

RACIAL DISPARITIES IN SENTENCING DECISIONS

Stephen P. Klein

1991

P-7742

RAND

Papers are issued by RAND as a service to its professional staff. Their purpose is to facilitate the exchange of ideas among those who share the author's research interests; Papers are not reports prepared in fulfillment of RAND's contracts or grants. Views expressed in a Paper are the author's own and are not necessarily shared by RAND or its research sponsors.

RAND, 1700 Main Street, P.O. Box 2138, Santa Monica, CA 90407-2138

SUMMARY

Statisticians generally define racial discrimination in sentencing as a difference between groups in the rate at which a penalty is imposed that cannot be explained by non-racial case and defendant characteristics. Most studies that control on several factors find little or no bias related to the race of the defendant. This holds for both capital and non-capital crimes. In capital cases, race of victim is slightly but not statistically significantly related to sentencing once there is adjustment for several aggravating and mitigating circumstances, but this disparity only appears for the small proportion of cases that have a middling probability of being sentenced to death. Race of victim is not a factor for the lion's share of the cases that are subject to the death penalty.

The validity and reliability of the research in this area is threatened by conclusions riding on the results with just a handful of cases and by concerns about sample selection bias, important variables that are not studied, and the use of statistical methods that do not account for the complex interactions among variables that the U.S. Supreme Court says must be considered in rendering a verdict in capital cases. In short, unexplained differences in death penalty rates between groups is not an appropriate or legally acceptable basis for determining whether the death penalty is imposed in a racially biased manner.

RACIAL DISPARITIES IN SENTENCING DECISIONS¹

My remarks today begin with a brief discussion of the distinction between racial disparity and racial discrimination. I will then summarize what is known about racial bias in capital and non-capital cases. Finally, I will point out why the serious limitations of the research methods in this field (and certain provisions in the proposed Racial Justice Act) preclude relying on these methods to reach valid or reliable inferences about whether bias is present.

DISPARITY AND DISCRIMINATION

Racial disparities exist in the criminal justice system. Although blacks (African Americans) constitute less than 11 percent of the U.S. population, they make up nearly half of the national prison population. This startling difference has prompted charges of racial discrimination. But, the question is, are so many blacks in prison because of racial bias or because they are more likely than others to commit the crimes that lead to imprisonment? Young men are also over represented in prison, but no one is suggesting this is due to age discrimination.

The distinction between racial discrimination and racial disparity is too often glossed over. Discrimination occurs if the criminal justice system makes decisions based on the alleged offender's race rather than on legitimate factors, such as whether there are fingerprints linking the defendant to the crime. Discrimination does not occur if disparities arise because different groups simply have different crime commission rates and/or the crimes they commit differ in severity. Disparities alone are not prima facie evidence of discrimination.

Comparisons between groups in the rate at which they receive a penalty must first control for factors that can appropriately influence

1. Based on testimony given before the Subcommittee on Civil and Constitutional Rights hearing on Race and Arbitrariness in Capital Sentencing, Committee on the Judiciary, U.S. House of Representatives; July 10, 1991.

sentencing decisions. Only after such controls are instituted can there be an investigation of the unique role of race. However, for the reasons I will discuss, even when controls are used, social science research procedures still fall short of providing a valid or legally sufficient assessment of whether race affects sentencing decisions.

RESEARCH ON NON-CAPITAL CRIMES

The research literature on non-capital cases suggests that race of defendant is not related to sentencing decisions once there is control on important case characteristics. The pre-1980 studies have been summarized by Kleck (1981). Recent research on this topic has been conducted by Blumstein (1982) for the National Academy of Sciences and Langan (1985) for the U.S. Bureau of Justice Statistics. Their studies, which used quite different methodologies and samples, found that even without extensive controls on several key variables, almost all of the observed racial disparities in prison populations can be attributed to racial differences in crime commission and arrest rates.

