ETHICAL BACKGROUND

It is generally agreed that discrimination based on 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 is not 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). 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 (for example, 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 (p. 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 Georges-Abeyie (2001: x), to insults, rough treatment, 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 (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, been 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 Natives and Alaskan Natives are the only indigenous groups in the United States. The history of contact between American Natives and Anglo Americans is replete with acts of violence against American Natives and with the dispossession of their lands. Alaskan 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, for example, Banks 2002; Brod 1975; Fienup-Riordan 1994; Kraus and Buffler 1979; Travis 1983 in Phillips and Inui 1986; Schafer, Curtis and Atwell 1997). Similarly, American Natives continue to be disproportionately represented in arrest and incarceration data in those states where they are primarily located (see, for example, Bureau of Justice Statistics 1999; Grobsmith 1994; Ross 2000). Both groups suffer economic, educational, and social stereotyping, which are revealed in their treatment by the criminal justice system.

**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 (1991) (also called the Christopher Commission) 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 against 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 four or five 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.

In order 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 research agrees with Wilbanks (1987) and Petersilia (1983) that although there is racial discrimination within the criminal justice system, the system itself is not characterized by racial discrimination; that is, that discrimination is not systematic (Blumstein 1993; Dilulio 1996; Russell 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. (Petersilia 1983: 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” (1983: 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 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 in its other parts. 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 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 (Georges-Abeyie in Russell 1998: 32). 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 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 (Knepper 2000: 19). 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. 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 (Pope and Feyerherm 1990).

As to whether racial discrimination exists within the juvenile justice system, after a review of the literature, Pope and 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.

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, 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.

In considering the proportion of blacks involved in police shootings of criminal suspects, 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.

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 accused’s employment, marital status, and length of residence in an area as an illustration of community ties, which may allow the court to conclude that the accused is unlikely to flee (Albonetti et al. 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.

Jury Selection

Is there any evidence of racial discrimination in the jury selection process? Historically, laws have tried to entrench racial discrimination in 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, as explained by the state authorities, 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, 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. 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* newspaper report, illustrates an alleged case of racial discrimination in jury selection.

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**CASE STUDY 3.1 IN DALLAS, DISMISSAL OF BLACK JURORS LEADS TO APPEAL BY DEATH ROW INMATE**

Thomas Miller-El is an African American charged with shooting two white hotel clerks during a robbery in 1985. One of the hotel clerks died and Miller-El, 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.

(Continued)
Conviction and Sentencing

In the aggregate, blacks tend to be convicted less than whites (Petersilia 1983; Wilbanks 1987), and according to Sampson and 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 1964)

ETHICS AND THE CRIMINAL JUSTICE SYSTEM

(Continued)

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, in order 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-El was convicted and sentenced one 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-El’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 (in Rimer 2002). Further, in the early 1970s the prosecutor’s office employed a training manual which 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” (in Rimer 2002).

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-El 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-El case supported capital punishment and wanted to be on the jury.

1983) concluded that rather than race being a significant factor in sentencing, it was the prior criminal record that affected 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, Peterson and 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.

Current 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 (Walker et al. 2000: 146), but 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 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 1995, about 11% of all whites were below the poverty line compared with 29% of blacks and 30% of Hispanics. 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 owning a house or a car and holding savings—the 1991 median wealth
of white families was $44,400, compared with only $4,600 for African Americans and $5,300 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**

In 2000, at year end, there were 1,381,892 federal and state prisoners. Black inmates made up an estimated 46% of all inmates with sentences of more than one year, and white and Hispanic inmates accounted for 36% and 16%, respectively (BJS 2001b). Nearly 10% of all black males between the ages of 25 and 29 were in prison in the year 2000. This compares with 2.9% of Hispanic males and 1.1% of white males in the same age category.

