

Box 7.5 Judges and Unconscious Racial Bias: Can Judges Control the "Bigot in the Brain"?

The first study to explicitly test for unconscious racial bias in judges was published in 2008–2009 in the *Notre Dame Law Review* (Rachlinski, Johnson, Wistrich, and Guthrie 2008–2009). The authors of the study pointed out that there is evidence suggesting that explicit, or overt, racial bias has declined markedly over time. Noting that racial disparities in punishment have persisted even as explicit bias has declined, the authors suggested that one possible explanation might be implicit, or unconscious racial bias, which they defined as "stereotypical associations so subtle that people who hold them might not even be aware of them" (Rachlinski et al., 2008–2009, 1196).

Rachlinski and his colleagues recruited 128 judges from three different jurisdictions to participate in a study designed to answer two questions: Do judges hold implicit racial biases and, if so, do those biases produce racially biased decisions? To answer the first question, they used the Implicit Association Test (IAT), which is a test developed by psychologists to measure whether participants associate good or bad stereotypes with white or black faces. They found that judges, like most other individuals, "harbor implicit racial biases" (Rachlinski et al., 2008–2009, 1208). Seventy-four of the 85 white judges and 14 of the 43 African-American judges demonstrated a "white preference," but the white judges expressed significantly stronger white preferences than did the African-American judges. The remainder of the African-American judges either expressed no preference at all or expressed a black preference.

To answer the second question about the effect of implicit bias on behavior, the authors asked the judges to read three hypothetical cases and to indicate what they believed to be the most appropriate disposition in each case. What they found was that when the race of the defendant was clearly identified (as it was in only one of the hypothetical cases), the white judges treated white defendants and African-American defendants the same. In fact, the higher the judge's white preference score on the IAT, the more favorably the judge treated the African-American defendant.

According to the authors, the findings of their study "demonstrate that the white judges were attempting to compensate for unconscious racial biases in their decision making. These judges were, we believe, highly motivated to avoid making biased judgments" (Rachlinski et al., 1223). The authors noted that most of the judges reported that they knew that the study was designed to assess racial bias—that is, they were aware of the potential for biased decision making and had "the cognitive skills necessary to avoid its influence" (1225).

Rachlinski and his colleagues were careful to point out that they were not concluding that judges would be able "to avoid bias on a continual basis in their own courtrooms" (1225). They noted that judges may not have the time or the information necessary to avoid unconscious bias. As they put it, judges who have implicit biases but who, "due to time pressure or other distractions, do not actively engage in an effort to control the 'bigot in the brain'" are apt to make racially biased decisions (1225).

demonstrated that offenders who were not citizens of the United States received harsher sentences than U.S. citizens did.

The first study to systematically investigate the effect of citizenship status on federal sentencing outcomes was conducted by Scott Wolfe and his colleagues at Arizona State University.⁵³ They used data on offenders adjudicated in fed-

district courts in 2006 to explore the sentences imposed on U.S. citizens, illegal aliens, and resident-legal aliens. When they examined the descriptive data, they found that the incarceration rate was higher for illegal aliens (99 percent) and resident-legal aliens (89 percent) than for citizens (85 percent). By contrast, contrast, the mean sentence imposed on U.S. citizens was longer than the average sentence imposed on the two groups of noncitizens: it was 74.36 months for citizens, 52.65 months for resident-legal aliens, and only 34.79 months for illegal aliens. They also found that illegal aliens were substantially more likely than U.S. citizens to be Hispanic, to not have a high school degree, to be charged with an immigration offense, and to be held in custody prior to trial.⁵⁴

The authors then controlled for the offender's offense seriousness score, prior record score, and other offender and case characteristics that have been shown to affect sentencing outcomes in federal courts. They found that both categories of noncitizens were significantly more likely than citizens to be sentenced to prison, but that there were no differences in the prison sentences imposed on resident-legal aliens and citizens. Moreover, the sentences imposed on illegal aliens were 5 percent shorter than those imposed on U.S. citizens. They also found that the offender's ethnicity affected the length of the sentence for both U.S. citizens and illegal aliens; however, the effect of ethnicity was negative for U.S. citizens (Hispanic citizens received shorter prison sentences than white citizens), but positive for illegal aliens (Hispanic illegal aliens received longer prison sentences than white illegal aliens).⁵⁵

To explain their finding that illegal aliens had higher odds of incarceration than U.S. citizens but received shorter prison sentences than citizens, the authors suggested that it may reflect the fact that illegal aliens are likely to face deportation once they have served their prison sentences. Federal judges, in other words, imprison illegal aliens to ensure their appearance at removal proceedings but impose shorter sentences to expedite their deportation. According to the authors, there is "an incentive for judges to impose a sentence at the low end of the guideline range (or even to depart downward) in these types of cases, as doing so reduces the cost of imprisoning illegal aliens who eventually will be subject to removal proceedings."

