Race, Class, and Gender

Fundamental constitutional and moral principles of equal treatment tell us that people should not be punished more or less severely because of their race (or ethnicity), social or economic class, or gender. These abstract principles quickly confront a dramatic reality of American criminal justice: criminal defendants, as a group, are overwhelmingly male and poor. Equally striking, African Americans and Native Americans are convicted of crimes at highly disproportionate levels. These unsettling facts of the American criminal justice system—disproportions shared in varying degrees by other countries—raise a profound question: why are men, members of (some) racial minority groups, and the poor convicted more frequently than others?

For a good part of U.S. history, state laws explicitly justified differential treatment on the basis of race and gender. But such laws have for some time been anathema to the U.S. legal system. See, e.g., Commonwealth v. Butler, 328 A.2d 851 (Pa. 1974) (statute requiring mandatory minimum sentence for men but not women declared unconstitutional). Now, the issue of whether people are sentenced more severely on the basis of their race, ethnicity, wealth, or gender has become more subtle and difficult to answer.

Studies conducted in the United States find little difference between races in their formal treatment by the criminal justice system after controlling for other differences among cases. Some of the racial disproportionality in prison sentences appears to be largely contextual: African American defendants are more likely to go to prison in areas of high unemployment, in places where blacks constitute a larger percentage of the population, and in the South. For other racial groups the data are more ambiguous and more difficult to explain. The few empirical studies done on inmate populations indicate that those sentenced to custodial terms are poorer than the rest of the population. The gender data are clear: despite rising imprisonment rates for women, they are dramatically underrepresented, and the offenses of which they are convicted tend to be less violent.
than those of male offenders.

This chapter considers the charge that racism, classism, and sexism are an inherent part of the criminal justice process and that their end product is highly disproportionate punishment. The chapter also raises the question whether the criminal justice system in general, and sentencing law in particular, is an appropriate place to remedy bias that may stem from more pervasive societal and historical forces.

A. AFRICAN AMERICANS IN THE CRIMINAL JUSTICE SYSTEM

There is nothing more painful to me at this stage in my life than to walk down the street and hear footsteps and start thinking about robbery—then look around and see somebody white and feel relieved.

_Jesse Jackson, 1993_

Race is an unavoidable issue in modern American criminal procedure. Difficult questions arise at all stages of the criminal process: What is the role of race in police stops and investigations? When might racial disparities justify challenges to charging practices? How may race affect the setting of bail, which has an impact on the likelihood of a conviction? What role should race play in jury selection? In arguments at trial? But perhaps the most common and visible questions about race arise at the end of the process, in the form of claims that black Americans and other minorities are punished more severely than whites. In some situations, the responsible decision makers may be identifiable; in other situations, the source of racial disparity may be hard to specify even when it clearly exists.

The first section of this chapter sets the stage by identifying the aggregate racial disparities in sanctioning and by presenting some preliminary arguments about the source of those disparities. The next part examines the 1987 decision of the U.S. Supreme Court in _McCleskey v. Kemp_, one of the most difficult and contentious racial cases of the past half century. _McCleskey_ addresses a claim that the state of Georgia discriminates on the basis of the victim’s race when it imposes the death penalty. The last section considers the
link between early decisions made in investigations or charging and the later pattern of sentencing outcomes. Sometimes early decisions by police and by prosecutors become de facto decisions about punishment, and the entire criminal justice process can be said to be racially skewed. In what circumstances—and in what legal institutions—should challenges to entire systems be allowed based on claims of racial bias? Does the criminal justice system exacerbate or mitigate larger social problems? Can criminal justice systems respond to intentional or unintentional racial bias in society?

1. An American Dilemma

It seems obvious to many that there is a relationship between race and punishment, but it is difficult to study or discuss. Problems with studying racial disparities include difficulties in defining race, the propriety and cost of collecting useful data, and the difficulties in knowing what conclusions to draw from the information. Does the very pervasiveness of racial tension, and the difficulty of frank discussion about race in the United States, make it impossible to explain the numbers satisfactorily? Much of the racial focus in the United States has been on the black-white disparity. In December 2010 black men were incarcerated about 7 times more than white non-Hispanic men. Bureau of Justice Statistics, Prisoners in 2010 (NCJ 236096, 2011). When the number of young men on probation or parole are combined with the number in prison or jail, almost one-third of young black men are under criminal justice supervision on any given day. Imprisonment rates vary dramatically by state: In some states 10-15% of the black male population are in prison. The black-to-white ratio also differs substantially, from a high of 13.6-to-1 to a low of 1.9-to-1, with the highest ratio found disproportionately in the Northeast and Midwest. Drug offenses have contributed more than any other crime to the rapid growth in the imprisonment rate for African Americans.

_Malign Neglect: Race, Crime and Punishment in America, Michael Tonry_  

Crime by blacks is not getting worse. The proportions of serious violent crimes committed by blacks have been level for more than a decade. Since the mid-1970s, approximately 45 percent of those arrested for murder, rape, robbery, and aggravated
assault have been black (the trend is slightly downward). Disproportionate punishment of blacks, however, [has] been getting worse, especially since Ronald Reagan became president. Since 1980, the number of blacks in prison has tripled.

Black Americans are far more likely than whites to be in prison or jail. [At the end of 2010 3,074 black men per 100,000 were in prison; among white non-Hispanic men, 459 per 100,000 were imprisoned. For women the comparable figures were 133 and 47.]

Another even more remarkable pattern of black-white disparities has been revealed by a series of studies attempting to determine the proportions of blacks under the control of the criminal justice system on a given day. Of all the people in prison or jail, on probation or parole, or released on bail or recognizance pending trial, what percentage are black?…

Three findings about race, crime, and punishment stand out concerning blacks. First, at every criminal justice stage from arrest through incarceration, blacks are present in numbers greatly out of proportion to their presence in the general population….Second, although black disproportions in the front of the system—as offenders and arrestees—are essentially stable, since the early 1980s they have steadily grown worse at the back [in sentencing and in prison populations]. Third, perhaps surprisingly, for nearly a decade there has been a near consensus among scholars and policy analysts that most of the black disproportions result not from racial bias or discrimination within the system but from patterns of black offending and of blacks’ criminal records. Drug law enforcement is the conspicuous exception….  

Do not misunderstand. A conclusion that black overrepresentation among prisoners is not primarily the result of racial bias does not mean that there is no racism in the system. Virtually no one believes that racial bias and enmity are absent, that no police, prosecutors, or judges are bigots, or that some local courts or bureaucracies are not systematically discriminatory. The overwhelming weight of evidence, however, is that invidious bias explains much less of racial disparities than does offending by black offenders. Much offending is intraracial, which means that a failure by the state to take crimes by blacks seriously depreciates the importance of victimization of blacks—discrimination little less objectionable than bias against black offenders. Virtually every
sophisticated review of social science evidence on criminal justice decision making has concluded, overall, that the apparent influence of the offender’s race on official decisions concerning individual defendants is slight.

How is it possible that black participation in serious crime has not increased while rising numbers and proportions of blacks are in prison or jail, and yet racial bias does not pervade the system? There is an answer, and it lies not in the criminal justice system but in the aggressive promotion of punitive crime control policies and a “War on Drugs.” These policies have caused the ever harsher treatment of blacks by the criminal justice system, and it was foreseeable that they would do so. Just as the tripling of the American prison population between 1980 and 1993 was the result of conscious policy decisions, so also was the greater burden of punishment borne by blacks. Crime control politicians wanted more people in prison and knew that a larger proportion of them would be black.

NOTES

1. Data and knowledge about race. Surprisingly little race data is available in the criminal justice system. In most states,

   race data are virtually nonexistent with regard to victims; information on the race of the offender is limited. Race data on offenders are collected by law enforcement at arrest and maintained in the criminal history record for felons and gross misdemeanants. Race data on offenders are also collected by probation officers on sentencing worksheets. There are no race data anywhere on misdemeanants.


   The absence of race data also hampers analysis in other states, including an assessment whether disparity amounts to discrimination. See Governor Jim Doyle’s Commission on Reducing Racial Disparities in the Wisconsin Justice System, Final Report (Feb. 2008). For a thorough discussion of the limited available data on the racial impact of the federal sentencing guidelines, see United States Sentencing Commission, Fifteen Years of

Are the social and financial costs of collecting additional race data likely to be worth the benefits? Should the United States follow the model of many European states that do not collect racial data on offenders, or does its history make this impossible? Dailey provides this cautionary note:

One reason for the paucity of data is ambivalence as to whether the race of individuals ought to be recorded at all. In 1993, for instance, the mayor of Minneapolis declared that “the use of race in crime statistics is an abomination and an outrage.” The mayor questioned the purpose of reporting arrest data by race and expressed concern that such data can lead to improper inferences about the relationship between crime and race.…

Racial or ethnic data must be treated with caution because [this data] may be recorded from observation or from self-identification…. Moreover, existing research on crime has generally shown that racial or ethnic identity is not predictive of crime behavior within data which has been controlled for social or economic factors such as education levels, family status, income, housing density, and residential mobility.

Dailey at 89. Is race merely a proxy for other factors? One study’s findings seems to indicate that race does not explain disparities at sentencing but instead racial stereotyping occurs based on the perceived Afrocentric facial appearance of the offender. William T. Pizzi, Irene V. Blair & Charles M. Judd, Discrimination in Sentencing on the Basis of Afrocentric Features, 10 Mich. J. of Race & L. 7 (2005). With increasing rates of intermarriage and offspring with multiple racial identities, will collections of racial data become misleading or even irrelevant?

2. Who takes action? Even if we do understand the sources of some racial disparities in the criminal justice system, how can we best implement changes? In 1993 the Minnesota legislature created the Criminal and Juvenile Justice Information Policy Group to provide leadership and support for improving criminal justice. Made up of representatives from the state’s sentencing commission, the judiciary, and other governmental bodies, the group was expected to recommend a framework for integrating
criminal justice information, including information about race and ethnicity. Was the Minnesota legislature likely to defer to the group’s recommendations? What institutions are most likely to make changes in law that will reduce disparate racial effects throughout the criminal justice system? Are courts the best avenue to bring about such changes? Sentencing commissions? If none of these institutions is the answer, then what should we do? Wait for society to improve?

2. **Whose Race?**

Our exploration of the influence of race on punishment begins where the issue has received the most sustained attention: in the context of capital punishment. On the morning of May 13, 1978, Warren McCleskey and three other men planned to rob a furniture store. McCleskey had a .38 caliber Rossi nickel-plated revolver, which he had stolen in an armed robbery of a grocery store a month earlier. The others carried a sawed-off shotgun and pistols. McCleskey, who was black, entered the front of the store, and the other three came through the rear. While the robbers tied up all the employees, Officer Frank Schlatt, who was white, answered a silent alarm and entered the store, where he was fatally shot. The robbers fled but, some time later McCleskey was arrested in Cobb County in connection with another armed robbery. He confessed to the furniture store robbery but denied the shooting. Ballistics showed that Schlatt had been shot by a .38 caliber Rossi revolver. The weapon was never recovered.

McCleskey was convicted in 1978. The jury found two aggravating circumstances that authorized the use of the death penalty: (1) the murder was committed while the offender was committing another capital felony (armed robbery), and (2) the murder was committed against a police officer engaged in the performance of his official duties. The jury sentenced McCleskey to death for murder. One co-defendant was sentenced to life imprisonment, while another received a 20-year sentence.

On direct appeal in the Georgia courts, McCleskey first raised the claim that the death penalty violates the due process and equal protection provisions of the federal and state constitutions because prosecutorial discretion permits the government to apply the penalty in a racially discriminatory way. The Georgia Supreme Court rejected this claim.
as follows: “Appellant’s argument is without merit. Gregg v. Georgia, 428 U.S. 153 (1976); Moore v. State, 243 S.E.2d 1 (Ga. 1978).” McCleskey v. State, 263 S.E.2d 146, 148 (Ga. 1980). After his direct appeals were exhausted, McCleskey began to file a series of state and federal habeas challenges to his conviction and sentence, which culminated in a decision by the U.S. Supreme Court.

*Warren McCleskey v. Ralph Kemp*

481 U.S. 279 (1987)

POWELL, J.

This case presents the question whether a complex statistical study that indicates a risk that racial considerations enter into capital sentencing determinations proves that petitioner McCleskey’s capital sentence is unconstitutional under the Eighth or Fourteenth Amendment.

**THE BALDUS STUDY**

[In support of his habeas claim], McCleskey proffered a statistical study performed by Professors David Baldus, Charles Pulaski, and George Woodworth (the Baldus study) that purports to show a disparity in the imposition of the death sentence in Georgia based on the race of the murder victim and, to a lesser extent, the race of the defendant. The Baldus study is actually two sophisticated statistical studies that examine over 2,000 murder cases that occurred in Georgia during the 1970’s. The raw numbers collected by Professor Baldus indicate that defendants charged with killing white persons received the death penalty in 11% of the cases, but defendants charged with killing blacks received the death penalty in only 1% of the cases….Baldus also divided the cases according to the combination of the race of the defendant and the race of the victim. He found that the death penalty was assessed in 22% of the cases involving black defendants and white victims; 8% of the cases involving white defendants and white victims; 1% of the cases involving black defendants and black victims; and 3% of the cases involving white defendants and black victims….

