

agreed to provide information about other, more serious, cases.¹⁰⁸ Finally, prosecutors can reject charges as felonies but prosecute them as misdemeanors.

If a formal charge is filed by the prosecutor, it still can be reduced to a less-serious felony or to a misdemeanor during plea bargaining. It also can be dismissed by the court on a recommendation by the prosecutor. This usually happens when the case "falls apart" prior to trial. A witness may refuse to cooperate or may fail to appear at trial, or the judge may rule that the confession or other essential evidence is inadmissible. Unlike the prosecutor's initial decision to reject the charge, the decision to dismiss a charge already filed requires official court action.

The Effect of Race on Charging Decisions Although the prosecutor's discretion is broad, it is not unlimited. The Supreme Court, in fact, has ruled that the decision to prosecute may not be "deliberately based upon an unjustifiable standard such as race, religion, or other arbitrary classification."¹⁰⁹ The prosecutor, in other words, cannot legitimately take the race of the suspect into account in deciding whether to file charges or in deciding on the seriousness of the charge to be filed.

Relatively few studies have examined the effects of race and ethnicity on prosecutorial charging decisions, and those few studies conducted reach contradictory conclusions.¹¹⁰ Some researchers found either that race/ethnicity did not affect charging decisions at all or that race/ethnicity played a very minor role in the decision of whether to prosecute.¹¹¹ Two recent studies, one of charging decisions in federal courts and one of charging outcomes in state courts, illustrate this conclusion. Lauren Shermer and Brian Johnson examined U.S. attorneys' decisions to reduce the severity of the charges that defendants were facing in U.S. district courts.¹¹² They found that males were less likely than females to receive charge reductions but that neither race/ethnicity nor age affected the likelihood of charge reduction. Further analysis revealed that race, ethnicity, gender, and age did not interact to affect charge reductions in the predicted way; that is, young male African-American and Hispanic offenders were *not* less likely than older white male offenders to receive a reduction in the charges. Although they were careful to point out that they only examined one aspect of charging in federal courts, Shermer and Johnson concluded that the results of their study "are encouraging in that they support a general lack of systematic bias in the charge reduction decisions of federal prosecutors."¹¹³ Travis Franklin found a similar pattern of results using state court data to examine whether the prosecutor dismissed the case against the defendant (after charges were initially filed).¹¹⁴ Race did not affect the likelihood of dismissal, and black males were no less likely than black females, white males, or white females to have the charges against them dismissed. Both of these recent and methodologically sophisticated studies, then, found no evidence of racial/ethnic bias in prosecutors' decisions to reduce or dismiss the charges. (For a discussion of a case of *reverse discrimination* in a prosecutor's charging decision, see Box 5.3, "In the Media: Mike Nifong and the Duke Lacrosse Case.")

Several studies concluded that prosecutors' charging decisions *are* affected by race. For example, a study that examined the decision to reject or dismiss charges against felony defendants in Los Angeles County revealed a pattern of

Box 5.3 In the Media: Mike Nifong and the Duke Lacrosse Case

Gunnar Myrdal, a Swedish social scientist and the author of a book examining the "Negro Problem" in the United States in the late 1930s and early 1940s, found substantial discrimination against African Americans in the decision of whether to charge. As Myrdal noted:

State courts receive indictments for physical violence against Negroes in an infinitesimally small proportion of the cases. It is notorious that practically never have white lynching mobs been brought to court in the south, even when the killers are known to all in the community and are mentioned by name in the local press. When the offender is a Negro, indictment is easily obtained, and no such difficulty at the start will meet the prosecution of the case.¹¹⁵

Discrimination of a different type surfaced in a recent, and highly publicized, case involving three members of the Duke University lacrosse team. In April 2006, Durham County (North Carolina) District Attorney Mike Nifong filed first-degree forcible rape, first-degree sexual offense, and kidnapping charges against the players, all of whom were white, after an African-American woman who had been hired as a stripper for a team party claimed that she had been repeatedly raped. The charges were filed in spite of the fact that the complainant's story changed several times and that DNA tests failed to connect any of the accused to the alleged sexual assault.

In the weeks and months following the filing of charges, District Attorney Nifong gave dozens of interviews to local and national media. He stated repeatedly that he was "confident that a rape occurred,"¹¹⁶ and he called the players "a bunch of hooligans" whose "daddies could buy them expensive lawyers."¹¹⁷ Professors at Duke University were even blunter, emphasizing the race of the victim and the suspects and implying that justice would not be served. For example, William Chafe, a professor of history, published an op-ed piece in which he argued that there were similarities between the Duke case and the case involving whites who kidnapped, beat, and murdered an African-American boy named Emmett Till in 1950s in Mississippi:

Sex and race have always interacted in a vicious chemistry of power, privilege and control. Emmett Till was brutalized and lynched in Mississippi in 1954 for allegedly speaking with too easy familiarity to a white woman storekeeper. . . . What has all this to do with America today? Among other things, it helps to put into context what occurred in Durham two weeks ago. The mixture of race and sex that transpired on Buchanan Boulevard is not new.¹¹⁸

