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RACIAL DISPARITY IN SENTENCING:

A REVIEW OF THE LITERATURE

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RACIAL DISPARITY IN SENTENCING: A REVIEW OF THE LITERATURE

INTRODUCTION

The intersection of racial dynamics with the criminal justice system is one of longstanding duration. In earlier times, courtrooms in many jurisdictions were comprised of all white decisionmakers. Today, there is more diversity of leadership in the court system, but race still plays a critical role in many criminal justice outcomes. This ranges from disparate traffic stops due to racial profiling to imposition of the death penalty based on the race of victim and/or offender. A particularly important aspect of the role of race in the justice system relates to sentencing, because the prospect of a racially discriminatory process violates the ideals of equal treatment under law under which the system is premised.

The most recent generation of evidence suggests that while racial dynamics have changed over time, race still exerts an undeniable presence in the sentencing process. Racial discrimination generally does not exist in the explicit fashion that it did in the American South 50 years ago, in which blacks and whites were routinely handled differently by law enforcement and judicial authorities. Rather, racial discrimination in sentencing today is often a more surreptitious process, manifesting itself in connection with other factors and producing racially discriminatory outcomes in certain situations.

The studies that have been conducted during the past twenty years are particularly noteworthy for two, interconnected reasons. First, these studies are more methodologically sophisticated than the studies of the criminal justice system that preceded them. For example, they correct for the most serious flaws in analysis that plagued previous studies, such as not controlling statistically for the seriousness of the crime committed or for the defendant's criminal history. Second, contemporary studies reject the assumption that the sentencing process is universally plagued by racial bias and that black and Latino defendants will always be disadvantaged as compared to white defendants. Instead of this perspective, current research attempts to ask: "If racial bias does exist in the criminal sentencing process, under what circumstances does it manifest itself and when is it most apparent?"

The type of analysis in which race was presumed to play such a pervasive role in sentencing that it would almost always result in differences in sentence severity is called additive analysis. For example, additive analysis would try to ascertain if blacks, as a group, receive harsher sentences than whites, as a group. In contrast, current research is more engaged in interactive analysis, in which the effect of race, as one independent variable, is examined in conjunction with the effect of other independent variables. An example of interactive analysis is examining the confluence of age, race, and gender on sentencing practices in order to determine if young black males are sentenced more severely than young white males.

The review of recent studies that follows examines the effect of race on sentencing, differentiating between capital (subject to the death penalty) cases and non-capital cases. The sections addressing non-capital cases are heavily indebted to Cassia Spohn's 2000 survey of the relevant studies produced for the National Institute of Justice.¹ In the realm of non-capital cases, the studies deliver mixed results. While a majority of the studies report racially discriminatory sentencing outcomes, the evidence indicates that these outcomes are not uniform or extensive. The more incisive findings in non-capital cases are the result of interactive analysis. The key findings in this regard include:

- Young, black and Latino males (especially if unemployed) are subject to particularly harsh sentencing compared to other offender populations;
- Black and Latino defendants are disadvantaged compared to whites with regard to legal-process related factors such as the "trial penalty," sentence reductions for substantial assistance, criminal history, pretrial detention, and type of attorney;
- Black defendants convicted of harming white victims suffer harsher penalties than blacks who commit crimes against other blacks or white defendants who harm whites;
- Black and Latino defendants tend to be sentenced more severely than comparably situated white defendants for less serious crimes, especially drug and property crimes.

Studies that examine death-penalty cases have generally found that:

- In the vast majority of cases, if the murder victim is white, the defendant is more likely to receive a death sentence;
- In a few jurisdictions, notably the federal system, minority defendants (especially blacks) are more likely to receive a death sentence.

While this report deals primarily with sentencing processes and outcomes, it is important to keep in mind that the criminal justice system is an interdependent process and that effects are cumulative. For example, while this report does not address aspects of criminal justice such as the manner in which laws are enforced or the rates at which different populations have parole revoked and must face resentencing, both of these factors, along with many others, affect sentencing practices. For example, a study of the Maryland capital punishment system published in 2003 found that although the race of the victim did not affect the decision of the jury to sentence the defendant to death, among all death-eligible homicides, killers of white victims were still three times more likely to be sentenced to death than comparably situated killers of non-white victims.² The disparity between white-victim and non-white-victim cases in this instance arose from the decisions of the state's attorney to seek, and follow through with, death penalty prosecutions more often in white-victim cases than in non-white-victim cases. In other words, although there is no evidence in this case that the specific decision to sentence to death is racially discriminatory, the sentencing outcome is nevertheless racially discriminatory because of actions taken during another phase of the criminal justice process.

¹ Spohn, Cassia. "Thirty Years of Sentencing Reform: The Quest for a Racially Neutral Sentencing Process." *Criminal Justice*, National Institute of Justice, Vol. 3, 2000: 427-501; p. 453.