How can the racial disproportionality that exists in the U.S. prison population be accounted for? A study conducted by Blumstein (1982, 1993) concluded that between 1979 and 1991 there had been 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 had been 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 incarcerated 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 (BJS 2000a). Table 3.1

**Table 3.1**

<table>
<thead>
<tr>
<th>Age</th>
<th>Male Total</th>
<th>Male White</th>
<th>Male Black</th>
<th>Male Hispanic</th>
<th>Female Total</th>
<th>Female White</th>
<th>Female Black</th>
<th>Female Hispanic</th>
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<td>1,848,700</td>
<td>630,700</td>
<td>818,900</td>
<td>342,500</td>
<td>165,800</td>
<td>68,800</td>
<td>65,600</td>
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<td>18–19</td>
<td>78,800</td>
<td>23,100</td>
<td>35,800</td>
<td>16,100</td>
<td>4,100</td>
<td>1,800</td>
<td>1,500</td>
<td>900</td>
</tr>
<tr>
<td>20–24</td>
<td>340,900</td>
<td>97,000</td>
<td>159,700</td>
<td>73,200</td>
<td>22,100</td>
<td>9,600</td>
<td>7,500</td>
<td>4,500</td>
</tr>
<tr>
<td>25–29</td>
<td>340,800</td>
<td>97,800</td>
<td>161,600</td>
<td>72,000</td>
<td>26,800</td>
<td>10,200</td>
<td>10,500</td>
<td>4,700</td>
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<td>30–34</td>
<td>329,200</td>
<td>112,800</td>
<td>142,300</td>
<td>45,900</td>
<td>35,700</td>
<td>14,300</td>
<td>14,200</td>
<td>5,500</td>
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<td>35–39</td>
<td>294,200</td>
<td>107,900</td>
<td>132,800</td>
<td>45,900</td>
<td>34,400</td>
<td>14,500</td>
<td>14,200</td>
<td>4,500</td>
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<td>40–44</td>
<td>213,800</td>
<td>84,200</td>
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<td>8,900</td>
<td>9,700</td>
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<td>+ 183,100</td>
<td>76,500</td>
<td>72,800</td>
<td>27,300</td>
<td>16,200</td>
<td>7,200</td>
<td>6,300</td>
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<td>27,600</td>
<td>14,400</td>
<td>7,000</td>
<td>3,000</td>
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<td>400</td>
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</tbody>
</table>


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

**Excludes Hispanics.**
shows the number of inmates in state and federal prisons and local jails by race, gender, ethnicity, and age; Table 3.2 illustrates the rate of incarceration per 100,000 population through these same categories.

**DEATH PENALTY DISPARITIES**

Research has shown that, controlling for type of homicide, 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). It appears that the race of the victim, together with the race of the offender, have 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 3.3). 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.

**HATE CRIMES**

An act of racial discrimination may take the form of a hate crime. Hate crime statutes fall into two types (Russell 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 an attack 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 previous history.
of similar incidents in the same area (Byers and Spillane 2000: 265).

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 3.4). 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 (BJS 2001a).

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 (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

Table 3.3 Executions and Other Dispositions of Inmates Sentenced to Death, by Race and Hispanic Origin, 1977–2001

<table>
<thead>
<tr>
<th>Race/Hispanic Origin**</th>
<th>Prisoners Under Sentence of Death 1977–2001***</th>
<th>Prisoners Executed</th>
<th>Prisoners Who Received Other Dispositions*</th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td>Number</td>
<td>Percent of Total</td>
<td>Number</td>
</tr>
<tr>
<td>Total</td>
<td>6,754</td>
<td>749</td>
<td>11.1%</td>
</tr>
<tr>
<td>White</td>
<td>3,316</td>
<td>422</td>
<td>12.7%</td>
</tr>
<tr>
<td>Black</td>
<td>2,784</td>
<td>263</td>
<td>9.4%</td>
</tr>
<tr>
<td>Hispanic</td>
<td>550</td>
<td>52</td>
<td>9.5%</td>
</tr>
<tr>
<td>All other races****</td>
<td>104</td>
<td>12</td>
<td>11.5%</td>
</tr>
</tbody>
</table>

Source: Snell and Maruschak 2002.

*Includes persons removed from a sentence of death because of statutes struck down on appeal, sentences or convictions vacated, commutations, or death by other than execution.