The authors concluded that their findings provide evidence that judges believe that noncitizens, and particularly illegal aliens, are more dangerous and blameworthy than U.S. citizens. This was reflected in the fact that conviction for immigration offenses, a drug offense, or a violent offense had a more pronounced effect on the likelihood of incarceration for illegal aliens than for citizens. The authors speculated that federal judges may take into account "that illegal alien offenders who are convicted of such offenses have brought violence, drug trafficking and further immigration problems into a country already fraught with crime."

The results of this study, then, demonstrate the power of popular perceptions that increasing numbers of immigrants are associated with increases in crime rates. The existence of a substantial body of evidence challenging these perceptions notwithstanding, the stereotype of the crime-prone immigrant appears to affect federal judges' sentencing decisions.

Are Asian Americans Sentenced More Leniently Than All Other Offenders?

Noting that sentencing scholars have devoted "conspicuously little attention" to the sentences imposed on Asian Americans, Brian Johnson and Stephanie Betsinger compared outcomes for African Americans, Hispanics, Asian Americans, and whites who were convicted in federal district courts from 1997 to 2000.⁵⁶ They argued that it was important to include Asian Americans in studies of sentencing disparity given their popular image as "the model minority." According to the authors, the negative image of Asian Americans that was predominant in the period prior to World War II was altered during the post-war period. As they noted, "Whatever the reasons for the historic transformation, by the mid-1960s, the popular press had begun to highlight the success stories of Asian Americans, identifying them as the 'model minority'"—a group characterized by positive traits such as a strong work ethic, high levels of educational achievement, and social and economic success.⁵⁷

Johnson and Betsinger began their analysis by examining sentence outcomes for each of the four groups: Asian Americans, whites, African Americans, and Hispanics. They found that Hispanics had the highest incarceration rate (93 percent), followed by African Americans (85 percent), whites (74 percent), and Asian Americans (71 percent). They found a similar pattern when they examined the length of the sentence: Hispanics received the longest sentences and Asians received the shortest sentences. Although this suggests leniency in the sentencing of Asian Americans, the authors pointed out that the Asian offenders differed in important ways from offenders in the other three groups—Asians had less serious criminal histories, were less likely to be detained prior to sentencing, were less likely to be convicted of drug offenses and more likely to be convicted of fraud offenses, and were more likely to be college graduates.⁵⁸

The racial/ethnic differences in sentence severity did not disappear when Johnson and Betsinger controlled for these variables and for other legally relevant factors. Even after taking these factors into account, Asian offenders were significantly less likely to be incarcerated; they were 35 percent less likely than whites to be sentenced to prison, 37 percent less likely than African Americans to be sentenced to prison, and 80 percent less likely than Hispanics to be sentenced to prison. Even larger differences were found when the authors compared the likelihoods of incarceration for young males in each of the four groups. Compared to young Asian males, the odds of incarceration were 18 percent greater for young white males, 42 percent higher for young African-American males, and 106 percent greater for young Hispanic males. The differences were also larger when the authors examined drug offenses separately; there were no significant differences in the odds of incarceration for Asian and white offenders convicted of drug offenses, but African Americans and Hispanics were more than twice as likely as Asians to be incarcerated for drug offenses.⁵⁹

The findings of this study, which was the first study to comprehensively compare sentence outcomes for Asian Americans with those for other racial/ethnic groups, confirm that race and ethnicity matter, even in a jurisdiction with rigid

sentencing guidelines. They also provide support for the notion that Hispanic Americans receive harsher sentences than other racial groups and provide a first look at the more lenient treatment of Asian Americans. As the authors of the study stated, their results suggest that "federal punishments are race graded in important ways."⁶⁰ Noting that Asian Americans, as an aggregate group, can be regarded as an American success story on a variety of dimensions, Johnson and Betsinger concluded that

It may be, then, that economic equality is a precursor to social justice—that is, striving to improve the relative socioeconomic standing of other racial and ethnic minority groups may have important ripple effects that translate into more favorable societal stereotypes and greater equality of punishment within the American justice system itself.⁶¹

Native Americans and Sentencing Disparity: Disparity in State and Federal Courts

Although there is a growing body of sentencing research that includes Hispanic Americans, most studies investigating the effect of race on sentence outcomes focus exclusively on African Americans and whites. As we have seen, there are very few studies that include other racial minorities, such as Asian Americans or Native Americans.

