup>61</sup> and more likely than other prisoners to be assessed as "high risk to re-offend."<sup>62</sup> While the percentage of African Americans subject to supervision was roughly equivalent to their percentage of the arrest data (22% subject to supervision versus 23% of all arrests), the supervision percentages for other minorities were strikingly lower than their arrest statistics.<sup>63</sup> African Americans subject to supervision were also far more likely to be administratively sanctioned while completing the terms of their release. The Department of Community Justice imposes administrative sanctions when an offender violates one or more of the conditions of supervision. These sanctions can include anything from referral to a rehabilitative program to revocation of parole.<sup>64</sup> The Working Group examined the supervision data to identify any racial differentials between the total number of offenders subject to supervision and the number of those administratively sanctioned, finding that African-American offenders experienced the greatest "discrepancy between the percent of caseload and the percent receiving administrative sanction."<sup>65</sup>

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59. *See id.* at 23.

60. *See id.* at 24.

61. The Department oversees the supervision of adult offenders sentenced to probation, released from custody on parole, or sentenced to prison and some form of post-prison supervision. *See OREGON, supra* note 6, at 17.

62. This disparity raises questions about whether institutional personnel, even if not motivated by racial animus, were indirectly influenced by racial considerations.

63. Asians comprised 2.3% of all arrests (in Portland, Gresham, and the Sheriff's Office) but only 1.8% of the cases subject to state supervision. Native Americans comprised 2.1% of the arrests, but only 1.2% of the state supervised cases. Hispanics comprised 9.5% of the arrests and only 4.9% of the cases subject to state supervision. The numbers for whites were higher, probably due to their higher rates of probation (63% of arrests, 70.1% of supervised cases). *See id.*

64. *See id.*

65. *Id.*

Although they constituted only 22% of those subject to post-conviction state supervision, African Americans represented 36% of the cases in which administrative sanctions were imposed.<sup>66</sup> In addition to being sanctioned in numbers disproportionate to their percentage of the supervised cases, further analysis of the types of sanctions administered revealed that supervised African Americans received the most odious of available administrative sanctions—revocation of parole and incarceration—slightly more often than the overall proportion of offenders received that sanction (79% versus 77%).<sup>67</sup> In summary, the Oregon report described an over-representation problem for certain minorities that began at the “front door” of the county jailhouse and continued as they proceeded to sentencing and post-adjudication supervision. By comparison, white offenders fared better at nearly every decision point examined.

### 5. *Critique of the Oregon Report*

Measured against the traditional standards for empirical reliability, the analytical approach taken by the Working Group, including multivariate as well as bivariate analysis at multiple junction points, helped to ensure the integrity of its conclusions. The Group’s willingness to delve deeper into the data by “disaggregating” it into sub-districts provided even greater assurance of the reliability of its quantitative results. Although it is important to have sufficient data to work with, there are empirical drawbacks to aggregating data across city or county lines, or indiscriminately using state-wide data. When data from two or more jurisdictions with different experiences are aggregated, the combination of the data can have the effect of diluting otherwise observable racialized patterns of decision-making and “obscure identification of jurisdictions in which minorities are at a considerable disadvantage.”<sup>68</sup>

A possible concern about the Oregon Working Group’s approach is that there was no documented effort to gather qualitative information to better inform its quantitative results. As shown in Part II, doing so might have led to a better understanding of the findings in the report about administrative sanc-

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66. By contrast, each of the other racial and ethnic groups examined made up a smaller percentage of the “sanctioned” group than their percentage of the “supervised” group. White offenders made up 70% of the supervised cases, but only 59% of the sanctioned cases. Asians constituted 1.8% of the supervised cases and 0.7% of the sanctioned cases. Hispanics represented 4.9% of the supervised cases and 2.6% of those administratively sanctioned. Native Americans constituted 1.2% of those under supervision, and 1.6% of those sanctioned. *Id.*

67. *See id.* at 102.

68. *See* Pope & Feyerherm, *supra* note 23, at 335. Professors Pope and Feyerherm detected such a skewing effect in a study they conducted of statewide juvenile justice data from Florida and California. The scholars reported that although clear racial effects were observable in several counties of those states, when data from those counties was examined on a statewide level “the strength of those patterns was considerably diminished.” *Id.* The opposite phenomenon is also possible, of course. A researcher may miss racial effects that become observable only when data from the entire state is considered in the aggregate. For example, a study of data from individual counties may display no substantial difference in the way that whites, African Americans, and Latinos are treated until those data are considered from a statewide perspective. *See id.* In short, unless researchers are careful to consider local anomalies, they may miss the trees for the forest. At the same time, failure to consider the larger statewide picture may lead them to miss the forest for the trees.

tions imposed on African-American offenders. On the whole, however, measured against conventional standards for accuracy and reliability, the analytical effort of the Oregon Working Group stands up well to critique.

#### B. The Washington Report

Unlike Oregon and Utah, the Washington Commission chose as its primary focus the role, if any, that race and ethnicity played, in the charging decisions of prosecutors respecting felony drug offenders.<sup>69</sup> Secondly, the Commission examined the effect charging decisions and other factors had on available sentencing options, in the hope that such an examination might provide further insight into the racial and ethnic disparities that had been detected at the sentencing level by a statewide study completed the year prior in 1999.<sup>70</sup> The earlier study had employed a multinomial logistic regression model to analyze a database of 25,030 felony drug convictions entered over a three-and-a-half-year period (July 1, 1995 to December 31, 1998). After controlling for a variety of legal factors, the earlier study found “relatively small” racial and ethnic effects on offender sentence length,<sup>71</sup> but “considerable” racial and ethnic effects on the type of sentence employed,<sup>72</sup> and “significant variation” across racial and ethnic groups in the employment of sanctions alternative to imprisonment.<sup>73</sup>

The Commission purported to explore these sentencing disparities “in greater depth” in its later study by considering the impact prosecutors’ charging decisions might have had on the sentencing options available to judges.<sup>74</sup> It also gathered and analyzed data not considered in the earlier study, such as quantity of drugs involved in the offenses and “more accurate indicators of ethnicity” to help explain the sentencing disparities observed. In addition, the Commission gathered qualitative information to help provide a more complete understanding of observed differentials.<sup>75</sup> Given its goal of improving on the earlier sentencing study by, among other things, adding a second stage of the criminal jus-

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69. See WASHINGTON I, *supra* note 7, at 5.