² Paternoster, Raymond, and Robert Brame. "An Empirical Analysis of Maryland's Death Sentencing System with Respect to the Influence of Race and Legal Jurisdiction," 2003 (Final Report). Retrieved from <http://www.urhome.umd.edu/newsdesk/pdf/finalrep.pdf> on July 27, 2004.

The areas in which evidence regarding racially discriminatory sentencing outcomes will be examined are:

- Direct racial discrimination;
- Interaction of race/ethnicity with other offender characteristics;
- Interaction and indirect effects of race/ethnicity and process-related factors;
- Interaction of race of the offender with race of the victim;
- Interaction of race/ethnicity and type of crime;
- Capital punishment.

DIRECT RACIAL DISCRIMINATION

This section examines the evidence for racially discriminatory sentencing outcomes for minority defendants in the aggregate. The data that is used simply looks at sentencing outcomes for racial and ethnic groups as a whole, without incorporating any of the factors discussed in following sections, such as type of crime, age and gender of the defendant, etc.

Key findings:

- There is evidence of direct racial discrimination (against minority defendants in sentencing outcomes);
- Evidence of direct discrimination at the federal level is more prominent than at the state level;
- Blacks are more likely to be disadvantaged in terms of sentence length at the federal level, whereas Latinos are more likely to be disadvantaged in terms of the decision to incarcerate;
- At the state level, both Latinos and blacks are far more likely to be disadvantaged in the decision to incarcerate or not, as opposed to the decision regarding sentence length.

Forty studies have been published that examine data collected since 1980 in order to determine whether racial and ethnic bias exists in the sentencing process.³ Of these, 32 analyzed state-level data, while the remaining 8 analyzed data from the federal system. The 32 state-level studies contained 95 estimates—meaning 95 different ways in which these studies sought to determine whether sentencing decisions were biased—of the direct effect of race (white and black, for this purpose) on sentence severity, and 29 estimates of the direct impact of ethnicity (Latino and Anglo, for this purpose) on sentence severity. The 8 studies of the federal system contained 22 estimates of the direct relationship between race and sentence severity, and 21 estimates of the direct effect of ethnicity on sentence severity.⁴

Of the estimates of the direct effect of race on sentencing at the state level, 43.2% indicated harsher sentences for blacks, and over a quarter (27.6%) of the estimates on the direct impact of ethnicity registered harsher sentences for Latinos. The statistics also show that, at the state level, the likelihood that blacks and Latinos will be disadvantaged, as compared to whites, is far greater at the initial decision to incarcerate or not (the in/out decision) than at the subsequent decision about how long incarceration should last (sentence length decision).

At the federal level, over two-thirds (68.2%) of the estimates of the direct effect of race on sentencing indicated harsher sentences for blacks, and almost half (47.6%) of the estimates of the direct effect of ethnicity on sentencing registered harsher sentences for

³ The studies cited here were all published up to the year 2000. They are based on sentences imposed for non-capital offenses during the 1980s and 1990s and use appropriately rigorous statistical techniques; including controls for crime seriousness and prior criminal record. See: Spohn, 2000.

⁴ Ibid.

Latinos. At the federal level, the statistics pointed to blacks more likely being disadvantaged as compared to similarly situated whites regarding the length of imprisonment, as opposed to the in/out decision. Compared to whites, Latinos at the federal level face a greater disadvantage concerning the decision to incarcerate rather than the sentence length decision.⁵

Although not all of the estimates cited above find a universal incidence of direct racial discrimination in sentencing, the *majority of the studies report direct racially discriminatory sentencing outcomes*. For the most part, those estimates that do not indicate sentencing outcomes that are directly biased against minorities are not statistically significant; only 6 estimates out of a total 167 find sentencing outcomes that are favorable to minorities as compared to whites.⁶

The findings of these studies regarding incidence of direct racial discrimination in sentencing contradict those commentators who claim that discrimination no longer exists in criminal sentencing.⁷ The argument most often used by these commentators is that studies that detail the existence of racially discriminatory sentencing practices do not take into account crucial variables such as seriousness of the crime and criminal history. While analytical problems of this nature did exist in earlier research, all of the studies cited here use appropriately rigorous statistical techniques and account for the seriousness of the crime committed, and 36 of the 40 studies account for criminal history. Furthermore, 35 of the 40 studies only analyze sentencing outcomes in jurisdictions and periods that have implemented some version of a determinate or guidelines-based sentencing structure, designed, in part, to eliminate racial disparities in sentencing. The results of the studies indicate that *racially discriminatory sentencing persists despite sentencing reforms and the implementation of structured sentencing*.⁸

Despite the findings of the cited studies in the area of direct racial discrimination, a number of factors indicate that the presence of direct discrimination is not uniform and extensive. Some of the state-level studies found no evidence of direct racial discrimination, and many of those that did find evidence of direct discrimination concluded that it exercised relatively modest effects, increasing the likelihood of a minority being sentenced to prison by only a few percentage points. Also, while the studies varied geographically somewhat across the United States, a number of the estimates were derived from data from a few jurisdictions, such as Pennsylvania, Chicago, Miami, and Kansas City, which makes the findings somewhat less generalizable.

