

# Chapter Four: Racial, Ethnic, and Gender Disparities In Federal Sentencing Today

## A. Examining Group Differences

### 1. *Disparity, Discrimination, and Adverse Impacts*

Fair sentencing is individualized sentencing. Unwarranted disparity is defined as different treatment of *individual* offenders who are similar in relevant ways, or similar treatment of *individual* offenders who differ in characteristics that are relevant to the purposes of sentencing. Membership in a particular demographic group is not relevant to the purposes of sentencing, and there is no reason to expect—and some might argue no to reason to care—if the *average* sentence of different demographic groups are the same or different. As long as the individuals in each group are treated fairly, average group differences simply reflect differences in the characteristics of the individuals who comprise each group. Group disparity is not necessarily unwarranted disparity.

***Discrimination.*** Sadly, however, history teaches that sometimes individuals are treated differently *because* of the racial, ethnic, or gender group to which they belong. The SRA singles out a number of demographic characteristics for special concern, directing the Commission to “assure that the guidelines and policy statements are entirely neutral as to the race, sex, national origin, creed, and socioeconomic status of offenders.”<sup>134</sup> Different treatment based on such characteristics is generally called *discrimination* (Blumstein, 1983). Discrimination may reflect intentional or conscious bias toward members of a group, or it may result from a distortion of rational judgment by unconscious stereotypes or fears about a group or greater empathy with persons more similar to oneself. Whatever the cause, discrimination is generally considered the most onerous type of unwarranted disparity and sentencing reform was clearly designed to eliminate it.

***Adverse impacts.*** In addition to discrimination, group differences may reflect a different type of problem. In its 1995 report to Congress, *Cocaine and Federal Sentencing Policy* (1995), the Commission recognized that discrimination cannot be the sole concern of those interested in fair sentencing. If a sentencing rule has a disproportionate impact on a particular demographic group, however unintentional, it raises special concerns about whether the rule is a necessary and effective means to achieve the purposes of sentencing. In its cocaine reports, the Commission was addressing the sentencing of crack cocaine defendants (over eighty percent of whom are Black) who are given identical sentences under the statutes and the guidelines as powder cocaine offenders who traffic 100

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<sup>134</sup> 28 U.S.C. § 994(d).

times as much drug (the so-called 1-to-100 quantity ratio). Congress chose to more severely penalize those dealing in crack cocaine because of a perception that crack had proven peculiarly harmful. The Commission stated that “the high percentage of Blacks convicted of crack cocaine offenses is a matter of great concern. . . . [W]hen such an enhanced ratio for a particular form of a drug has a disproportionate effect on one segment of the population, it is particularly important that sufficient policy bases exist in support of the enhanced ratio.” (USSC, 1995, p. xii.) For these reasons, the Commission carefully analyzed the relative harmfulness of the two forms of cocaine in its reports to Congress to arrive at its recommendation that cocaine sentencing be reconsidered (USSC, 1995, 1997, 2002).

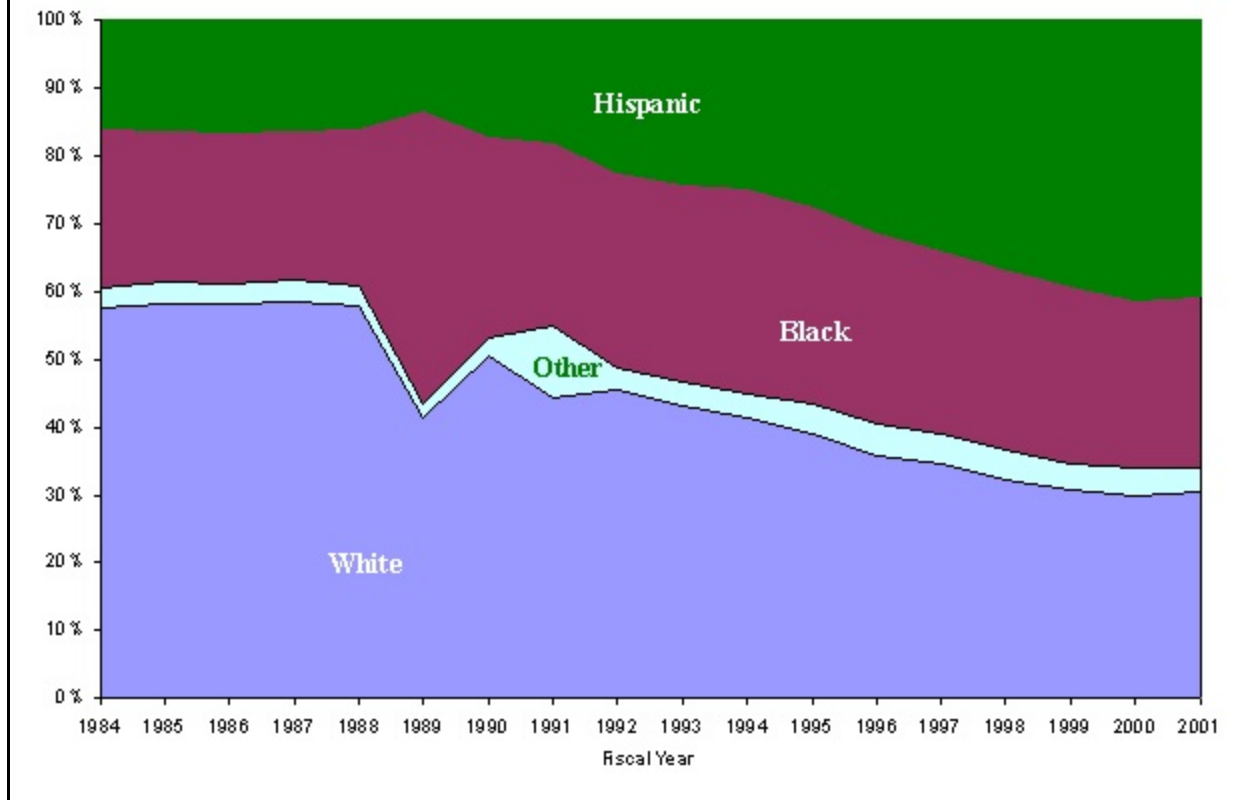
This principle—that rules having a disproportionate impact on a particular group be necessary to achieve a legitimate purpose—is found in other legal contexts, such as employment law. The individual and societal interests at stake in criminal sentencing are even greater than in the employment context, and a similar analysis can apply and has been used in several criminal justice contexts (Gastwirth & Nayak, 1997). Sentencing rules that are needed to achieve the purposes of sentencing are considered fair, even if they adversely affect some groups more than others. But if a sentencing rule has a significant adverse impact and there is insufficient evidence that the rule is needed to achieve a statutory purpose of sentencing, then the rule might be considered unfair toward the affected group. These distinctions between warranted and unwarranted group differences, and between discrimination and adverse impacts, will be used in the examination of group differences in this chapter.

## **2. *A Growing Minority Caseload***

Elimination of any vestiges of discrimination and reduction of unsupportable adverse impacts are especially important as the proportion of minorities in the federal offender population grows. Figure 4.1 shows the percentage of federal offenders in each of the three major racial and ethnic groups sentenced in the federal courts from 1984 until 2001. (Unlike the Bureau of Prisons, the Commission classifies Hispanic offenders based on national origin, regardless of race. Thus, the White, Black, and Hispanic categories are mutually exclusive.) While the majority of federal offenders in the preguidelines era were White, minorities dominate the federal criminal docket today. Most of this shift is due to dramatic growth in the Hispanic proportion of the caseload, which has approximately doubled since 1984. This growth is due in large measure to the growth of prosecutions for immigration law violations.

A small but significant proportion of the federal caseload consists of Native Americans, who are included along with Asians and Pacific Islanders in the “other” category on the chart. Due to the special federal jurisdiction over Native American lands, they are subject to federal prosecution for many offenses, such as motor vehicle homicide or sexual assault, that are usually prosecuted in the state courts when committed by other groups. The Commission formed a special Native American Advisory Group to address the concerns of the Native American community, and their 2003 report is available on the Commission’s website at <http://www.ussc.gov/NAAG/NativeAmer.pdf>.

