

Staff Report: HJR 15
Study of Disproportionate Minority Contact in the
Montana Criminal Justice System

prepared by Sheri Heffelfinger, Research Analyst
Montana Legislative Services Division
for the
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Overview

The 2005 legislature passed House Joint Resolution No. 15 to request a legislative interim committee study of disproportionate minority contact in the Montana criminal justice system. The Legislative Council assigned HJR 15 as a staff "white paper" under the oversight of the Law and Justice Interim Committee (LJIC). Because the scope of the HJR 15 study was beyond Legislative Services Division staff capabilities and available resources, the Legislative Council asked that a staff paper assessing what resources would be required to conduct the full study outlined in HJR 15.

This paper is organized in three parts as follows:

- Part I - Study Objectives
- Part II - Research and Resources
- Part III - Conclusions and Legislative Options

Part I - Study Objectives

Text of the resolution

The text of HJR 15 asks for a study of "the reasons, including quality of counsel, arrest rates, detention in jail versus release on bail, the various uses of plea agreements and trials, rates of conviction, sentencing patterns, opportunities for effective treatment, rates of incarceration, rates in receiving deferred or suspended sentences and in granting parole, and differences in probation and parole revocations, why there is a disproportionate number of adult and youth minority persons in the criminal justice system in Montana".

Further, HJR 15 requests recommendations about how the criminal justice and corrections systems and the Judiciary may "alleviate any disparate treatment of minorities".

Scope of assignment

The Legislative Council's assignment to staff did not encompass the collection and evaluation of data. Rather, the assignment was to evaluate the study's objectives and to estimate what resources would be needed to fulfill those objectives. Additionally, HJR 15 encompasses only Montana's criminal justice system, not the tribal justice system, which falls under federal jurisdiction.

Definitions

Although, HJR 15 does not specifically mention American Indians, staff interprets the word "minorities" as used in the resolution to mean American Indians. Another assumption staff made is that "disproportionate number" means a number is not proportionate to the number of American Indians as a percentage of the total non-Indian population in Montana. The term of art typically used to refer to this disproportion in context with a criminal justice system is "Disproportionate Minority Contact" or DMC. Also, in this paper, the term "intersection" is used to

describe the points within the state system where a person would come in contact with law enforcement or corrections officials who exercise authority and make decisions with regard to the person's status with the criminal justice system, such as making an arrest, setting bail, approving probation, etc..

Staff approach

To help define HJR 15's study objectives, staff reviewed the minutes from the 2005 session committee hearings on HJR 15, spoke briefly with HJR 15's primary sponsor, Rep. Carol Juneau, with the governor's Indian Affairs Coordinator, Reno Charette and with Youth Justice Coordinator Cil Robinson. Staff also considered the testimony and information received during the LJIC's hearing on HJR 15 held June 30, 2006, and the discussion with members of the State-Tribal Relations Interim Committee during its July 24, 2006, meeting. The LJIC hearing involved testimony from representatives of the Department of Corrections, the Department of Justice, the Montana County Attorney's Association, the ACLU, the Youth Justice Division of the Montana Board of Crime Control, the Office of State Public Defender, and public comment from a representative from the Fort Peck Tribal Executive Board. The State-Tribal Relations Interim Committee hearing involved a staff progress report and a discussion with committee members about the goals and objectives of HJR 15.

To assess what research and resources would be needed to fulfill the study objectives, staff conducted a literature review, examined the resources and costs spent on similar studies, and spoke with researchers in the field.

Due to time constraints, staff did not contact individual tribal representatives, seek interviews with co-sponsors of HJR 15, or collect data to assess limitations or gaps in the data.

Three study phases

The study contemplated in HJR 15 involves three-phases, which must be conducted in order. The three phases are as follows:

- (1) Is there DMC?
- (2) If there is DMC, why?
- (3) If there is DMC, and based on the causes, what will alleviate the DMC?

Intersections with the criminal justice system

The text of HJR 15 lists the following as the intersections within the criminal justice system which should be studied to determine if there is DMC, why, and what will alleviate it:

- a. arrests;
- b. quality of counsel;
- c. detention or bail;
- d. plea agreements or going to trial;
- e. conviction rates;
- f. sentencing equity;
- g. treatment options;
- h. probation and parole rates and lengths of incarceration;
- i. preparation for and transition to post-prison life.

For each of the topics itemized as "a." through "i." above, the three basic questions previously identified as the study phases must be asked.