There are reasons to expect harsher sentences for Native Americans than for whites, since negative stereotypes of members of this group are common. For example, Iris Marion Young⁶² asserted that "Native Americans are viewed in terms of narrow ethnocentric stereotypes (e.g., drunken savage)," and Carol Chiago Lujan⁶³ contended that the stereotype of the "drunken Indian" makes Native Americans more vulnerable to arrest for alcohol-related offenses and that stereotypical perceptions of reservation life as unstable and conducive to crime may lead to longer sentences for Native Americans. Similarly, Keith Wilmot and Miriam DeLone noted that forces such as colonialism "have lead to distinct public perceptions about the crime-proneness and threatening nature of Native Americans,"⁶⁴ and that these perceptions may affect the sentencing decisions of judges confronted with Native American offenders.

The few studies that do examine sentence outcomes for Native Americans have produced mixed results. Some studies found that Native Americans and whites are sentenced similarly once crime seriousness, prior record, and other legally relevant variables are taken into account.⁶⁵ Other studies concluded that Native Americans adjudicated in federal⁶⁶ and state⁶⁷ courts are sentenced more harshly than similarly situated whites or that Native Americans serve significantly more of their prison sentence before parole or release than whites do.⁶⁸

One study used data on offenders incarcerated in Arizona state correctional facilities in 1990 to compare sentence lengths for Native Americans and whites.⁶⁹ Alvarez and Bachman found that whites received longer sentences than Native Americans for homicide, but Native Americans received longer sentences than whites for burglary and robbery.

Alvarez and Bachman speculated that these findings may reflect the fact that homicide tends to be intraracial, whereas burglary and robbery are more likely to be interracial. Whites may have received longer sentences for homicide, in other words, because their victims were also likely to be white, whereas the victims of Native Americans usually were other Native Americans. As the authors note, "Because the lives of American Indian victims may not be especially valued in U.S. society and the justice system, these American Indian defendants may receive more lenient sentences for their crime." Similarly, Native Americans convicted of burglary or robbery may have received harsher sentences than whites convicted of these crimes because their victims were more likely to be "higher-status Caucasians."⁷⁰ Alvarez and Bachman concluded that their study demonstrates "the need for more crime-specific analyses to investigate discriminatory practices in processing and sentencing minority group members, especially American Indians."

The most methodologically sophisticated study of Native American sentencing disparities is Wilmot and DeLone's⁷² study of sentences imposed on white, Native American, African American, Hispanic, and Asian offenders. This study was conducted using data from Minnesota, which has operated under presumptive sentencing guidelines since 1980. Using data on offenders convicted in 2001, the authors of this study found that Native American offenders were treated more harshly than white offenders on five of the six sentencing outcomes examined. For example, the pronounced prison sentence (i.e., the prison sentence that the offender would serve if he/she were sentenced to prison) was longer for Native Americans (and African Americans) than for whites, and Native Americans were 10 percent more likely than whites to receive an executed prison sentence (i.e., to be sentenced to prison rather than to jail or probation).⁷³ These differences were found even after the seriousness of the offense, the offender's prior record, the type of crime, and other legally relevant factors were taken into consideration.

Wilmot and DeLone ended their paper with a call for the development of a theoretical perspective on criminal justice decision making (including sentencing) that takes into account the unique aspects of Native American culture and historical experiences. Noting that such perspectives already exist for African Americans and Hispanics, the authors concluded that "Such theories allow for the formation of racially and ethnically specific hypotheses that highlight the contextual circumstances under which no differences between racial groups are expected, as well as the situations in which racial and ethnic groups will be expected to experience discrimination in ways that are similar and dissimilar across different racial and ethnic groups."⁷⁴

Race/Ethnicity, Gender, Age, and Employment: A Volatile Combination?

In an article exploring the "convergence of race, ethnicity, gender, and class on court decision making," Zatz urged researchers to consider the ways in which offender (and victim) characteristics jointly affect case outcomes.⁷⁵ As she noted, "Race, gender, and class are the central axes undergirding our social structure. They intersect in dynamic, fluid, and multifaceted ways."⁷⁶

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The findings of a series of studies conducted by Darrell Steffensmeier and his colleagues at Pennsylvania State University illustrate these "intersections." Research published by this team of researchers during the early 1990s concluded that race,⁷⁷ gender,⁷⁸ and age⁷⁹ each played a role in the sentencing process in Pennsylvania. However, it is interesting to note, especially in light of its later research findings,⁸⁰ that the team's initial study of the effect of race on sentencing concluded that race contributed "very little" to our understanding of judges' sentencing decisions.⁸¹ Although the incarceration (jail or prison) rate for African Americans was 8 percentage points higher than the rate for whites, there was only a 2 percentage-point difference in the rates at which African Americans and whites were sentenced to prison. Race also played "a very small role in decisions about sentence length."⁸² The average sentence for African-American defendants was only 21 days longer than the average sentence for white defendants. These findings led Kramer and Steffensmeier to conclude that "if defendants' race affects judges' decisions in sentencing . . . it does so very weakly or intermittently, if at all."⁸³

