

Race and Sentencing Disparity

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Although the overt and widespread racism that characterized the operation of the criminal justice system during the early part of the 20th century has largely been eliminated, racial disparities in sentencing and punishment persist. Research conducted during the past four decades concludes that the continuing—some would say, worsening—racial disparity in incarceration rates and use of the death penalty can be attributed to the policies pursued during the war on drugs and to criminal justice officials' use of race-linked stereotypes of culpability and dangerousness. Remedying the situation and ensuring that imprisonment will no longer be a normal part of the life course for young black and Hispanic men will require reducing the size of the prison population through decarceration, reforming the sentencing process so that a larger proportion of offenders convicted of nonserious crimes are given an alternative to incarceration, and abolishing or severely restricting use of the death penalty.

INTRODUCTION

In the late 1930s, Dr. Gunnar Myrdal, an economics professor at the University of Stockholm, was invited by the Carnegie Corporation of New York to undertake a “comprehensive study of the Negro in America.”¹ Myrdal’s examination of “courts, sentences and prisons,”² which relied primarily on anecdotal accounts of differential treatment of blacks and whites in Southern court systems, documented widespread racial discrimination in court processing and sentencing. Although Myrdal highlighted disparities in provision of counsel, bail, jury selection, and trial, he reserved his harshest criticism for the differences in punishment imposed on similarly situated white and black defendants and on those who victimized whites rather than blacks. He noted that grand juries routinely refused to indict whites for crimes against blacks, that whites who were indicted for crimes against blacks were rarely convicted,

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1. GUNNAR MYRDAL, *AN AMERICAN DILEMMA: THE NEGRO PROBLEM AND AMERICAN DEMOCRACY* vi (1944).

2. *Id.* at 247.

and that those who were convicted received only the mildest punishment. He also pointed out that crimes by blacks against other blacks were not regarded as serious and, as a result, also were unlikely to result in indictment, conviction, or appropriate punishment. By contrast, blacks convicted of, or even suspected of, crimes against whites were subject to the harshest treatment. Myrdal concluded that “[t]his whole judicial system of courts, sentences and prisons in the South is overripe for fundamental reforms.”³

Myrdal’s conclusion was based on his assessment of the situation regarding race and punishment in the early part of the 20th century, and the situation obviously has changed since then. Legislative reforms and Supreme Court decisions protecting the rights of criminal defendants, coupled with changing attitudes toward race and race relations, have made it less likely that criminal justice officials will systematically treat defendants of different races differently. The stigma assigned to crimes and the severity of punishment imposed on those convicted of crimes no longer reflect overt discrimination based on the race of the defendant and the race of the victim. Thus, whites who commit crimes against blacks are not beyond the reach of the criminal justice system, blacks who victimize other blacks are not immune from punishment, and blacks who victimize whites do not routinely receive disproportionately harsh sentences.

Although most commentators would agree that the flagrant racism described in *An American Dilemma* has been eliminated, most also would argue that significant punishment inequities persist. As evidence of this, consider that in 2004, the United States celebrated the 50th anniversary of *Brown v. Board of Education*,⁴ the landmark Supreme Court case that ordered desegregation of public schools. Also in 2004, the Sentencing Project issued a report entitled *Schools and Prisons: Fifty Years after Brown v. Board of Education*.⁵ The report noted that, whereas many institutions in society had become more diverse and more responsive to people of color in the wake of the *Brown* decision, the American criminal justice system had taken “a giant step backward.”⁶ To illustrate this, the report pointed out that in 2004, there were *nine times* as many black Americans in prison or jail as on the day the *Brown* decision was handed down—the number increased from 98,000 to 884,500.⁷ The authors of the report concluded that “such an outcome should be shocking to all Americans.”⁸

3. *Id.* at 555.

4. 347 U.S. 483 (1954).

5. THE SENTENCING PROJECT, *SCHOOLS AND PRISONS: FIFTY YEARS AFTER BROWN V. BOARD OF EDUCATION* (2004), <https://static.prisonpolicy.org/scans/sp/brownvboard.pdf>.

6. *Id.* at 5.

7. *Id.*

8. *Id.*

The situation has not improved significantly in the decade since the Sentencing Project issued its report. Racial minorities—and especially young black and Hispanic men—are substantially more likely than whites to be serving time in prison; they also face significantly higher odds than whites of receiving life sentences, life sentences without the possibility of parole, and the death penalty. Reducing—not to mention eliminating—these disparities will require bold policy reforms that go beyond simply reducing the discretion of prosecutors, judges, and corrections officials. The most obvious solution—decarceration—may be both politically unpalatable and, given the current mood of the country, infeasible. Other reforms include the elimination of mandatory minimum sentences, restrictions on the use of life-without-parole sentences, the repeal or modification of three-strikes and truth-in-sentencing laws, and either repealing the death penalty or passing legislation designed to make it easier for those on death row to challenge their sentences based on racial discrimination. Although these policy changes will not—indeed cannot—eliminate the overt and implicit racial discrimination that leads to disparate punishment, they will reduce the punitive bite of conviction for non-serious crimes, help bring the U.S. incarceration rate more in line with the rates of other Western democracies, and reduce the racial disparities that result from implementation of these “tough on crime” policies.