The case against the three Duke University students began to unravel during the summer and fall of 2006. In mid-December, it was revealed that Nifong had withheld exculpatory DNA evidence (i.e., evidence that proved none of the three men accused of the assaults was involved) from defense lawyers, and on December 22, Nifong dropped the rape charges, but not the sexual offense and kidnapping charges. Six days later the North Carolina Bar Association filed ethics charges against Nifong, alleging that he had engaged in "conduct that involves dishonesty, fraud, deceit or misrepresentation, as well as conduct that is prejudicial to the administration of justice."¹¹⁹ In January 2007, Nifong asked to be taken off the case, which was then turned over to the North Carolina Attorney General, Roy Cooper. After conducting his own investigation, Cooper dropped all of the remaining charges on

April 11. Cooper stated that his office "believed these three individuals are innocent of these charges." He also alleged that the charges resulted from a "tragic rush to accuse and a failure to verify serious allegations" and showed "the enormous consequences of overreaching by a prosecutor."¹²⁰

Nifong resigned from his position as Durham County District Attorney on June 18. Two days earlier, he had been disbarred after a disciplinary hearing committee of the North Carolina Bar ruled that he had committed numerous violations of the state's rules of professional conduct. In August, Nifong was held in criminal contempt of court and sentenced to one day in jail for his actions in the case.

As this case illustrates, prosecutors have an ethical obligation to "do justice." Their charging decisions cannot be motivated by "personal or political advantages or disadvantages which might be involved" or by "a desire to enhance [their conviction records]."¹²¹

discrimination in favor of female defendants and against African-American and Hispanic defendants.¹²² The authors controlled for the defendant's age and prior criminal record, the seriousness of the charge against the defendant, and whether the defendant used a weapon in committing the crime. As shown in Table 5.4, they found that Hispanic males were most likely to be prosecuted fully, followed by African-American males, white males, and females of all ethnic groups.

The authors of this study speculated that prosecutors took both race and gender into account in deciding whether to file charges in "marginal cases." They reasoned that strong cases would be prosecuted and weak cases would be dropped, regardless of the race or gender of the suspect. In marginal cases, however,

prosecutors may simply feel less comfortable prosecuting the dominant rather than the subordinate ethnic groups. They might feel the dominant groups are less threatening. Or they might believe they can win convictions more often against blacks and Hispanics than against Anglos.¹²³

Similar results surfaced in a study of prosecutors' charging decisions in King County, Washington.¹²⁴ When the authors of this study examined the prosecutor's decision to file felony charges (rather than file misdemeanor charges or decline to prosecute the case), they found that prosecutors were substantially more likely to file felony charges against racial minorities than against whites. These differences were especially pronounced for violent crimes and drug offenses. Moreover, the racial disparities did not disappear when the authors controlled for the seriousness of the crime, the defendant's prior criminal record, and the defendant's age and gender. Even taking these factors into account, Native Americans were 1.7 times more likely than whites to be charged with a felony, and African Americans were 1.15 times more likely than whites to face felony charges.¹²⁵

Robert D. Crutchfield and his coauthors stressed that these racial differences were not "necessarily the result of individuals making biased decisions."¹²⁶ Rather, the differences probably reflected race-linked legal, economic, and social factors that prosecutors take into account in deciding whether to charge, as well

TABLE 5.4 The Effect of Race and Gender on Prosecutors' Charging Decisions

Group	Adjusted Means ^a		
	Rejected at Screening %	Dismissed by Court %	Fully Prosecuted %
African-American male	46	34	39
African-American female	57	42	30
Hispanic male	46	33	42
Hispanic female	54	43	31
White male	54	33	26
White female	59	42	19

^aMeans have been adjusted for the effect of four independent variables: age of the defendant, prior record of the defendant, seriousness of the charge, and whether the defendant used a weapon.

SOURCE: Table adapted from Cassia Spohn, John Gruhl, and Susan Welch, "The Impact of the Ethnicity and Gender of Defendants on the Decision to Reject or Dismiss Felony Charges," *Criminology* 25 (1987), pp. 175-191.

as officials' focus on drug offenses involving crack cocaine. As we have repeatedly emphasized, however, this type of subtle or indirect discrimination is problematic. It is difficult to disentangle the effects of race/ethnicity, social class, employment history, and family situation. Even if criminal justice officials are justified in taking these social and economic factors into account, doing so will necessarily produce unintended race effects.

Prosecutorial Discretion in the Context of Mandatory Minimum Sentences and Habitual Offender Laws

An important component of prosecutorial discretion is found in the context of mandatory minimum sentences and habitual offender laws. In many jurisdictions, prosecutors have discretion whether to file charges that trigger mandatory minimum sentences, three-strikes-and-you're-out provisions, and habitual offender sentencing requirements. All of these provisions lead to more punitive sentences. If such charges are filed, the judge's discretion at sentencing is reduced or, in some jurisdictions, eliminated entirely. By determining whether defendants will face charges that trigger these sentence enhancements, prosecutors in essence influence the sentences that judges impose.

