

## 9.2 Sentencing Policies and Practices

### A. History of Race in Sentencing

In the past, racially disparate criminal punishment was the law of the land. Harsher punishment of Black people supported the institution of slavery and, following the abolition of slavery, served to maintain their subjugation. For example, under slavery, rape was a capital offense when committed by a Black man when the victim was White, but not when the victim was Black. JOHN HOPE FRANKLIN, *THE FREE NEGRO IN NORTH CAROLINA 1790–1860* 98–99 (1943). North Carolina’s Black Codes, adopted in 1866, imposed different punishments for people based on their race. ERIC FONER, *RECONSTRUCTION: AMERICA’S UNFINISHED REVOLUTION, 1863–77* (1988). *See also* *McCleskey v. Kemp*, 481 U.S. 279, 330–33 (1987) (Brennan, J., dissenting) (discussing history of race-based criminal punishment in the United States, and arguing that the influence of that history should be considered in assessing modern evidence of racially disparate sentencing practices); Loic Wacquant, [\*Deadly Symbiosis: Rethinking Race and Imprisonment in Twenty-First-Century America\*](#), *BOSTON REV.*, Apr.–May 2002 (discussing history of slavery, Black codes, Jim Crow laws, urban ghettos, and mass incarceration).

Laws singling out Black people for greater punishment were often defended as necessary in light of perceived Black criminality. For example, when reviewing a statute criminalizing rebellious behavior by “negroes or other slaves,” an early North Carolina Supreme Court decision stated that “the more debased or licentious a class of society is, the more rigorous must be the penal rules of restraint.” *State v. Tom, a slave*, 13 N.C. 569 (1830); *see also* *Luke, a slave v. State*, 5 Fla. 185, 192 (1853) (considering racially disparate schemes and determining that “there is an obvious propriety in visiting the[] offences [of African Americans] with more degrading punishment than is inflicted on the white citizens”).

Disparate criminal punishment also provided a source of cheap labor through involuntary servitude. Black people who were convicted of minor crimes could in essence be sold on the courthouse steps for inability to pay fines. “The act of 1831, directs that when a free negro or free persons of colour shall be convicted of an offence against the criminal law and sentenced to pay a fine, if it shall appear to the satisfaction of the Court that he is unable to pay the fine imposed, the Court shall direct the Sheriff of the County to hire out the free negro or free person of color so convicted to any person who will pay the fine for his services . . . . It further makes it the duty of the Sheriff . . . publicly, at the door of the Court-house to hire out the convict . . . .” *State v. Manuel*, 20 N.C. 144, 147–48 (1838).

### B. Modern Sentencing Schemes and Studies of Potential Sentencing Disparities

Over the last 30 years, most states and the federal government have adopted sentencing guidelines aimed, at least in part, at reducing racial disparities. However, studies have concluded that race continues to influence criminal sentencing. For example, in February 2013, the United States Sentencing Commission released a report concluding that,

between 2007 and 2011, federal prison sentences for Black men were nearly 20% longer than those imposed on White men for similar crimes. Mark Hansen, [\*Black Prisoners are Given Longer Sentences than Whites, Study Says\*](#), ABAJOURNAL.COM (Feb. 15, 2013). This study was cited by U.S. Attorney General Eric Holder in a recent speech citing racial disparities in sentencing and announcing a plan to address them. See Eric Holder, United States Attorney General, [\*Remarks at the Annual Meeting of the American Bar Association's House of Delegates\*](#) (Aug. 12, 2013).

A review of thirty years of sentencing studies concluded that Black and Latino offenders, in both state and federal courts, face “significantly greater odds” of incarceration than similarly situated White offenders and, in some jurisdictions, longer sentences and fewer downward departures from sentencing guidelines. Cassia C. Spohn, *Thirty Years of Sentencing Reform: The Quest for a Racially Neutral Sentencing Process*, CRIM. JUST., July 2000, at 427, 458. Another analysis of data from seventy-one studies reached similar conclusions, finding that African Americans and Latinos are generally sentenced more harshly than Whites, and that these differences are most significant in the context of: (1) drug offenses, (2) the decision whether to imprison a defendant, and (3) other discretionary sentencing decisions. Ojmarrh Mitchell, [\*A Meta-Analysis of Race and Sentencing Research: Explaining the Inconsistencies\*](#), 21 J. QUANTITATIVE CRIMINOLOGY 439 (2005).

