

sentence means for each of the six combinations of offender race, victim race, and the relationship between the victim and the offender. These adjusted rates take all of the other independent variables into account. They show that three types of offenders received substantially longer sentences than the other three types. The harshest sentences were imposed on African Americans who victimized whites (strangers or non-strangers) and on African Americans who victimized African-American strangers. More lenient sentences were imposed on African Americans who assaulted African-American non-strangers and on whites who assaulted whites (strangers or non-strangers).

As the authors noted, these results suggest that judges consider the offender's race, but not the relationship between the victim and the offender, in determining the appropriate sentence for offenders convicted of assaulting whites. Regardless of the relationship between the victim and the offender, African Americans who victimized whites received longer sentences than whites who victimized whites. However, judges do consider the relationship between the victim and offender in determining the appropriate sentence for African Americans convicted of sexually assaulting other African Americans. Judges apparently believe that African Americans who sexually assault African Americans who are strangers to them deserve harsher punishment than those who sexually assault African-American friends, relatives, or acquaintances.

Considered together, the results of these studies demonstrate that in sexual assault cases criminal punishment is contingent on the race of the victim as well as on the race of the offender. The harshest penalties are imposed on African Americans who victimize whites and the most lenient penalties are imposed on African Americans who victimize other African Americans. (See Box 7.8 for information on different groups' perceptions of the severity of sanctions.)

Box 7.8 Perceptions of the Severity of Sanctions: Do African Americans Evaluate Prison Differently than Whites?

Studies of sentencing decisions assume that prison is a harsher punishment than probation, a county jail sentence, or other alternatives to incarceration. But is this necessarily this case? Is it possible that some people would rather serve time in prison than be subjected to electronic monitoring, ordered to perform community service, or placed on intensive supervision probation? More to the point, is it possible that African Americans would evaluate the severity of these sanctions differently than whites?

To answer these questions, Peter Wood and David May asked 113 probationers to rate the severity of prison and a number of alternatives to incarceration.¹¹⁸ Respondents were given descriptions of 10 alternative sanctions and then were asked to indicate how many months of the alternative they would be willing to do to avoid serving a sentence of 4, 8, or 12 months of imprisonment in a medium-security facility. The authors used these responses to calculate the percentage of respondents who would choose each prison term rather than any duration of the alternative sanction. They found that African Americans were much more likely than

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whites to choose prison rather than an alternative; this was true for each of the alternative sentences. For example,

- 22.2 percent of African Americans, but only 13.2 percent of whites, said that they would rather serve 4 months in prison than any time on electronic monitoring; 17 percent of African Americans, but only 11.5 percent of whites, said that they would rather serve a year in prison than any time on electronic monitoring.
- Six times as many African Americans as whites said that they would rather spend time in prison than be placed on intensive supervision probation (ISP). For example, 26.8 percent of African Americans said that they would rather serve a year in prison than any time on ISP; for whites, the figure was only 3.8 percent.
- The percentage of African Americans who said they would rather spend 8 months in prison than any time in county jail was 24.1 percent, compared to 13.5 percent of whites.¹¹⁹

Wood and May also asked the respondents about their reasons for wanting to avoid alternative sanctions. Like their evaluations of the sanctions themselves, these varied depending on the race of the respondent. Twice as many African Americans as whites reported that a "very important reason" for avoiding alternative sanctions was that the officials in charge of these programs were too hard on participants—they wanted to catch them and send them back to prison. Similarly, 38.9 percent of African Americans, but only 18.9 percent of whites, said that abuse by officials overseeing the programs was a very important reason for avoiding them. African Americans also were more likely than whites to believe that serving time in prison is less of a hassle and that the program rules for alternative sanctions were too hard to follow. Because African Americans believe that the risk of revocation is high, they are "less willing to gamble on alternatives and more likely to choose prison instead."¹²⁰

According to the authors of this study, their findings raise questions about the deterrent value of imprisonment for African Americans. Although they admitted that they did not know whether African Americans' preference for prison over alternative sanctions was due to a belief that doing time in prison was easier or that the risk of revocation made alternatives too risky, the authors did conclude that "a brief prison term may be more of a deterrent for whites than for blacks."¹²¹

The Effect of Race on Sentencing for Various Types of Crimes

The studies summarized thus far highlight the importance of testing for interaction between offender race/ethnicity and other factors, such as the age, gender, and employment status of the offender, the race of the victim, and the relationship between the victim and the offender. The importance of testing for interactions between offender race and other predictors of sentencing is also demonstrated by the results of studies examining the effect of race on sentence severity for various types of crimes. Some researchers, building on Harry Kalven and Hans Zeisel's "liberation hypothesis,"¹²² assert that African Americans will be sentenced more harshly than whites only in less serious cases.