There is compelling evidence that prosecutors do exercise their discretion in these types of cases. A study by the U.S. Sentencing Commission, for example, showed that only about half of all federal offenders who were potentially subject to mandatory minimums actually received a mandatory minimum sentence, and there are a number of studies at the state level that reveal that mandatory minimums, sentencing enhancements for use of a firearm, and habitual offender provisions are applied to only a small proportion of eligible defendants.¹²⁷

There also is evidence that race and ethnicity influence prosecutors' decisions in these situations. Both David Bjerk¹²⁸ and Jill Farrell¹²⁹ found that racial minorities were more likely than whites to be sentenced under mandatory minimum sentences, and two studies¹³⁰ found that eligible racial minorities were substantially more likely than eligible whites to be sentenced as habitual offenders. A somewhat different pattern of results was found by Jeffery Ulmer and his colleagues, who used data from Pennsylvania (which operates under sentencing guidelines) to examine cases that were eligible to receive a mandatory minimum sentence.¹³¹ The outcome of interest was whether the prosecutor filed a motion to apply the mandatory sentence. Their analysis controlled for the severity of the offense, the offender's prior criminal record, the type of offense, whether the defendant went to trial or pled guilty, and the defendant's race, ethnicity, gender, and age. They found, consistent with the research discussed earlier, that prosecutors applied the mandatory minimums to a small fraction of eligible offenders. They also found that Hispanics, but not African Americans, were more likely than whites to receive mandatory minimums, and that young Hispanic males were singled out for mandatory application, particularly in drug trafficking cases.¹³² The authors of this study concluded that "legally relevant factors, case processing concerns (i.e., rewarding guilty pleas), and social statuses (i.e., gender, ethnicity and age) shape prosecutors' perceptions of blameworthiness and community protection and thus their decisions to apply mandatory sentences."¹³³

The Effect of Offender Race and Victim

Race on Charging Decisions

The research discussed thus far suggests that the race/ethnicity of the offender affects prosecutors' charging decisions. There also is evidence that charging decisions vary depending on the race of the offender and the race of the victim. Gary D. LaFree,¹³⁴ for example, found that African Americans arrested for raping white women were more likely to be charged with felonies than were either African Americans arrested for raping African-American women or whites arrested for raping white women. One study found that defendants arrested for murdering whites in Florida were more likely to be indicted for first-degree murder than those arrested for murdering African Americans.¹³⁵ Another study of prosecutors' charging decisions in death penalty cases found that homicide cases involving African-American defendants and white victims were more likely than similar cases involving other offender-victim racial combinations to result in first-degree murder charges.¹³⁶ The prosecutor in the midwestern jurisdiction where this study was conducted was also more likely to file a notice of aggravating circumstances and to proceed to a capital trial if the defendant was an African American who was accused of killing a white.

Research on sexual assault case processing decisions in Detroit reached a different conclusion. Cassia Spohn and Jeffrey Spears¹³⁷ used data on sexual assaults bound over for trial in Detroit Recorder's Court to examine the effect of

offender race, victim race, and other case characteristics on the decision to dismiss the charges against the defendant (versus the decision to fully prosecute the case). Building on previous research demonstrating that African Americans who murder or rape whites receive more punitive treatment than other victim-offender racial combinations, they hypothesized that African American-on-white sexual assaults would be more likely than either African American-on-African American or white-on-white sexual assaults to result in the dismissal of all charges. They found just the opposite: the likelihood of charge dismissal was significantly *greater* for cases involving African-American offenders and white victims than for the other two groups of offenders. They also found that African Americans prosecuted for assaulting whites were less likely to be convicted than whites charged with sexually assaulting whites.¹³⁸

Spohn and Spears concluded that their "unexpected findings" suggest that African American-on-white sexual assaults with weaker evidence are less likely to be screened out during the preliminary stages of the process.¹³⁹ Police and prosecutors, in other words, may regard sexual assaults involving African-American men and white women as inherently more serious than intraracial sexual assaults; consequently, they may be more willing to take a chance with a reluctant victim or a victim whose behavior at the time of the incident was questionable. According to the authors of this study:

The police may be willing to make an arrest and the prosecutor may be willing to charge, despite questions about the procedures used to obtain physical evidence or about the validity of the defendant's confession. If this is true, then cases involving black offenders and white victims will be *more* likely than other types of cases to "fall apart" before or during trial.¹⁴⁰

A study of charging decisions in California reached a similar conclusion. Joan Petersilia found that white suspects were *more* likely than African-American or Hispanic suspects to be formally charged.¹⁴¹ Her analysis of the reasons given for charge rejection led her to conclude that the higher dismissal rates for nonwhite suspects reflected the fact that "blacks and Hispanics in California are more likely than whites to be arrested under circumstances that provide insufficient evidence to support criminal charges."¹⁴² Prosecutors were more reluctant to file charges against racial minorities than against whites, in other words, because they viewed the evidence against racial minorities as weaker and the odds of convicting them as lower.