In recent years, researchers examining the influence of race on criminal sentences have refined methods for examining the interaction between race and other factors, such as age, sex, offense type, and income, that may influence sentencing determinations. See, e.g., Traci Schlesinger, *The Failure of Race Neutral Policies: How Mandatory Terms and Sentencing Enhancements Contribute to Mass Racialized Incarceration*, 57 CRIME & DELINQ. 56 (2011). For example, one study of federal sentencing concluded that sentencing disparities between Black and White offenders were most pronounced in the context of drug trafficking offenses; on average, controlling for relevant factors, Black defendants convicted of such offenses received sentences 10.5 months longer than White defendants. David B. Mustard, *Racial, Ethnic, and Gender Disparities in Sentencing: Evidence from the Federal Courts*, 44 J. L. & ECON. 285, 304 (2001). Another study of sentencing data in Pennsylvania found that nonwhite offenders are most likely to face harsher punishment when they are young, male, and unemployed. See, e.g., Darrell Steffensmeier et al., *The Interaction of Race, Gender, and Age in Criminal Sentencing: The Punishment Cost of Being Young, Black, and Male*, 36 CRIMINOLOGY 763 (1998). Researchers have referred to this as “the punishment cost of being young, black, and male.” *Id.*

Extensive research has been conducted about sentencing in capital cases. Studies have concluded that the race of the victim results in disparities in the imposition of capital punishment. In the Baldus study reviewed by the U.S. Supreme Court in *McCleskey v. Kemp*, 481 U.S. 279 (1987), for example, researchers found that people convicted in Georgia of murdering White victims were approximately four times as likely to receive a death sentence as those convicted of murdering Black people. In North Carolina, a recent study examining approximately 15,000 homicides committed in the state between 1980

and 2007 concluded that the odds of a death sentence for those accused of killing White victims are around three times higher than for those accused of killing Black victims. Michael L. Radelet & Glenn L. Pierce, *Race and Death Sentencing in North Carolina: 1980–2007*, 89 N.C. L. REV. 2119, 2120 (2011); *see also* Seth Kotch & Robert P. Mosteller, *The Racial Justice Act and the Long Struggle with Race and the Death Penalty in North Carolina*, 88 N.C. L. REV. 2031, 2097–2100 (2010) (discussing continuing predominance of White victims in North Carolina death sentences).

Few studies have examined whether racial disparities exist in sentencing in non-capital cases in North Carolina. A study conducted by the North Carolina Sentencing and Policy Advisory Commission in 2002 found that while extralegal factors such as age, type of defense, judicial division, mode of disposition, and sex influenced sentencing determinations, the offender's race did not have an identifiable effect on sentencing. NORTH CAROLINA SENTENCING AND POLICY ADVISORY COMMISSION, [SENTENCING PRACTICES UNDER NORTH CAROLINA'S STRUCTURED SENTENCING LAWS](#) (2002) (noting, however, that eligible White offenders were slightly less likely to be convicted as habitual felons than non-white offenders). The study did not examine the possible link between race and socioeconomic indicators considered by criminal justice decision-makers, including "family situation and community ties, education and income, ability to make restitution, and general attitude and demeanor." *Id.* at 70. For this reason, the authors concluded that the influence of socioeconomic factors, "their impact on justice and their possible link with race are worth further exploration." *Id.*

A later student project focused on sentences of imprisonment and found that nonwhite offenders were more likely than White offenders to be sentenced to terms of imprisonment for felony convictions in the years 2008–09. Michelle L. Hall, [Disparity under Structured Sentencing in North Carolina: Do Similarly Situated Offenders Receive Different Outcomes Based on Legally Irrelevant Factors?](#) (Spring 2011) (unpublished UNC School of Government MPA Thesis). Researchers studying sentencing outcomes in an administrative drug court in a large, urban North Carolina jurisdiction (not named in the study's published results) found racial disparities in the sentencing of felony drug offenders convicted in the year 2000. White offenders received less severe punishment than both Black and Hispanic offenders, with Hispanic offenders receiving the most severe punishments. Pauline K. Brennan & Cassia Spohn, *Race/Ethnicity and Sentencing Outcomes Among Drug Offenders in North Carolina*, 24 J. CONTEMP. CRIM. JUST. 371 (2008).

