

Dangerous

Hispanics (N = 544)	
	N
10	492
12	66
12	67
32	10
10	53
10	54
49	375
31	6
53	46

Whites and Crack

dangerous of-
 dangerous
 es. There
 imposed
 five cate-
 data by the
 of the
 Hispanic
 other types
 affected
 convicted of
 length for
 of drugs.
 and threat
 offenders

are differ-
 in crack
 reflect a
 the type
 and crack
 in the
 harmful

drug and believe that the typical crack offender is an African American, they may believe that it is appropriate to impose especially punitive sentences on offenders who accumulate more of the characteristics of a dangerous offender.

Spohn and Sample noted that although the results of their study conflicted with the substantive findings from Washington State, they were nonetheless consistent with Steen and her colleagues' conclusion that "the meaning of race ... will vary depending on other offender and offense characteristics, and that differences in treatment within race may therefore be as large as differences between races."¹⁶²

Racial Minorities and Cumulative Disadvantage

Although recent research on the relationship between race/ethnicity and sentencing has evolved both theoretically and methodologically, several commentators have recently argued that even these more sophisticated studies leave a number of questions unanswered.¹⁶³ Of particular importance is that the typical race and sentencing study, which relies on what Eric Baumer refers to as "the modal approach" involving regression-based analysis of the final sentencing outcome, cannot identify the mechanisms that lead to racially disparate sentencing. Stated differently, even these more theoretically and methodologically sophisticated studies were unable to explain why racial minorities are sentenced more harshly than whites, whether disparate treatment is found only at sentencing or accumulates as cases moved through the court process, or whether the disparities reflected decisions made by prosecutors as well as judges. These criticisms of research on racial justice are not new. Forty years ago, John Hagan (1974, p. 379) called for studies that better captured "transit through the criminal justice system" especially as it operates "cumulatively to the disadvantage of minority group defendants."¹⁶⁴ Four decades later, Baumer reiterated this concern, arguing that "it would be highly beneficial if the next generation of scholars delved deeper into the various ways that 'race'" matters "across multiple stages of the criminal justice process."¹⁶⁵ (See "Recent Research: The Effect of Skin Tone on Punishment," for another explanation for why race might matter.")

Researchers are just beginning to address these issues. As they have done so, the focus has begun to shift from the final sentencing outcome to the life course of a criminal case and the ways in which disparities accumulate as the case progresses through the criminal process. Arguing that a key limitation of extant sentencing research is its failure to consider the conditioning effects of the many consequential case-processing decisions that precede the final punishment decision, these scholars point out that focusing on a single decision-making stage (i.e., sentencing) may mask disparities originating at other discretionary points in the system. Although select work demonstrates that early charging decisions or intermediate bail and pretrial detention decisions can affect final sentencing outcomes, there are only four studies that address the issue of cumulative disparity in the prosecution and sentencing of criminal defendants.¹⁶⁶ Each of these studies used different statistical techniques and each of them reached somewhat different conclusions. One study used data on men charged with felony drug offenses to

Recent Research: The Effect of Skin Tone on Punishment

A recent study by a research team at Villanova University investigated the role that skin tone has on punishment. Jill Viglione, Lance Hannon, and Robert DeFina used data on African-American females incarcerated in North Carolina from 1995 to 2009 to test whether females with light skin tone (as indicated by a correctional officer's assessment of whether the offender had light or non-light skin at the time of admission to the prison) received shorter sentences and served less time than those with darker complexions.

The results of their analysis, which controlled for the offender's criminal history and for the seriousness of the crime(s) for which the offender was incarcerated, revealed that African-American females with light complexions received sentences that were about 12 percent shorter than those imposed on African Americans with darker complexions; having light skin also reduced the actual time served in prison by 11 percent.

The authors of the study concluded that their results add to "a growing body of research that underscores the complexity of racism in our society . . . Among blacks, characteristics associated with whiteness appear to have a significant impact on important life outcomes, such as the amount of time one spends in prison" (p. 257).