Part II - Research and Resources Required

Intersections Within the Criminal Justice System and Study Tasks at Each Phase

Intersection	Is there DMC?	Why is there DMC?	What will alleviate the DMC?
Arrest rates	To determine if minorities are arrested more often than whites, data must be gathered from each local law enforcement agency and each person making an arrest. The demographic information of arrested persons would need to be compared with the demographics of the total population. The data collected must include all variables that could have contributed to the arrest, not just race. This study must start with an assessment of whether the required data is currently collected and reported.	To test whether race was a primary factor in the person's arrest, all other variables would need to be controlled for (i.e., fixed or made a constant).	Assuming there is DMC and that the primary reasons for the DMC is determined to be racial or cultural biases, the next step is to examine effective methods of addressing those causes and alleviating the DMC. For example, if a primary cause for DMC regarding arrest rates is found to be racial profiling by law enforcement officers, then the researcher would need to study what types of programs could be implemented with the criminal justice system to reduce or eliminate racial profiling. Evaluation criteria would need to be developed so that progress and program effectiveness could be measured.

Intersection	Is there DMC?	Why is there DMC?	What will alleviate the DMC?
Quality of counsel	<p>To determine if American Indians receive disproportionately poorer quality counsel than non-Indians, data would have to be gathered from a statistically valid sample of cases. The qualifications and experience of counsel in each of these cases would have to be identified and compared and correlated to data about the race of the client. Part of this study would be to identify if such data is currently collected and recorded. Very likely, it is not. Thus, the study would likely involve a manual research of records and a determination of what procedures should be put in place to collect and report this data in the future so that there is a means of comparing the initial findings (base-line data) with future findings. A researcher in this area should have a solid background in statistics as well as criminal defense.</p>	<p>If it is found that American Indians are disproportionately represented by less-qualified counsel, then studying the reasons for this would be the next step. This would research into how counsel is selected for or by a client and why. Rather than trying to determine all causes, the research objective could be narrowed to test a thesis such as "American Indians are more likely to be represented by less-qualified counsel because of racial discrimination". However, even narrowed, testing such a thesis would be a very complex undertaking requiring the control of multiple variables.</p>	<p>Assuming Indians are found to be disproportionately represented by less-qualified counsel and that the reasons for the disparity are determined to be racial or cultural biases, the next step is to decide how best to address the causes and alleviate the disparity. Performance evaluation criteria would have to be developed and analyzed to determine whether the mitigation efforts is effective. For example, if poorer quality of counsel for Indians is found to be caused by racial discrimination on the part of public defenders or those who assign public defenders, then a program to alleviate this may include special measures to ensure that counsel assigned for indigent American Indian defendants have a background in Indian culture. To evaluate whether this program is effective, quality control measures would also have to be identified for future evaluation.</p>

Intersection	Is there DMC?	Why is there DMC?	What will alleviate the DMC?
Setting or denying bail	<p>This involves gathering data about whether bail is set differently or denied more often for American Indians than for non-Indians. The collection points for this information are the courts, defense attorneys, and judges. The study would have to determine where discretionary decisions are made with regard to bail and collect data to determine if that discretion is disproportionately exercised against American Indians. This study requires a researcher experienced with court processes and differences between Indian and White cultures.</p>	<p>If DMC is found, then an investigation into possible causes must be conducted. The data collected during the first study phase would have to be analyzed by controlling for variables and correlating the data to various possible causes for setting bail at a certain amount or denying bail.</p>	<p>If DMC is found and the cause is determined to be racial discrimination or cultural biases, then research about how to alleviate this could be conducted. Study tasks would involve examining the viability of various options, such as passing laws that reduce the amount of judicial discretion in setting or denying bail. Evaluation criteria would also need to be set to determine if the action taken has proven to be effective in reducing the DMC.</p>