These issues are discussed in the following sections of this chapter. Part I will discuss current statistics on race and punishment, with a focus on demonstrating that, legal reforms and Supreme Court decisions notwithstanding, there remains substantial racial and ethnic disparity in punishment. Part II focuses on explanations for the disproportionate number of blacks and Hispanics under the control of the criminal justice system. Part III discusses policy reforms designed to improve the current situation and ensure that imprisonment will no longer be a typical life event for young black and Hispanic men.

I. THE CURRENT SITUATION

There is compelling evidence of racial disparity in punishment in the United States.⁹ In 2015, blacks comprised about 13% of the U.S. population, but 39% of all state and federal prison inmates. Hispanics were 17% of the U.S. population but 24% of prison inmates. By contrast, non-Hispanic whites made up 63% of the total population but only 37% of the prison population. Stated another way, people of color comprised only 30% of the U.S. population

9. The following statistics come from E. ANN CARSON & ELIZABETH ANDERSON, BUREAU OF JUSTICE STATISTICS, U.S. DEP'T OF JUSTICE, PRISONERS IN 2015 (Dec. 2016), <https://www.bjs.gov/content/pub/pdf/p15.pdf>.

but almost two-thirds of all prison inmates. Imprisonment rates vary by both race/ethnicity and sex. In 2015, for example, 2,613 of every 100,000 African-American men, 1,043 of every 100,000 Hispanic men, and 457 of every 100,000 white men were incarcerated in a state or federal prison; this means that the incarceration rate for African-American men was about six times the rate for white men and that the incarceration rate for Hispanic men was 2.3 times the rate for white men. The incarceration rates for women, although much lower than the rates for men, revealed a similar pattern of disparity: 103 of every 100,000 for African-Americans, 63 of every 100,000 for Hispanics, and 52 of every 100,000 for whites. There also is evidence that blacks and Hispanics are more likely than whites to be serving life (and life without the possibility of parole) sentences.¹⁰ A Sentencing Project report on the expansion of life sentences revealed that blacks comprised 47.2% of those serving life sentences and 58% of those serving life sentences with no possibility of parole in state and federal prisons in 2012. The proportion of blacks among those serving life sentences was even higher in states such as Maryland (77.4%), Georgia (72%), and Mississippi (62.3%). Hispanics made up 16.4% of those serving life sentences nationwide, with the largest proportions in New Mexico (44.1%), California (35.7%), and Arizona (30.9%). According to David Garland, statistics such as those reported above suggest the “systematic imprisonment of whole groups of the population.”¹¹

There is also clear and convincing evidence of racial disparity in the application of the death penalty.¹² In 2016, there were 2,905 prisoners under sentence of death in the United States. Of these, 42.3% were white, 41.8% were black, and 13.1% were Hispanic. Similar disparities are found in statistics regarding those executed by the states and by the federal government. Of the 1,419 prisoners executed from 1977 through 2016, 55.6% were white, 34.5% were black, 8.3% were Hispanic, and 1.6% were Native American or Asian. Despite the fact that they make up only 13% of the population, blacks comprise more than 40% of those under sentence of death and more than a third of those executed since 1977. There also is evidence that those who murder whites are sentenced to death and executed at disproportionately high rates. From

10. The following statistics come from THE SENTENCING PROJECT, *LIFE GOES ON: THE HISTORIC RISE IN LIFE SENTENCES IN AMERICA* (2013), <http://sentencingproject.org/wp-content/uploads/2015/12/Life-Goes-On.pdf>.

11. David Garland, *Introduction: The Meaning of Mass Imprisonment*, in *MASS IMPRISONMENT: SOCIAL CAUSES AND CONSEQUENCES I* (David Garland ed., 2001).

12. The following statistics come from *Death Row USA*, NAACP LEGAL DEF. & EDUC. FUND (2016), <http://www.naacpldf.org/death-row-usa>. For a discussion of the death penalty, see Carol S. Steiker & Jordan M. Steiker, “Capital Punishment,” in the present Volume.

