

Sentencing Discretion and Disparity

WASHINGTON STATE INSTITUTE FOR PUBLIC POLICY

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Criminal
Sentencing
Task Force

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WASHINGTON STATE INSTITUTE FOR PUBLIC POLICY

Non-partisan research at legislative/board direction

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PURPOSE

The Criminal Sentencing Task Force has had many conversations about discretion at sentencing (both judicial and prosecutorial) and disproportionality in sentencing outcomes.

Two main questions:

- 1. What do we mean when we talk about racial disparity or racial disproportionality at sentencing?**
- 2. How are judicial discretion and sentencing guidelines related to racial disparity in sentencing?**

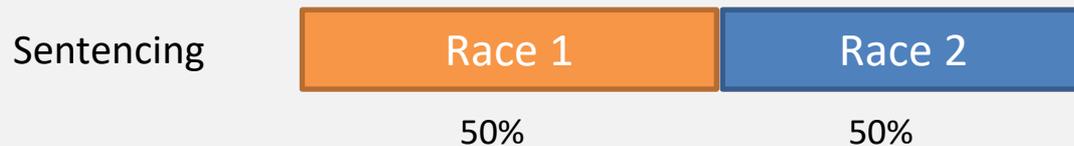
KEY TERMS

- ✓ Discretion: freedom/leeway an individual or an organization has to make decisions
- ✓ Racial disproportionality: when the proportion of a racial/ethnic group within the control of the system is greater than the proportion of such groups in the general population. This is a state of being.
- ✓ Racial disparity: when the ratio of one racial/ethnic group experiencing an event is not equal to the ratio of another racial or ethnic group who experienced the same event. Question of equality in treatment.

