

RACE AND SENTENCING: In Search of Fairness and Justice

We must confront another reality. Nationwide, more than 40 percent of the prison population consists of African American inmates. About 10 percent of African American men in their mid-to-late 20s are behind bars. In some cities, more than 50 percent of young African American men are under the supervision of the criminal justice system . . . Our resources are misspent, our punishments too severe, our sentences too long.

—JUSTICE ANTHONY KENNEDY, SPEAKING AT THE
AMERICAN BAR ASSOCIATION, AUGUST 2003

LEARNING OBJECTIVES

In this chapter, we address the issue of racial disparity in sentencing. Our purpose is not simply to add another voice to the debate over the existence of racial discrimination in the sentencing process. Although we do attempt to determine whether racial minorities are sentenced more harshly than whites, we believe that this is a theoretically unsophisticated and incomplete approach to a complex phenomenon. It is overly simplistic to assume that racial minorities will receive harsher sentences than whites regardless of the nature of the crime, the seriousness of the offense, the culpability of the offender, or the characteristics of the victim. The more interesting questions are “When does race matter?” and “Why does race matter?” It is these questions that we attempt to answer.

After you have read this chapter:

1. You should be able to explain why racial disparity in sentencing does not necessarily signal the presence of racial discrimination in sentencing and to discuss the five explanations for racial disparities in sentencing.
2. You should be able to clarify why crime seriousness and prior criminal record are not necessarily racially neutral factors.
3. You should be able to discuss and evaluate the conclusions of recent reviews of research investigating the effects of race/ethnicity on sentencing and to explain how research in this area has evolved over time.
4. You should be able to answer the question “When does race (and ethnicity) matter in sentencing?”
5. You should be able to explain why some researchers argue that race/ethnicity, age, and sex are a “volatile combination” in the context of sentencing decisions.
6. You should be able to discuss differences in research findings regarding sentences imposed on whites and those imposed on African Americans, Hispanics, Asian Americans, and Native Americans.
7. You should be able to explain how the race of the victim affects sentencing decisions.
8. You should be able to discuss the focal concerns perspective and explain how judges’ focal concerns may lead to unwarranted disparities in sentencing.
9. You should be able to explain the difference between direct and indirect race effects and you should be able to discuss the consequences of cumulative disadvantage.
10. You should be able to evaluate competing arguments regarding similarities and differences in the sentencing decisions of African-American and white judges.
11. You should be able to discuss the crack-powder cocaine disparity, explain its relationship to racial/ethnic disparities in sentencing, and explain how it was recently modified by Congress.

RACE AND SENTENCING: IS THE UNITED STATES MOVING FORWARD OR BACKWARD?

In 2004, the United States celebrated the fiftieth anniversary of *Brown v. Board of Education*, the landmark Supreme Court case that ordered desegregation of public schools. Also in 2004, the Sentencing Project issued a report entitled “Schools and Prisons: Fifty Years after *Brown v. Board of Education*.”¹ The report noted that, whereas many institutions in society had become more diverse and more responsive to the needs of people of color in the wake of the *Brown* decision,

the American criminal justice system had taken "a giant step backward."² To illustrate this, the report pointed out that in 2004 there were *the same* as many African Americans in prison or jail as on the day the *Brown* decision was handed down—the number increased from 98,000 to 884,500. The report also noted that 1 of every 3 African-American males and 1 of every 18 African-American females born today could expect to be imprisoned at some point in his or her lifetime.³ The authors of the report concluded that "such an outcome should be shocking to all Americans."⁴

Other statistics confirm that racial minorities—and especially young African-American and Hispanic men—are substantially more likely than whites to be serving time in prison. In 2014, for example, African Americans comprised about 13 percent of the U.S. population but 35.8 percent of all state and federal prison inmates. Hispanics were 17 percent of the U.S. population but 21.6 percent of prison inmates. By contrast, non-Hispanic whites made up 63 percent of the total population but only 33.6 percent of the state and prison population. Among inmates who were 18 or 19 years old, black males were 10 times more likely than white males to be imprisoned.⁵

Explanations for the disproportionate number of African-American and Hispanic males under the control of the criminal justice system are complex. As discussed in more detail in Chapter 9, a number of studies have concluded that most—but not all—of the racial disparity in incarceration rates can be attributed to racial differences in offending patterns and prior criminal records. African-American and Hispanic males, in other words, face greater odds of incarceration than white males primarily because they commit more serious crimes and have more serious prior criminal records. As the National Research Council Panel on Sentencing Research concluded in 1983, "Factors other than racial discrimination in the sentencing process account for most of the disproportionate representation of black males in U.S. prisons."⁶ Although there is recent evidence that the proportion of the racial disparity in incarceration unexplained by racial differences in arrest rates is increasing, most scholars would contend that this conclusion is still valid today.⁷

