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What is This?
THE CHANGING FORMS OF RACIAL/ETHNIC BIASES IN SENTENCING

MARJORIE S. ZATZ

Racial/ethnic discrimination in criminal justice processing has been the subject of heated debate for several decades. This article traces findings from four historical waves of research on sentencing disparities. Particular attention is given to changes in research methodologies and data sources, the social contexts within which research has been conducted, and the various forms that bias can manifest. It explores the change from findings of overt racial/ethnic disparities to more subtle, but still systematic, institutionalized biases. In so doing, the movement toward determinate sentencing is discussed, and the biases identified are partially explained by the need for the system to maintain legitimacy in the face of social change.

The question of whether or not the legal system discriminates on the basis of racial/ethnic group membership has sparked considerable controversy and heated debate. Indeed, it may well have been the major research inquiry for studies of sentencing in the 1970s and early 1980s (see Hagan, 1974; Kleck, 1981; Garber, Klepper, and Nagin, 1983; Hagan and Bumiller, 1983; Klepper, Nagin, and Tierney, 1983, for comprehensive reviews and assessments of the literature). Not surprisingly, this controversy is rooted in ideological, theoretical, and methodological conflicts that encompass the meaning and pervasiveness of “discrimination” and the appropriate methods for assessing its existence, strength, and form.

Across what I shall term four waves of research on sentencing disparities, conflicting conclusions have been drawn. Research conducted through the mid-1960s (Wave I) indicated some overt discrimi-
nation against minority defendants. Reanalyses of these studies during the late 1960s and 1970s (Wave II) concluded that, with the exception of use of the death penalty in the South, findings of discrimination were an artifact of poor research designs and analyses. Original research conducted in this period suggested that minorities were overrepresented in prison because of their proportionately greater involvement in crime, rather than as a consequence of judicial bias. A third wave of research was published in the late 1970s and 1980s, using data from the late 1960s and 1970s. These studies benefited from advances in research design and analytic techniques, and indicated that both overt and more subtle forms of bias against minority defendants did occur, at least in some social contexts. Finally, we are in the midst of the fourth wave of studies, begun in the early 1980s and relaying on data from states following determinate sentencing guidelines. These studies show subtle, if no longer overt, bias against minority defendants.

A key element in this controversy is the scope of the concept *discrimination*. In part, this scope consideration asks whether discrimination is restricted to the behavior of individuals or whether it also includes administrative processes that serve to institutionalize biases against minorities. Some researchers limit discrimination to main effects of race/ethnicity on sentence severity after other factors have been statistically held constant. Such disparities reflect overt discrimination. Other researchers conceptualize discrimination more broadly to include indirect and interaction effects of race/ethnicity, operating through other variables. These disparities reflect more subtle institutionalized biases, but still fall within the purview of discrimination if they systematically favor one group over another.

Proponents of this second position argue that although policy changes such as the new determinate sentencing statutes sweeping across the country could reduce inequities in sanctioning, the inevitable outcomes of formal rationality in a capitalist society favor capital and maintain class and racial/ethnic disparities (see Greenberg and Humphries, 1980; Irwin, 1980; Michalowski, 1985). Also, the increased bureaucratization and formal rationalization, which accrue from implementing the rules of determinate sentencing, enhance the legitimacy of the legal system. Accordingly, claims by Hindelang (1978) and others that the poor and minorities are not being discriminated against, but rather that the system is simply responding to their high levels of street crime, are also legitimized without calling attention to the harmful acts of the wealthy or to biased administrative processes and policies.
This article reviews the controversy over racial/ethnic bias in sentencing. It proceeds in three stages. First, findings from four waves of research on sentencing disparities are traced. The studies discussed are representative of research in different time periods and social contexts, and using different methodologies. They do not represent a comprehensive overview of all relevant research; rather they are used for illustrative purposes. Studies in the first two waves are deemphasized since others (e.g., Hagen, 1974; Kleck, 1981) have dealt with them adequately. For each wave, the major findings and their implications are discussed and a methodological critique offered. Then, potential biases in data collection and analysis are explored, along with bias that is institutionalized in the workings of the legal system. Finally, the biases identified are partially explained by the need for the system to maintain legitimacy in the face of social change.

Throughout the discussion that follows, the broader term race/ethnicity is used rather than race. Although somewhat cumbersome, race/ethnicity more accurately reflects the overlap between color and culture that may disadvantage minorities, particularly those from Latin America. For example, while one Puerto Rican may appear white and another black, and thus only the latter would suffer from racial discrimination, both may be the victims of cultural and linguistic barriers and prejudices.

PRIOR RESEARCH ON RACE/ETHNICITY AND SENTENCING

Wave I (1930s - mid-1960s)

A number of studies conducted from the 1930s through the mid-1960s showed clear and consistent bias against nonwhites in sentencing (e.g., Sellin, 1935; Lemert and Rosberg, 1948; Johnson, 1957; Bullock, 1961; Wolfgang, Kelly, and Nolde, 1962; Bedau, 1964). This period preceded the major gains of the civil rights movement and included the early race riots beginning with the 1943 Zoot Suit Riot between sailors and Chicano youths in California and continuing through the 1960s.