Race, Drugs, and Selective Prosecution The results of Petersilia's study in Los Angeles and Spohn and Spears's study in Detroit provide evidence suggestive of a pattern of *selective prosecution*—that is, cases involving racial minorities, or certain types of racial minorities, are singled out for prosecution, whereas similar cases involving whites are either screened out very early in the process or never enter the system in the first place.

This argument has been made most forcefully with respect to drug offenses. In *Malign Neglect*, for example, Michael Tonry¹⁴³ argues that "urban black

Americans have borne the brunt of the War on Drugs.” More specifically, he charges that “the recent blackening of America’s prison population is the product of malign neglect of the war’s effects on black Americans.”¹⁴⁴ Jerome Miller similarly asserts that “from the first shot fired in the drug war African-Americans were targeted, arrested, and imprisoned in wildly disproportionate numbers.”¹⁴⁵

There is ample evidence that the war on drugs is being fought primarily in African-American and Hispanic communities. In 2014, for example, racial minorities comprised nearly three-fourths of all offenders prosecuted in federal district courts for drug trafficking: 24.5 percent of these offenders were white, 24.8 percent were African American, and 47.6 percent were Hispanic.¹⁴⁶ These figures are inconsistent with national data on use of drugs, which reveal that whites are more likely than either African Americans or Hispanics to report having “ever” used a variety of drugs, including cocaine, PCP, LSD, and marijuana.¹⁴⁷

Some commentators cite evidence of a different type of selective prosecution in drug cases (see Box 5.4 for the U.S. Attorney General’s memorandum regarding racial neutrality in federal prosecution). Noting that the penalties for use of crack cocaine mandated by the federal sentencing guidelines are substantially harsher than the penalties provided under many state statutes, these critics suggest that state prosecutors are more likely to refer crack cases involving racial

Box 5.4 The U.S. Attorney General and Racial Neutrality in Prosecution

In January 1999, Janet Reno, then attorney general for the United States, issued a memorandum on “Ensuring Racial Neutrality in Prosecution Practices” to all U.S. Attorneys.¹⁴⁸ Excerpts from the memo included the following:

- “Each United States Attorney should examine his or her office’s practices and procedures and take all necessary measures to ensure the use of race-neutral policies in the exercise of prosecutorial discretion within a district. Absent compelling, specific law enforcement imperatives there is ordinarily no justification for differing policies and practices within a district with respect to similarly situated defendants. Moreover, any race-neutral policy that has a disparate racial impact should be carefully reviewed to determine whether the disparity is justified by law enforcement necessity and not the product of conscious or unconscious racial bias.”
- “Care must be taken to ensure that race plays no part in the Government’s decision whether to file a substantial assistance motion or the amount of any recommended reduction.”
- “As the chief federal law enforcement officer in the district, the United States Attorney should take a leadership role in ensuring that all agencies within the district are aware of issues of racial disparity [O]ur constant vigilance will ensure that there is no perception of racial disparity in the discharge of our duties. The public recognition that our policies are administered in a race-neutral fashion is as important as the reality that we do so administer them.”

minorities to the federal system for prosecution. Richard Berk and Alec Campbell,¹⁴⁹ for example, compared the racial makeup of defendants arrested for sale of crack cocaine in Los Angeles to the racial makeup of defendants charged with sale of crack cocaine in state and federal courts. They found that the racial makeup of arrestees was similar to the racial makeup of those charged with violating state statutes. However, African Americans were overrepresented in federal cases; in fact, over a four-year period, no whites were prosecuted for the sale of crack cocaine in federal court.

This issue was addressed by the Supreme Court in 1996. The five defendants in the case of *U.S. v. Armstrong et al.*¹⁵⁰ alleged that they were selected for prosecution in federal court (the U.S. District Court for the Central District of California) rather than in state court because they were African American. They further alleged that this decision had serious potential consequences. Christopher Armstrong, for example, faced a prison term of 55 years to life under federal statutes, compared to 3–9 years under California law. Another defendant, Aaron Hampton, faced a maximum term of 14 years under California law but a mandatory life term under federal law.

Following their indictment for conspiring to possess with intent to distribute more than 50 grams of crack cocaine, the defendants filed a motion for discovery of information held by the U.S. Attorney's office regarding the race of people prosecuted by that office. In support of their motion, they offered a study showing that all of the defendants in the crack cocaine cases closed by the Federal Public Defender's Office in 1991 were African American.