Racial discrimination in sentencing in the United States today is neither invariable nor universal, nor is it as overt as it was even 30 years ago. As will be described below,

⁵ Ibid.

⁶ Ibid.

⁷ See: Thernstrom, Stephen, and Abigail Thernstrom. *America in Black and White: One Nation, Indivisible*. New York: Simon and Schuster, 1997, chapter 10; McWhorter, John H. *Losing the Race: Self-Sabotage in Black America*. New York: The Free Press, 2000, chapter 1; DiIulio, John. "My Black Crime Problem and Ours." *City Journal* 6 (spring 1996); Wilson, James Q. "The Facts." *Commentary* (January 1998).

⁸ Spohn, 2000.

while the situation has improved in some ways, racially discriminatory sentencing today is far more insidious than in the past, and treating a racial or ethnic group as a unitary body can mask the presence of discrimination. As such, an interactive analysis that takes into account other offender characteristics (such as gender, age, and employment status), legal process-related factors, the race of the victim, or the nature of the crime, can highlight patterns of racial discrimination that a more generic examination may gloss over.⁹

⁹ Ibid.

INTERACTION OF RACE/ETHNICITY WITH OTHER OFFENDER CHARACTERISTICS

This section synthesizes the findings of recent studies that examine how the defendant's race interacts with the defendant's age, gender, and employment status.

Key findings:

- Young black and Latino males tend to be sentenced more severely than comparably situated white males;
- Unemployed black males tend to be sentenced more severely than comparably situated white males.

The findings of relevant studies suggest that certain demographic groups within minority populations are treated especially harshly at sentencing in comparison to a similar population of white offenders. For example, a study of the Pennsylvania State Correctional System published in 1998 found both in terms of the decision to incarcerate and in terms of the length of sentence, blacks received harsher sentences than whites, younger offenders received harsher sentences than older offenders, and males received harsher sentences than females.¹⁰ The confluence of these three factors results in young black males being sentenced particularly harshly. A number of other recent studies have found similar evidence indicating that young black and Latino males are sentenced more harshly than white males.¹¹

The Pennsylvania study found that, controlling for other factors, including severity of the offense and prior criminal history, *white men aged 18-29 were 38 percent less likely to be sentenced to prison than black men of the same age group. In addition, white men of this age group were sentenced to an average prison term that was almost three months shorter than that given to black men of this age group.* Furthermore, black men aged 18-29 were more than four times as likely to be sentenced to prison as white men over the age of fifty.

There is also evidence that employment status (specifically, being unemployed) interacts with race to produce harsher sentencing patterns for certain subgroups of offenders. A study published in 1991 that examined data from two Florida counties found that while unemployment increased the likelihood of imprisonment for all defendants, young black male defendants suffered the most severe effects.¹² Indeed, the study found that unemployed blacks were 5.2 times more likely to be incarcerated than employed whites. Another study published in 1998 found that unemployment increased the likelihood of incarceration for young males and young Latino males, and increased sentence length for

¹⁰ Steffensmeier, Darrell, Jeffrey Ulmer, and John Kramer. "The Interaction of Race, Gender, and Age in Criminal Sentencing: The Punishment Cost of Being Young, Black, and Male." *Criminology*, Vol. 36, 1998: 763-797.

¹¹ Chiricos, Theodore G. and William D. Bales. "Unemployment and Punishment: An Empirical Assessment." *Criminology*, Vol. 29, 1991: 701-724; Nobiling, Tracy, Cassia Spohn, and Miriam DeLone. "A Tale of Two Counties: Unemployment and Sentence Severity." *Justice Quarterly*, Vol. 15, 1998: 401-427; Spohn Cassia, and David Holleran. "Research Note: The Imprisonment Penalty Paid by Young, Unemployed Black and Hispanic Male Offenders." *Criminology*, Vol. 38, 2000: 501-526.