70. See *id.*; see also WASHINGTON STATE MINORITY AND JUSTICE COMMISSION, RACIAL AND ETHNIC DISPARITIES IN SENTENCING OUTCOMES FOR DRUG OFFENDERS IN WASHINGTON STATE (1999) [hereinafter WASHINGTON II].

71. See WASHINGTON II, *supra* note 70, at 17–18. The study found that while “the overall impact of race and ethnicity on sentence length appear[ed] to be small, net of legal factors,” some differences did appear. *Id.* at 17. “Most notably, the effects of conviction of drug delivery, and offense involving hard drugs, each [had] a slightly greater impact on sentence length for minority offenders than for white offenders.” *Id.* at 17–18.

72. See *id.* at 19. The study found, controlling for differences in offending, “the likelihood of incarceration is considerably greater for racial/ethnic minorities than it is for white offenders.” *Id.*

73. See *id.* at 23.

74. The predominant theme of the study was that prosecutors’ charging decisions so greatly affect the options available to sentencing judges that even if racial or ethnic disparities were seen at sentencing, the source of those disparities would likely lie with prosecutors, not sentencing judges. The Commission provided several examples of the interrelated nature of charging decisions and sentencing outcomes. If, for example, the prosecutor chose to charge that a drug offense occurred within a certain distance from a school, the sentencing guidelines would call for a sentencing enhancement of the offense score, which would open up the possibility of a harsher sentencing range. See *id.* at 12.

75. See *id.* at 6.

tice process (the charging stage), it is perplexing that the Commission chose to analyze only a small fraction of the cases analyzed in the earlier study. As noted previously, the 1999 sentencing study gathered and analyzed data reflecting more than 25,000 felony drug convictions entered across the state of Washington over a three-year period. By contrast, the Commission based its more recent analysis of charging and sentencing decisions on a randomly selected pool of 301 felony drug convictions entered in three counties of the state in a single year. Due to the small sample size, only five of the cases in the sample involved Native-American offenders and only three involved Asian-American offenders. Concerns about the lack of statistical significance of those cases led the Commission to eliminate those minority groups from the database. This reduced the data to 294 cases, involving white, African-American, and Hispanic offenders only.<sup>76</sup>

In addition to a significantly reduced database, the Commission chose to constrict its analysis to two of the multiple processing junctions in the Washington criminal justice system (the prosecutorial and sentencing junctions), with a primary focus on only one of those stages—acts of prosecutorial discretion.<sup>77</sup> In defense of this relatively cabined focus, the Commission reasoned that the adoption of sentencing guidelines had dramatically shifted the control over sentencing outcomes from judges to prosecutors. In the Commission's view, this justified a more tailored analysis of how, if at all, offenders' race or ethnicity related to prosecutors' charging decisions<sup>78</sup> rather than judge's sentencing decisions, since the prosecutors' charging decisions inevitably would impact and limit the sentencing options open to judges.<sup>79</sup> The Commission also noted that the earlier state sentencing study had focused exclusively on the role race and ethnicity had played in sentencing decisions, and thus special attention to the charging stage was warranted.<sup>80</sup>

In defense of its choice to study data related to the possible disparate effect of charging decisions regarding *drug offenders* as opposed to all offenders, the Commission noted simply the dramatic and disproportionate increase in the number of minorities imprisoned after the nation declared its "war on drugs."<sup>81</sup> The Commission's report is silent as to whether the group considered the possi-

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76. The Commission limited its study to King, Pierce, and Yakima counties, the counties responsible for roughly half of the state's felony drug prosecutions and three-quarters of the African-American and Hispanic sentenced drug offenders. See WASHINGTON I, *supra* note 7, at 19.

77. The Commission criticized the earlier study for examining only one stage of the justice process, sentencing, even though it was content to add only one additional stage to its inquiry. See *id.* at 4.

78. Charging includes decisions to file, amend, or dismiss charges, and decisions to extend or withhold a plea bargain.

79. See generally MICHAEL H. TONRY, SENTENCING MATTERS (1996).

80. See WASHINGTON I, *supra* note 7, at 3. The earlier study had explored racial and ethnic disparities in sentencing outcomes for drug offenders and had concluded that while minority drug offenders received longer sentences on average than non-minority offenders, the differences were principally, though not entirely, attributable to legal versus extra-legal factors.

81. *Id.* at 3–4.

bility that such a single-offense emphasis might cloak disparities made visible only by cross-offense comparisons.