This conclusion is called into question by Steffensmeier, Ulmer, and Kramer's more recent research,⁸⁴ which explores the ways in which race, gender, and age interact to influence sentence severity. They found that each of the three legally irrelevant offender characteristics had a significant direct effect on both the likelihood of incarceration and the length of the sentence: African Americans were sentenced more harshly than whites, younger offenders were sentenced more harshly than older offenders, and males were sentenced more harshly than females. More importantly, they found that the three factors interacted to produce substantially harsher sentences for one particular category of offenders—young, African-American males—than for any other age–race–gender combination. According to the authors, their results illustrate the "high cost of being black, young, and male."⁸⁵

Although the research conducted by Steffensmeier and his colleagues provides important insights into the judicial decision-making process, their findings also suggest the possibility that factors other than race, gender, and age may interact to affect sentence severity. If, as the authors suggest, judges impose harsher sentences on offenders perceived to be more deviant, more dangerous, and more likely to recidivate, and if these perceptions rest, either explicitly or implicitly, on "stereotypes associated with membership in various social categories,"⁸⁶ then offenders with constellations of characteristics other than "young, black, and male" may also be singled out for harsher treatment.

The validity of this assertion is confirmed by the results of a replication and extension of the Pennsylvania study. Cassia Spohn and David Holleran examined the sentences imposed on offenders convicted of felonies in Chicago, Miami, and Kansas City.⁸⁷ Their study included Hispanics and African Americans and tested for interactions between race, ethnicity, gender, age, and employment status. They found that none of the four offender characteristics had a significant effect on the length of the sentence in any of the three jurisdictions but that each of the characteristics had a significant effect on the decision to incarcerate or not in at least one of the jurisdictions. As shown in Part A of Table 7.1, in Chicago,

African-American offenders were 12.1 percent more likely than white offenders to be sentenced to prison; Hispanics were 15.3 percent more likely than whites to be incarcerated. In Miami, the difference in the probabilities of incarceration for Hispanic offenders and white offenders was 10.3 percent. Male offenders were more than 20 percent more likely than female offenders to be sentenced to prison in Chicago and Kansas City, and unemployed offenders faced significantly higher odds of incarceration than employed offenders (+9.3 percent) in Kansas City. In all three jurisdictions, offenders aged 21–29 were about 10 percent more likely than offenders aged 17–20 to be sentenced to prison.⁸⁸ Race, ethnicity, gender, age, and employment status, then, each had a direct effect on the decision to incarcerate or not.

Like Steffensmeier and his colleagues, Spohn and Holleran found that various combinations of race/ethnicity, gender, age, and employment status were better predictors of incarceration than any variable alone. As shown in Part B of Table 7.1, young African-American and Hispanic males were consistently more likely than middle-aged white males to be sentenced to prison. These offenders, however, were not the only ones singled out for harsher treatment. In Chicago, young African-American and Hispanic males and middle-aged African-American males faced higher odds of incarceration than middle-aged white males. In Miami, young African-American and Hispanic males and older Hispanic males were incarcerated more often than middle-aged white males. In Kansas City, both young African-American males and young white males faced higher odds of incarceration than middle-aged whites. These results led Spohn and Holleran to conclude that “in Chicago and Miami the combination of race/ethnicity and age is a more powerful predictor of sentence severity than either variable individually, while in Kansas City age matters more than race.”⁸⁹

Other, more recent, research confirms these findings.⁹⁰ One study, for example, analyzed the effects of race/ethnicity and sex on sentences imposed on drug offenders in three U.S. District Courts.⁹¹ This study found that African-American and Hispanic females received more lenient sentences than their male counterparts, but there were no differences in the sentences imposed on white females and males. Further analysis revealed that black male drug offenders received longer sentences than all other offenders, with the exception of Hispanic males. A second study⁹² of federal sentencing decisions explored the independent and joint effects of race/ethnicity, gender, and age, finding that young (ages 18–20) Hispanic and African-American males received significantly harsher sentences than young white males. This study also found that young Hispanic females received sentences that were more similar to those imposed on male defendants than on female defendants, but that African-American females were treated similar to or more leniently than white females.