Baldus subjected his data to an extensive analysis, taking account of 230 variables that
could have explained the disparities on nonracial grounds. One of his models concludes that, even after taking account of 39 nonracial variables, defendants charged with killing white victims were 4.3 times as likely to receive a death sentence as defendants charged with killing blacks. According to this model, black defendants were 1.1 times as likely to receive a death sentence as other defendants. Thus, the Baldus study indicates that black defendants, such as McCleskey, who kill white victims have the greatest likelihood of receiving the death penalty.…

**DISCRIMINATORY INTENT AND STATISTICS**

McCleskey’s first claim is that the Georgia capital punishment statute violates the Equal Protection Clause of the Fourteenth Amendment. He argues that race has infected the administration of Georgia’s statute….McCleskey’s claim of discrimination extends to every actor in the Georgia capital sentencing process, from the prosecutor who sought the death penalty and the jury that imposed the sentence, to the State itself that enacted the capital punishment statute and allows it to remain in effect despite its allegedly discriminatory application. [This] claim must fail.

[To] prevail under the Equal Protection Clause, McCleskey must prove that the decisionmakers in his case acted with discriminatory purpose. He offers no evidence specific to his own case that would support an inference that racial considerations played a part in his sentence. Instead, he…argues that the Baldus study compels an inference that his sentence rests on purposeful discrimination. McCleskey’s claim that these statistics are sufficient proof of discrimination, without regard to the facts of a particular case, would extend to all capital cases in Georgia, at least where the victim was white and the defendant is black.

The Court has accepted statistics as proof of intent to discriminate in certain limited contexts. First, this Court has accepted statistical disparities as proof of an equal protection violation in the selection of the jury venire in a particular district. Although statistical proof normally must present a “stark” pattern to be accepted as the sole proof of discriminatory intent under the Constitution, because of the nature of the jury-selection task, we have permitted a finding of constitutional violation even when the statistical
pattern does not approach such extremes. Second, this Court has accepted statistics in the form of multiple-regression analysis to prove statutory violations under Title VII of the Civil Rights Act of 1964.

But the nature of the capital sentencing decision, and the relationship of the statistics to that decision, are fundamentally different from the corresponding elements in the venire-selection or Title VII cases. Most importantly, each particular decision to impose the death penalty is made by a petit jury selected from a properly constituted venire. Each jury is unique in its composition, and the Constitution requires that its decision rest on consideration of innumerable factors that vary according to the characteristics of the individual defendant and the facts of the particular capital offense. Thus, the application of an inference drawn from the general statistics to a specific decision in a trial and sentencing simply is not comparable to the application of an inference drawn from general statistics to a specific venire-selection or Title VII case. In those cases, the statistics relate to fewer entities, and fewer variables are relevant to the challenged decisions.

Another important difference between the cases in which we have accepted statistics as proof of discriminatory intent and this case is that, in the venire-selection and Title VII contexts, the decisionmaker has an opportunity to explain the statistical disparity. Here, the State has no practical opportunity to rebut the Baldus study. Controlling considerations of public policy dictate that jurors cannot be called to testify to the motives and influences that led to their verdict. Similarly, the policy considerations behind a prosecutor’s traditionally wide discretion suggest the impropriety of our requiring prosecutors to defend their decisions to seek death penalties, often years after they were made. Moreover, absent far stronger proof, it is unnecessary to seek such a rebuttal, because a legitimate and unchallenged explanation for the decision is apparent from the record: McCleskey committed an act for which the United States Constitution and Georgia laws permit imposition of the death penalty.

Finally, McCleskey’s statistical proffer must be viewed in the context of his challenge. McCleskey challenges decisions at the heart of the State’s criminal justice system. “[One] of society’s most basic tasks is that of protecting the lives of its citizens and one of the
most basic ways in which it achieves the task is through criminal laws against murder.” Gregg v. Georgia, 428 U.S. 153, 226 (1976) (White, J., concurring). Implementation of these laws necessarily requires discretionary judgments. Because discretion is essential to the criminal justice process, we would demand exceptionally clear proof before we would infer that the discretion has been abused… Accordingly, we hold that the Baldus study is clearly insufficient to support an inference that any of the decisionmakers in McCleskey’s case acted with discriminatory purpose….

**ARBITRARY AND CAPRICIOUS**

[McCleskey also] contends that the Georgia capital punishment system is arbitrary and capricious in application, and therefore his sentence is excessive [and contrary to the Eighth Amendment], because racial considerations may influence capital sentencing decisions in Georgia….

To evaluate McCleskey’s challenge, we must examine exactly what the Baldus study may show. Even Professor Baldus does not contend that his statistics prove that race enters into any capital sentencing decisions or that race was a factor in McCleskey’s particular case. Statistics at most may show only a likelihood that a particular factor entered into some decisions. There is, of course, some risk of racial prejudice influencing a jury’s decision in a criminal case. There are similar risks that other kinds of prejudice will influence other criminal trials. The question is at what point that risk becomes constitutionally unacceptable. McCleskey asks us to accept the likelihood allegedly shown by the Baldus study as the constitutional measure of an unacceptable risk of racial prejudice influencing capital sentencing decisions. This we decline to do.

Because of the risk that the factor of race may enter the criminal justice process, we have engaged in “unceasing efforts” to eradicate racial prejudice from our criminal justice system. Our efforts have been guided by our recognition that “the inestimable privilege of trial by jury…is a vital principle, underlying the whole administration of criminal justice,” Ex parte Milligan, 4 Wall. 2, 123 (1866)….

Individual jurors bring to their deliberations qualities of human nature and varieties of human experience, the range of which is unknown and perhaps unknowable. The capital
sentencing decision requires the individual jurors to focus their collective judgment on the unique characteristics of a particular criminal defendant. It is not surprising that such collective judgments often are difficult to explain. But the inherent lack of predictability of jury decisions does not justify their condemnation. On the contrary, it is the jury’s function to make the difficult and uniquely human judgments that defy codification and that build discretion, equity, and flexibility into a legal system.

McCleskey’s argument that the Constitution condemns the discretion allowed decisionmakers in the Georgia capital sentencing system is antithetical to the fundamental role of discretion in our criminal justice system. Discretion in the criminal justice system offers substantial benefits to the criminal defendant. Not only can a jury decline to impose the death sentence, it can decline to convict or choose to convict of a lesser offense. Whereas decisions against a defendant’s interest may be reversed by the trial judge or on appeal, these discretionary exercises of leniency are final and unreviewable. Similarly, the capacity of prosecutorial discretion to provide individualized justice is firmly entrenched in American law. As we have noted, a prosecutor can decline to charge, offer a plea bargain, or decline to seek a death sentence in any particular case. Of course, the power to be lenient also is the power to discriminate, but a capital punishment system that did not allow for discretionary acts of leniency would be totally alien to our notions of criminal justice.…

At most, the Baldus study indicates a discrepancy that appears to correlate with race. Apparent disparities in sentencing are an inevitable part of our criminal justice system. The discrepancy indicated by the Baldus study is a far cry from the major systemic defects identified in Furman v. Georgia, 408 U.S. 238 (1972), [which struck down existing capital punishment statutes because they imposed the punishment arbitrarily and capriciously. There] can be no perfect procedure for deciding in which cases governmental authority should be used to impose death. Despite these imperfections, our consistent rule has been that constitutional guarantees are met when the mode for determining guilt or punishment itself has been surrounded with safeguards to make it as fair as possible. Where the discretion that is fundamental to our criminal process is involved, we decline to assume that what is unexplained is invidious. In light of the
safeguards designed to minimize racial bias in the process, the fundamental value of jury trial in our criminal justice system, and the benefits that discretion provides to criminal defendants, we hold that the Baldus study does not demonstrate a constitutionally significant risk of racial bias affecting the Georgia capital sentencing process.

Two additional concerns inform our decision in this case. First, McCleskey’s claim, taken to its logical conclusion, throws into serious question the principles that underlie our entire criminal justice system. The Eighth Amendment is not limited in application to capital punishment, but applies to all penalties. Thus, if we accepted McCleskey’s claim that racial bias has impermissibly tainted the capital sentencing decision, we could soon be faced with similar claims as to other types of penalty. Moreover, the claim that his sentence rests on the irrelevant factor of race easily could be extended to apply to claims based on unexplained discrepancies that correlate to membership in other minority groups, and even to gender. Similarly, since McCleskey’s claim relates to the race of his victim, other claims could apply with equally logical force to statistical disparities that correlate with the race or sex of other actors in the criminal justice system, such as defense attorneys or judges. Also, there is no logical reason that such a claim need be limited to racial or sexual bias. If arbitrary and capricious punishment is the touchstone under the Eighth Amendment, such a claim could—at least in theory—be based upon any arbitrary variable, such as the defendant’s facial characteristics, or the physical attractiveness of the defendant or the victim, that some statistical study indicates may be influential in jury decisionmaking. As these examples illustrate, there is no limiting principle to the type of challenge brought by McCleskey. The Constitution does not require that a State eliminate any demonstrable disparity that correlates with a potentially irrelevant factor in order to operate a criminal justice system that includes capital punishment….

Second, McCleskey’s arguments are best presented to the legislative bodies. It is not the responsibility—or indeed even the right—of this Court to determine the appropriate punishment for particular crimes. It is the legislatures, the elected representatives of the people, that are constituted to respond to the will and consequently the moral values of the people. Legislatures also are better qualified to weigh and evaluate the results of
statistical studies in terms of their own local conditions and with a flexibility of approach that is not available to the courts. Capital punishment is now the law in more than two-thirds of our States. It is the ultimate duty of courts to determine on a case-by-case basis whether these laws are applied consistently with the Constitution. Despite McCleskey’s wide-ranging arguments that basically challenge the validity of capital punishment in our multiracial society, the only question before us is whether in his case the law of Georgia was properly applied. [T]his was carefully and correctly done in this case.…

BRENNAN, J., dissenting.

At some point in this case, Warren McCleskey doubtless asked his lawyer whether a jury was likely to sentence him to die. A candid reply to this question would have been disturbing. First, counsel would have to tell McCleskey that few of the details of the crime or of McCleskey’s past criminal conduct were more important than the fact that his victim was white. Furthermore, counsel would feel bound to tell McCleskey that defendants charged with killing white victims in Georgia are 4.3 times as likely to be sentenced to death as defendants charged with killing blacks. In addition, frankness would compel the disclosure that it was more likely than not that the race of McCleskey’s victim would determine whether he received a death sentence: 6 of every 11 defendants convicted of killing a white person would not have received the death penalty if their victims had been black, while, among defendants with aggravating and mitigating factors comparable to McCleskey’s, 20 of every 34 would not have been sentenced to die if their victims had been black. Finally, the assessment would not be complete without the information that cases involving black defendants and white victims are more likely to result in a death sentence than cases featuring any other racial combination of defendant and victim. The story could be told in a variety of ways, but McCleskey could not fail to grasp its essential narrative line: there was a significant chance that race would play a prominent role in determining if he lived or died.…

Georgia’s legacy of a race-conscious criminal justice system, as well as this Court’s own recognition of the persistent danger that racial attitudes may affect criminal proceedings, indicates that McCleskey’s claim is not a fanciful product of mere statistical artifice.
For many years, Georgia operated openly and formally precisely the type of dual system the evidence shows is still effectively in place. The criminal law expressly differentiated between crimes committed by and against blacks and whites, distinctions whose lineage traced back to the time of slavery. During the colonial period, black slaves who killed whites in Georgia, regardless of whether in self-defense or in defense of another, were automatically executed. A. Higginbotham, In the Matter of Color: Race in the American Legal Process 256 (1978).

By the time of the Civil War, a dual system of crime and punishment was well established in Georgia. See Ga. Penal Code (1861). The state criminal code contained separate sections for “Slaves and Free Persons of Color,” and for all other persons. The code provided, for instance, for an automatic death sentence for murder committed by blacks, but declared that anyone else convicted of murder might receive life imprisonment if the conviction were founded solely on circumstantial testimony or simply if the jury so recommended. The code established that the rape of a free white female by a black “shall be” punishable by death. However, rape by anyone else of a free white female was punishable by a prison term not less than 2 nor more than 20 years. The rape of blacks was punishable “by fine and imprisonment, at the discretion of the court.”…

Citation of past practices does not justify the automatic condemnation of current ones. But it would be unrealistic to ignore the influence of history in assessing the plausible implications of McCleskey’s evidence….

The Court…states that its unwillingness to regard petitioner’s evidence as sufficient is based in part on the fear that recognition of McCleskey’s claim would open the door to widespread challenges to all aspects of criminal sentencing. Taken on its face, such a statement seems to suggest a fear of too much justice. Yet surely the majority would acknowledge that if striking evidence indicated that other minority groups, or women, or even persons with blond hair, were disproportionately sentenced to death, such a state of affairs would be repugnant to deeply rooted conceptions of fairness. The prospect that there may be more widespread abuse than McCleskey documents may be dismaying, but it does not justify complete abdication of our judicial role.
[To] reject McCleskey’s powerful evidence…is to ignore both the qualitatively different character of the death penalty and the particular repugnance of racial discrimination, considerations which may properly be taken into account in determining whether various punishments are “cruel and unusual.” Furthermore, it fails to take account of the unprecedented refinement and strength of the Baldus study.…

Warren McCleskey’s evidence confronts us with the subtle and persistent influence of the past. His message is a disturbing one to a society that has formally repudiated racism, and a frustrating one to a Nation accustomed to regarding its destiny as the product of its own will. Nonetheless, we ignore him at our peril, for we remain imprisoned by the past as long as we deny its influence in the present.…

The destinies of the two races in this country are indissolubly linked together, and the way in which we choose those who will die reveals the depth of moral commitment among the living.…

**PROBLEM 9-1. OFFENDER’S RACE AND RECORD**

You represent Gerald Lane, a black man who is accused of murder. Lane claims that the Washoe County, Nevada, district attorney’s office seeks the death penalty much more frequently when the defendant in a murder case is black. “If a person is accused of murder in Washoe County,” Lane asserts, “it is better to be a white felon than a black with no prior felony convictions.”