The liberation hypothesis, which Kalven and Zeisel developed to explain jury decision making, suggests that jurors deviate from their fact-finding mission in cases in which the evidence against the defendant is weak or contradictory. Jurors' doubts about the evidence, in other words, liberate them from the constraints

imposed by the law and free them to consider their own sentiments or values. When Kalven and Zeisel examined jurors' verdicts in rape cases, they found that jurors' beliefs about the victim's behavior at the time of the attack (e.g., whether the victim was intoxicated or under the influence of drugs, whether the victim was walking alone late at night or in a bar by herself) were much more likely to influence their verdicts if the victim was raped by an unarmed acquaintance than if the victim was raped by a stranger armed with a gun or a knife.

Applied to the sentencing process, the liberation hypothesis suggests that in more serious cases the appropriate sentence is strongly determined by the seriousness of the crime and by the defendant's prior criminal record. In these types of cases, judges have relatively little discretion and thus few opportunities to consider legally irrelevant factors such as race. In less serious cases, on the other hand, the appropriate sentence is not clearly indicated by the features of the crime or the defendant's criminal record, which may leave judges more disposed to bring extralegal factors to bear on the sentencing decision.

Consider, for example, a case of sexual assault in which the offender, who has a prior conviction for armed robbery, raped a stranger at gunpoint. This case clearly calls for a severe sentence; all defendants who fall into this category, regardless of their race or their victim's race, will be sentenced to prison for close to the maximum term.

The appropriate sentence for a first-time offender who assaults an acquaintance with a weapon other than a gun, however, is not necessarily obvious. Some defendants who fall into this category will be incarcerated, but others will not. This opens the door for judges to consider the race of the defendant or the race of the victim in determining the appropriate sentence.

The Liberation Hypothesis and Offenders Convicted of Violent Felonies

Cassia Spohn and Jerry Cederblom used data on defendants convicted of violent felonies in Detroit to test the hypothesis that racial discrimination in sentencing is confined to less serious criminal cases.¹²³ Although they acknowledged that all the cases included in their data file are by definition "serious cases," they argued that some are more serious than others: murder, rape, and robbery are more serious than assault; crimes in which the defendant used a gun are more serious than those in which the defendant did not use a gun; and crimes in which the defendant had a prior felony conviction are more serious than those in which the defendant did not have prior convictions.

As shown in Table 7.3, which summarizes the results of their analysis of the likelihood of incarceration (controlling for other variables linked to sentence severity), the authors found convincing support for their hypothesis. With only one exception, race had a significant effect on the decision to incarcerate only in less serious cases (but see Box 7.9 for evidence of racial stereotyping in homicide cases). African Americans convicted of assault were incarcerated at a higher rate than whites convicted of assault; there were no racial differences for the more serious offenses. Similarly, race affected the likelihood of incarceration

TABLE 7.3 The Effect of Race on the Likelihood of Incarceration for Various Types of Cases in Detroit

	Effect of Race on Incarceration: Statistically Significant?
Most serious conviction charge	
Murder	No
Robbery	No
Rape	No
Other sex offenses	No
Assault	Yes
Prior criminal record	
Violent felony conviction	No
No violent felony conviction	Yes
Relationship between offender and victim	
Strangers	No
Acquaintances	Yes
Use of a weapon	
Offender used a gun	No
Offender did not use a gun	Yes
Injury to victim	
Offender injured victim	Yes
Offender did not injure victim	Yes

SOURCE: Adapted from Cassia Spohn and Jerry Cederblom, "Race and Disparities in Sentencing: A Test of the Liberation Hypothesis," *Justice Quarterly* 8 (1991), pp. 305-327.

defendants with no violent felony convictions, but not for those with a prior conviction; for defendants who victimized acquaintances, but not for those who victimized strangers; and for defendants who did not use a gun to commit the crime, but not for those who did use a gun.