The findings of the studies discussed above confirm Richard Quinney’s assertion, which he made 35 years ago, that “judicial decisions are not made uniformly. Decisions are made according to a host of extra-legal factors, including the age of the offender, his race, and social class.”⁹³ Their findings confirm that dangerous or problematic populations are defined “by a mix of economic *and* racial . . . references.”⁹⁴ African-American and Hispanic offenders who are also male, young, and

TABLE 7.1 Do Young, Unemployed African-American and Hispanic Males Pay a Punishment Penalty?

Differences in the Probabilities of Incarceration: The Effect of Race, Ethnicity, Gender, Age, and Employment Status

A. Probability Differences	Chicago	Miami	Kansas City
African Americans versus whites	+12.1%	not significant	not significant
Hispanics versus whites	+15.3%	+10.3%	(not applicable)
Males versus females	+22.8%	not significant	+21.1%
Unemployed versus employed	not significant	(not applicable)	+9.3%
Age 21-29 versus age 17-20	+10.0%	+9.5%	+10.8%

Differences in the Probabilities of Incarceration: Male Offenders Only

B. Probability Differences between Whites aged 30-39 and	Chicago	Miami	Kansas City
African Americans, 17-29	+18.4%	+14.7%	+12.7%
Hispanics, 17-29	+25.1%	+18.2%	(not applicable)
Whites, 17-29	not significant	not significant	+14.4%
African Americans, 30-39	+23.3%	not significant	not significant
Hispanics, 30-39	not significant	+18.5%	(not applicable)
C. Probability Differences between Employed Whites and			
Unemployed African Americans	+16.9%	(not applicable)	+13.0%
Unemployed Hispanics	+23.5%	(not applicable)	(not applicable)
Unemployed Whites	not significant	(not applicable)	not significant
Employed African Americans	not significant	(not applicable)	not significant
Employed Hispanics	not significant	(not applicable)	(not applicable)

SOURCE: Cassia Spohn and David Holleran, "The Imprisonment Penalty Paid by Young, Unemployed Black and Hispanic Male Offenders," *Criminology* 38 (2000), Tables 3, 5, 6.

unemployed may pay a higher punishment penalty than white offenders or other types of African-American and Hispanic offenders.

Why Do Young, Unemployed Racial Minorities Pay a Punishment Penalty?

The question, of course, is *why* young, unemployed racial minorities are punished more severely than other types of offenders—why "today's prevailing criminal predator has become a euphemism for young, black males."⁵⁵

A number of scholars suggest that certain categories of offenders are regarded as more dangerous and more problematic than others and thus more in need of formal social control. Steven Spitzer, for example, used the term "social dynamite"⁵⁶ to characterize that segment of the deviant population that is viewed as particularly threatening and dangerous; he asserted that social dynamite "tends

to be more youthful, alienated and politically volatile” and contended that those who fall into this category are more likely than other offenders to be formally processed through the criminal justice system.⁹⁷ Building on this point, Steven Box and Chris Hale argued that unemployed offenders who are also young, male, and members of a racial minority will be perceived as particularly threatening to the social order and thus will be singled out for harsher treatment.⁹⁸ Judges, in other words, regard these types of “threatening” offenders as likely candidates for imprisonment “in the belief that such a response will deter and incapacitate and thus defuse this threat.”⁹⁹

Steffensmeier and his colleagues advanced a similar explanation for their finding “that young black men (as opposed to black men as a whole) are the defendant subgroup most at risk to receive the harshest penalty.”¹⁰⁰ They interpreted their results using the “focal concerns” perspective on sentencing. According to this perspective, judges’ sentencing decisions reflect their assessment of the blameworthiness or culpability of the offender; their desire to protect the community by incapacitating dangerous offenders or deterring potential offenders; and their concerns about the practical consequences, or social costs, of sentencing decisions. Because judges rarely have enough information to accurately determine an offender’s culpability or dangerousness, they develop a “perceptual shorthand” based on stereotypes and attributions that are themselves linked to offender characteristics such as race, gender, and age (see Box 7.6 for a discussion of the ways in which a prior criminal record affect perceptions of offenders by potential employers). Thus, according to these researchers,

Younger offenders and male defendants appear to be seen as more of a threat to the community or not as reformable, and so also are black offenders, particularly those who also are young and male. Likewise, concerns such as “ability to do time” and the costs of incarceration appear linked to race-, gender-, and age-based perceptions and stereotypes.¹⁰¹

The conclusions proffered by Spohn and Holleran, who noted that their results are consistent with the focal concerns perspective on sentencing, are very similar. They suggested that judges, who generally have limited time in which to make decisions and have incomplete information about offenders, “may resort to stereotypes of deviance and dangerousness that rest on considerations of race, ethnicity, gender, age, and unemployment.”¹⁰² Young, unemployed African-American and Hispanic males, in other words, are viewed as more dangerous, more threatening, and less amenable to rehabilitation; as a result, they are sentenced more harshly.