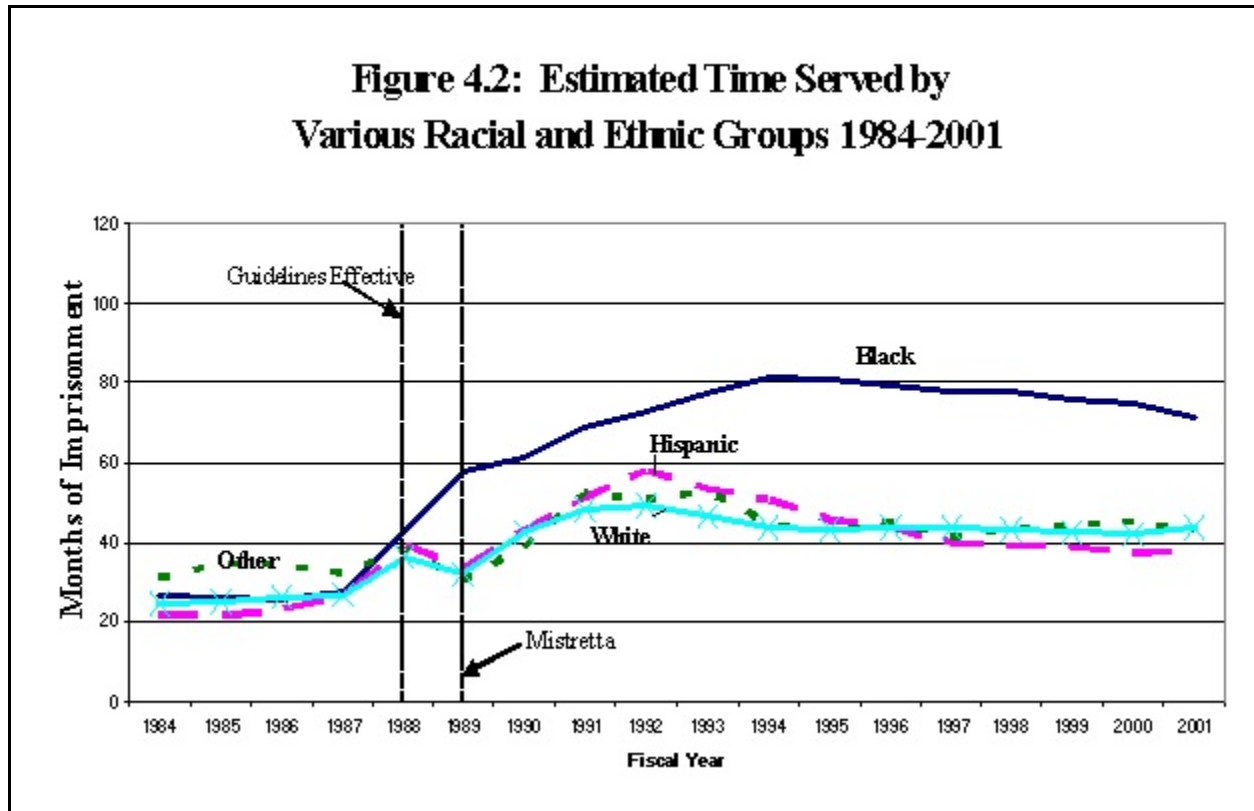
**Figure 4.1: Racial and Ethnic Composition of Federal Offender Population**



### **3. A Growing Gap in Sentencing**

Figure 4.2 displays trends in average sentences for the three major racial and ethnic groups from the preguidelines era through the first fifteen years of guidelines implementation. The gap between White and minority offenders was relatively small in the preguidelines era. Contrary to what might be expected at the time of guidelines implementation, which was also the period during which large groups of offenders became subject to mandatory minimum drug sentences, the gap between African American offenders and other groups began to widen. The gap was greatest in the mid-1990s and has narrowed only slightly since then. Similar gaps or disproportionalities can be observed in the proportion of majority versus minority offenders who receive non-imprisonment sentences instead of prison terms.

**Figure 4.2: Estimated Time Served by Various Racial and Ethnic Groups 1984-2001**



*What explains the gap?* A great deal of research over many decades, in both state and federal courts, has established that most of any gap between majority and minority offenders reflects, to a great extent, legally relevant differences among individual group members in the types of crimes committed and in criminal records (Hagen, 1974; Spohn, 2000). No careful student of sentencing research seriously disputes this finding. A great deal of controversy remains, however, over how much, if any, of the gap remains after accounting for the effects of legally relevant factors, and whether any of this gap is due to discrimination on the part of judges. This question remains an active area of research both within the Sentencing Commission and in outside agencies and among academic researchers.

The definitions discussed at the beginning of this chapter give us three possible explanations for the gap among Black, Hispanic, and other offenders:

- **Fair differentiation:** Offenders receive different treatment based on legally relevant characteristics needed to achieve the purposes of sentencing.
- **Discrimination:** Offenders receive different treatment based on their race, ethnicity, gender, or other forbidden factors.
- **Unsupportable adverse impact:** Offenders receive different treatment based on sentencing rules that are not clearly needed to achieve the purposes of sentencing.

The remainder of this chapter details the evidence regarding how much each of these explanations contributes to the gap among different demographic groups in federal sentencing today. General conclusions can be summarized at the outset. Most of the gap among different groups results from fair differentiation among individual offenders in the seriousness of their crimes and in their criminal histories. Discrimination on the part of judges contributes little, if any, to the gap among racial and ethnic groups. Discrimination, in the form of paternalism, may make a small but significant contribution toward more lenient treatment of female offenders.

A significant amount of the gap between Black and other offenders can, however, be attributed to the adverse impact of current cocaine sentencing laws. In addition, other changes in sentencing policies over the past fifteen years, particularly the harsher treatment of drug trafficking, firearm, and repeat offenses, have widened the gap among demographic groups. Whether these new policies contribute to crime control or to fair and proportionate sentencing sufficiently to outweigh their adverse impact on minority groups should be carefully considered by policymakers.

## **B. Studying Racial, Ethnic, and Gender Discrimination in Sentencing**

### **1. Continuing Concern in the Guidelines Era**

Concern over possible racial or ethnic discrimination in federal sentencing remains strong today, fifteen years after implementation of guidelines designed to eliminate it. No sentencing issue has received more attention from investigative journalists or scholarly researchers. In recent years, feature articles in major newspapers have undertaken analyses of federal sentences and concluded that racial discrimination persists (Frank, 1995; Flaherty & Casey, 1996). Support for these allegations has been strengthened by academic researchers who reached similar conclusions in studies presented at conferences and published in professional journals (Albonetti, 1997, 1998; Hebert, 1998; Steffensmeier & Demuth, 2000, 2001; Kautt & Spohn, 2002; Mustard 2001; Kempf-Leonard & Sample, 2002; Everett & Wojtkiewicz, 2002; Schanzenbach, 2004; Spohn, 2004).

Gender discrimination has received less attention but also has generated an interesting range of views (Daly, 1995). Arguments that women properly should receive more lenient sentences based on their status as women has been criticized by advocates of formal neutrality (Nagel & Johnson, 1994; Segal, 2001) but defended by others who see women as often playing more mitigated roles in their offenses, or as having, because of their status as women, more family responsibilities that may justify more lenient sentences (Raeder 1993, Coughenour, 1995; Wald, 1995). Others have argued that gender differences should not be seen as representing excessive leniency for women but as excessive harshness for men, who are often subject to the same pressures and responsibilities as women (Daly & Tonry, 1997).

It is clear that the Commission must address these concerns and identify whether discrimination based on demographic status persists and, if so, how it is manifested and what can be done to eliminate it.

## **2. *Research on Discrimination under the Guidelines***

Proving discrimination is difficult if a decision maker chooses to hide it or is not even aware of it, but researchers have developed statistical methods that are widely accepted as means for inferring conscious or unconscious bias. The general approach is to examine a large number of cases and measure the influence of the legally relevant characteristics on the types and lengths of sentences imposed. The average sentences of different racial, ethnic, or gender groups are then compared *after accounting for the effects of legally relevant factors*. If, for example, men on average receive longer sentences than women, even after controlling for differences in the types of crimes they commit and in their criminal records, then we may infer that sentences are influenced by gender or something correlated with gender.

The advent of sentencing guidelines has been a boon to this kind of research. By definition, the guidelines identify almost all of the factors that are legally relevant to the sentencing decision (factors that may justify a departure are an exception). Like other sentencing commissions, the United States Sentencing Commission collects and disseminates large datasets that can be used to study federal sentencing decisions, and many researchers have used these data to study discrimination. Almost twenty different studies have addressed racial, ethnic, or gender discrimination in federal sentencing using these datasets in the fifteen years since full implementation of the guidelines. (They are listed in the bibliography, Appendix A.)

The studies agree on several general points. First, legally relevant considerations account for by far the largest share of variation in sentences among federal defendants. When disparity is found, it is more prevalent in cases receiving a departure than in cases sentenced within the guideline range. And unexplained differences in the sentencing of women compared to men are greater than any

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unexplained differences in the sentencing of different racial and ethnic groups. On other important questions, however, the studies diverge. Different studies yield different answers as to whether discrimination influences sentences at all and, if so, how much. These studies also disagree on which racial and ethnic groups are discriminated against and exactly

where in the criminal justice process this discrimination occurs. Some of the variation in conclusions results from differences among authors in how they define disparity and discrimination. Many of the differences, however, result from the different research methodologies employed.