SOURCE: Jill Viglione, Lance Hannon, and Robert DeFina, "The Impact of Light Skin Tone on Prison Time for Black Female Offenders," *The Social Science Journal* 48 (2011), pp. 250-258.

examine decisions regarding bail, pretrial detention, felony adjudication, and sentencing.¹⁶⁷ The results of the analysis revealed that African Americans and Latinos were treated more severely than whites at several of these decision points and, more importantly, that racial/ethnic disparities in these earlier decisions increased disparities in sentencing outcomes. By contrast, John Sutton used data on male defendants sampled in 2000 to estimate the direct and indirect effects of race and ethnicity on pretrial detention, guilty pleas, and sentence severity.¹⁶⁸ He found that African Americans and Latinos were substantially more likely than whites to be detained prior to trial; that pretrial detention had differential effects on the likelihood of a guilty plea for whites, African Americans, and Latinos; and that both pretrial detention and guilty pleas affected sentence outcomes, but the patterns of results were somewhat different for each of the three racial groups. Sutton used the results of his analysis to calculate conditional probabilities of sentence outcomes for defendants who were detained or released and who pled guilty or went to trial. He found that "once prior events are fully taken into account, Latinos and blacks experience about the same rather large cumulative disadvantage," but that the mechanisms that produced this cumulative disadvantage varied for defendants in the two racial groups.¹⁶⁹ Sutton concluded with a call for future research on cumulative disadvantage that "plumb[s] the murky depths of the prosecutor's office."¹⁷⁰

Besiki Kutateladze and his colleagues answered this call for additional research designed to identify cumulative disadvantage in the prosecution and sentencing of criminal defendants. Using data on a large sample of white, African-American, Latino, and Asian defendants charged with misdemeanors and felonies in New

York City, the researchers investigated racial and ethnic disparity across multiple prosecutorial and judicial decisions.¹⁷¹ Their analysis revealed strong evidence of disparity in pretrial detention, plea offers, and use of incarceration: for each of these outcomes, African Americans and Latinos were treated more harshly and Asians were treated more leniently than whites. Moreover, pretrial detention had a large and statistically significant effect on subsequent outcomes. They also found that African Americans, and to a lesser extent Latinos, were more likely than whites to suffer from cumulative disadvantage; for both felonies and misdemeanors, the most disadvantaged combination of outcomes (pretrial detention, case not dismissed, custodial plea offer [misdemeanors only], and incarceration) was most likely for blacks and Latinos and least likely for Asians. Noting that research on the justice system traditionally has been divided into studies of policing, courts, or corrections, the authors of this study concluded that "it may be time to begin examining the broader nexus among different domains of the system—for the pursuit of racial justice ultimately will require thoughtful examination of the many diverse and interrelated discretionary components of the entirety of the formal criminal punishment process."¹⁷²

Summary: Research on Race and Sentencing

Research examining the relationship between race and sentencing has evolved both theoretically and methodologically over the past five decades. Of particular importance is the fact that the questions asked have changed dramatically. Most researchers now acknowledge that it is overly simplistic to ask whether race matters at sentencing. We know that it does. The more interesting questions—and those whose answers will help us understand the mechanisms underlying the harsher punishment imposed on African Americans and Hispanics—revolve around the contexts in which or the circumstances under which race and ethnicity influence sentencing and the ways in which disparities accumulate over the life course of a criminal case. As this new era of race and sentencing research continues to unfold, more definitive answers to questions regarding racial disparity and racial discrimination in punishment should be forthcoming.

Does It Make a Difference? A Comparison of the Sentencing Decisions of African-American, Hispanic, and White Judges

Historically, most state and federal judges have been white males. Although the nation's first African-American judge was appointed in 1852, by the mid-1950s there were only a handful of African Americans presiding over state or federal courts. During the 1960s and 1970s, civil rights leaders lobbied for increased representation of African Americans at all levels of government, including the courts. By 1990, there were nearly 500 African-American judges on the bench nationwide.

Those who champion the appointment of racial minorities argue that African-American and Hispanic judges could make a difference. They contend that

increasing the number of racial minorities on state and federal courts will alter the character of justice and the outcomes of the criminal justice system. Because the life histories and experiences of African Americans and Hispanics differ dramatically from those of whites, the beliefs and attitudes they bring to the bench also will differ. Justice A. Leon Higginbotham Jr., an African American who retired from the U.S. Court of Appeals for the Third Circuit in 1993, wrote, "The advantage of pluralism is that it brings a multitude of different experiences to the judicial process."¹⁷³ More to the point, he stated that "someone who has been a victim of racial injustice has greater sensitivity of the court's making sure that racism is not perpetrated, even inadvertently."¹⁷⁴ Judge George Crockett's assessment of the role of the African-American judge was even more pointed: "I think a black judge . . . has got to be a reformist—he cannot be a member of the club. The whole purpose of selecting him is that the people are dissatisfied with the status quo and they want him to shake it up, and his role is to shake it up."¹⁷⁵