The North Carolina Sentencing and Policy Advisory Commission also publishes annual statistics regarding felony and misdemeanor convictions; however, only the conviction data is disaggregated by race, not the sentencing data. *See* North Carolina Sentencing and Policy Advisory Commission, [Structured Sentencing Statistical Report for Felonies and Misdemeanors-Fiscal Year 2011/12 \(July 1, 2011 - June 30, 2012\)](#), 9 Fig. D (2013) (showing that, in FY 2011/2012, 50% of people convicted of felonies were Black, 44% were White, 3% were Hispanic, 2% were Native American, and 1% were Other/Unknown).

### C. Causes of Potential Sentencing Disparities

**Potential for racially disparate effects from race-neutral policies.** Disparities in sentencing may occur from sentencing laws and policies that, while facially race-neutral, have disparate effects. *See, e.g.,* Traci Schlesinger, *The Failure of Race Neutral Policies: How Mandatory Terms and Sentencing Enhancements Contribute to Mass Racialized Incarceration*, 57 CRIME & DELINQ. 56 (2011). The most familiar example of this phenomenon is the 100:1 crack/cocaine drug quantity differential established by Congress in 1986. Before the ratio was modified to 18:1 in 2010, the sale of 5 grams of crack triggered a mandatory minimum prison term of five years, while a sale of 500 grams of powder cocaine triggered the same term. This law had a disproportionate impact on Black people, who were vastly overrepresented among those convicted of crack-cocaine violations. The U.S. Sentencing Commission reported that 88.3% of those convicted of crack offenses in federal courts in 1994 were Black. *See* U.S. SENTENCING COMMISSION, [SPECIAL REPORT TO CONGRESS: COCAINE AND FEDERAL SENTENCING POLICY](#) Ch. 7 (1995).

Laws that increase penalties for drug activity conducted within a school zone have also been found to produce racial disparities. The Sentencing Project's Marc Mauer posits that these effects are largely a result of housing patterns. "Since urban areas are much more densely populated than rural or suburban areas, it is more likely that any given drug offense will take place within a school zone district. And since persons of color disproportionately reside in urban areas, a drug offense committed by an African American or Latino person will be more likely to incur these enhanced penalties." Marc Mauer, [Addressing Racial Disparities in Incarceration](#), 91 PRISON J. 87S, 95S (2011). A recent review of criminal sentencing in New Jersey discovered that 96% of offenders incarcerated for violations of school zone laws were African American or Latino. *Id.* As a result of this discovery, the New Jersey legislature eliminated the mandatory sentencing enhancement for school zone violations in 2010. *Id.*

Additionally, laws that increase penalties based on an offender's prior record may result in greater punishment for racial minorities, who are more likely to have prior convictions. In North Carolina, African Americans are 2.46 times more likely than Whites to be incarcerated as habitual felons. *See, e.g.,* [North Carolina Advocates for Justice: Task Force on Racial and Ethnic Bias Executive Summary](#), NCAJ.COM (African Americans represent 21.5% of the population of North Carolina but 69.6% of those incarcerated as habitual felons) (last visited Sept. 18, 2014).

**Potential for bias.** Studies have shown that bias tends to arise when actors are making discretionary decisions. *See generally* TONY FABELO ET AL., BREAKING SCHOOLS' RULES, A STATEWIDE STUDY OF HOW SCHOOL DISCIPLINE RELATES TO STUDENTS' SUCCESS AND JUVENILE JUSTICE INVOLVEMENT (Council for State Gov'ts Justice Ctr. 2011) (finding that racial disparities in school discipline were most pronounced when disciplinary action was discretionary: African American students had a 31 percent higher likelihood of a school discretionary action as compared to otherwise identical White and Hispanic students); FRANK BAUMGARTNER & DEREK EPP, [NORTH CAROLINA TRAFFIC STOP](#)

[ANALYSIS](#) (2012) (observing in an analysis of over 13 million North Carolina traffic stops that “disparities appear greatest when the level of officer discretion is highest—seat belts, vehicle equipment, and vehicle regulatory issues”).

In evaluating jury sentencing in capital cases, the U.S. Supreme Court has observed that the discretion afforded jurors provides “a unique opportunity for racial prejudice to operate but remain undetected.” *Turner v. Murray*, 476 U.S. 28, 35 (1986). More broadly, some researchers have concluded that biases may cause decision-makers unwittingly to ignore the positive aspects of a non-White person’s employment record, while crediting the same attributes of a White person’s employment record. See GEOFFREY BEATTIE, *OUR RACIST HEART? AN EXPLORATION OF UNCONSCIOUS PREJUDICE IN EVERYDAY LIFE* 241 (2013); see also Jennifer L. Eberhardt et al., *Seeing Black: Race, Crime, and Visual Processing*, 87 J. PERSONALITY & SOC. PSYCH. 876 (2004).