These early scholars emphasized the social prejudice against blacks and foreign-born persons, a prejudice shared by the American judiciary:
Laws are made by dominant interest groups in society, who believe in protection for the social values which they conceive to be important. These laws are, furthermore, administered by men imbued with the ideas and concepts of the social environment which has molded their personalities. The judge is no exception to the rule. . . . When the judge dons his robes of office he is unable to divest himself of his social beliefs and prejudices [Sellin, 1935, p. 212].

Thus Sellin and others working at this time concluded that "equality before the law is a social fiction" (p. 217). A chilling example of the level that racist sentiment could reach is evident in a statement by Judge Chargin of Santa Clara, California, in 1969, during juvenile court proceedings against a Chicano boy:

We ought to send you back to Mexico. You belong in prison for the rest of your life for doing things of this kind. You ought to commit suicide. That's what I think of people of this kind. You are lower than animals and haven't the right to live in organized society—just miserable, lousy, rotten people. . . . Maybe Hitler was right [in Hernandez, Haug, and Wagner, 1976, pp. 62-63].

While Judge Chargin was censured by his colleagues and forced to retract this statement and publicly apologize, he was reelected in 1972, receiving twice as many votes as his closest opponent. This may, and probably does, reflect an extreme position, but it is significant nonetheless because a high level of generalized racist sentiment is suggested when a judicial official feels comfortable making such a statement publicly and the statement apparently does not offend voters.

As was pointed out in the U.S. Commission on Civil Rights report on Mexican Americans and the Administration of Justice in the Southwest (1970), differences at early stages of decision making (e.g., bail) can accumulate and be compounded further in the system. This notion of "cumulative disadvantage" became important in later studies, but the earliest researchers somewhat naively failed to recognize or appreciate the possibility that bias could accumulate in this fashion. As later critics noted, these studies were flawed by a number of serious methodological problems. The most damning flaw was the lack of controls for legally relevant factors, especially prior record. In addition, the models used were somewhat simplistic, and the analytic techniques (mostly cross-tabular, with few controls) relatively unsophisticated, in part due to the
limited data sources and analytic techniques available. Yet some of the differentials observed by these earlier researchers were quite large, suggesting that even with better controls they might still show evidence of discrimination.\(^2\)

*Wave II (late 1960s-1970s)*

Following in the wake of the civil rights movement, research findings showing no discrimination emerged. Increased fears of urban street crime and high rates of unemployment caused by an economic recession turned attention away from eliminating the sources and consequences of racial/ethnic discrimination and repression, and toward more extensive social control (see Greenberg and Humphries, 1980). Nevertheless, the obvious manifestations of discrimination were no longer socially acceptable, at least in public forums. The courthouse was one such public forum, and was also an extremely visible symbol of equality and justice for all. As such, it served a very important legitimating function for the state.

With major advances in quantitative data analytic techniques, sentencing researchers began to question whether or not some of the disparities noted earlier might have been mistaken. Using data from the early 1970s, researchers such as Hindelang (1978) and Cohen and Kluegel (1978) argued that minorities were overrepresented in the criminal justice system and prisons because of their greater proportional involvement in crime, and not because of any bias in the system. Others, such as Pruitt and Wilson (1983), examined data drawn from several points in time, and concluded that sentencing was discriminatory in the late 1960s, but changes in the composition and bureaucratization of the judiciary did away with this bias by the 1970s.

Reanalyses of earlier studies were conducted, with results typically interpreted to mean that discrimination was no longer an issue. Critics such as Hagan (1974) and Kleck (1981) argued that the effect of race was in part a proxy for prior record and, once this was controlled for, the direct effect of race would be greatly diminished. These reanalyses often concluded with two very important but unheeded caveats. The first was that race might have a cumulative effect by operating *indirectly* through other variables to the disadvantage of minority group members. The second was that race and other extralegal attributes of the offender could *interact* with other factors to influence decision making (see, for
example, Hagan 1974, pp. 379-380). These caveats were usually lost on readers who later placed such studies squarely in the “no discrimination found” side of the debate.

*Wave III (data from late 1960s-1970s, conducted in 1970s and 1980s)*

Paradoxically, the lessons learned in the third wave of research suggest that a countervailing bias might call into question these “no discrimination” findings. Recent studies using data from the period of Wave II research, but employing new techniques to mitigate or avoid earlier problems, are particularly enlightening. Ironically, some of these more recent studies were conducted by the same researchers whose earlier work constituted the bulwark of the “no discrimination” group. For example, one of the most frequently cited studies from Wave II was Hagan’s reanalysis of twenty studies, published in 1974. Yet his later analyses of the sentencing of white and black drug offenders in New York from 1963 to 1976 (Peterson and Hagan, 1984) and of white and black draft dodgers for the same years (Hagan and Bernstein, 1979) showed that changing conceptions of race in this controversial time led to racial disparities in sanctioning. Depending on the degree of victimization and the relative social harm perceived, minority members were treated more harshly in some situations and whites in others. Thus a sense was beginning to emerge among researchers that examination of main effects was not sufficient if we were to explicate fully the impact of minority status on sentencing.

