

Racial Discrimination in the Criminal Justice System

❖ Ethical Background

It is generally agreed that discrimination based on racial or ethnic origin is morally wrong and a violation of the principle of equality. The equality principle requires that those who are equal be treated equally based on similarities, and that race not be a relevant consideration in that assessment (May and Sharratt 1994: 317). In other words, it is only possible to justify treating people differently if there exists some factual difference between them that justifies such difference in treatment (Rachels 1999: 94). *Equality* is a nonspecific term that means nothing until applied to a particular context. Thus, in a political context, equality means equal access to public office and equal treatment under the law, and equal treatment extends to equality in terms of job hiring, promotion, and pay.

Race refers to groups of persons who are relatively alike in their biological inheritance and are distinct from other groups (American Anthropological Association 1997: 2). *Ethnicity* is a cultural phenomenon referring to a person's identification with a particular cultural group (Hinman 1998: 403). However, race is socially constructed, and the notion that persons "belong" to a particular race was developed in the last century based on the belief that there was a biological basis for categorizing groups of people. Biologically, however, the term *race* has no meaning, yet society continues to give the notion meaning by using it as a social category. The notion of race gradually took hold in U.S. society when the institution of slavery reinforced the idea that one race could be inferior to another (Banks and Eberhardt 1998: 58). In the United States, the law has had the effect of distributing benefits and burdens based on race, and the assignment of a person to a racial category has often, in the past, determined his or her rights and obligations (e.g., in the "Jim Crow" laws passed at the end of the Civil War).

Racism in its most general sense can be defined as "social practices which (explicitly or implicitly) attribute merits or allocate values to members of racially categorized groups solely because of their 'race'" (Zatz and Mann 1998: 3). There are at least three aspects to racism: personal prejudice; ideological racism, where culture and biology are used to rationalize and justify the superior position of a dominant culture; and institutional racism, where the policies and practices of institutions operate to produce systematic and continuing differences between racial groups (p. 4).

One aspect of institutionalized racism has been termed *petit apartheid*. This concept includes daily informal or hidden interactions between police and minorities, such as stop-and-question and stop-and-search law enforcement practices, which may or may not result in an arrest and consequent entry into the criminal justice system (Zatz and Mann 1998: 4). The notion of *petit apartheid* has recently been explored both theoretically and in terms of those activities that might fall within its definitional scope (Milovanovic and Russell 2001). The focus of *petit apartheid* appears to be attitudinal factors that influence policing and other decisions within the system, that is, “culturally biased beliefs and actions” extending, in the view of Daniel Georges-Abeyie (2001: x), to insults, rough treatment, and lack of civility faced by black suspects, the quality and objectivity of judicial instructions to a jury when an African American is on trial, and other discretionary acts within the system.

Petit apartheid contrasts with grand apartheid. The latter encompasses overt racism. Studies on racism within the criminal justice system have been critiqued for giving undue emphasis to overt racism and ignoring *petit apartheid* (Georges-Abeyie 2001: x). This chapter aims to explore *overt racism* within the criminal justice system. Issues such as racial profiling and racial slurs, which appear to constitute an aspect of *petit apartheid* as well as being discriminatory practices, have already been discussed in Chapter 2.

❖ Historical Context

African Americans have suffered discrimination on grounds of race, initially through the system of slavery, and then through a pattern of exclusion and segregation, both informal and formal, in the shape of legislation and court decisions that have historically endorsed overt racial discrimination. From the time of the inception of slavery in the early 17th century until 1865, slaves were considered the property of their masters based on a view that they were naturally unequal and inferior people. They were subjected to slave codes, which prohibited the possession of any rights or freedoms enjoyed by whites; experienced brutal and inhumane treatment of an extralegal nature; and were exploited for their labor. Following the Civil War, amendments to the Bill of Rights prohibited slavery and granted all persons, regardless of race, a right to equal protection. However, despite these legal statements of freedom, patterns of discrimination persisted after the war because many states passed Jim Crow laws, which had the effect of maintaining forms of discrimination in legal, social, and economic forums. For example, African Americans were denied the right to vote or to enter into contracts, and the doctrine of *separate but equal* was applied to keep the races separate.

The courts continued to enforce Jim Crow laws until the mid-1900s, and African Americans were also subjected to extralegal treatment in the form of physical assaults and practices such as lynching, where police were often present. About 3,000 African Americans were lynched between the mid-1800s and the early 1900s (B. Smith 2000: 75), and those performing the lynchings were seldom prosecuted. During the 20th century, legal rights were accorded to African Americans and have been protected by the courts. In the landmark case of *Brown v. Board of Education* in 1954, the Supreme Court struck down the “separate but equal” doctrine, and the civil rights acts passed in the mid-20th century attempted to restate and reinforce a policy against segregation.

Today, the black community in the United States is diverse, comprising, for example, Jamaicans, Nigerians, Ethiopians, Somalis, and other African and West Indies nationalities, each with its own culture distinguishable from that of African Americans. Nevertheless, despite this heterogeneity, racist attitudes continue to be manifested based on skin color.

The history of Latinos in the United States has been one of contention with the Anglo American culture. Spanish colonies were established in the United States in the late 16th century, predating the Anglo American presence; however, in 1847, Mexico lost approximately half of its territory to the United States. In recent times, it has been common to associate Latinos with the

issue of immigration, and Mexicans in particular are constructed as an illegal immigrant group (De Uriarte in Alvarez 2000: 88). Racist stereotyping of Latinos depicts them as sneaky, lazy, and thieving (Levin in Alvarez 2000: 88), and law enforcement practices and the criminal justice system have been shown to collaborate in discrimination against Latinos in the form of police harassment of Mexican Americans (Turner in Alvarez 2000: 88).

It is important to appreciate the heterogeneity of the Latino population in the United States, because issues affecting Mexican Americans may differ from those impacting Puerto Ricans, Cubans, or immigrants from Central America. For example, Puerto Ricans are the most economically disadvantaged group (Myers et al. in Alvarez 2000: 89), whereas Cuban immigrants to the United States have tended to come from the middle class, be well educated, and possess significant economic resources. Nevertheless, like African Americans and other black groups, the heterogeneous Latino population tends to be viewed as homogeneous.

American Indians and Alaska Natives are the only indigenous groups in the United States. The history of contact between American Indians and Anglo Americans is replete with acts of violence against American Indians and with the dispossession of their lands. Alaska Natives, as a colonized and marginalized people, have experienced and continue to experience severe trauma generated by social change, with high rates of suicide, alcohol abuse, and a disproportionate representation in the criminal justice system (see, e.g., Banks 2002; Brod 1975; Fienup-Riordan 1994; Kraus and Buffler 1979; Travis in Phillips and Inui 1986; Schafer, Curtis, and Atwell 1997). Similarly, American Indians continue to be disproportionately represented in arrest and incarceration data in those states where they are primarily located (see, e.g., Greenfeld and Smith 1999; Grobsmith 1994; Perry 2004; Ross 2000). Both groups suffer economic, educational, and social stereotyping, which is revealed in their treatment by the criminal justice system.

In terms of criminal victimization, blacks disproportionately commit and are victimized by violent crime. They are almost 7 times as likely as whites to be murdered and about twice as likely to be robbed, raped, or sexually assaulted (Banks, Eberhardt, and Ross 2006: 1177). Although they make up less than 13% of the population, in 2004 blacks were arrested for 47.2% of murders, 53.3% of robberies, 31.9% of rapes, and 32.7% of assaults (p. 1178). Blacks represented 45% of the incarcerated population in state and federal prisons in 2002 (Harrison and Beck 2003) and more than 40% in 2004 (Harrison and Beck 2005). In 2001, American Indians represented 2.4% of all offenders entering federal prison and about 16% of all violent offenders in federal prisons (Perry 2004: 21), and they made up 0.9% of the total U.S. population in the 2000 Census (p. 1).