Not all of the racial disparity, however, can be explained away in this fashion. Critics contend that at least some of the over incarceration of racial minorities is the result of racially discriminatory sentencing policies and practices. As one commentator noted, "A conclusion that black overrepresentation among prisoners is not primarily the result of racial bias does not mean that there is no racism in the system."⁸ The National Academy of Sciences Panel similarly concluded that evidence of racial discrimination in sentencing may be found in some jurisdictions or for certain types of crimes.

Underlying this controversy are questions concerning discretion in sentencing. To be fair, a sentencing scheme must allow the judge or jury discretion to shape sentences to fit individuals and their crimes. The judge or jury must be free to consider all *relevant* aggravating and mitigating circumstances. To be consistent, on the other hand, a sentencing scheme requires the even-handed application of objective standards. The judge or jury must take only relevant considerations into account and must be precluded from determining sentence severity based on prejudice or whim.

Critics of the sentencing process argue that judges, juries, and other members of the courtroom workgroup sometimes exercise their discretion inappropriately. Although they acknowledge that some degree of sentence disparity is to be expected in a system that attempts to individualize punishment, these critics suggest that there is *unwarranted* disparity in the sentences imposed on similarly situated offenders convicted of similar crimes. More to the point, they assert that judges impose harsher sentences on African-American, Hispanic, and Native American offenders than on white (or Asian American) offenders.

Other scholars contend that judges' sentencing decisions are not racially biased. They argue that disparity in sentencing is the result of legitimate differences among individual cases and that racial disparities disappear once these differences are taken into consideration. These scholars argue, in other words, that judges' sentencing decisions are both fair and consistent.

RACIAL DISPARITY IN SENTENCING

There are two types of clear and convincing evidence of racial *disparity* in sentencing. The first is evidence derived from national statistics on prison admissions and prison populations. These statistics, which we discuss in detail in Chapter 8, reveal that the incarceration rates for African Americans and Hispanics are much higher than the rate for whites. In June 2009, for example, 4,749 of every 100,000 African-American men, 1,822 of every 100,000 Hispanic men, and 700 of every 100,000 white men were incarcerated in a state or federal prison or jail. Stated another way, the incarceration rate for African-American men was 6.5 times greater than the rate for white men; the incarceration rate for Hispanic men was 2.6 times greater than the rate for white men. The incarceration rates for women, although much lower than the rates for men, revealed a similar pattern: 333 of every 100,000 for African Americans, 142 of every 100,000 for Hispanics, and 91 of every 100,000 for whites. Among males between the ages of 25 and 34, the disparities were even larger: 10,501 of every 100,000 African Americans, 3,500 of every 100,000 Hispanics, and 1,569 of every 100,000 whites were incarcerated.

The second type of evidence comes from studies of judges' sentencing decisions. These studies, which are the focus of this chapter, reveal that African-American and Hispanic defendants are more likely than whites to be sentenced to prison; those who are sentenced to prison receive longer terms than whites. Consider the following statistics:

- Black and Hispanic offenders sentenced under the federal sentencing guidelines in the U.S. District Courts from 1997 to 2000 received harsher sentences than white offenders. The incarceration rate was 93 percent for African Americans, 85 percent for Hispanics, and 74 percent for whites. In contrast, the incarceration rate for Asian Americans (71 percent) was lower than the rate for all other groups, including whites. Among those sentenced to prison, African Americans received the longest sentences, Asian Americans received the shortest sentences, and Hispanics and whites fell in the middle.

- Among offenders convicted of drug offenses in federal district courts in 1997 and 1998, the mean sentence length was 82 months for African Americans and 52 months for whites. For offenses with mandatory minimum sentences, the mean sentences were 136 months (African Americans) and 82 months (whites).¹¹
- Fifty-eight percent of the African-American offenders convicted of violent crimes in state courts in 2006 were sentenced to prison, compared with 52 percent of the white offenders. The figures for offenders convicted of drug offenses were 43 percent for African Americans and 31 percent for whites. The mean maximum sentence imposed on offenders sentenced to prison for violent offenses was 108 months for African Americans and 99 months for whites.¹²
- A study of sentences imposed on offenders convicted of misdemeanors and felonies in New York City during 2010 and 2011 revealed that African Americans were more likely than other offenders to receive a sentence of incarceration. The rates were 32 percent for African Americans, 25 percent for Hispanics, 21 percent for whites, and 9 percent for Asians.¹³