In support of this charge, you evaluate the 86 murder cases prosecuted by the Washoe County district attorney’s office since Nevada’s death penalty law took effect. In approximately 80% of cases involving a white defendant with at least one prior felony conviction, the district attorney did not seek the death penalty. By contrast, in approximately 80% of cases involving a black defendant without prior felony convictions, the district attorney did seek the death penalty. In other words, Lane argues that the Washoe County district attorney’s office seeks the death penalty for only one out of five white murderers with past felonies and seeks the death penalty for four out of five black murderers without prior felonies.
In what legal terms will you frame the claim that might bar the use of the death penalty against Lane? How would you distinguish *McCleskey*? How would you use it? Compare Lane v. State, 881 P.2d 1358 (Nev. 1994).

**NOTES**

1. *Compelling evidence of intent.* What sort of statistical study might provide the circumstantial evidence necessary to convince a court that arbitrary racial discrimination plays a large enough role in a sentencing system to invalidate the outcome in a particular case? Is such a statistical study possible? If racial discrimination does influence some decision makers in some cases, how might one demonstrate that fact in a court of law? In *McCleskey* both the court of appeals and the Supreme Court concluded that a stronger statistical showing would be necessary for racial influences in sentencing to amount to a constitutional problem. What sort of evidence did the courts have in mind?

2. *Whose race, victim’s or defendant’s?* Note that the Baldus study found that the race of the defendant had no statistically significant effect on the use of capital punishment. In *Furman v. Georgia*, 408 U.S. 238 (1972), the Supreme Court struck down several capital punishment statutes, declaring that the death penalty (as administered at that time) was a “cruel and unusual punishment” in violation of the Eighth Amendment. Several of the Justices argued that capital punishment could not stand because it was imposed disproportionately against the poor and racial minorities. Would the Supreme Court have reached a different outcome in *McCleskey* if the Baldus study had pointed to racial discrimination based on the defendant’s race rather than the victim’s race? Can a punishment be racially discriminatory if the government imposes it equally on defendants of all races?

A recent study indicates the African-Americans are underrepresented on death row as compared with the number of black murders. This disproportion stems from a reluctance to seek or impose the death penalty on black defendants when the victim is also black. On the other hand, black murders are more likely to be sentenced to death if the victim is white. John Blume, Theodore Eisenberg & Martin T. Wells, Explaining Death Row’s Population and Racial Composition, 1 J. Empirical Legal Studies 165 (2004). Would a
white defendant be able to argue this finding in a capital case?

To complicate the situation further, not all members of the same racial group may be perceived or treated alike. One study has indicated that more pronounced Afrocentric facial features may lead to longer sentences and that judges are less sensitized to control for discrimination within the same racial group. William T. Pizzi, Irene V. Blair & Charles M. Judd, Discrimination in Sentencing on the Basis of Afrocentric Features, 10 Mich. J. of Race & L. 7 (2005).

3. Other venues. Suppose that on the day after the Supreme Court issues its decision, the NAACP sends a copy of the Baldus study to a member of the Georgia legislature, and that member distributes copies. As the chair of the Senate’s committee on criminal justice matters, would you hold hearings? If so, what would be the topic of the hearings—the validity of the study or the most appropriate response to the study? If the Supreme Court had concluded instead that the influence of race in Georgia’s capital punishment system rendered McCleskey’s sentence unconstitutional, how would you advise Georgia legislators and prosecutors to respond? Would a victory for McCleskey mean abolition of the death penalty in Georgia? Would it necessitate any other changes or inquiries into Georgia’s sentencing system?

sufficient to establish a prima facie case of a violation of the state constitution. The court also indicated, however, that New Jersey had not yet executed enough people to form the basis for a convincing statistical study. See State v. Bey, 645 A.2d 685, 712 (N.J. 1994) (“Our abiding problem with analyzing the effect of race is that the case universe still contains too few cases to prove that the race of a defendant improperly influences death sentencing.”). New Jersey abolished the death penalty legislatively in 2007.


   (1) No person shall be subject to or given a sentence of death that was sought on the basis of race.

   (2) A finding that race was the basis of the decision to seek a death sentence may be established if the court finds that race was a significant factor in decisions to seek the sentence of death in the Commonwealth at the time the death sentence was sought.

   (3) Evidence relevant to establish a finding that race was the basis of the decision to seek a death sentence may include statistical evidence or other evidence, or both, that death sentences were sought significantly more frequently:

       (a) Upon persons of one race than upon persons of another race; or

       (b) As punishment for capital offenses against persons of one race than as punishment for capital offenses against persons of another race.

   (4) The defendant shall state with particularity how the evidence supports a claim that racial considerations played a significant part in the decision to seek a death sentence in his/her case. The claim shall be raised by the defendant at the pre-trial conference. The court shall schedule a hearing on the claim and shall prescribe a time for the submission of evidence by both parties. If the court finds that race was the basis of the decision to seek the death sentence, the court shall order that a death sentence shall not be sought.

   (5) The defendant has the burden of proving by clear and convincing evidence that race was the basis of the decision to seek the death penalty. The Commonwealth may offer evidence in rebuttal of the claims or evidence of the defendant.

Is this law an appropriate response to the Baldus study and other evidence concerning
the impact of race on the application of the death penalty? Would a capital defendant in Kentucky armed with a Kentucky version of the Baldus study be able to prevail on a claim based on this act? Would it surprise you that no defendant has yet been able to make a case under the statute?

As a legislator in a death penalty state, would you advocate the adoption of such a law? Does this legislation go far enough to address racial disparities in the application of the death penalty? Or does it go too far by providing all capital defendants with an additional set of arguments to delay appropriate and otherwise lawful executions?

In August 2009 North Carolina enacted its Racial Justice Act, which provides that pre-trial defendants and death-row inmates can challenge racial bias in the death penalty system, ranging from the county to the state level, through the use of statistical studies and/or other evidence. A sufficient showing of race being a significant factor in the request or imposition of the death penalty requires prosecutors to rebut the claim that the disparities indicate racial bias in the application of the death penalty in the defendant’s case. If they are unable to make such a showing, the court may grant relief from the death sentence.

In July 2010, Michael Radelet, a professor of sociology at the University of Colorado, and Glenn Pierce, a criminologist at Northeastern University, published a study of over 15,000 North Carolina homicides between 1980 and 2008. The study concluded that a convicted killer is three times more likely to receive a death sentence if the victim is white rather than black, a finding consistent with studies of capital punishment in other states. The study attempted to control for additional crimes committed by the offender at the time of the murder, but it did not control for the offender’s prior criminal record. Another study by Barbara O’Brien and Catherine Grosso indicated that across the state prosecutors remove a substantially larger number of African-Americans than whites from juries.

Almost all of the 159 inmates on death row filed claims under the Act. In 2012 a North Carolina court converted the death sentence of Marcus Robinson to life without parole upon a finding, based on statistical analysis combined with individual testimony in this
case, that intentional racial bias against African-Americans tainted jury selection.

In July 2012 the North Carolina legislature overrode a gubernatorial veto and amended the Racial Justice Act to limit statistical proof to the county or prosecutorial district where the crime occurred rather than the entire state or region. In addition, statistical findings with respect to the race of the victim are no longer acceptable, and statistics alone are insufficient to prove bias.

6. *The federal death penalty.* The federal death penalty, which had been defunct for many decades before the early 1990s, has been the focus of much recent race-based debate. More than 80% of the federal death row inmates are nonwhite. The first individual executed since the reinstitution of the federal death penalty—Timothy McVeigh—was white, however. See, e.g., U.S. Department of Justice, The Federal Death Penalty System: A Statistical Survey (1988-2000), 14 Fed. Sent’g Rep. 35 (2002); U.S. Department of Justice, The Federal Death Penalty System: Supplementary Data, Analysis and Revised Protocols for Capital Case Review, 14 Fed. Sent’g Rep. 40 (2002). Nevertheless, criticism of the racial makeup on federal death row continues. How should this debate affect prosecutorial discretion? As a federal prosecutor, would you be more inclined to ask for capital punishment in the case of a white defendant since you know about the existing disparity? Federal death penalty decisions appear to be centralized in the hands of the attorney general. Will a centralized decision-making structure protect better against racial disparity across the country? See, e.g., G. Ben Cohen & Robert J. Smith, The Racial Geography of the Federal Death Penalty, 85 Wash. L. Rev. 425 (2010).

3. *Discretionary Decisions and Race*

Racial disparities at sentencing can result from decisions, such as the selection of charges, made at various earlier stages of the criminal justice process. If prosecutors discriminate on the basis of race (or gender or other objectionable grounds), the U.S. Supreme Court has stated that it is possible, at least in theory, to overturn a prosecutor’s charging decision. A defendant who makes such a claim must establish that the prosecutor (1) made different charging decisions for similarly situated suspects (a
discriminatory effect) and (2) intentionally made the decision on the basis of an “arbitrary” classification (a discriminatory intent). Arbitrary classifications would include “suspect classes” under equal protection doctrine or those defendants exercising their constitutional liberties such as freedom of speech or religion. See Oyler v. Boles, 368 U.S. 448 (1962); Wayte v. United States, 470 U.S. 598 (1985).

The *Wayte* decision made it clear that a criminal defendant claiming discrimination must demonstrate that the prosecutor chose the defendant for criminal charges “because of” and not “despite” the protected conduct or status of the defendant. This basic federal framework for analyzing constitutional challenges to discriminatory charging policies has also been influential in state courts. See, e.g., State v. Muetze, 534 N.W.2d 55 (S.D. 1995) (no proof that non–Native Americans who were not charged were similarly situated).

In 1996 the U.S. Supreme Court considered the claim of Christopher Armstrong, who was indicted in 1992 for crack distribution. He responded by filing a motion for discovery or for dismissal of the indictment, alleging that he had been selected for federal prosecution because he was black. The issue in the case was not whether Armstrong was able to show selective prosecution, but what burden he had to carry to obtain discovery on a selective prosecution claim. Armstrong based his initial motion on evidence that the defendant was black in all 24 narcotics cases closed in 1991 by the U.S. Attorney’s office that had prosecuted him.

The Supreme Court rejected Armstrong’s claim, holding that a court hearing a claim of selective prosecution may grant discovery to the defendant only if there is “some evidence” to support each of the elements of the claim, and finding that the “study” presented by Armstrong “failed to identify individuals who were not black, could have been prosecuted for the offenses for which respondents were charged, but were not so prosecuted.” The Court did not explain how Armstrong or other claimants should obtain information about the pool of nonprosecuted suspects. Armstrong v. United States, 517 U.S. 456 (1996). Very few courts have reversed convictions on selective prosecution grounds, and no U.S. Supreme Court decisions have done so on racial grounds since Yick Wo v. Hopkins, 118 U.S. 356 (1886). In United States v. Bass, 536 U.S. 862 (2002), the
Supreme Court held that national charging and plea bargaining statistics on the race of offenders in federal death penalty cases were insufficient under *Armstrong*’s credible evidence requirement to trigger a discovery order.

Claims of selective prosecution are difficult to pursue successfully, not only because of the difficult proof requirements under federal law, but also because so many actors are involved, including prosecutors, police, judges, probation officers, and decision makers in a variety of other institutions, such as schools. A strong bias in investigations or arrests may be concealed by studies showing unbiased decision making at a later stage of the process. For example, if whites and blacks who are convicted of a particular offense are punished identically, but members of one race are disproportionately investigated, then the sanction will appear neutral but will in fact be highly disparate, at least to the extent that the investigatory practices do not accurately reflect underlying behavior.

Much of the racial disparity in the criminal justice system can be explained through the offender’s criminal record. As detailed in Chapter 5, offenders with prior convictions are typically punished more harshly; many minority offenders have such records. Studies indicate that one of the most discriminatory elements of the criminal justice system is the juvenile system. African American boys, in particular, are more likely to come under its supervision than white youngsters who commit similar offenses. Our Children, Their Children: Confronting Racial and Ethnic Differences in American Juvenile Justice (Kimberly Kempt-Leonard & Darnell F. Hawkins, eds. (University of Chicago Press 2005); Perry L. Moriearty, Combating the Color-Coded Confinement of Kids: An Equal Protection Remedy, 32 N.Y.U. Rev. L. & Soc. Change 285, 315 (2008); Barry C. Feld, Juvenile and Criminal Justice Systems’ Responses to Juvenile Violence, 24 Crime & Just. 189, 231-232 (1998). The juvenile case becomes the stepping-stone into the adult criminal justice system.

In states that allow transfer of juveniles into the adult system, racial disparity also occurs. Missouri’s state law mandates consideration of racial disparity when making a transfer. Nevertheless, racial disparity continues and has even widened in recent years. What type of data does a court need to have to decide on the impact of racial disparity? What forms of racial disparity should the court consider—systemic or individual?
This section highlights the difficulty of proving the source of discrimination in large, complicated systems with many participants. Discrimination may be especially hard to unearth when it is the product of ongoing, low-level behavior of a large group of criminal justice officials and, perhaps, the result of unconscious influences on decision making. This section also raises questions about the law’s capacity to change group behavior.

Freddie Stephens v. State

456 S.E.2d 560 (Ga. 1995)

FLETCHER, J.