¹² Chiricos and Bales, 1991.

males, young males, and black males in Chicago. The same study found that unemployment yielded a greater chance of incarceration for males and black males in Kansas City.¹³

A number of scholars suggest that young black and Latino males tend to be punished more severely than their white counterparts or black and Latino males of a different age because they are perceived to be particularly dangerous and problematic. As a result, judges single them out for incarceration (and, to a lesser degree, for longer prison terms for public safety reasons). Another hypothesis contends that rather than judges viscerally and indiscriminately sentencing young, black and Latino males to harsher sentences, they seek to assess the real threat that a particular offender presents to society. As judges possess imperfect information, however, they develop a “perceptual shorthand” that is informed by stereotypes about race, age, and gender. In the interest of protecting society, sentencing judges will therefore sentence the offender based, in part, on stereotypes about perceived antisocial and incorrigible natures of young black and Latino males.¹⁴

¹³ Nobile, Spohn, and DeLone, 1998.

¹⁴ Spohn, 2000.

INTERACTION AND INDIRECT EFFECTS OF RACE/ETHNICITY

This section summarizes the findings of recent studies that examine the interaction of race with factors that are directly related to adjudication in the judicial system. Examples of these factors are a guilty plea, the provision of substantial assistance to the prosecution (given in exchange for a reduced sentence), prior criminal history, pretrial status (jailed pending trial or freed on bond), and type of attorney (private or court-appointed).

Key findings:

- Blacks pay a higher “trial penalty” than comparably situated whites;
- Whites receive a larger reduction in sentence time than blacks and Latinos for providing “substantial assistance” to the prosecution;
- Blacks and Latinos with a more serious criminal record tend to be sentenced more severely than comparably situated whites;
- Blacks are more likely to be jailed pending trial, and therefore tend to receive harsher sentences;
- Whites are more likely to hire a private attorney than Latinos or blacks, and therefore receive a less severe sentence.

It is widely acknowledged that defendants who go to trial and are found guilty instead of initially pleading guilty tend to receive harsher sentences; this is known as the “trial penalty.” The trial penalty applies to all defendants, regardless of race or ethnicity. Nevertheless, studies in Pennsylvania released in 1996 and 1997 found that *conviction at trial increases the odds of incarceration more for blacks than it does for whites.*¹⁵ In other words, these studies suggest that blacks pay a higher trial penalty than similarly situated whites.

In the federal sentencing system, drug offenders subject to the mandatory minimum sentencing scheme can reduce the severity of a sentence by providing “substantial assistance” to the prosecution, such as information about the trafficking of narcotics or cooperating in the prosecution of other drug offenders. A study released in 1997 found that *whites who provided substantial assistance received an average 23% reduction in the likelihood of incarceration, while comparably situated Latinos received a 14% reduction and blacks received a 13% reduction.*¹⁶ This study suggests that for drug offenses (constituting the majority of federal criminal cases) the racial bias that structured sentencing was intended to eliminate has instead shifted to other stages of the trial process, such as the prosecutorial charging decision or the granting of sentence reductions in exchange for substantial assistance, as seen here.

¹⁵ Ulmer, Jeffery T. *Social Worlds of Sentencing: Court Communities Under Sentencing Guidelines*. Albany: State University of New York Press, 1997; Ulmer, Jeffery T., and John H. Kramer. “Court Communities Under Sentencing Guidelines: Dilemmas of Formal Rationality and Sentencing Disparity.” *Criminology*, Vol. 34, 1996: 383-408.

¹⁶ Albonetti, Celesta. “Sentencing Under the Federal Sentencing Guidelines: Effects of Defendant Characteristics, Guilty Pleas, and Departures on Sentence Outcomes for Drug Offenses, 1991-1992.” *Law and Society Review*, Vol. 31, 1997: 789-822.

Several studies have found that having a more serious criminal history has led to harsher sentencing for blacks and Latinos compared to similarly situated whites. For example, in Miami, black drug offenders with a prior felony conviction faced a greater likelihood of incarceration than similar white offenders, but race had no impact on drug offenders without a prior felony conviction.¹⁷ A study in a metropolitan Pennsylvania county similarly found that race played a larger role in the decision to incarcerate for offenders with more serious criminal histories.¹⁸ Latinos in Miami with a prior prison term were more likely to be incarcerated than similar whites,¹⁹ and Latinos in California faced longer prison sentences than whites when both had more serious prior criminal records.²⁰

Evidence suggests that the pretrial status of defendants indirectly affects sentencing patterns according to race. A study released in 1991 found that black defendants faced a much higher probability of being jailed prior to trial (as opposed to being freed on bond pending trial) than white defendants, and that pretrial detention made incarceration following conviction more likely.²¹ Another study found that black defendants faced a higher probability of being jailed prior to trial, and as a result were convicted of more serious offenses (than similarly situated defendants who were freed pending trial), and that convictions on more serious charges resulted in longer sentences.²² In other words, both studies found that black defendants were more likely to be detained pending trial, and as a result, received harsher sentences.