Five Explanations for Racial Disparities in Sentencing

These statistics provide compelling evidence of *racial disparity* in sentencing. They indicate that the sentences imposed on African-American and Hispanic offenders are different from—that is, harsher than—the sentences imposed on white offenders. These statistics, however, do not tell us *why* this occurs. They do not tell us whether the racial disparities in sentencing reflect racial discrimination and, if so, whether that discrimination is institutional or contextual. We suggest that there are at least five possible explanations for racial disparity in sentencing, only four of which reflect racial discrimination. Box 7.1 summarizes these explanations.

First, the differences in sentence severity could result from the fact that African Americans and Hispanics commit more serious crimes and have more serious prior criminal records than whites. Studies of sentencing decisions consistently demonstrate the importance of these two “legally relevant” factors (but see Box 7.2 for an alternative interpretation of the legal relevance of crime seriousness and prior record). Offenders who are convicted of more serious offenses, who use a weapon to commit the crime, or who seriously injure the victim receive harsher sentences, as do offenders who have serious, more recent, or multiple prior felony convictions. The more severe sentences imposed on African Americans and Hispanics, then, might reflect the influence of these legally prescribed factors, rather than the effect of racial prejudice or unconscious bias on the part of judges.

Second, the differences could result from economic discrimination. As explained in Chapter 5, poor defendants are not as likely as middle- or upper-class defendants to have a private attorney or to be released prior to trial. They also are more likely to be unemployed. All of these factors may be related to sentence severity. Defendants represented by private attorneys or released prior to trial may receive more lenient sentences than those represented by public defenders or

Box 7.1 Five Explanations for Racial Disparities in Sentencing

African Americans and Hispanics are sentenced more harshly than whites for the following reasons:

1. They commit more serious crimes and have more serious prior criminal records than whites.

Conclusion: Racial disparity but not racial discrimination

2. They are more likely than whites to be poor; being poor is associated with a greater likelihood of pretrial detention and unemployment, both of which may lead to harsher sentences.

Conclusion: Indirect (i.e., economic) discrimination

3. They are more likely to be subject to facially neutral laws and policies that prescribe more severe sentences or sentence enhancements:

Conclusion: Institutional discrimination

4. Judges are biased or have prejudices against racial minorities.

Conclusion: Racial discrimination

5. The disparities occur in some contexts but not in others.

Conclusion: Subtle (i.e., contextual) racial discrimination

held in custody prior to trial. Defendants who are unemployed may be sentenced more harshly than those who are employed. Because African-American and Hispanic defendants are more likely than white defendants to be poor, economic discrimination amounts to *indirect* racial discrimination.

Third, the differences might result from the application of facially neutral laws and policies that have racially disparate effects. For example, many jurisdictions prescribe harsher sentences for offenses involving crack cocaine than for offenses involving powder cocaine. These laws, which are based on the assertion that crack cocaine is a more dangerous drug than powder cocaine, are facially neutral; the harsher sentences are imposed on all offenders convicted of offenses involving crack cocaine, regardless of the offender's race. However, the fact that African Americans are more likely than whites to be charged with and convicted of crack cocaine offenses means that they receive longer sentences than similarly situated white offenders charged with possessing, manufacturing, or delivering powder cocaine. Sentencing guidelines, habitual offender statutes, and three-strikes-and-you're-out laws, all of which prescribe harsher penalties for offenders with more serious prior criminal histories, similarly could produce racially disparate results. If, in other words, African Americans and Hispanics are more likely than whites to have accumulated prior criminal histories that make them eligible for harsher sentences under sentencing guidelines or for sentence enhancements, the application of these policies, which are racially neutral on their face, may result in systematically more punitive sentences for racial minorities. As discussed in Chapter 1, this would be evidence of institutional discrimination.

Fourth, the differences could result from overt racial discrimination or conscious racial bias on the part of judges, prosecutors, and other participants

the sentencing process. Judges might take the race or ethnicity of the offender into account in determining the appropriate sentence, and prosecutors might consider the offender's race or ethnicity in deciding whether to plea bargain and in making sentence recommendations to the judge. If so, this implies that judges and prosecutors who are confronted with similarly situated African-American, Hispanic, and white offenders treat racial minorities more harshly than whites. It also implies that these criminal justice officials, the majority of whom are white, may stereotype African-American and Hispanic offenders as more violent, more dangerous, and less amenable to rehabilitation than white offenders. Alternatively, the differential treatment of racial minorities could result from more implicit—or unconscious—racial bias that leads criminal justice officials to treat racial minorities differently than whites (for a more detailed discussion of this possibility, see Box 7.5).