1977 through 2016, 75.6% of the persons executed were convicted of killing whites, 15.3% were convicted of killing blacks, and 6.9% were convicted of killing Hispanics. These disparities were particularly pronounced for the crime of rape (use of the death penalty for rape was ruled unconstitutional in 1977 in *Coker v. Georgia*).¹³ Among those executed for rape from 1930 through 1972, 89% (405 of the 455 who were executed) were black men.¹⁴ During this time period, Louisiana, Mississippi, Oklahoma, Virginia, West Virginia, and the District of Columbia executed 66 black men, but not a single white man, for the crime of rape.¹⁵

II. LITERATURE REVIEW

The statistics presented in the previous section provide compelling historical and contemporary evidence of racial *disparity* in punishment. They indicate that the sentences imposed on black and Hispanic offenders have been and continue to be different—that is, harsher—than the sentences imposed on white offenders. These statistics, however, do not tell us *why* this occurs. They do not tell us whether the racial disparities in imprisonment and use of the death penalty reflect racial discrimination and, if so, whether that discrimination is institutional or contextual, overt or implicit.

Explanations for the disproportionate number of blacks and Hispanics under the control of the criminal justice system are complex. A number of studies determined that a large portion of the racial disparity in incarceration rates can be attributed to racial differences in offending patterns and criminal histories.¹⁶ As the National Research Council's Panel on Sentencing Research concluded in 1983, “[f]actors other than racial discrimination in the sentencing process account for most of the disproportionate representation of black males in U.S. prisons.”¹⁷ Although there is recent evidence that the proportion of the racial disparity in incarceration unexplained by racial differences in arrest rates

13. *Coker v. Georgia*, 486 U.S. 584 (1977); see also *Kennedy v. Louisiana*, 554 U.S. 407 (2008).

14. LAWRENCE A. GREENFIELD, BUREAU OF JUSTICE STATISTICS, U.S. DEP'T OF JUSTICE, CAPITAL PUNISHMENT 1991 (1992), <https://www.bjs.gov/content/pub/pdf/cp91.pdf>.

15. Marvin E. Wolfgang & Marc Reidel, *Rape, Race, and the Death Penalty in Georgia*, 45 AM. J. ORTHOPSYCHIATRY 658 (1975).

16. See Alfred Blumstein, *On the Racial Disproportionality of United States' Prison Populations*, 73 J. CRIM. L. & CRIMINOLOGY 1259 (1982); Alfred Blumstein, *Racial Disproportionality of U.S. Prison Populations Revisited*, 64 U. COLO. L. REV. 743 (1993).

17. NAT'L RESEARCH COUNCIL, 1 RESEARCH ON SENTENCING: THE SEARCH FOR REFORM 92 (Alfred Blumstein et al. eds., 1983).

is increasing,¹⁸ as well as evidence that racial differences in offending patterns cannot account for racial differences in incarceration for drug offenses,¹⁹ most scholars contend that the conclusion presented by the Panel on Sentencing Research in 1983 is still valid today.

Not all of the racial disparity, however, can be explained away in this fashion. Critics contend that at least some of the over-incarceration of racial minorities is a result of criminal justice policies and practices with racially disparate effects. As one commentator noted, “[a] conclusion that black overrepresentation among prisoners is not primarily the result of racial bias does not mean that there is no racism in the system.”²⁰ Alexander’s critique is even more pointed. As she put it, “[t]he fact that more than half of the young black men in any large American city are currently under the control of the criminal justice system (or saddled with criminal records) is not—as many argue—just a symptom of poverty or poor choices, but rather evidence of a new racial caste system at work.”²¹

Researchers have conducted dozens of studies designed to untangle the complex relationship between race and punishment and to determine if racial disparities result from overt or unconscious racial bias and/or the implementation of policies and practices with racially disparate effects. Over this time period, the research questions became more theoretically sophisticated and the methodologies used to answer those questions more analytically rigorous; the answers to these questions also changed over time. A comprehensive review of this body of research is beyond the scope of this paper. Instead, I focus on the non-capital sentencing process and the conclusions emanating from five waves of research published over the past eight decades.

Studies conducted during the first two waves of sentencing research—which began during the 1930s and continued through the 1970s—often concluded that racial disparities in sentencing reflected racial discrimination and that “equality

18. See Eric P. Baumer, *Reassessing and Redirecting Research on Race and Sentencing*, 30 *JUST. Q.* 231 (2013); Michael Tonry & Matthew Melewski, *The Malign Effects of Drug and Crime Control Policies on Black Americans*, 37 *CRIME & JUST.* 1 (2008); BRUCE WESTERN, *PUNISHMENT AND INEQUALITY IN AMERICA* (2006).

19. See Katharine Beckett et al., *Drug Use, Drug Possession Arrests, and the Question of Race: Lessons from Seattle*, 52 *SOC. PROBS.* 419 (2005); MICHAEL TONRY, *MALIGN NEGLECT: RACE, CRIME, AND PUNISHMENT IN AMERICA* (1995).