Assuming that African-American judges agree with Judge Crockett's assertion that their role is to "shake it up," how would this affect their behavior on the bench? One possibility is that African American (and Hispanic) judges might attempt to stop—or at least slow—the flow of young African-American (and Hispanic) men into state and federal prisons. If African-American judges view the disproportionately high number of young African-American males incarcerated in state and federal prisons as a symptom of racial discrimination, they might be more willing than white judges to experiment with alternatives to incarceration for offenders convicted of non-violent drug and property crimes. Susan Welch and her colleagues make an analogous argument. Noting that African-American judges tend to view themselves as liberal rather than conservative, they speculate that African-American judges might be "more sympathetic to criminal defendants than whites judges are, since liberal views are associated with support for the underdog and the poor, which defendants disproportionately are."¹⁷⁶ Other scholars similarly suggest that increasing the number of African-American judges would reduce racism in the criminal justice system and produce more equitable treatment of African-American and white defendants.¹⁷⁷

Statements made by African-American judges suggest that they might bring a unique perspective to the courts. Michael David Smith's¹⁷⁸ survey of African-American judges throughout the United States revealed that these judges believed that their presence on the bench reduced racial discrimination and promoted equality of justice. A Philadelphia judge, for instance, stated that the mere presence of African-American judges "has done more than anything I know to reduce police brutality and to reduce illegal arrests and things of that sort."¹⁷⁹ Moreover, nearly half of the respondents stated that African-American judges should exercise their powers to protect the rights of African-American defendants. One Michigan judge remarked that African-American judges should state that "everybody's going to get equal justice," by saying that, "you're going to give blacks something that they haven't been getting in the past."¹⁸⁰

Decision Making by African-American and White Federal Judges

As more African Americans have been appointed or elected to state and federal trial courts, it has become possible to compare their decisions with those of white judges. Two studies examined the consequences of the affirmative action policies of President Carter, who appointed a record number of African Americans to the federal courts. (Carter appointed 258 judges to the federal district courts and courts of appeals; 37, or 14 percent, were African Americans. In contrast, African Americans accounted for only 6 of the 71 [7.2 percent] persons appointed to the U.S. District Courts by President George W. Bush and only 10 of the 132 [6.8 percent] persons appointed to the U.S. District Courts by President George H. W. Bush. Fifty-three [17.4 percent] of President Clinton's 229 appointees were African American and 18 [5.9 percent] were Hispanic.)¹⁸¹

Thomas G. Walker and Deborah J. Barrow¹⁸² compared decisions handed down by the African-American and white district court judges appointed by President Carter. The question they asked was, "Did it make a difference that President Carter appointed unprecedented numbers of women and minorities to the bench as opposed to filling vacancies with traditional white, male candidates?"¹⁸³ The authors found no differences in criminal cases or in four other types of cases. In criminal cases, African-American judges ruled in favor of the defense 50 percent of the time; white judges ruled in favor of the defense 48 percent of the time. These similarities led the authors to conclude that black judges do not view themselves as advocates for the disadvantaged or see themselves as especially sympathetic to the policy goals of minorities.

Jon Gottschall¹⁸⁴ examined decisions in the U.S. Courts of Appeals in 1979 and 1981. He compared the decisions of African-American and white judges in terms of "attitudinal liberalism," which he defined as "a relative tendency to vote in favor of the legal claims of the criminally accused and prisoners in criminal and prisoner's rights cases and in favor of the legal claims of women and racial minorities in sex and race discrimination cases."¹⁸⁵

In contrast to Walker and Barrow, Gottschall found that the judge's race had a "dramatic impact" on voting in cases involving the rights of criminal defendants and prisoners. African-American male judges voted to support the legal claims of defendants and prisoners 79 percent of the time, as compared to only 53 percent for white male judges. African-American judges, however, did not vote more liberally than white judges in race or sex discrimination cases. Gottschall concluded, "Affirmative action for blacks does appear to influence voting on the courts of appeals in cases involving the rights of the accused and prisoners, where black voting is markedly more liberal than is that of whites."¹⁸⁶