The U.S. District Court ordered the U.S. Attorney's office to provide the data requested by the defendants. When federal prosecutors refused to do so, noting that there was no evidence that they had refused to prosecute white or Hispanic crack defendants, U.S. District Judge Consuelo Marshall dismissed the indictments. The 9th Circuit U.S. Court of Appeals affirmed Judge Marshall's dismissal of the indictments. The appellate court judges stated that they began with "the presumption that people of all races commit all types of crimes—not with the premise that any type of crime is the exclusive province of any particular racial or ethnic group."¹⁵¹ They stated that the defendant's evidence showing that all 24 crack defendants were African American required some response from federal prosecutors.

The U.S. Supreme Court disagreed. In an 8-to-1 decision that did not settle the issue of whether the U.S. Attorney's Office engaged in selective prosecution, the Court ruled that federal rules of criminal procedure regarding discovery do not require the government to provide the information requested by the defendants. Although prosecutors *are* obligated to turn over documents that are "material to the preparation of the . . . defense," this applies *only* to documents needed to mount a defense against the government's "case-in-chief" (in other words, the crack cocaine charges) and not to documents needed to make a selective prosecution claim. Further, the Court ruled that "for a defendant to be entitled to discovery on a claim that he was singled out for prosecution on the basis of his race, he must make a threshold showing that the Government declined to prosecute similarly situated suspects of other races."¹⁵²

Justice Stevens, the lone dissenter in the case, argued that the evidence of selective prosecution presented by the defendants "was sufficiently disturbing to require some response from the United States Attorney's Office." According to Stevens:

If a District Judge has reason to suspect that [the United States Attorney for the Central District of California], or a member of her staff, has singled out particular defendants for prosecution on the basis of their race, it is surely appropriate for the Judge to determine whether there is a factual basis for such a concern.¹⁵³

Stevens added that the severity of federal penalties imposed for offenses involving crack cocaine, coupled with documented racial patterns of enforcement, "give rise to a special concern about the fairness of charging practices for crack offenses." His concerns are echoed by U.S. District Court Judge Consuelo B. Marshall, who observed, "We do see a lot of these [crack] cases and one does ask why some are in state court and some are being prosecuted in federal court . . . and if it's not based on race, what's it based on?"¹⁵⁴

Prosecution of the Jena Six In September 2006, an African-American student at Jena (Louisiana) High School defied tradition and sat under a large oak tree in the center of campus that was "reserved" for whites. The next day, three hangman's nooses were found dangling from the tree. This led to a series of altercations involving white and African-American students and, eventually, to the beating of a white student, Justin Barker, by six African-American youths who also attended the school. Barker was treated at a local hospital and released. The white students who admitted hanging the nooses were suspended from school for three days.

Although the incident was widely regarded as nothing more than a "schoolyard brawl,"¹⁵⁵ the six students, five of whom were juveniles at the time of the incident, were expelled from school and charged, not with assault, but with attempted second-degree murder and conspiracy to commit second-degree murder. All but one of the students—Jesse Ray Beard, who was 14 at the time of the incident—were charged as adults and were facing sentences of up to 100 years in prison.

Rapides Parish District Attorney Reed Walters, who initially justified the murder charges by classifying the tennis shoes the African-American students were wearing during the incident as "deadly weapons," reduced the charges against Mycah Bell, who was 16 when the incident occurred, to aggravated second-degree battery and conspiracy to commit aggravated second-degree battery just before the case was to go to trial. He was convicted of these charges by an all-white jury, but a Louisiana appellate court threw out the conviction, ruling that Bell's case should have been heard in juvenile court. Bell pled guilty to simple battery in juvenile court and was sentenced to serve 18 months in a juvenile facility. In 2009, the remaining five defendants pleaded no contest to misdemeanor simple battery and were sentenced to seven days unsupervised probation and ordered to pay fines of \$500.

Walters's decisions to charge the Jena Six with felonies in adult court and to not file charges against the students who hung the nooses were widely criticized.

In September 2007, Walters answered those criticisms in an op-ed piece for the *New York Times*.¹⁵⁶ Although he acknowledged that hanging the nooses was “abhorrent and stupid,” he nonetheless argued that “it broke no law.” He also contended that the attack on Justin Barker was not a “schoolyard fight” but rather was a brutal and unprovoked attack on an individual who had nothing to do with the noose incident. According to Walters:

I can understand the emotions generated by the juxtaposition of the noose incident with the attack on Mr. Barker and the outcomes for the perpetrators of each. In the final analysis, though, I am bound to enforce the laws of Louisiana as they exist today, not as they might in someone’s vision of a perfect world.¹⁵⁷

Walters’s explanation did not placate his critics. In 2007, the *Harvard Civil Rights-Civil Liberties Law Review* devoted an entire issue to the case of the Jena Six, with a focus on the actions of the prosecuting attorney. Andrew E. Taslitz and Carole Steiker, who wrote the lead article for the issue, argued that Walters’s decisions and the racial conflict they sparked “provide important windows into how race operates in the American criminal justice system.”¹⁵⁸ According to these authors:

The racialized meaning of modern actions also affects public attitudes toward crime, the content of resulting legislation, the ways in which judicial and prosecutorial discretion are exercised, and the nature of what are likely to be effective solutions to the problems of racial bias and disparity. Once again, these meanings may do their work at a subconscious level, yet their influence cannot be denied. All Americans, but especially those with power to change the criminal justice system, have a duty to expose the subconscious and institutional influences at work in their own choices (and in those of other criminal justice system actors) and to correct racism’s pernicious effects.¹⁵⁹

Prosecution of Pregnant Women Who Abuse Drugs: Racial Discrimination?