20. TONRY, *supra* note 19, at 49.

21. MICHELLE ALEXANDER, *THE NEW JIM CROW: MASS INCARCERATION IN THE AGE OF COLORBLINDNESS* 16 (2010).

before the law is a social fiction.”²² Reviews of these early studies, however, found that most of them were methodologically flawed.²³ Many—including the somewhat more methodologically sophisticated studies from the 1960s and 1970s—employed inadequate or no controls for crime seriousness and prior criminal record, and most used inappropriate statistical techniques to isolate the effect of race. Kleck’s evaluation of 40 noncapital sentencing studies revealed that many of them found no evidence that race affected sentence outcomes and most that did find such evidence either did not control for prior record or used a crude measure that simply distinguished between offenders with some type of criminal history and those with no criminal history. According to Kleck, “the more adequate the control for prior record, the less likely it is that a study will produce findings supporting a discrimination hypothesis.”²⁴

The conclusions presented by these early reviews, coupled with the findings of its own review of sentencing research, led the National Research Council’s Panel on Sentencing Research to claim that the sentencing process, although not racially neutral, was not characterized by systematic and widespread racial discrimination.²⁵ Rather, “some pockets of discrimination are found for particular judges, particular crime types, and in particular settings.”²⁶ The panel echoed the concerns voiced by Hagan and Kleck regarding the absence of controls for prior criminal record in many of the early studies. Members of the panel also noted that even more recent and methodologically rigorous studies (i.e., those published in the late 1970s and early 1980s) suffered from measurement error and sample-selection problems that raised “the threat of serious biases in the estimates of discrimination effects.”²⁷

The findings of studies published during the third wave of sentencing-disparity research suggested that these conclusions might have been premature.²⁸ Social scientists conducting research in the 1970s and 1980s challenged the no-discrimination thesis and suggested that racial disparities in sentencing had not declined or disappeared but had become more subtle and difficult to detect.

22. Thorsten Sellin, *Race Prejudice in the Administration of Justice*, 41 AM. J. SOC. 212, 217 (1935).

23. See John Hagan, *Extra-Legal Attributes and Criminal Sentencing: An Assessment of a Sociological Viewpoint*, 8 LAW & SOC’Y REV. 357 (1974); Gary Kleck, *Racial Discrimination in Criminal Sentencing: A Critical Evaluation of the Evidence with Additional Evidence on the Death Penalty*, 46 AM. SOC. REV. 783 (1981).

24. Kleck, *supra* note 23, at 792.

25. NAT’L RESEARCH COUNCIL, *supra* note 17.

26. *Id.* at 93.

27. *Id.* at 109.

28. For a review of this research, see Marjorie S. Zatz, *The Changing Forms of Racial/Ethnic Biases in Sentencing*, 25 J. RES. CRIME & DELINQ. 69 (1987).

They contended that testing only for direct race effects was insufficient and asserted that disentangling the effects of race and other predictors of sentence severity required tests for indirect race effects and the use of interactive, as well as additive, models. Methodological refinements and the availability of more-complete data enabled third-wave researchers to test hypotheses regarding these indirect and interactive effects of race on sentencing. Although some researchers uncovered evidence of direct racial bias, others demonstrated that race affected sentence severity indirectly through its effect on variables such as pretrial status or type of attorney, or that race interacted with other variables to produce harsher sentences for racial minorities for some types of crimes (e.g., less serious crimes), in some types of settings (e.g., the South), or for some types of offenders (e.g., the unemployed). Research conducted during this third wave also revealed that blacks who victimized whites were sentenced much more harshly than either blacks who victimized other blacks or whites who victimized blacks. According to Zatz, these third-wave studies indicated “that both overt and more subtle forms of bias against minority defendants *did* occur, at least in some social contexts.”²⁹

During the fourth wave of race and sentencing research, researchers began to investigate the effect of race on sentencing severity using data from jurisdictions—including the federal district courts—with determinate sentencing and sentencing guidelines.³⁰ Research conducted during this era, which was published from the mid-1980s through the mid-2000s, improved on research from the earlier eras in a number of important ways. Although the studies varied in terms of their analytical rigor, most did not suffer from the serious methodological deficiencies that characterized the early research. The research conducted during this era used appropriate multivariate statistical techniques and controlled for relevant legal and extralegal variables; most studies also included a wide variety of offenses rather than only one or two types of offenses, and many of them tested interactive as well as additive models. Finally, many of these fourth-wave studies, particularly those conducted using federal data, examined the effect of ethnicity as well as race.

29. *Id.* at 70.

30. For reviews of this research, see Theodore G. Chiricos & Charles Crawford, *Race and Imprisonment: A Contextual Assessment of the Evidence*, in *ETHNICITY, RACE, AND CRIME: PERSPECTIVES ACROSS TIME AND PLACE* (Darnell F. Hawkins ed., 1995); Ojmarrh Mitchell, *A Meta-Analysis of Race and Sentencing Research: Explaining the Inconsistencies*, 21 *J. QUANTITATIVE CRIMINOLOGY* 439 (2005); and Cassia Spohn, *Thirty Years of Sentencing Reform: The Quest for a Racially Neutral Sentencing Process*, in 3 *CRIMINAL JUSTICE 2000: POLICIES, PROCESS, AND DECISIONS OF THE CRIMINAL JUSTICE SYSTEM* 427 (2000).