Advances in data sources and analytic techniques during the late 1970s and early 1980s paved the way for a new approach to the study of bias in decision making. These improvements substantially altered the ways in which research was conducted and the conclusions drawn from them. Because the justice system itself started using computers, data collection was made easier and more systematic. Rather than digging through dusty piles of court records to unearth what happened to a given defendant, researchers gained access to data tapes such as the Offender-Based Transaction Statistics (OBTS) and the Prosecutor’s Management Information System (PROMIS). While there are some serious biases and methodological problems inherent in these data sets (discussed below), the longitudinal data bases created by such systems allowed researchers to trace repeated processings of the same individuals from arrest to sentencing. Alongside these improvements in the data
came increases in methodological sophistication, again due in part to the decreased cost and increased ease of use of statistical computing packages.

Two major methodological problems, and their solutions, came to light during the late 1970s and early 1980s: selection bias and specification error. Selection bias refers to the selection of the sample to be analyzed. When persons who were filtered out of the system at earlier decision points are excluded from a sample, variation in sentencing outcomes due to race/ethnicity, as well as social class and gender, may be inappropriately removed. It was first thought that this bias primarily limited the generalizability of the findings. Now, however, the problem is recognized as a more serious one. Bias in the sample selection process can invalidate our estimates; a typical consequence being a statistical masking of discrimination (see Berk, 1983; Klepper, Nagin, and Tierney, 1983; Zatz and Hagan, 1985).

Specification error means that the model to be analyzed was not drawn correctly. Since at least Wave II research, it has been recognized that models are misspecified when relevant variables are omitted. In addition, we now know that erroneous results will be obtained if the ways in which variables influence outcomes are not properly identified. In particular, recent work has shown that beyond any main, or direct, effect on sentencing, race/ethnicity can operate indirectly through its effect on other factors. It can also interact with other factors to affect sentencing. That is, the impact of other variables (e.g., prior record, type of offense) could differ, depending on the defendant’s race/ethnicity. If indirect and interaction effects in fact exist, but are not included in the equations, then the models are misspecified and the results inaccurate. Fortunately, methods of mitigating selection biases and of properly specifying our models have been developed, and were used starting with Wave III research.

Indirect effects refer to the situation in which a variable operates through some other factor, rather than directly. For example, using 1971 data from Chicago, Lizotte (1978) found that the defendant’s race and occupation indirectly influenced sentencing through their effects on bail status. That is, blacks and persons in lower occupational strata were more likely than whites and persons in higher prestige occupations to be detained pending trial, and detention increased the length of the prison sentence. Similarly, LaFree (1985) examined 1976-1977 court processing data for whites, blacks, and Hispanics in Tucson and El Paso. He did not find evidence of discrimination in Tucson, but in El Paso,
ethnicity had an indirect effect operating through bail status. Also, being Hispanic was the single best predictor of guilty verdicts in El Paso. While Lizotte and LaFree were unable to control for income (since court records rarely include economic data), they argued that economic status may help explain why minority defendants and laborers received less favorable pretrial release outcomes.

Another type of indirect effect is what has come to be called cumulative disadvantage. This refers to a situation in which race/ethnicity has small, and often statistically nonsignificant, effects on decision making at various stages of the process (e.g., arrest, prosecution, conviction, sentencing, and parole). But, as the person moves through the system, these add up to substantial, and often statistically significant, disparities in processing and outcomes for different social groups.

For example, based on data from the period 1970-1976 and supplemented with findings reported by Hall and Simkus (1975), Bynum (1981) showed that Native Americans were sent to prison for offenses for which whites received nonprison sanctions. When whites were sent to prison, their court-imposed sentences were longer than those for Native Americans. But, parole boards compensated by releasing whites when they had served shorter parts of their sentences than Native Americans. Thus the discrimination was double-edged, and the disparity accumulated. Similarly, Spohn, Gruhl, and Welch (1981) found, for the period 1968-1979, that race operated indirectly through case processing variables to influence both the decision to incarcerate and the length of the prison sentence. Their work suggests that in borderline cases where either a long term of probation or short prison sentence is appropriate, judges accord whites the greater leniency, granting them probation while blacks go to prison (1981, p. 85).

Race/ethnicity has also been shown to interact with other factors to influence sentencing jointly. This means that while “main” effects may not be found, the effects of other factors vary systematically, depending on the defendant’s race/ethnicity. Interaction effects can be assessed in either of two ways. First, a new variable can be created by multiplying together the values for the original variables suspected of interacting. This new variable is then added to the equation and its effect estimated. Second, separate models can be estimated for each group (e.g., for blacks and whites, or males and females) to determine whether the decision-making process varies in fundamental ways for members of different social groups. The latter procedure allows the effects of all variables in the equation to differ for the two groups, and the differences
can be tested for statistical significance. The choice of technique depends upon whether just one or a few factors are hypothesized to interact, or whether the entire process is thought to operate differently for members of various social groups. Both types of interactions are evident in the following illustrative examples.