*Limitations in previous research.* Several problems have plagued much of the existing research into discrimination in federal sentencing. Most difficult to overcome is the lack of good data on all the legally relevant considerations that might help explain differences in sentences. The lack of data is especially severe regarding circumstances that might justify departure from the guidelines. Since these circumstances are, by definition, expected to be unusual or atypical, data on them is not routinely collected. (Data are collected on the reasons for departure in cases that receive one, but whether the same circumstances are present in cases that do *not* receive a departure is not routinely collected.) This lack of data can cause some legally appropriate differentiations among offenders to appear as discrimination.

In addition, because we lack data on case characteristics that might justify departure in some cases, several researchers have ignored departures when modeling the legally relevant factors that might explain differences among groups, or have treated departure and non-departure cases separately. Given the known disproportionate rates of departure among different racial and ethnic groups (Kramer & Maxfield, 1998; Adams, 1998), failure to include departure status as a control variable inevitably leads to race and ethnicity effects. But these effects may, in fact, reflect the legally relevant differences among offenders that cause judges to depart in some cases but not in others.

Other problems with previous research include the complexity of the federal guidelines system and its interactions with mandatory minimum statutes. Mustard (2001) described the non-linear relationship between offense level and sentence length and offered one approach to model it. Hofer and Blackwell (2000) described the effects of mandatory minimum statutes that trump the guideline range in some cases. For example, conviction under a mandatory minimum statute has no effect in cases where the guideline range is higher than the minimum penalty, but in other cases the mandatory minimum penalty “trumps” the guideline range and forces judges to impose higher penalties than required by the guidelines. Simply including, in a standard regression equation, a variable indicating the presence of a mandatory minimum penalty will mis-specify these important legal differences among cases. Because mandatory minimum penalties disproportionately apply to minority offenders, failure to correctly specify these complex legal interactions will lead to exaggerated race and ethnic effects.

In an important article recommending a new approach to studying disparity in a guidelines system, Engen and Gainey (2001) argued that previous findings on disparity under sentencing guidelines had to be reconsidered.

Conventional approaches to modeling the effects of these variables on sentencing are not adequate in this context because they fail to specify the relationships prescribed by law between offense severity, offender history, and sentencing outcomes. As a result, extant research on the effects of legal and extralegal factors, in the context of guidelines, may have produced biased estimates and reached erroneous conclusions.  
p. 1208.

*A new “presumptive sentence” model for the federal courts.* The method suggested by Engen and Gainey, the “presumptive sentence” model, can be modified to solve several, although not all, of the problems that plagued earlier research on discrimination in federal guidelines sentencing. Legally relevant factors, and the complex interactions among them, can be specified with a single independent variable representing the “presumptive sentence,” *i.e.*, the minimum months of imprisonment required by the guidelines *or any trumping mandatory minimum penalty* applicable in the case. The effects of variations in departure rates among groups can be accounted for by including variables representing whether a particular defendant received any of the three types of departure. In effect, the model predicts that each defendant will receive the minimum penalty required by law unless they receive a departure, in which case their sentence will be reduced or increased by the average length for that type of departure among all offenders who receive one.

Once race, ethnicity, and gender are added to the model, we can investigate whether judges systematically vary from the model’s prediction to the disadvantage of any group. Use of the presumptive sentence model solves the problem of non-linearity noted by Mustard (2001), and also can control for the effects of trumping mandatory minimums described by Hofer and Blackwell (2000). Engen and Gainey showed that a presumptive sentence model out-performed (that is, accounted for more of the variation in sentences) than other approaches when studying disparity in Washington state. They also demonstrated that previous research using models that failed to address the non-linearity problem had exaggerated racial and ethnic effects. The presumptive sentence model cannot overcome a lack of complete data on all legally relevant considerations that might influence judges, but it is the best available method for investigating discrimination in federal sentencing today.

## **C. Results from Recent Research**

### **1. *Racial and Ethnic Disparity***

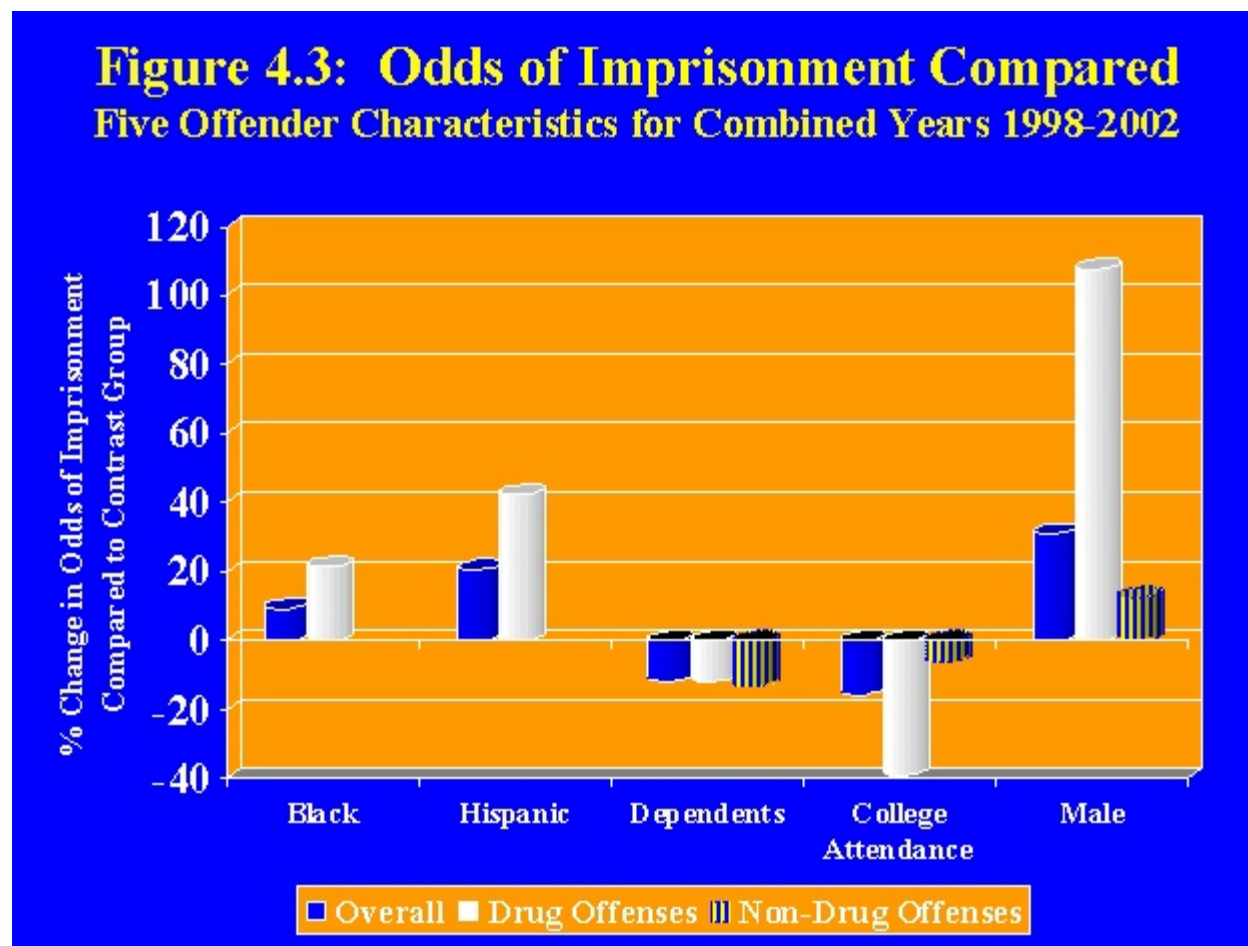
*The best-performing model.* Commission staff have used the presumptive sentence approach to test whether there is evidence of systematic discrimination against minorities or men in federal sentencing today. Details of the data and statistical models used can be found in Hofer and Blackwell (2002) and in Technical Appendix D. Analyses were performed using data on U.S. citizens sentenced under the guidelines in five recent years. (Inclusion of non-citizens, who are often non-White, confounds race and ethnicity effects with those of citizenship, detention prior to sentencing and pending deportation, lack of a U.S. residence, and other factors.) The Commission’s statistical model out-performed any other reported in the published research, accounting for over 80 percent of the variation in sentences imposed—an excellent result for regression research of this kind, and a measure of how thoroughly we understand the factors affecting federal sentencing today.

In order to get a sense of the relative degree to which various offender characteristics influence the sentencing decision, the model included—in addition to each offender’s race,



ethnicity, and gender—their age, college attendance, and whether they supported any dependents. To assess whether judges weigh some legally relevant factors differently than the guidelines rules themselves, several such factors were included in the model along with the presumptive sentence. These included the general type of offense (property, drug, white collar, or other), the type of drug involved in drug offenses, the offenders’ criminal history, whether they pled guilty, and whether they received a guideline adjustment for possession or use of a firearm.