My review of state and federal sentencing studies that used data from the 1980s and 1990s highlighted the importance of attempting to identify “the structural and contextual conditions that are most likely to result in racial discrimination.”³¹ Many of the 40 studies I examined found a direct race effect. At both the state and federal level, there was evidence that blacks and Hispanics were more likely than whites to be sentenced to prison; at the federal level, there also was evidence that blacks received longer sentences than whites. Noting that “evidence concerning direct racial effects ... provides few clues to the circumstances under which race matters,” I also evaluated the research for evidence of indirect or contextual discrimination.³² The studies revealed four themes or patterns of contextual effects: (1) the combination of race and ethnicity and other legally irrelevant offender characteristics (e.g., age, sex, education, and employment status) produced greater sentence disparity than race or ethnicity alone; (2) process-related factors such as pretrial detention, pleading guilty, hiring an attorney, and providing evidence or testimony in other cases moderated the effect of race and ethnicity on sentence severity; (3) the severity of punishment was contingent on the race of the victim as well as the race of the offender; and (4) the effects of race and ethnicity were conditioned by the nature of the crime. I concluded that the sentencing reforms implemented during the last quarter of the 20th century had not achieved their goal of eliminating racial disparity and discrimination in sentencing.

The studies conducted during the fourth wave of race and sentencing research improved on earlier work in a number of important ways. Nonetheless, as Baumer argued recently, even this fourth wave of research left a number of questions unanswered.³³ Of particular importance is that the typical race and sentencing study from this era—which relied on what Baumer refers to as “the modal approach” involving regression-based analysis of the final sentencing outcome—could not identify the mechanisms that led to racially disparate sentencing. Stated differently, even these more theoretically and methodologically sophisticated fourth-wave studies were unable to explain *why* racial minorities were sentenced more harshly than whites, whether disparate treatment was found only at sentencing or accumulated 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

31. Spohn, *supra* note 30, at 443 (quoting John Hagan & Kristin Bumiller, *Making Sense of Sentencing: A Review and Critique of Sentencing Research in NAT'L RESEARCH COUNCIL, 2 RESEARCH ON SENTENCING: THE SEARCH FOR REFORM* 21 (Alfred Blumstein et al. eds., 1983)).

32. *Id.* at 458.

33. Baumer, *supra* note 18; see also Jeffrey T. Ulmer, *Recent Developments and New Directions in Sentencing Research*, 29 JUST. Q. 1 (2012).

not new. Forty years ago, Hagan called for studies that better captured “transit through the criminal justice system” especially as it operates “cumulatively to the disadvantage of minority group defendants.”³⁴ 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.”³⁵

Researchers are just beginning to address these issues. During this fifth wave of research on race/ethnicity and sentencing, 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 existing sentencing research is its failure to consider the conditioning effects of the many consequential case-processing decisions that precede the final punishment decision, these fifth-wave 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 decisions³⁶ or intermediate bail and pretrial detention decisions³⁷ can affect final sentencing outcomes, there are only a handful of studies that address the issue of cumulative disparity in the prosecution and sentencing of criminal defendants.³⁸ Together, these studies reveal the importance of examining decisions that precede the final sentencing decision and of attempting to tease out the ways in which these earlier decisions affect sentencing. For example, Sutton found that blacks 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, blacks, and Latinos; and that both pretrial detention and guilty

34. Hagan, *supra* note 23, at 379.

35. Baumer, *supra* note 18, at 240.

36. See Lauren O’Neill Shermer & Brian D. Johnson, *Criminal Prosecutions: Examining Prosecutorial Discretion and Charge Reductions in U.S. Federal District Courts*, 27 JUST. Q. 394 (2010); Sonia B. Starr & M. Marit Rehavi, *Mandatory Sentencing and Racial Disparity: Assessing the Role of Prosecutors and the Effects of Booker*, 123 YALE L.J. 2 (2013); see also John F. Pfaff, “Prosecutorial Guidelines,” in Volume 3 of the present Report.

37. Cassia Spohn, *Race, Sex, and Pretrial Detention in Federal Court: Indirect Effects and Cumulative Disadvantage*, 57 U. KAN. L. REV. 879 (2009); see also Megan Stevenson & Sandra G. Mayson, “Pretrial Detention and Bail,” in Volume 3 of the present Report.