Using 1974 data from Washington D.C., Albonetti (1985) found that blacks received longer sentences than did whites. In addition, she observed that race interacted with bail status to affect sentencing, further disadvantaging blacks. These findings closely resemble Lizotte's (1978) study discussed above, in which race and occupation influenced sentencing indirectly through bail status. Paralleling these findings, Burke and Turk (1975) found that sentencing in Indianapolis in 1964 was influenced by interactions among race, occupational status, and type of offense, and among race, age, and prior incarceration, leading them to conclude that "the race effect may be masked by its complex relations with other factors" (1975, p. 328). Spohn, Welch, and Gruhl (1985) further suggest that failure to examine the interaction of gender and race can result in misleading findings. They note that sentencing for black women resembled that for white men in a northeastern city between 1968 and 1979, and interpret this to mean that not all women are treated equally paternalistically, and that black men receive the brunt of racial discrimination. Finally, Farnworth and Horan (1980) found interaction effects that also suggest cumulative disadvantage. They observed that separate equations for blacks and whites were required to specify properly the processes by which decisions surrounding bail, conviction, type of sentence, and sentence length were reached for felony cases in North Carolina between 1967 and 1969.

While these findings present a somewhat disjointed picture of when and how differential treatment occurs, one pattern that has become accepted even by many in the "no discrimination" camp (e.g., Kleck, 1981) is devaluation of nonwhite victims. That is, injury to a white victim is dealt with considerably more harshly than injury to a minority victim. For example, using 1974-1976 data, Myers (1979) demonstrated the indirect influence of the racial composition of the victim-offender dyad on sentencing. This effect was mediated by the probation officers' recommendations, with blacks who victimized other blacks treated most leniently. Typically, however, the greatest harshness occurs when the offender is black and the victim white. For instance, LaFree (1980a) found a direct effect of the victim-offender dyad in his 1970-1975 data from a midwestern city, with black men who raped white women...
sanctioned most harshly at every stage of court processing. He interpreted this as a consequence of sexual stratification by race, where violation of women who were the “property” of white men was treated quite severely, and this severity was further aggravated when the offense crossed racial lines.

Studies that found indirect, interaction, and/or cumulative effects of race/ethnicity on sentencing were based on data from a time during which popular and judicial conceptions of race and ethnicity were undergoing marked changes. Also, the research designs and analytic techniques used by Wave III researchers reflected major improvements in social science research. These factors might explain some of the diverse findings. In a few cases (e.g., Albonetti, 1985; LaFree, 1985), main or direct effects of race/ethnicity were found. Such effects are indicative of overt discrimination. Other studies did not find main effects, but report interaction or indirect effects of race/ethnicity with other variables. Such forms of disparity still reflect a bias, but it is a more subtle, rather than overt, form of discrimination. As Feyerherm concluded from his research on juveniles, “while there is not evidence of blatant discrimination in these data, there is a suggestion of accumulations of discrimination which collectively may have the same results” (1981, pp. 142-143).

Thus the weight of the evidence on the key question of whether the overrepresentation of minorities in prison was due to their greater proportional involvement in crime or to biases in their administrative processing began to shift toward the latter interpretation. Nevertheless, the data sources, and thus the analyses that could be conducted, were limited because the decision to record data on certain factors and not others was made by the judiciary, rather than by the researchers themselves. This potential source of bias became even more salient during Wave IV, the era of determinate sentencing.

*Wave IV (data from late 1970s-1980s, conducted in 1980s)*

We are still in the midst of the fourth period of research to be discussed, and research findings are just beginning to emerge. While analytic techniques continued to improve and data collection became increasingly systematic, no major methodological breakthroughs signaled the transition to this fourth wave. Rather, it was the initiation of a policy change to determinate sentencing that distinguishes research
during this period from its predecessors. The first states enacted determinate sentencing statutes in the mid-1970s, and additional states are still passing them.

The determinate sentencing debate is widespread and complex. From the various discussions, a picture emerges in which the call for fixed sentencing was initiated by a liberal and radical reform agenda charging that the rhetoric of rehabilitation hid repressive social control. Reformers sought to advance the interests of prisoners through short, fixed, sentences and reform of substantive law. These reforms were co-opted by conservatives in the early 1970s when the liberal and radical coalitions, and the social movements that supported them (e.g., the civil rights and anti-Vietnam War movements), faltered in the face of a deteriorating economy, unemployment, prison riots, and reported increases in urban street crime (see Greenberg and Humphries, 1980; Irwin, 1980; Greenberg, 1983; Humphries, 1984; Reiman and Headlee, 1981; Von Hirsch, 1976). The conservatives, like the liberals and radicals, indicted the rehabilitation model and the widespread discretion it engendered. Unlike the liberals (who saw its arbitrariness as an abridgement of rights) and radicals (who viewed it as a repressive expansion of social control), conservatives viewed rehabilitation as too lenient. At the same time that rehabilitation was losing its intellectual legitimacy, it also lost its popular support. Legislators were confronted with a system that simply did not seem to work, and were charged by their constituents and law enforcement lobbies with the task of quickly reducing urban street crime.