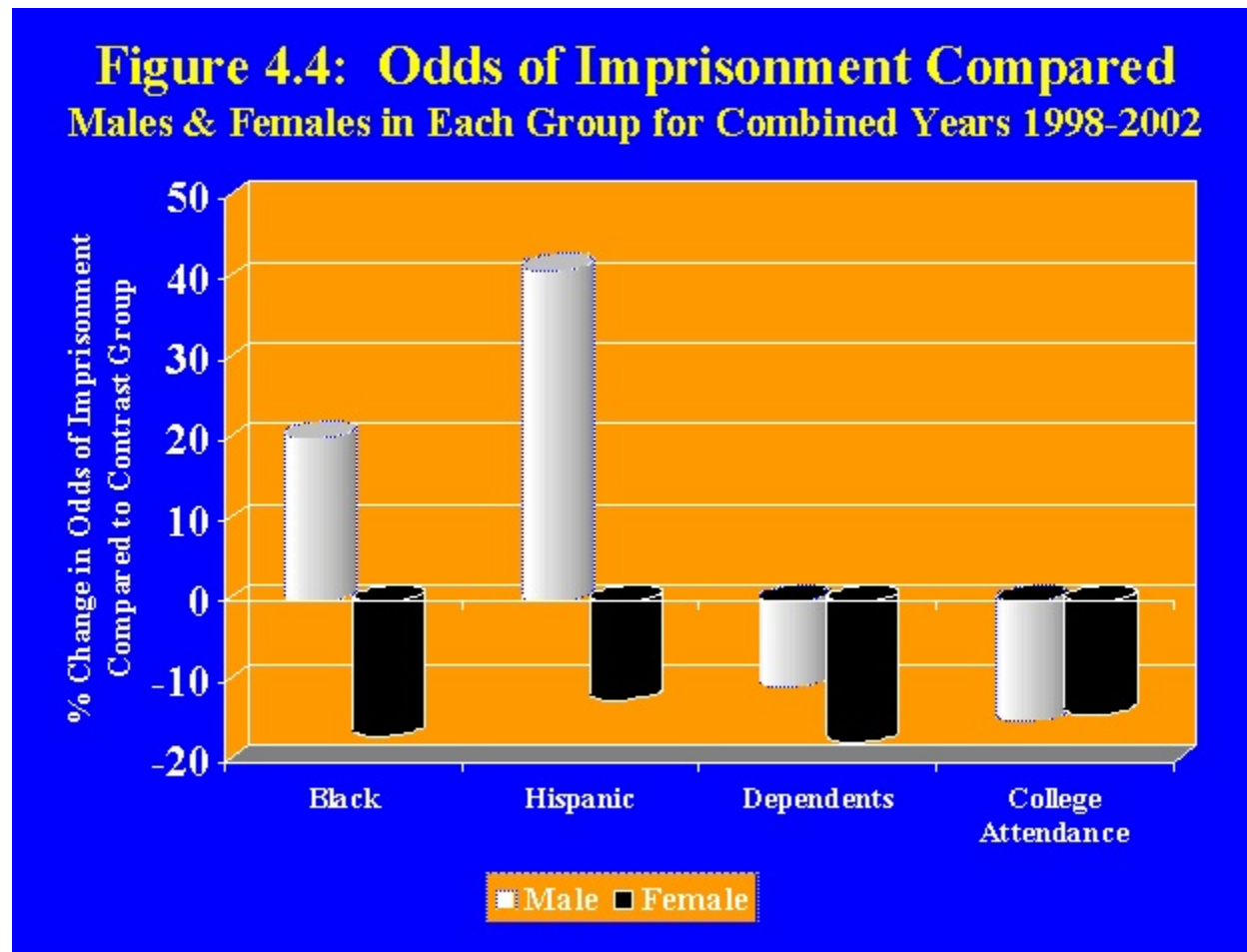
**The decision to imprison.** Figures 4.3 and 4.4 display the results of the Commission’s analysis of judges’ decisions to use sentencing options other than imprisonment in those zones of the Sentencing Table where options are permitted. Figure 4.3 presents the percentage increase or decrease in various groups’ odds of going to prison in comparison to a contrast group. Odds for Blacks and Hispanics are compared with those for Whites, odds for offenders with no dependents are contrasted with those with dependents, odds for offenders with some college are compared with those who did not attend college, and odds for men are compared with women. In addition, for each of these five groups, which are listed along the bottom of the chart, results are further broken down into three offense groupings indicated with different bars. Reading from left to right, the black bar in each group represents results for the overall caseload, the white bar represents results for drug



offenses only, and the striped bar indicates non-drug offenses. Only results that are statistically significant are displayed: a missing bar means that the result for that group was not significantly different from their contrast group.

Beginning with results for Blacks and Hispanics on the left side of Figure 4.3, the black bars show that when considering the overall caseload, a typical Black or Hispanic offender has somewhat greater odds of being imprisoned when compared to a typical White offender. (“Typical” in this sense is an offender who has average values on all the other explanatory variables, such as an offense of average seriousness.) However, the white bars and the missing striped bars indicate that these greater odds are restricted entirely to drug trafficking offenses. The odds of a typical Black drug offender being sentenced to imprisonment are about 20 percent higher than the odds of a typical White offender, while the odds of a Hispanic drug offender are about 40 percent higher. The relative importance of race and ethnicity can be further evaluated by comparing it with the effects of having dependents or attending college. These factors reduce the odds of imprisonment for all types of cases, but generally by a smaller amount.

Figure 4.4 displays the results of separate analyses for males and females in each group. The white and black bars show that it is *male* Black and Hispanic offenders who have greater odds of imprisonment than White males. Female Black and Hispanic offenders actually have somewhat



lower odds of imprisonment than their White counterparts. While the benefit of having dependents or attending college is shared by both males and females, the disadvantage of being Black or Hispanic is borne entirely by males. Additional discussion of gender effects is found in a later section of this chapter.

Percentage changes in odds of the type reported in Figures 4.3 and 4.4, although common in the research literature, are notoriously difficult to interpret. An increase in odds does not directly equate with an increase in relative risk of imprisonment (Baldus, et al., 1990); nor does 40 percent increased odds mean that 40 percent more Hispanic offenders are imprisoned than White offenders. Langan (2001) has warned that reliance on odds ratios in reporting results of disparity research can easily lead to an overestimation of the importance of a factor in decision-making. He has supplied a method for translating odds ratios into measures of the “proportional reduction in error.” Using this method, the odds ratios were translated into estimates of the number of offenders for whom knowledge of race or ethnicity improves the ability to predict who receives sentences of imprisonment instead of alternatives. Knowledge of race or ethnicity helps account for the imprisonment decision in under twenty cases sentenced in the three years included in the analysis.

Some of the effects we observed could be due to unmeasured, but possibly legitimate, considerations that are correlated with gender, race, or ethnicity. If women are more likely to have child-rearing responsibilities that lead to longer departures, this would appear in our data as a gender effect. Another such possibility results from a presentencing decision: whether to detain offenders at their bail hearing rather than release them awaiting conviction and sentencing. Some offenders are routinely detained due to statutory presumptions in favor of detention for certain classes of crime,<sup>135</sup> or for other factors, such as risk of flight. Some of these detained offenders, who might otherwise have received probation or non-imprisonment options under the guidelines, are subsequently sentenced to prison “time served” upon conviction. If minority offenders are disproportionately represented among this group, it would appear as a race or ethnicity effect in this analysis.