38. See Besiki L. Kutateladze et al., *Cumulative Disadvantage: Examining Racial and Ethnic Disparity in Prosecution and Sentencing*, 52 CRIMINOLOGY 514 (2014); Traci Schlesinger, *Racial and Ethnic Disparity in Pretrial Criminal Processing*, 22 JUST. Q. 170 (2005); Lisa Stolzenberg, Stewart J. D’Alessio & David Eitle, *Race and Cumulative Discrimination in the Prosecution of Criminal Defendants*, 3 RACE & JUST. 275 (2013); John R. Sutton, *Structural Bias in the Sentencing of Felony Defendants*, 42 SOC. SCI. RES. 1207 (2013).

pleas affected sentence outcomes. Sutton also 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.³⁹ Kutateladze and his colleagues, who used data on a large sample of white, black, Latino, and Asian defendants charged with misdemeanors and felonies in New York City, similarly found strong evidence of disparity in pretrial detention, plea offers, and use of incarceration: for each of these outcomes, blacks 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 blacks, 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.⁴⁰

As this review demonstrates, research examining the relationship between race/ethnicity and sentencing has evolved both theoretically and methodologically over the past eight 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 and ethnicity matter at sentencing. The more interesting questions—and those whose answers will help us understand the mechanisms underlying the harsher punishment imposed on blacks 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. The statistical techniques used to answer these questions also have changed; researchers have moved from bivariate comparisons of outcomes for members of different racial groups, to multivariate and multilevel models incorporating relevant control variables, to propensity score matching methods designed to ensure that offenders in each racial group are equivalent, to structural equation models that identify direct, indirect, and total racial effects and to use of techniques that allow the calculation of cumulative effects. As the fifth wave of race and sentencing research continues to unfold, more-definitive answers to questions regarding race, ethnicity, and punishment should be forthcoming.

39. Sutton, *supra* note 38, at 1217.

40. Kutateladze et al., *supra* note 38.

III. ASSESSMENT

Concerns about disparity, discrimination, and unfairness in sentencing are not new. In 1918, the Bureau of the Census published a report on the “Negro Population.”⁴¹ The authors of the report noted that blacks made up only 11% of the population but constituted 22% of the inmates of prisons, jails, reform schools, and workhouses. The authors then posed a question that would spark debate and generate controversy for the next hundred years:

While these figures ... will probably be generally accepted as indicating that there is more criminality and lawbreaking among Negroes than among whites and while that conclusion is probably justified by the facts ... it is a question whether the difference ... may not be to some extent the result of discrimination in the treatment of white and Negro offenders on the part of the community and the courts.⁴²

This question—whether the disproportionate number of racial minorities incarcerated in state and federal prisons might be “to some extent the result of discrimination”—is a question that is still being asked today. That it reflects the fact that the racial disparity in imprisonment documented by the Bureau of the Census *has worsened over time*, to the point that blacks and Hispanics now make up three quarters of all persons locked up in our nation’s prisons.

What can be done to remedy the situation and to ensure that imprisonment will no longer be a “common life event”⁴³ for young black and Hispanic men? In the 1970s, critics of the sentencing process lobbied for reforms designed to curb discretion, reduce disparity and discrimination, and achieve proportionality and parsimony in sentencing. The initial focus of reform efforts was the indeterminate sentence, in which the judge imposed a minimum and maximum sentence and the parole board determined the date of release. Under indeterminate sentencing, sentences were tailored to the individual offender, and discretion was distributed not only to the criminal justice officials who determined the sentence but also to corrections officials and the parole board. The result of this process was “a system of sentencing in which there was little understanding or predictability as to who would be imprisoned and for how long.”⁴⁴

41. BUREAU OF THE CENSUS, U.S. DEP’T OF COMMERCE, *NEGRO POPULATION: 1700-1915* (1918).

42. *Id.* at 448.

43. WESTERN, *supra* note 18, at 31.

44. BUREAU OF JUSTICE ASSISTANCE, U.S. DEP’T OF JUSTICE, *NATIONAL ASSESSMENT OF STRUCTURED SENTENCING 6* (1996), <https://www.ncjrs.gov/pdffiles/strsent.pdf>.

Both liberal and conservative reformers challenged the principles underlying the indeterminate sentence. Liberals and civil-rights activists argued that indeterminate sentencing was arbitrary and capricious and therefore violated defendants' rights to equal protection and due process of law.⁴⁵ Liberal critics were also apprehensive about the potential for racial bias under indeterminate sentencing. They asserted that "racial discrimination in the criminal justice system was epidemic, that judges, parole boards, and corrections officials could not be trusted, and that tight controls on officials' discretion offered the only way to limit racial disparities."⁴⁶ Political conservatives, on the other hand, argued that the emphasis on rehabilitation too often resulted in excessively lenient treatment of offenders who had committed serious crimes or had serious criminal histories.⁴⁷ They also charged that sentences that were not linked to crime seriousness and offender culpability were unjust.