Intersection	Is there DMC?	Why is there DMC?	What will alleviate the DMC?
Plea agreements as opposed to trial	<p>The study question implied is whether American Indians are more likely to be involved in plea agreements than in going to trial. This study involves examining a complex set of decision points and numerous case-by-case variables. Data alone would not prove or disprove DMC. A researcher would have to determine how to control for such variables as the crime involved, the race of the county attorney, the race of the public defender, when a plea agreement might be in the best interest of the client, and other variables that may affect a decision about bail. This would likely require a qualitative approach to the study rather than a quantitative approach. A researcher undertaking this task would have to be an expert in complex social and criminal research and qualitative research methodologies.</p>	<p>Assuming a valid qualitative study can be accomplished and racially-linked disparities are found, then the next step is to determine causes. Again, this would involve developing a qualitative research methodology to determine why certain decisions are made when setting or denying bail. The researcher would have to have the knowledge and skill required to reach a supportable conclusion about what factors influence these decisions when an Indian is detained. The research would likely involve detailed survey instruments and interviews.</p>	<p>If a cause for an identified disparity is found, then the next step is to examine what would most likely address the cause and alleviate the disparity. Due to the nature of this issue (the fact that there are so many personal decisions involved by various parties involved in a case, e.g., the county attorney, the public defender, the client) in bail decisions, this would involve a complex application of sociology and behavioral sciences. For example, if a disparity is found and the cause is racial discrimination by judges, then research would need to be conducted into the best way to alleviate or avoid that discrimination by judges in the future.</p>

Intersection	Is there DMC?	Why is there DMC?	What will alleviate the DMC?
Conviction rates	<p>This study involves a numerical count of how many of the total cases filed involved convictions and of those, how many were convictions of American Indians compared to non-Indians. The collection points for this data are the court system and county attorney offices.</p>	<p>While conviction rates can be compared by race in a relatively simple numerical study, if there is a disproportionate number of convictions of American Indians, determining the cause is not so simple a study. Conviction rates would have to be compared with the data collected at other relevant intersections (e.g., arrest rates, plea agreements, quality of counsel, and others). Further, this study objective implies that race is a determining factor in whether a person is convicted or not. And, if race is a determining factor, is it a cumulative effect of many causes, or is there one or two causes that are primary reasons for the disparity? A key factor in convictions can be a jury. A qualitative study approach would most likely be the best research method in this case.</p>	<p>How to alleviate a disproportionate number of convictions for American Indians will be a complex analysis involving evaluation of mitigation efforts that may go well beyond the correctional system. For example, an alleviation program may involve public education and awareness of cultural differences. Or, a program to provide cultural education to prospective jurors could be considered.</p>

Intersection	Is there DMC?	Why is there DMC?	What will alleviate the DMC?
Sentencing equity	<p>Sentencing equity has been the focus of several previous studies. However, a key finding in many of these studies is that data cannot be collected that would conclusively show that American Indians receive harsher sentences than non-Indians. Thus, this study would involve a researcher with the expertise to overcome gaps in data or discover methodologies that allow for the collection of the necessary data.</p>	<p>If numerical disparities are found, discovering causes would involve examining the various factors that come into play when sentences are determined, such as criminal history, statutory law, judicial discretion, the prosecutor's recommendations, and the strength of the argument made for a lighter sentences. These variables would have to be controlled in order to determine causes for numerical disparities.</p>	<p>Research of the most effective ways to alleviate disparities caused by racial discrimination in sentencing practices would likely involve an examination of basic criminal justice policy. For example, statutory sentencing guidelines that takes away judicial discretion in setting sentences could be evaluated as a possible solution. However this could not be done in a vacuum. Unintended consequences should also be researched.</p>

Intersection	Is there DMC?	Why is there DMC?	What will alleviate the DMC?
Treatment opportunities	<p>Research has determined that a significant number of people in the corrections system also have chemical dependency and mental health issues. To discover if there are disparities in treatment options available to Indians versus non-Indians, this study component would encompass evaluation of treatment programs that are or could be available and whether those programs treat American Indians as less than equal. This is not as much a quantitative study as a program evaluation and qualitative study. Researchers in this area should have a solid background in Indian culture as well as chemical dependency and mental health treatment programs.</p>	<p>If it is found that American Indians are treated less fairly than non-Indians in designing and providing for treatment programs, then the next step in the study is to analyze why. This is also likely to be a qualitative study that would involve surveys and interviews with program staff and administrators.</p>	<p>To develop recommendations about effective ways to alleviate any disparities with respect to treatment options within the criminal justice system, the researcher or study commission would have to work closely with experts in the field of both corrections and treatment. Expertise would also be critical in the area of Indian culture and program components that are most effective for Indians.</p>