*1. The Washington Commission's Quantitative Analysis*

*a. Prosecutors' charging decisions.* Beginning with an examination of prosecutor's charging decisions, the Commission sorted its data into three drug offense types charged: delivery offenses, anticipatory delivery offenses, and possession offenses. The Commission analyzed the data by county to determine county level differences in "offender and offense types, police activity, and charging practices."<sup>82</sup> The Commission found that while "whites were far more likely to be arrested for possession (63%)," and "African American and Hispanic offenders were more likely to be arrested for delivery type offenses (72% and 58% respectively),"<sup>83</sup> by the time of charging, the minorities benefited from considerable movement toward the lesser possession offense. While charging disparities were not completely eliminated after the arrest stage,<sup>84</sup> the Commission believed it significant that the percentage of African-Americans charged with drug possession rather than drug delivery grew from the time of their arrest (28% to 45%), and the percentage of Hispanics charged with possession rather than delivery grew from the time of their arrest (42% to 53%). By the time of conviction, the Commission noted even greater movement. While nearly 80% of all those arrested on delivery charges were initially charged with a delivery offense, by the time of conviction, only about one-third of that group was actually convicted on a delivery charge. This statistic reflected significant plea bargaining behavior by prosecutors that appeared unrelated to racial and ethnic factors.<sup>85</sup> "[T]he data provide no evidence that race and ethnicity are important factors affecting charging decisions for drug offenders,"<sup>86</sup> the Commission concluded. While prosecutors routinely changed offenders' charges between initial filing and conviction, this plea bargaining behavior did not consistently appear to "advantage or disadvantage any particular group of offenders."<sup>87</sup> Rather, the longer sentences received by minorities appeared to result from "legal" factors, such as the type of controlled substance involved in the offense conduct.

*b. Prosecutors' sentencing recommendations.* The Commission also explored prosecutors' sentencing recommendations by race and ethnicity of offenders. After reviewing the sentence recommendations in the 294 cases, the Commission acknowledged that "on average prosecutors recommend significantly longer sentences for blacks (on average twelve months longer) than for

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82. *Id.* at 52.

83. *Id.* at 55.

84. Whites were still more likely than African Americans and Hispanics to be charged with a possession offense.

85. See WASHINGTON I, *supra* note 7, at 63. The group of offenders most likely to be convicted of delivery versus possession were those who declined to plead and were convicted after trial. *Id.*

86. *Id.* at 2.

87. *Id.*

whites.”<sup>88</sup> After controlling for type of crime, however, the Commission concluded that the differentials were due to legal, not extra-legal factors. As would be expected, the Commission wrote “prosecutors recommend longer sentences for those offenders convicted of delivery and anticipatory offenses as opposed to those convicted of simple possession.”<sup>89</sup> Thus, the disparity in prosecutors’ sentencing recommendations did not strike the Commission as attributable to racial or ethnic bias.

*c. Judges’ sentencing decision.* With respect to sentencing decisions, the Commission acknowledged that judges sentenced African-American offenders to sentences that were an average of six months longer than white offenders. Nevertheless, following the same analytic approach as that applied to prosecutors’ charging and sentencing recommendations, the Commission concluded “these differences disappear once legally relevant factors” are considered.<sup>90</sup> According to the Commission, the most significant factor in length of sentence was the applicable guideline range<sup>91</sup> rather than offender race or ethnicity. Judges simply applied the sentence the guidelines mandated based on the offender’s role in a particular crime and his criminal history.

## 2. *The Commission’s Qualitative Results*

In addition to the quantitative analysis and findings described above, the Washington Commission also gathered qualitative information by interviewing some of the key players in the state’s criminal justice system.<sup>92</sup> While most of the respondents to the interviews reported personal awareness of the over-representation of minorities within the system, as a whole they did not perceive those gaps to be attributable to racial or ethnic bias by prosecutors or judges. Rather, most opined that the disparities were due to differences in offending behavior, such as the type of drug involved<sup>93</sup> or the nature of the offender’s connection to it, which could lead to steeper sentences.<sup>94</sup> Very few interviewed by

88. *See id.* at 64.

89. *Id.* at 65.

90. *Id.* at 66.

91. The Commission concluded:

In summary, it appears that on average prosecutors recommend, and judges sentence, African-American offenders to longer periods of incarceration than they do whites, but that this can be entirely explained by the types of drug offenses that offenders are convicted of, their prior criminal history, and the guidelines recommended by the State of Washington. Once legal factors are controlled, the only extra-legal factors affecting a prosecutor’s recommended sentence length is whether the case was convicted at trial. Because sentencing recommendations, and the guidelines, determine the sentence ordered, trial conviction has little or no independent effect on the actual sentence length imposed.

*Id.* at 67.

92. The Commission interviewed judges, public defenders, and prosecutors. *See WASHINGTON I, supra* note 7, at 38.

93. The quantitative data supported this anecdotal information. Of all offenders studied, 84% of African-American offenders, 71% of Hispanics, and 30% of whites were arrested for involvement with cocaine. *Id.* at 75.

94. *See id.* at 39. According to the interviewees, white offenders were arrested more often in connection with methamphetamine and marijuana, while African Americans and Hispanics were arrested

the Commission believed that offender's race and ethnicity affected processing outcomes more directly.<sup>95</sup>

A greater concern, however, was expressed about the fairness of arrest decisions. A majority of those interviewed believed that the racial and ethnic disparities among offenders could be attributable to differential arrest rates. While the respondents disagreed about whether these differences were attributable to offender or police behavior,<sup>96</sup> most pointed to this early stage as the original source of the differentials. Despite the consensus of views, the Commission declined to broaden its analysis to examine data concerning the arrest decisions of the police.<sup>97</sup> Instead, based on the quantitative<sup>98</sup> and qualitative<sup>99</sup> data gathered, the Commission concluded that it had been right to focus on the decisions of prosecutors as the critical stage for review in the state's criminal justice process.<sup>100</sup> In its view, the data provided insufficient proof that the disproportionate number of minorities processed through the Washington criminal justice system was the result of racial or ethnic bias.

### 3. *Critique of the Washington Report*

The Washington Commission's decision to tailor its focus narrowly on only two of the multiple stages of the case processing system raises serious concerns about the validity of its conclusions.<sup>101</sup> As explored in Part II, scholars have made strong arguments about the need to examine multiple junctures in a criminal justice system to reach reliable conclusions about the presence or lack of racial bias with the system.<sup>102</sup> This includes the point of arrest, the point at which the prosecutor decides or declines to move forward with the case, the point of detention or pre-trial release, the point of formal charge (such as by

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more often in connection with cocaine and heroin offenses; whites were arrested more often on suspicion of possession or manufacturing, while minorities were arrested more often on suspicion of distribution. *See id.* at 39–40.