Under the new determinate sentencing statutes that arose, legislatures retained a portion of what had been judicial discretion. In addition to mandating presumptive sentences and any enhancements, they set guidelines and criteria stipulating how other actors in the system should use their discretion. These guidelines severely constrained the discretion of judges and parole boards, though judges were still relatively free to decide when to grant or withhold probation, hand out concurrent or consecutive sentences, and use the aggravating and mitigating circumstances loophole to alter the presumptive sentence.4

Nevertheless, most of the discretion shifted further behind the scenes to the prosecutor. Since the sentence was prescribed for each offense, the only way to substantially alter the sanction was to change the charge. Plea bargaining thus became exceedingly important. However, LaFree (1980b), Petersilia (1983), and Zatz and Lizotte (1985) have shown that cases involving black offenders are less likely to be resolved through
guilty pleas than are cases involving white offenders, with the latter two studies conducted in a determinate sentencing state. Whether the racial disparities found are the result of defendant preferences or bias on the part of prosecutors is still unclear, and raises questions about the quality of the deals being offered to white and minority defendants. In addition, language barriers place Hispanics (and others for whom English is not the primary language) at a disadvantage if the benefits and implications of pleading guilty rather than going to trial are communicated in subtle ways requiring knowledge of the multiple meanings and intricacies of the English language.

One of the most comprehensive studies during this period was Petersilia’s (1983) analysis of sentencing for whites, blacks, and Hispanics. Using the 1978 Rand Inmate Survey for California, Michigan, and Texas to supplement 1980 OBTS data for California, she examined disparities in the decision to proceed with felony prosecution, the type of sentence, the length of court-imposed sentence, and the length of sentence actually served. Some differences arose across states in the effects of race/ethnicity on these various outcomes, but generally Petersilia found that nonwhites convicted of felonies were more likely than whites to receive prison sentences, and these sentences were longer than those handed down to whites.

In my earlier research using California OBTS data for felony arrests in the years immediately preceding Petersilia (1977-1979), I found that the factors that can legally enhance or mitigate sentence lengths (e.g., prior record) were invoked differentially, depending upon whether the defendant was white, black, or Chicano (Zatz, 1984, 1985). Race/ethnicity also interacted with the size of the jurisdiction in influencing police and prosecutorial decision making (Hagan and Zatz, 1985). In comparison with whites, we found that blacks and Chicanos (but especially blacks) in small cities were repeatedly arrested and then quickly released by the police in the three-year period studied. When the police did not release minority suspects, the prosecutor often denied the case due to insufficient evidence. Since the police did not have sufficiently strong cases to hold the suspects, but then soon after release would rearrest them, this pattern can be interpreted as harassment of minorities. This pattern is particularly interesting because the existence of a lengthy prior record can be legally invoked to increase sentence lengths, but at least in California, it has been used primarily against Chicanos.
Finally, Miethe and Moore (1985) analyzed sentencing and presentence decisions in Minnesota before (1978) and after (1980-1981) implementation of Sentencing Commission Guidelines to assess whether or not the determinants of these outcomes changed over time. They found little change overall in the importance of socioeconomic characteristics on decision making over time, suggesting that neutrality in sentencing has not been displaced to nonregulated sentencing decisions (e.g., charge bargaining). However, they found indirect effects of race on sentencing decisions, operating through prior criminal history and use of a weapon, leading them to conclude that under determinate sentencing social and economic biases in decision making “are slightly more subtle, but no less real” (1985, p. 358).

It is difficult to critique research during this fourth wave midstream, but a few gaps in the literature are beginning to emerge. First, although investigations by Bynum (1981) and Spohn, Gruhl, and Welch (1981) suggest that social groups differ in their likelihood of receiving sentences to probation, the question of who gets probation and who gets prison has not yet been explored adequately. Second, researchers are only now starting to return to questions raised fifteen years ago by Quinney (1970), Chambliss and Seidman (1971), and others who argued that cases enter the system in a biased fashion. While some of their assertions about the gatekeeping of the criminal justice system appear conspiratorial and instrumentalist, the still unresolved question of institutionalized bias has since been reframed in more structural terms (e.g., Greenberg, 1977; Burns, 1982; Chambliss and Seidman, 1982; Michalowski, 1985). It is to the various sources of bias that we now turn.

**SOURCES OF BIAS**

A clearer understanding of racial/ethnic bias in sentencing requires that we step back from the research findings for a moment and address two questions: (1) Are our research designs inadvertently biased against findings of discrimination? and (2) Are court processing and decision making systematically biased due to institutionalized discrimination?

