

# Utah officials want to let minority defendants raise issues of race and bias at their sentencing

*A sweeping criminal justice reform passed by Utah legislators in 2015 was intended to reduce a bloated prison population and emphasize rehabilitation – but it's mostly working for white people.*

<https://www.sltrib.com/news/2019/09/06/utah-officials-want-let/>

By Jessica Miller  
Salt Lake Tribune  
Sept. 6, 2019

A sweeping criminal justice reform passed by Utah legislators in 2015 was intended to reduce a bloated prison population and emphasize rehabilitation.

Since it went into effect, it has helped some offenders — mostly white people.

State data shows that since the reforms, the percentage of racial minorities among new prisoners is on the rise. In the year before the reform, 34% of new prisoners were ethnic minorities. Three years later, that jumped to just over 43%.

It dipped down slightly last year, but the data has alarmed Utah officials and is prompting a new rule that is now under consideration — judges would be able to take a defendant's race into account when deciding punishment.

A judge generally looks at many factors in deciding what is an appropriate sentence, such as a defendant's age or their criminal history. But the Utah Sentencing Commission has proposed allowing defense attorneys to argue that a client should get a more lenient sentence if they are a minority and have been affected by bias in the criminal justice system.

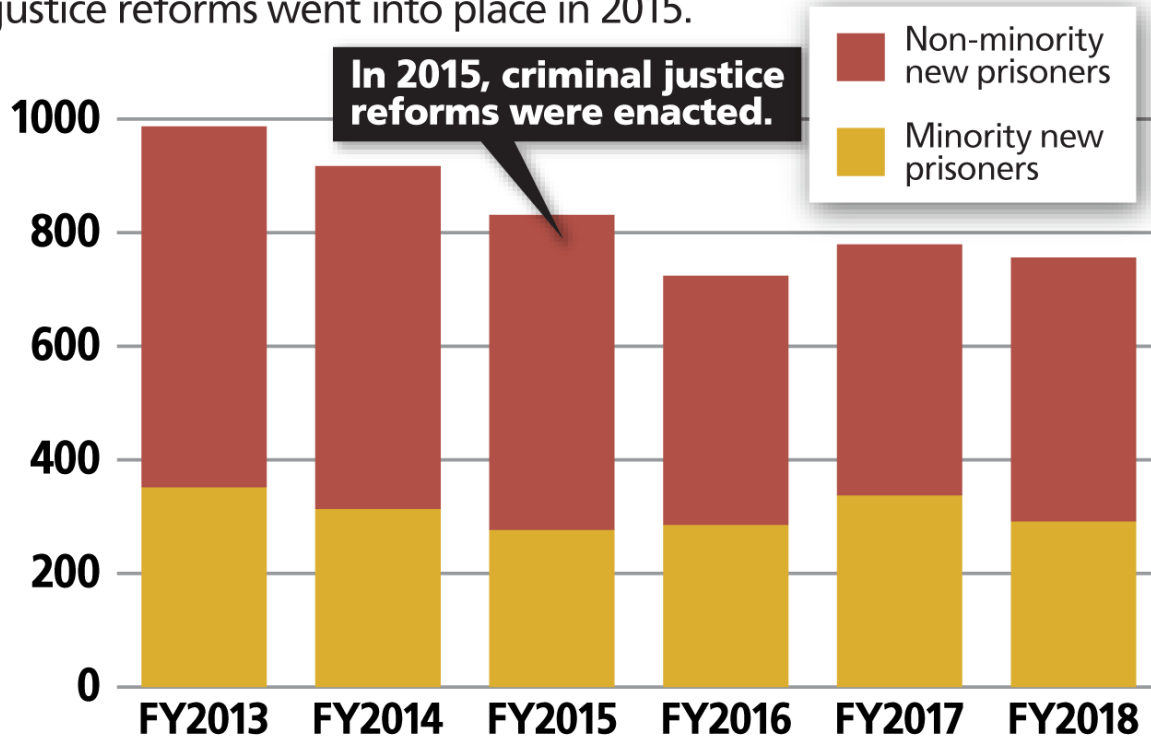
Executive Director Marshall Thompson said the proposal came from a subcommittee studying data that shows minorities in Utah are not benefiting from the Justice Reinvestment Initiative in the same way white people are.