95. *See id.* at 43–44.

96. *See* WASHINGTON I, *supra* note 7, at 37, 40–42. One judge opined that the differential arrest rates were due to the greater visibility of drug crimes committed on the street, which disproportionately involved minorities, rather than behind closed doors. Although such a policing practice would disproportionately affect minorities, it might also be justifiable, the judge reasoned, given the overtly public aspect of the criminal behavior. *See id.* at 41. Such police behavior “is not racist,” the judge concluded, even though it “has important effects on different racial groups.” *See id.* A few respondents believed that racial profiling played a role in the arrest differentials. *See id.* at 42.

97. The Commission wrote without further justification: “Because the focus of this study is on charging and sentencing decisions, we did not purposively [sic] collect information on arrest patterns.” *See id.* at 42.

98. The Commission supplemented previously gathered data from the state Sentencing Guideline Commission with data culled from prosecutors' case files regarding the quantity of drugs involved in the offense, the reasons for the arrest, and improved information about ethnicity of the offender. *See id.* at 47–50.

99. This included “in-depth interviews with court officials” including judges, prosecutors, and defense counsel. *See id.* at 5.

100. *See id.* at 2.

101. The Commission tailored its analysis in two ways, by focusing primarily on the charging decisions of prosecutors, and on felony drug offenses to the exclusion of all other offenses. *See id.* at 5.

102. *See supra* text accompanying notes 19–22.

indictment) or non-prosecution agreement, the point at which a plea-bargain is or is not struck, the point of conviction or acquittal by a factfinder, and the point of sentencing to a term of incarceration or alternative form of punishment.<sup>103</sup>

There are several advantages to following this laborious but informative data-collection process. Most important, analysts can better position themselves to determine whether variations in the decisions of institutional players are significantly correlated with race if they scrutinize the actions of multiple persons with decision-making authority vis-à-vis suspected individual offenders, such as police, prosecutors, judges, and probation personnel. If a correlation is detected, the multifaceted information provided by data associated with multiple decision points makes it possible to consider whether the “professional philosophies, organizational subcultures, and discretionary authority” of these decision-makers explain the observed disparities. Those disparities, in turn, can help to illuminate whether the racially discriminatory effects are intentional or the indirect result of institutional rules, policies, and structures.<sup>104</sup>

Failure to examine multiple decision points can also seriously limit the researcher’s ability to uncover otherwise hidden racial effects. As empiricists Donna Bishop and Charles Frazier put it, “if a researcher examines only a single decision point, such as judicial disposition, the researcher’s analyses may underestimate or altogether miss the effect of race.”<sup>105</sup> Likewise, “[i]f disparities occur at early decision points that are not examined, analyses of late-stage outcomes are likely to produce findings of no discrimination.”<sup>106</sup>

The serious implications of the Washington Commission’s decision not to expand its analysis to additional decision-makers comes into sharper focus when one contrasts its approach with that of the Oregon Working Group. As discussed above, the Oregon Working Group analyzed decisions respecting minority offenders at four junctures of its criminal justice process. Like Washington, one of those junctures was the charging decisions of prosecutors, and like Washington, the Working Group found little evidence of racial differentials related to the rates of minority prosecution, dismissals, or plea offers.<sup>107</sup> Unlike Washington, however, by extending its study beyond this single stage to four points of the justice process, the Oregon Working Group found evidence of racial and ethnic gaps which otherwise would have gone undetected. Thus, consistent with the recommendations of the literature discussed in Part II, the far more inclusive Oregon methodology produced results which underscore the

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103. See CARL POPE & WILLIAM FEYERHERM, U.S. DEP’T OF JUSTICE, OFFICE OF JUSTICE PROGRAMS, OFFICE OF JUVENILE JUSTICE AND DELINQUENCY PREVENTION, MINORITIES & THE JUVENILE JUSTICE SYSTEM: RESEARCH SUMMARY (1993).

104. See Bishop & Frazier, *Race Effects*, *supra* note 25, at 393 (examining data collected by Florida authorities related to the over-representation of minority youth in the state’s juvenile justice system).

105. See *id.* at 394.

106. *Id.*; see also Bishop & Frazier, *Influence*, *supra* note 19, at 242; Bortner & Reed, *supra* note 18, at 414.

107. See *supra* text accompanying notes 50–51, 81–91.

importance of examining multiple decision stages in the justice process. Had Oregon been content to look at charging decisions only, it too would have reached the conclusion that “no evidence” indicated that race or ethnicity affected institutional decision-makers. By looking further, Oregon observed racial and ethnic gaps across the system which worsened as minority offenders moved through the process. By failing to broaden its analysis beyond charging and sentencing, the Commission may have seriously compromised the reliability of its conclusions.<sup>108</sup>

Even if one puts aside the implications of the structural decision made by the Washington Commission to limit its analysis to only two stages of the justice process, an additional complaint may be leveled against its choice of those particular stages of the process. A growing body of literature has made the argument that over-representation problems are attributable to the selection biases of the institutional actors most responsible for the flow of bodies into those systems—namely, the police. Because the decisions made by these gatekeepers to the justice process mean the difference between investigation and non-investigation, arrest and non-arrest, actions taken by the police are worthy of especially careful scrutiny for signs of conscious or unconscious bias. Many studies suggest that over-representation problems that exist from the point of arrest escalate as arrestees proceed past additional decision points within criminal justice systems.<sup>109</sup> That is, not only do minorities enter these systems in numbers disproportionate to their numbers in the general population, but they suffer increasing racial effects as they penetrate further into these systems.