Freddie Stephens challenges the constitutionality of OCGA §16-13-30(d), which provides for life imprisonment on the second conviction of the sale or possession with intent to distribute a controlled substance. He contends that the provision as applied is irrational and racially discriminatory in violation of the United States and Georgia Constitutions….The challenged statute states:

[Any] person who violates subsection (b) of this Code section with respect to a controlled substance in Schedule I or a narcotic drug in Schedule II shall be guilty of a felony and, upon conviction thereof, shall be punished by imprisonment for not less than five years nor more than 30 years. Upon conviction of a second or subsequent offense, he shall be imprisoned for life.

Subsection (b) makes it unlawful to “manufacture, deliver, distribute, dispense, administer, sell, or possess with intent to distribute any controlled substance.” For a defendant to receive a life sentence for a second conviction, the state must notify the defendant prior to trial that it intends to seek the enhanced punishment based on past convictions.

Stephens contends that the statute as applied discriminates on the basis of race. He argues that this court should infer discriminatory intent from statewide and county-wide statistical data on sentences for drug offenders. In Hall County, where Stephens was convicted, the trial court found that one hundred percent (14 of 14) of the persons serving a life sentence under OCGA §16-13-30(d) are African-American, although African-
Americans make up less than ten percent of the county population and approximately fifty to sixty percent of the persons arrested in drug investigations. Relying on evidence provided by the State Board of Pardons and Paroles, the trial court also found that 98.4 percent (369 of 375) of the persons serving life sentences for drug offenses as of May 1, 1994 were African-American, although African-Americans comprise only 27 percent of the state’s population. Finally, a 1994 Georgia Department of Corrections study on the persons eligible for a life sentence under subsection (d) shows that less than one percent (1 of 168) of the whites sentenced for two or more convictions for drug sales are serving a life sentence, compared to 16.6 percent (202 of 1219) of the blacks.

In an earlier challenge to death penalty sentencing in Georgia based on statistics showing that persons who murder whites are more likely to be sentenced to death than persons who murder blacks, the United States Supreme Court held that the defendant had the burden of proving the existence of purposeful discrimination and that the purposeful discrimination had a discriminatory effect on him. McCleskey v. Kemp, 481 U.S. 279 (1987)…

Stephens concedes that he cannot prove any discriminatory intent by the Georgia General Assembly in enacting the law or by the Hall County district attorney in choosing to seek life imprisonment in this case….These concessions preclude this court from finding an equal protection violation under the United States Constitution.

We also conclude that the statistical evidence Stephens presents is insufficient evidence to support his claim of an equal protection violation under the Georgia Constitution. Stephens fails to present the critical evidence by race concerning the number of persons eligible for life sentences under OCGA §16-13-30(d) in Hall County, but against whom the district attorney has failed to seek the aggravated sentence. Because the district attorney in each judicial circuit exercises discretion in determining when to seek a sentence of life imprisonment, a defendant must present some evidence addressing whether the prosecutor handling a particular case engaged in selective prosecution to prove a state equal protection violation…. 

Stephens’s argument about inferring intent from the statistical evidence also ignores
that other factors besides race may explain the sentencing disparity. Absent from the statistical analysis is a consideration of relevant factors such as the charges brought, concurrent offenses, prior offenses and sentences, representation by retained or appointed counsel, existence of a guilty plea, circuit where convicted, and the defendant’s legal status on probation, in prison, or on parole. Without more adequate information about what is happening both statewide and in Hall County, we defer deciding whether statistical evidence alone can ever be sufficient to prove an allegation of discriminatory intent in sentencing under the Georgia Constitution.

The dissent argues that McCleskey v. Kemp is not the controlling precedent, instead relying on the United States Supreme Court decision on peremptory challenges in jury selections in Batson v. Kentucky, 476 U.S. 79 (1986). We must look to McCleskey for a proper analysis of the substantive issue before us, rather than Batson, because McCleskey dealt with the use of statistical evidence to challenge racial disparity in sentencing, as does this case.

The Supreme Court in McCleskey pointed out several problems in requiring a prosecutor to explain the reasons for the statistical disparity in capital sentencing decisions. Many of these same problems exist in requiring district attorneys to justify their decisions in seeking a life sentence for drug offenses based on statewide, and even county-wide, statistics of persons serving life sentences in state prisons for drug offenses.

First, “requiring a prosecutor to rebut a study that analyzes the past conduct of scores of prosecutors is quite different from requiring a prosecutor to rebut a contemporaneous challenge to his own acts. See Batson v. Kentucky, 476 U.S. 79 (1986).” McCleskey, 481 U.S. at 296. Second, statewide statistics are not reliable in determining the policy of a particular district attorney. Finally, the Court stated that the policy considerations behind a prosecutor’s discretion argue against requiring district attorneys to defend their decisions to seek the death penalty. Since district attorneys are elected to represent the state in all criminal cases, it is important that they be able to exercise their discretion in determining who to prosecute, what charges to bring, which sentence to seek, and when to appeal without having to account for each decision in every case…. 
Stephens also argues that the statute violates due process and equal protection by creating an irrational sentencing scheme. Seeking to deter repeated drug sales by the same person is not irrational. Therefore, we adhere to our previous decision that there is a rational basis for the sentencing scheme in OCGA §16-13-30(d) and that it does not deprive persons of due process or equal protection under the law.…

THOMPSON, J., concurring.

[We] are presented once again with the claim that OCGA §16-13-30(d) is being used in a discriminatory fashion. This time, we are introduced to statewide statistical information which must give us pause: From 1990 to 1994, OCGA §16-13-30(d) was used to put 202 out of 1,107 eligible African-Americans in prison for life. During that same period, the statute was used to put 1 out of 167 eligible whites in prison for life. A life eligible African-American had a 1 in 6 chance of receiving a life sentence. A life eligible white had a 1 in 167 chance of receiving a life sentence. An African-American was 2,700 percent more likely to receive a life sentence than a white…. These statistics are no doubt as much a surprise to those who work and practice within the judicial system as to those who do not.

Statistical information can inform, not explain. It can tell what has happened, not why. However, only a true cynic can look at these statistics and not be impressed that something is amiss. That something lies in the fact that OCGA §16-13-30(d) has been converted from a mandatory life sentence statute into a statute which imposes a life sentence only in those cases in which a district attorney, in the exercise of his or her discretion, informs a defendant that the State is seeking enhanced punishment.…

McCleskey v. Kemp, 481 U.S. 279 (1987), should continue to be applied in death penalty cases where there is a system of checks and balances to ensure that death sentences are not sought and imposed autocratically. Likewise McCleskey should be applied in other cases where the courts have discretion to determine the length of time to be served. However, McCleskey probably should not be applied where a district attorney has the power to decide whether a defendant is sentenced to life, or a term of years.…

I am persuaded that Batson v. Kentucky, 476 U.S. 79 (1986), could be used to supply
a general framework in analyzing cases of this kind….Nevertheless, it is my considered view that the judgment in this case must be affirmed because the defendant has failed to meet his burden even under a *Batson*-type analysis.

In order to establish a prima facie case under *Batson*, a defendant must prove systematic discrimination in his particular jurisdiction. Although the statistics presented by defendant are indicative of a statewide pattern of discrimination in the use of OCGA §16-13-30(d), the Hall County statistics are insufficient to make such a case. They simply show that all the persons in Hall County serving a life sentence under OCGA §16-13-30(d) are African-Americans. They do not show how many African-Americans were eligible to receive a life sentence under the statute; nor do they show how many whites were eligible. Moreover, they offer no information concerning the record of the district attorney in this case. Thus, upon careful review, I must conclude that this defendant, in this case and on this record, failed to prove a pattern of systematic discrimination in his jurisdiction….

Statewide, approximately 15 percent of eligible offenders receive a life sentence under OCGA §16-13-30(d). The statistical evidence presented in this case serves as notice to the General Assembly of Georgia that the mandatory life sentence provision of OCGA §16-13-30(d) has been repealed de facto. With such notice, there are at least three courses of action the legislature might now choose to pursue.

One. The General Assembly could choose to leave the mandatory life sentence on the books realizing that it is being used in a small percentage of the eligible cases. Militating against this course of action is the fact that all laws passed by the legislature should be followed. Contempt for and failure to follow any law breeds contempt for and failure to follow other laws.

Two. The General Assembly could reaffirm its commitment to a mandatory life sentence by requiring district attorneys to inform all defendants of prior convictions and thus enforce OCGA §16-13-30(d) with respect to all life eligible offenders. Militating against this course of action is the fact that mandatory life sentences are not favored by the prosecuting bar or by the defense bar. That is evidenced by the fact that from 1990 to
1994 only 203 out of 1,274 life eligible defendants actually received a life sentence under OCGA §16-13-30(d).…

Three. The General Assembly could choose to change the mandatory life sentence penalty to one of several sentencing options which the court could impose. For example, the penalty for a second or subsequent sale could be imprisonment for not less than 5 nor more than 30 years, or life.…

It is my concern that these problems be resolved in whatever way the General Assembly deems best and that, thereafter, the prosecutors and the courts carry out that legislative will.

BENHAM, P.J., dissenting.

Of those persons from Hall County serving life sentences pursuant to OCGA §16-13-30(d), which mandates a life sentence for the second conviction for sale of or possession with intent to distribute certain narcotics, 100 percent are African-American, although African-Americans comprise only approximately 10 percent of Hall County’s population. In our state prison system, African-Americans represent 98.4 percent of the 375 persons serving life sentences for violating OCGA §16-13-30(d). These statistics were part of the finding of the trial court in this case. In the face of such numbing and paralyzing statistics, the majority say there is no need for inquiry. It is with this determination that I take issue and from which I respectfully dissent.…

[In Batson v. Kentucky, 476 U.S. 79 (1986), the Supreme Court] installed a system that shifted the burden to the prosecutor to give race-neutral reasons for the peremptory challenges once the defendant established facts supporting an inference that the prosecutor’s use of peremptory challenges was racially motivated. [The] court in Batson stated that an inference of discriminatory intent could be drawn from certain conduct or statistical data. Beyond its effect on peremptory challenges, the importance of Batson was that it significantly reduced the burden on one claiming discrimination, recognizing that under certain circumstances, the crucial information about an allegedly discriminatory decision could only come from the one who made the decision.
This is the course of reasoning we need to follow in analyzing the issue in this case rather than the more restrictive course taken in McCleskey v. Kemp and applied by the majority.…

I am not unmindful or unappreciative of the vital and taxing role district attorneys are called upon to undertake in the ongoing battle against the blight of illicit drug trafficking. Throughout this state, they shoulder an enormous burden of responsibility for advancing the fight against drugs, and to do so successfully, they must be invested with considerable discretion in making decisions about ongoing prosecutions. However, it is the very breadth of that discretion, concentrated in a single decision-maker, which makes it necessary that the one exercising the discretion be the one, when confronted with facts supporting an inference of discriminatory application, to bear the burden of establishing that the discretion was exercised without racial influence. This case is more like Batson than McCleskey because all the discretion in the sentencing scheme involved in this case resides in the district attorney, to the exclusion of the trial court, whereas in death penalty cases such as McCleskey, the spread of discretion among the prosecutor, the trial court, and the jurors introduces variables which call for more rigorous statistical analysis. In addition, the complexity of the death penalty procedure, with its many safeguards and the recurring necessity of specific findings at every stage from the grand jury to the sentencing jury, differentiates it from the relative simplicity of the sentencing scheme applicable to this case.

[The] U.S. Supreme Court recognized in McCleskey itself that statistical proof which presents a “stark pattern” may be accepted as the sole proof of discriminatory intent. In distinguishing McCleskey from such a case, the Supreme Court mentioned in a footnote two cases in which “a statistical pattern of discriminatory impact demonstrated a constitutional violation.”…The statistics in those cases presented a “stark pattern,” but no more stark than the pattern presented in this case. In the present case, based on evidence from law enforcement officers who testified as to arrest rates and other relevant statistics, the trial court found that 100% of the people from that county who were serving life sentences pursuant to OCGA §16-13-30(d) were African-Americans and that statewide, 98.4% of all the persons serving life sentences pursuant to OCGA §16-13-30(d) were
African-Americans….

I believe it is necessary that we adopt a procedure which will make it possible to address the issue openly and honestly in the trial courts….I would hold, therefore, as a matter purely of state constitutional law, that equal protection of the law in the context of OCGA §16-13-30(d) requires that the prosecution be required, when a defendant has made a prima facie showing sufficient to raise an inference of unequal application of the statute, to “demonstrate that permissible racially neutral selection criteria and procedures have produced the monochromatic result.” *Batson*, 476 U.S. at 94….

Because appellant has made a sufficient showing of discriminatory application of OCGA §16-13-30(d) that the State should be required to give race-neutral reasons for the “monochromatic” application of that statute in Hall County, this court should vacate the life sentences and remand this case to the trial court for a hearing. At such a hearing, should the trial court find that the prosecution could not provide race-neutral reasons for the “monochromatic result” of the application of OCGA §16-13-30(d) in Hall County, sentencing for the offenses involved would still be permissible, but not with the aggravation of punishment authorized by OCGA §16-13-30(d). On the other hand, should the trial court find that the State has provided appropriate race-neutral reasons, the life sentences would be reimposed, whereupon appellant would be entitled to a new appeal.

Just as the prosecution was reined in by *Batson*, it must also be reined in here and called upon to give an account of itself. The statistics offered in this case show an enormous potential for injustice, and those statistics are just like the tip of an iceberg, with the bulk lying below the surface, yet to be realized….