Regarding the effect of the defense attorney on sentencing, a study released in 1996 found that whites were much more likely to hire a private attorney than blacks or Latinos, and that retention of a private attorney tended to result in less severe sentences.²³

¹⁷ Spohn, Cassia and Jeffrey Spears. "Sentencing of Drug Offenders in Three Cities: Does Race/Ethnicity Make a Difference?" In *Crime Control and Social Justice: A Delicate Balance*, Darnell F. Hawkins, Samuel L. Myers, Jr., and Randolph N. Stone, ed. Westport, Connecticut: Greenwood Publishing Group, 2000.

¹⁸ Ulmer, 1997; Ulmer and Kramer, 1996.

¹⁹ Spohn, Cassia, and Miriam DeLone. "When Does Race Matter?: An Analysis of the Conditions Under which Race Affects Sentence Severity." *Sociology of Crime, Law, and Deviance*, Vol. 2, 2000: 3-37.

²⁰ Zatz, Marjorie S. "Race, Ethnicity, and Determinate Sentencing: A New Dimension to an Old Controversy." *Criminology*, Vol. 22, 1984: 147-171.

²¹ Chiricos and Bales, 1991.

²² Crew, Keith. "Race Differences in Felony Charging and Sentencing: Toward an Integration of Decision-Making and Negotiation Models." *Journal of Crime and Justice*, Vol. 14, 1991: 99-122.

²³ Holmes, Malcolm D., Harmon M. Hosch, Howard C. Daudistel, Dolores A. Perez, and Joseph B. Graves. "Ethnicity, Legal Resources, and Felony Dispositions in Two Southwestern Jurisdictions." *Justice Quarterly*, Vol. 13, 1996: 11-30.

INTERACTION OF RACE OF THE OFFENDER WITH RACE OF THE VICTIM

This section examines evidence from recent studies regarding the effect on sentence severity of the interaction of defendant's and victim's race.

Key findings:

- Black defendants who victimize whites tend to receive more severe sentences than both blacks who victimize other blacks (especially acquaintances), and whites who victimize whites.

Two studies that provide clear data regarding the combination of the offender's race and the victim's race deal with sexual assault cases. The first study, conducted in a metropolitan Ohio county and released in 1987, found that blacks who sexually assaulted white nonstrangers were more likely to be incarcerated than blacks who assaulted black nonstrangers.²⁴ Furthermore, *blacks who sexually assaulted white strangers received sentences that were approximately one year longer than blacks who assaulted black strangers, and blacks who sexually assaulted white nonstrangers received sentences that were approximately seven months longer than blacks who assaulted black nonstrangers.* The author of the report hypothesizes that the less severe punishments given in cases of assault against black victims indicates a "disregard for minority victims of sexual assault."²⁵

A study conducted in Detroit and published in 1996 controlled for a number of offender characteristics, case characteristics, and victim characteristics.²⁶ The study found that *the average sentence for blacks who were convicted of sexually assaulting whites was more than three years longer than the sentence for blacks who assaulted blacks, and more than four years longer than the sentence for whites who sexually assaulted whites.* This study also found that black men who assaulted whites (whether the victim was a stranger or an acquaintance) and black men who assaulted black strangers received the harshest punishment, while black men who assaulted black acquaintances and white men who assaulted white women (stranger or nonstranger) received lighter punishments.

The results of these studies suggest that *blacks who sexually assault whites will receive the harshest punishment, while blacks who assault other blacks, especially those with whom they are acquainted, will receive lighter sentences.* It is somewhat unclear to researchers whether this disparity in sentencing arises primarily from a perception that black men who cross racial lines and sexually assault white women are particularly threatening to societal stability and social mores, or whether the sentencing process systematically treats black victims of sexual assault as less worthy of justice than their white counterparts.²⁷

²⁴ Walsh, Anthony. "The Sexual Stratification Hypothesis and Sexual Assault in Light of the Changing Conceptions of Race." *Criminology*, Vol. 25, 1987: 153-173.

²⁵ Walsh, 1987: 167.

²⁶ Spohn, Cassia, and Jeffrey Spears. "The Effect of Offender and Victim Characteristics on Sexual Assault Case Processing Decisions." *Justice Quarterly*, Vol. 13, 1996: 649-679.

²⁷ Spohn, 2000.

INTERACTION OF RACE/ETHNICITY AND TYPE OF CRIME

This section synthesizes the findings of recent studies that seek to analyze the differential effect that race/ethnicity may have on sentencing when interacting with crimes of varying severity and with drug offenses.

Key findings:

- Latinos and blacks tend to be sentenced more harshly than whites for lower-level crimes such as drug crimes and property crimes;
- However, Latinos and blacks convicted of high-level drug offenses also tend to be more harshly sentenced than similarly situated whites.