The important work of David Harris,<sup>110</sup> John Lamberth,<sup>111</sup> and others on the topic of racial profiling provides good reason to examine the racial neutrality of police investigative behavior at the level of the street.<sup>112</sup> Based on this body of work, and highly publicized racial profiling allegations across the country,

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108. A possible defense that might be offered by the Washington Commission is that the same body had completed a study a year earlier which had analyzed separately the impact of race and ethnicity on sentencing outcomes in drug cases. *See generally* WASHINGTON II, *supra* note 70. That earlier study, however, is susceptible to the same criticism: It analyzed only a single stage rather than multiple junctures of the justice process. In addition, the earlier study failed to take into account crime and offender characteristics that might have provided an explanation for why judges employed certain sentencing ranges or options. Finally, the analysis failed to incorporate qualitative information that provide a fuller understanding of the patterns that appear from the data.

109. For a particularly compelling account of the selection bias problem in the context of the over-representation of minority youths in juvenile justice systems, see Pope & Feyerherm, *supra* note 23.

110. *See* DAVID A. HARRIS, *PROFILES IN INJUSTICE: WHY RACIAL PROFILING CANNOT WORK* (2002).

111. John Lamberth, Revised Statistical Analysis of the Incidence of Police Stops and Arrests of Black Drivers/Travellers on the New Jersey Turnpike Between Interchanges 1 and 3 from the Years 1988 Through 1991 (submitted to the Court in *State v. Soto*, 734 A.2d 350, 354 (N.J. Super. 1996)).

112. These scholars have argued persuasively that the disproportionate representation of minorities in the criminal justice system may be no more mysterious than the disproportionate number of interactions between police officers and persons of color. Such interactions provide increased opportunities for the development of reasonable suspicion and probable cause, and in turn provide increased opportunities for more intrusive investigative actions, including frisks and full scale searches, which are formidable precursors to the gathering of criminal evidence.

leading social scientists studying the minority offender over-representation problem have begun to emphasize that empirical assessments of disproportionate minority offender status should proceed from the point of arrest.<sup>113</sup> Notwithstanding these calls for broader empirical inquiry, the vast majority of minority offender studies have scrutinized the conduct of justice officials who have come into contact with offenders after, and sometimes well after, the initial police-citizen contacts have occurred.<sup>114</sup>

More fundamentally, the size of the database on which the Washington Commission relied undermines the Commission's claim of improving upon the earlier sentencing study. The relatively small sample size used by the Commission (294 cases versus over 25,000 analyzed in the earlier study) unquestionably affected its ability to analyze racial and ethnic effects on sentencing decisions, even across the three counties on which it chose to focus. This decision directly affected the Commission's ability to analyze the treatment of Native-American and Asian-American offenders. No such analysis could be conducted due to its lack of statistical significance. Moreover, because the Commission chose to use a random sample of the cases considered in the earlier sentencing report, and because it limited its focus to felonies, only a few of the 294 cases studied by the Commission involved offenders who were eligible for alternative sanctions.<sup>115</sup> Thus, the Commission was unable to do anything more than note the earlier study's finding of "strong race and ethnic differences" in the use of alternative sanctions.<sup>116</sup>

Given the insurmountable hurdles presented by its choice of data, it is surprising that the Commission could feel sufficiently confident to proclaim that the racial and ethnic disparities observed by it and the earlier study were due to legal and not extra-legal factors. Perhaps more importantly, the Commission's conclusions reveal its implicit assumptions about the racial neutrality of those legal variables. It seems clear that the Commission did not conceive of the pos-

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113. See, e.g., Bortner & Reed, *supra* note 18, at 421 ("Future research will be more fruitful if we are able to trace the involvement of [an offender] cohort throughout the entire process, [including] exploring police decisions to arrest.").

114. To be fair, until recently attempts to study the impact of race and ethnicity on decisions to stop and arrest were stymied by the seemingly insurmountable problem of a lack of data. See David A. Harris, *The Stories, The Statistics, and the Law: Why 'Driving While Black' Matters*, 84 MINN. L. REV. 265 (1999). The police rarely recorded identifying information about the race or ethnicity of motorists, pedestrians, travelers, or others with whom they interacted. No laws required them to do so, and given that the voluntary collection of such data might actually be used against them, law enforcement officers perceived no upside to such data collection efforts and rarely undertook them. Even where such information was gathered, it was rarely publicly disseminated or made available for empirical study. See *id.*

115. Washington judges may sometimes choose among a number of alternatives to the imposition of a prison or jail term. Briefly, these include the option of ordering a reduced jail term and drug treatment for certain first-time offenders (known as the Drug Offender Sentencing Alternative ("DOSA")), the possibility of granting a reduced jail term and period of community service for other eligible first-time offenders (known as First-Time Offender Waiver ("FTOW")), and ordering an eligible offender's participation in a Work Ethic Camp ("WEC") with subsequent release into the community upon successful completion of the 120- to 180-day program. See WASHINGTON I, *supra* note 7, at 17-18.