❖ Is There Racial Discrimination in the Criminal Justice System?

One report suggests that racial discrimination does occur at some points in the criminal justice system. Following the Rodney King incident, the report of the Independent Commission on the Los Angeles Police Department (also called the Christopher Commission) (1991) found that there was excessive use of force by LAPD officers and that this was compounded by racism and bias. One quarter of the 960 LAPD officers surveyed by the commission agreed that officers held a racial bias toward minorities, and more than one quarter agreed that this racial bias could lead to the use of excessive force. The commission also reviewed radio transmissions within the LAPD, which revealed disturbing and recurrent racial remarks, often made in the context of discussing vehicle pursuits or beating suspects. Testimony from witnesses depicted the LAPD as an organization whose practices and procedures tolerated discriminatory treatment, and witnesses repeatedly testified about LAPD officers who verbally harassed minorities, detained African American and Latino men who fit generalized descriptions of subjects, and employed invasive and humiliating tactics against minorities in minority neighborhoods. As well as racism in relations with the public, racial bias was also reflected in conduct directed at fellow officers who were members of

racial or ethnic minority groups. These officers were subjected to racial slurs and comments in radio messages and to discriminatory treatment within the department.

In another report, that of the New York State Judicial Commission on Minorities (1991), a panel of judges, attorneys, and law professors found that “there are two justice systems at work in the courts of New York State; one for whites, and a very different one for minorities and the poor” (p. 1). The panel found inequality, disparate treatment, and injustice based on race. It reported that many minorities received “basement justice” in that court facilities were infested with rats and cockroaches, family members of minorities were often treated with disrespect and lack of courtesy by court officers, and racist graffiti appeared on the walls of court facilities. The panel also concluded that minority cases often take only 4 or 5 minutes in court, suggesting a form of assembly line justice, and that black defendants outside of New York City frequently have their cases heard by an all-white jury.

To determine whether racial discrimination exists within the criminal justice system, criminologists have conducted research studies that have examined the *major decision points* within criminal justice systems in the United States. Most researchers agree with William Wilbanks (1987) and Joan Petersilia (1983) that although there is racial discrimination within the criminal justice system, the system itself is not characterized by racial discrimination; that is, discrimination is not systematic (Blumstein 1993; DiIulio 1996; Russell-Brown 1998; Tonry 1995). There are, however, individual cases occurring within the system that appear to demonstrate racial discrimination at certain decision-making points (Wilbanks 1987). According to Petersilia (1983), racial disparities have come about because procedures were adopted within the criminal justice system prior to any real assessment about the effect of those procedures on minorities. For example, she found that

although the case processing system generally treated offenders similarly . . . we found racial differences at two key points: Minority suspects were more likely than whites to be released after arrest; however, after a felony conviction, minority offenders were more likely than whites to be given longer sentences and to be put in prison instead of jail (p. vi).

Petersilia also suggested that “racial differences in plea bargaining and jury trials may explain some of the difference in length and type of sentence” (p. ix).

The contention that there is no systematic bias in the criminal justice system based on race has been challenged by other researchers who dispute this conclusion on a number of grounds (Russell-Brown 1998: 28). These include the fact that prior studies have assessed discrimination at a single stage in the system and have therefore been ineffective in detecting discrimination that might exist at other stages. For example, the finding that there is no racial disparity in sentencing within a system does not exclude the possibility of discrimination in other parts of the system. As already discussed, Georges-Abeyie (in Russell-Brown 1998: 32) has drawn attention to how research on racial discrimination in the system focuses on formal, easily observed decision-making points and fails to take account of more informal law enforcement action. He argues that this informal decision making determines who will be arrested and who will enter the system and that these encounters should be included in any assessment of whether the system operates in a discriminatory manner. If such informal action were to be included, he suggests that a system of petit apartheid would be revealed that would demonstrate that African Americans are consistently treated in a discriminatory manner as compared to whites.

Another criticism is that official statistics on race and crime do not provide a proper basis for research on discrimination in the justice system, because the data collection procedures make these statistics unreliable and distort analysis derived from them (Knepper 2000: 16). This argument points out that the primary classification scheme employed in crime statistics designates four official races—white, black, American Indian/Alaskan Native, and Asian and Pacific Islander—as well as two official ethnic groups, “Hispanic origin” and “not of Hispanic

origin.” In contrast, the 1990 census includes 43 racial categories and subcategories. If race is made the focus of inquiry, there is an assumption that races constitute discrete groups, but in fact, the races in America are not monolithic. For example, the designation “black” fails to capture the most significant aspects of what it means to be black in the United States, because the designation “black” includes persons of Caribbean, African, and Central and South American origin, and within each of these groups are populations distinguished by culture, language, and shades of color (p. 19). Paul Knepper argues that no objective statements can be made based on these race categories, which are essentially political rather than social definitions of races derived from a legal ideology of separate races grounded in the institution of slavery (p. 23).

In relation to the juvenile justice system, it has been argued that any discrimination within that system should be considered separately from the adult system for two basic reasons (Pope and Feyerherm 1990). First, a high level of discretion is permitted in the juvenile justice system, and this may tend to produce more discrimination. Second, because most adult offenders begin their contact with the adult system through the juvenile justice system, characteristics acquired in the juvenile system, such as a prior record, may influence their treatment in the adult system.

As to whether racial discrimination exists within the juvenile justice system, after a review of the literature, Carl Pope and William Feyerherm (1990) conclude that two thirds of the studies reviewed suggested evidence of direct or indirect discrimination against minorities, or a mixed pattern of bias, especially in the processing of juveniles through the system. Their survey also suggests there is evidence that race differences in outcome may seem to be minor at a certain decision-making stage in the system but that these differences have more serious implications as earlier decisions in the system move toward a final disposition. Third, Pope and Feyerherm state that although the relationship between race and juvenile justice decision making is complex, their analysis suggests that various factors do interact to produce racial differences in juvenile justice dispositions. Certainly, race seems to continue as a factor in responses to juvenile crime. Information collected by the organization Building Blocks for Youth (2000) revealed that African Americans represent 15% of the population nationwide, 26% of juvenile arrests, 44% of youth who are detained, 46% of youth who are judicially waived to criminal court, and 58% of youth admitted to state prisons.

In considering racial discrimination within the criminal justice system, researchers have isolated and examined various decision-making points, including arrest, bail, jury selection, conviction, and sentencing. These decision-making points will be considered in the following sections.

Police Encounters With Citizens and Police Arrest

Racial origin may sometimes influence police decisions about making an arrest. In the case of suspected juvenile offenses, research has shown that for minor offenses, police officers may take into account the demeanor of a juvenile in deciding whether to make an arrest (Black and Reiss 1970; Piliavin and Briar 1964). If the police perceive the suspected offender as showing them disrespect, this may increase the likelihood of an arrest. Along with racial origin, Douglas Smith (1986) found that the context of a particular neighborhood also influenced police decisions about arrest or use of force, because police were more likely to arrest, threaten, or use force against suspects in racially mixed or minority neighborhoods.