**Bias in Research Methodology**

Coincident with widespread determinate sentencing reforms, the increased use of computers has made longitudinal tracking systems
(e.g., OBTS, PROMIS) more common. Whether the computer revo-
lution stimulated development of tracking systems or simply facilitated
their implementation, a computerized data base that tracks defendants
as they repeatedly traverse the system is useful, perhaps even necessary,
for implementation and evaluation of determinate sentencing. These
systems necessitate collection of certain data for each defendant
processed. But, some interesting variables are frequently omitted,
leading radical criminologists to question data collection and coding
decisions. For example, the defendant's income is typically not recorded,
and so is unavailable to researchers. Similarly, California stopped
recording information on the type of attorney in 1978, shortly after its
new determinate sentencing statute came into effect (July 1977). Failure
of courts to collect and record such information means that researchers
cannot test for class-based disparities in case processing and sentencing.
Additional variables that are often not recorded but that would be
useful for research purposes include the defendant's occupation and
education and the victim's race/ethnicity, gender, and social class.

Coding decisions can also be problematic. For example, the coding of
race/ethnicity is often unclear and inconsistent. Typically, it is coded as
white versus nonwhite (with all nonwhites arbitrarily lumped together)
or white versus black (with all others excluded from analyses). As Gruhl,
Welch, and Spohn (1984), Zatz (1984, 1985), and LaFree (1985) have
shown, blacks and Hispanics are processed in different ways, and these
differences will be obscured if all nonwhites are collapsed into one
category. When race is broken down beyond white-nonwhite, the
nonwhite codes are not systematic; sometimes the defendant is asked his
or her ethnicity, other times the determination is made by court officials
based on primary language, surname, or physical appearance. Since
sentencing researchers rely almost exclusively on court data, data
collection and coding decisions will inevitably shape research findings
by determining the range of questions that can be addressed.

In a rather provocative paper, Myers (1984, p. 5) claims that
sentencing research has "failed to tackle squarely" the problems of the
measurement of discrimination. His assessment of the weaknesses of
traditional analytic techniques is correct, but his framing of the problem
leads us astray, particularly where he asks whether racially biased
punishment is "efficient" for reducing recidivism. Essentially, he argues
for use of a methodology in which "residual discrimination" is
measured, based on average differences between racial groups. This
methodology, which is borrowed from labor economics, certainly
improves upon simple regression estimates of main effects, but it ignores the problems of selection bias and specification error. Moreover, it represents an attempt to measure the exact amount of discrimination, without ever considering its various manifestations and forms.

It may well be the case that research has become bogged down by efforts to distinguish between discrimination, differential treatment, and disparity. Where findings of differences in the processing and outcomes to which members of different racial/ethnic groups are subjected are substantial, significant, and repeatable, however, distinctions of this sort may be unnecessary. A more useful approach might be to focus on whether overt, subtle, or no racial/ethnic biases exist, and why. By overt, I refer to main or direct effects of race/ethnicity (or gender or class) on court processing and sanctioning. Subtle forms of bias exist where membership in a particular social group influences decision making indirectly or in interaction with other factors, with the outcome favoring one group over another. Such biases are no less systematic or harmful than overt bias; they simply differ in form. They have become institutionalized, and thus are less glaring and harder to find. As a consequence, research that tests only for main effects (i.e., overt bias) and does not investigate all of the possible manifestations of discrimination may erroneously conclude that discrimination does not exist when, in fact, it does.

Other Sources of Bias in Court Processing and Decision Making

Our stereotypic perceptions of who and what is threatening rest on the fear of immediate, visible danger. Yet the visibility of danger is to some extent socially conditioned. That is, we learn to fear, and to actively guard against, certain threats (e.g., street crime) and not others (e.g., offenses occurring in the privacy of one’s home or office). In addition to learning what and where to fear, we also learn whom to fear. As Lemert and Rosberg (1948), Swigert and Farrell (1977), Poole and Regoli (1980), and Balbus (1973) have shown, minority members are stereotypically perceived as more threatening to society than are whites.

Determinate sentencing provides a set of rules for calculating the appropriate sanction for a given offense, as well as aggravating and mitigating circumstances and the range within which they can lengthen or shorten the sentence; all presumably independent of stereotypic images of who constitutes a threat. The indicators of "aggravating
circumstances” and the factors invoking sentence enhancements, however, are based on our socially learned fears of persons using guns, inflicting great bodily injury, or who are “habitual” criminals. These fears do not typically extend to such harmful acts as corporate crime or violence against women behind the gates of middle- or upper-class homes. Such acts may be injurious and even fatal to thousands of people and may occur habitually, but, if defined as crimes and prosecuted, they are not accorded harsh statutory sentences. On the contrary, persons convicted of such acts may benefit from the “mitigating circumstances” clause that, although formally applicable across all crimes and all offenders, by its very nature tends to favor the middle-class offender.