"There's no way you can let that sit and go unremedied or unaddressed," he said. "One thing we realized is if you feel racial disparity or unconscious bias is affecting your case, there's no good place to raise that in the context of a criminal case."

The proposed change would give defendants the chance to bring up racial issues at their sentencing. The guidelines say someone must persuade a judge that the offender's minority group is overrepresented in Utah's prison, and there is some reason to believe that bias — whether conscious or unconscious — affected their case.

## Racial disparities in Utah prisons

Utah officials are alarmed that the percentage of racial minorities among new prisoners is on the rise after sweeping criminal justice reforms went into place in 2015.



Source: Department of Corrections

GRAPHIC BY CHRISTOPHER CHERRINGTON | *The Salt Lake Tribune*

It should be assumed that all bias is unconscious, the proposed guideline states, meaning that someone did not intend to treat someone differently because of their race. But the guideline notes that even if a bias wasn't intentional, it still has the same damaging effect.

"I do not think there are racist judges out there or racist police or racist prosecutors or racist defense attorneys," Thompson said. "But there is unconscious bias at every level."

But some involved in Utah's criminal justice system are concerned that the guidelines don't provide enough guidance. There's concern that it will be impossible for a defense attorney or overworked public defender to actually prove bias in the courtroom. And some ask, would it be unfair to treat minorities differently and punish them less harshly than white people for the same crimes?

Jason Groth, with the American Civil Liberties Union of Utah, said the proposed change addresses the symptoms of racial bias but doesn't address the root causes. There should be more data publicly available, he said, not just about who ends up in prison. Are people of color arrested more often in certain neighborhoods? Do white people get better plea deals than minorities? That's the data that should be used, he said, in deciding policy changes to address

racial disparities. But that kind of data is not readily available in many Utah police stations and prosecutor offices.

Absent that information, Groth predicts it may be tough for a defense attorney to successfully argue that their client was treated differently because of unconscious bias.

"Implicit bias is going to be extremely hard to show without data analysis," he said. "It's really hard to figure out what's going on in someone's brain."

Salt Lake District Attorney Sim Gill said the proposal is a step in the right direction, but he said meaningful change needs to go deeper and look at the policies and laws that led to the disparity. He said that even well-intentioned legislation, like Utah's criminal justice reform efforts, can have a negative impact on minorities.

"It's a very complex issue," he said. "We would all have to agree that there's an issue of racism in our country, especially when it comes to the criminal justice system. We have to acknowledge that some of the statutes and decisions we've made — whether intentional or unintentional — have resulted in a disproportionate and overrepresentation of people of color."

But Gill's biggest concern about the proposed change is that a white defendant could argue that they are being punished more harshly because of their race, and that could create an equal protection issue.

"We have to be very careful about how that is implemented," he said. "Where the challenge is going to be is wanting to make sure you aren't treating one class of citizens different than another set of citizens."

This unconscious bias provision is among several proposed changes to the sentencing guidelines. Some forms are being updated, Marshall said, and there's also been a change made to when defendants who commit minor crimes need to complete a full pre-sentence evaluation prior to punishment.

There's also a proposed change advising judges to not weigh whether someone convicted of a sex offense shows remorse at sentencing. Marshall said this change is suggested because research doesn't show that expressing remorse is a reliable indicator of someone's risk.

But these changes aren't yet final. The Utah Sentencing Commission is taking public comment until Sept. 28. Those who have an opinion can email [marshallthompson@utah.gov](mailto:marshallthompson@utah.gov).

Thompson said they haven't received any feedback so far, and they didn't get any suggestions when the guidelines were changed in 2017, either. He encouraged the public to get in touch with him and share their thoughts.

"It's an important part of our criminal justice system," he said. "And we want to make sure everyone is participating."