Recent research conducted at RAND has produced similar findings. For example, a prediction model that does not include defendant race forecasts with about 80 percent accuracy whether a convicted offender will be sentenced to prison or probation (Klein, Petersilia, & Turner, 1990). These results are based on analyses of over 10,000 California offenders. Adding race improved predictive accuracy for two of the six crimes studied, but by only one percentage point. Moreover, the reason for the increase was not consistent. For robbery, blacks had a relatively higher and Latinos a relatively lower probability of going to prison, whereas for drug crimes, Latinos had a higher probability and white offenders had a lower probability of imprisonment.

Another RAND project examined case processing of over 2,000 burglars and armed robbers in 13 urban jurisdictions across the country (Klein, et al., 1991). This study, which was supported by the Bureau of Justice Statistics, also found that adding race to a prediction model that already included legitimate sentencing factors -- such as whether the

defendant pleaded guilty, was convicted, or was incarcerated -- did not improve the accuracy with which various criminal justice outcomes could be forecasted.

The failure to find racial disparities after controlling for several variables does not mean the system is free from discrimination. Bias can enter into the processing of individual cases as well as more subtly across many cases. For example, suppose blacks and whites commit crimes at the same rate, but the police are more likely to arrest black offenders than equally culpable white ones. If that happened, then a typical black offender will have a more severe prior criminal record than the average white offender. Because longer sentences tend to be given to those with more severe prior records, black offenders will also tend to receive longer sentences than white offenders for the same crime; and, the statistical analysis will erroneously attribute this disparity to differences in their prior records rather than to racial discrimination in police arrest practices.

RESEARCH ON CAPITAL CRIMES

Several studies have examined racial disparities in capital cases since the Furman (1972) decision. A few studies have found a relationship between race of defendant and the sentence imposed (e.g., Bowers & Pierce, 1980; Keil & Vito, 1989). However, most studies have found no statistically significant relationship between capital sentencing and race of defendant once there is control on several case characteristics (Judson et al., 1969; Gross & Mauro, 1984; Radelet, 1981; Jacoby & Paternoster, 1982; Paternoster, 1984; and Barnett, 1985). This trend has shifted attention to the possible effects of the victim's race.

The most comprehensive race of victim study was conducted by Baldus, Pulaski, and Woodworth (1983). According to their analyses of 594 post-Furman Georgia cases, 24 percent of the white victim cases but only 6 percent of the black victim cases resulted in a sentence of death (Table 6, p. 708). They also discovered that white victim cases were generally more aggravated and less mitigated than black victim cases.

After adjusting for these differences in case severity, Baldus et al., found the disparity in death sentencing rates between white and black victim cases shrunk from 18 to a non-statistically significant 3 percentage points. And, all of this 3 percentage point disparity could be eliminated by changing the verdicts on just 4 of the 246 Black victim cases.²

These results are typical of what has been found in other studies. For example, Radelet and Pierce (1985) reported that Florida prosecutors were more likely to classify a homicide as involving an accompanying felony (and therefore more likely to result in a death penalty) when the victim was white. However, this difference stemmed from only 3 percent of the 1,017 cases studied. Moreover, the authors could not locate the police reports for over eight times that number of defendants. There also are concerns about impartiality when data are gathered by advocacy groups, such as Citizens Against the Death Penalty.

Research results on capital punishment cases in California are generally consistent with other studies that have used several control variables. A recent study (Klein & Rolph, 1991) focused on 496 defendants who were convicted of homicide with special circumstances and therefore received a sentence of life-without-the-possibility-of-parole or death. This study found no race of defendant effects, no overall race of victim effects, and a slight, but not statistically significant race of victim effect for the small percentage of cases that had a middling probability of receiving the death penalty. Again, changing the verdict on less than a handful of cases completely washed out the disparities that remained after a few control variables are used.

2. There appeared to be less racial disparity when the cases were divided into the eight groups described in the Baldus et al., (1983) article than when they were divided into the six groups discussed in Baldus' May 1990 testimony before this Committee.