**PROBLEM 9-2. TOWN AND COUNTRY**

Darryl Pierre Wooden, an African American man sentenced to ten years in prison for selling illegal narcotics, believes that an Alabama law is racially discriminatory and asks for your help. His sentence was the product of the following two statutes, each of which mandates a five-year term:

- §13A-12-250. In addition to any penalties…provided by law for any person convicted of
an unlawful sale of a controlled substance, there is hereby imposed a penalty of five years’ incarceration in a state corrections facility with no provision for probation if the situs of such unlawful sale was on the campus or within a three-mile radius of the campus boundaries of any public or private school…or other educational institution in this state.

• §13A-12-270. In addition to any penalties…provided by law for any person convicted of an unlawful sale of a controlled substance, there is hereby imposed a penalty of five years’ incarceration in a state corrections facility with no provision for probation if the situs of such unlawful sale was within a three-mile radius of a public housing project owned by a housing authority.

Wooden’s conviction and ten-year mandatory sentence resulted from his sale to an undercover police officer of one tablet of “hydromorphone.” Indisputably, this $50 transaction, which occurred on the 100 block of Fourth Avenue North in Birmingham, occurred within a three-mile radius both of a school and of a housing project. Wooden claims these statutes disproportionately impose a heavier sentence on black defendants in Jefferson County than on similar defendants in other Alabama counties because the conditions described in the statute ordinarily are present in an urban setting rather than a rural setting, and the overwhelming majority of citizens living in the city of Birmingham are black.

You gather the following evidence: Birmingham Police Officer B. H. Butler reports that of 150 persons he arrested for the “unlawful sale of a controlled substance,” 145 were black and were subject to the enhanced sentence provisions of §13A-12-250 and 13A-12-270. Officer Eric Benson asserts that of approximately 100 persons he arrested for the “unlawful sale of a controlled substance” in the preceding year, 70 were black. He also states that “any sale of a controlled substance within the city limits of Birmingham would be within three miles of both a school and a housing project, and that 98% to 99% of those living in these housing projects are black.”

Alabama Administrative Office of Courts official Larry Forston provides computer data gleaned from circuit court clerks’ offices throughout the state. He tells you that from 1989, when the three-mile-radius provisions were adopted, through 1994, only three black defendants and one white defendant were sentenced in Jefferson County under
either statute, compared with 267 black defendants and 90 white defendants sentenced elsewhere in the state.

Is Wooden right to focus on the application of the law to his county? How would you frame that claim? What other information would you try to obtain? Whose actions are suspect? Compare Ex parte Wooden, 670 So. 2d 892 (Ala. 1995).

**NOTES**

1. *Who discriminates against whom?* What discrimination does Freddie Stephens claim? Other than the fact that both McCleskey and Stephens asserted that race was the basis for discrimination, were these similar claims? A controversial case at all stages, *Stephens* garnered additional attention when, 13 days before issuing the above opinion, the Georgia justices issued a slip opinion with a majority written by Justice Hugh Thompson announcing the “watershed” conclusion that under the equal protection clauses of both the federal and state constitutions these statistics required a prosecutor to provide a race-neutral explanation for the decision to apply the statute to Stephens. The slip opinion was bitterly attacked by the Georgia attorney general and the 46 state district attorneys, who together filed a brief asking that it be reversed. Attorney General Michael Bowers asserted that it was the worst decision from the Georgia Supreme Court in more than 20 years and that it “sets up sentencing quotas.”

2. *Competing analogies.* Did the majority in Stephens v. State think that Stephens’s claim was the same as McCleskey’s? Did the concurrence think so? The dissent? Were you convinced by the competing analogy to discriminatory jury selection in Batson v. Kentucky? Did you find convincing Justice Thompson’s application of Batson in the concurring opinion? Justice Robert Benham, dissenting in *Stephens*, argued that sentencing under the Georgia drug statute was different from capital punishment because it concentrates the decision in the hands of the district attorney. Do you agree? Are there ways a police officer might influence who receives a life sentence under the statute? Does the judge have some control over this question? The defense counsel? The state attorney general? Voters in the county or in the state?

3. *The federalization of drug law enforcement.* In many criminal cases, state and
federal prosecutors both have jurisdiction. Sometimes they investigate cases together and then allocate prosecutorial responsibilities; sometimes state prosecutors call in federal investigatory assistance; and sometimes federal prosecutors refer cases, especially those of a minor nature, to the state for trial. The different penalty structures in state and federal courts, together with procedural differences, may provide an incentive for state and federal prosecutors to send cases to federal court. This is true particularly when higher penalties exist under the federal sentencing guidelines or congressional mandatory sentences. While the so-called federalization of crime has been thoroughly criticized, it provides prosecutors with substantial additional discretion. See American Bar Association, Criminal Justice Section, Task Force on the Federalization of Criminal Law, Report on the Federalization of Criminal Law (1998).

Some of the results of the federalization may be startling. Hispanics, for example, make up about 15% of the inmates in state prisons but almost one third of the inmates in federal prisons. This substantial difference likely reflects Hispanics’ higher rate of federal drug and especially immigration convictions. In FY 2011 50% of those sentenced under the federal guidelines were Hispanic; about 47% of all drug trafficking offenders and almost 90% of all immigration offenders were Hispanic.

In a study of charging for crack cocaine offenses in Los Angeles, Richard Berk and Alex Campbell found that black defendants are more likely than white or Latino defendants to be charged in federal court with sale of crack cocaine (which translates into more severe punishments than for comparable charges in state court). While black defendants represented 58% of those arrested by the Los Angeles Sheriff’s Department for sale of crack cocaine between 1990 and 1992, they made up 83% of the defendants charged with that crime in federal court. White and Latino defendants arrested for this crime were more likely to be prosecuted in state court. Richard Berk & Alex Campbell, Preliminary Data on Race and Crack Charging Practices in Los Angeles, 6 Fed. Sent’g Rep. 36 (1993). What might explain the racially disparate federal crack prosecutions reported by Berk and Campbell?

4. Racial patterns in charging. Racial minorities are charged with crimes in a number disproportionate to their percentage in the population. But are minorities charged with
crimes at a higher rate, once one accounts for different levels of participation in crime? Criminologists addressing this question have studied records of large numbers of cases, using statistical techniques (especially regression analysis) to compare similar cases and to sort out racial and nonracial influences over charging decisions. These charging decision also seem to be impacted by the availability of mandatory minimums. See, e.g., M. Marit Rehavi & Sonja B. Starr, Racial Disparity in Federal Criminal Charging and Its Sentencing Consequences (2012) (black males face more severe charges than others, with the disparity increasing when charges with mandatory minimums are available), available at papers.ssrn.com/sol3/papers.cfm?abstract_id=1985377##; Jeffery T. Ulmer, Megan C. Kurylick & John H. Kramer, Prosecutorial Discretion and the Imposition of Mandatory Minimum Sentences, 44 J. Res. in Crime & Delinq. 427 (2007) (in Pennsylvania prosecutors exercise their charging decisions when mandatory minimums are available primarily against young Hispanic men). See also Cassia Spohn, John Gruhl & Susan Welch, The Impact of the Ethnicity and Gender of Defendants on the Decision to Reject or Dismiss Felony Charges, 25 Criminology 175 (1987) (study of 33,000 felony cases between 1977 and 1980 to determine whether racial bias influenced prosecutors’ decisions to decline felony charges; declinations occurred more frequently for white suspects after controlling for age, criminal record, and seriousness of offense). If racial discrimination in charging is indeed widespread, is it unrealistic to ask a defendant to make a prediscovery showing? Or is it necessary to limit litigation to the most egregious cases of racial discrimination in prosecutorial decision making? How egregious must the disparity be?

A factor that overlaps with race is neighborhood. As indicated in Problem 9-2, some laws that increase punishment for drug sales based on the proximity to school grounds have markedly different effects between urban and rural counties. In New Jersey, the legislature increased judicial discretion with respect to the application of such laws in response to a state sentencing commission report which found that only a miniscule percentage of the drug sales in such areas were made to juveniles and that the law largely impacted only Hispanics and Blacks, many of whom were non-violent offenders.

5. **Race and intermediate sanctions.** In Chapter 7, we indicated the depth of state
budget problems and increasing state interest in intermediate sanctions in lieu of imprisonment. Recent studies, however, have indicated that minority offenders are less likely to receive such sanctions. Whether this is the case because judges consider them less suitable for such sanctions or because they view such sanctions as too onerous and therefore decide against them remains an open question. Brian D. Johnson & Stephanie M. DiPietro, The Power of Diversion: Intermediate Sanctions and Sentencing Disparity under Presumptive Guidelines, 50 Criminology 811 (2012).

6. Influence of race on sentencing in the United Kingdom. The United States is not the only nation in which the influence of race on sentencing has ignited controversy. In a study of the English crown courts of Birmingham, Wolverhampton, Coventry, Warwick, and Stafford in 1989, Roger Hood noted that blacks were given prison sentences rather than a nonprison alternative more often than whites (56.6% of blacks sentenced, compared with 48.4% of whites). After attempting to account statistically for differences in cases based on arguably nonracial factors such as the seriousness of the offense or past criminal record, Hood concluded that race still had a minor influence on the custody decision: There was a “5 percent greater probability of a male black defendant being sentenced to custody than a white male.” Race seemed to have more influence in cases of “medium seriousness”: black defendants had a 13% higher probability of receiving custody in these cases. Roger Hood, Race and Sentencing: A Study in the Crown Court 198 (1992). A recent governmental set of data indicates that these racial disparities continue, if not widen, though the data set was not robust enough to indicate whether this was due to discrimination. Why is the specific racial difference Hood found of particular concern?

PROBLEM 9-3. THE CRACK-POWDER DIFFERENTIAL

By 1989 the Minnesota legislature was debating the sentencing of crack offenses. The legislators considered a bill that would make a person who possessed three or more grams of crack cocaine guilty of a third-degree offense. Under the same statute, a person who possessed ten or more grams of cocaine powder would be guilty of the same offense; someone who possessed fewer than ten grams of cocaine powder would be guilty of a fifth-degree offense. The bill became known as the “10-to-3 ratio” law.
The sponsors of the bill argued that this structure facilitated prosecution of street-level drug dealers. Law enforcement officers who testified at legislative hearings suggested that three grams of crack and ten grams of powder indicated a level at which dealing, not merely using, took place. A person convicted of selling 100 grams of crack may often be characterized as a midlevel dealer (someone who provides the drug to street-level retailers). By comparison, 100 grams of powder usually typifies a low-level retailer; 500 grams is more indicative of a midlevel dealer. But witnesses from the Department of Public Safety Office of Drug Policy contradicted these estimates for the typical amount of drugs carried by dealers, suggesting that most cocaine powder users are dealers as well.

The customary units of sales for the two drugs are also different. The typical unit of crack is a rock weighing .1 gram, which at the time sold for $20 to $25. The customary unit of powder is the 8-ball, one-eighth of an ounce or about 3.5 grams, which sold for about $350. Ten grams of powder cocaine could be easily converted into more than three grams of crack.

Sponsors of the bill echoed Congress’s argument that crack is more addictive and dangerous than cocaine powder, and witnesses at the hearings supported this contention. But other witnesses pointed out that crack and powder cocaine have the same active ingredient and produce the same type of pharmacological effects. The difference in effect between the two drugs stems from the fact that cocaine powder is sniffed through the nostrils while crack cocaine is smoked. If powder cocaine is dissolved and injected, it is just as addictive as crack.

As a member of the Minnesota legislature, would you have supported the 10-to-3 ratio bill? What else would you like to have known before you vote? Compare State v. Russell, 477 N.W.2d 886 (Minn. 1991).

NOTES

1. *Constitutional challenges to punishment differentials: majority position*. Racial disparities in the application of death penalty laws highlight several distinct forms of discrimination. A law can be discriminatory in intent, either at the point of creation or
when it is applied. Some laws have racially discriminatory effects, even though the people who create and enforce the law do not intend to burden one racial group more than another and even though they apply the law with complete evenhandedness. These effects occur when the criminal sanctions apply to behavior that people of one race engage in more often than people of other races. Would it ever be unconstitutional for a legislature to criminalize conduct when one racial group is more likely to engage in it?

A number of defendants convicted of trafficking in crack cocaine have argued for a downward departure from the guideline sentence (or an invalidation of the relevant guidelines and statutes) based on an equal protection claim. Federal courts have uniformly rejected this assertion, reasoning that any disparate racial impact of the crack cocaine statutes and guidelines on African Americans was unintentional. See, e.g., United States v. Reece, 994 F.2d 277 (6th Cir. 1993) (per curiam); United States v. Thomas, 900 F.2d 37 (4th Cir. 1990). While not often addressing such claims, high state courts have also usually rejected the constitutional challenges.


3. Crack and cocaine sentences in the federal system. In 1986 Congress passed the Anti-Drug Abuse Act to increase the penalties for various drug crimes. The new law imposed heavier penalties on cocaine base (crack) than on cocaine powder, a relationship later known as the “100-to-1 ratio.” An offense involving mixtures weighing 5 grams or more containing cocaine base was subject to the same punishment as an offense involving mixtures weighing 500 grams or more containing cocaine powder.

Congress considered crack cocaine to be more dangerous than cocaine powder because of crack’s potency, its more highly addictive nature, and its greater accessibility
because of its relatively low cost. Some of the impetus for the federal law came from the news media. Stories associated the use of crack cocaine with social maladies such as gang violence and parental neglect among user groups. Critics of the federal law, however, argued that these social problems resulted not from the drug itself but from the disadvantaged social and economic environment in places where the drug is often used.