A more recent study¹⁸⁷ of the decisions of judges appointed to the U.S. Courts of Appeals found that judges who were both members of a racial minority group and female decided cases differently than other judges. Arguing that "female members of a racial minority occupy a unique place within society,"¹⁸⁸ Todd Collins and Laura Moyer hypothesized that female minority judges would support more liberal (i.e., more pro-defendant) outcomes in cases involving the rights of

criminal defendants. Consistent with their hypothesis, they found that minority female judges voted in favor of the defendant in 33.9 percent of the cases; the comparable figures for white males, white females, and minority males were 21 percent, 23 percent, and 24.7 percent, respectively. Further analysis revealed that these differences persisted even after the authors added other judge characteristics and characteristics of the circuit to the model. The authors concluded that the results of their analysis suggest that "minority women may have a distinctive identity that differs significantly from Caucasian women and minority males."¹⁸⁹

An Alternative Approach: Racial Representation of the Bench Because the United States Sentencing Commission does not provide data on the identity of the judge who imposed the sentence on an offender adjudicated in one of the U.S. District Courts, researchers have been unable to compare the sentencing decisions of white, African-American, and Hispanic judges on the federal bench. Two studies used an alternative approach to this issue.¹⁹⁰ Rather than examining the race of the sentencing judge, these studies compared sentences for offenders of different races/ethnicities who were sentenced in jurisdictions with different proportions of white, African-American, and Hispanic court workers, including judges. The purpose of these studies, in other words, was to determine "whether racially representative courts yield more racially equitable case outcomes."¹⁹¹

Both of the studies using this approach produced similar, although not identical, results. Farrell and her colleagues found that defendants were less likely to be sentenced to prison in jurisdictions with greater representation of African-American judges and prosecutors but were more likely to be sentenced to prison in districts with greater numbers of African-American public defenders and probation officers. They also found that although African-American offenders were more likely than white offenders to be sentenced to prison, the disparity was reduced when African-American offenders were sentenced in districts with increased representation of African-American prosecutors (in contrast, the disparity in incarceration rates did not decline as the percentage of judges who were African American increased).¹⁹² These findings led the authors to conclude that "greater representation of workers of color in the justice system can contribute to more equitable treatment of racial groups. Specifically, equity would be improved with greater representation of blacks among prosecutors."¹⁹³

Max Schanzenbach's¹⁹⁴ approach differed somewhat from the approach Farrell and her colleagues used. Whereas the latter researchers included variables measuring the percentages of judges, prosecutors, public defenders, and probation officers who were African American, Schanzenbach focused only on the effect of the percentages of judges who were African American and Hispanic. When examining sentences imposed on offenders convicted of more serious crimes, he found that as the proportion of the bench that was Hispanic increased, the probability of incarceration decreased for African-American and Hispanic offenders. He also found that representation of African Americans on the bench had no effect on the likelihood of incarceration for African-American offenders but did result in a lower likelihood for Hispanic offenders. For nonserious crimes, on the other

minority
cases; the
were 20
ealed that
characteristics
that the re-
identity

Because
the iden-
ed in one
the sen-
the fed-
Rather
pared sen-
in juris-
Hispanic
er words,
cially eq-

not iden-
likely to be
African-Amer-
prison in
and pro-
enders were
parity was
with in-
the dispar-
who were
clude that
tribute to
improved

each Far-
variables
probation
the effects
When he
crimes, he
the proba-
enders; he
no effect
did result
the other

hand, the percentage of African-American judges did reduce the odds of incarceration for African-American offenders. These results led Schanzenbach to conclude that, at least for serious crimes, appointing more African-American judges to the bench would not reduce racial disparities in sentencing.

Decision Making by African-American and White State Court Judges

Research comparing the sentencing decisions of African-American and white state court judges also has yielded mixed results. Most researchers have found few differences and have concluded that the race of the judge is not a strong predictor of sentence severity.¹⁹⁵ Two early studies, for example, found few differences in the sentencing behavior of African-American and white judges. Engle¹⁹⁶ analyzed Philadelphia judges' sentencing decisions. He found that although the judge's race had a statistically significant effect, nine other variables were stronger predictors of sentence outcomes. He concluded that the race of the judge exerted "a very minor influence" overall.¹⁹⁷ Thomas M. Uhlman's¹⁹⁸ study of convicting and sentencing decisions in "Metro City" reached a similar conclusion. African-American judges imposed somewhat harsher sentences than white judges, but the differences were relatively small. And both African-American and white judges imposed harsher sentences on African-American defendants than on white defendants. Moreover, there was more "behavioral diversity" among the African-American judges than between African-American and white judges. Some of the African-American judges imposed substantially harsher sentences than the average sentence imposed by all judges, whereas other African-American judges imposed significantly more lenient sentences. These findings led Uhlman to conclude that "Black and white judges differ little in determining both guilt and the punishment a defendant 'deserves' for committing a crime in Metro City."¹⁹⁹