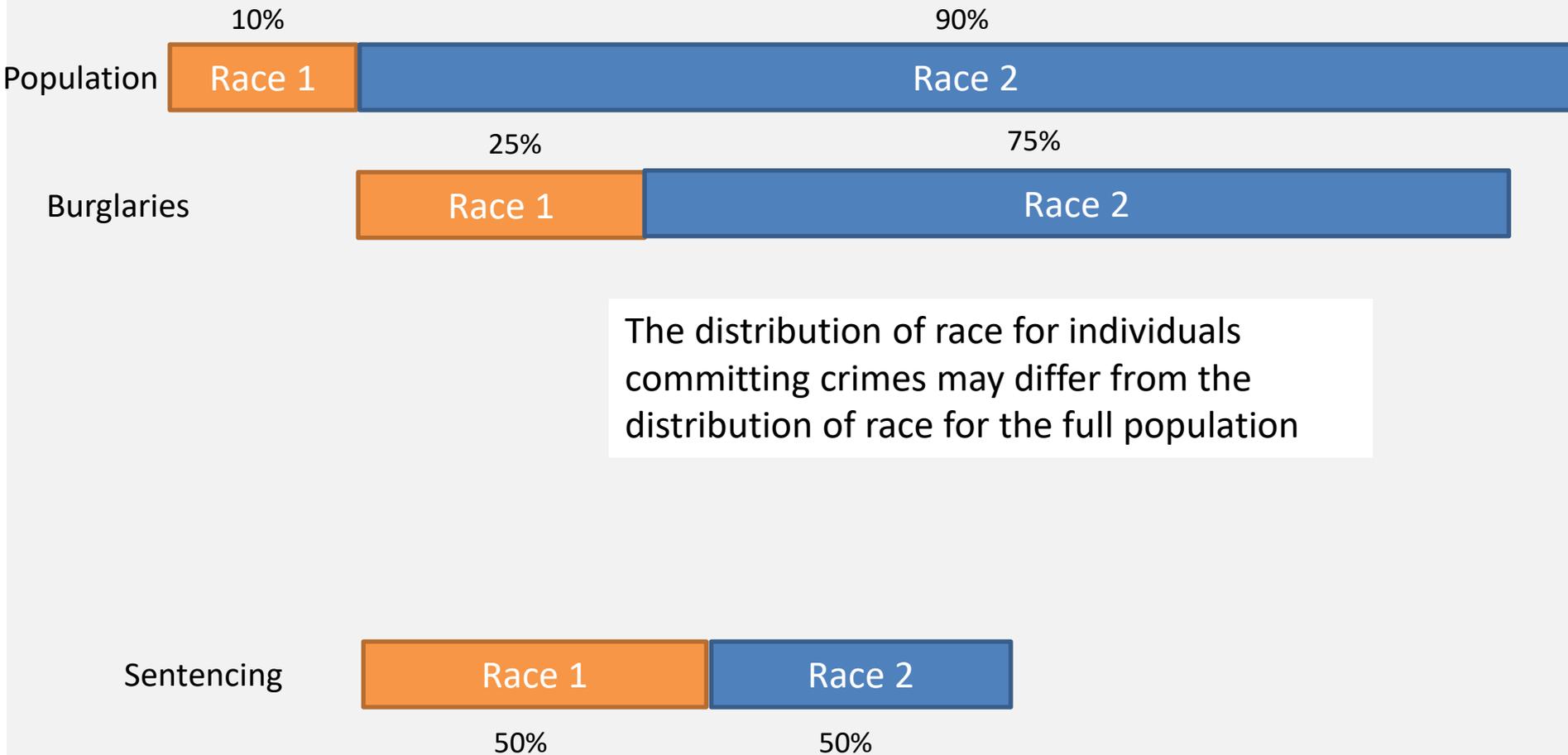
UNDERSTANDING DISPARITY



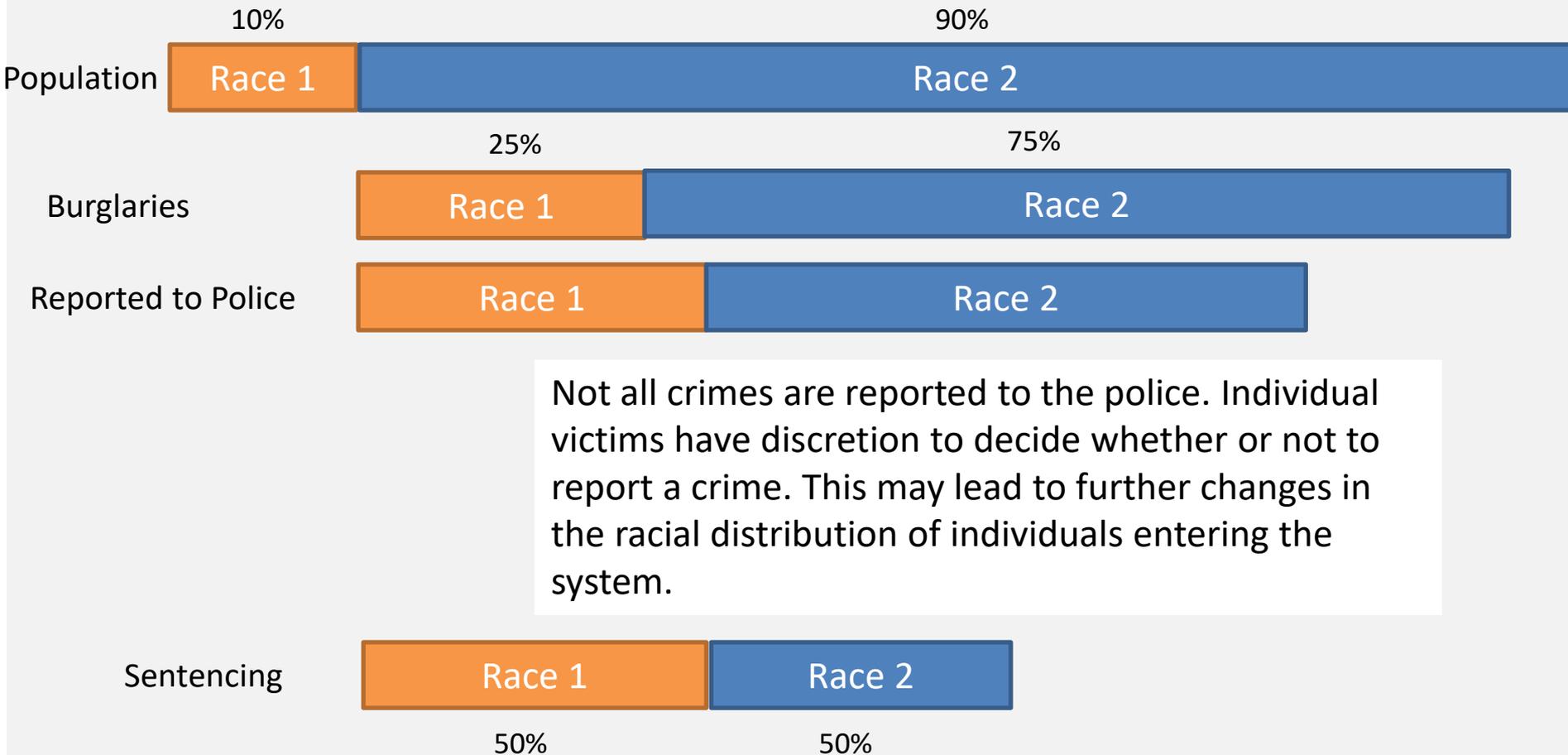
Comparing sentencing outcomes to population percentages may indicate significant disproportionality at sentencing. But is it representative of disparity at sentencing?