Differential Treatment of Interracial and Intraracial Sexual Assault

There is compelling historical evidence that interracial and intraracial crimes were treated differently. Gunnar Myrdal’s examination of the southern court system in the 1930s, for example, revealed that African Americans who victimized whites received the harshest punishment, whereas African Americans who victimized other African Americans were often “acquitted or given a ridiculously

Box 7.6 The Mark of a Criminal Record

It is clear that racial disparities in the treatment of defendants at various stages of the criminal justice system have spillover effects and collateral consequences. As noted earlier in this chapter, if African Americans and Hispanics are more likely than whites to be arrested, prosecuted, convicted, and sentenced to prison, they will accumulate more serious prior criminal histories than whites. As a result, they may be treated differently than whites in areas outside the criminal justice system—for example, they may find it more difficult to locate suitable housing or find appropriate employment.

The effect of having a criminal record was examined in an innovative study by Devah Pager. Her work on "The Mark of a Criminal Record" used the so-called "audit strategy." In this design, which was used first to study the effects of race and ethnicity on job prospects, the backgrounds and resumes of job applicants from different racial/ethnic groups are carefully constructed to be identical. The matched pairs (who differ only by race or ethnicity) present themselves to potential employers, and differences in outcomes are then assumed to be due to differences in race or ethnicity. This work enjoys a long tradition in applied economics, where research consistently documents that African Americans do worse than matched white job applicants and Hispanics fare worse than matched white applicants.

Pager used the audit strategy to independently assess the impact of a criminal record by matching prospective job applicants on race and varying the presence or absence of a criminal background. In a carefully controlled experiment conducted in Milwaukee, Wisconsin, Pager had matched pairs of African American and white job seekers send their resumes to prospective employers. These pairs had identical resumes with regard to age, length of time in the job market, prior type of job, and education. However, one member of each race-matched pair indicated that he had been to prison.

Use of this strategy allowed Pager to test for differences within and between racial groups. Using callbacks from employers as the dependent variable, she found significant differences within race for the impact of a prison sentence. African-American job applicants without a criminal record were nearly three times as likely to get a callback as were African-American job applicants with a criminal record (14 percent versus 5 percent). The effects of a criminal record were not quite as stark for whites, as applicants without a criminal record were twice as likely to get a callback (34 percent versus 17 percent). However, the between race results remain the major finding from Pager's research, as white applicants *with* a criminal record were more likely to receive job callbacks than were African-American applicants who did not have a criminal record.

These findings reinforce the effect of criminal stigma for job seeking, an effect that varies with race but is often trumped by race.

SOURCE: Devah Pager, "The Mark of a Criminal Record," *American Journal of Sociology* 108 (2003): pp. 937–975; Devah Pager, *Marked: Race, Crime, and Finding Work in an Era of Mass Incarceration* (Chicago: University of Chicago Press, 2009).

mild sentence . . ."¹⁰³ Myrdal also noted that "it is quite common for a white criminal to be set free if his crime was against a Negro."¹⁰⁴

These patterns are particularly pronounced for the crime of sexual assault. As Susan Brownmiller has noted, "No single event ticks off America's political schizophrenia with greater certainty than the case of a black man accused of raping a white woman."¹⁰⁵ Evidence of this can be found in pre-Civil War statutes

Box 7.7 Pre-Civil War Statutes on Sexual Assault: Explicit Discrimination against African-American Men Convicted of Raping White Women

Virginia Code of 1819

The penalty for the rape or attempted rape of a white woman by a slave, African American, or mulatto was death; if the offender was white, the penalty was 10–21 years.

Georgia Penal Code of 1816

The death penalty was prescribed for rape or attempted rape of a white woman by slaves or free persons of color. A term of not more than 20 years was the penalty for rape of a white woman by a white man. A white man convicted of raping an African-American woman could be fined or imprisoned at the court's discretion.

Pennsylvania Code of 1700

The penalty for the rape of a white woman by an African-American man was death; the penalty for attempted rape was castration. The penalty for a white man was 1–7 years in prison.

Kansas Compilation of 1855

An African-American man convicted of raping a white woman was to be castrated at his own expense. The maximum penalty for a white man convicted of raping a white woman was 5 years in prison.¹⁰⁶

that prescribed different penalties for African-American and white men convicted of sexual assault. As illustrated in Box 7.7, these early laws also differentiated between the rape of a white woman and the rape of an African-American woman.