Fifth, the sentencing disparities could reflect both equal treatment and discrimination, depending on the nature of the crime, the racial composition of the victim-offender dyad, the type of jurisdiction, the age and gender of the offender, and so on. It is possible, in other words, that racial minorities who commit certain

Box 7.2 Are Crime Seriousness and Prior Criminal Record "Legally Relevant" Variables?

Most policy makers and researchers assume that the seriousness of the conviction charge and the offender's prior criminal record are legally relevant to the sentencing decision. They assume that judges who base sentence severity primarily on crime seriousness and prior record are making legitimate, and racially neutral, sentencing decisions. But are they?

Some scholars argue that crime seriousness and prior criminal record are "race-linked" variables. If, for example, sentencing schemes consistently mandate the harshest punishments for the offenses for which racial minorities are most likely to be arrested (such as robbery and drug offenses involving crack cocaine), the imposition of punishment is not necessarily racially neutral.

Similarly, if prosecutors routinely file more serious charges against racial minorities than against whites who engage in the same type of criminal conduct, or offer less attractive plea bargains to racial minorities than to whites, the more serious conviction charges for racial minorities will reflect these racially biased charging and plea bargaining decisions. An African-American defendant who is convicted of a more serious crime than a white defendant, in other words, may not necessarily have engaged in more serious criminal conduct than his or her white counterpart.

Prior criminal record also may be race-linked. If police target certain types of crimes (e.g., selling illegal drugs) or patrol certain types of neighborhoods (e.g., inner-city neighborhoods with large African-American or Hispanic populations) more aggressively, racial minorities will be more likely than whites to "accumulate" a criminal history that then can be used to increase the punishment for the current offense. Racially biased charging and convicting decisions would have a similar effect.

If crime seriousness and prior criminal record are, in fact, race-linked in the ways outlined here, it is misleading to conclude that sentences based on these two variables are racially neutral. Similarly, it is misleading to conclude that the absence of "a race effect" once these two variables are taken into account signals the absence of racial discrimination in sentencing.

types of crimes (such as forgery) are treated no differently than whites who commit these crimes, whereas those who commit other types of crimes (such as sexual assault) are sentenced more harshly than their white counterparts. Similarly, it is possible that racial discrimination in the sentencing of offenders convicted of sexual assault is confined to the South or to the cases involving black offenders and white victims. It is possible, in other words, that the type of discrimination found in the sentencing process is contextual discrimination.

EMPIRICAL RESEARCH ON RACE AND SENTENCING

Researchers have conducted dozens of studies to determine which of the explanations for racial disparity in sentencing is more correct and to untangle the complex relationship between race and sentence severity. In fact, as Marjorie Heiter has noted, this issue "may well have been the major research inquiry for studies of sentencing in the 1970s and early 1980s."¹⁴ The studies that have been conducted vary enormously in theoretical and methodological sophistication. They range from simple bivariate comparisons of incarceration rates for whites and minorities, to methodologically more rigorous multivariate analyses designed to identify direct race effects, to more sophisticated designs incorporating tests for indirect race effects, for cumulative disadvantage, and for interaction between race and other predictors of sentence severity. The findings generated by these studies and the conclusions drawn by their authors also vary.

Reviews of Recent Research

Studies conducted from the 1930s through the 1960s generally concluded that racial disparities in sentencing reflected overt racial discrimination. For example, the author of one of the earliest sentencing studies, which was published in 1934, claimed that "equality before the law is a social fiction."¹⁵ Reviews of these studies,¹⁶ however, found that most of them were methodologically flawed. They usually used simple bivariate statistical techniques, and they failed to control adequately for crime seriousness and prior criminal record.