Research into how police use their powers against minorities, whatever may be the race of the officer, has been an important issue in policing research, and the approach has been to explore whether white officers treat black citizens differently than nonblack citizens (R. Brown and Frank 2006: 104). In one study of police employed by the Cincinnati Police Division between 1997 and 1998, where about 65% of the population was white and 35% black, researchers examined 614 police–suspect encounters during which 104 citizens were arrested. They discovered that about 18% of the white officer–suspect encounters ended in arrest compared to 15% of the black officer–suspect interactions. Further, male and juvenile suspects were

significantly more likely to be arrested than females or adults, and police were significantly more likely to arrest black suspects than white suspects (p. 118). They also found that citizens who show disrespect to the police increase their likelihood of arrest. Interactions involving black officers and black suspects were significantly more likely to result in arrest than interactions involving black officers and white suspects (p. 119). Thus, the authors suggest that black officers are more likely to use coercion with black citizens than white citizens. The authors are unable to offer any explanation for this differential arresting behavior other than that race seems to make a difference and that more research is required (pp. 120–121).

In considering the proportion of blacks involved in police shootings of criminal suspects, James Fyfe (1982) demonstrated that in New York City, blacks were more likely than whites to be shot by police, because they were disproportionately involved in armed incidents that involved shooting. In contrast, research in Memphis showed that blacks were no more likely than whites to be involved in armed incidents, but nevertheless, police shot disproportionately more blacks when they were fleeing. Fyfe concludes that police use of deadly force in Memphis is influenced by the race of a suspect.

In Seattle, a study of race and drug-delivery arrests revealed that most drugs, including powder cocaine and heroin, are delivered by whites, and that blacks are the majority delivering only one drug, namely, crack cocaine (Beckett, Nyrop, and Pfingst 2006: 129). However, 64% of those arrested for delivering drugs other than crack cocaine are black. The explanation suggested for this disparity is the law enforcement focus on crack cocaine and also the fact that the white drug markets in Seattle receive less attention from law enforcement than the more racially diverse markets in the city (p. 129). Thus, the researchers conclude, “Race shapes perceptions of who and what constitute Seattle’s drug problem” (p. 105).

Why have police in many states prioritized drug enforcement as a police function and engaged in repeated traffic stops to conduct drug searches? Some commentators have argued that the Comprehensive Crime Act of 1984 has been the cause of this high ranking enjoyed by drug enforcement. The reason is that this act permitted local police agencies to retain the proceeds from assets seized in drug-enforcement activity where federal and local police cooperated in the investigation (Mast, Benson, and Rasmussen 2000: 287). As Brent Mast, Bruce Benson, and David Rasmussen put it, “Entrepreneurial local police shift[ed] production efforts into drug control in order to expand their revenues” (p. 287). In fact, the Department of Justice went further than the act’s provisions, because it decided that local police could arrange for federal authorities to “adopt” local police forces’ drug seizures, even when federal agents were not involved in the investigation. Interestingly, drug arrests per 100,000 population in states with limits on the assets that local police could retain averaged 363 during 1989, while the arrest rate in such cases where police were able to keep seized assets averaged 606 per 100,000 (p. 289). Mast et al., after conducting an empirical study, found that where legislation permits police to keep assets seized in drug investigations raises the drug arrest rate as a proportion of total arrests by about 20% and drug arrest rates themselves by about 18% (p. 285).

Bail

For most offenses charged, prosecutors and judges have a wide discretion about whether defendants should be released on bail, and the courts may use factors such as dangerousness to the community and the possibility of flight in making bail decisions. Generally, the court looks at the employment, marital status, and length of residence in an area of the accused as an illustration of community ties, which may allow the court to conclude that the accused is unlikely to flee (Albonetti, Hauser, Hagan, and Nagel 1989).

Studies tend to show that race is not a factor in bail applications once an accused’s dangerousness to the community and prior history of appearance at trial are controlled for. However, race does relate to the decision to grant bail in other ways. For example, in a study of more than 5,000 male defendants, Albonetti et al. (1989) reveal that defendants with lower levels

of education and income were less likely to get bail and more likely to receive onerous bail terms. They also found that white defendants with the same education, background, and income as black defendants were more likely to be granted bail, and that in considering bail applications, a prior criminal record counted against blacks more than whites. However, in assessing the criteria for bail, dangerousness and seriousness of the offense were of greater weight for whites than for blacks. Overall, the study shows that under certain conditions, whites are treated more severely on bail applications but that, generally, white defendants receive better treatment. Samuel Walker, Cassia Spohn, and Miriam DeLone (2000: 135) note that it is impossible to guarantee that judges will refrain from taking race into account in determining applications for bail, and that the simple stereotyping of minorities as less reliable and more prone to violence than whites will likely result in a higher rate of bail denial regardless of any other assessed factors.

Jury Selection

Is there any evidence of racial discrimination in the jury selection process? Historically, laws have tried to entrench racial discrimination into the process of jury selection. In *Strauder v. West Virginia* (1880), the court struck down a statute that limited jury service to white men on the grounds that it violated the Fourteenth Amendment to the Constitution. However, this ruling did not prevent some states from attempting to preserve the lawfulness of an all-white jury by other means. For example, in Delaware, jury selection was drawn from lists of taxpayers, and jury members were required to be “sober and judicious.” Although African Americans were eligible for selection under this rule, they were seldom if ever selected, because the state authorities argued that few African Americans in the state were intelligent, experienced, or moral enough to serve as jurors (Walker et al. 2000: 156). The Supreme Court subsequently ruled this practice in Delaware as unconstitutional.

Since the mid-1930s, the Supreme Court has ruled on jury selection issues in a way that has made it difficult for court systems to practice racial discrimination in jury selection. For example, the Court has ruled it unconstitutional to put the names of white potential jurors on white cards and the names of African American potential jurors on yellow cards and then to supposedly make a random draw of cards to determine who would be summoned for jury duty (Walker et al. 2000: 157). Walker et al. argue that many states still practice discriminatory procedures in selecting jury pools. For example, obtaining the names of potential jurors from registered voters, the Department of Motor Vehicles, or property tax rolls seems to be an objective process, but in some jurisdictions, racial minorities are less likely to be registered voters, own automobiles, or own taxable property (p. 157). The effect, therefore, is to stack the jury pool with middle-class white persons and to marginalize minorities.

Prosecutors and defense lawyers are able to use peremptory challenges to excuse potential jurors without identifying any cause or explanation and without any accountability to the court, so it is therefore possible to employ peremptory challenges in the practice of racial discrimination in jury selection. According to Samuel R. Sommers and Michael I. Norton, such is the force of stereotypes concerning jurors of different races, especially in relation to judgments that are made on the basis of limited knowledge, under “cognitive load,” and under pressure of time (all factors present in a *voir dire*), that “the discretionary nature of the peremptory challenge renders it precisely the type of judgment most likely to be biased by race” (2008: 527). Initially, the Supreme Court was unwilling to restrict a prosecutor’s right to use peremptory challenges to excuse potential jurors on racial grounds, preferring to rely on the presumption that the prosecutor was always acting in good faith in making such challenges. However, the Court determined that it would intervene if a defendant could establish a case of deliberate discrimination by showing that eliminating African Americans from a particular jury was part of a pattern of discrimination in a jurisdiction. Not surprisingly, this stringent test has proved difficult to satisfy, because few defense lawyers possess information proving a pattern of discrimination. In 1986, the Supreme Court rejected this test, ruling that it was not necessary to establish a pattern to show discrimination and that a defendant need only bring evidence showing the prosecutor

had exercised his or her peremptory challenges on racial grounds. Once a prima facie case of discrimination has been made out, the state must explain why an African American has been excluded from the jury pool. Even so, Walker et al. (2000: 160) contend that judges have given the benefit of the doubt to prosecutors and have shown themselves willing to accept the prosecutor's explanations rather than make a finding of deliberate discrimination. Case Study 3.1, derived from a *New York Times* report, illustrates an alleged case of racial discrimination in jury selection.