Social groups differ in their abilities not only to shape and define deviance, but also to mobilize resources once involved in the legal system as defendants (Chambliss and Seidman, 1971; Troyer and Markle, 1982). The more favorable outcomes tend to go to those who have the greatest social, political, and economic resources, while the lack of resources needed to combat the legal system from a truly adversarial position disadvantages the poor and minorities. For example, decisions to release defendants on their own recognizance or on unsecured bonds are based primarily on the strength of community ties, determined largely by steady employment and home ownership. Such indicators tend to favor middle-class whites over poorer whites and minorities. Also, financial resources become important where attempts at acquittals or dismissals require delaying case processing until the evidence stales or public interest in the case dissipates (see, for example, Nardulli, 1978). Finally, the wealthy executive who is “an upstanding pillar of the community” may be viewed as having “suffered enough” if conviction results in loss of position, wealth, or reputation, but these same losses are apparently not sufficient for the poor and minorities who fill our prisons. Thus the factors that serve to differentiate those receiving lenient treatment from those given the full measure of the legal system’s available sanctions are not class or race-neutral.

**LEGITIMACY, FORMAL RATIONALITY, AND INSTITUTIONALIZED BIAS**

The increased watchdogging of the courts under determinate sentencing makes overt discrimination unlikely. This does not, however, necessarily imply that discrimination no longer occurs. While that is one
possibility, the evidence presented here suggests that racial/ethnic bias has become institutionalized in more subtle ways, and occurs earlier in the system, so that it is no longer caught by the guardian of determinate sentencing.

The legal system is a bureaucracy that increasingly is becoming what Weber (1968) has called “formal rational.” Following Weber, the formalization of the legal system along rational lines does not occur in a social, political, or economic vacuum:

Formal justice guarantees the maximum freedom for the interested parties to represent their formal legal interests. But because of the unequal distribution of economic power, which the system of formal justice legalizes, this very freedom must time and again produce consequences which are contrary to the substantive postulates of religious ethics or of political expediency [Weber, 1968, p. 812, my emphasis].

Also:

It is precisely this abstract character which constitutes the decisive merit of formal justice to those who wield the economic power at any given time and who are therefore interested in its unhampered operation. . . . Among those groups who favor formal justice we must include all those political and economic interest groups to whom the stability and predictability of legal procedure are of very great importance. . . . Above all, those in possession of economic power look upon a formal rational administration of justice as a guarantee of “freedom” [Weber, 1968, p. 813].

More concretely, the legal system receives greater legitimacy through formal rationality and the bureaucratization that goes with it. It is seen as meeting out justice fairly and blindly. Yet as Marxist scholars have long argued and the evidence presented here indicates, the factors that go into the decision-rules may themselves be biased, and, in following the rules, this bias necessarily continues into the final sanctioning decisions.

When fixed sentencing reforms were initially suggested, law makers and law enforcers were faced with an increasingly vocal and organized minority community inside and outside of prison that accused the police and courts of discrimination. Liberal whites concerned about what they perceived to be injustices perpetrated against minorities joined in, lending their political support and intellectual credibility to the movement. Before this movement became effectual, however, the
political climate grew increasingly conservative, and the proposed fixed sentencing reforms were co-opted by conservative proponents of the "justice model" (Greenberg and Humphries, 1980; see also Greenberg, 1983 and Humphries, 1984). As a consequence of, and in response to, these political shifts, the legislature and the judiciary had to adapt new strategies if they were to maintain a semblance of legitimacy. One such strategy was determinate sentencing; a practice that, at first glance, appears fair and equitable. As Balbus concluded from his analysis of the legal system's response to the major ghetto riots of the 1960s:

Although court authorities in the liberal state may temporarily disregard the constraints of formal rationality and organizational maintenance, they may not ignore them for very long or without suffering serious consequences [Balbus, 1973, p. 240].

CONCLUSIONS

Court officials and researchers of the courts have expressed long-term concern over the possible existence of discriminatory sanctioning on the basis of race/ethnicity, class, and gender. A plethora of research has been published, without arriving at any definitive answers. Findings over the years have been contradictory, and the quest for answers seen as elusive. With each wave of research, methodological flaws in its predecessors have been discovered. Overall, however, research has consistently unearthed subtle, if not overt, bias.

Contrary to the dictates of the positivist approach to scientific inquiry, our data often determine our methods of analysis, and our choice of methodology often constrains, and perhaps even determines, our theories and research questions. One consequence of this is that our data and methodologies will be biased toward findings of no discrimination if, as the research discussed here suggests, the legal system and the bases for legal decision making are themselves biased. In part, this bias results from socially conditioned fears and prejudices that have become institutionalized in the very nature of who and what are defined as harmful; definitions that arise within a social context in which resources are unequally distributed across social groups.