The increased penalties for crack meant that African American defendants received heavier penalties than whites for possession and sale of cocaine. More than 90% of all people arrested for sale or possession of crack were African American; roughly 80% of all people arrested for sale or possession of powder cocaine were white.

Proposals to reduce this ratio flared into combustible debates several times over the years. In 1994 Congress ordered the U.S. Sentencing Commission to report on cocaine punishment policies in the federal system. The following year the commission issued a report attacking the 100-to-1 quantity ratio and recommending instead a 1-to-1 crack-powder quantity ratio, to be achieved by lowering the penalties for crack while punishing behavior associated with crack offenses more severely.

The commission’s proposed ratio came under attack from legislators across the political spectrum. In 1995 Congress, for the first time in the history of the commission, voted to override a proposed amendment to the sentencing guidelines.

In May 2007, the commission unanimously adopted an amendment that abandoned the 100-to-1 ratio and modestly reduced crack cocaine guideline levels across the board, even though mandatory minimum penalty statutes remained in place to trump the guideline sentences in some cases. In the original guidelines, the commission established guideline ranges that were set above applicable mandatory minimum penalties for crack set by Congress. The 2007 amendment reduced the base offense level for crack cocaine offenses so that the sentencing range includes, rather than exceeds, any applicable statutory mandatory minimum.

After reviewing the statutory purposes of sentencing under 18 U.S.C. §3553(a), the scientific and medical literature, and its own extensive research into sentencing patterns in drug cases, the commission found that the existing crack penalties failed in several
respects:

(1) The current quantity-based penalties overstate the relative harmfulness of crack cocaine compared to powder cocaine.

(2) The current quantity-based penalties sweep too broadly and apply most often to lower level offenders.

(3) The current quantity-based penalties overstate the seriousness of most crack cocaine offenses and fail to provide adequate proportionality.

(4) The current severity of crack cocaine penalties mostly impacts minorities.

Report to the Congress: Cocaine and Federal Sentencing Policy 8 (2007) (available at http://www.uscc.gov/r_congress/cocaine2007.pdf). The revised guidelines use different ratios at different offense levels, with higher powder-to-crack ratios operating at higher offense levels. The commission estimated that its modifications to the guidelines would affect 69.7% of crack cocaine offenses and would reduce the average sentence for all crack cocaine offenses from 121 months to 106 months. The commission also urged Congress to revise the mandatory minimum penalties for crack cocaine to “focus the penalties more closely on serious and major traffickers” and to exclude simple possession of crack from the reach of any mandatory penalty.

This amendment attracted relatively little congressional attention, and took effect on November 1, 2007. Thereafter in December 2007, the Sentencing Commission voted unanimously to give retroactive effect to this amendment, effective on March 3, 2008. As a result of these actions, approximately 1500 inmates became eligible for immediate release and approximately 16,000 received a sentence reduction of two years on average in the following years.

What explains the different political outcomes in 1995 and 2007? Did the commission manage the 2007 process more effectively, or did an overall change in the political atmosphere or practical experience with drug sentencing make the difference? As for the merits of the proposal, what might explain the use of a ratio between powder and crack that varies depending on the seriousness of the offense?
In August 2010, the Fair Sentencing Act of 2010 became law. The federal statute reduced the disparity between mandatory minimums applying to crack and powder cocaine sentencing. The new statutory law reduces the crack-powder sentencing disparity from 100-to-1 under the former law to about 18-to-1 by raising the amounts of crack needed to trigger applicable mandatory minimum sentencing terms. As a result of the legislation, the U.S. Sentencing Commission promulgated new guidelines that applied the lower sentencing threshold but also included a list of aggravating and mitigating factors Congress wished to have reflected in revised crack sentencing guidelines. In a recent decision, the U.S. Supreme Court found the new law to apply when the crime had been committed before its passage but the defendant was to be sentenced after adoption. Dorsey v. United States, 567 U.S. ______ (2012).

4. Crack sentencing after Booker. As we saw in Chapter 3, the Supreme Court in United States v. Booker, 543 U.S. 220 (2005), ruled that the federal sentencing guidelines could not compel federal sentencing judges to impose the sentences that were indicated as “presumptive” under the guidelines. On the other hand, appellate courts were still allowed to review sentences for “reasonableness.” In Kimbrough v. United States, 552 U.S. 85 (2007), the Court upheld a district court’s decision to go outside the applicable guideline range in crack cocaine cases if it found the sentence to be imposed “greater than necessary, to comply with” the statutory purposes of sentencing.

5. Race and crack. Are racial differentials the central issue in the crack-powder punishment debate, or are they rather a by-product of social structure? Do different parts of the criminal world just happen to be controlled by groups of a particular race or ethnicity, as the analogy to the use of racketeering laws against the Mafia suggests? Or do you find convincing the position that, in effect, racially disproportionate effects (but not intent) justify reworking the system to start with a 1-to-1 quantity ratio?

In an excerpt reprinted in the first part of this section, Michael Tonry asserted that politicians pursued the war on drugs with full knowledge that “the greater burden of punishment [would be] borne by blacks. Crime control politicians wanted more people in prison and knew that a larger proportion of them would be black.” Is this the sort of discriminatory intent that could form the basis for an equal protection challenge? Does
this argument create a politically viable basis for revising penalties for drug offenses?

B. NATIVE PEOPLES

The concept of race is being undermined by the growing diversity of racialized identities. The most prominent example is professional golfer Tiger Woods. Nevertheless, race remains a powerful concept in U.S. legal discourse. Equality is constitutionally guaranteed, and limits on unequal treatment are reinforced in statutes and rules. Congress required the U.S. Sentencing 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.” 28 U.S.C. §994(d). In accordance with this mandate, the guidelines state unequivocally that race, sex, national origin, creed, religion, and socioeconomic status “are not relevant in the determination of a sentence.” U.S. Sentencing Guidelines Manual §5H1.10. Should national origin never be relevant in a sentence determination?

The strong statements of equal treatment, grounded in constitutional principle, contrast sharply with the social realities of Native Americans. This contrast generates dilemmas for courts trying to balance the defendants they see with the constitutional, statutory, and guideline nondiscrimination provisions that seem to prohibit the recognition of racial and ethnic differences.

Native Americans in South Dakota: An Erosion of Confidence in the Justice System

South Dakota Advisory Committee to the United States Civil Rights Commission, Mar. 2000

South Dakota Demographics. …The estimated white population in South Dakota is 669,007, or 90.6 percent. American Indians are by far the largest minority group, making up 8 percent (59,292) of the population. Only Alaska and New Mexico have larger percentages of American Indian residents.…

Native Americans in South Dakota. …Nationwide, American Indians number approximately 1.2 million, with 900,000 living on or near Indian reservations….South Dakota’s nine reservations vary in size from Lower Brule, with about 1,200 residents, to
Pine Ridge, with more than 30,000, making it the second largest reservation in the United States.

**Economic Conditions.** Despite a booming economy, nationwide half of the potential work force in Indian Country is unemployed. For American Indians in South Dakota the statistics are even worse. More than 50 percent of the labor force was unemployed in 1997 on 8 of the 9 reservations in the state, with unemployment reaching as high as 85 percent at Yankton and 80 percent at Cheyenne River.

Of the 10 poorest counties in the United States in 1990, 4 were on Indian reservations in South Dakota. The poorest county in the Nation is Shannon County, which includes much of Pine Ridge Reservation: 63.1 percent of county residents have incomes that fall below the poverty line. The average annual income for families living on Pine Ridge is just $3,700.

The effects of poverty are far reaching. According to the director of [the Bureau of Indian Affairs’ (BIA’s)] Great Plains Regional Office, on South Dakota’s reservations “economic depression has manifested itself in the form of suicides, alcohol and drug abuse, juvenile gangs, and dropping out of school, to physical abuse, sexual abuse, and child abuse.”

**Health.** On average, men in Bangladesh can expect to live longer than Native American men in South Dakota. A study by the Harvard School of Health in conjunction with health statisticians from the Centers for Disease Control found that Native American men living in six South Dakota counties had the shortest life expectancy in the Nation….Indian men in South Dakota…usually live only into their mid-50s….

In 1993, age-adjusted death rates for the following causes were considerably higher for American Indians [than for the general population]: alcoholism, 579 percent greater; tuberculosis, 475 percent; diabetes mellitus, 231 percent; accidents, 212 percent; suicide, 70 percent; pneumonia and influenza, 61 percent; and homicide, 41 percent. Further, infant mortality in Indian Country is double the national average, and Pine Ridge Reservation has the highest infant mortality rate in the Nation.
Crime. In an October 1997 report, the Justice Department’s Criminal Division concluded “there is a public safety crisis in Indian Country.” While most of the Nation has witnessed a drastic reduction in serious crime over the past 7 years, on Indian reservations crime is spiraling upwards. Between 1992 and 1996, the overall crime rate dropped about 17 percent, and homicides were down 22 percent. For the same period, however, the Bureau of Indian Affairs reported that murders on America’s Indian reservations rose sharply. Some tribes, the Justice Department report says, “have murder rates that far exceed those of urban areas known for their struggles against violent crime.” And other violent crimes parallel the rise in homicide.

Tribal law enforcement agencies do not have the resources to meet their growing caseloads. The Criminal Division’s report concluded, “The single most glaring problem is a lack of adequate resources in Indian Country. Any solution requires a substantial infusion of new money in addition to existing funds.” A chronic shortage of personnel plagues most agencies. For example, in 1996 Indian Country residents were served by less than one-half the number of officers provided to small non-Indian communities. Tribal officers are also in dire need of training. According to the BIA, no reservation in South Dakota has a fully staffed, adequately trained law enforcement program.

[A 1999 study by the Bureau of Justice Statistics found] that American Indians experience per capita rates of violence which are more than twice those of the U.S. population. From 1992 through 1996 the average annual rate of violent victimizations among Indians 12 years and older was 124 per 1,000 residents, compared with 61 for blacks, 49 for whites, and 29 for Asians. The rate of violent crime experienced by American Indian women is nearly 50 percent higher than that reported by black males.

**Annual Average Rate of Violent Victimization by Race of Victim, 1992-96**

<p>| Violent victimizations per 1,000 persons age 12 or older in each racial group |
|---|---|---|---|---|---|
| All Races | American Indian | White | Black | Asian |</p>
<table>
<thead>
<tr>
<th>Violent victimizations</th>
<th>50</th>
<th>124</th>
<th>49</th>
<th>61</th>
<th>29</th>
</tr>
</thead>
<tbody>
<tr>
<td>Rape/ sexual assault</td>
<td>2</td>
<td>7</td>
<td>2</td>
<td>3</td>
<td>1</td>
</tr>
<tr>
<td>Robbery</td>
<td>6</td>
<td>12</td>
<td>5</td>
<td>13</td>
<td>7</td>
</tr>
<tr>
<td>Aggravated assault</td>
<td>11</td>
<td>35</td>
<td>10</td>
<td>16</td>
<td>6</td>
</tr>
<tr>
<td>Simple assault</td>
<td>31</td>
<td>70</td>
<td>32</td>
<td>30</td>
<td>15</td>
</tr>
</tbody>
</table>

The report also found that in 7 out of 10 violent victimizations of American Indians the assailant was someone of a different race, a substantially higher incidence of interracial violence than experienced by white or black victims. Among white victims, 69 percent of the offenders were white; similarly, black victims are most likely to be victimized by a black assailant (81 percent). For American Indian victims of rape/sexual assault, the offender is described as white in 82 percent of the cases.

Alcohol is more often a factor in crimes committed by and against American Indians than for other races. Seventy percent of Indians in local jails for violent crimes had been drinking when they committed the offense, nearly double the rate for the general population. In 55 percent of violent crimes against American Indians, the victim said the offender was under the influence of alcohol and/or drugs. The offender’s use of alcohol is less likely for white and black victims (44 and 35 percent, respectively). Other important findings of the study are as follows:

- The arrest rate for alcohol-related offenses among American Indians (drunken driving, liquor law violations and public drunkenness) was more than double that for the total population during 1996. However the drug arrest rate was lower than for other races.

- Almost four in 10 American Indians held in local jails had been charged with a public order offense—most commonly driving while intoxicated.

- During 1996 the American Indian arrest rate for youth violence was about the same as that for white youths.

- On any given day an estimated one in 25 American Indians 18 years old and older is under the jurisdiction of the nation’s criminal justice system. This is 2.4 times the rate for whites and 9.3 times the per capita rate for Asians but about half the rate for blacks.
• The number of American Indians per capita confined in the state and federal prisons is about 38 percent above the national average. However, the rate of confinement in local jails is estimated to be nearly 4 times the national average.