UNDERSTANDING DISPARITY

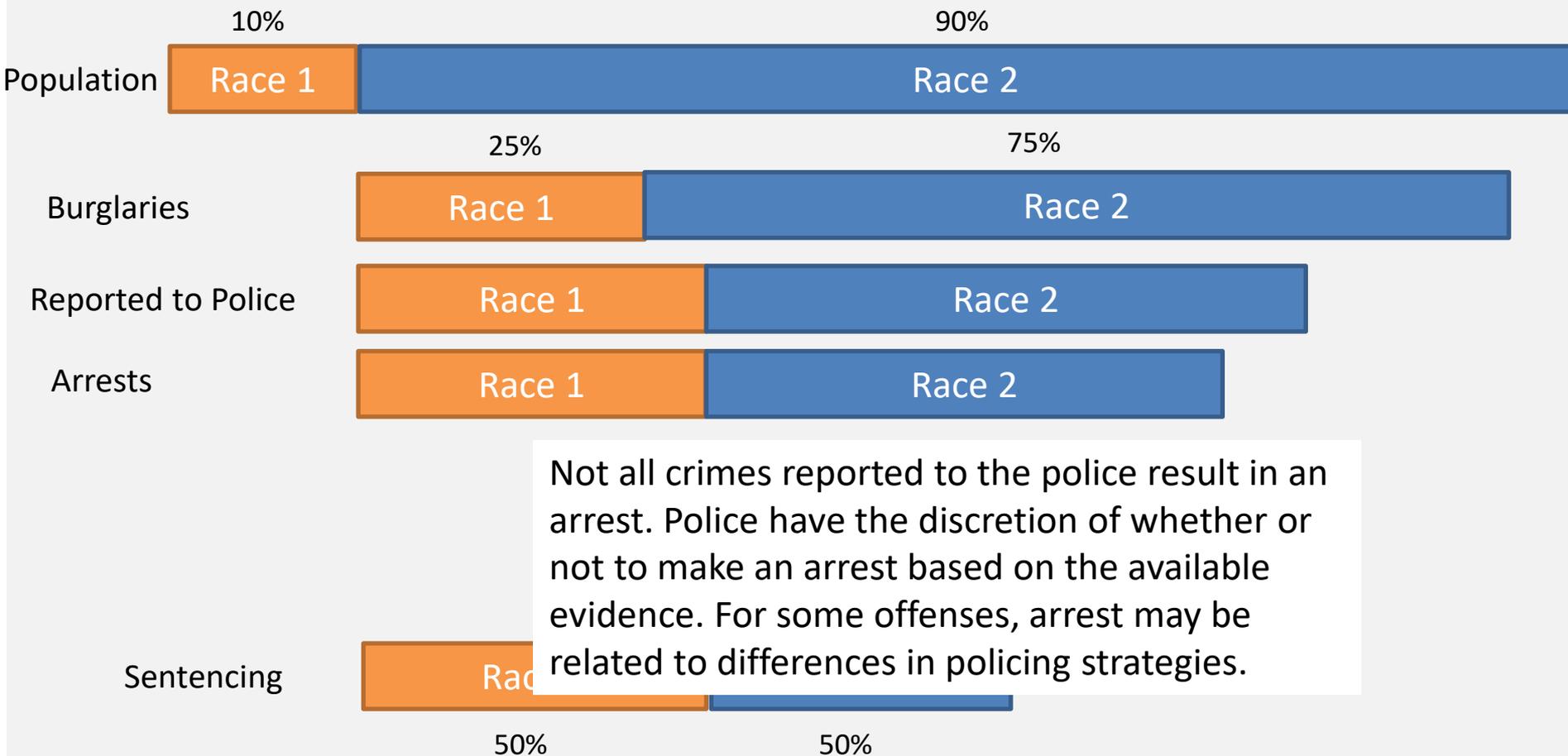


UNDERSTANDING DISPARITY



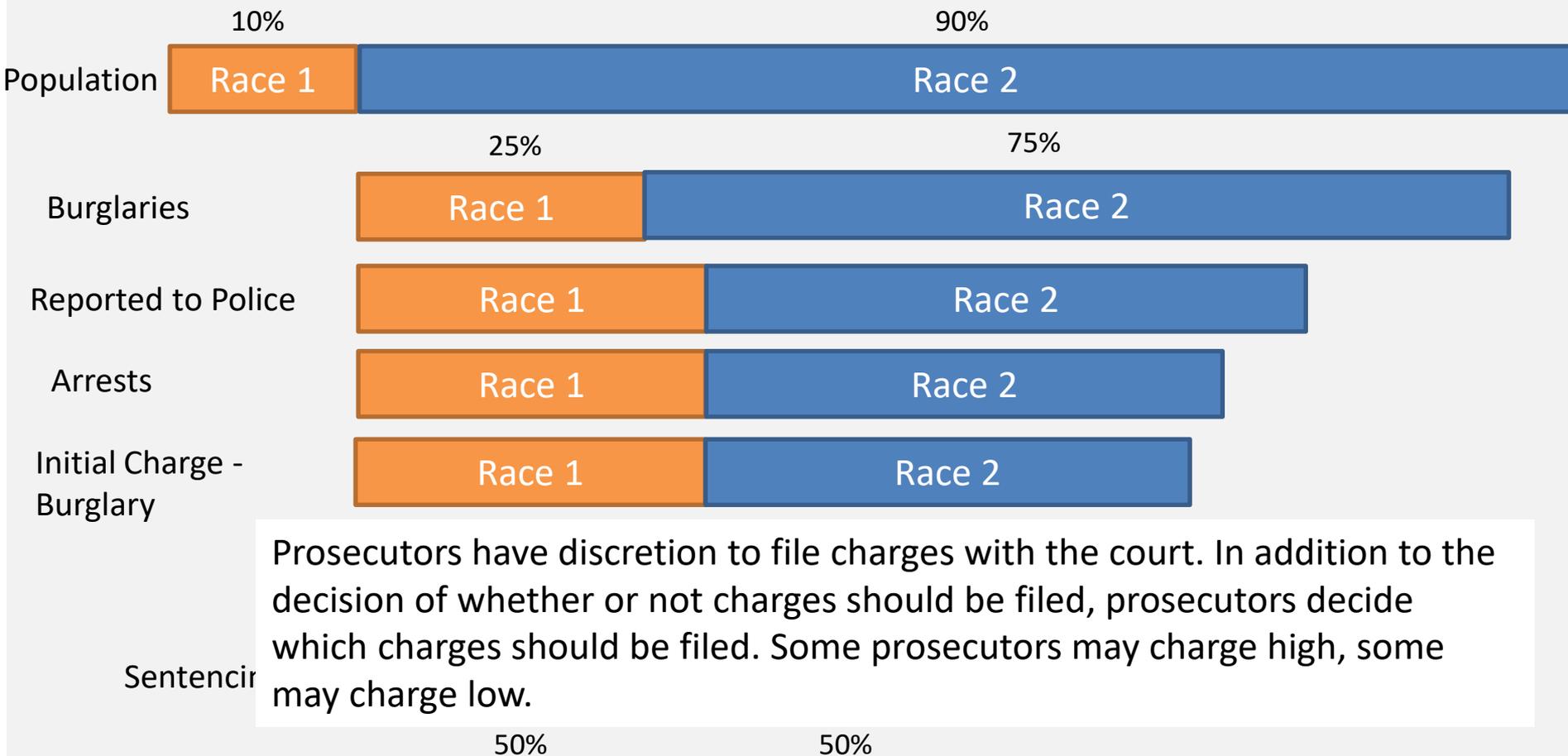
Not all crimes are reported to the police. Individual victims have discretion to decide whether or not to report a crime. This may lead to further changes in the racial distribution of individuals entering the system.