Spohn and Cederblom concluded that their results provided support for Kalven and Zeisel's liberation hypothesis, at least with respect to the decision to incarcerate. They also concluded that their findings offered important insights into judges' sentencing decisions. According to the authors,

When the crime is serious and the evidence strong, judges' sentencing decisions are determined primarily by factors of explicit legal relevance—the seriousness of the conviction charge, the number of conviction charges, the nature of the defendant's prior criminal record, and so on. Sentencing decisions in less serious cases, however, reflect the influence of extralegal as well as legal factors.¹²⁴

Box 7.9 Racial Stereotyping in Homicide Cases

The assumption that offender race will not affect sentence outcomes in the most serious felonies because of limited judicial discretion in these cases is called into question by the results of a study examining sentences imposed on male homicide offenders sentenced to a term of years (rather than a life or death sentence) in Philadelphia.¹²⁵ Because either life without parole or death were the only sentence options allowed in cases of first- or second-degree murder and because judges adhered closely to these guidelines, the study focused on offenders convicted of third-degree murder, voluntary manslaughter, involuntary manslaughter, and homicide by vehicle.

Kathleen Auerhahn suggested that the offender's race and ethnicity would not have a direct effect on the length of the sentence. Rather, she hypothesized that harsher treatment would be reserved for African-American and Hispanic defendants who more closely matched stereotypes of dangerousness and threat—that is, those who were also young and held in custody prior to trial. Her results were consistent with this hypothesis; the race/ethnicity of the offender did not have a direct effect on the sentence length, but the combination of being young, African American or Hispanic, and detained prior to trial did lead to longer sentences. In other words, all three characteristics were needed to trigger more punitive sentences.

Auerhahn concluded that her findings provided

convincing evidence that sentencing judges make attributions about offenders based on their conformity to a criminal stereotype, and sentence them more harshly because of it . . . conformity to the stereotype may trigger attributions about the defendant's character, disposition, or blameworthiness, as well as assumptions about the potential for future criminality in that stereotypes may be seen as the embodiment of stable characteristics on the part of decision makers.¹²⁶

**Racial Discrimination in the Sentencing
of Misdemeanor Offenders?**

Most of the research on sentencing examines the sentences imposed on offenders convicted of felonies. There is relatively little research testing for racial discrimination in the sentencing of individuals convicted of misdemeanor offenses. Because the lower courts where misdemeanor cases are handled usually have huge caseloads and informal, nonadversarial procedures for delivering what is often referred to as "assembly-line justice," one might predict that the likelihood of racially disparate decisions would be even greater in these courts than in the more formal felony courts.

Research by Michael J. Leiber and Anita N. Blowers addressed this issue. They used data from an urban jurisdiction in a southeastern state to test for racial differences in a series of outcomes in misdemeanor cases. One of the dependent variables they examined was whether the case was assigned "priority status." This case-screening decision, which was made based on the defendant's prior criminal record or the facts in the case, identified cases that warranted priority prosecution. Two other dependent variables were whether the defendant was convicted and whether the defendant was sentenced to jail or prison.

When they examined the case prioritization variable, they found that cases involving assaults, cases in which the victim was a stranger to the offender, and cases involving offenders with prior criminal histories were more likely to be prioritized. They also found that cases involving African Americans were significantly more likely than those involving whites to be prioritized. Regarding the conviction and incarceration variables, they found that more serious cases had greater odds of conviction and incarceration and that the race of the offender did not affect either of these decisions. However, both decisions were affected by the status of the case; cases labeled as priority status cases were more likely to result in convictions and sentences to jail or prison.¹²⁸ The effect of race on these decisions, in other words, was indirect rather than direct. Cases involving African Americans were more likely to be prioritized and, as a result, were more likely than cases involving whites to result in conviction and incarceration. In these misdemeanor cases, then, African Americans were treated more harshly than whites when the case was characterized as serious rather than nonserious.

The results of these studies demonstrate that the criteria used by judges to determine the appropriate sentence will vary depending on the nature of the crime and the defendant's prior criminal record. More to the point, they demonstrate that *the effect of race on sentence severity will vary*. Judges impose harsher sentences on African Americans than on whites under some circumstances and for some types of crime; they impose similar sentences under other circumstances and for other types of crime. The fact that race does not affect sentence severity for *all* cases, in other words, does not mean that judges do not discriminate in *any* cases.