Differential treatment of interracial and intraracial sexual assaults continued even after passage of the Fourteenth Amendment, which outlawed explicit statutory racial discrimination. In the first half of the twentieth century, African-American men accused of, or even suspected of, sexually assaulting white women often faced white lynch mobs bent on vengeance. As Jennifer Wriggins noted, “The thought of this particular crime aroused in many white people an extremely high level of mania and panic.”¹⁰⁷ In a 1907 Louisiana case, the defense attorney stated:

Gentlemen of the jury, this man, a nigger, is charged with breaking into the house of a white man in the nighttime and assaulting his wife, with the intent to rape her. Now, don't you know that, if this nigger had committed such a crime, he never would have been brought here and tried; that he would have been lynched, and if I were there I would help pull on the rope.¹⁰⁸

African-American men who escaped the mob's wrath were almost certain to be convicted, and those who were convicted were guaranteed a harsh sentence. Many, in fact, were sentenced to death; 405 of the 453 men executed for rape in

the United States from 1930 to 1972 were African Americans.¹⁰⁹ According to Brownmiller, "Heavier sentences imposed on blacks for raping white women is an incontestable historic fact."¹¹⁰ As we show, it is not simply a historic fact. Research conducted during the past three decades illustrates that African-American men convicted of raping white women continue to be singled out for harsher treatment.

Offender-Victim Race and Sentences for Sexual Assault

Researchers analyzing the impact of race on sentencing for sexual assault (and other crimes with victims) have argued that focusing only on the race of the defendant and ignoring the race of the victim will produce misleading conclusions about the overall effect of race on sentencing. They contend that researchers may incorrectly conclude that race does not affect sentence severity if only the race of the defendant is taken into consideration. Table 7.2 presents a hypothetical example to illustrate how this might occur. Assume that 460 of 1,000 African-American men (46 percent) and 440 of 1,000 white men (44 percent) convicted of sexual assault in a particular jurisdiction were sentenced to prison. A researcher who focused only on the race of the offender would therefore conclude that the incarceration rates for the two groups were nearly identical.

Assume now that the 1,000 cases involving African-American men included 800 cases with African-American victims and 200 cases with white victims and that 320 of the 800 cases with African-American victims and 140 of the 200 cases with white victims resulted in a prison sentence. As shown in Table 7.2,

TABLE 7.2 Incarceration of Offenders Convicted of Sexual Assault: A Hypothetical Example of the Effect of Offender-Victim Race

Example: 2,000 men convicted of sexual assault. Analysis reveals that incarceration rate for African Americans is very similar to the rate for whites.

1,000 convicted African-American offenders	460 incarcerated = 46% incarceration rate
1,000 convicted white offenders	440 incarcerated = 44% incarceration rate

Problem: Similarities are masking differences based on the race of the victim.

1,000 African-American Offenders	460 incarcerated (46%)
800 cases with African-American victims	320 incarcerated (40%)
200 cases with white victims	140 incarcerated (70%)
1,000 White Offenders	440 incarcerated (44%)
300 cases with African-American victims	90 incarcerated (30%)
700 cases with white victims	350 incarcerated (50%)

Thus, the incarceration rate varies from 30% (for whites who assaulted African Americans) to 70% (for African Americans who assaulted whites).

although the overall incarceration rate for African-American offenders is 46 percent, the rate for crimes involving African-American men and white women is 70 percent, whereas the rate for crimes involving African-American men and African-American women is only 40 percent. A similar pattern—an incarceration rate of 50 percent for cases with white victims but only 30 percent for cases with African-American victims—is found for sexual assaults involving white offenders. The similar incarceration rates for African-American and white offenders in this hypothetical example mask large differences based on the race of the victim.

The findings of empirical research suggest that this scenario is not simply hypothetical. Gary D. LaFree, for example, examined the impact of offender and victim race on the disposition of sexual assault cases in Indianapolis.¹¹¹ He found that African-American men who assaulted white women were more likely than other offenders to be sentenced to prison. They also received longer prison sentences than any other offenders. LaFree concluded that his results highlight the importance of examining the racial composition of the offender-victim pair. Because the law was applied *most* harshly to African Americans charged with raping white women but *least* harshly to African Americans charged with raping African-American women, simply examining the overall disposition of cases with African-American defendants would have produced misleading results.