**White, black and other race categories exclude Hispanics.

***Includes persons sentenced to death prior to 1977 who were still under sentence of death on 12/31/01 (8), persons sentenced to death prior to 1977 whose death sentence was removed between 1977 and 12/31/01 (372), and persons sentenced to death between 1977 and 12/31/01 (6,374).

****Includes American Indians and Asians.
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 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.

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 1988

Table 3.4  Hate-bias incidents, by type of bias motivation, 1997–1999

<table>
<thead>
<tr>
<th>Type of Bias</th>
<th>Number</th>
<th>Percent</th>
</tr>
</thead>
<tbody>
<tr>
<td><strong>Race</strong></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Anti-black</td>
<td>1,820</td>
<td>61.2%</td>
</tr>
<tr>
<td>Anti-white</td>
<td>1,059</td>
<td>35.6%</td>
</tr>
<tr>
<td>Anti-multiracial</td>
<td>92</td>
<td>3.1%</td>
</tr>
<tr>
<td>Anti-Asian</td>
<td>60</td>
<td>2.0%</td>
</tr>
<tr>
<td>Anti-American Indian</td>
<td>48</td>
<td>1.6%</td>
</tr>
<tr>
<td><strong>Religion</strong></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Anti-Jewish</td>
<td>177</td>
<td>5.9%</td>
</tr>
<tr>
<td>Anti-other religious group</td>
<td>132</td>
<td>4.4%</td>
</tr>
<tr>
<td>Anti-Catholic</td>
<td>29</td>
<td>1.0%</td>
</tr>
<tr>
<td>Anti-Protestant</td>
<td>30</td>
<td>1.0%</td>
</tr>
<tr>
<td>Anti-Islamic</td>
<td>30</td>
<td>1.0%</td>
</tr>
<tr>
<td>Anti-multiracial group</td>
<td>28</td>
<td>0.9%</td>
</tr>
<tr>
<td>Anti-atheist</td>
<td>5</td>
<td>0.2%</td>
</tr>
<tr>
<td><strong>Ethnicity</strong></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Anti-Hispanic</td>
<td>329</td>
<td>11.1%</td>
</tr>
<tr>
<td>Anti-other ethnicity or nationality of origin</td>
<td>199</td>
<td>6.7%</td>
</tr>
<tr>
<td></td>
<td>130</td>
<td>4.4%</td>
</tr>
<tr>
<td><strong>Sexual Orientation</strong></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Anti-male homosexual</td>
<td>379</td>
<td>12.7%</td>
</tr>
<tr>
<td>Anti-homosexual</td>
<td>167</td>
<td>5.6%</td>
</tr>
<tr>
<td>Anti-female homosexual</td>
<td>103</td>
<td>3.5%</td>
</tr>
<tr>
<td>Anti-bisexual</td>
<td>65</td>
<td>2.2%</td>
</tr>
<tr>
<td>Anti-heterosexual</td>
<td>32</td>
<td>1.1%</td>
</tr>
<tr>
<td></td>
<td>12</td>
<td>0.4%</td>
</tr>
<tr>
<td><strong>Disability</strong></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Anti-physical disability</td>
<td>17</td>
<td>0.6%</td>
</tr>
<tr>
<td>Anti-mental disability</td>
<td>12</td>
<td>0.4%</td>
</tr>
<tr>
<td></td>
<td>5</td>
<td>0.2%</td>
</tr>
</tbody>
</table>


Note: Unit of count is incidents (n = 2,976).
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, 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 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, Bright and 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. It was penalized in the 1950s with a sentence of two to five 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 (p. 134) cites 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, Tonry (1998: 52) believes 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. 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 (cited in Mauer and U.S. Sentencing Project 1999: 149) conclude that the “war on drugs” has resulted in an 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 et al. 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 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 five-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 Carson 1993).

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 amongst 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 to 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 amongst 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 system?

6. What theoretical explanations are offered for racial discrimination in the criminal justice system? Explain with examples.

REFERENCES


Racial Discrimination in the Criminal Justice System


Strauder v. West Virginia, 100 U.S. 303 (1880).