MAJOR CONCERNS AND CONCLUSIONS

1. Many Native Americans in South Dakota have little or no confidence in the criminal justice system and believe that the administration of justice at the Federal and State levels is permeated by racism. There is a strongly held perception among Native Americans that there is a dual system of justice and that race is a critical factor in determining how law enforcement and justice functions are carried out. This perception includes a belief that violent crimes involving Native Americans are dealt with differently from those involving whites. It is believed that crimes perpetrated by whites against Indians are investigated and prosecuted with less vigor than those committed by Indians against whites….Information was received by the Advisory Committee suggesting disparities in many aspects of the criminal justice system, including law enforcement stops and racial profiling, arrests, prosecutions, legal representation, and sentencing.…

6. The Advisory Committee heard many complaints concerning Federal sentencing guidelines. It was alleged that crimes prosecuted in the Federal system require harsher sentences than similar offenses prosecuted in State courts. Because of the much broader Federal jurisdiction applicable to crimes committed by Native Americans in Indian Country, disparate sentencing— with more severe punishment for Native Americans—may result. This serves to reinforce and strengthen the perception of unequal justice for American Indians.…

8. Native Americans are underrepresented in the employment of all institutions involved in the administration of justice, at the Federal, State, and local levels. They are also largely excluded from elected positions and other decisionmaking positions that govern the administration of justice.…

13. There appear to be limited legal resources available for Native Americans in South Dakota. Victims of discrimination often find it difficult to secure legal representation. Court-appointed defense attorney systems and local public defender programs have been
described as inadequate, due to inexperience, lack of funding, and potential conflicts of interest. There are also few Native Americans in the legal professions. National civil rights legal organizations are not easily accessible, and there are few such programs at the State level.…

While some have overcome the obstacles and achieved great success, most American Indians have been left behind. For the most part, Native Americans are very much separate and unequal members of society. Thus, it is not surprising that they are underrepresented in terms of economic status and overrepresented in the population of the State’s jails, juvenile facilities, and prisons. Systemic, institutionalized, and historic discrimination disadvantage Native Americans in many ways, and therefore the problems they encounter when caught up in the criminal justice system are wholly consistent with other forms of discrimination.

Despair is not too strong a word to characterize the emotional feelings of many Native Americans who believe they live in a hostile environment.…

**PROBLEM 9-4. HARD WORKER**

Following an evening of heavy drinking, David Big Crow and his wife, Margaret, returned from a dance to their trailer home near Porcupine, South Dakota, on the Pine Ridge Indian Reservation. They were met there by Donald Twiss and several other friends who had attended the same dance and who also had been drinking. The group gathered in the kitchen and began playing a drinking game called quarter pitch.

Some time later, David left the kitchen. When he returned, he fell on Donald, who had been asleep on the floor. Donald awoke feeling a sharp pain above his eye and bleeding from his forehead. David stood next to him with a piece of firewood in his hand, making derogatory remarks about the Twiss family. The two of them fought until Donald left the room. At that point, David hit Margaret with a folding chair. She was taken to the hospital and remained unconscious until noon the next day.

Big Crow was convicted of assault with a dangerous weapon and assault resulting in serious bodily injury. Under the Guidelines, aggravated assault has a base offense level of
15. Use of a dangerous weapon and the infliction of serious bodily injury increase the offense level by 8 levels for a total of 23. U.S.S.G. §2A2.2(b)(2)(B), 2A2.2(b)(3)(B). Big Crow had no criminal record, and this gave him a criminal history category of I. The United States Probation Officer’s presentence investigation report recommended that Big Crow receive 2 points for acceptance of responsibility, and suggested that a departure from the Guideline range might be warranted because Big Crow’s offense was out of character and he had been a decent citizen living in a difficult environment. An offense level of 21 carries a range of 37-46 months.

As the sentencing judge in this case, you have received letters written on Big Crow’s behalf by community leaders and a Bureau of Indian Affairs official. The letter writers include a local school principal, the president of the Oglala Sioux Tribe, and the agency safety officer of the Bureau of Indian Affairs. The presentence investigation report also noted that Big Crow has a positive reputation in his community and is well liked by his employers and area law enforcement personnel.

Big Crow, who was 23 at the time of his offense, has worked steadily since the age of 17. With his wife’s help, he provides more than adequately for the needs of their family, which includes two children. During the three years before this offense, Big Crow worked as a forestry aid and firefighter for the Bureau of Indian Affairs. His employer indicated that Big Crow was “a hard worker in what is not too pleasant a job.” He expressed willingness to hold Big Crow’s job for him until he is released from custody. The unemployment rate on the Pine Ridge Indian Reservation is 72%. Per-capita annual income on the reservation is estimated at $1,042.

In your experience, extreme intoxication appears to play a role in a large number of crimes committed in the Indian country. Will the role of alcohol in Big Crow’s offense affect the sentence you impose? Is his lack of a prior criminal record a basis for imposing a sentence below the Guideline range? Does his employment history, in the context of this community, convince you to sentence outside the Guideline range?

Guideline policy statements indicate that previous employment record, family ties and responsibilities, and community ties are “not ordinarily relevant in determining whether a

Perhaps it is the principle of equality itself that should be moderated to take account of racial, ethnic, biological, social, or historical circumstances. The Canadian Charter, for example, mandates consideration of the disadvantaged circumstances in which Native Americans find themselves at sentencing. Does this make for fairer sentences in light of the extreme economic disadvantage of aborigines? Should all those who are defined as aborigines benefit from such special consideration, or is it designed only for those on reservations? Is the differentiating characteristic race or race “plus” some other feature(s)? Consider the solution offered by the legislature and high court in Canada. Alternatively, should we move away from equality of punishment and instead consider equality as a pre-conviction matter, i.e., as an “equal threat of investigation and prosecution” rather than an “equal threat of punishment”? James Q. Whitman, Equality in Criminal Law: The Two Divergent Western Roads, 1 J. Leg. Analysis 119 (Winter 2009).

Jamie Tanis Gladue v. R.


CORY and IACOBUCCI, JJ.

[Criminal Code §718.2(e)] provides that all available sanctions other than imprisonment that are reasonable in the circumstances should be considered for all offenders, with particular attention to the circumstances of aboriginal offenders. This appeal must consider how this provision should be interpreted and applied.

FACTUAL AND PROCEDURAL BACKGROUND

…The appellant and the victim Reuben Beaver started to live together in 1993, when
the appellant was 17 years old. Thereafter they had a daughter, Tanita. By September 1995, the appellant and Beaver were engaged to be married, and the appellant was five months pregnant with their second child.

In the early evening of September 16, 1995, the appellant was celebrating her 19th birthday. She and Reuben Beaver, who was then 20, were drinking beer with some friends and family members in the townhouse complex. The appellant suspected that Beaver was having an affair with her older sister, Tara. During the course of the evening she voiced those suspicions to her friends. The appellant was obviously angry with Beaver. She said, “the next time he fools around on me, I’ll kill him.”

The appellant and Beaver returned separately to their townhouse and they started to quarrel. During the argument, the appellant confronted him with his infidelity and he told her that she was fat and ugly and not as good as the others.

Mr. Gretchin, [a neighbor,] saw the appellant run toward Beaver with a large knife in her hand and, as she approached him, she told him that he had better run. Mr. Gretchin heard Beaver shriek in pain and saw him collapse in a pool of blood. The appellant had stabbed Beaver once in the left chest, and the knife had penetrated his heart. As the appellant went by on her return to her apartment, Mr. Gretchin heard her say, “I got you, you fucking bastard.” The appellant was described as jumping up and down as if she had tagged someone. Mr. Gretchin said she did not appear to realize what she had done. At the time of the stabbing, the appellant had a blood-alcohol content of between 155 and 165 milligrams of alcohol in 100 millilitres of blood.

[After] a jury had been selected, the appellant entered a plea of guilty to manslaughter. [The government had evidence] that Beaver had subjected the appellant to some physical abuse in June 1994, while the appellant was pregnant with their daughter Tanita. Beaver was convicted of assault, and was given a 15-day intermittent sentence with one year’s probation. The neighbour, Mr. Gretchin, told police that the noises emanating from the appellant’s and Beaver’s apartment suggested a fight….Bruises later observed on the appellant’s arm and in the collarbone area were consistent with her having been in a physical altercation on the night of the stabbing. However, the trial judge found that the
facts as presented before him did not warrant a finding that the appellant was a “battered or fearful wife.”

The appellant’s sentencing took place 17 months after the stabbing. Pending her trial [she] took counselling for alcohol and drug abuse at Tillicum Haus Native Friendship Centre in Nanaimo, and completed Grade 10 and was about to start Grade 11. After the stabbing, the appellant was diagnosed as suffering from a hyperthyroid condition, which was said to produce an exaggerated reaction to any emotional situation.…

In his submissions on sentence at trial, the appellant’s counsel did not raise the fact that the appellant was an aboriginal offender but, when asked by the trial judge whether in fact the appellant was an aboriginal person, replied that she was Cree. When asked by the trial judge whether the town of McLennan, Alberta, where the appellant grew up, was an aboriginal community, defence counsel responded: “it’s just a regular community.” No other submissions were made at the sentencing hearing on the issue of the appellant’s aboriginal heritage. Defence counsel requested a suspended sentence or a conditional sentence of imprisonment. Crown counsel argued in favour of a sentence of between three and five years’ imprisonment. The appellant was sentenced to three years’ imprisonment and to a ten-year weapons prohibition.…

The trial judge noted that both the appellant and the deceased were aboriginal, but stated that they were living in an urban area off-reserve and not “within the aboriginal community as such.” He found that there were not any special circumstances arising from their aboriginal status that he should take into consideration. He stated that the offence was a very serious one, for which the appropriate sentence was three years’ imprisonment with a ten-year weapons prohibition.

The appellant appealed her sentence of three years’ imprisonment [on the ground that] the trial judge failed to give appropriate consideration to the appellant’s circumstances as an aboriginal offender. The appellant also sought to adduce fresh evidence at her appeal regarding her efforts since the killing to maintain links with her aboriginal heritage.…

**INTERPRETATION OF SENTENCING PROVISION**
The issue in this appeal is the proper interpretation and application to be given to §718.2(e) of the Criminal Code. The provision reads as follows:

A court that imposes a sentence shall also take into consideration the following principles:…(e) available sanctions other than imprisonment that are reasonable in the circumstances should be considered for all offenders, with particular attention to the circumstances of aboriginal offenders.…

As a general principle, §718.2(e) applies to all offenders, and states that imprisonment should be the penal sanction of last resort. Prison is to be used only where no other sanction or combination of sanctions is appropriate to the offence and the offender.

The next question is the meaning to be attributed to the words “with particular attention to the circumstances of aboriginal offenders.” The phrase cannot be an instruction for judges to pay “more” attention when sentencing aboriginal offenders. It would be unreasonable to assume that Parliament intended sentencing judges to prefer certain categories of offenders over others. Neither can the phrase be merely an instruction to a sentencing judge to consider the circumstances of aboriginal offenders just as she or he would consider the circumstances of any other offender. There would be no point in adding a special reference to aboriginal offenders if this was the case. Rather, the logical meaning to be derived from the special reference to the circumstances of aboriginal offenders, juxtaposed as it is against a general direction to consider “the circumstances” for all offenders, is that sentencing judges should pay particular attention to the circumstances of aboriginal offenders because those circumstances are unique, and different from those of non-aboriginal offenders. The fact that the reference to aboriginal offenders is contained in §718.2(e)…dealing with restraint in the use of imprisonment, suggests that there is something different about aboriginal offenders which may specifically make imprisonment a less appropriate or less useful sanction.…

Section 718 now sets out the purpose of sentencing in the following terms:

The fundamental purpose of sentencing is to contribute, along with crime prevention initiatives, to respect for the law and the maintenance of a just, peaceful and safe society by imposing just sanctions that have one or more of the following objectives:
(a) to denounce unlawful conduct;

(b) to deter the offender and other persons from committing offences;

(c) to separate offenders from society, where necessary;

(d) to assist in rehabilitating offenders;

(e) to provide reparations for harm done to victims or to the community; and

(f) to promote a sense of responsibility in offenders, and acknowledgment of the harm done to victims and to the community. [Emphasis added.]

Clearly, §718 is, in part, a restatement of the basic sentencing aims, which are listed in paras. (a) through (d). What are new, though, are paras. (e) and (f), which along with para. (d) focus upon the restorative goals of repairing the harms suffered by individual victims and by the community as a whole, promoting a sense of responsibility and an acknowledgment of the harm caused on the part of the offender, and attempting to rehabilitate or heal the offender. [As] a general matter restorative justice involves some form of restitution and reintegration into the community. The need for offenders to take responsibility for their actions is central to the sentencing process. Restorative sentencing goals do not usually correlate with the use of prison as a sanction. In our view, Parliament’s choice to include (e) and (f) alongside the traditional sentencing goals must be understood as evidencing an intention to expand the parameters of the sentencing analysis for all offenders.…

The parties and interveners agree that the purpose of §718.2(e) is to respond to the problem of overincarceration in Canada, and to respond, in particular, to the more acute problem of the disproportionate incarceration of aboriginal peoples. They also agree that one of the roles of §718.2(e)…is to encourage sentencing judges to apply principles of restorative justice alongside or in the place of other, more traditional sentencing principles when making sentencing determinations.…

Although the United States has by far the highest rate of incarceration among industrialized democracies, at over 600 inmates per 100,000 population, Canada’s rate of
approximately 130 inmates per 100,000 population places it second or third highest. Moreover, the rate at which Canadian courts have been imprisoning offenders has risen sharply in recent years, although there has been a slight decline of late. This record of incarceration rates obviously cannot instil a sense of pride. . .

If overreliance upon incarceration is a problem with the general population, it is of much greater concern in the sentencing of aboriginal Canadians. In the mid-1980s, aboriginal people were about 2 percent of the population of Canada, yet they made up 10 percent of the penitentiary population. In Manitoba and Saskatchewan, aboriginal people constituted something between 6 and 7 percent of the population, yet in Manitoba they represented 46 percent of the provincial admissions and in Saskatchewan 60 percent. The situation has not improved in recent years. By 1997, aboriginal peoples constituted closer to 3 percent of the population of Canada and amounted to 12 percent of all federal inmates. The situation continues to be particularly worrisome in Manitoba, where in 1995-96 they made up 55 percent of admissions to provincial correctional facilities, and in Saskatchewan, where they made up 72 percent of admissions. A similar, albeit less drastic situation prevails in Alberta and British Columbia. . .