Case Study 3.1 In Dallas, Dismissal of Black Jurors Leads to Appeal by Death Row Inmate

Thomas Miller-EI is an African American charged with shooting two white hotel clerks during a robbery in 1985. One of the hotel clerks died, and Miller-EI, age 50, is due to be executed by the State of Texas on February 21. He has asked the Texas Board of Pardons to commute his sentence and has appealed his case to the U.S. Supreme Court on the ground that the jury that convicted him was chosen using racial discriminatory standards that have been applied by the Dallas County district attorney's office in many cases. The district attorney's office opposes the appeal, arguing that there is no evidence of any racial discrimination.

The jury in the trial comprised nine whites, one Filipino, one Hispanic, and one African American. Three other African Americans were excluded from the jury by prosecutors, as were seven of eight other African Americans interviewed as prospective jurors.

Racial discrimination in jury selection is prohibited by the Constitution, and until 1986, to establish race discrimination, an accused had to meet a heavy burden of proof, because he or she had to show a pattern of discrimination. In 1986, in *Batson v. Kentucky*, the U.S. Supreme Court lowered the standard, determining that if the accused was able to show that the prosecution appeared to be using its peremptory challenges to jurors to exclude minorities, the trial judge could call for an explanation.

Miller-EI was convicted and sentenced 1 month before the *Batson* ruling, but the decision applies to his case retroactively. To date, both state and federal courts have upheld his death sentence, determining that no racial discrimination occurred during jury selection. Miller-EI's argument is that the courts considered only the number of challenges to jurors (10 out of 11 prospective African American jurors) and failed to consider other evidence showing that prosecutors in Dallas County had for years excluded blacks from juries as a matter of routine practice. This argument is supported by four former prosecutors whose terms of office cover the period from 1977 to 1989 and who confirmed that the Dallas County office did apply a policy of excluding blacks from juries. Further supporting this argument is a 1986 article in a local newspaper citing a 1963 internal memo in the district attorney's office advising prosecutors not to include "Jews, negroes, Dagos, Mexicans or a member of any minority race" as a jury member. Further, in the early 1970s, the prosecutor's office employed a training manual that contained advice on jury selection to the effect that a prosecutor should not include any member of a minority group because "they almost always empathize with the accused."

The *Dallas Morning News* has examined 15 capital murder trials from 1980 through 1986 and has revealed that prosecutors excluded 90% of African Americans qualified for jury selection. Nevertheless, the assistant district attorney in the Miller-EI case disclaimed any notion that he had challenged the 10 African American jurors on grounds of race. He claimed that he was trying to assemble the best possible jury and that his office had no policy of racial discrimination. Despite these claims, at least three of the potential African American jurors challenged in the Miller-EI case supported capital punishment and wanted to be on the jury.

SOURCE: Rimer 2002.

Conviction and Sentencing

In the aggregate, blacks tend to be convicted less than whites (Petersilia 1983; Wilbanks 1987), and according to Robert Sampson and Janet Lauritsen (1997), no consistent evidence exists of racial discrimination at the point of criminal conviction. Research on sentencing, however, has generated the most interest among those studying racial disparity. A review of a large number of studies conducted for the National Academy of Sciences (Hagan and Bumiller 1983) concluded that it was the prior criminal record rather than race that affected the sentencing disposition and that, once this was controlled for, the direct effect of race was basically eliminated. Racial disparities in sentencing arose from the disproportionate representation of minorities in officially processed criminal conduct, and this in turn was reflected in longer or more serious prior criminal records. However, some concerns were raised that race might have a cumulative effect on sentencing by operating indirectly through other factors that disadvantage minorities and that race might interact with other factors, such as initial arrest, to influence decision making.

In studies conducted in the 1970s and 1980s, researchers investigated racial bias by considering the victim's status rather than that of the offender, explored historical changes in sentencing, and included in their research crimes not previously covered, such as drug processing. In drug prosecutions, Ruth Peterson and John Hagan (1984) found that low-level black drug dealers in New York were treated more leniently than white drug dealers, but that major black dealers were treated more harshly than their white counterparts, because they were perceived as inflicting still more harm on the already victimized nonwhite population. Overall, the research conducted during this period seemed to suggest that there was some discrimination, sometimes, in some places.

Research has focused on determinate sentencing, including three-strikes legislation. In one analysis of over 11,000 such cases in California, researchers found some racial disparities in sentencing, but once the results were controlled for prior record and other variables, it was concluded that racial disparity in sentencing was not the result of racial discrimination (Klein, Petersilia, and Turner 1990). The question of whether the exercise of prosecutorial discretion produces discrimination has also been investigated. Where sentences are fixed, charging and plea bargaining become crucial, and attempts have been made to uncover the full dimensions of prosecutorial discretion. Looking at the prosecutor's decision to charge, one analysis of more than 30,000 cases from Los Angeles County showed that cases against blacks and Hispanics were significantly more likely to be prosecuted than cases against whites (Spohn, Gruhl, and Welch 1987). This contrasts with a Supreme Court ruling that the decision to prosecute shall not be "deliberately based upon an unjustifiable standard such as race, religion, or other arbitrary classifications" (Walker et al. 2000: 140). A number of studies have concluded that white defendants are offered plea bargains more frequently and obtain better deals than minorities (p. 146), although other studies have found that race has an insignificant effect on plea negotiations (Albonetti 1990; Miethe and Moore 1986).

Researchers have begun to pay attention to macro-social and economic contexts, attempting to frame research that could identify the role of poverty, urbanization, and related factors in sentencing. Walker et al. (2000: 62) point out that a large economic gap exists between white Americans and minorities, and that over the past 20 years, there has been considerable growth in the number of the very poor. The first official definition of poverty was developed by the federal government in 1964, and it reflects the minimum income needed for an adequate standard of living. In 1995, the poverty line was \$7,763 for a single person and \$15,569 for a family of four; in that year, 13.8% of all Americans were below the poverty line (p. 65). In 2005, about 10.6% of all whites were below the poverty line compared with 24.9% of blacks and 21.8% of Hispanics (DeNava-Walt, Proctor, and Lee 2006). Although the African American middle class has grown significantly, the percentage of African Americans among the very poor has also increased. In terms of wealth—that is, the measure of all accumulated assets such as a house, a car, or savings—the 2005 median of white families was \$48,554, compared with only \$30,858 for African Americans and \$35,967 for Hispanics.

As well as investigating decision-making points within the criminal justice system for racial discrimination, the racial disproportion in prison populations and the place of race in seeking and imposing the death penalty have been the subject of research attention.

❖ Imprisonment Disparities

Table 3.1 shows rates of incarceration for different ethnic/racial groups. In 2009, at year-end, there were 1,405,622 state prisoners and 208,118 federal prisoners, for a total of 1,613,740 (West, Sambol and Greenman 2010: 2), and an incarceration rate of 502 per 100,000 population (p. 1). Jails admitted 12.8 million persons over the 12-month period ending June 30, 2010 (Minton 2011: 2) and a jail incarceration rate of 250 per 100,000 population (p. 4). Over the next 12-months period, the average daily population in jails midyear 2010 was 748,728 (down from 767,434 in 2009), with an incarceration rate of 242 (p. 1). On June 30, 2010, 44.3% of all jail inmates were white, while 37.8% were black and 15.8% Hispanic (p. 1).