Anthony Walsh¹¹² reached a similar conclusion. When he examined the sentences imposed on offenders convicted of sexual assault in a metropolitan Ohio county, he found that neither the offender's race nor the victim's race influenced the length of the sentence. In addition, the incarceration rate for white defendants was *higher* than the rate for African-American defendants. Further analysis, however, revealed that African Americans convicted of assaulting whites received more severe sentences than those convicted of assaulting members of their own race. This was true for those who assaulted acquaintances and for those who assaulted strangers. As Walsh noted, "The leniency extended to blacks who sexually assault blacks provides a rather strong indication of disregard for minority victims of sexual assault."¹¹³

Somewhat different results were reported by Cassia Spohn and Jeffri Spears,¹¹⁴ who analyzed a sample of sexual assaults bound over for trial in Detroit Recorder's Court. Unlike previous research, which controlled only for offender and victim race and other offender and case characteristics, the authors of this study also controlled for a number of victim characteristics in addition to race. They controlled for the age of the victim, the relationship between the victim and the offender, evidence of risk-taking behavior on the part of the victim, and the victim's behavior at the time of the incident. They compared the incarceration rates and the maximum sentences imposed on three combinations of offender and victim race: African American-African American, African American-white, and white-white.

In contrast to the results reported by LaFree and Walsh, Spohn and Spears found that the race of the offender-victim pair did not affect the likelihood of incarceration. The prison sentences imposed on African Americans who assaulted whites, however, were significantly longer than the sentences imposed on whites who assaulted whites or African Americans who assaulted African Americans.

The average sentence for African American-on-white crimes was more than four years longer than the average sentence for white-on-white crimes and more than three years longer than the average sentence for African American-on-African American crimes. These results, according to the authors, reflected discrimination based on the offender's race and the victim's race.¹¹⁵

To explain the fact that offender-victim race affected the length of sentence but had no effect on the decision of whether to incarcerate, the authors suggested that judges confronted with offenders convicted of sexual assault may have relatively little discretion in deciding whether to incarcerate. As they noted, "Because sexual assault is a serious crime . . . the 'normal penalty' may be incarceration. Judges may have more latitude, and thus more opportunities to consider extralegal factors such as offender/victim race, in deciding on the length of the sentence."¹¹⁶

Spohn and Spears also tested a number of hypotheses about the interrelationships among offender race, victim race, and the relationship between the victim and the offender. Noting that previous research has suggested that crimes between intimates are perceived as less serious than crimes between strangers, they hypothesized that sexual assaults involving strangers would be treated more harshly than assaults involving intimates or acquaintances regardless of the offender's race or the victim's race. Contrary to their hypothesis, they found that the offender-victim relationship came into play only when both the offender and the victim were African American. African Americans convicted of assaulting African-American strangers received harsher sentences than African Americans convicted of assaulting African-American intimates or acquaintances; they were more likely to be incarcerated, and those who were incarcerated received longer sentences.¹¹⁷

The data presented in Figure 7.2 illustrate these differences. The authors used the results of their multivariate analysis of sentence length to calculate adjusted

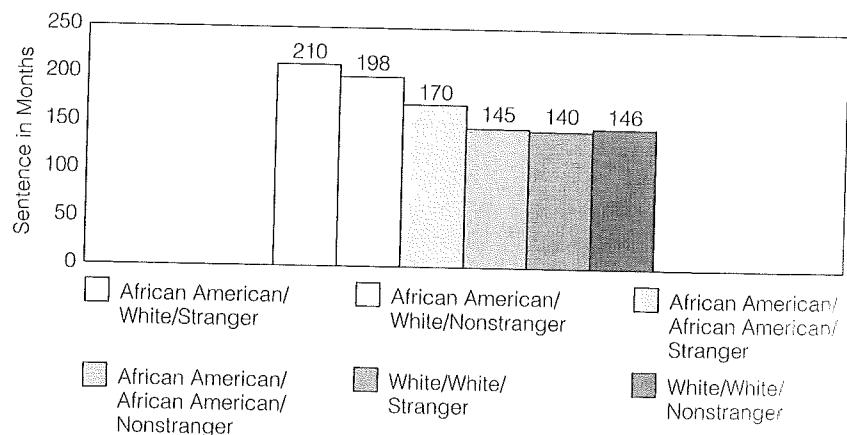


FIGURE 7.2 Offender's Race, Victim's Race, Relationship, and Length of Sentence

SOURCE: Cassia Spohn and Jeffrey Spears, "The Effect of Offender and Victim Characteristics on Sexual Assault Case Processing Decisions," *Justice Quarterly* 3 (1996), copyright © The Academy of Criminal Justice Sciences (Taylor & Francis Ltd, <http://www.tandf.co.uk/journals>) on behalf of The Academy of Criminal Justice Sciences.