A later study of sentencing decisions in "Metro City" reached a different conclusion. Susan Welch, Michael Combs, and John Gruhl²⁰⁰ found that African-American judges were more likely than white judges to send white defendants to prison. Further analysis led them to conclude that this difference reflected African-American judges' tendency to incarcerate African-American and white defendants at about the same rate and white judges' tendency to incarcerate African-American defendants more often than white defendants. They also found, however, that African-American judges, but not white judges, favored defendants of their own race when determining the length of the prison sentence.

These results led them to conclude that "black judges provide more than symbolic representation."²⁰¹ According to these authors, "To the extent that they equalize the criminal justice system's treatment of black and white defendants, as they seem to for the crucial decision to incarcerate or not, [black judges] thwart discrimination against black defendants. In fact, the quality of justice received by both black and white defendants may be improved."²⁰²

A study of sentencing decisions by African-American and white judges on the Cook County (Chicago) Circuit Court reached a similar conclusion.²⁰³

Spears found that African-American judges sentenced white, African-American, and Hispanic offenders to prison at about the same rate, whereas white judges sentenced both African-American and Hispanic offenders to prison at a significantly higher rate than white offenders. In fact, compared to white offenders sentenced by white judges, African-American offenders sentenced by white judges had a 13 percent greater probability of imprisonment; for Hispanic offenders sentenced by white judges, the difference was 15 percent. Like the "Metro City" study, then, this study found that white judges sentenced racial minorities more harshly than whites and concluded that having African-American judges on the bench "does provide more equitable justice."²⁰⁴

Spohn's²⁰⁵ analysis of the sentences imposed on offenders convicted of violent felonies in Detroit Recorder's Court produced strikingly different results and led to very different conclusions. Like Engle and Uhlman, Spohn uncovered few meaningful differences between African-American and white judges. She found that African-American judges were somewhat more likely than white judges to sentence offenders to prison, but that judicial race had no effect on the length of sentence. Like Engle, she concluded that "the effect of judicial race, even where significant, was clearly overshadowed by the effect of the other independent variables."²⁰⁶ Spohn also tested for interaction between the race of the judge, the race of the offender, and the race of the victim—that is, she attempted to determine, first, if African-American and white judges treated African-American and white offenders differently and, second, if African-American and white judges imposed different sentences on African-American offenders who victimized other African Americans, African-American offenders who victimized whites, white offenders who victimized other whites, and white offenders who victimized African Americans.

Spohn's research highlighted the similarities in the sentences imposed by African-American and white judges. African-American judges sentenced 72.9 percent of African-American offenders to prison, whereas white judges incarcerated 74.2 percent, a difference of less than 2 percentage points. The adjusted figures for white offenders were 65.3 percent (African-American judges) and 66.5 percent (white judges), again a difference of less than 2 percentage points. More important, these data reveal that both African-American and white judges sentenced African-American defendants more harshly than white defendants. For both African-American and white judges, the adjusted incarceration rates for African-American offenders were 7 percentage points higher than that for white offenders. Moreover, African-American judges sentenced offenders to prison at about the same rate as white judges, regardless of the racial makeup of the offender-victim pair.

These findings led Spohn to conclude that there was "remarkable similarity"²⁰⁷ in the sentencing decisions of African-American and white judges. They also led her to question the assumption that discrimination against African-American defendants reflects prejudicial or racist attitudes on the part of white criminal justice officials. As she noted, "Contrary to expectations, both black and white judges in Detroit imposed harsher sentences on black offenders. Harsher sentencing of black offenders, in other words, cannot be attributed solely to discrimination by white judges."²⁰⁸ Spohn suggested that her findings

American, white judges sentenced a significantly higher percentage of offenders sentenced to life in prison than did black judges. In "Metro City," Spohn found that black judges imposed more harsh sentences on the

of violent crimes. The results and findings were consistent. She found that black judges to impose longer sentences on offenders where the race of the offender was a factor. First, if the offender was black, black judges imposed different sentences on African-Americans, and white judges imposed

imposed sentences on white offenders. The additional finding was that black judges (as a percentage of the total sample) imposed longer sentences on white offenders than that imposed on black offenders to the same crimes. The makeup of

able similarities between the judges. The findings against the part of the study, both of the offenders attributed to the findings

contradicted the widely held assumption that African Americans do not discriminate against other African Americans and conventional wisdom about the role of African-American judges. She concluded "that we should be considerably less sanguine in predicting that discrimination against black defendants will decline as the proportion of black judges increases."²⁰⁹