Black inmates with sentences of more than 1 year in state or federal institutions were incarcerated at a rate of 3,119 per 100,000 population, a rate 6 times higher than white non-Hispanic males (487 per 100,000), while Hispanic males were incarcerated at a rate of 1,193 per 100,000 (West et al. 2010: 9). One in 703 black females, 1 in 1,987 white females, and 1 in 1,356 Hispanic females were imprisoned during the period (p. 9). Males were imprisoned at a rate of 949 per 100,000 population, while females were imprisoned at a rate of 67 per 100,000 (p. 9). As of February 2008, a Pew report announced that 1 in 100 Americans are now behind bars, and that for some groups, this rate is significantly higher. For example, the report states,

While one in 30 men between the ages of 20 and 34 is behind bars, for black males in that age group the figure is one in nine. Gender adds another dimension of the picture. Men still are 10 times more likely to be in jail or prison, but the female population is burgeoning at a far brisker pace. For black women in their mid-to-late 30s, the incarceration rate has also hit the one-in-100 mark. Growing older, meanwhile, continues to have a dramatic chilling effect on criminal behavior. While one in every 53 people in their 20s is behind bars, the rate for those over 55 falls to one in 837 (The Pew Center on the States 2008: 3).

The most recent Pew report (2010) notes that state prison populations declined 0.3% in 2009 for the first time in 38 years, while federal prisoners increased by 3.4% (The Pew Center on the States 2010).

Table 3.1

Racial and Ethnic Rates of Incarceration Under Federal and State Jurisdiction, 2009

Racial/Ethnic Group	Rate per 100,000	
	Males	Females
White	487	50
Black	3,119	142
Hispanic	1,193	74

SOURCE: West et al. 2010.

How can the racial disproportionality that exists in the U.S. prison population be accounted for? A study conducted by Alfred Blumstein (1982) concluded that between 1979 and 1991, there was an enormous growth in the rate of imprisonment and that the incarceration rate had tripled between 1975 and 1990. While the total number of drug offenders had increased nearly 10 times, there was little change between 1979 and 1991 in the level of racial disproportionality in incarceration rates. Importantly, the War on Drugs had focused on offenses involving high levels of discretion, opening up the possibility of charges of discrimination. In light of the increase in the proportion of those incarcerated that were drug offenders, from 5.7% in 1979 to 21.5% in 1991, Blumstein (1993) suggested that an adequate investigation of racial disproportionality in incarceration should specifically examine the issue of disparity by crime type. In particular, having considered the growth in the number of drug offenders, he concluded that the War on Drugs had contributed to racial disproportionality to a major degree, despite what he saw as the futility of that strategy. The War on Drugs continues to impact African Americans disproportionately; in 1999, black inmates made up 57.6% of all offenders convicted of drug offenses serving time in state prisons (Beck and Harrison 2001). Table 3.2 shows the number of inmates in state and federal prisons and local jails by race, gender, ethnicity, and age; Table 3.3 illustrates the rate of incarceration per 100,000 population through these same categories.

Table 3.2

Number of Sentenced Prisoners Under State or Federal Jurisdiction, by Sex, Race, Hispanic Origin, and Age, December 31, 2009

Age	Number of Sentenced Prisoners							
	Males				Females			
	Total ^a	White ^b	Black ^b	Hispanic	Total ^a	White ^b	Black ^b	Hispanic
Total ^c	1,443,500	479,000	563,500	303,500	105,200	51,200	28,200	17,500
18–19	23,800	6,500	10,300	5,000	1,000	400	300	200
20–24	209,100	62,700	94,200	50,400	11,900	5,300	3,600	2,300
25–29	246,700	65,900	102,400	61,100	15,800	7,300	4,200	3,100
30–34	239,900	71,100	97,000	55,800	18,600	9,000	4,900	3,300
35–39	228,300	75,400	90,700	47,300	20,800	10,000	5,800	3,300
40–44	203,900	75,600	77,900	36,700	17,900	8,800	4,900	2,700
45–49	137,300	53,200	51,400	23,300	10,800	5,500	3,000	1,500
50–54	76,600	31,900	27,100	12,700	5,000	2,500	1,400	700
55–59	39,600	19,100	12,000	6,400	2,200	1,300	500	300
60–64	19,600	10,900	4,800	3,100	1,000	600	200	200
65 or older	16,100	9,500	3,700	2,200	600	400	100	100

SOURCE: West et al. 2010.

NOTE: Totals based on prisoners with a sentence of more than 1 year.

- a. Includes American Indians, Alaska Natives, Asians, Native Hawaiians, other Pacific Islanders, and persons identifying two or more races.
- b. Excludes persons of Hispanic or Latino origin.
- c. Includes persons under age 18.

Table 3.3**Number of Sentenced Prisoners Under State or Federal Jurisdiction per 100,000 Residents, by Sex, Race, Hispanic Origin, and Age, December 31, 2009**

Age	Number of Sentenced Prisoners per 100,000 Residents							
	Males				Females			
	Total ^a	White ^b	Black ^b	Hispanic	Total ^a	White ^b	Black ^b	Hispanic
Total ^c	949	487	3,119	1,193	67	50	142	74
18–19	526	242	1,512	781	23	17	42	24
20–24	1,874	886	5,339	2,365	109	86	186	124
25–29	2,211	1,001	6,927	2,682	149	115	287	164
30–34	2,348	1,204	7,721	2,481	188	155	361	178
35–39	2,226	1,220	7,490	2,305	206	164	426	187
40–44	1,949	1,121	6,447	2,054	172	131	360	171
45–49	1,219	684	4,063	1,520	94	67	205	107
50–54	712	408	2,345	1,073	45	32	101	60
55–59	424	272	1,291	732	22	18	42	29
60–64	251	180	701	490	11	9	22	22
65 or older	94	69	287	184	3	2	6	4

SOURCE: West et al. 2010.

NOTE: Totals based on prisoners with a sentence of more than 1 year. Rates are per 100,000 U.S. residents in each referenced population group on January 1, 2009.

- a. Includes American Indians, Alaska Natives, Asians, Native Hawaiians, other Pacific Islanders, and persons identifying two or more races.
- b. Excludes persons of Hispanics or Hispanic origin.
- c. Includes persons under age 18.

❖ Death Penalty Disparities

Research has shown that when type of homicide is controlled for, race is a factor in the prosecutor's decision to seek the death penalty and in its imposition (Aguirre and Baker 1990; Baldus, Woodward, and Pulaski 1990; Paternoster et al. 2003). It appears that the race of the victim, together with the race of the offender, has a significant influence on the prosecutor's willingness to seek the death penalty and on the willingness of judges and jurors to impose it (see Table 3.4). Black offenders convicted of murdering white victims are at the highest risk for receiving the sentence of capital punishment, and offenders, whether black or white, convicted of murdering black victims are least likely to receive the death penalty. Evidence of discrimination in relation to black offenders is paralleled by similar discrimination in cases involving Hispanic victims according to research that examined all death eligible homicides in one county in California from 1977 to 1986 (Lee 2006: 17).

There is a substantial difference between white and black views about the death penalty. In the 2002 General Social Survey, 69.8% of whites favored the death penalty as compared with only 42.1% of blacks (Barkan and Cohn 2005: 40). Some argue that racial prejudice plays a significant role in white support for the death penalty, and several studies have found such racial prejudice combined with a punitive approach among whites (see, e.g., Soss, Langbein, and Metelko 2003: 416). Research based on the 1992 American National Election Study (ANES) concluded that “for white people living in an all white county, racial prejudice emerges as the strongest predictor of white death penalty support. . . . In more racially integrated counties this effect is more than doubled” (Barken and Cohn 2005: 41). The results of this study have been confirmed in similar research based on the 1992 ANES and data from the 1990 U.S. Census (Soss et al. 2003). The researchers also found that whites with higher family incomes were more likely to support the death penalty than whites from lower-income-earning groups (p. 407).