In general, the relevant studies have found that greater racial disparity exists in sentencing for less serious crimes (especially property crimes and drug offenses, as opposed to violent crimes). For example, a 1998 study conducted in Florida found that while racial disparity existed across the board, blacks were substantially more likely than whites to be sentenced as “habitual offenders” for property crimes and drug offenses than for higher level crimes.²⁸ The effect was most pronounced for drugs, such that *blacks charged with drug offenses were 3.6 times more likely than similarly situated whites to be sentenced as habitual offenders*. A study published in 2000 found that blacks in Kansas City received sentences that were 14.09 months longer for drug offense convictions and 6.57 months longer for property crime convictions than sentences given to similarly situated whites, but did not face harsher sentencing than whites for violent crimes.²⁹ The pattern of differential sentencing for property and drug crimes but not for violent crimes may be explained by a phenomenon in which judges faced with offenders who have committed serious crimes are constrained in their sentencing decisions but have somewhat greater latitude in sentencing less serious offenders, and may allow extra-legal factors (such as race/ethnicity) to influence the sentencing decision in these cases.³⁰

Various studies show that blacks and Latinos face highly disproportionate sentencing outcomes for drug offenses. *A study of offenders convicted of drug crimes in Georgia between 1977 and 1985 found that blacks were more likely to be incarcerated for drug crimes than whites, especially for more serious offenses: there was a 25 percentage point difference in the probability that a black person would be incarcerated for drug trafficking compared to a white person, a 19 percentage point difference for drug*

²⁸ Crawford, Charles, Ted Chiricos, and Gary Kleck. “Race, Racial Threat, and Sentencing of Habitual Offenders.” *Criminology*, Vol. 36, 1998: 481-511.

²⁹ Spohn and DeLone, 2000.

³⁰ Spohn, 2000. Judges tend to be more constrained in their sentencing decisions for more serious and violent crimes than for less serious crimes because sentencing statutes and guidelines tend to prescribe harsh punishments for serious crimes whereas the range of acceptable sentences for less serious crimes tends to be larger. Also, in cases of less serious crimes, judges may have the discretionary power of whether to sentence the defendant to probation or incarceration, and also decide how long to incarcerate for more serious crimes, sentencing policy may not allow probation, and for especially serious crimes, may mandate life sentences, in which judges have no flexibility to decide the length of sentence.

*distribution, and a 12 percentage point difference for drug use.*³¹ Georgia toughened penalties and restricted judicial discretion in sentencing for drug offenses between 1980 and 1982. While one may presume that these legislative actions would reduce racial disparity in sentencing, the study found that racial disparity was actually most pronounced during this period, about which the author postulates that the anti-trafficking crusade of 1980-1982 was selectively directed against black traffickers.

A study published in 1997 found that black and Latino drug offenders in the federal system were sentenced more severely than white offenders.³² As noted previously, this study also found that whites received a much larger reduction in sentence length than either blacks or Latinos in exchange for providing substantial assistance. Furthermore, a conviction for possession of drugs in lieu of a conviction for trafficking resulted in a larger sentence reduction for whites than for comparably situated blacks and Latinos.

The studies cited here indicate that racial disparity in sentencing of drug offenders persists despite structured sentencing and other reforms. One explanation for this enduring disparity may relate to assumptions about crime and drugs that link blacks and Latinos to drugs and a drug-involved lifestyle.³³ These perceptions persist despite statistical evidence that indicates that the percentage of monthly drug users within the white (7.2%), black (7.7%), and Latino (5.9%) communities is roughly equivalent. As such, whites comprise 71.8% of U.S. drug users, blacks comprise 13.3%, and Latinos comprise 10.7%. The best evidence to date has found that the vast majority of drug users purchase drugs from someone of their own racial or ethnic background, indicating that the vast majority of drug dealers are probably white, judging from the preponderance of white drug users. These perceptions may carry over to prosecutors and judges as well, resulting in more severe sentences for blacks and Latinos.³⁴

³¹ Myers, Martha A. "Symbolic Policy and the Sentencing of Drug Offenders." *Law & Society Review*, Vol. 23, 1989: 295-315. It is important to note, however, that this study did not include a control for prior criminal record.

³² Albonetti, 1997.

³³ For statistical information about drug users, see: "Results from the 2002 National Survey on Drug Use and Health: Detailed Tables." Department of Health and Human Services: Substance Abuse and Mental Health Services Administration, Office of Applied Studies, 2003. And the 2000 U.S. Census, available at: <http://www.census.gov/>. For studies about the race and ethnicity of drug dealers, see: Beckett, Katherine. "Race and the Enforcement of Drug Delivery Laws in Seattle." December, 2003. Retrieved from <http://www.november.org/resources/RacialDisparity.pdf> on July 23, 2004. Also: Riley, K. Jack. "Crack, Powder Cocaine, and Heroin: Drug Purchase and Use Patterns in Six U.S. Cities." *National Institute of Justice & Office of National Drug Control Policy Research Report*, December, 1997. Retrieved from <http://www.ncjrs.org/pdffiles/167265.pdf> on July 23, 2004.