The conclusions of these early reviews, coupled with the findings of its own review of sentencing research,¹⁷ led the National Research Council's Panel on Sentencing Research to state in 1983 that the sentencing process was not characterized by "a widespread systematic pattern of discrimination." Rather, "pockets of discrimination are found for particular judges, particular crime types, and in particular settings."¹⁸ Zatz, who reviewed the results of four waves of sentencing research conducted from the 1930s through the early 1980s, reached a somewhat different conclusion.¹⁹ Although she acknowledged that it would be misleading to suggest that race/ethnicity is *the* major determinant of sentencing, Zatz nonetheless asserted that "race/ethnicity is a determinant of sentencing, and a potent one at that."²⁰

The three most recent reviews of research on race and sentencing corroborate Zatz's assertion. Theodore G. Chiricos and Charles Crawford reviewed 38 studies

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published between 1979 and 1991 that included a test for the direct effect of race on sentencing decisions in noncapital cases.²¹ Unlike previous reviews, they distinguished results involving the decision to incarcerate or not from those involving the length of sentence decision. Chiricos and Crawford also considered whether the effect of race varied depending on structural or contextual conditions. They asked whether the impact of race would be stronger "in southern jurisdictions, in places where there is a higher percentage of Blacks in the population or a higher concentration of Blacks in urban areas, and in places with a higher rate of unemployment."²² Noting that two-thirds of the studies that they examined had been published subsequent to the earlier reviews (which generally concluded that race did not play a prominent role in sentencing decisions), Chiricos and Crawford stated that their assessment "provides a fresh look at an issue that some may have considered all but closed."²³

The authors' assessment of the findings of these 38 studies revealed "significant evidence of a *direct* impact of race on imprisonment."²⁴ This effect, which persisted even after the effects of crime seriousness and prior criminal record were controlled, was found only for the decision to incarcerate or not; it was not found for the decision on the length of sentence. The authors also identified a number of structural contexts that conditioned the race-imprisonment relationship. African-American offenders faced significantly greater odds of incarceration than white offenders in the South, in places where African Americans comprised a larger percentage of the population and in places where the unemployment rate was high.

Cassia Spohn's²⁵ review of noncapital sentencing research that used data from the 1980s and 1990s also highlighted the importance of attempting to identify "the structural and contextual conditions that are most likely to result in racial discrimination."²⁶ Spohn reviewed 40 studies examining the relationship between race, ethnicity, and sentencing. This included 32 studies of sentencing decisions at the state level and 8 studies at the federal level. Consistent with the conclusions of Chiricos and Crawford, Spohn reported that many of these studies found a *direct race effect*. At both the state and federal levels, there was evidence that African Americans and Hispanics were more likely than whites to be sentenced to prison; at the federal level, there was also evidence that African Americans received longer sentences than whites.²⁷

Noting that "[e]vidence concerning direct racial effects . . . provides few clues to the circumstances under which race matters,"²⁸ Spohn also evaluated the 40 studies included in her review for evidence of indirect or contextual discrimination. Although she acknowledged that some of the evidence was contradictory—for example, some studies revealed that racial disparities were confined to offenders with less serious prior criminal records, whereas others reported such disparities only among offenders with more serious criminal histories—Spohn nonetheless concluded that the studies revealed four "themes" or "patterns" of contextual effects. Box 7.3 summarizes these themes.

The first theme or pattern revealed was that the combination of race/ethnicity and other legally irrelevant offender characteristics produces greater sentence disparity than race/ethnicity alone. That is, the studies demonstrated that certain

Box 7.3 Race, Ethnicity, and Sentencing Decisions: Contextual Effects

Spohn's review of recent studies analyzing the effect of race and ethnicity on state and federal sentencing decisions identified four themes, or patterns, of contextual effects. These studies revealed the following:

1. Racial minorities are sentenced more harshly than whites if they are young, male, are unemployed, are male and unemployed, are young, male, and unemployed, have lower incomes, or have less education.
2. Racial minorities are sentenced more harshly than whites if they are detained prior to trial, are represented by a public defender rather than a private attorney, are convicted at trial rather than by plea, have more serious prior criminal records.
3. Racial minorities who victimize whites are sentenced more harshly than whites in race-of-offender/race-of-victim combinations.
4. Racial minorities are sentenced more harshly than whites if they are convicted of less serious crimes or convicted of drug offenses or more serious drug offenses.

SOURCE: Cassia Spohn, "Thirty Years of Sentencing Reform: The Quest for a Racially Neutral Sentencing System," in *Criminal Justice 2000: Policies, Process, and Decisions of the Criminal Justice System* (Washington, DC: Department of Justice, 2000).

types of racial minorities—males, the young, the unemployed, the less educated—are singled out for harsher treatment. Some studies found that each offender characteristic, including race/ethnicity, had a direct effect on sentencing outcomes but that the combination of race/ethnicity and one or more other characteristics was a more powerful predictor of sentence severity than any characteristic individually. Other studies found that race/ethnicity only if the offender was male, young, and/or unemployed.²⁹

The second pattern of indirect/interaction effects was that process-related factors conditioned the effect of race/ethnicity on sentencing outcomes.³⁰ Some of the studies revealed, for example, that pleading guilty resulted in greater sentence discounts for white offenders than for African-American or Hispanic offenders. Other studies showed that racial minorities received a harsher penalty—in terms of harsher sentences—for being detained prior to trial or having a serious prior criminal record. As Spohn noted, these results suggest that race and ethnicity influence sentence outcomes through their interaction with earlier decisions and suggest that these process-related determinants of sentence outcomes do not operate in the same way for racial minorities.