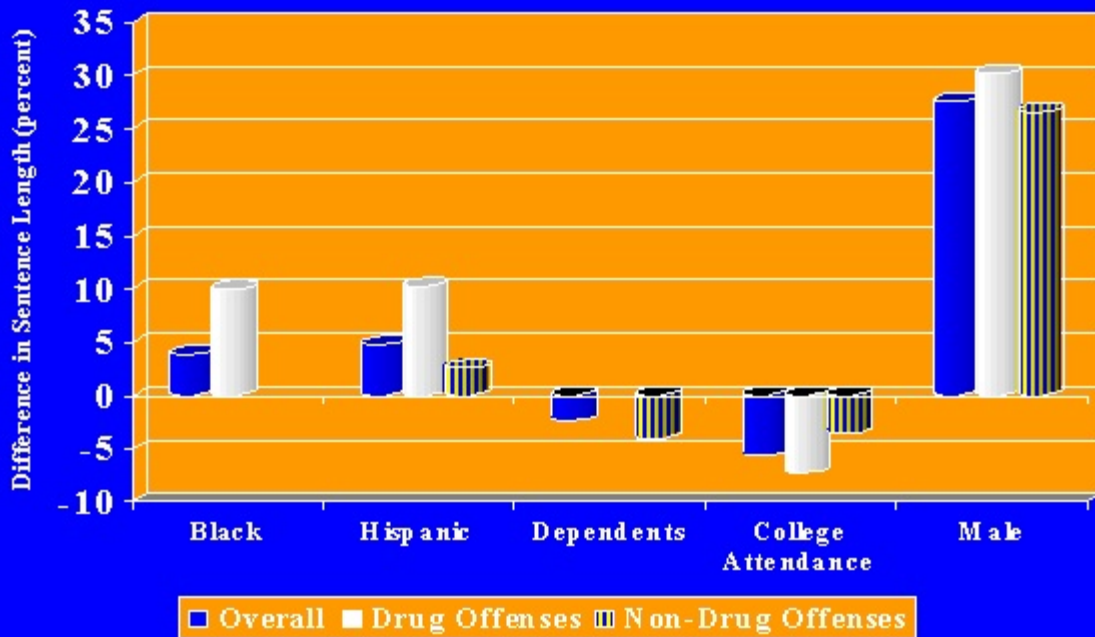
***The length of imprisonment.*** For offenders whom judges choose to incarcerate, the question is whether similar offenders receive similar prison terms, or whether there are average differences among groups that cannot be accounted for by legally relevant characteristics. Figures 4.5 and 4.6 display differences in the lengths of sentence, expressed as a percentage of the average sentence, imposed on various groups compared to the same contrast groups as Figure 4.3 and 4.4. The black bar again shows differences for all offenses combined, the white bar shows drug offenses only and the striped bar shows non-drug offenses.

For Black offenders, the results are once again limited to drug trafficking offenses and to male offenders. The typical Black drug trafficker receives a sentence about ten percent longer than a similar White drug trafficker. This translates into a sentence about seven months longer. A similar effect is found for Hispanic drug offenders, with somewhat lesser effects also found for non-drug

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<sup>135</sup> 18 U.S.C. § 3142(e).

**Figure 4.5: Lengths of Imprisonment Compared Offender Characteristics in Combined Years 1998-2002**



**Figure 4.6: Lengths of Imprisonment Compared Males & Females in Each Group for Combined Years 1998-2002**



and female Hispanic offenders. The race and ethnicity effects for drug offenders are greater than the effects of college attendance or having dependents.

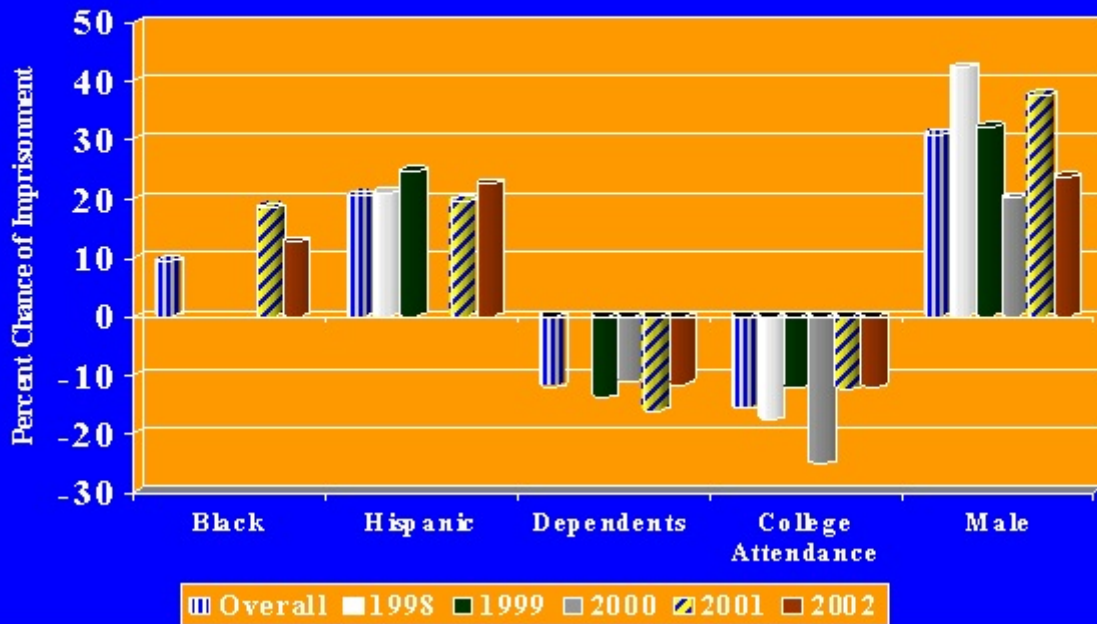
Because the presumptive sentence model predicts that the sentence imposed will be the minimum sentence required by law adjusted uniformly for any departure that was granted, the effects we observe can arise in only two ways. Judges can 1) place some offenders above the presumptive sentence, that is, above the bottom of the guideline range or the minimum statutory penalty, or 2) depart from the guidelines non-uniformly. Because variables that indicate whether an offender received any of the three types of departure are included in the model, differences in departure *rates* among the groups are controlled in this analysis. Any departure effect must therefore arise from differences in the average *extent* of departure among the groups. These findings indicate that all types of Hispanic offenders are placed above the minimum required sentence more frequently than similar White offenders, or receive somewhat lesser reductions when receiving a downward departure. The same is true of Black drug trafficking offenders and Black males. Research regarding both of these possibilities is reported later in this chapter.

As with the analysis of the decision to incarcerate, it is possible that differences among groups in legally relevant characteristics on which we have no data may account for these findings in whole or in part. There may be differences among groups in numerous factors that judges legitimately may consider when deciding where to sentence within the guideline range or how far to depart. These could include differences in the seriousness of the offenses committed by the groups, or in their criminal histories, that are not adequately captured by the guideline offense level and criminal history score. Particularly with regard to departures, there may be differences in the kind and degree of aggravating or mitigating factors present in the cases. For motions based on a defendant's substantial assistance to the government, there could be differences in the type and degree of the offender's cooperation.

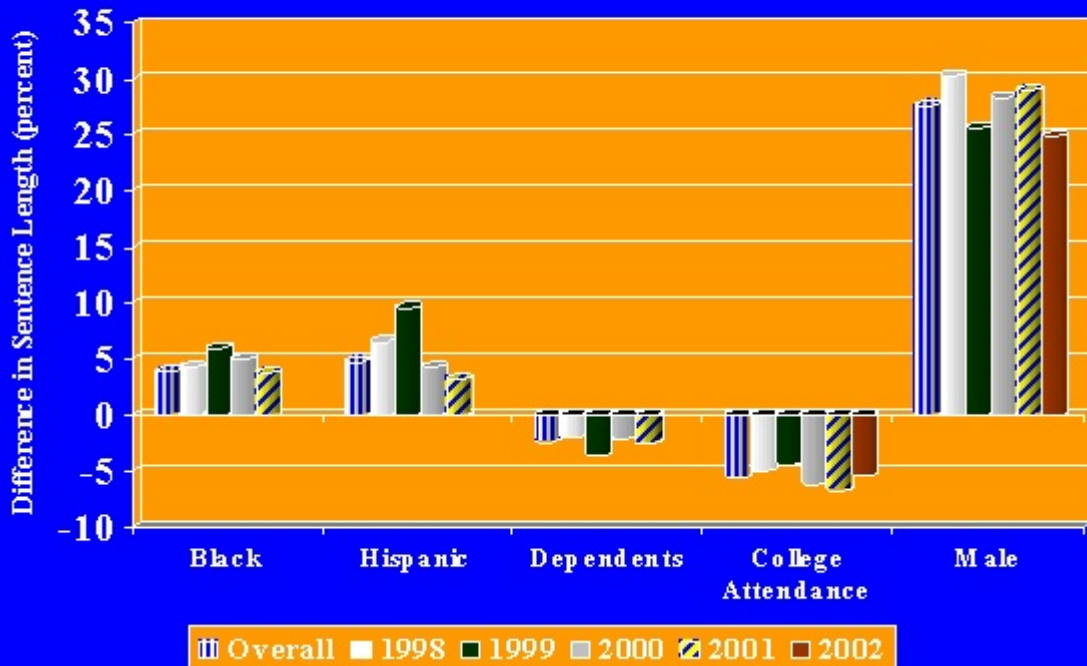
*Do these findings confirm the discrimination hypothesis?* While any unexplained differences in the likelihood of incarceration or in the lengths of prison terms imposed on minority and majority offenders is cause for examination, there is reason to doubt that these racial and ethnic effects reflect deep-seated prejudices or stereotypes among judges. Most noteworthy is that the effects, which are found only for some offense types and for males, are also unstable over time. Separate year-by-year analyses, presented in Figure 4.7, reveals that significant differences in the likelihood of imprisonment are found in only two of the last five years for Black offenders, and four of the last five for Hispanic offenders.