Sentencing and the War on Drugs

The task of assessing the effect of race on sentencing is complicated by the war on drugs, which critics contend has been fought primarily in minority communities. Michael Tonry, for example, argued that "urban black Americans have borne the brunt of the War on Drugs."¹²⁹ More specifically, he charged that "the recent blackening of America's prison population is the product of malign neglect of the war's effects on black Americans."¹³⁰ Miller similarly asserted that, "The racial discrimination endemic to the drug war wound its way through every stage of the process—arrest, jailing, conviction, and sentencing."¹³¹ Marc Mauer's criticism is even more pointed. He asserted that "... the drug war has exacerbated racial disparities in incarceration while failing to have any sustained impact on the drug problem."¹³²

Assertions such as these suggest that racial minorities will receive more punitive sentences than whites for drug offenses. This expectation is based in part on theoretical discussion of the "moral panic" surrounding drug use and the war on drugs.¹³³ Moral panic theorists argue that society is characterized by a variety of common-sense perceptions about crime and drugs that result in community intolerance for such behaviors and increased pressure for punitive action.¹³⁴ Many theorists argue that this moral panic can become ingrained in the judicial ideology of sentencing judges, resulting in more severe sentences for those—that is, African Americans and Hispanics—believed to be responsible for drug use, drug distribution, and drug-related crime.¹³⁵

Racial Disparities in Sentences Imposed for Drug Offenses

As demonstrated in earlier chapters and summarized in what follows, there is ample evidence that the war on drugs has been fought primarily in minority communities (see also Box 7.10, Drug-Free School Zones). In 2000 Human

Box 7.10 Drug-Free School Zones: A Racially Neutral Policy?

Demetric Young was 20 years old when he was convicted of selling a small amount of cocaine to an undercover narcotics agent in North Lubbock, Texas. Young sold the drugs from his room in the Sunset Motel, a rundown place in a largely Hispanic neighborhood that, unknown to him, was located within 1,000 feet of Cavazos Junior High School. The normal sentence for Young's crime under Texas law would have been about 10 years. Because Young sold the drugs in a "drug-free school zone," he was sentenced to serve 38 years in prison.¹³⁶

The Texas law under which Young was sentenced was modeled after the Federal Drug-Free School Zones Act (21 U.S.C. § 860 [1984]), which was enacted "to reduce the presence of drugs in the schools by threatening those who distributed drugs near schools with heavy penalties." The law, which doubles the maximum sentences for drug offenses that occur within the protected zones, is applicable to offenders who are convicted of distributing, possessing with intent to distribute, or manufacturing a controlled substance in or on, or within 1,000 feet of, the real property comprising a public or private elementary, vocational, or secondary school; a public or private college, junior college, or university; a playground; or housing facility owned by a public housing authority; or within 100 feet of a public or private youth center, swimming pool, or video arcade facility.

Laws similar to this have been enacted in most states. Although they are designed to prevent the sale of drugs to children by moving drug dealing away from schools, critics contend that the statutes are irrational in that they assume that all drug sales near a school involve children or are more dangerous to children than drug sales that occur farther away from schools. Critics also argue that the laws transform entire urban areas—indeed, entire cities—into school zones and that this is most likely to occur in the inner-city neighborhoods populated by poor African Americans and Hispanics. A study of New Bedford, Massachusetts, for example, found that "most of the urban core falls within the enhanced-penalty area" and that more than three-fourths of all drug-dealing cases within the city limits occurred within school zones. This study also found that the drug dealers who were arrested within the school zones were not selling drugs to children and that most of them were arrested when school was not in session.¹³⁷

A report by the Justice Policy Institute reached similar conclusions about the impact of the drug-free school zone law in New Jersey.¹³⁸ Noting that the New Jersey law used a broad definition of "schools" that included day care centers and vocational training centers, the report concluded that "in New Jersey's poorest urban centers, minority offenders find themselves blanketed in drug free school zones." The report also noted that "a more suburban county, with fewer African American and Hispanic residents and a less dense distribution of 'schools' might experience less enforcement of school-zone laws, placing fewer Whites at risk of arrest and imprisonment."

As these reports suggest, drug-free school zone statutes, which are racially neutral on their face, may have racially discriminatory effects.

Rights Watch, a New York-based watchdog organization, issued a report titled *Punishment and Prejudice*.¹³⁹ The report analyzed nationwide prison admission statistics and presented the results of the first state-by-state analysis of the impact of drug offenses on prison admissions for African Americans and whites. The authors of the report alleged that the war on drugs, which is "ostensibly color blind," has been waged "disproportionately against black Americans." As they noted, "The statistics we have compiled present a unique—and devastating—picture of the price black Americans have paid in each state for the national effort to curtail the use and sale of illicit drugs." In support of this conclusion, the report noted that:

- African Americans constituted 62.6 percent of all drug offenders admitted to state prisons in 1996; in certain states, the disparity was much worse—in Maryland and Illinois, for example, African Americans comprised 90 percent of all persons admitted to state prisons for drug offenses.
- Nationwide, the rate of drug admissions to state prison for African-American men was 13 times greater than the rate for white men; in 10 states, the rates for African-American men were 26–57 times greater than those for white men.
- Drug offenders accounted for 38 percent of all African-American prison admissions but only 24 percent of all white prison admissions; in New Hampshire, drug offenders accounted for 61 percent of all African-American prison admissions.
- The disproportionate rates at which African Americans are sentenced to prison for drug offenses "originate in racially disproportionate rates of arrest." From 1979 to 1998, the percentage of drug users who were African American did not vary appreciably; however, among those arrested for drug offenses, the percentage of African Americans increased significantly. In 1979, African Americans comprised 10.8 percent of all drug users and 21.8 percent of all drug arrests; in 1998, African Americans comprised 16.9 percent of all drug users and 37.3 percent of all drug arrests.

The authors of the report stated that their purpose was "to bring renewed attention to extreme racial disparities in one area of the criminal justice system—the incarceration of drug law offenders." They also asserted that, although the high rates of incarceration for all drug offenders were a cause for concern, "the grossly disparate rates at which blacks and whites are sent to prison for drug offenses raise a clear warning flag concerning the fairness and equity of drug law enforcement across the country, and underscore the need for reforms that would minimize these disparities without sacrificing legitimate drug control objectives."

Critics of the report's conclusions, which they branded "inflammatory," argued that the statistics presented did not constitute evidence of racial discrimination. "There will be inevitably, inherently, disparities of all sorts in the enforcement of any kind of law," said Todd Graziano, a senior fellow in legal studies at the Heritage Foundation. Critics noted that because the illegal drug trade flourishes in inner-city, minority neighborhoods, the statistics presented in the report could simply indicate that African Americans commit more drug crimes than whites.

There are now a number of studies that focus on racial disparities in sentences imposed on drug offenders. In this section, we summarize the results of three studies comparing the sentences imposed on African-American, Hispanic, and white drug offenders. All of these studies used data on offenders sentenced since the initiation of the war on drugs. The first two studies¹⁴⁰ used data on offenders sentenced in state court; the third¹⁴¹ analyzed data on offenders sentenced under the Federal Sentencing Guidelines.

Sentencing of Drug Offenders in State Courts

Steffensmeier and Demuth's study of sentence outcomes in Pennsylvania focused on the differential treatment of white, black, and Hispanic drug offenders. Arguing that "the specific social and historical context involving Hispanic Americans exacerbates perceptions of their cultural dissimilarity and the 'threat' it poses," the authors of this study hypothesized that *Hispanic drug offenders* would be singled out for the harshest treatment.¹⁴³ They found evidence in support of this hypothesis when they examined the raw data: the incarceration rate for Hispanics (87.4 percent) was substantially higher than the rates for African Americans (69.9 percent) or whites (52.3 percent), and Hispanics received somewhat longer sentences than African Americans or whites.¹⁴⁴

These differences did not disappear when the authors controlled for the offender's age and for a number of case characteristics (offense type and severity, criminal history, number of convictions, whether the conviction was by plea or trial). Hispanics were 26 percentage points and African Americans were 7 percentage points more likely than whites to be incarcerated; Hispanics also received sentences that averaged 8 months longer than the sentences imposed on whites. These findings led the authors to conclude that Hispanic defendants in Pennsylvania faced "real and meaningful" disadvantages at sentencing. They also concluded that the results of their study raise questions "about the equal application of law and the wherewithal of the sentencing guidelines in reducing sentencing disparities of any kind, including race and ethnicity."¹⁴⁶

Research conducted in Washington State also examined the effect of offender characteristics on sentencing decisions in drug cases. Sara Steen, Rodney L. Engen, and R. R. Gainey interviewed criminal justice officials about their perceptions of typical drug cases and drug offenders and the factors they used to differentiate among drug cases.¹⁴⁷ They found that decision makers used three offender characteristics—gender, prior record, and whether the offender was using or selling drugs—to construct a stereotype of a dangerous drug offender. Males with prior felony convictions who were convicted of drug-delivery offenses involving cocaine, heroin, or methamphetamine were perceived as more dangerous and threatening than other types of drug offenders.