To explain her unexpected finding that both African-American and white judges sentenced African-American defendants more harshly than white defendants, Spohn suggested that African-American and white judges might perceive African-American offenders as more threatening and more dangerous than white offenders. Alternatively, she speculated that at least some of the discriminatory treatment of African-American offenders might be the result of concern for the welfare of African-American victims. African-American judges, in other words, "might see themselves not as representatives of black defendants but as advocates for black victims. This, coupled with the fact that black judges might see themselves as potential victims of black-on-black crime, could help explain the harsher sentences imposed on black offenders by black judges."²¹⁰

Spohn acknowledged that because we do not know with any degree of certainty what goes through a judge's mind during the sentencing process, these explanations were highly speculative. As she put it, "We cannot know precisely how the race of the offender is factored into the sentencing equation. Although the data reveal that both black and white judges sentence black offenders more harshly than white offenders, the data do not tell us *why* this occurs."²¹¹

Decision Making by Hispanic and White Judges Although most research examining the effect of judicial characteristics on sentencing has focused on the race of the sentencing judge, there is one study that compares the sentencing decisions of white and Hispanic judges in two southwestern jurisdictions.²¹² Malcolm D. Holmes and his colleagues found that Hispanic judges sentenced white and Hispanic offenders similarly, whereas white judges sentenced Hispanics more harshly than whites. In fact, the sentences imposed on Hispanic offenders by Hispanic and white judges were very similar to the sentences imposed by Hispanic judges on white offenders. What was different, according to these researchers, was that white judges sentenced white offenders more leniently. Thus, "Anglo judges are not so much discriminating against Hispanic defendants as they are favoring members of their ethnic groups."²¹³

Reasons for Similarities in Decision Making

Although there is some evidence that African-American and Hispanic judges sentence racial minorities and whites similarly and that white judges give preferential treatment to white offenders, the bulk of the evidence suggests that judicial race/ethnicity makes very little difference. The fact that African-American, Hispanic, and white judges decide cases similarly is not particularly surprising. Although this conclusion challenges widely held presumptions about the role of African-American and Hispanic criminal justice officials, it is not at odds with the results of other studies comparing African-American and white decision makers.

As noted in Chapter 4, studies have documented similarities in the behavior of African-American and white police officers.

Similarities in judicial decision making can be attributed in part to the judicial recruitment process, which produces a more or less homogeneous judiciary. Most judges recruited to state courts are middle or upper class and were born and attended law school in the state in which they serve. Even African-American and white judges apparently share similar background characteristics. Studies indicate that “both the black and white benches appear to have been carefully chosen from the establishment center of the legal profession.”²¹⁴ The judicial recruitment process may screen out candidates with unconventional views.

These similarities are reinforced by the judicial socialization process, which produces a subculture of justice and encourages judges to adhere to prevailing norms, practices, and precedents. They also are reinforced by the courtroom work group—judges, prosecutors, and defense attorneys who work together after day to process cases as efficiently as possible. Even unconventional or nonconformist judges may be forced to conform. As one African-American jurist noted, “No matter how ‘liberal’ black judges may believe themselves to be, the law remains essentially a conservative doctrine, and those who practice it conform

In the Courts: The Constitutionality of Hate-Crime Sentencing Enhancements—*Wisconsin v. Mitchell* (508 U.S. 47 [1993])

In 1989, Todd Mitchell, a 19-year-old African American, and a group of his friends accosted Gregory Reddick, a 14-year-old white boy, beat him severely, and stole his tennis shoes. Mitchell and his friends had just watched the movie *Mississippi Burning*, which depicts Ku Klux Klan terrorism against African Americans in the South during the 1960s. They were standing outside an apartment complex in Kenosha, Wisconsin, discussing the movie, when Reddick walked by. Mitchell asked his friends, “Do you feel hyped up to move on some white people?” He then pointed to Reddick and said, “There goes a white boy. . . Go get him!” The beating put Reddick in a coma for four days and he suffered permanent brain damage.