UNDERSTANDING DISPARITY



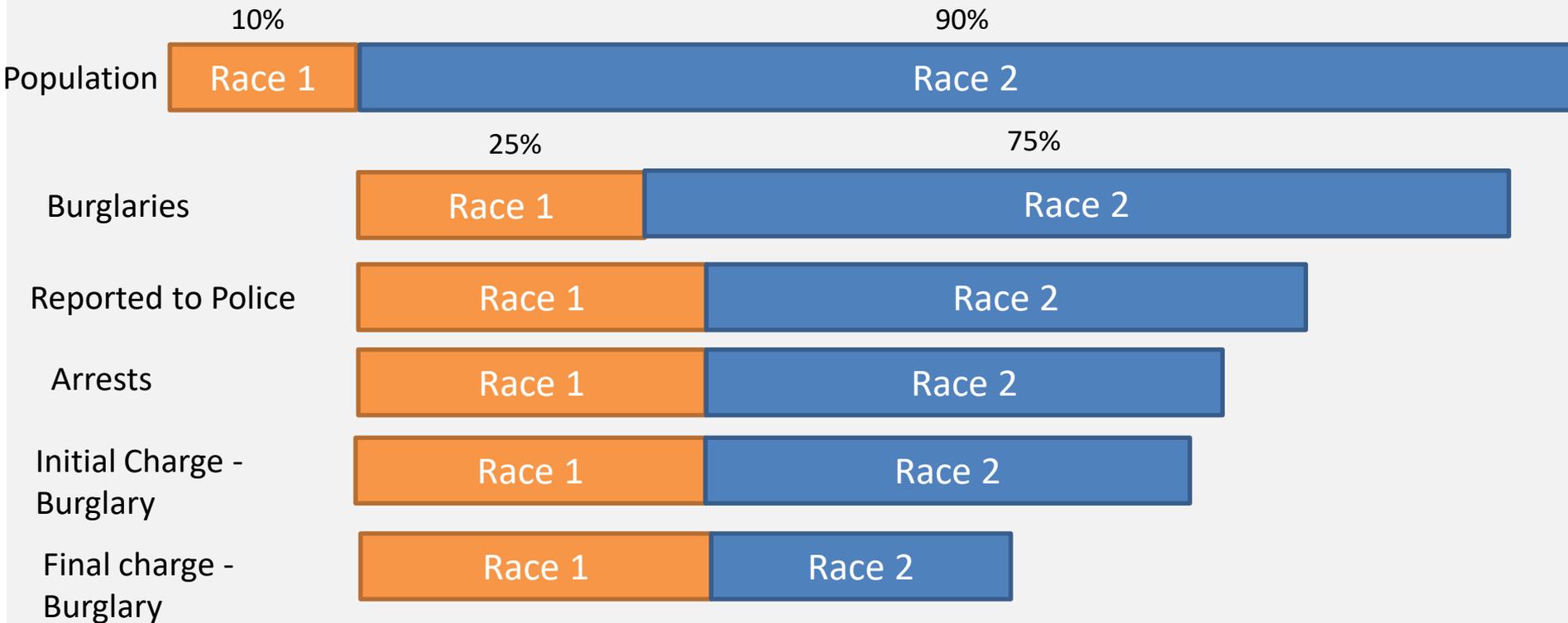
Not all crimes reported to the police result in an arrest. Police have the discretion of whether or not to make an arrest based on the available evidence. For some offenses, arrest may be related to differences in policing strategies.