Table 3.4**Inmates Under Sentence of Death, by Race and Hispanic Origin, 2009**

<i>Race/Hispanic Origin</i>	<i>Total Under Sentence of Death: Males</i>	<i>Total Under Sentence of Death: Females</i>	<i>Prisoners Executed</i>	<i>Mean Time Elapsed Since Sentenced to Death</i>	
Total	3,483	66	52	152 mo. (male)	118 mo. (female)
White	1,738	42	24	155 mo.	
Hispanic	346	4			
Black	1,302	15	21	155 mo.	
Hispanic	10	0			
All other races ^a	73	3	0		
Hispanic	14	2	7	133 mo. ^b	

SOURCE: Snell 2010.

a. Includes American Indians, Alaska Natives, Asians, Native Hawaiians, and other Pacific Islanders.

b. Includes those identifying as white Hispanic and all other races identifying as Hispanic

Tracy Snell (2010: 1) notes that the 3,483 inmates held under a death sentence at year-end 2009 represent the ninth decline over the same number of years; 98% of those on death row were male, while 2% were female. Executions declined from 85 in 2000 to 46 in 2010 (Death Penalty Information Center 2010). Public opinion also seems to be changing. When asked in a national poll what the penalty for murder should be, 33% said the death penalty, 39% life without parole plus restitution, 13% life without parole, and 9% life with parole, giving a total of 61% choosing an alternative sentence to death. The Death Penalty Information Center describes the drop in death sentences as representing near historic lows. This trend is attributed to

ongoing controversy over lethal injections, the high cost of capital punishment, and increasing public sentiment in favor of alternative sentences. Executions dropped by 12% compared with 2009, and by more than 50% since 1999. The number of new death sentences was about the same as in 2009, the lowest in 34 years (p. 1).

❖ Hate Crimes

An act of racial discrimination may take the form of a hate crime. Hate crime statutes fall into two types (Russell-Brown 1998: 86), some treating hate crimes as independent offenses and others providing enhanced penalties for crimes that are motivated by bias. Additional penalties may be imposed by the court where it finds that an offense has been committed and was motivated by bias based on race. To successfully convict a person of a hate crime, the prosecution must establish the motive of the accused, which is extremely difficult to do. Sometimes the nature of the crime provides a motive, such as painting a swastika on the side of a house owned by a Jewish family, which common sense would interpret as a hate crime because the family is Jewish. The language used by an offender during the offense may be particularly important, especially if racial slurs are used. Prosecutors also pay attention to the severity of the attack, the absence of any provocation by the victim, any prior history of contact between the victim and suspect, and any history of similar incidents in the same area (Byers and Spillane 2000: 265). The definition of *bias-motivated* or *hate crimes* was defined by the 1990 Hate Crime Statistics Act as “crimes that manifest evidence of prejudice based on race, religion, sexual orientation, or ethnicity” (Langton and Planty 2011: 1). This definition was amended in 1994 to include “crimes motivated by bias against persons with disabilities” and again in 2009 to include “crimes of prejudice based on gender or gender identity” (p. 1).

Data collected between 1997 and 1999 under the Hate Crime Statistics Act of 1990 show that 61% of hate crime incidents were motivated by race and 11% by ethnicity, and that the majority of such incidents involved a violent offense (see Table 3.5). From July 2000 through December 2003, an annual average of 210,000 hate crime victimizations occurred (Harlow 2005: 1). Most hate crimes were associated with violent crimes such as rape or other sexual assault, and a minority with property crimes. During this period, 55% of hate crimes were motivated by race (Table 3.6). Racially motivated hate crimes most often target African Americans, with 6 in 10 racially based incidents targeting African Americans, and 3 in 10 targeting whites (Strom 2001).

Table 3.5

Hate-Bias Incidents, by Type of Bias Motivation, 1997–1999

<i>Hate Crime Incidents</i>	<i>Number</i> 2,976	<i>Percentage</i> 100%
Race	1,820	61.2
Anti-black	1,059	35.6
Anti-white	561	18.9
Anti-multiracial	92	3.1
Anti-Asian	60	2.0
Anti-American Indian	48	1.6

Religion	431	14.4
Anti-Jewish	177	5.9
Anti—other religious group	132	4.4
Anti-Catholic	29	1.0
Anti-Protestant	30	1.0
Anti-Islamic	30	1.0
Anti—multiracial group	28	0.9
Anti-atheist	5	0.2
Ethnicity	329	11.1
Anti-Hispanic	199	6.7
Anti—other ethnicity or nationality of origin	130	4.4
Sexual Orientation	379	12.7
Anti—male homosexual	167	5.6
Anti-homosexual	103	3.5
Anti—female homosexual	65	2.2
Anti-bisexual	32	1.1
Anti-heterosexual	12	0.4
Disability	17	0.6
Anti—physical disability	12	0.4
Anti—mental disability	5	0.2

SOURCE: Strom 2001.

NOTE: Unit of count is incidents ($n = 2,976$).

Table 3.6

Motivation and Evidence in Hate Crime

	Percentage of Hate Crime	
	<i>Incidents</i>	<i>Victimizations</i>
Motivation		
Race	55.4	56.0
Association	30.7	30.6
Ethnicity	28.7	27.9
Sexual orientation	18.0	17.9

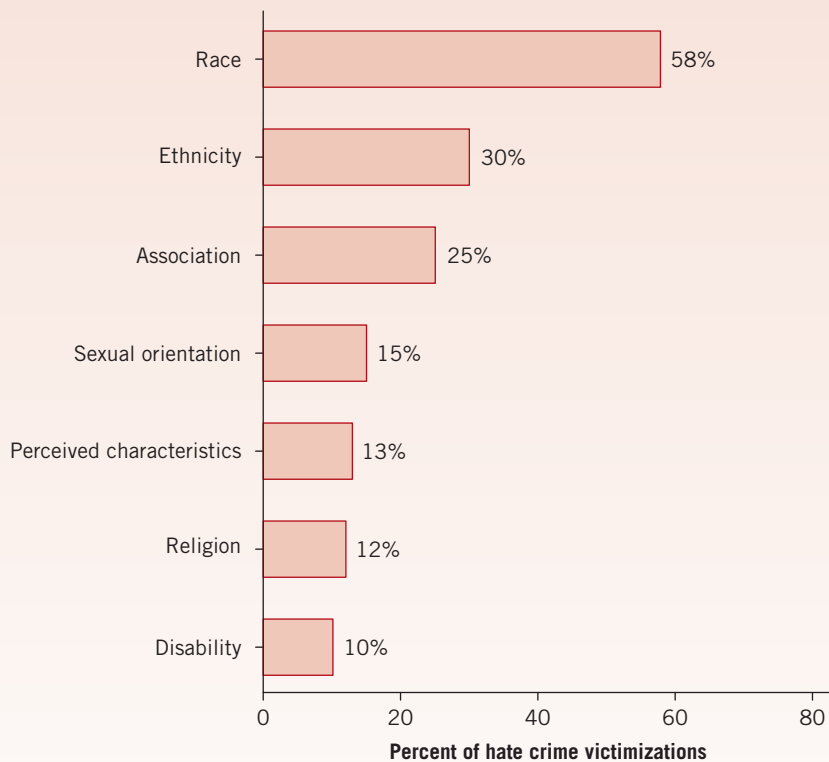
(Continued)

(Continued)

Perceived characteristic	13.7	13.2
Religion	12.9	12.4
Disability	11.2	10.5
Evidence of motivation		
Negative comments, hurtful words, abusive language	98.5	98.5
Confirmation by police investigation	7.9	8.4
Hate symbols	7.6	7.8

SOURCE: BJS, National Crime Victimization Survey, July 2000 through December 2003, in Harlow 2005.

NOTE: Detail adds to more than 100% because some respondents included more than one motivation or evidence of motivation.

Table 3.7**Victims's account of suspected hate crime motivation, 2003–2009**

SOURCE: Langton and Planty 2011: 4.