In 1989, Jennifer Clarise Johnson, a 23-year-old African-American crack addict, became the first woman in the United States to be convicted for exposing a baby to illegal drugs during pregnancy. The Florida court gave Johnson 15–20 years’ probation and required her to enter drug treatment and report subsequent pregnancies to her probation officer. According to the prosecutor who filed charges against Johnson, “We needed to make sure this woman does not give birth to another cocaine baby.”¹⁶⁰

Other prosecutions and convictions in other state courts followed; by 1992, more than 100 women in 24 states had been charged with abusing an unborn child through illegal drug use during pregnancy.

Many of these cases were appealed and, until 1997, all of the appeals resulted in the dismissal of charges. Then in October 1997, the South Carolina Supreme

Court became the first court in the United States to rule that a viable fetus could be considered a person under child abuse laws and that a pregnant woman who abused drugs during the third trimester of pregnancy therefore could be charged with child abuse or other, more serious, crimes.¹⁶¹ Two months later, Talitha Renee Garrick, a 27-year-old African-American woman who admitted that she smoked crack cocaine an hour before she gave birth to a stillborn child, pled guilty to involuntary manslaughter in a South Carolina courtroom.

Do Prosecutors "Target" Pregnant African-American Women? A number of commentators contend that prosecutors' charging decisions in these types of cases reflect racial discrimination. Humphries and colleagues, for example, asserted, "The overwhelming majority of prosecutions involve poor women of color."¹⁶² Dorothy Roberts¹⁶³ similarly argued that "poor Black women are the primary targets of prosecutors, not because they are more likely to be guilty of fetal abuse, but because they are Black and poor."¹⁶⁴

To support her allegations, Roberts cited evidence documenting that most of the women who have been prosecuted have been African American; she noted that the 52 women prosecuted through 1990 included 35 African Americans, 14 whites, 2 Hispanics, and 1 Native American. Ten out of 11 cases in Florida and 17 out of 18 cases in South Carolina were brought against African-American women.¹⁶⁵ According to Roberts, these glaring disparities create a presumption of racially selective prosecution.

Randall Kennedy, an African-American professor of law at Harvard University and the author of *Race, Crime, and the Law*, acknowledged that Roberts' charges of selective prosecution and racial misconduct "are surely plausible." As he noted, "Given the long and sad history of documented, irrefutable racial discrimination in the administration of criminal law . . . no informed observer should be shocked by the suggestion that some prosecutors treat black pregnant women more harshly than identically situated white pregnant women."¹⁶⁶

Kennedy claimed, however, that Roberts's contention that prosecutors target women "because they are black and poor,"¹⁶⁷ although plausible, was not persuasive. He noted that Roberts relied heavily on evidence from a study designed to estimate the prevalence of alcohol and drug abuse among pregnant women in Pinellas County, Florida. This study revealed that there were similar rates of substance abuse among African-American and white women but that African-American women were 10 times more likely than white women to be reported to public health authorities (as Florida law required).

Kennedy argued that the Florida study does not provide conclusive evidence of racial bias. He noted, in fact, that the authors of the study themselves suggested that the disparity in reporting rates might reflect either the fact that newborns who have been exposed to cocaine exhibit more severe symptoms at birth or the fact that African-American pregnant women are more likely than white pregnant women to be addicted to cocaine (rather than to alcohol, marijuana, or some other drug). Kennedy asserted that Roberts failed to address these alternative hypotheses and simply insisted "'racial prejudice and stereotyping must be a factor' in the racially disparate pattern of reporting . . ."¹⁶⁸

Kennedy also contended that Roberts's analysis failed to consider the problem of underprotection of the law. Imagine, he asked, what the reaction would be if the situation were reversed and prosecutors brought child-abuse charges solely against drug-abusing white women. "Would that not rightly prompt suspicion of racially selective devaluation of black babies on the grounds that withholding prosecution deprives black babies of the equal *protection* of the laws?"¹⁶⁹