Researchers examining the influence of biases on sentencing decisions have found that facial features associated with Black people (sometimes referred to as “Afrocentric” features) activate negative associations and stereotypes that lead to longer sentences. One study found that defendants whose facial features were more Afrocentric received longer sentences than similarly situated offenders with less Afrocentric features. Irene V. Blair et al., *The Influence of Afrocentric Facial Features in Criminal Sentencing*, 15 PSYCH. SCI. 674 (2004). Researchers examining death-eligible cases from 1979–99 in Philadelphia concluded that, in capital cases involving Black defendants and White victims, defendants with more Afrocentric facial features were more likely to be sentenced to death than those with less Afrocentric ones. Jennifer L. Eberhardt et al., *Looking Deathworthy: Perceived Stereotypicality of Black Defendants Predicts Capital-Sentencing Outcomes*, 17 PSYCHOL. SCI. 383 (2006).

**Poverty.** Black and Latino people are more likely to live in poverty, which can negatively affect them at the sentencing phase in various ways. See *infra* § 9.4C, Pretrial Strategies. For example, under the impaired driving sentencing scheme, Level One and Level Two offenders can reduce or avoid otherwise mandatory periods of imprisonment if they can verify abstinence from alcohol using Continuous Alcohol Monitoring, a costly device for which there is not state funding. G.S. 20-179(g), (h).

#### **D. Impact of Incarceration Rates**

Nationwide, it is estimated that nearly one out of three Black men in their twenties is currently under correctional control, either in jail, prison, or under a community supervision program such as probation or parole. Equal Justice Initiative, [Our Work: Race and Poverty](#), EJI.ORG (last visited Sept. 18, 2014). In North Carolina in 2012, Black inmates comprised 57% of the prison population, more than double their representation in the general population. North Carolina Department of Public Safety, [Prison Statistics Fact Card, 2012](#), DOC.STATE.NC.US (last visited Sept. 18, 2014); The Henry J. Kaiser Family Foundation, [Population Distribution by Race/Ethnicity](#), KFF.ORG (last visited Sept. 18, 2014) (reporting that in 2012 Black people comprised 21% of the general population of North Carolina). Disparities in sentencing may be a contributing factor. See

Traci Schlesinger, [\*The Cumulative Effects of Racial Disparities in Criminal Processing\*](#), THE ADVOCATE, May 2008, at 22 (racial disparities may influence various stages of a criminal proceeding and produce a cumulative effect on outcomes, making it difficult to isolate the influence of sentencing decisions); *see also* *U.S. v. Leviner*, 31 F. Supp. 2d 23 (D. Mass. 1998) (recognizing the possible influence of racially disparate policing practices on defendant's criminal history and ultimate sentence).

Incarceration often triggers consequences such as loss of employment, housing, or child custody. Black children are far more likely than other children to have an incarcerated parent: one in nine Black children has an incarcerated parent, compared to one in 28 Latino children and one in 57 White children. BRUCE WESTERN & BECKY PETTIT, THE PEW CHARITABLE TRUSTS, COLLATERAL COSTS: INCARCERATION'S EFFECT ON ECONOMIC MOBILITY 4 (2010); *see also* Rebecca Ballard DiLoreto, [\*Disparate Impact: Racial Bias in the Sentencing and Plea Bargaining Process\*](#), THE ADVOCATE, May 2008, at 15 (discussing impact on children and non-incarcerated parent trying to raise children alone).

The psychological effects of higher imprisonment rates on communities of color are difficult to quantify. One scholar has observed that “[w]hole generations have already accepted prison as the norm. This is the destructive effect of mass incarceration on community consciousness and personal aspirations.” TANYA E. COKE, CRIMINAL JUSTICE IN THE 21ST CENTURY: ELIMINATING RACIAL AND ETHNIC DISPARITIES IN THE CRIMINAL JUSTICE SYSTEM 22 (2012) (quoting Dr. Divine Pryor, Executive Director of the NuLeadership Center for Urban Solutions).