³⁴ Spohn, 2000.

CAPITAL PUNISHMENT

This section analyzes the findings of some of the key studies that examine racial disparity in death penalty sentences.

Key findings:

- In the vast majority of cases, the race of the victim tends to have an effect on the sentence outcome, with white victim cases more often resulting in death sentences;
- However, in some jurisdictions, notably in the federal system, the race of the defendant also affects sentencing outcomes, with minority defendants more likely to receive a death sentence than white defendants.

Death penalty cases in the United States are perhaps the most notable regarding the effect of race on sentencing outcome. Indeed, the literally “vital” consequences of the outcome of a capital trial seemingly provide a greater seriousness to the possibility of racial disparity in death penalty cases than in non-capital cases. Contrary to what many may believe, however, the evidence indicates that, especially at the state level (where the vast majority of death sentences are imposed), the race of the defendant plays a negligible role on the outcome of the trial. This is not to say that racial bias does not exist in the disposition of capital cases, however. The evidence instead primarily points to discrimination based on the race of the victim of the crime.

Before the U.S. Supreme Court temporarily suspended the death penalty in 1972, studies indicated that the race of the defendant had a direct impact on the sentences handed down in capital punishment cases, especially in Southern jurisdictions.³⁵ Since that time, however, most reliable studies that examine the period since the death penalty was reinstated in 1976 indicate that the race of the defendant no longer plays a direct role in influencing the outcomes of death penalty cases, at least at the state level.

The federal system, on the other hand, is still plagued by race-of-defendant bias. A Congressional report published in 1994, for example, found that *although three-quarters of the people convicted under a drug kingpin law between 1988 and 1994 (during this period, this drug kingpin statute contained the only federal death penalty) were white and only 24% of the defendants were black, the state nevertheless chose to pursue death penalty prosecutions overwhelmingly against blacks: 78% of defendants were black, and only 11% of defendants were white (an additional 11% were Latino).*³⁶ Although the report does not specify how many of the kingpin prosecutions included a homicide charge, and thus qualified for capital prosecution, the staggering disparity between the

³⁵ Baldus, David C., and George Woodworth. “Race Discrimination and the Legitimacy of Capital Punishment: Reflections on the Interaction of Fact and Perception” *DePaul Law Review* Vol 53, No 4 (Summer 2004), 1411-1495.

³⁶ “Racial Disparities in Federal Death Penalty Prosecutions 1988-1994” Staff Report by the Subcommittee on Civil and Constitutional Rights, Committee on the Judiciary. One Hundred Third Congress, Second Session: March 1994. Retrieved from <http://www.deathpenaltyinfo.org/article.php?scid=45&did=528> on July 28, 2004.

racial ratio of those convicted under the law and the racial ratio of death sentences sought by prosecutors suggests that blacks faced a greater likelihood of capital prosecution in the federal system than whites during this period.

A Department of Justice (DOJ) study of the federal system found that, between 1995 and 2000 (after Congress opened a wealth of crimes to capital prosecution in 1994 and 1996), *the U.S. Attorney General approved 159 cases for death penalty prosecution by federal attorneys, and 72% of these cases involved minority defendants.*³⁷ The DOJ study further found that, among the 159 defendants against whom the death penalty was to be sought, almost half (48%) of the white defendants received pretrial waivers for the death penalty in a plea agreement, whereas only a quarter of minority defendants (25% of blacks, 28% of Latinos, and 25% of “Other”) received waivers for the death penalty. Regarding race-of-victim effects, the DOJ study found that between 1995 and 2000, *U.S. Attorneys were almost twice as likely to recommend seeking the death penalty against a black defendant if the victim was non-black (36%) as opposed to black (20%).* Although the Congressional and DOJ studies of the federal death penalty are not as methodologically rigorous as the studies cited above regarding non-capital cases, they do strongly suggest that the federal capital punishment system exhibits race-of-defendant and race-of-victim effects that are prejudicial to blacks and other minorities.

The vast majority (99%) of prisoners who have been sentenced to death, however, have been sentenced by the states.³⁸ A report published in 1990 by the General Accounting Office (GAO, and now called the Government Accountability Office) culled data from 28 studies that examined the period dating from 1976 to 1990, with the vast majority of these studies examining state capital punishment systems.³⁹ The GAO report found that *82% of the studies surveyed concluded that the defendant had a greater likelihood of being sentenced to death if the murder victim was white than if the victim was nonwhite.*⁴⁰ While the studies surveyed in the GAO report varied in their methodology (for example, how many variables were controlled for), the report determined that the weaknesses in the lower-quality studies was not enough to discount the overall conclusion of racial discrimination. The studies surveyed in the GOA report also found equivocal evidence for a race-of-defendant effect in the determination of a death sentence.⁴¹

³⁷ U.S. Department of Justice, “Survey of the Federal Death Penalty Systems: 1988-2000, (2000). Retrieved from <http://www.usdoj.gov/dag/pubdoc/dpsurvey.html> on July 28, 2004.