The third theme or pattern concerned an interaction between the race of the offender and victim. Consistent with research on the death penalty (which is discussed in Chapter 8), two studies found that African Americans who sexually assaulted whites were sentenced more harshly than either African Americans who sexually assaulted other African Americans or whites who sexually assaulted whites. Thus, "punishment is contingent on the race of the victim as well as the race of the offender."³¹

The final pattern of indirect/interaction effects, which Spohn identified as "less obvious" than the other three,³² was that the effect of race/ethnicity was conditioned by the nature of the crime. Some studies found that racial discrimination was confined to less serious—and thus more discretionary—crimes. Other studies revealed that racial discrimination was most pronounced for drug offenses or, alternatively, that harsher sentencing of racial minorities was found only for the most serious drug offenses.³³

The most recent review of research on race and sentencing is Mitchell's meta-analysis of published and unpublished studies that included controls for offense seriousness and prior criminal record.³⁴ Mitchell's quantitative analysis focused on the direction and size of the effect (the "effect size") of race on sentencing. His analysis revealed that 76 percent of the effect sizes from the nonfederal studies and 73 percent of the effect sizes from the federal studies indicated that African Americans were sentenced more harshly than whites, especially for drug offenses and for imprisonment decisions. The effect sizes were smaller in studies that used more precise controls for offense seriousness and criminal history; they were larger in jurisdictions that did not utilize structured sentencing guidelines. Moreover, the analysis revealed that the amount of unexplained disparity in sentencing had not changed appreciably since the 1970s. Mitchell concluded that his findings "undermine the so-called 'no discrimination thesis,' given that 'independent of other measured factors, on average African Americans were sentenced more harshly than whites.'"³⁵

The fact that a majority of the studies reviewed by Chiricos and Crawford, Spohn, and Mitchell found that African Americans (and Hispanics) were more likely than whites to be sentenced to prison, even after taking crime seriousness and prior criminal record into account, suggests that racial discrimination in sentencing is not a thing of the past. Although the contemporary sentencing process may not be characterized by "a widespread systematic pattern of discrimination,"³⁶ it is not racially neutral.

WHEN DOES RACE/ETHNICITY MATTER?

Research conducted during the past two decades clearly demonstrates that race and ethnicity interacts with or is conditioned by (1) other legally irrelevant offender characteristics such as sex and employment status, (2) process-related factors such as pretrial detention, (3) the race of the victim, and (4) the nature and seriousness of the crime. A comprehensive review of these studies is beyond the scope of this book. Instead, we summarize the findings of a few key studies. We begin

by summarizing the results of a study that found both direct and indirect racial and ethnic effects. This is followed by a discussion of studies that focus explicitly on sentence outcomes for Hispanic Americans, illegal immigrants, Asian Americans, and Native Americans. Next we review the findings of a series of studies that explore the intersections among race, ethnicity, sex, age, employment status, and sentence severity. We also review studies that examine differential treatment in interracial and intraracial crime. We then discuss the findings of studies examining the effect of race on sentencing for different types of offenses and the findings of a number of studies that focus explicitly on the relationship between race and sentence severity for drug offenders. We end this section with a discussion of studies that attempt to identify the degree to which racial minorities are subject to cumulative disadvantage. Our purpose is to illustrate the subtle and complex ways in which race influences the sentencing process.

Race/Ethnicity and Sentencing: Direct and Indirect Effects

A number of methodologically sound studies have concluded that African American and Hispanic offenders are sentenced more harshly than whites. Caspary, Spohn and Miriam DeLone, for example, compared the sentences imposed on African-American, Hispanic, and white offenders convicted of felonies in Chicago, Kansas City, and Miami in 1993 and 1994.³⁷ They controlled for the legal and extralegal variables that affect judges' sentencing decisions: the offender's age, sex, and prior criminal record; whether the offender was on probation at the time of the current offense; the seriousness of the conviction charge; the number of conviction charges; the type of attorney representing the offender; whether the offender was detained or released prior to trial; and whether the offender pleaded guilty or went to trial.