116. See *id.* at 71.

sibility that disparities attributable to prior criminal history, type of drug involved in the offense, or applicable guideline range, though technically classifiable as “legal” variables, could nevertheless import significant racial and ethnic effects into the analysis.<sup>117</sup>

### C. The Utah Report

Members of the Utah Task Force unanimously accepted as a “premise fact” that minorities were over-represented at every stage within its criminal justice system.<sup>118</sup> Similar agreement existed among the group that the over-representation problem appeared to worsen as minority offenders moved deeper into the system.<sup>119</sup> As it began its work, however, the Task Force was divided about the cause of those numerical disparities. From the start, members of the group strongly disagreed about whether the presence of such differentials meant that “racial or ethnic bias existed within system.”<sup>120</sup> While conscious or unconscious bias *might* be the culprit, the Task Force noted, a number of the members of the group thought it equally plausible that heightened minority criminality was the source of the disparities (perhaps because forces of socio-economic disadvantage drove minorities to commit more crimes).<sup>121</sup>

As was true in Oregon and Washington, the Utah Task Force hoped to name the true cause of the minority over-representation problem after examining the objective data and comparing the experiences of similarly situated groups as they moved past certain decision points. In the end, however, severely limited data and the immensity of the analytic task prevented it from being able to identify the actual cause of the racial and ethnic disparities.<sup>122</sup> Thus, it abandoned its effort to confirm or deny the reality of racial or ethnic bias within the system, and refocused its attention on whether minorities in Utah perceived such bias to exist.<sup>123</sup>

As to its qualitative assessments, the Utah Task Force faced fewer obstacles. In addition to interviews with Utah attorneys and judges, the group conducted a series of public hearings to gather information about perceptions of the treatment of minorities in the system. The interviewees and hearing witnesses disagreed as to whether minorities were treated unfairly at different stages of the justice process on the basis of race or ethnicity. The opinions expressed in the

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117. *See supra* text accompanying notes 23–28.

118. *See UTAH, supra* note 7, at 17. The racial composition of the state of Utah in 1997 was approximately 89% white, 0.86% African American, 6.44% Hispanic, 2.48% Asian Pacific Islander and 1.41% American Indian. *Id.* at 41. Hispanics were over-represented at every stage of the criminal justice process. *Id.*

119. *See id.* at 19 (observing “greater disproportionality at incarceration than at arrest”).

120. *See id.* at 17.

121. *See id.* at 19.

122. *See UTAH, supra* note 7, at 20. To remedy this problem in the future, the group asked the Social Research Institute of the University of Utah to design a model for future analysis of minority disproportionality, including a prescription of the data collection efforts that would be necessary to enable quantitative analysis.

123. *See id.* at 19.

interviews and hearings did coalesce around one issue of possible unfair treatment, however—racial profiling practices by the police. Witnesses at the public hearings described profiling as a part of minorities’ “everyday experience,” a practice so ubiquitous that most persons of color simply accepted it as “a part of life that must be endured.”<sup>124</sup> Similarly, during interviews, attorneys and judges agreed that racial profiling was a problem in the state.

Faced with this anecdotal evidence, the Task Force sought to test the reality of racial profiling practices within the state. Despite the strong consensus among the anecdotes and opinions gathered by the Task Force about racial profiling practices, the Task Force members themselves strongly disagreed about the reality of racial profiling in Utah.<sup>125</sup> But, again, when the group attempted to determine who was right, it found itself thwarted by a lack of available quantitative data.<sup>126</sup> In the absence of that data, the Task Force found it necessary to stress that the opinions expressed in the hearings and interviews on the matter “were not meant to establish fact.”<sup>127</sup> They simply reflected “people’s perspectives and interpretations of their experience of racial and ethnic bias,” and could not “establish in any objective way whether such bias does or does not occur.”<sup>128</sup> “While many groups and individuals” had attempted to prove the reality of racial profiling within the state, the Task Force went on, none had provided “conclusive” proof that the police actually engaged in the practice.<sup>129</sup> On this question, too, it recommended further study and requested its research consultants to assess existing databases and develop a list of additional data fields that would be needed for future analysis.<sup>130</sup>

It is, of course, not possible to critique an empirical effort never conducted. It also appears unseemly to be overly critical of a state reviewing body presented with such severe data retrieval problems that it was prevented from carrying out its primary mission. On the other hand, one is entitled to wonder whether, by employing one of the wide variety of data-gathering methods developed and utilized by other criminal justice researchers elsewhere (some admittedly quite labor and time intensive), the Task Force could have gathered sufficient demographic and offender data to enable some review of the state’s confessed overrepresentation problem. Racial and ethnic offender information is now available in most jurisdictions, provided researchers are willing to put in the hours necessary to gather and properly code that information for quantitative assessment.<sup>131</sup> Researchers outside Utah have also managed to secure data regarding

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124. *Id.*

125. *Id.* at 28.

126. *Id.* at 27; *see also* HARRIS, *supra* note 110.

127. UTAH, *supra* note 7, at 27.

128. *Id.*

129. *Id.*

130. *Id.* at 84.

131. Ethnic heritage has posed special problems for researchers. It is not unusual for court papers to describe a Hispanic defendant as white, for example. This may necessitate a more thorough review

an offender's past criminal record, type of drug involved, weight of drug involved, use of violence, or gravity of the offense more generally. Thus, it is difficult to understand how Utah's data storage difficulties could so completely disable it from conducting any quantitative analysis whatsoever.

More fundamentally, it is valuable to reflect on how the Task Force dealt with the statistical information that was available to it, and the qualitative information it was able to gather. As argued more fully below, from the start of its work, the members of the Task Force unanimously accepted as a premise fact that minorities were disproportionately over-represented within the Utah criminal justice system, and that the gravity of the observed disparities increased as minorities moved further into that system. Despite this consensus, and despite apparent agreement among the judges and lawyers interviewed by the Task Force about the reality of racial profiling practices within the state, the Task Force went to great lengths to emphasize that it had no conclusive evidence to support the racial profiling allegations or any other allegations of racial bias within the system. I argue below that the Utah review group, like those in Oregon and Washington, employed a presumption of fairness that benefitted the system and concomitantly burdened critics of the over-representation phenomenon.

#### IV

#### CONCLUSION

Although it would have been possible for the states to assess the fairness and social impact of their respective criminal justice systems' treatment of minority offenders from any of a number of different angles, central to the evaluative success of any such assessment is its willingness to recognize and question its own theoretical assumptions. A review of the studies completed in Washington, Oregon, and Utah reveals a number of central assumptions, striking both for the reason that each of the states adhered to them and because the assumptions themselves are subject to criticism that none of the states considered.