A few caveats are in order. First, this is not a comprehensive review of all studies of race/ethnicity and sentencing. As was noted earlier, several such reviews already exist (e.g., Hagan, 1974; Kleck, 1981; Hagan and
Bumiller, 1983; Klepper, Nagin, and Terney, 1983). Instead, the studies reviewed were chosen for illustrative purposes, and as representative of research conducted during each of the four periods. Second, it would be misleading to suggest that race/ethnicity is the major determinant of sanctioning. Other factors (e.g., type of offense, number of prior arrests and convictions, plea bargaining, pretrial detention) typically explain larger amounts of variation in sentencing. But, race/ethnicity is a determinant of sanctioning, and a potent one at that. Third, gender has not been discussed except as it interacts with race/ethnicity, and age is noticeably absent from this review. While one’s race/ethnicity, gender, and usually class are constant throughout an individual’s lifetime, age is always changing, making it a qualitatively different type of social attribute. Also, the juvenile court traditionally has followed substantive rational rather than formal rational justice. Nevertheless, the same trend toward finding subtle interaction effects of race is suggested by recent studies of juvenile court processing (e.g., Feyerherm, 1981; Dannefer and Schutt, 1982; Thornberry and Christenson, 1984; Bortner and Reed, 1985). Finally, this article does not even begin to develop a theory of social harm, nor does it undertake the task of defining “justice.” These are necessary tasks at this juncture, and must be informed by the biases documented here.

In response to the varied pressures facing them, the “state managers” of justice have established mechanisms for controlling “problematic” populations. The currently used mechanisms (e.g., determinate sentencing) are less blatantly biased than were their predecessors, and are cloaked with the legitimacy accruing from formalized rules. This does not mean, however, that the end result has been a change in our prison population. Minority and lower-class males still overwhelmingly constitute the bulk of the prison population. It is just the path by which they are sent to prison that has changed, not the end result. The road to this end is more subtle now. Differential processing and treatment is now veiled by legitimacy, but it is a legitimacy in which certain biases have become rationalized and institutionalized. Stereotypes of who is threatening, and disparities in available resources with which to combat the legal system from a truly adversarial stance, have not dissipated.

Consequently, discrimination has not gone away. It has simply changed its form to become more acceptable. Increased formal rationality of the legal process has caused discrimination to undergo cosmetic surgery, with its new face deemed more appealing. The result is bias in a different form than it showed in the past. It is now subtle rather
than overt. But, to borrow and twist an expression from Weber (1958), the “iron cage” still locks primarily minorities and lower-class whites behind its bars.

NOTES

1. Although Judge Chargin’s statement was made in 1969 (thus falling into the time frame covered by the second wave), it more appropriately reflects the sentiment at the end of Wave I.

2. This is, of course, an empirical question. It would be interesting to see whether similar analyses (i.e., crosstabular, lacking control variables) using contemporary data would show similar results. If there has been a real change in discrimination, then results from contemporary data should yield fewer differences between groups than in the past. This would, however, only constitute a partial test of discrimination; differences could still exist in the processing of various groups, but they might only be visible in interaction with “legally relevant” variables.

3. Sample selection bias can also be viewed as falling under the general rubric of specification error. They are treated as separate issues here for conceptual convenience.

4. Under determinate sentencing, legislatures generally set three sentences: the presumptive sentence, a shorter term for mitigating circumstances, and a longer term for aggravating circumstances. Judges must typically set down in writing their reasons for invoking the mitigating or aggravating clauses. However, as research on mandatory sentence enhancements for gun offenses has shown (e.g., Heumann and Loftin, 1979; Loftin, Heumann, and McDowall, 1983; Lizotte and Zatz, 1986), legislative mandates are not necessarily followed by court officials.

5. Longitudinal data aid in exploration of racial/ethnic biases. Since discrimination can accumulate both over time and across stages of the system, cross-sectional data can create a censoring problem by unrealistically carving a slice out of time, thus potentially distorting findings. For example, if we had looked only at one incident, our findings might suggest bias against whites. But, examination of a series of arrests showed a recurring pattern over time, with the same minority persons repeatedly arrested and released. This suggests that whites were not arrested unless there was a strong case against them, while the same consideration was not extended to minorities. Findings by Hepburn (1978), Petersilia (1983), and others lend further credence to this interpretation.

6. A recent study by Myers and Talarico (1986) examined both the likelihood of receiving a prison sentence and the length of prison sentence for blacks and whites in Georgia, using data for the period 1976-1982. Using sophisticated analytic techniques to control for selection bias, they found both main and interaction effects of race, some of which disadvantage blacks, others whites. Their findings suggest that where relatively recent data from a nondeterminate sentencing state are used, the racial composition of the county and the type of offense are the most important determinants of racial disparities in sentencing.

7. An analogy can be made to employment litigation. Although this appears to be changing under the Reagan administration, for many years “disparate impact” of a policy was actionable. That is, if a hiring or promotion policy negatively affected some protected group, it was seen as deserving redress.
8. The Minnesota and Pennsylvania Sentencing Commission guidelines include certain white-collar offenses in their lists of potentially aggravating circumstances, presumably to address the problem of inordinate leniency for middle- and upper-class offenders. Nevertheless, "aggravating circumstances" still consist primarily of factors related to street-crime, and the presumptive sentences tend to be longer for crimes involving personal injury (e.g., robbery with injury, aggravated assault with serious injury) than for general theft offenses. Since the former category of offenses are more likely to involve lower-class and minority offenders than are the latter, the result may be, as Irwin (1980, p. 226) suggests, "sentences equally as disparate and discriminatory, but even longer."

REFERENCES