After a few initial "missteps," in which jurisdictions attempted to *eliminate* discretion altogether through flat-time sentencing, states and the federal government adopted structured sentencing proposals designed to *control* the discretion of sentencing judges. A number of states adopted determinate sentencing policies that offered judges a limited number of sentencing options and included enhancements for use of a weapon, presence of a prior criminal record, or infliction of serious injury. Other states and the federal government adopted sentence guidelines that incorporated crime seriousness and prior criminal record into a sentencing "grid" that judges were to use in determining the appropriate sentence. Other reforms enacted at both the federal and state level included mandatory minimum penalties for certain types of offenses (especially drug and weapons offenses), "three-strikes-and-you're-out" laws that mandated long prison sentences for repeat offenders, and truth-in-sentencing statutes that required offenders to serve a larger portion of the sentence before being released.⁴⁸

Advocates of these policy changes believed that their enactment would result in fairer—that is, less disparate and discriminatory—sentence outcomes. Although there is evidence that sentences are more uniform and less disparate in jurisdictions with sentencing guidelines, there is little evidence that the reforms reduced or eliminated the racial and ethnic disparities that were the

45. See KENNETH CULP DAVIS, *DISCRETIONARY JUSTICE: A PRELIMINARY INQUIRY* (1969); MARVIN E. FRANKEL, *CRIMINAL SENTENCES: LAW WITHOUT ORDER* (1973).

46. TONRY, *supra* note 19, at 164.

47. See JAMES Q. WILSON, *THINKING ABOUT CRIME* (1975). For a discussion of rehabilitation, see Francis T. Cullen, "Correctional Rehabilitation," in the present Volume.

48. See generally Douglas A. Berman, "Sentencing Guidelines," in the present Volume; Erik Luna, "Mandatory Minimums," in the present Volume.

focus of the sentencing reform movement. Studies of sentences imposed under federal and state guidelines reveal that blacks and Hispanics continue to receive harsher outcomes than whites, and research focusing on mandatory minimum sentences, three-strikes provisions, and habitual offender laws also find that the application of these provisions disadvantages racial minorities. These findings imply that prosecutors and judges are reluctant to base sentences on only crime seriousness and prior criminal record and that statutorily irrelevant factors such as race and ethnicity (as well as sex, age, and social class) may be factually relevant to criminal justice officials' assessments of dangerousness, threat, and culpability. They attest to the validity of Tonry's assertion that "[t] here is, unfortunately, no way around the dilemma that sentencing is inherently discretionary and that discretion leads to disparities."⁴⁹

This suggests that the problem of racial and ethnic disparities in sentencing and punishment requires something more than the passage of legislation designed to reduce the discretion of prosecutors, judges, and corrections officials. The most obvious solution—decarceration—may also be the most politically unpalatable, as releasing large numbers of offenders before they have served most of their sentences or reducing the incarceration rate will inevitably trigger charges that those who advocate these solutions are “soft on crime.” Nonetheless, as Tonry and Melewski convincingly demonstrate,⁵⁰ it is the only solution that will significantly reduce the prison population and, in so doing, reduce the number of imprisoned black Americans. Although reducing racial bias and discrimination in the criminal justice system is important and should continue to be a goal of policy efforts, doing so will not appreciably affect the number of blacks and Hispanics behind bars. By contrast, if imprisonment rates were returned to 1980 levels, the black incarceration rate would fall from 2,661 to 827 per 100,000 and there would be 702,400 fewer black Americans locked up in our nation's prisons.⁵¹ According to Tonry and Melewski, “[t]o attempt to limit damage done to people now entangled in the arms of the criminal justice system, devices need to be created for reducing the lengths of current prison sentences and releasing hundreds of thousands of people from prison.”⁵²

49. MICHAEL TONRY, SENTENCING MATTERS 180 (1996).

50. Tonry & Melewski, *supra* note 18.

51. *Id.* at 36.

52. *Id.* at 37.

Assuming that large-scale decarceration is unlikely,⁵³ what is to be done? A number of policy reforms would reduce the likelihood that those convicted of crimes will go to prison and the severity of sentences imposed on those who are incarcerated. These reforms include the elimination of mandatory minimum sentences, restrictions on the use of life-without-parole sentences, and the repeal or modification of three-strikes and truth-in-sentencing laws.⁵⁴ Each of these sentencing “reforms” played a role in the imprisonment boom that ensnared disproportionately large numbers of racial minorities. Modifying or repealing them will reduce the punitive bite of conviction for non-serious crimes, help bring the U.S. incarceration rate more in line with the rates of other Western democracies, and reduce the racial disparities that result from implementation of these policies.