Mitchell was convicted of aggravated battery, an offense that ordinarily carries a maximum sentence of two years in prison. The jury, however, found that Mitchell had intentionally selected his victim because of the boy’s race, in violation of Wisconsin’s hate-crime statute. That law, which increased the maximum sentence for Mitchell’s crime to seven years, enhances the maximum penalty for an offense whenever the defendant “intentionally selected the person against whom the crime . . . is committed . . . because of the race, religion, color, disability, sexual orientation, national origin, or ancestry of that person.”²¹⁶ The judge sentenced Mitchell to four years in prison for the aggravated battery.

Mitchell challenged his conviction and sentence, arguing that the hate-crime statute infringed on his First Amendment right to freedom of speech. The Wisconsin Supreme Court agreed, holding that the statute “violates the First Amendment directly by punishing what the legislature has deemed to be offensive thought.” The court rejected the state’s claim that the statute punished only conduct (i.e., the intentional selection of a victim on the basis of race) and stated that “the Wisconsin legislature cannot criminalize bigoted thought with which it disagrees.”

behavior of

to the judi-
 judiciary.
 born and
 American and
 indicate
 chosen
 recruitment

ess, which
 prevailing
 courtroom
 together day
 or mav-
 rist noted,
 the law re-
 form."²¹⁵

ends
 his
 Burning,
 during
 Wisconsin
 Do you
 and
 coma

carries
 Mitchell
 Wisconsin
 Mitchell
 whenever
 is com-
 national
 years in

crime
 Wisconsin
 ment
 light."
 e., the
 Wisconsin

In 1993, the United States Supreme Court upheld the hate-crime statute and ruled that Mitchell's First Amendment rights were not violated by the application of the sentencing enhancement provision. Writing for a unanimous court, Chief Justice Rehnquist stated that the primary responsibility for determining penalties for criminal behavior rests with the legislature, which can differentiate among crimes based on their seriousness and the degree of harm they inflict on victims and on society. Justice Rehnquist noted that this was the case with the hate-crime statute: the Wisconsin legislature had decided that bias-inspired conduct was more harmful and thus had enhanced the penalties for these types of crimes. Although he acknowledged that "a defendant's abstract beliefs, however obnoxious to most people, may not be taken into consideration by a sentencing judge," Rehnquist stated that trial judges are not barred from considering the defendant's racial animus toward his victim.

(The decision in this case is available online at <http://straylight.law.cornell.edu/>. Search for *Wisconsin v. Mitchell*.)

CONCLUSION

Despite dozens of studies investigating the relationship between defendant race and sentence severity, a definitive answer to the question, "Are racial minorities sentenced more harshly than whites?" remains elusive. Although a number of studies have uncovered evidence of racial discrimination in sentencing, others have found that there are no significant racial differences.

The failure of research to produce uniform findings of racial discrimination in sentencing has led to conflicting conclusions. Some researchers assert that racial discrimination in sentencing has declined over time and contend that the predictive power of race, once relevant legal factors are taken into account, is quite low. Other researchers claim that discrimination has not declined or disappeared but simply has become more subtle and difficult to detect. These researchers argue that discrimination against racial minorities is not universal but is confined to certain types of cases, certain types of settings, and certain types of defendants.

We assert that the latter explanation is more convincing. We suggest that although the sentencing process in most jurisdictions today is not characterized by overt or systematic racism, racial discrimination in sentencing has not been eliminated. We argue that sentencing decisions in the 1990s reflect *contextual discrimination*. Judges in some jurisdictions continue to impose harsher sentences on racial minorities who murder or rape whites and more lenient sentences on racial minorities who victimize members of their own racial/ethnic group. Judges in some jurisdictions continue to impose racially biased sentences in less serious cases; in these "borderline cases" racial minorities get prison, whereas whites get probation. Judges, in other words, continue to take race into account, either explicitly or implicitly, when determining the appropriate sentence.

The problem is compounded by the existence of institutional discrimination. This type of discrimination is exemplified by facially neutral sentencing policies—the crack/powder cocaine sentencing disparity, the drug-free school zones, and habitual offender or three-strikes-and-you're-out laws—that have disparate effects

on racial minorities and whites. Because these laws are applicable more often to African American and Hispanics than to whites, their effects are to increase racial disparities in incarceration rates and to exacerbate the collateral consequences of incarceration for racial minorities and the communities in which they live.

It thus appears that although flagrant racism in sentencing has been eliminated, equality under the law has not been achieved. Today, whites who commit crimes against racial minorities are not beyond the reach of the criminal justice system, African Americans suspected of crimes against whites do not receive “justice” at the hands of white lynching mobs, and racial minorities who victimize other racial minorities are not immune from punishment. Despite these significant changes, inequities persist. Racial minorities who find themselves in the arms of the law continue to suffer discrimination in sentencing.