As shown in Table 7.4, Steen and her colleagues also found that African Americans were more likely than whites to have the characteristics of the stereotypical dangerous drug offender. African Americans were more likely than whites to be male, to be drug dealers rather than drug users, and to have prior felony convictions. African Americans also were more likely than whites to have a

TABLE 7.4 Race and the Stereotype of a Dangerous Drug Offender: Percentage of Whites and African Americans Having Characteristics Stereotypical of a Dangerous Drug Offender

	Whites (%)	African Americans (%)
Offender is male	74	82
Offender is a drug dealer	14	27
Offender has at least one prior felony conviction	48	68
Offender Groups		
Offender is a male dealer with prior felony convictions	6	16
Offender is a male dealer without prior felony convictions	5	6
Offender is a male non-dealer with prior felony convictions	32	41
Offender is a male non-dealer with no prior felony convictions	31	18
Offender is a female dealer	3	4
Offender is a female non-dealer with prior felony convictions	9	8
Offender is a female non-dealer without prior felony convictions	14	5

the characteristics of a dangerous drug offender; 16 percent of the African Americans, but only 6 percent of the whites, were male offenders with prior felony convictions who were convicted of drug dealing. According to the authors, "this disproportionality, along with cultural stereotypes, makes decision makers more inclined to expect this 'worst case' behavior from black offenders (especially black males) than from white offenders."¹⁴⁸ As a result, whites who match the stereotype of a dangerous drug offender will be seen as atypical, and their behavior will be subjected to more judicial scrutiny; African Americans who match the stereotype, however, will be perceived as typical and their cases will be handled in a routine fashion.

The results of the authors' analysis of the decision whether to incarcerate revealed that African Americans were substantially more likely than whites to be incarcerated and that offenders whose characteristics matched those of the dangerous drug offenders had higher odds of incarceration than offenders whose characteristics were at odds with the stereotype. Males were 56 percent more likely than females to be incarcerated, and the odds of incarceration were 23 times greater for dealers than for non-dealers and 8 times greater for offenders with prior felony convictions than for those without prior felonies. When the authors partitioned the data by the race of the offender, they found that although being a drug dealer had a significant effect on the likelihood of incarceration for both white offenders and African-American offenders, it had a significantly larger effect for whites than for African Americans. Being a dealer increased the odds of incarceration 27 times for white offenders, compared to 9 times for African-American offenders.¹⁴⁹ Further analysis revealed that fitting the stereotype of a dangerous

drug offender (i.e., a male dealer with prior felony convictions) also affected the likelihood of incarceration for white offenders more than for African-American offenders.¹⁵⁰

The authors interpreted their finding that matching the stereotype of a dangerous drug offender had a more pronounced effect on the severity of the sentence for whites than for African Americans as reflecting “greater leniency in the sentencing of less-threatening white offenders, compared to blacks, as opposed to greater punitiveness in the sentencing of the most threatening white offenders.”¹⁵¹ All offenders—whites as well as African Americans—who matched the stereotype of a dangerous offender were sentenced to jail or prison. Probation was not an option for these dangerous offenders. Among less serious offenders, however, judges sent whites to jail or prison less often than African Americans. The authors concluded that their results suggested that “decision makers are more likely to define low-level black offenders as a threat to public safety, and therefore deserving of incarceration, than similarly situated white offenders.”¹⁵² (For additional discussion of dangerous drugs and dangerous drug offenders, see “Focus on an Issue: Penalties for Crack and Powder Cocaine.”)

FOCUS ON AN ISSUE

Penalties for Crack and Powder Cocaine

Federal sentencing guidelines for drug offenses differentiate between crack and powder cocaine. In fact, until very recently, the guidelines treated crack cocaine as being 100 times worse than powder cocaine. Until 2010, possession of 500 grams of powder cocaine, but only 5 grams of crack, triggered a mandatory minimum sentence of five years. Critics charged that this policy, although racially neutral on its face, discriminated against African-American drug users and sellers, who prefer crack cocaine to powder cocaine. More than 90 percent of the offenders sentenced for crack offenses in federal courts are African American. Those who defend the policy, however, suggested that it is not racially motivated; rather, as Randall Kennedy, an African-American professor at Harvard Law School, contended, the policy is a sensible response “to the desires of law-abiding people—including

the great mass of black communities—for protection against criminals preying on them.”¹⁵³

Concerns about the racial implications of the crack–powder disparity led some federal judges to attempt to circumvent the mandatory minimum sentences for offenders convicted of offenses involving crack cocaine. For example, in 1993, Judge Lyle Strom, the chief judge of the United States District Court in Nebraska, sentenced four African-American crack dealers to significantly shorter prison terms than called for under the guidelines. In explanation, Strom wrote, “Members of the African American race are being treated unfairly in receiving substantially longer sentences than Caucasian males who traditionally deal in powder cocaine.”¹⁵⁴