A final area of reform concerns the death penalty.⁵⁵ Following the Supreme Court’s decision in *McCleskey v. Kemp*,⁵⁶ in which the Justices ruled against McCleskey’s claim of racial discrimination in the application of the death penalty, the U.S. House of Representatives added the Racial Justice Act to the Omnibus Crime Bill of 1994. A slim majority of the House voted for the provision, which would have allowed condemned offenders to challenge their death sentences using statistical evidence showing a pattern of racial discrimination in the capital sentencing process in their jurisdictions. Under this provision, the offender would not have had to show that criminal justice officials acted with discriminatory purpose in his or her case. Opponents of the Racial Justice Act argued that it would effectively abolish the death penalty in the United States and the provision eventually was eliminated from the crime bill. Although racial-justice acts were enacted in Kentucky in 1998 and in North Carolina in 2009, the North Carolina Legislature repealed the act in 2013; no other states have enacted racial-justice acts.

53. There is, however, evidence of growing skepticism about the use and effectiveness of incarceration in the United States. See, e.g., Joan Petersilia & Frank Cullen, *Liberal but Not Stupid: Meeting the Promise of Downsizing Prisons*, 2 STAN. J. CRIM. L. & POL’Y 1 (2015); Todd R. Clear & James Austin, “Mass Incarceration,” in the present Volume. For example, in 2011 the California Legislature passed the Public Safety Realignment Act, A.B. 109, 2011-2012 Leg., Reg. Sess. (Cal. 2011); which, among other things, provided that offenders sentenced after October 1, 2011, on non-serious, non-violent and non-sex offenses are, with certain limited exceptions, no longer eligible for state prison sentences. Other states have revised or eliminated mandatory minimum sentences that have contributed to mass incarceration.

54. See, e.g., Luna, *supra* note 48.

55. See, e.g., Steiker & Steiker, *supra* note 12.

56. *McCleskey v. Kemp*, 481 U.S. 279 (1987).

The defeat of the Racial Justice Act in Congress and the failure of the issue to gain traction in the states, coupled with persuasive evidence of racial disparity in the application of the death penalty, suggest that the remedy for racial bias in the capital sentencing process is abolition of the death penalty. Advocates for reforming the process contend that the capital sentencing process can be fixed through the enactment of reforms (e.g., access to post-conviction DNA testing, funding to pay for DNA tests requested by indigent offenders, and establishing standards on qualifications and experience for defense attorneys in capital cases) designed to ensure that innocent persons are not convicted and sentenced to death.⁵⁷ Those who advocate abolishing the death penalty contend that the system is fatally flawed. To support their position, these “new abolitionists”⁵⁸ cite mounting evidence of wrongful conviction of those on death row, as well as evidence that the death penalty is administered in an arbitrary and racially discriminatory manner. They also contend that the implementation of the proposed procedural rules cannot solve the problems inherent in the capital sentencing process. According to Sarat, the underlying problem is that “[p]articipants in the legal system—whether white or black—demonize young black males, seeing them as more deserving of death as a punishment because of their perceived dangerousness. These cultural effects clearly are not remediable.”⁵⁹

Reducing the racial disproportionality in our nation’s prisons and eliminating racial bias in the non-capital and capital sentencing processes should be highly prioritized goals of policymakers and politicians. The mass imprisonment of young black (and Hispanic) men (and women) has altered their life-course trajectories, which, in turn, has had dire consequences for their families, children, and communities. Evidence that race infects the sentencing process undermines respect for the law and casts doubt on the ability of the criminal justice system to ensure due process for all and equal protection under the law. The policy changes needed to accomplish these goals and to erase the legacy of several decades of insensitivity to the plight of racial minorities in this country are straightforward. Policymakers must significantly reduce, through decarceration, the number of men and women locked up in our nation’s

57. For a discussion of wrongful convictions, see Brandon L. Garrett, “Actual Innocence and Wrongful Convictions,” in Volume 3 of the present Report.

58. Austin Sarat, *Recapturing the Spirit of Furman: The American Bar Association and the New Abolitionist Politics*, 61 LAW & CONTEMP. PROBS. 5 (1998); AUSTIN SARAT, *WHEN THE STATE KILLS: CAPITAL PUNISHMENT AND THE AMERICAN CONDITION* (1998).

59. Sarat, *Recapturing the Spirit*, *supra* note 58, at 26.

prisons and must modify or repeal sentencing laws and practices that make imprisonment for decades the rule rather than the exception to the rule and that lead to racially tainted death sentences and execution.

RECOMMENDATIONS

It is clear that reducing racial and ethnic disparities in sentencing and punishment requires something more than the passage of legislation designed to reduce incrementally the discretion of prosecutors, judges, and corrections officials. Given that the most obvious solution—decarceration—is unlikely to garner widespread support, policymakers can implement a number of reforms designed to reduce both the punitive bite of incarceration and the disparity in punishment.

1. Eliminate mandatory minimum sentences, severely restrict the use of life-without-parole sentences, and repeal or modify three-strikes and truth-in-sentencing laws.
2. Abolish the death penalty.
3. Enact Racial Justice Acts designed to allow offenders to challenge their sentences with statistical evidence showing a pattern of racial/ethnic discrimination in sentencing.