DESIGN LIMITATIONS

There are several threats to the validity of studies that have investigated the effects of race on capital sentencing decisions. For instance, as a result of small sample sizes, changing the sentence imposed on a few cases completely changes the conclusions that are drawn from the results. The GAO (1990) report on death penalty sentencing also discussed concerns about sample sizes as well as selection bias and omitted variables.

Sample selection bias occurs if discrimination is present at one stage of the arrest or adjudication process but is undetected and carried through to a subsequent stage. I already noted the potential for this type of problem in connection with the concerns raised about using "prior criminal record" as a control variable.

The omitted variable problem is an equally if not more serious problem. Research on racial discrimination defines bias as any unexplained disparity, i.e., any disparity that remains after using some statistical model to adjust for legitimate factors. No study can measure let alone control all of the factors that may be important. For example, no study to date has adequately adjusted for witness credibility. And, this is just one of the multitude of variables that may be correlated with both the race of victim and the sentence imposed.³

The omitted variable problem apparently led the U.S. Supreme Court to conclude that correlational studies -- specifically the one done by Baldus and his colleagues -- cannot separate out racial bias from the legitimate factors that may appropriately influence death penalty decisions. In the Court's words, "Where the discretion that is fundamental to our criminal process is involved, we decline to assume that what is unexplained is invidious" (McCleskey v. Kemp, p. 313).

3. During the hearing, Congressman Washington (D-Texas) illustrated how omitted variables could influence case outcomes. He did this by showing how court records would not reflect bias that was introduced through verbal tone, inflection, and non-verbal body language.

Barnett's (1985) analyses and my own research have indicated that a given variable may operate one way for defendants who share certain case characteristics, such as those who commit sex crimes in addition to murder, but in a different manner for defendants who share a different set of case characteristics. Most statistical models are not very good at identifying or adjusting for these complex interactions. They are just not sensitive to the effects of various combinations of variables, especially when a given combination is unique to a given defendant.

SPECIFIC PROBLEMS WITH THE RACIAL JUSTICE ACT

The proposed Racial Justice Act says that evidence of bias "shall include comparisons of similar cases involving persons of different races" (Chapter 177, d). But, the U.S. Supreme Court has said that in capital cases, the jury, in the exercise of its discretion, must weigh all the unique aspects of each case (see Lockett v. Ohio, 1978; Zant v. Stephens, 1983; Eddings v. Oklahoma, 1982; and McCleskey v. Kemp, 1987). In short, there is no such thing as "similar" capital cases.

The Act's failure to define what constitutes "similar" is a very serious omission. Using a large number of variables to determine whether two cases are alike allows for control of several factors that may appropriately influence penalty decisions. However, as the number of variables increases, so does the number of different groups that can be formed where all the cases in a group can be said to have "similar" characteristics. And, as more groups are formed, there are fewer cases per group and therefore less opportunity to find statistically significant differences in death penalty rates that are related to race. If the Court's mandate is followed (i.e., the jury attends to all the aggravating and mitigating factors in a case), then it is highly unlikely that two capital cases will ever be "similar" and there will be as many groups as there are defendants.

Finally, the Act says that for the prosecution to rebut a charge of bias, it must show (with a preponderance of the evidence) that any racial disparity in penalty rates stemmed from factors other than race

(i.e., even if that disparity was due to racial differences in defendant responses to the criminal justice system, such as white defendants being more willing than black ones to plead guilty). In short, the Act says the prosecution will have to get into the business of conducting large scale social science research projects to show that racial differences could have stemmed from factors other than race. In my opinion, neither the prosecution nor the defense could use such studies to "prove" that differences stemmed from race or from something else.

CONCLUSIONS AND IMPLICATIONS

To sum up, most studies find race of defendant is not related to sentencing decisions once there is control on a few relevant factors. This is true for both capital and non-capital cases. In capital cases, race of victim may influence decisions for the cases that have a middling probability of receiving the death penalty, but this is a small percentage of all the defendants who actually face the possibility of being sentenced to death. No study that has controlled for several aggravating and mitigating factors has found this trend to be substantially different than what might occur by chance. The number of cases with middling probabilities is far too small to provide a reliable basis for reaching a conclusion about the role of victim race in the sentencing process. The picture is further obscured by concerns about impartiality, sample selection bias, the statistical procedures used to identify similar cases, and omitted variables (the latter problem was apparently serious enough to cause the Court to throw out the Baldus study).