Strom’s decision was overturned by the Eighth Circuit Court of Appeals in

1994. The three-judge panel ruled that even if the guidelines are unfair to African Americans, that is not enough to justify a more lenient sentence than called for under the guidelines. Other federal appellate courts have upheld the 100-to-1 rule, holding that the rule does not violate the equal protection clause of the Fourteenth Amendment (see, e.g., *U.S. v. Thomas*, 900 F.2d 37 [4th Cir. 1990]; *U.S. v. Frazier*, 981 F.2d 92 [3rd Cir. 1992]; and *U.S. v. Latimore*, 974 F.2d 971 [8th Cir. 1992]).

In 1996, the U.S. Supreme Court ruled 8-1 that African Americans who allege that they have been singled out for prosecution under the crack cocaine rule must first show that whites in similar circumstances were not prosecuted.¹⁵⁵ The case was brought by five African-American defendants from Los Angeles, who claimed that prosecutors were systematically steering crack cocaine cases involving African Americans to federal court, where the 100-to-1 rule applied, but steering cases involving whites to state court, where lesser penalties applied. The Court stated that a defendant who claimed he or she was a victim of selective prosecution "must demonstrate that the federal prosecutorial policy had a discriminatory effect and that it was motivated by a discriminatory purpose."

The United States Sentencing Commission repeatedly recommended that the penalties for crack and powder cocaine offenses be equalized. In 1995, the Commission recommended that the 100-to-1 ratio be changed to a 1-to-1 ratio. Both Congress and former President Clinton rejected this amendment. In May 2002, the Commission "unanimously and firmly" reiterated its earlier position that "the various congressional objectives can be achieved

more effectively by decreasing substantially the 100-to-1 drug quantity ratio."¹⁵⁶ The Commission recommended increasing the quantity levels that trigger the mandatory minimum penalties for crack cocaine. They recommended that the 5-year mandatory minimum threshold be increased to at least 25 grams and that the 10-year mandatory minimum threshold be increased to at least 250 grams. The Commission also recommended that Congress repeal the mandatory minimum sentence for simple possession of crack cocaine.

The Commission's 2002 report also noted that the majority (85 percent in 2000) of offenders subject to the harsh penalties for drug offenses involving crack cocaine were African American. Although the commissioners acknowledged that this did not necessarily prove that "the current penalty structure promotes unwarranted disparity based on race," they cautioned that "even the perception of racial disparity [is] problematic because it fosters disrespect for and lack of confidence in the criminal justice system."¹⁵⁷

In 2010, Congress finally acted to reduce the crack/powder cocaine disparity. Under the Fair Sentencing Act, which President Obama signed into law in August of 2010, the amount of crack cocaine necessary to trigger a 5-year mandatory minimum sentence was increased from 5 grams to 28 grams; the amount necessary to trigger a 10-year sentence was increased from 50 grams to 280 grams. Because the amounts of powder cocaine that led to a 5-year (500 grams) or a 10-year (1,000 grams) sentence did not change, the disparity under the 2010 law is 18-to-1 rather than 100-to-1. (For a discussion of another type of race-linked sentencing statute, see "In the Courts: The Constitutionality of Hate-Crime Sentencing

(Continued)

Enhancements—*Wisconsin v. Mitchell* (508 U.S. 47 [1993]).”)

Marc Mauer, who is the Executive Director of The Sentencing Project, has suggested that one way to avoid the enactment of facially neutral but racially disparate policies such as the crack/powder cocaine sentencing disparity is to require “racial impact statements” whenever new sentencing legislation is proposed.¹⁵⁸ Arguing that it would be better to assess the racial dimensions of proposed policy changes before new legislation is enacted, Mauer called for the adoption of a policy requiring policy makers to evaluate the potential racial effects of laws prior to their adoption. As he noted, “the adoption of racial impact statements offers a means by which policymakers can avoid some of the mistakes of the past and develop crime policy that is both constructive and fair.”¹⁵⁹

THE RETROACTIVITY DEBATE

The Fair Sentencing Act did not apply retroactively to those who were sentenced under the old law, with its 100-to-1 ratio. In 2012, the U.S. Supreme Court modified this somewhat, ruling that the Act’s “new, lower mandatory minimums apply to the post-Act sentencing of pre-Act offenders” (*Dorsey v. United States*, 132 S. Ct. 2321 [2012]). The act applied, in other words, to offenders who committed crimes before the act went into effect but who were sentenced after that date. This ruling, of course, was of no help to the thousands of federal inmates—most of whom were African American—who committed their crimes before the act took effect in August

of 2010 and who were still serving sentences that would not have been imposed under the new law.