UNDERSTANDING DISPARITY



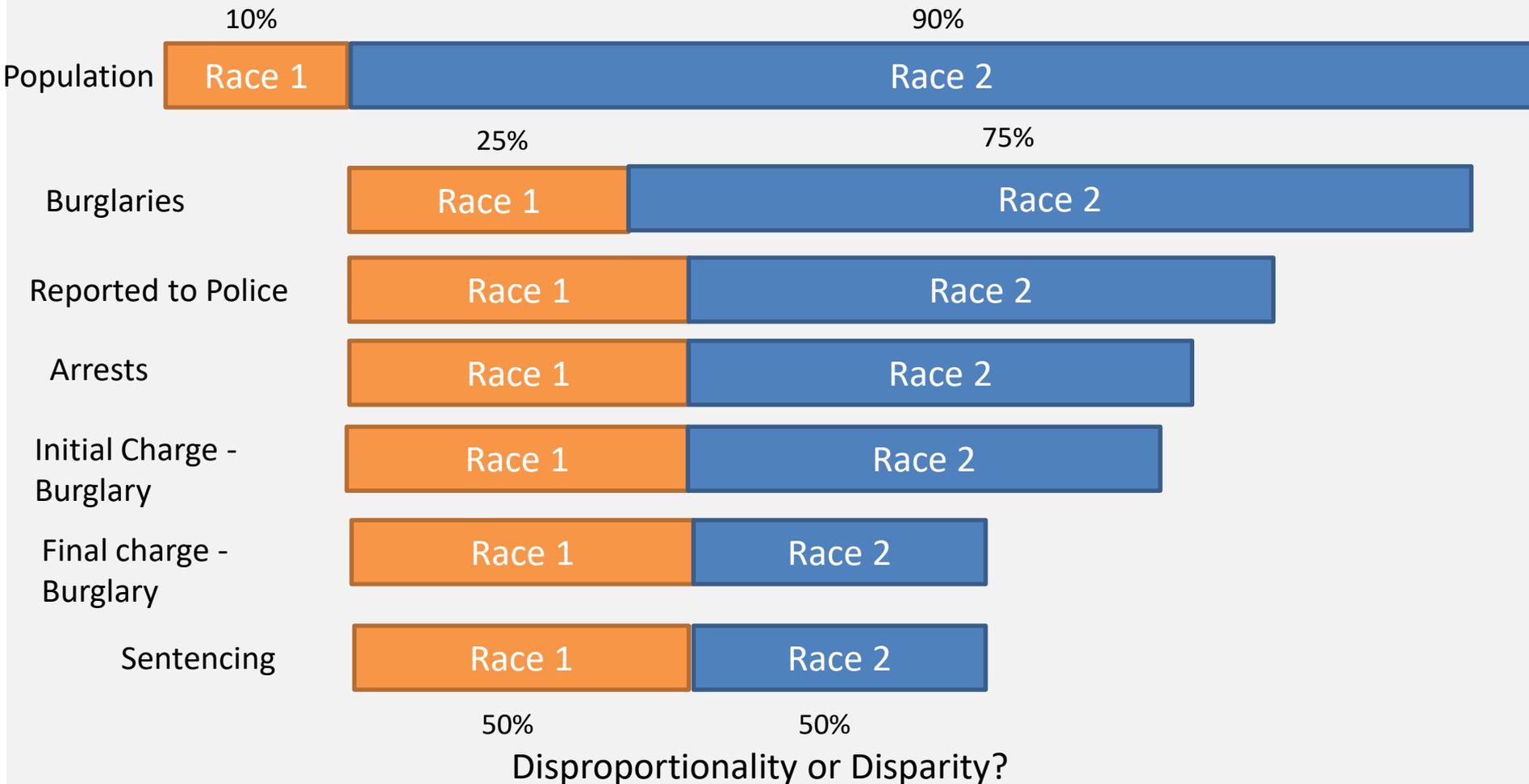
Prosecutors have discretion to file charges with the court. In addition to the decision of whether or not charges should be filed, prosecutors decide which charges should be filed. Some prosecutors may charge high, some may charge low.