Where does this leave us? Statistical and research techniques are just not up to the task of providing definitive evidence of whether racial bias is present. Discrimination in capital or non-capital cases cannot be inferred simply because groups differ in the rate at which they receive a given penalty. I therefore recommend that Congress and the

courts continue to insure that defendants receive a fair trial, but whether or not that goal is achieved cannot be inferred from comparisons of sentencing rates among groups.

REFERENCES

- Baldus, D. C., Pulaski, C. & Woodworth, G. (1983). Comparative review of death sentences: An empirical study of the Georgia experience. The Journal of Criminal Law & Criminology, 74, No. 3, 661-763.
- Barnett, A. (1985). Some distribution patterns for the Georgia death sentence. University of California at Davis Law Review, 18, 1327-1374.
- Blumstein, A. (1982). On the racial disproportionality of the United States prison population. Journal of Criminal Law & Criminology, 73, 1259-1281.
- Bowers, W.J. & Pierce, G. (1980). Arbitrariness and discrimination under post-Furman capital statutes. Crime and Delinquency, 26, 563-635.
- Government Accounting Office (1990). Death penalty sentencing. Report to the Senate and House Committees on the Judiciary. B-23676.
- Gross, S. R. & Mauro, R. (1984). Patterns of death: An analysis of racial disparities in capital sentencing and homicide victimization. Stanford Law Review, 37:27, 28-153.
- Jacoby, J. E. & Paternoster, R. (1982). Sentencing disparity and jury packing: Further challenges to the death penalty. Journal of Criminal Law and Criminology, 73, 379-387.
- Judson, C. J., et al. (1969). A study of the California death penalty jury in first degree murder cases. Stanford Law Review, 21, 1297-1431.
- Keil, Thomas J., & Vito, G. (1989). Race, homicide severity, and application of the death penalty: A consideration of the Barnett scale. Criminology, 27, No. 3, 511-535.
- Kleck, G. (1981). Racial discrimination in criminal sentencing: A critical evaluation of the evidence with additional evidence on the death penalty. American Sociological Review, 46, 783-805.
- Klein, S., Petersilia, J., & Turner, S. (1990). Race and imprisonment decisions in California. Science, 247, 812-816.
- Klein, S. et al. (1991). Predicting criminal justice outcomes: What matters? RAND, R-3972-BJS.
- Klein, S. & Rolph, J. E. Relationship of offender and victim race to death penalty sentences in California. Jurimetrics (in press).

- Langan, P. (1985). Racism on trial: New evidence to explain the racial composition of prisons in the United States. Journal of Law & Criminology, 76, 271-285.
- Paternoster, R. (1984). Prosecutorial discretion in requesting the death penalty: A case of victim-based racial discrimination. Law and Society Review, 18, No. 3, 437-478.
- Radelet, M. (1981). Racial characteristics and the imposition of the death penalty. American Sociological Review, 46, 918-927.
- Radelet, M. L. and G. L. Pierce (1985). Race and prosecutorial discretion in homicide cases. Law and Society Review, 19, No. 4, 587-621.

CASES CITED

- Eddings v. Oklahoma, 455 US 104, 71 L Ed 2d 1, 102 S Ct 869 (1982)
Furman v. Georgia, 408 US 238 (1972)
Gregg v. Georgia, 428 US 485 (1976)
Lockett v. Ohio, 438 US 586 (1978)
McCleskey v. Kemp, 481 US _____, 95 L Ed 2d 262, 107 S Ct 1756 (1987)
Zant v. Stephens, 462 US 862 (1983)

RAND/P-7742

RACIAL DISPARITIES IN SENTENCING DECISIONS

Klein