As shown in Figure 4.8, the effects on sentence length are more persistent, but disappear for both Black and Hispanic offenders in the most recent year for which data are available. Offense-to-offense and year-to-year fluctuations in racial and ethnic effects are difficult to reconcile with theories of enduring stereotypes, powerlessness, or overt discrimination affecting sentencing of minorities under the guidelines.

**Figure 4.7: Odds of Imprisonment**  
**Offender Characteristics Year-by-Year Analysis 1998-2002**



**Figure 4.8: Length of Imprisonment**  
**Offender Characteristics Year-by-Year Analysis 1998-2002**



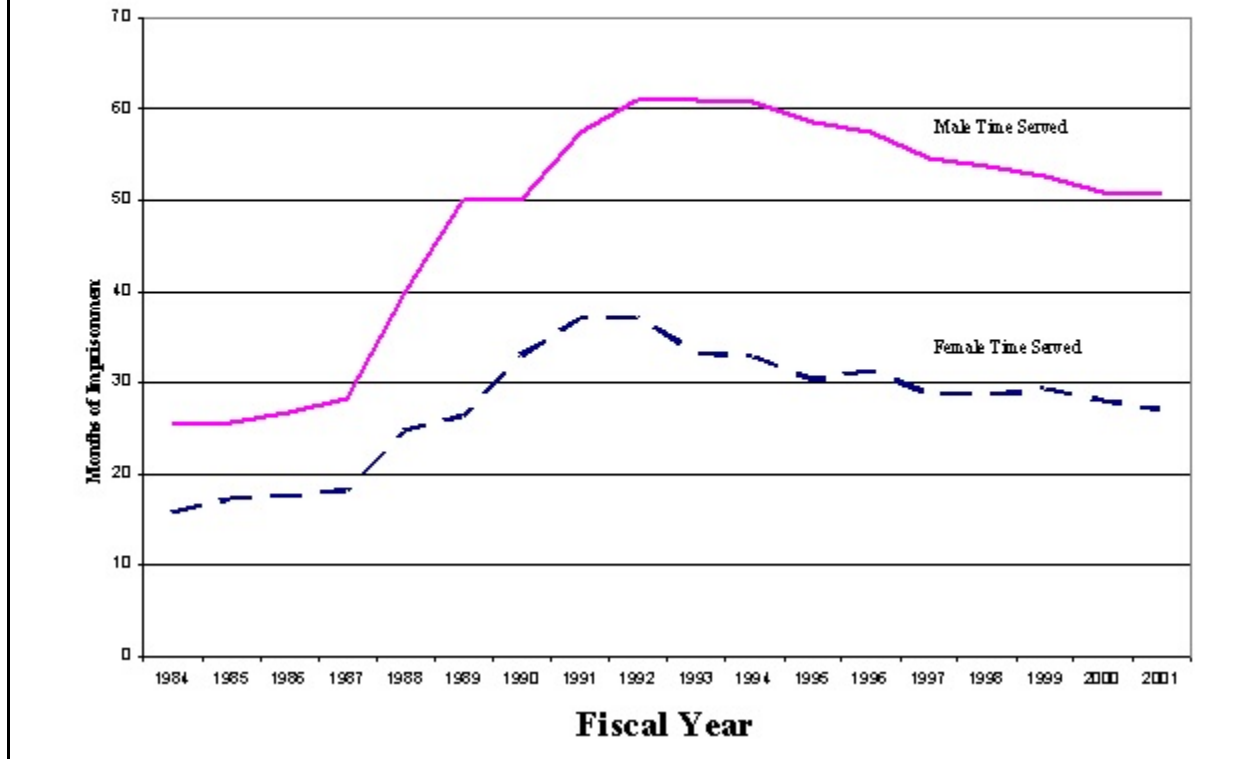
Skepticism that discrimination is a significant factor in sentencing under the guidelines is further reinforced by the findings of McDonald and Carlson (1993), the GAO (1992), and by previous work at the Commission (Katzenelson & Conley, 1997). McDonald and Carlson (1993) found some race effects in some years for some kinds of offenses, but none in other years or with other types of offenses. They warned “[a]ny findings that are sensitive to minor changes in model specification such as these must be interpreted with caution” (p. 106). Katzenelson and Conley found that when they learned more about specific court practices, findings that at first appeared to indicate discrimination turned out to reflect benign court practices that may have actually benefitted minorities. In their analysis of sentencing in the Ninth Circuit, Hispanic drug trafficking offenders received sentences averaging about five months longer than Whites. But further investigation revealed that one district charged drug couriers caught crossing the border from Mexico with significant amounts of drugs only with drug *possession* instead of the more serious charge of drug trafficking. The offense level of these largely Hispanic offenders (based on the drug possession guideline) under-represented the seriousness of their actual offense and their sentences tended to be higher than “similar” offenders at the same level. Due to the charging practices in that district, the presumptive offense level misrepresented the true seriousness of the offense and judicial compensation (sentencing higher than the presumptive sentence) appeared in the statistical analysis as an ethnicity effect.

Perhaps the best conclusion is that if discrimination affects the decisions of even some judges in some cases, the number of cases affected is small and the size of the effect is relatively minor compared to the consistent importance of the seriousness of the offense and the criminal history of the offender. As discussed in the final section of this chapter, discrimination contributes less to the gap between majority and minority offenders than do certain of the sentencing rules themselves, some of which may arguably represent an institutionalized unfairness that is a greater cause for concern than is discrimination by individual judges.

## **2. *Gender Disparity***

Like the gap between Black offenders and other groups, the gap in average prison terms between male and female offenders has widened in the guidelines era, as shown in Figure 4.9. Unlike race and ethnic discrimination, however, the evidence is more consistent that part of this gap is due to different treatment of offenders based on their gender. The group on the right side of Figure 4.3 compares the odds of imprisonment for men with those of women for the overall caseload, drug trafficking offenses, and non-drug offenses. Gender effects are found in both drug and non-drug offenses and greatly exceed the race and ethnic effects discussed above. The typical male drug offender has twice the odds of going to prison as a similar female offender. The group at the right of Figure 4.5 shows the results for length of imprisonment. Sentence lengths for men are typically 25 to 30 percent longer for all types of cases. Additional analyses show that the effects are present every year.

**Figure 4.9: Estimated Time Served  
by Gender of Offender 1984-2001**



Consistent with these results from the presumptive sentence model, women have been shown in previous research to receive sentences at the bottom of the applicable guideline more frequently than men (Newton, et al., 1995) and to receive proportionately larger reductions when granted a downward departure (Kramer & Maxfield, 1997).

Whether these patterns of more lenient sentencing for women reflect unwarranted disparities or legitimate sentencing considerations that happen to disproportionately benefit women has been the subject of lively debate. Analyses of data and case law have suggested that judges' paternalistic attitudes toward women might hold women to be more vulnerable and sympathetic and less responsible than men (Nagel & Johnson, 1994; Segal, 2000; Schazenbach, 2004). Differences may arise from enduring attitudes that hold women more responsible for child care.

Part of the more lenient treatment may arise, however, from differences between the genders that are relevant to sentencing but not well captured by the available data. Several commentators have noted that women offenders are often among the least culpable members of criminal conspiracies, yet are subject to lengthy sentences due to the conduct of their accomplices, on whom they may be emotionally or financially dependent (Demleitner, 1995). Judges may seek to mitigate



the effects of strict application of the guidelines rules based on female offenders sometimes being dominated by more culpable male accomplices. There is also reason for judges to believe that women are more instrumental in raising their children than their male counterparts (Wald, 1995; Raeder, 1993), and may suffer more from imprisonment than do men due to greater separation from their families caused by the relative scarcity of prisons for women (Seldin, 1995).

### **3. *Research on Departures, Sentencing Options, and Placement within the Guideline Range***

Like the presentencing stages reviewed in Chapter Three, sentencing under the guidelines is actually a series of separate decisions. These include individual fact-findings, guideline interpretations, and the important decision whether to depart from the guideline range in exceptional cases or, where departure is not appropriate, where to place the offender within the guideline range and available options. Many of these separate decisions have themselves been the subject of empirical research designed to illuminate, as best as possible with available data, the factors influencing the decision and whether racial or ethnic disparity may be present.

***The decision to depart and how far.*** Departures have been the subject of several empirical analyses investigating possible racial, ethnic, and gender disparities. The GAO (1992) used a standard multivariate approach to examine if demographic characteristics account for whether an offender receives a downward departure for reasons other than substantial assistance, after controlling for offense seriousness, criminal history, offense type, and mode of conviction (*i.e.*, whether defendant pled guilty or went to trial). The sample used in the study was not sufficient to permit controlling for all the legally relevant factors simultaneously, so analyses were performed using each control variable one at a time. The findings were described as tentative and preliminary, but the researchers reported that race, gender, age, and other extra-legal factors did *not* affect likelihood of departure.