SOURCE: National Crime Victimization Survey, January 2003 -December 2009.

NOTE: Detail does not sum to 100% because victims may have reported more than one type of bias motivating the hate crime. See appendix table 18 for standard errors.

According to the National Crime Victimization Survey, between 2003 and 2009 there was an annual average of 195,000 hate crime victimizations against persons aged 12 or older in the United States (Langton and Planty 2011: 1), and a decline between 2003 (239,400 hate victimizations) and 2009 (148,400). The majority (90%) of hate crime victimizations during the period appear to have been racially motivated (p. 1).

❖ Explanations for Racial Discrimination in the Criminal Justice System

How Do We Explain the Existence of Racial Discrimination in the Criminal Justice System?

Most research on racial discrimination draws on consensus and conflict theories to explain discrimination. In the *consensus view*, individuals share their values with the state, which is organized to protect the interests of society and employs criminal law as an instrument of protection. Punishment is based on rational factors such as the seriousness of the offense and prior convictions. On the other hand, *conflict theorists* perceive society as comprising groups with conflicting values, with the state organized to represent the interests of the powerful ruling class. Criminal law is viewed as an instrument of protection for the powerful and elite, and punishment is based on nonrational factors including race and social class. Conflict theorists argue that groups that threaten the power of the rulers are more likely to be the subjects of social control; that is, these groups are more criminalized and suffer greater rates of incarceration. They argue that minorities, the unemployed, and the poor represent these threatening groups (C. Brown and Warner 1995; Chambliss and Seidman 1971).

Laws concerning vagrancy help to illustrate conflict theory. Being a vagrant is defined as simply occupying public space without resources and with no clear purpose for being there. It is argued that only the poor engage in vagrancy, and making vagrancy a criminal act and enforcing laws against it are attempts by the powerful to control the poor (Walker et al. 2000: 18). The era of segregation in the South from the 1890s to the 1960s also demonstrates conflict theory in action. During this period, the criminal justice system enforced laws providing for white supremacy and declared the subordinate status of blacks. Nowadays, street crime is a primary target of law enforcement, and this kind of crime is for the most part committed by the poor and by racial and ethnic minorities. This targeting of street crime contrasts with the relatively sparse enforcement of white-collar crime committed primarily by middle- and upper-class whites. Accordingly, conflict theorists argue that street crime is another demonstration of conflict theory.

In reviewing the applicability of conflict theory to instances of police brutality involving minorities, Malcolm D. Holmes and Brad W. Smith (2008: 11) argue that police and minorities should be viewed as distinct groups that are dynamically and intractably opposed, and that police brutality is an outcome and a symptom of that relationship. While police accord with conflict theory in representing dominant interests, they are far more concerned for their personal safety in entering and policing impoverished minority neighborhoods than with that representation. For minorities, police represent oppression and an ever-present threat in their daily lives. Each group stereotypes the other—the police see minorities as criminal threats, and minorities regard police as racist and authoritarian (p. 13). Emotional responses, including fear and anger, are significant factors in the intergroup dynamics. The role of emotions in policing is under researched, especially the place of fear in interactions with the public, but studies show that police regard danger as a defining element of their work and, in terms of minorities, perceive young black males in impoverished neighborhoods as “dangerous until proven otherwise” (p. 90). Police rely heavily on stereotypes to shape their actions and responses with minorities at street level, reducing complex interactions to manageable situations. Police arrive at the training academy with mental stereotypes that associate race with crime, and when they work the

streets, they employ the same typifications to structure their interactions, save time, and resolve uncertainties (p. 71). The stress of working in such neighborhoods is likely to call up stereotypical and emotional responses that are aggressive and authoritarian in the face of what police regard as imminent threats to their safety (p. 92). Thus, minorities and police are conditioned to distrust and fear each other. Where police use brutality against minorities despite the likely adverse career consequences, the authors suggest this has little to do with cognitive rational decision making but rather is an outcome of emotional responses and prior stereotyping (p. 122). It is therefore a normal by-product of intergroup relations. There are few easy solutions in light of police cultural norms that condone violence and value concealing discipline violations, but psychological screening and increased professionalism and education may go some way toward minimizing the incidence of police brutality toward minorities.

Another theoretical explanation for racial discrimination argues that *the symbolic aspect of social conflict drives crime control*. For example, perceptions of threats, rather than actual threats, are influential in the design of crime control policies (Tittle and Curran in Sampson and Lauritsen 1997). Some studies support this position. For example, one study in Washington State found that nonwhites were sentenced to imprisonment at higher rates in counties with large minority populations, and interviews with justice officials and leaders in the community showed a consistent public concern with “dangerousness” and the “threat from minorities.” Accordingly, crime was perceived as a minority problem, and race was used as a code for certain lifestyles and forms of dress thought to signal criminality. According to this view, it follows that the poor and the underclass are seen not as a threat to rulers and elites, but to the middle and working classes who make up the dominant majority of American society.

Sampson and Lauritsen (1997: 362), after reviewing most of the studies on discrimination in the criminal justice system, conclude that discrimination appears on occasion at some stages in the criminal justice system, in some locations. However, there is little evidence of any systematic or overt bias on the part of criminal justice decision makers. They contend that there is a perception of racial discrimination in the administration of justice that is fueled by the regular moral panics and political responses to those panics such as the War on Crime, the War on Drugs, and the concern with sexual predators. These are targeted at particular lifestyles or locations associated with minorities and have the effect of subjecting the behavior of minorities to increased levels of social control (Chambliss 1995; Tonry 1995).

In discussing the relationship between African Americans and the criminal justice system, Marc Mauer seeks to account for the striking increase in the proportion of African Americans incarcerated in the United States, pointing out that blacks represented only 21% of those imprisoned in 1926 compared to one half of all prison admissions today (Mauer and U.S. Sentencing Project 1999: 120). Mauer suggests that to some extent the explanation is rooted in society’s response to crime, noting that most crime is intraracial; that is, people fight their neighbors and invade homes in their own communities. Historically, as long as black crime was located within black communities, it was of little concern to law enforcement, but when it was perceived to spill over into white communities, police became proactive. Mauer argues that the influence of race is clearly seen in some parts of the criminal justice system, pointing to death penalty sentences as providing compelling evidence of this.

He suggests that the way in which race plays a role in sentencing decisions is quite subtle and is influenced by a number of factors. These include whether white offenders benefit from greater resources such as a private lawyer, whether whites have access to expert evidence, whether they are able to afford the costs of substance abuse treatment, and whether whites are able to arouse less unease in criminal justice decision makers than minorities. Commenting on these factors, Mauer points out, in relation to the right to counsel guaranteed by the Sixth Amendment, that although minorities are entitled to legal representation at trial and during the process leading up to trial, there is some question about the quality of legal representation provided to indigent defendants by public defenders. Although African Americans are more likely to be defended by public defenders, it does not follow that this is necessarily discriminatory treatment, because

some argue that public defenders are underpaid, poorly trained, and lack resources (Weitzer 1996). Others, however, disagree, believing that public defenders have negotiating capital within the criminal justice system that can benefit the indigent defendant, especially through plea bargaining (Wice 1985). In the case of capital offenses, Stephen Bright and Patrick Keenan (1995) assert that judges often assign inexperienced or incompetent lawyers to represent indigent accused, and the Innocence Project continues to uncover cases in which defendants in capital cases, whether minorities or not, have been poorly advised or represented by court-assigned lawyers (Innocence Project 2002).