A more recent study of arrest and forced interventions on pregnant women calls Kennedy's criticisms of Robert's study into question.¹⁷⁰ Lynn M. Paltrow and Jeanne Flavin collected data on 413 cases in which pregnant women were arrested and/or charged with crimes in state and federal jurisdictions of the United States between 1973 and 2005. The authors of the study found that in 84 percent of these cases, illicit drug use by the woman was an issue and over half of the women were charged with child abuse or neglect. Paltrow and Flavin also pointed out that nearly three quarters of the women were economically disadvantaged, as indicated by the fact that they qualified for indigent defense counsel and that more than half of the 368 women for whom information on race/ethnicity was available were racial minorities; in fact, 52 percent of them were African-American women. The racial disparity was even greater in some states. In South Carolina, for example, African Americans made up 30 percent of the state's population, but 74 percent of the cases in the state were brought against African-American women. An even more glaring disparity was found in Florida, where African Americans comprised 15 percent of the state's population, but 75 percent of the cases brought against pregnant women. Noting that "rates of drug use and dependency are similar across races," the authors concluded that "the clear racial disparities identified cannot be explained as the consequences of 'color-blind' decisions to exercise state control over pregnant women who use drugs or more specifically those who use cocaine."¹⁷¹

What do you think? Do prosecutors concerned about drug use/abuse "target" pregnant women who are poor and African American or Hispanic? What would the reaction be (among whites? among racial minorities?) if only white women were prosecuted?

Race and Plea Bargaining Decisions

Although the prosecutor's decision to file charges or not obviously is a critical decision, prosecutors also exercise considerable discretion in the context of plea bargaining. They decide whether to offer the defendant concessions—for example, a reduction in the severity or number of charges or a recommendation regarding the sentence the defendant should serve—in exchange for a guilty plea. Some jurisdictions limit the prosecutor's ability to plea bargain in certain types of cases or require that plea offers be documented in writing, but in most jurisdictions plea bargaining is an unregulated and largely invisible phenomenon.

There has been relatively little research focusing explicitly on the effect of race on prosecutors' plea bargaining decisions. The research that has been conducted reveals that prosecutors' plea bargaining decisions are strongly determined by the strength of evidence against the defendant, by the defendant's prior

criminal record, and by the seriousness of the offense.¹⁷² Prosecutors are more willing to offer concessions to defendants who commit less serious crimes and have less serious prior records. They also are more willing to alter charges when the evidence against the defendant is weak or inconsistent.

A number of studies conclude that white defendants are offered plea bargains more frequently and get better deals than racial minorities (for a detailed discussion of this, see "New York City and Prosecution of Marijuana Offenses"). A study of the charging process in New York, for example, found that race did not affect charge reductions if the case was disposed of at the first presentation. Among defendants who did not plead guilty at the first opportunity, however, African Americans received less substantial reductions than whites.¹⁷³ An analysis of 683,513 criminal cases in California concluded that "whites were more successful in getting charges reduced or dropped, in avoiding 'enhancements' or extra charges, and in getting diversion, probation, or fines instead of incarceration."¹⁷⁴

An analysis of plea bargaining under the federal sentencing guidelines also concluded that whites receive better deals than racial minorities.¹⁷⁵ This study, which was conducted by the U.S. Sentencing Commission, examined sentence reductions for offenders who provided "substantial assistance" to the government. According to §5K1.1 of the *Guidelines Manual*, if an offender assists in the investigation and prosecution of another person who has committed a crime, the prosecutor can ask the court to reduce the offender's sentence. Because the guidelines do not specify either the types of cooperation that "count" as substantial assistance or the magnitude of the sentence reduction that is to be given, this is a highly discretionary decision.

The Sentencing Commission estimated the effect of race/ethnicity on both the probability of receiving a substantial assistance departure and the magnitude of the sentence reduction. They controlled for other variables such as the seriousness of the offense, use of a weapon, the offender's prior criminal record, and other factors deemed relevant under the sentencing guidelines. They found that African Americans and Hispanics were less likely than whites to receive a substantial assistance departure; among offenders who did receive a departure, whites received a larger sentence reduction than either African Americans or Hispanics.¹⁷⁶ According to the Commission's report, "The evidence consistently indicated that factors that were associated with either the making of a §5K1.1 motion and/or the magnitude of the departure were not consistent with principles of equity."¹⁷⁷

Similar results were reported by Celesta A. Albonetti,¹⁷⁸ who examined the effect of guideline departures on sentence outcomes for drug offenders. She found that guideline departures (most of which reflected prosecutors' motions to reduce the sentence in return for the offenders' "substantial assistance") resulted in larger sentence reductions for white drug offenders than for African-American or Hispanic drug offenders. A guideline departure produced a 23 percent reduction in the probability of incarceration for white offenders, compared with a 14 percent reduction for Hispanic offenders and a 13 percent reduction for African-American offenders.¹⁷⁹ Albonetti concluded that her findings "strongly suggest that the mechanism by which the federal guidelines permit the exercise of discretion operates to the disadvantage of minority defendants."¹⁸⁰