A more recent analysis by Adams (1998) reached the opposite conclusion. In a regression analysis, both race and gender predicted whether a defendant would receive a departure after controlling for a long list of offense and criminal history factors. Blacks were less likely than non-Blacks (odds ratio of .71), and women were more likely than men, to receive downward departures. Women and Hispanics were less likely to receive upward departures. Some of the demographic effects were found to remain significant when specific offense types were examined. Adams also examined the variation in the *extent* of departure. Among the entire population, gender was significant in predicting both downward and upward departure length, while race was not. The only demographic variable significant for specific offense types was that Hispanics received lengthier departures in fraud cases.

Maxfield and Kramer (1998) also used regression analyses to predict the extent of departure in substantial assistance cases, using various guideline offense characteristics as control variables. Rather than predicting months of departure, they predicted the *percentage* reduction of the sentence from the minimum in the otherwise-applicable guideline range. Women received larger reductions,

especially in drug trafficking cases, where their reduction was 10 percent larger than men's. Race and ethnicity was also significant in drug trafficking, with Whites receiving reductions three percent larger than Blacks and five percent larger than Hispanics. Among non-drug cases, only Hispanics showed a smaller degree of reduction than Whites.

It is not clear what policymakers should conclude from these contradictory findings. Research cannot possibly test whether discrimination is present in the departure decision without data on the most important control variables. For example, in the case of section 5K1.1 departures, information on the type of assistance provided to authorities by the defendant is needed. For other departures, information is needed on legally relevant factors that may make cases eligible for departure. Without these data, these findings only raise the possibility that discrimination may be influencing the departure decision.

***Use of sentencing options available under the guidelines.*** As described in Chapter One, imprisonment is an option in any case under the guidelines, but USSG §5C1.1 authorizes judges to impose alternatives to imprisonment, such as probation or home confinement, for defendants who fall in certain zones of the sentencing table. Except in immigration cases, the majority of offenders who qualify for a non-prison sentence receive one (USSC, 2002, *Sourcebook*, at Fig. F). A sizeable proportion of qualifying offenders do not get the benefit of an alternative, however, and there is some racial disproportionality in the use of these options.

A 1996 Commission research report examined the factors associated with judges' use of sentencing options (USSC, 1996). Data were available on several factors legally relevant to this stage, and these were found to explain the racial, but not the gender, disproportionalities. Criminal history, employment status, role in the offense, citizenship, and mode of conviction accounted for all the racial differences. However, women remained more likely to receive an alternative sentence than men even after controlling for these factors. It is possible that other factors such as a greater responsibility for the care of young children might explain the gender difference.

***Placement within the guideline range of imprisonment.*** For offenders who do not receive a departure or a sentencing option, judges must decide on a term of imprisonment within the prescribed guideline range. The width of the guideline ranges vary from a minimum of six months for the least serious crimes up to over six and a half years for the most serious, so where an offender is placed within the imprisonment range can make a real difference.

In its Four-Year Evaluation (USSC, 1991a), the Commission calculated the percentage of various racial and gender groups who were sentenced in each quartile of the range for a 25 percent random sample of cases. Women were more likely to be in the bottom quartile and less likely to be in the top. Blacks were slightly more likely than Whites to be in the top half of the range. Flaherty and Casey (1996) updated and extended this analysis. Excluding cases that received a departure or that were affected by mandatory penalties, Blacks received sentences, on average, two percentiles higher in the range than Whites. Whites and Hispanics showed no difference in one of the years that were analyzed and a two percent difference in the other year. Women received sentences ten percentiles lower than men.

The GAO's 1992 analysis also tried to determine whether race or gender accounted for placement within the range, after controlling for some additional factors. The 25 percent sample used in the study was not sufficient to permit controlling for all the factors simultaneously, so analyses were performed using each control variable one at a time. They, too, found that race, gender, age, employment, and marital status did affect placement within the sentencing range. Hispanic defendants were more likely to be sentenced in the middle of the guideline range. Blacks were most likely to receive sentences at the very top or bottom of the range. Women were more likely to be sentenced at the bottom of the range.

Like the evidence of disparity in departure decisions, it is not clear what policymakers should make of these findings. The presumptive sentence analysis, in conjunction with these findings, leaves little doubt that racial and ethnic *disparities* arise when judges decide whether to depart, how far to depart, and where to place an offender within the guideline range. But without data on whether these disparities might be accounted for by legally relevant considerations, it seems premature to conclude that they represent *unwarranted* disparity or discrimination on the part of judges.

## **D. Rules Having Significant Adverse Impacts**

Previous sections have evaluated how much of the sentencing gap between various groups is due to discrimination and how much reflects legally relevant considerations that judges are bound to take into account. One other possibility remains: some of the gap may result from sentencing rules that have a disproportionate impact on a particular offender group but that serve no clear sentencing purpose. A rule that serves no clear purpose would be questionable in any event, but rules that adversely affect a particular group deserve extra scrutiny. Chapter Three described how mandatory minimum penalties that trump the otherwise applicable guideline range, such as sentencing enhancements under 18 U.S.C. § 924(c), fall disproportionately on African-American offenders. This section identifies several other sentencing rules that have such an adverse impact.

### ***1. The 100-to-1 Powder to Crack Cocaine Ratio.***

In 2002, 81 percent of the offenders sentenced for trafficking the crack form of cocaine were African-American.<sup>136</sup> The average length of imprisonment for crack cocaine was 119 months, compared to 78 months for the powder form of the drug. Average sentences for crack cocaine were 25 months longer than for methamphetamine and 81 months longer than for heroin.<sup>137</sup> The reason for the harsher treatment of crack cocaine offenses is the low threshold amounts for five- and ten-year mandatory minimum sentences that are built into the mandatory minimum penalty statutes and incorporated into the Drug Quantity Table of the guidelines, as discussed in Chapter Two. It takes

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<sup>136</sup> USSC, *Sourcebook* (2002), at Tbl. 34.

<sup>137</sup> *Id.* at Fig. J.

100 times as much powder cocaine to get the same five-year sentence as a particular amount of crack cocaine. Under the statutes, five grams of crack cocaine—an amount a heavy user might consume in a weekend with a street value under a thousand dollars—receives a minimum sentence of five years' imprisonment. Crack cocaine is the only drug for which simple possession of greater than five grams, even without an intent to distribute, is treated the same as drug trafficking.

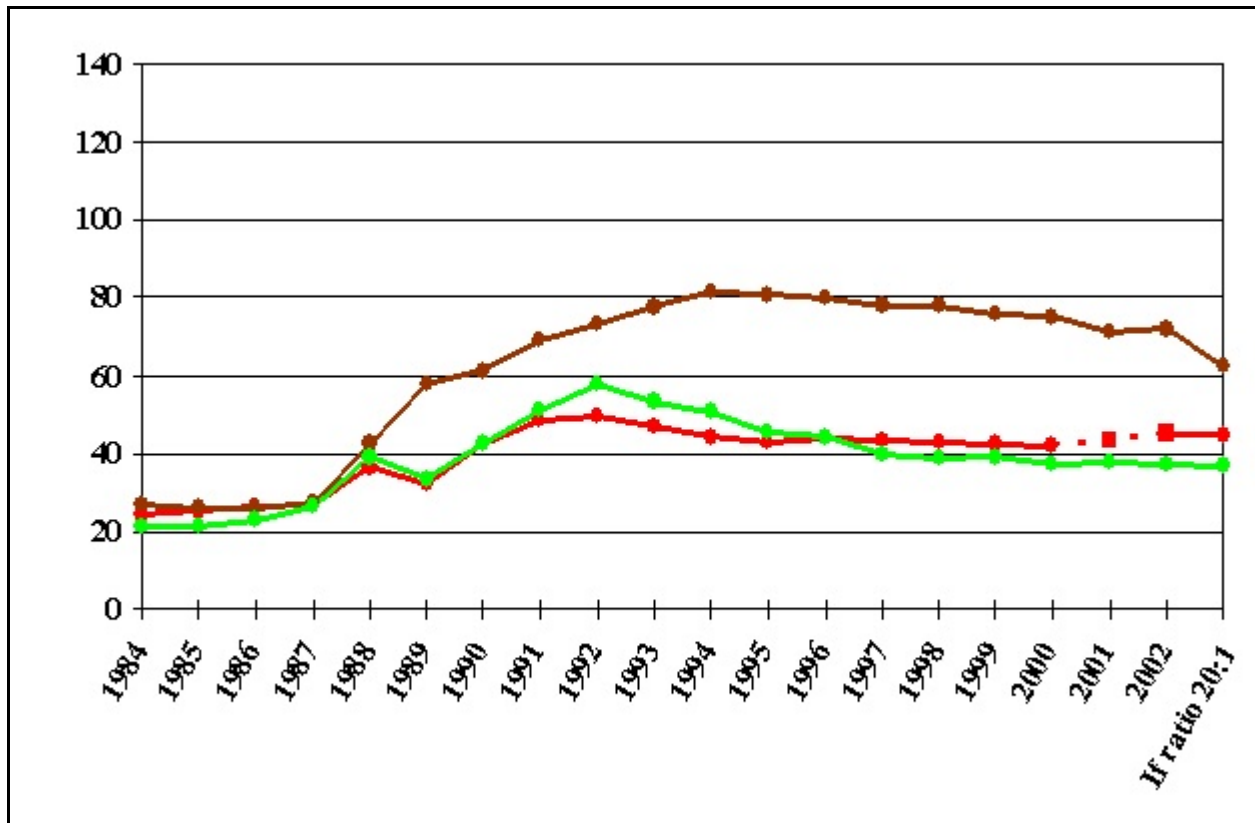
The Commission has previously reported that the harms associated with crack cocaine do not justify its substantially harsher treatment compared to powder cocaine (USSC, 1995; 1997; 2001). The increased addictiveness of crack cocaine is due to its method of use (smoking), rather than to any pharmacological difference between the various forms of cocaine. Powder cocaine that is smoked is equally as addictive as crack cocaine, and powder cocaine that is injected is more harmful and more addictive than crack cocaine, although cocaine injection is relatively rare. Recent research has demonstrated that some of the worst harms thought to be associated with crack cocaine use, such as disabilities associated with pre-natal cocaine exposure, are not as severe as initially feared and no more serious from crack cocaine exposure than from powder cocaine exposure.