Spohn and DeLone found evidence of racial discrimination in the decision to incarcerate or not in two of the three jurisdictions. Although race had no effect on the likelihood of incarceration in Kansas City, both African Americans and Hispanics were more likely than whites to be sentenced to prison in Chicago, and Hispanics (but not African Americans) were more likely than whites to be incarcerated in Miami. The data presented in Figure 7.1 illustrate these results more clearly. The authors used the results of their multivariate analyses to calculate the estimated probability of imprisonment for a "typical" white, African-American, and Hispanic offender who was convicted of burglary in each of the three cities.³⁸

These estimated probabilities confirm that offender race had no effect on the likelihood of incarceration in Kansas City; 55 percent of the whites and 54 percent of the African Americans convicted of burglary were sentenced to prison. In Chicago, however, there was about a 4 percentage-point difference between white offenders and African-American offenders and between white offenders and Hispanic offenders. In Miami, the difference between white offenders and Hispanic offenders was somewhat larger; even after the other legal and extralegal variables were taken into consideration, 34 percent of the Hispanics, but 26 percent of the whites, received a prison sentence.

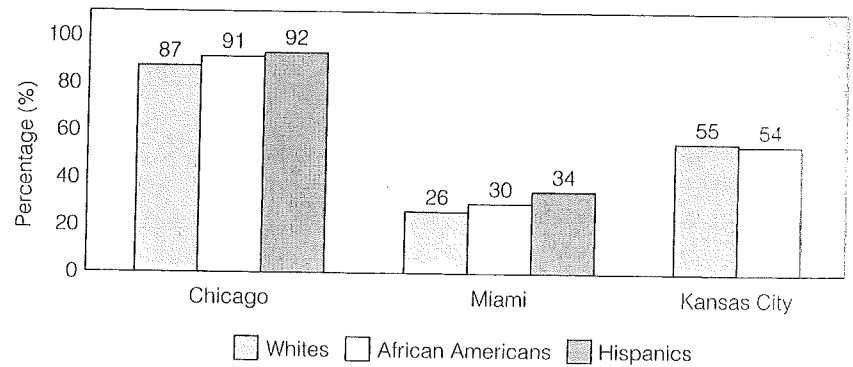
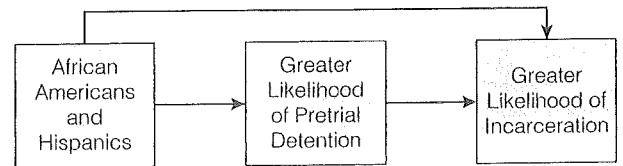


FIGURE 7.1 Estimated Probabilities of Incarceration for Offenders Convicted of Burglary

Consistent with the explanations presented in Box 7.1, Spohn and DeLone also found evidence of economic discrimination. When they analyzed the likelihood of pretrial detention, controlling for crime seriousness, the offender's prior criminal record, and other factors associated with the type and amount of bail required by the judge, they found that African Americans and Hispanics faced significantly higher odds of pretrial detention than whites in Chicago and Miami and that African Americans were more likely than whites to be detained in Kansas City. They also found that pretrial detention was a strong predictor of the likelihood of incarceration following conviction in all three cities. Thus, African-American and Hispanic defendants were more likely than whites to be detained prior to trial, and those who were detained were substantially more likely than those who were released to be incarcerated.

This study, then, demonstrated that race/ethnicity affected the likelihood of incarceration differently in these three cities. In Chicago, race/ethnicity had both a direct effect on incarceration (African Americans and Hispanics were more likely than whites to be sentenced to prison) and an indirect effect on incarceration through pretrial detention (African Americans and Hispanics were more likely than whites to be detained prior to trial and pretrial detention increased the odds of a prison sentence). In Miami, on the other hand, ethnicity, but not race, had a direct effect on the likelihood of a prison sentence (Hispanics were more likely than whites to be sentenced to prison), but both race and ethnicity had an indirect effect on incarceration through pretrial detention. And in Kansas City, race did not have a direct effect on incarceration but did influence the likelihood of a prison sentence through its effect on pretrial detention. The pattern of results found for Chicago is illustrated in Box 7.4.