Intersection	Is there DMC?	Why is there DMC?	What will alleviate the DMC?
Probation and parole	<p>This component involves analysis of whether there are racial disparities in the granting or not granting of probation and parole. Probation could be studied in conjunction with the sentencing equity study component, while the granting of parole and parole revocation could either be approached as a stand-alone study or in conjunction with the final study component discussed below, which is transition to post-prison life. Data is currently available and can be analyzed with respect to how many Indians versus non-Indians receive probation or parole. This data would have to be carefully analyzed, however, to see if the data can be used as a valid starting point to determining possible causes for the disparities, such as racial discrimination by officials within the judicial and correctional system when probation and parole decisions are made.</p>	<p>If numerical disparities are found, then the data would have to be further analyzed for indicators of what may be causing the numerical disparities. For example, if American Indians are being paroled less often than non-Indian inmates and all else is equal (e.g., the crime and sentence involved) is race a determinate factor. If no data was collected on how parole boards make their decisions, then the numerical data collected in the first phase cannot be correlated to racial or cultural biases held by parole board members. Additionally, if parole data is not collected in a manner that allows correlation to sentencing rates or conviction rates, then it will be impossible to determine whether denial of parole is being caused by racial biases or because of harsher sentences.</p>	<p>Once causes are determined, a plan can be developed to mitigate those causes. However, it is important to keep in mind that the nature of the cause or causes may not lend itself to solutions through reform of the criminal justice system. For example, if a certain aspect of American Indian culture is clashing with non-Indian culture (e.g., an Indian not looking a parole board member in the eye), then developing effective ways to alleviate the cultural "clash" would require experts in sociology and behavior sciences as well as within criminal justice systems and policy. If racial bias is found to be a more significant cause than a cultural difference, then a different approach may be warranted, such as statutory guidelines on when probation or parole is to be granted and when it is not. This would reduce the discretion involved. Again, research of potential unintended consequences should be also be conducted.</p>

Intersection	Is there DMC?	Why is there DMC?	What will alleviate the DMC?
Transition to post-prison life and recidivism	To fulfill this study objective, a quantitative (i.e., numerical) study could be made to identify how many American Indians re-enter the criminal justice system after being released from prison. However, it is possible that a quantitative study would not show a disparity even though unfair treatment did exist within the criminal justice system.	Case studies could provide insight into determining whether there is disparate treatment and the reasons why. However, it is important to keep in mind that information gathered from case studies provides subjective rather than objective findings. A researcher with solid background in qualitative studies, sociology, and criminal justice would be required in order to provide meaningful analysis about what causes recidivism and whether or how cultural or racial differences may be a cause.	Research could be conducted into what programs have been shown to reduce recidivism in general and for Indians in particular. This requires specialized research knowledge and skills in areas beyond criminal justice.

Part III - Conclusions and Legislative Options

What research and resources are required

To successfully conduct the studies involved in HJR 15, researchers would need to be skilled not only in quantitative research methods and statistics, but also in qualitative research methodologies.

Quantitative measures variables with numbers and numbers are analyzed based on statistical procedures in order to predict outcomes, make generalizations, and test whether a certain theory holds true.

Qualitative research involves a process of inquiry using a holistic approach to understanding human psychology and motivation and looking closely at peoples words and actions. The result of qualitative research is to identify behavioral patterns within a certain context, such as in a court room, in a prison, in an office with defense counsel, or when called to the scene of a crime or in making an arrest.

Furthermore, both quantitative and qualitative research would need to be done at each of the nine "intersections" with the Montana criminal justice system described in HJR 15.

The expertise and manpower required to conduct these studies is far beyond the capacity of the Montana Legislative Services Division or the resources available to an interim committee of the legislature. The HJR 15 study tasks would require years of research at the masters or doctorate level in many different fields, such as statistics, criminology, corrections, Indian culture, sociology, and human behavior.

Previous "sentencing equity" studies involved only sentencing practices--one of the nine "intersections" with the criminal justice system mentioned in HJR 15. These sentencing equity studies involved many months, in some cases several years, involving several researchers and only to provide a "snap shot" in time. Costs for some of these studies were paid by federal grants, by the state through a contract

with a university or "think tank". However, a primary conclusion in many of these studies is that the data is not available or that a statistically valid sample could not be obtained. To overcome these obstacles requires researchers to develop methodologies for the collection of the data and to collect the data in statistically valid amounts.

Options for action

If the legislature desires to undertake a study of the magnitude contemplated in HJR 15, the following are two options that could be considered:

- (1) Enact a bill to require the Department of Corrections, the Judicial Branch, and the Department of Justice to undertake certain portions of this study. This option will likely require special funding and appropriations to these agencies.
- (2) Enact a bill directing the Legislative Services Division to contract for the study.

There may be other options. In any case, however, adequate funding would be required. The amount of money needed could range from \$200,000 to \$600,00 (or much more or less). The best way to know costs would be to issue a Request For Proposals and ask for a bid.