In May 2013, the Court of Appeals for the Sixth Circuit ruled in *U.S. v. Blewett* that the provisions of the Fair Sentencing Act must be applied retroactively; this opened the way for thousands of federal offenders sentenced for crack cocaine offenses prior to 2010 to petition for shorter prison sentences. Writing for the majority, Judge Gilbert Merritt stated that “the federal judicial perpetuation of the racially discriminatory mandatory minimum crack sentences for those defendants sentenced under the old crack sentencing law, as the government advocates, would violate of the Equal Protection Clause.” This decision, however, was overturned in December 2013 by the full Sixth Circuit bench by a vote of 10-7. Other appeals courts have similarly ruled against retroactivity for the Fair Sentencing Act; the consistency of these decisions means that it is unlikely that the U.S. Supreme Court will intervene.

Although the Fair Sentencing Act has substantially reduced the statutory disparity between crack and powder cocaine sentences, there remains a disparity between the two drug forms despite their similar chemical and pharmacological structures. Coupled with the fact that the courts have ruled that the act need not be applied retroactively to the thousands of federal inmates serving sentences that would not be imposed under the new law, this suggests that more needs to be done to address disproportionate drug sentencing practices.

The findings of this state-level study provide clues regarding the context in which race and ethnicity matter in sentencing drug offenders. They suggest that decision makers’ beliefs about the dangerousness of and degree of threat posed by white and African-American offenders are intertwined with their assumptions

crime and criminality. As Steen and her colleagues noted, "stereotypes about both crimes and criminals affect the way cases are perceived and decisions are made."¹⁶⁰

Sentencing of Drug Offenders in Federal Courts

Cassia Spohn and Lisa Sample build on Steen and her colleagues' study of the dangerous drug offender in state court using data on drug offenders convicted in three U.S. District Courts.¹⁶¹ They extended the study conducted by Steen and her colleagues by (1) using data on federal, rather than state, drug offenders; (2) including Hispanics as well as African Americans in the analyses; (3) using a definition of the dangerous drug offender that reflects the nature of the drug caseload in the federal court system; and (4) examining whether the effects of stereotypes of dangerousness varied by the type of drug.

Because there were only 23 drug offenders in their data file who were convicted of an offense other than drug trafficking, Spohn and Sample could not differentiate between offenders convicted of drug delivery and those convicted of simple possession. Instead, they defined the dangerous drug offender in federal court as a male offender with a prior conviction for drug trafficking, who used a weapon during the current crime. They hypothesized that offenders who perfectly matched the stereotype—that is, males with prior trafficking convictions who used a weapon—would receive longer sentences than all other offenders. They also predicted that the effect of matching the stereotype of a dangerous drug offender would not vary by race/ethnicity and that the effect of being a dangerous drug offender would vary by the type of drug involved in the case and by the race/ethnicity of the offender. They hypothesized that the effect of being a dangerous drug offender would be confined to crack cocaine cases for African-American offenders and to methamphetamine cases for white and Hispanic offenders.

As shown in Table 7.5, Spohn and Sample found that African-American offenders were more likely than either white offenders or Hispanic offenders to have the characteristics of a dangerous drug offender; they also found that white offenders were more likely than Hispanic offenders to match the characteristics of a dangerous drug offender. Forty-four percent of the African Americans but only 23 percent of the whites and 12 percent of the Hispanics had a prior drug trafficking conviction, and 25 percent of the African Americans but only 21 percent of the whites and 12 percent of the Hispanics used a weapon during the commission of the crime. Consistent with these findings, African Americans were over-represented in the most serious category of the offender groups. Fourteen percent of the African-American offenders, but only 5 percent of the white offenders and 2 percent of the Hispanic offenders, were male offenders with prior drug trafficking convictions who used weapons in the current offense.

Although Spohn and Sample found partial support for their hypothesis that offenders who perfectly matched the stereotype of a dangerous drug offender would be sentenced most harshly, their results were inconsistent with their hypothesis that the effect of matching this stereotype would not vary by race/ethnicity. They found that there were no significant differences in the sentences imposed