The authors of this study were careful to point out that the race effects they uncovered, although statistically significant, were "rather modest" and that the seriousness of the offense and the offender's prior criminal record were the primary determinants of sentence outcomes. They noted, however, the fact that offender race/ethnicity had both direct and indirect effects, coupled with the fact

Box 7.4 Chicago: Direct and Indirect Effects of Race/Ethnicity

that female offenders and those who were released prior to trial received substantially more lenient sentences than male offenders and those who were detained before trial, suggests that “judges’ sentencing decisions are not guided *exclusively* by factors of explicit legal relevance.”⁴⁰ They concluded that judges’ sentencing decisions reflect “stereotypes of dangerousness and culpability that rest, either explicitly or implicitly, on considerations of race, gender, pretrial status, and willingness to plead guilty.”⁴¹

Are Hispanics Sentenced More Harshly Than All Other Offenders?

A study of sentencing decisions in the state of Pennsylvania, where judges impose sentencing guidelines, compared the relative harshness of sentences imposed on Hispanic and African-American offenders. Arguing that “Hispanic defendants may seem even more culturally dissimilar and be even more disadvantaged” than African Americans, Darrell Steffensmeier and Stephen Demuth hypothesized that Hispanic offenders would be sentenced more harshly than either white or African-American offenders.⁴² They based this hypothesis on a number of factors, including the perceived threat posed by growing numbers of Hispanic immigrants; stereotypes that link Hispanics with drug trafficking and that characterize them as “lazy, irresponsible, low in intelligence, and dangerously criminal”; the relative powerlessness of Hispanic Americans in the political arena.⁴³ As the authors noted, “We expect that the specific social and historical context involving Hispanic Americans exacerbates perceptions of their cultural dissimilarity and ‘threat’ they pose in ways that will contribute to their harsher treatment in criminal courts.”⁴⁴

When they looked at the raw data, Steffensmeier and Demuth found that Hispanics were sentenced to prison more often than either African Americans or whites. The incarceration rates for nondrug offenses were 46.2 percent (whites), 62.9 percent (African Americans), and 66.8 percent (Hispanics). The differences were even larger for drug offenses: 52.3 percent (whites), 69.9 percent (African Americans), and 87.4 percent (Hispanics).⁴⁵ These differences diminished when the authors controlled for the seriousness of the offense, the offender’s criminal history, the mode of conviction, and the offender’s

In nondrug cases, African Americans were 6 percent more likely and Hispanics were 18 percent more likely than whites to be incarcerated. In drug cases, there was a 7 percentage-point difference in the probabilities of incarceration for African Americans and whites and a 26 percentage-point difference in the probabilities for Hispanics and whites.⁴⁶ For both types of crimes, then, African Americans faced higher odds of incarceration than whites, and Hispanics faced higher odds of incarceration than both whites and African Americans.

Steffensmeier and Demuth stated that their findings were consistent with hypotheses “drawn from the writings on prejudice and intergroup hostility suggesting that the specific social and historical context facing Hispanic Americans will exacerbate perceptions of their cultural dissimilarity and the ‘threat’ they pose.”⁴⁷ They illustrated this with comments made by a judge in a county with a rapidly growing Hispanic population:

We shouldn’t kid ourselves. I have always prided myself for not being prejudiced but it is hard not to be affected by what is taking place. The whole area has changed with the influx of Hispanics and especially Puerto Ricans. You’d hardly recognize the downtown from what it was a few years ago. There’s more dope, more crime, more people on welfare, more problems in school.⁴⁸

This judge’s comments suggest that “unconscious racism”⁴⁹ may infect the sentencing process. Concerns about the changes in the racial/ethnic makeup of a community, coupled with stereotypes linking race and ethnicity to drug use and drug-related crime and violence, may interact to produce harsher treatment of racial minorities by criminal justice officials who have always “prided themselves for not being prejudiced.” As David F. Greenberg notes, individuals who have ambivalent attitudes about race “may engage in automatic invidious stereotyping and may act on the basis of these stereotypes.”⁵⁰ (See Box 7.5 for a discussion of a study investigating unconscious racial bias among judges.)

Are Illegal Immigrants Sentenced Differently Than U.S. Citizens?

Do stereotypes of illegal immigrants as dangerous and crime-prone influence the sentences imposed on them? Anecdotal evidence suggests that they do. Consider the comments of a federal district judge, who justified a sentence at the top of the guideline range by stating on the record:

You are not a citizen of this country. This country was good enough to allow you to come in here to confer on you . . . a number of the benefits of this society, form of government, and its opportunities and you repay that kindness by committing a crime like this. We have got enough criminals in the United States without importing any.⁵¹

There also is empirical evidence that an offender’s citizenship status influences sentence outcomes. For example, there are a number of studies⁵² of federal sentencing that included the offender’s citizenship status as a control variable in models of the sentence length and other sentencing decisions. These studies