UNDERSTANDING DISPARITY

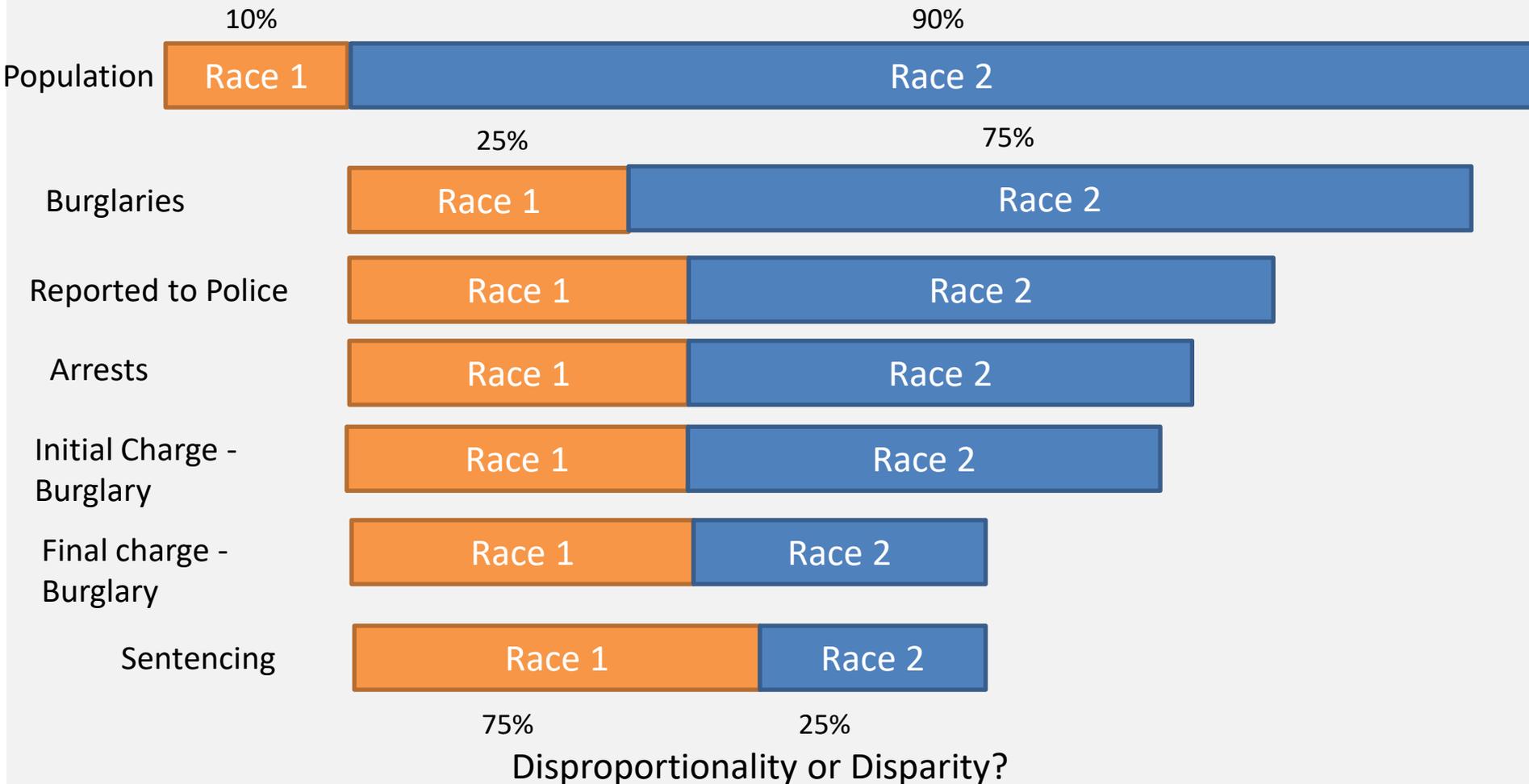


Sentencing Following initial charges, prosecutors and defense attorneys have discretion to negotiate charges and recommended sentences, often as a part of a plea negotiation process. (e.g., Burglary reduced to criminal trespass)