Each of the central assumptions addressed here involved an effort to identify the cause of the disproportionality of minority offenders in the systems. The states tended to assume that minority inmate disproportionality was caused by one of two things: disproportionately wrongful conduct by minorities, or discriminatory conduct by the official state actors who came into contact with them.<sup>132</sup> The goal was to discover which of these two explanations was true, or,

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of case files and police reports to discover evidence of Hispanic origin. *See, e.g., WASHINGTON I, supra* note 7, at 48.

132. The Oregon Working Group noted that it had briefly considered one other possible contributing cause—"the general social and economic conditions that may contribute to racial and ethnic inequality in this country." The group concluded, however, that such conditions were "largely out of the control" of its state justice agencies, and thus focused its attention on those areas within the criminal justice system that were under those agencies' control. *See OREGON, supra* note 6, at i.

if both were, to identify the degree to which discriminatory state conduct played a role in the over-representation problem.

It is important to note that the first explanation—disproportionate minority criminality—though contemplated by all three states, actually consumed very little of the researchers' time. In fact, this explanation appeared to concern the three state groups only to the extent that it struck them as necessary to be raised as a possible alternative source of the over-representation problem. Put slightly differently, each of the reports assumed that if minority group criminality was the culprit, the states would be off the hook, the implication being that responsibility for the disproportionate numbers in such a case would not lie with the states, but would belong to those who chose to violate societal norms and become rule breakers.<sup>133</sup> Conversely, if state discriminatory conduct provided the explanation for the exploding numbers of persons of color within the state justice systems, remedial action would be necessary. The errant state actors would have to be identified and dealt with. It might even be necessary to dismiss charges, retry cases, or open the prison doors. Presumably, the cost of such a finding would be large and embarrassing.

A second, related, assumption shared by the states was an apparent belief in, or at least strong hope for, the availability of a mono-causal agent for the states' observed over-representation problems. While each of the state reports contemplated both minority criminality and discriminatory conduct as possible explanations for their minority over-representation problems, each also tended to discuss these possible causalities in the alternative. Either African Americans and Latinos were committing more crime *or* institutional actors were dealing with them unfairly, but not both. This implicitly suggests two things: first, that disproportionate minority criminality is rightly considered an issue of individual responsibility and can never be attributable to systemic, discriminatory features of, say, legislative policy (as, for example, by creating a statutory system that penalizes the distribution of crack cocaine more heavily than the distribution of powder cocaine); and second, that the genesis of the problem can be situated in only one place—blameworthy individual behavior or blameworthy institutional actor behavior.

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133. Some adherents of this view believe that heightened minority criminality is the inevitable and unfortunate result of social and economic disadvantage, a status disproportionately borne by persons of color. See, e.g., OREGON, *supra* note 6, at I; UTAH, *supra* note 7, at 9. But even those among groups like the Oregon Working Group, the Washington Commission, and the Utah Task Force who would name socio-economic disadvantage as the explanation for the over-representation problem unintentionally may erect an obstacle to solution of the problem. Put slightly differently, the conclusion that minorities are more likely to become entangled in the criminal justice system because they have fewer realistic chances for life success implicitly takes the onus off of that system to provide relief for the observed disparities and places it elsewhere. Such a view, though "not made with glee or enthusiasm," allows the justice system to look at the problem as larger than itself. As put by two leading researchers of over-representation: "In effect, the discovery of the underclass allows justice officials to wring their hands in agony and then throw them up in despair, knowing that no reasonable person would expect the system to address such a mammoth social problem. As a result the problem can be effectively ignored." Pope & Feyerherm, *supra* note 23, at 327–28.

It is not difficult to see the allure of such a dichotomous approach in a study of the cause of an over-representation problem, for, as a practical matter, by posing the possible explanations as a dichotomy—the cause is either this or that—state researchers give themselves permission to focus their analyses on only one-half of the equation. That is, once state research groups conclude that there is insufficient evidence of official wrongdoing, their present tendency is simply to leave it to conjecture that the real cause of the over-representation problem is minority criminality. Virtually no time is devoted to considering a third possibility: *namely*, the existence of social or economic conditions disadvantageous to persons of color which may contribute to disproportionate criminal acts, because those conditions, the reports suggest, lay beyond researchers' missions.<sup>134</sup>

Accordingly, the states set about to find the “bad” state actors. If they found none, or at least insufficient evidence of any, the implicit answer delivered to critics of the states' minority over-representation problems was essentially, “Look in somebody else's backyard.” None of the reports acknowledged that the simple act of raising a dichotomy—minority criminality versus bad state actor—and attempting to resolve only part of it (no evidence of bad state actor) would leave hanging in the air the only remaining, unresolved possibility (African Americans and Latinos commit more crimes). Left unstudied, that alternative explanation would loom like a truth, even without the benefit of scrutiny or of process.

Another related assumption buried beneath the states' dichotomous approach was an unspoken consensus that, assuming minority criminality turned out to be the cause, the states would owe no responsibility for the natural, concomitant result of that outsized criminality—the greater presence of minorities within their respective criminal justice systems. This agreement seemed to flow naturally from two simple and implicit premises: Societies set norms to which they may rightly expect all of their members to adhere and divergence from those norms is the sole responsibility of the individuals who choose to engage in that divergent behavior. When one employs this prism to understand criminality, societal norms are presumed objective, neutral, and good, and divergence from those norms is considered subjectively determined, free-willed, and bad. Crime is simply the clash between good rules and bad actors. Accordingly, if the states determined, after conducting their analyses, that more minorities were in the criminal justice system because there were more minority criminals, not only was the state in the clear, but the state was the victim. To the extent that DuBois's “problem of the color line” still existed at the end of the twentieth century, it would have morphed from a problem of early-century racism into a problem of late-century-African-American crimi-

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134. *See supra* note 132 (noting that in the event the cause of the over-representation problem was general social or economic conditions disadvantageous to minorities, those conditions were outside the control of the states' justice agencies).

nality. And because this new problem was borne by the law-abiding, the state could justifiably clamp down on the criminals and adopt heavy penalties aimed at deterring future wrongdoing.