³⁸ Department of Justice, 2000.

³⁹ United States General Accounting Office. “Death Penalty Sentencing: Research Indicates Pattern of Racial Disparities,” Report to Senate and House Committees on the Judiciary, February 26, 1990. Retrieved from <http://161.203.16.4/t2pbat11/140845.pdf> on July 28, 2004.

⁴⁰ Similarly to the Paternoster study cited above, some of these studies distinguished between the different stages of a capital prosecution, while others did not. The GAO report does not distinguish between the stages of prosecution, and, in effect, the findings of the studies regarding the effect of race on the likelihood of a death sentence can include factors such as the likelihood of being charged with a crime punishable by death, which ultimately influences the likelihood of receiving a death sentence.

⁴¹ While a majority of the studies surveyed in the GOA report found that the race of the defendant influenced the likelihood of receiving a death sentence—with three-quarters of these studies finding that black defendants were more likely to be sentenced to death—some found that white defendants were more likely to be sentenced to death, with others reporting interaction effects between the race of the defendant and the race of the victim or differences based on geography and location.

Studies that examine capital sentencing data since 1990 also report results that indicate that direct race-of-defendant discrimination is, by in large, no longer a statistically significant variable in influencing death penalty sentences in statewide studies.⁴² Studies conducted in Philadelphia County, Pennsylvania, however, have found that black defendants are more likely to be sentenced to death than similarly situated non-black defendants are, and the 2003 Maryland study cited above found significant interaction effects between the race of the defendant and the race of the victim.⁴³ Even if these findings from Philadelphia and Maryland regarding the race of the defendant are somewhat anomalous, however, the evidence indicates that the race of the victim has an effect on capital sentencing. From 1976 to 1999, white victim cases nationwide have constituted between 51% and 56% of all murder and non-negligent homicide cases, while between 1976 and 2002, 81% of executed defendants had white victims.⁴⁴ When studies introduce controls for offender criminal culpability and geographic variability, the discrepancy between the percentage of murder cases with white victims and the percentage of defendants executed who had white victims diminishes somewhat, but the evidence still strongly indicates that defendants with white victims have a much higher probability of being sentenced to death than defendants with non-white victims.

⁴² Baldus, David C., and George Woodworth. "Race Discrimination and the Legitimacy of Capital Punishment: Reflections on the Interaction of Fact and Perception" *DePaul Law Review* Vol 53, No 4 (Summer 2004), 1411-1495.

⁴³ The Philadelphia study: The Pennsylvania Supreme Court Committee on Racial and Gender Bias in the Criminal Justice System. "Executive Summary of the Report on Racial and Gender Bias in the Justice System," March 3, 2003. The Philadelphia study found that one out of three black death row inmates would not be there if they were not black; The Maryland study: Paternoster and Brame, 2004. The Maryland study found that, given that a homicide is death eligible, blacks who kill whites are two and one-half times more likely to be sentenced to death than are whites who kill whites, three and one-half times more likely to be sentenced to death than are blacks who kill blacks, and almost eleven times more likely to be sentenced to death than "other" racial combinations.

⁴⁴ Baldus and Woodworth, 2004.

CONCLUSION

Contemporary, methodologically rigorous evidence indicates that racial bias continues to pervade the U.S. criminal justice sentencing system. Usually, the effects of this bias are somewhat hidden, and become most apparent for certain types of defendants, such as young minority males, or for certain types of offenses, such as drug and property crimes, or may even have less to do with the race of the defendant than with the race of the victim, as the evidence suggests in sexual assault and capital punishment cases. Although racial bias in sentencing may be somewhat surreptitious, the evidence indicates that it remains a very real part of the process.

Moreover, as previously indicated, sentencing is but one phase of the criminal justice process, and outcomes in this area are reflective of decisions made at prior points in the system. Thus, efforts to reduce racial disparity at sentencing must also pay attention to law enforcement arrest decisions, prosecutorial charging practices, indigent defense representation, presentence investigation procedures, and provision of sentencing alternatives options.

Reducing racial disparity in the criminal justice system is critical in order to produce fairness and to uphold the ideals upon which the system is premised. It is also essential from a practical point of view. Unless the justice system is perceived as fair and just, trust and confidence will erode and public cooperation with the system will diminish.

Decades of research have demonstrated that race has always played a role in sentencing outcomes, even as the dynamics of that relationship have evolved over time. Scholars, practitioners, and the public alike have a strong interest in assessing these dynamics and engaging in policy and practice changes designed to address this fundamental concern.