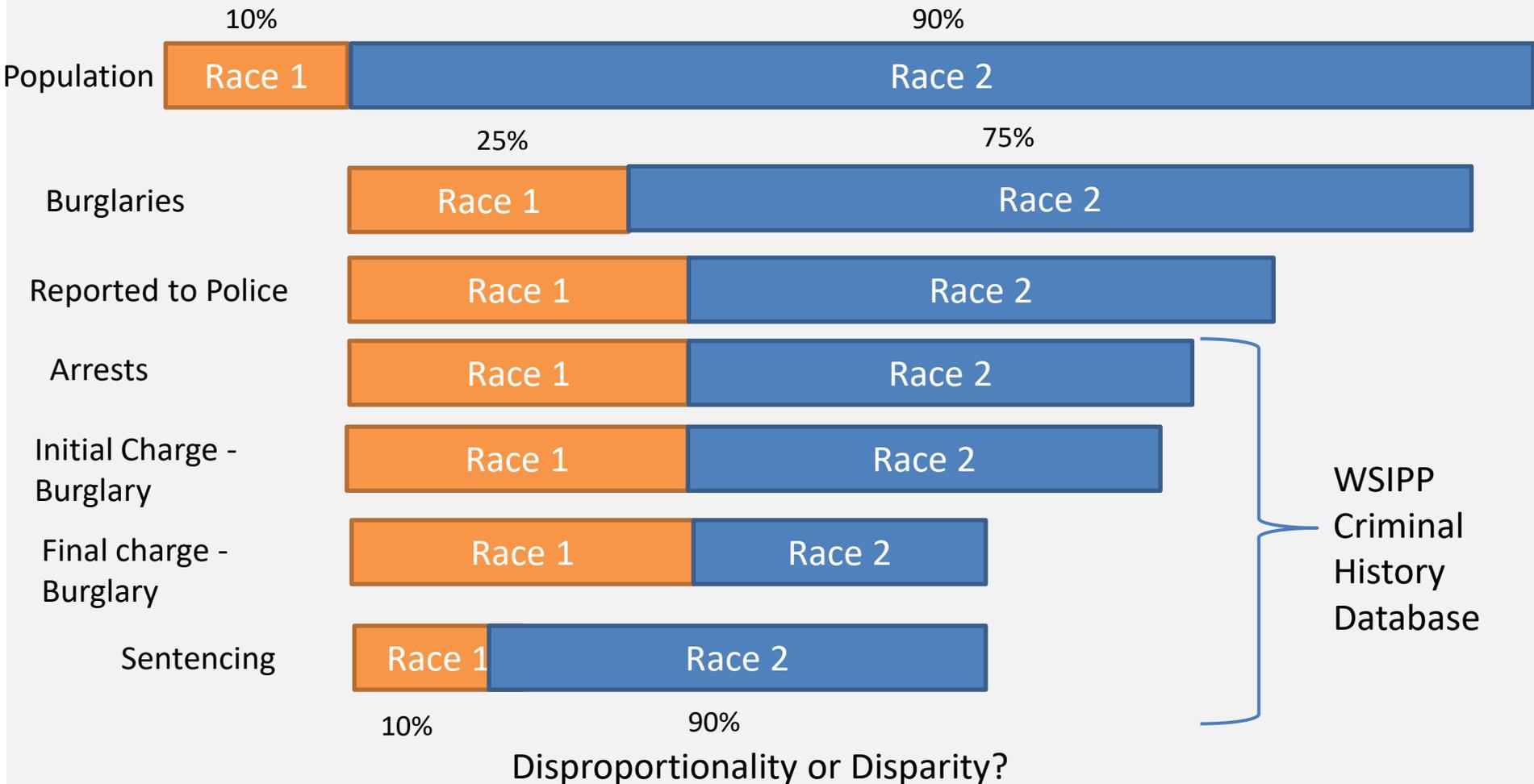
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FEDERAL SENTENCING CHANGES OVER TIME

1987	USSC	Passage of presumptive sentencing guidelines grid for federal courts	Judicial Discretion harshly restrained
1996	<i>Koon v. U.S.</i>	Established abuse of discretion standard for appellate review of departures	Judicial discretion increases slightly
2003	PROTECT Act	de novo appellate review of sentences, increase prosecutor discretion, directed USSC to reduce departure mechanisms	Judicial discretion restrained
2005	<i>US v. Booker/US. V Fanfan</i>	rendered sentencing guidelines advisory; move to a "reasonableness" standard	Judicial discretion increases significantly
2007	<i>Rita v. U.S.</i>	Federal appellate courts may but are not required to presume guidelines sentences to be reasonable	Affirms judicial discretion
2007	<i>Gall v. U.S.</i>	District judges may not automatically presume the guidelines range to be reasonable and must make an individualized assessment	Affirms judicial discretion