Mauer joins with those who believe that sentencing policies and moral panics target minorities (Mauer and U.S. Sentencing Project 1999). Discussing the history of marijuana policy, he points out that when this drug was first used in the 1900s, it was perceived to be a drug used only by blacks and Mexican Americans. Its use was penalized in the 1950s with a sentence of 2 to 5 years' imprisonment for first-time possession. In the 1960s, when marijuana came to be widely used by the white middle class, public attitudes began to change, and marijuana began to be perceived as a relatively harmless drug, nonaddictive, and not likely to lead to other criminal activity. By the 1970s, legislation had separated marijuana out from other narcotics and had lowered the penalties, and some jurisdictions even effectively decriminalized its possession in small quantities.

However, law enforcement practices in relation to marijuana laws vary and may result in acts of discrimination based on race. As an example, Mauer and the U.S. Sentencing Project (1999: 134) cite the city of Milwaukee, where possession was for many years classified as a misdemeanor, whereas the same conduct in the suburbs of Milwaukee was a mere ordinance violation. The outcome of this disparity in classification was that white offenders in the suburbs paid a fine, and in the city, the mostly nonwhite arrests might result in jail time and a record. In this case, while the policy makers in the city and in the suburbs may not have consciously targeted minorities, their failure to anticipate the impact of their decision making resulted in unconscious targeting.

Some, however, contend that the targeting of drug users is far from unconscious. For example, Michael Tonry (1998) argues that those who launched the drug war knew that "the enemy troops would mostly be young minority males" and that making mass arrests would disproportionately incarcerate those males (p. 52). He also contends that those promoting these policies were well aware that the laws distinguishing powder from crack cocaine would disproportionately affect blacks. Thus, the War on Drugs exemplifies the effect produced by a deliberate policy choice to focus on the enforcement of drug offenses.

Looking at the situational aspect of drug enforcement, Mauer points out that conducting drug arrests in inner-city neighborhoods is easier for law enforcement because of the visibility of street drug dealing as compared to dealing carried out behind closed doors in suburban neighborhoods (Mauer and U.S. Sentencing Project 1999: 148). Furthermore, where dealing takes place openly, residents of black neighborhoods are more likely to complain and ask for police intervention. Lynch and Sabol (in Mauer and U.S. Sentencing Project 1999: 149) conclude that the War on Drugs has resulted in increased targeting of black working- and middle-class areas for drug enforcement. While the processes that produce this outcome may not have been racially motivated, they have produced racially disparate outcomes.

The impact of the War on Drugs on women of color is a good example of a racially disparate outcome. This "war" has produced increased conviction rates for low-level drug offenders who have little prospect of negotiating any beneficial plea bargain in exchange for information about other offenders. These low-level offenders are often women, and in 1999, the Sentencing Project revealed that the number of women incarcerated for drug offenses rose by 888% between 1986 and 1996 (Mauer, Potler, and Wolf 1999). Between 1986 and 1995, New York drug offenses accounted for 91% of the increase in the number of women sentenced to imprisonment, and in California, drug offenses accounted for 55% of the increase over the same period (Mauer et al. 1999). The estimated percentage of incarcerated women under state jurisdiction for drug offenses

in 2006 was 28.4%; in 2007, it was 28.2%, and in 2008, 26.9% (West et al. 2010: 31–32). This compares to 19.3%, 19.6%, and 17.8%, respectively, for men (pp. 31–32).

The most discussed disparity in drug sentencing in recent years has been the issue of sentencing for possession of crack cocaine. The mandatory sentencing laws passed by Congress provided a far harsher punishment for possession of crack cocaine than for powder cocaine in that the sale of 500 grams of powder resulted in a mandatory 5-year prison term, whereas possession of only 5 grams of crack cocaine triggered the same mandatory penalty (Mauer and U.S. Sentencing Project 1999: 155). Significantly, crack cocaine is used primarily by urban blacks, and powder cocaine is used by middle- and upper-class whites. These mandatory sentencing laws have had a major impact on blacks, because the vast majority of persons charged with crack trafficking have been black. As a result of the disparity in these offenses, the average prison sentence served by black federal prisoners for possession of crack cocaine is 40% longer than the average sentence for whites convicted of possession of powder cocaine (McDonald and Carlson 1993). In December 2007, the Supreme Court ruled that judges could hand down lighter punishments in crack cocaine and ecstasy cases than those specified by federal guidelines in an effort to correct the sentencing disparities created by the crack cocaine laws (see *Gall v. United States* 2007; *Kimbrough v. United States* 2007).

Mandatory minimum crack cocaine policy has contributed significantly to the high incarceration rates of African Americans and Latinos. On July 28, 2010, Congress voted to change the 25-year law, which had mandated a sentence for possession of crack that was equivalent to the prison term for trafficking 100 times the amount of powder cocaine and reduced the ratio to 18:1 rather than 100:1. The legislation also eliminated the mandatory 5-year prison sentence for first-time offenders (Associated Press 2010). In July 2011, Ohio became the 38th state to address the sentencing disparity required under the old law, and the U.S. Sentencing Commission made the new guidelines retroactive (Fields 2011). A significant motivating factor for states to reform crack laws derives from the high costs of imprisonment that state's have born since 1986 when the law was first passed. As one policy maker noted,

“It’s only been in the last three or four years that you have seen a very unusual alliance between fiscal conservatives and social progressives emerge around prisons. . . . Prisons are really expensive. Then you add in the state budget crisis that every state is grappling with right now,” he said. “So we’ve had this rethinking of priorities in the criminal justice system which I think really opens the doors for what had been advocated for already to emerge” (in Fields 2011).

Summary

The debate about racial discrimination in the criminal justice system remains unresolved. While most research suggests an absence of systematic racial discrimination, there is agreement among researchers that acts of discrimination occur at specific decision-making points, and some argue that informal and hidden forms of discrimination occur both within and outside the system. It follows that the majority opinion supports arguments that acts of discrimination occur and that they may perhaps be deeply rooted in cultural and social attitudes toward other races. These may express themselves in complex and nuanced ways that are difficult to capture within research strategies. Associated with acts of discrimination is the issue of the public perception of the workings of the criminal justice system. Regardless of the conclusions of research studies, there is a widespread belief among minorities that the system discriminates against them and is therefore unjust. To counter this perception, those exercising decision-making powers within the system must act ethically and strive to eradicate any suggestion of racial bias and discrimination from their decisions.

Discussion Questions

1. Explain why the term *race* is an inadequate category of analysis.
2. What historical events and circumstances influence the possibility of the existence of racial discrimination within the criminal justice system?
3. What are the difficulties involved in focusing on decision-making points in the criminal justice system to determine whether racial discrimination occurs?
4. Explain the concept of *petit apartheid* and how its existence might generate acts of discrimination in the criminal justice system.
5. How can the study of drug policy and the prosecution of drug offenders assist in establishing the existence of racial discrimination in the criminal justice system?
6. What theoretical explanations are offered for racial discrimination in the criminal justice system? Explain with examples.

Web Resources

Brennan Center for Justice at New York University School of Law. http://www.brennancenter.org/dynamic/subpages/download_file_48382.pdf

Bureau of Justice Statistics. Hate Crimes. <http://www.fbi.gov/ucr/ucr.htm>

Civil Rights Coalition for the 21st Century—Hate Crimes. <http://www.civilrights.org/issues/hate/>

Drug Reform Coordination Network. <http://www.drcnet.org>

Drug War Chronicle. <http://stopthedrugwar.org/chronicle>

Drug Watch International. <http://www.drugwatch.org>

Families Against Mandatory Sentencing. <http://www.famm.org/>

The Justice Project. <http://www.thejusticeproject.org>

Marijuana Policy Project. <http://www.mpp.org>

The Sentencing Project. <http://www.sentencingproject.org>

Stop the Drug War. <http://stopthedrugwar.org/>