Two studies found that race did not affect plea bargaining decisions in the predicted way. An examination of the guilty plea process in nine counties in Illinois, Michigan, and Pennsylvania revealed that defendant race had no effect on four measures of charge reduction.¹⁸¹ The authors of this study concluded that “the allocation of charge concessions did not seem to be dictated by blatantly discriminatory criteria or punitive motives.”¹⁸² A study of charge reductions in two jurisdictions found that racial minorities received more *favorable* treatment than whites. In one county, African Americans received more favorable charge reductions than whites; in the other county, Hispanics were treated more favorably than whites.¹⁸³ The authors of this study speculated that these results might reflect devaluation of minority victims. As they noted, “If minority victims are devalued because of racist beliefs, such sentiments could, paradoxically, produce more favorable legal outcomes for minority defendants.” The authors also suggested that the results might reflect overcharging of minority defendants by the police; prosecutors may have been forced “to accept pleas to lesser charges from black defendants because of the initial overcharging.”¹⁸⁴

New York City and Prosecution of Marijuana Offenses In 2012, the Vera Institute of Justice partnered with Cyrus R. Vance, the newly elected New York district attorney, to study the effect of race and ethnicity on criminal justice outcomes for defendants arrested for misdemeanors and felonies in New York City. In a paper published in 2014 in *Justice Quarterly*, Kutateladze, Andiloro, and Johnson used data on defendants arrested for misdemeanor marijuana offenses to examine two types of plea offers—a prosecutor’s offer to allow the defendant to plead to a lesser charge and a prosecutor’s offer to make a noncustodial sentence recommendation to the judge (i.e., to recommend that the judge not send the defendant to jail or prison).¹⁸⁵ They focused on misdemeanor marijuana offenses both because arrests for these types of offenses have been criticized for targeting racial minorities and because processing of minor drug offenses is highly discretionary and relatively straightforward (at least as compared to more serious violent and property crimes).

The goal of this study was to determine if, among those arrested for misdemeanor marijuana offenses, African Americans, Hispanics, and Asian Americans were treated differently during the plea bargaining process than similarly situated whites. When the researchers examined the two outcomes, they found that African Americans and Hispanics were more likely and Asians were less likely than whites to plead to the original charge. They also found that African Americans were twice as likely as whites to receive a custodial plea offer, Hispanics were somewhat more likely than whites to receive a custodial plea offer, and there were no differences between whites and Asians in the odds of a custodial plea offer.

Because the researchers had access to case files, they were able to collect detailed data on the characteristics of the defendant, the characteristics of the offense, the strength of evidence in the case, and the circumstances of the arrest. When they controlled for these offender and case characteristics, they found that African Americans were still less likely than whites to receive a reduced charge offer and that both African Americans and Hispanics were more likely to whites

to receive a custodial plea offer. In fact, African Americans were 2.4 times more likely than whites and Hispanics were 1.4 times more likely than whites to receive a custodial plea offer.

The authors of the study concluded that their results offer support for "theoretical predictions grounded in implicit bias theory . . . which suggests that discretionary decisions by prosecutors are affected by subconscious racial schemas" that portray racial minorities as dangerous, violent, and prone to criminality.

In sum, although the evidence concerning the effect of race on prosecutors' charging and plea bargaining decisions is both scanty and inconsistent, a number of studies have found that African-American and Hispanic suspects are more likely than white suspects to be charged with a crime and prosecuted fully. There also is evidence supporting charges of selective prosecution of racial minorities, especially for drug offenses. The limited evidence concerning the effect of race on plea bargaining is even more contradictory. Given the importance of these initial charging decisions, these findings "call for the kind of scrutiny in the pretrial stages that has been so rightly given to the convicting and sentencing stages."¹⁸⁶

CONCLUSION

The court system that tried and sentenced the Scottsboro Boys in 1931 no longer exists, in the South or elsewhere. Reforms mandated by the U.S. Supreme Court or adopted voluntarily by the states have eliminated much of the blatant racism directed against racial minorities in court. African-American and Hispanic criminal defendants are no longer routinely denied bail and then tried by all-white juries without attorneys to assist them in their defense. They are not consistently prosecuted and convicted with less-than-convincing evidence of guilt.

Implementation of these reforms, however, has not produced equality of justice. As shown in the preceding sections of this chapter, there is evidence that defendant race/ethnicity continues to affect decisions regarding bail, charging, and plea bargaining. Some evidence suggests that race has a direct and obvious effect on these pretrial decisions; other evidence suggests that the effect of race is indirect and subtle. It is important to note, however, that discriminatory treatment during the pretrial stage of the criminal justice process can have profound consequences for racial minorities at trial and sentencing. If racial minorities are more likely than whites to be represented by incompetent attorneys or detained in jail prior to trial, they may, as a result of these differences, face greater odds of conviction and harsher sentences. Racially discriminatory charging decisions have similar "spillover" effects at trial. We return to this issue in Chapter 7.

DISCUSSION QUESTIONS

1. Some commentators have raised questions about the quality of legal representation provided to the poor. They also have suggested that racial minorities, who are more likely than whites to be poor, are particularly