Powder cocaine is easily converted into crack cocaine through a simple process involving baking soda and a kitchen stove. Conversion usually is done at the lowest levels of the drug distribution system. Large percentages of the persons subject to five- and ten-year penalties under the current rules do not fit the category of serious or high-level trafficker that Congress described when initially establishing the five- and ten-year penalty levels. Most crack cocaine offenders receiving sentences greater than five years are low-level street dealers. For no other drug are such harsh penalties imposed on such low-level offenders. High penalties for relatively small amounts of crack cocaine appear to be misdirecting federal law enforcement resources away from serious traffickers and kingpins toward street-level retail dealers (USSC, 1997).

For these and other reasons, the Commission has repeatedly recommended that the quantity thresholds for crack cocaine be revised upward. In 2001 (USSC, 2001) the Commission recommended that the crack cocaine threshold be raised to at least 25 grams from 5 grams, replacing the current 100 to-1 ratio with a 20-to-1 ratio.

As shown in Figure 4.10, this one change to current sentencing law would reduce the gap in average prison sentences between Black and White offenders by 9.2 months. Among drug trafficking offenders only, the current gap is even wider—92.1 months for Blacks compared to 57.9 months for Whites—and the reduction would be even greater, 17.8 months. This one sentencing rule contributes more to the differences in average sentences between African-American and White offenders than any possible effect of discrimination. Revising the crack cocaine thresholds would better reduce the gap than any other single policy change, and it would dramatically improve the fairness of the federal sentencing system.

**Figure 4.10: Estimated Time Served 1984-2002  
with Projections for Recommended Ratio**



**2. Using Prior Drug Trafficking Convictions to Define Career Offenders.**

The SRA directs the Commission to “assure that the guidelines specify a sentence to a term of imprisonment at or near the maximum term authorized by statute” for offenders who are at least 18 years old and who have been convicted of a crime of violence or a drug trafficking offense, and who previously have been convicted of two or more such offenses. The Commission implemented this directive by creating USSG §4B1.1, the “career offender” guideline. It places each offender with three violent or drug trafficking convictions in the highest criminal history category VI, and sets the offense level at the guideline range associated with the statutory maximum penalty for the offense.

In 2000, there were 1,279 offenders subject to the career offender provisions, which resulted in some of the most severe penalties imposed under the guidelines. Although Black offenders constituted just 26 percent of the offenders sentenced under the guidelines in 2000, they were 58 percent of the offenders subject to the severe penalties required by the career offender guideline. Most of these offenders were subject to the guideline because of the inclusion of drug trafficking crimes in the criteria qualifying offenders for the guideline. ( Interestingly, Hispanic offenders, while

representing 39 percent of the criminal docket, represent just 17 percent of the offenders subject to the career offender guideline.) Commentators have noted the relative ease of detecting and prosecuting offenses that take place in open-air drug markets, which are most often found in impoverished minority neighborhoods (Tonry, 1995), which suggests that African-Americans have a higher risk of conviction for a drug trafficking crime than do similar White drug traffickers (Tonry, 1995; Blumstein, 2000).

The question for policymakers is whether the career offender guideline, especially as it applies to repeat drug traffickers, clearly promotes an important purpose of sentencing. Unlike repeat violent offenders, whose incapacitation may protect the public from additional crimes by the offender, criminologists and law enforcement officials testifying before the Commission have noted that retail-level drug traffickers are readily replaced by new drug sellers so long as the demand for a drug remains high. Incapacitating a low-level drug seller prevents little, if any, drug selling; the crime is simply committed by someone else.

Most importantly, preliminary analysis of the recidivism rates of drug trafficking offenders sentenced under the career offender guideline based on prior drug convictions shows that their rates are much lower than other offenders who are assigned to criminal history category VI. The overall rate of recidivism for category VI offenders two years after release from prison is 55 percent (USSC, 2004). The rate for offenders qualifying for the career criminal guideline based on one or more violent offenses is about 52 percent. But the rate for offenders qualifying only on the basis of prior drug offenses is only 27 percent. The recidivism rate for career offenders more closely resembles the rates for offenders in the lower criminal history categories in which they *would be* placed under the normal criminal history scoring rules in Chapter Four of the *Guidelines Manual*. The career offender guideline thus makes the criminal history category a *less* perfect measure of recidivism risk than it would be without the inclusion of offenders qualifying only because of prior drug offenses.

There may be other rules that have unwarranted adverse impacts on minority groups without clearly advancing a purpose of sentencing. The use of some non-moving traffic violations in the calculation of the criminal history score is one such possibility but there are many others (Blackwell, 2003). Continued research on how well different rules that result in adverse impacts are fulfilling the purposes of sentencing will improve both the fairness and the effectiveness of federal sentencing.

## **E. Conclusion**

The federal criminal justice system must be both fair and perceived to be fair. A central aspect of fairness in America's multi-racial and multi-ethnic society is equal treatment under law, without regard to race, ethnicity, or gender. America's special concern with racial justice helped lead to the creation of a sentencing system based on racially neutral rules. Evaluating the success of this system at eliminating any vestige of discrimination must be a central component of evaluating the guidelines.

For these reasons, it is troubling that reports of continuing racial, ethnic, and gender discrimination continue to appear in newspaper stories and in academic journals. Such reports understandably undermine public confidence in the federal courts, particularly among minority groups. Public confidence also is threatened by data showing that the gap in average sentences between African-American and other offender groups grew wider in the years following implementation of the guidelines and mandatory minimum penalty statutes enacted shortly after passage of the SRA. These findings deserve the careful attention of policymakers.

To be useful to policymakers, evidence of continuing sentencing disparities must be both accurate and informative concerning *how* and *where* in the criminal justice process disparities arise, and whether they are justified by differences in the seriousness of the offenses committed by the members of each group or by other case characteristics that are important to achieving the purposes of law enforcement. The review of evidence in this chapter suggests that the importance of discrimination by judges has been exaggerated by the existing research, while other stages of the criminal justice process have been relatively neglected, in part because of the paucity of data that can be used to investigate them.

The evidence shows that if unfairness continues in the federal sentencing process, it is more an “institutionalized unfairness” (Zatz, 1987; Tonry, 1996) built into the sentencing rules themselves rather than a product of racial stereotypes, prejudice, or other forms of discrimination on the part of judges. Most of the difference between the average sentences of Blacks, Whites, and Hispanics is an impact of the offense and offender characteristics that have been made relevant to sentencing by the guidelines and the mandatory minimum penalty statutes.

Despite the Commission’s efforts to equalize the treatment of certain crimes, such “white collar” and “street” crimes involving similar economic harms, increasingly severe treatment of other crimes, particularly drug offenses and repeat offenses, has widened the gap among different offender groups. Today’s sentencing policies, crystalized into the sentencing guidelines and mandatory minimum statutes, have a greater adverse impact on Black offenders than did the factors taken into account by judges in the discretionary system in place immediately prior to guidelines implementation. Attention might fruitfully be turned to asking whether these new policies are necessary to achieve any legitimate purpose of sentencing.