DISCUSSION QUESTIONS

1. Why is evidence of racial disparity in sentencing not necessarily evidence of racial discrimination in sentencing? What are the alternative explanations? Which of these explanations is most convincing?
2. Some researchers argue that racial stereotypes affect the ways in which decision makers, including criminal justice officials, evaluate the behavior of racial minorities. Do an Internet search for race-linked stereotypes. What are the stereotypes most commonly associated with African Americans? Hispanics? Native Americans? Asian Americans? How might these stereotypes affect judges' sentencing decisions?
3. Do you agree or disagree with the argument (see Box 7.2) that crime seriousness and prior criminal record are not necessarily legally relevant variables?
4. Based on Spohn's (2000) review of research on race and sentencing, how would you answer the question, “When does race matter?” Prepare a PowerPoint presentation that summarizes these effects.
5. Research reveals that young, unemployed African American and Hispanic males pay a higher punishment penalty than other types of offenders. What accounts for this?
6. Spohn and Spears's study of sentencing decisions in sexual assault cases revealed that judges imposed the harshest sentences on African Americans who sexually assaulted whites (strangers or nonstrangers) and on African Americans who sexually assaulted African-American strangers. They imposed much more lenient sentences on African Americans who sexually assaulted African-American friends, relatives, and acquaintances and on whites who victimized other whites (strangers or non-strangers). How would you explain this pattern of results?
7. As discussed in Box 7.8, African Americans are more likely than whites to be willing to serve time in prison rather than be sentenced to some alternative to incarceration such as electronic monitoring or intensive supervision.

TABLE 7.5 Race, Ethnicity, and Characteristics of the Dangerous Drug Offender

	Whites (<i>N</i> = 705)		African Americans (<i>N</i> = 443)		Hispanics (<i>N</i> = 544)	
	%	<i>N</i>	%	<i>N</i>	%	<i>N</i>
<i>Offender Characteristics</i>						
Male	0.77	545	0.86	380	0.90	492
Prior Drug Trafficking Conviction	0.23	164	0.44	194	0.12	66
Used a Weapon During Offense	0.21	148	0.25	109	0.12	67
<i>Offender Groups</i>						
Male Prior Conviction Weapon	0.05	39	0.14	0	0.02	10
Male Prior Conviction No Weapon	0.14	97	0.27	4	0.10	53
Male No Prior Conviction Weapon	0.13	89	0.10	43	0.10	54
Male No Prior Conviction No Weapon	0.45	320	0.36	159	0.69	375
Female Prior Conviction or Weapon	0.06	43	0.04	18	0.01	6
Female No Prior Conviction No Weapon	0.17	117	0.10	43	0.08	46

SOURCE: Cassia Spohn and Lisa Sample, "The Dangerous Drug Offender in Federal Court: Stereotyping Blacks and Crack Cocaine," *Crime and Delinquency* (July 8, 2008), Table 1. Reprinted by permission of SAGE Publications.

on the most dangerous offenders and the five categories of less-dangerous offenders for whites or Hispanics. That is, matching the stereotype of the dangerous drug offender did not result in harsher sentences for whites or Hispanics. There were, on the other hand, significant differences in the prison sentences imposed on the most dangerous African-American offenders and offenders in all five categories of less-dangerous African-American offenders. Partitioning the data by the type of drug further clarified these relationships. Matching the stereotype of the dangerous drug offender had no effect on sentence severity for white or Hispanic offenders either in methamphetamine cases or in cases involving other types of drugs. In contrast, fitting the dangerousness stereotype significantly affected the length of the prison sentence for African-American offenders convicted of offenses involving crack cocaine, but had no effect on the sentence length for African-American offenders convicted of offenses involving other types of drugs. At least in these three U.S. District Courts, images of dangerousness and threat affected the length of the prison sentence only for African-American offenders who were convicted of trafficking in crack cocaine.

The authors of this study concluded that their finding of within-race differences in sentencing only for African Americans convicted of trafficking in crack cocaine suggests that judges' attributions of dangerousness and threat reflect a complex interplay among offender characteristics, crime seriousness, and the type of drug. They speculated that the linkage between African Americans and crack cocaine may create a more vivid and powerful metaphor of dangerousness in the minds of judges. If, in other words, judges regard crack as a particularly harmful