A final assumption evident in each of the reports was the notion that to the extent the over-representation problem was attributable to state wrongdoing, the “bad apples” responsible could be identified and eliminated through careful, rigorous analysis. None of the states, of course, suggested that this cleansing process would be easy. In fact, the contrary is true; each of the state groups expressed great concern that the data reflecting the arrests and treatment of African Americans and Latinos could be used to prove too much. There was a danger, each of the states warned, that the data could unfairly besmirch the reputations of men and women of true integrity, and it was important not to draw unfounded conclusions even when the data at first glance raised questions about the possible mistreatment of minority offenders.

To meet this danger, an unwritten presumption developed, a presumption of fair treatment, which redounded collectively to the benefit of the official state actors, without reflection upon whether any injustice was done in the process of conferring that one-sided presumption to those not on its receiving end.<sup>135</sup> With the benefit of this presumption, it was not enough to show that African Americans or Latinos were arrested disproportionately to whites, since all three of the reports agreed that this was true. Instead, it had to be shown that those disparities were the result of racial animus or prejudice. It was not enough to show that minority offenders were sentenced more harshly than non-minority offenders, since both of the states that had sufficient data to reach a conclusion about this found it to be true. The data also needed to support the conclusion that those disparities were due to improper racial or ethnic considerations rather than some legitimate “legal” variable, such as differences in the offenders’ criminal histories or the gravity of the offenders’ crimes.

These points are not in and of themselves troublesome. There is nothing particularly offensive about the suggestion that an offender with several prior offenses is more deserving of a prison term than an offender with none. What is troublesome is the suggestion that our concept of what it means to discriminate is a neutral one. Also troublesome is the suggestion that because a study shows longer sentences are imposed upon certain offenders due to their greater offense rates, their choice to traffic in certain kinds of controlled substances, or the peculiar way in which the applicable sentencing guidelines channel the dis-

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135. An example of this “presumption of fairness” and the state research groups’ reluctance to malign too quickly the decisions of justice system personnel is found in the report issued by the Oregon Working Group. The Group wrote that even if it found that persons of color “experience[d] negative outcomes in disproportionate numbers as they proceede[d] through the criminal justice system,” such a finding would simply be “cause for added concern and further investigation.” OREGON, *supra* note 6, at ii. Remedial action would be called for, the group noted, only after that “further investigation uncovered unfair practices or policies.” *Id.* This passage reflects the very real pressures that are present whenever a group of individuals is given the task of studying an issue as emotionally charged and politically consequential as race.

cretion of sentencing judges in such cases, then minority offenders are not being discriminated against on the basis of their race or ethnicity. The implicit suggestion is that the rules under which offenders are being processed may have an especially harsh impact on members of certain racial and ethnic groups, but they are not discriminatory.

Seen in this light, the reports suffer, among other things, from the same failing that the current judicial approach to anti-discrimination law does generally—an overly cabined understanding of what it means to discriminate against members of a particular racial or ethnic group. The studies are thus best read and understood against a constitutional backdrop that legally recognizes discrimination only when it is proved to be the work of intentionally racist actors.<sup>136</sup> The quest of each of the states, then, was to rout from within their respective systems any hidden racist actors, but the routing was undertaken with the understanding that to qualify as “racist” one must be shown to harbor plainly visible racial animus or discriminatory intent. The quest embarked upon was essentially the quest for a Grand Wizard, an unlikely find within the three state criminal justice systems, not just because of the normally attendant problems of proof that always make such a showing difficult, but because of a far more fundamental flaw in the concept of racism itself.

As other scholars have argued so well, if as yet unsuccessfully, unconscious racism is a much bigger problem for modern America than the overt, out-in-the-open racism of yesteryear.<sup>137</sup> Overt racism is not dead, of course, but it has been severely wounded, and it behaves as any other hunted and battle-scarred animal would act, hiding in the shadows, conducting its business as quietly as possible so as not to draw attention to itself. Far from the express acts of official racism that resulted in the Black Codes and legally mandated segregation and laws against miscegenation of the past, white bigotry today is generally perceived as immoral and reprehensible, something to be denied rather than embraced. Thus, attempts to expose the Grand Wizard, or to de-hood the lurking racist players within state criminal justice systems, must be recognized as misdirected from the start. Such attempts fuel the suggestion that all racist conduct is cut from the same cloth—a stark white sheet, sewn into a pointed hood with holes cut away to provide the cloaked racist some measure of cowardly anonymity. In doing so, they divert our attention from the uncovering and dispelling of the equally well-hidden and perhaps even more pernicious forms of racism that will continue to haunt us so long as our eyes continue myopically to search for those hated white hoods.

This contemporary concept of racial discrimination, marred by its hyper-simplicity, is a noticeable undercurrent in each of the states’ analyses. Each report is framed against a backdrop of constitutional adjudication that absolves

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136. See *Washington v. Davis*, 426 U.S. 229 (1976).

137. See, e.g., Charles R. Lawrence III, *The Id, The Ego, and Equal Protection, Reckoning with Unconscious Racism*, 39 STAN. L. REV. 317 (1987).

the states of any affirmative obligation of remedial action in the absence of proof of intentional state discrimination. If no such proof is forthcoming, even rules or policies that have the demonstrable effect of solidifying racial disparities become challenge-proof.