DISPARITY FOLLOWING INCREASE IN JUDICIAL DISCRETION

Ulmer, Light, and Kramer 2011

- Compared disparity during mandatory guidelines (prior to *Koon v U.S.*) to post-*Booker/Gall* disparity (advisory guidelines).
- Incarceration vs. no incarceration: general stability in disparity.
 - Slight increase in black male incarceration disparity post-*Gall*, but black male sentence length disparity reduced considerably.
 - All other gender x race combinations had slight (not significant) reductions in disparity post-*Booker/Gall*
- Sentence length: Post-*Booker/Gall* disparities are considerably less than those found prior to *Koon*.
 - Disparities for white females, black males, and Hispanic females were significantly less than pre-*Koon*.
- Criminal history accounts for a large portion of disproportionality for Black males.

DISPARITY DESPITE GUIDELINES

Changes to sentencing guidelines are neither the sole cause of significant racial disparity nor the solution for eliminating racial disparity at sentencing.

- Mandatory guidelines do not eliminate disparity.
 - During initial years of federal mandatory guidelines, research found significant disparity in sentencing for race/ethnicity, gender, education level, and citizenship – all of which were defined by guidelines as legally irrelevant (Albonetti, 1997)
 - Largely driven by differences in substantial assistance departures.

DISPARITY DESPITE GUIDELINES

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- Disparity changes over time and in response to different characteristics.
 - A new study (Ulmer and Parker, 2019) found variation in disparity in sentencing in federal courts between Hispanic citizens and Hispanic non-citizens based on whether the court was located in a traditional Hispanic immigration destination or a new/emerging Hispanic immigration destination.
 - Court communities establish a negotiated order that leads to differences in procedures between courts.

DISPARITY DESPITE GUIDELINES

Changes to sentencing guidelines are neither the sole cause of significant racial disparity nor the solution for eliminating racial disparity at sentencing.

- Even in the face of advisory guidelines, other sentencing policies and practices may inform disparity.
 - A study of Pennsylvania's structured sentencing alternatives found significant racial disparity in guideline decision-making – whether conformity or departures – when the sentence involved an intermediate punishment (Painter-Davis and Ulmer, 2019).
 - “From their inception, a key goal of guidelines was to reduce disparity. Others note that though this remains a core goal there is a growing focus on crafting effective sentences that reduce recidivism, are cost-effective, and mitigate unwanted consequences of punishment. These goals can conflict. Considering offender needs and rehabilitation requires individualization, a consideration of nonlegal factors, and discretion, but such discretion can lead to disparity.”

WHAT EXPLAINS THE FINDINGS?

Hydraulic Displacement of Discretion

- ✓ Underlying premise: a certain amount of discretion exists in the sentencing process and is distributed between different court actors (e.g., prosecutors and judges)
 - ✓ When you decrease discretion in one area, you increase it in another area.
- ✓ Key question to keep in mind: Where does discretion go when it is constrained in a given area?
- ✓ Source: Miethe 1987; Walker 1993

HYDRAULIC DISPLACEMENT OF DISCRETION

Example NY Drug Laws:

- 1973, NY legislature thought prosecutorial discretion was undermining tough sentences on drug crimes. In response they restricted prosecutorial discretion by passing a ban on pleas to lower charges for anyone charged with a Class A1 drug offense (mandatory sentence of 15-25 years to life). Charges for lesser felonies could not plea to Misdemeanor. Championed as one of toughest laws on drug crimes.
- Real effects:
 - Drug arrests resulting in indictment dropped from 39% to 25% (**prosecutors less likely to file initial charges**)
 - Convictions fell from 86% to 80% (**judges and juries less likely to convict**)
 - Net result: overall percentage of drug arrests resulting in convictions fell from 33.5% to 20%. Cases that were previously plea bargained down were either dismissed or beaten through acquittal.

DISPARITY FOLLOWING CHANGES IN WA

- Engen, Gainey, Crutchfield, and Weis (2003)
 - Sample of adult felony sentences from July 1989 through June 1992
 - Examined discretionary departures and structured sentencing alternatives (Alternative Sentence Conversion, FTOW, and SSOSA)
- Findings:
 - 85% of sentences fell within presumptive range
 - Legal, offense-related characteristics increased the use of upward departures, but less so for downward departures
 - White defendants, females, older defendants, and those who plead guilty were substantially more likely to receive downward departures
 - Hispanic defendants and those convicted in trials were more likely to receive upward departures

SO WHAT?

- Research finds there isn't a silver bullet to eliminating sentencing disparity.
- We cannot predict exactly how policies will be interpreted and used in different court communities. Impacts will likely vary between courts, even within the same state.
- Ongoing, quality research is critical to monitor post-policy implementation changes and to identify whether policies are serving the intended goals.
 - Identifying the "why" is just as important as identifying the "what"

THANK YOU

Questions?