Not surprisingly, the excessive imprisonment of aboriginal people is only the tip of the iceberg insofar as the estrangement of the aboriginal peoples from the Canadian criminal justice system is concerned. Aboriginal people are overrepresented in virtually all aspects of the system. As this Court recently noted in R. v. Williams, [1998] 1 S.C.R. 1128, at para. 58, there is widespread bias against aboriginal people within Canada, and “[there] is evidence that this widespread racism has translated into systemic discrimination in the criminal justice system.”. . . The figures are stark and reflect what may fairly be termed a crisis in the Canadian criminal justice system. [Section 718.2(e)] may properly be seen as Parliament’s direction to members of the judiciary to inquire into the causes of the problem and to endeavour to remedy it, to the extent that a remedy is possible through the sentencing process.

It is clear that sentencing innovation by itself cannot remove the causes of aboriginal offending and the greater problem of aboriginal alienation from the criminal justice system. The unbalanced ratio of imprisonment for aboriginal offenders flows from a
number of sources, including poverty, substance abuse, lack of education, and the lack of employment opportunities for aboriginal people. It arises also from bias against aboriginal people and from an unfortunate institutional approach that is more inclined to refuse bail and to impose more and longer prison terms for aboriginal offenders. There are many aspects of this sad situation which cannot be addressed in these reasons. What can and must be addressed, though, is the limited role that sentencing judges will play in remedying injustice against aboriginal peoples in Canada. Sentencing judges are among those decision-makers who have the power to influence the treatment of aboriginal offenders in the justice system. They determine most directly whether an aboriginal offender will go to jail, or whether other sentencing options may be employed which will play perhaps a stronger role in restoring a sense of balance to the offender, victim, and community, and in preventing future crime.

How are sentencing judges to play their remedial role? The words of §718.2(e) instruct the sentencing judge to pay particular attention to the circumstances of aboriginal offenders, with the implication that those circumstances are significantly different from those of non-aboriginal offenders….The background factors which figure prominently in the causation of crime by aboriginal offenders are by now well known. Years of dislocation and economic development have translated, for many aboriginal peoples, into low incomes, high unemployment, lack of opportunities and options, lack or irrelevance of education, substance abuse, loneliness, and community fragmentation. These and other factors contribute to a higher incidence of crime and incarceration.

[The] circumstances of aboriginal offenders differ from those of the majority because many aboriginal people are victims of systemic and direct discrimination, many suffer the legacy of dislocation, and many are substantially affected by poor social and economic conditions. Moreover, as has been emphasized repeatedly in studies and commission reports, aboriginal offenders are, as a result of these unique systemic and background factors, more adversely affected by incarceration and less likely to be “rehabilitated” thereby, because the internment milieu is often culturally inappropriate and regrettably discrimination towards them is so often rampant in penal institutions.…

In cases where [unique background and systemic] factors have played a significant
role [in bringing the particular offender before the courts], it is incumbent upon the sentencing judge to consider these factors in evaluating whether imprisonment would actually serve to deter, or to denounce crime in a sense that would be meaningful to the community of which the offender is a member. In many instances, more restorative sentencing principles will gain primary relevance precisely because the prevention of crime as well as individual and social healing cannot occur through other means.

Closely related to the background and systemic factors which have contributed to an excessive aboriginal incarceration rate are the different conceptions of appropriate sentencing procedures and sanctions held by aboriginal people. A significant problem experienced by aboriginal people who come into contact with the criminal justice system is that the traditional sentencing ideals of deterrence, separation, and denunciation are often far removed from the understanding of sentencing held by these offenders and their community. [Most] traditional aboriginal conceptions of sentencing place a primary emphasis upon the ideals of restorative justice. This tradition is extremely important to the analysis under §718.2(e).

[Restorative] justice may be described as an approach to remedying crime in which it is understood that all things are interrelated and that crime disrupts the harmony which existed prior to its occurrence, or at least which it is felt should exist. The appropriateness of a particular sanction is largely determined by the needs of the victims, and the community, as well as the offender. The focus is on the human beings closely affected by the crime.

The existing overemphasis on incarceration in Canada may be partly due to the perception that a restorative approach is a more lenient approach to crime and that imprisonment constitutes the ultimate punishment. Yet in our view a sentence focussed on restorative justice is not necessarily a “lighter” punishment….

In describing the effect of §718.2(e) in this way, we do not mean to suggest that, as a general practice, aboriginal offenders must always be sentenced in a manner which gives greatest weight to the principles of restorative justice, and less weight to goals such as deterrence, denunciation, and separation. It is unreasonable to assume that aboriginal
peoples themselves do not believe in the importance of these latter goals, and even if they do not, that such goals must not predominate in appropriate cases. Clearly there are some serious offences and some offenders for which and for whom separation, denunciation, and deterrence are fundamentally relevant.

Yet, even where an offence is considered serious, the length of the term of imprisonment must be considered. In some circumstances the length of the sentence of an aboriginal offender may be less and in others the same as that of any other offender. Generally, the more violent and serious the offence the more likely it is as a practical reality that the terms of imprisonment for aboriginals and non-aboriginals will be close to each other or the same, even taking into account their different concepts of sentencing.…

How then is the consideration of §718.2(e) to proceed in the daily functioning of the courts? The manner in which the sentencing judge will carry out his or her statutory duty may vary from case to case. In all instances it will be necessary for the judge to take judicial notice of the systemic or background factors and the approach to sentencing which is relevant to aboriginal offenders. However, for each particular offence and offender it may be that some evidence will be required in order to assist the sentencing judge in arriving at a fit sentence. Where a particular offender does not wish such evidence to be adduced, the right to have particular attention paid to his or her circumstances as an aboriginal offender may be waived. Where there is no such waiver, it will be extremely helpful to the sentencing judge for counsel on both sides to adduce relevant evidence.…

However, even where counsel do not adduce this evidence, where for example the offender is unrepresented, it is incumbent upon the sentencing judge to attempt to acquire information regarding the circumstances of the offender as an aboriginal person. Whether the offender resides in a rural area, on a reserve or in an urban centre the sentencing judge must be made aware of alternatives to incarceration that exist whether inside or outside the aboriginal community of the particular offender. The alternatives existing in metropolitan areas must, as a matter of course, also be explored. Clearly the presence of an aboriginal offender will require special attention in pre-sentence reports. Beyond the use of the pre-sentence report, the sentencing judge may and should in appropriate
circumstances and where practicable request that witnesses be called who may testify as to reasonable alternatives.

Similarly, where a sentencing judge at the trial level has not engaged in the duty imposed by §718.2(e) as fully as required, it is incumbent upon a court of appeal in considering an appeal against sentence on this basis to consider any fresh evidence which is relevant and admissible on sentencing. [Although]§718.2(e) does not impose a statutory duty upon the sentencing judge to provide reasons, it will be much easier for a reviewing court to determine whether and how attention was paid to the circumstances of the offender as an aboriginal person if at least brief reasons are given.…

The fact that a court is called upon to take into consideration the unique circumstances surrounding these different parties is not unfair to non-aboriginal people. Rather, the fundamental purpose of §718.2(e) is to treat aboriginal offenders fairly by taking into account their difference.…

Section 718.2(e) applies to all aboriginal offenders wherever they reside, whether on-or off-reserve, in a large city or a rural area. Indeed it has been observed that many aboriginals living in urban areas are closely attached to their culture.…

Based on the foregoing, the jail term for an aboriginal offender may in some circumstances be less than the term imposed on a non-aboriginal offender for the same offence.…

**APPLICATION OF PRINCIPLES**

In most cases, errors such as those in the courts below would be sufficient to justify sending the matter back for a new sentencing hearing. It is difficult for this Court to determine a fit sentence for the appellant according to the suggested guidelines set out herein on the basis of the very limited evidence before us regarding the appellant’s aboriginal background. However, as both the trial judge and all members of the Court of Appeal acknowledged, the offence in question is a most serious one, properly described…as a “near murder.” Moreover, the offence involved domestic violence and a breach of the trust inherent in a spousal relationship. That aggravating factor must be
taken into account in the sentencing of the aboriginal appellant as it would be for any offender. For that offence by this offender a sentence of three years’ imprisonment was not unreasonable.

More importantly, the appellant was granted day parole on August 13, 1997, after she had served six months in the Burnaby Correctional Centre for Women. She was directed to reside with her father, to take alcohol and substance abuse counselling and to comply with the requirements of the Electronic Monitoring Program. On February 25, 1998, the appellant was granted full parole with the same conditions as the ones applicable to her original release on day parole.

In this case, the results of the sentence with incarceration for six months and the subsequent controlled release were in the interests of both the appellant and society. In these circumstances, we do not consider that it would be in the interests of justice to order a new sentencing hearing in order to canvass the appellant’s circumstances as an aboriginal offender….

NOTES

1. *Aboriginal offenders in prison.* The *Gladue* court recognized the disproportionate imprisonment of aboriginal offenders in Canada. In response to the problem, Parliament added Criminal Code §718.2(e). In Australia aborigines are also overrepresented in prisons. In fact, the racial disparities in Canada and Australia between aborigines and non-aborigines are worse than those between blacks and whites in the United States. What factors account for the high imprisonment rates of natives? Much of Australia’s high aboriginal imprisonment rate has been blamed on mandatory sentencing laws for relatively minor property offenses. Why would mandatory sentences not lead to greater ethnic equality? Should the disparate impact on minority groups be a reason for abolishing such legislation?

2. *Aboriginal sentencing practices.* In a later decision, Canada’s highest court emphasized that in cases of aboriginal offenders sentencing judges must consider the types of sentencing procedures and sanctions which may be appropriate in the
circumstances for the offender because of his or her particular Aboriginal heritage or connection. In particular, given that most traditional Aboriginal approaches place a primary emphasis on the goal of restorative justice, the alternative of community-based sanctions must be explored.


To what extent can and should U.S. courts consider the punishment practices of native courts? While some aboriginal groups have focused on restorative justice, others have used punishment practices that many today would consider torture. How should the courts accommodate considerations of traditional practice and modern human rights concerns? See, e.g., Barbara Creel, Tribal Court Convictions and the Federal Sentencing Guidelines: Respect for Tribal Courts and Tribal People in Federal Sentencing, 46 U.S.F. L. Rev. 37 (2011).

3. Native Americans, blacks, and other minority offenders. Data from the United States indicate that at least in some areas Native Americans appear to be treated unequally with respect to length of sentence and time served. See Richard Braunstein & Steve Feimer, South Dakota Criminal Justice: A Study of Racial Disparities, 48 South Dakota L. Rev. 171 (2003). In many countries with native populations, natives are not the only ones overrepresented in prison. Should the situation of native offenders be any more disconcerting than the situation of offenders from other racial groups? Why? To what extent can sentencing judges be expected to “fix” racial disparity at individualized sentencing hearings? Will such attempts not merely lead to other forms of injustice?

4. Ethnicity. Ethnicity has become an alternative to race in describing human diversity, but the term also carries deep ambiguities. Ethnicity focuses on the cultural distinctiveness of a group: country of origin, language, religion, food, and values all create a particular ethnic identity. Which of these characteristics are relevant and the extent to which one should be allowed to self-classify as a member of a particular ethnic group remain ambiguous. Ethnicity allows for distinctions within racial groups (blacks emigrating from the Caribbean, for example, differ from those hailing from the African continent), but it may also conceal racial differences (blacks and whites from Brazil are both considered Hispanics). Often ethnicity appears to be a substitute for national origin,
but in fact the latter is usually limited to first- and possibly second-generation immigrant populations, though such categorization is likely to vary between countries.

5. **Culture and sentencing.** Offenders from some ethnic groups may be culturally conditioned or socialized not to enter guilty pleas. Since guilty pleas often result in a sentence reduction, offenders who insist on their right to trial may receive longer sentences. In imposing a sentence, should a court consider whether the choice of trial may be characteristic of the offender’s ethnic group? If not, is the offender being punished for a cultural value that differs from that of mainstream society rather than for offense-relevant conduct? Australia’s Crimes Act requires courts to consider the “cultural background” of an offender, including “ethnic, environmental and cultural matters.” Would the insistence on going to trial be a cultural factor?

6. **Culture and victims.** Most crime is committed within a given racial or ethnic group. Sentencing patterns based on the offender’s culture, therefore, often parallel the victims’ ethnicity and culture. Do lower sentences based on offenders’ cultural background devalue the suffering of their victims or indicate that the victims deserve less state protection?

7. **Principles of equality.** U.S. law is based on principles of equality. All individuals, independent of their race, ethnicity, or national origin, should be treated the same. The federal sentencing guidelines as well as state sentencing regimes reflect this mantra. Such neutrality can lead to injustice, however, when the situations of individuals are so different that equal treatment in the criminal justice system merely magnifies the unequal treatment in other aspects of life.

As the preceding materials indicate, many Native Americans who commit offenses on reservations are tried in federal court and sentenced under the federal guidelines. Historically, the guarantee of criminal trials in federal courts was designed to protect Native Americans from discriminatory state courts. Today, however, when federal sentences are perceived as harsher than those in many states, Native Americans tend to consider themselves as being treated unfairly. While the guidelines appear to have decreased racial disparity within the federal system, federal courts have refused to
undertake state-federal comparisons to determine whether a sentence is too harsh.

8. Inequality and the state. In contrast to the current approach to race equality, an alternative sentencing system might deliberately take group differences into account. But considering group status at sentencing could undermine the concept of “one nation” and the fundamental equality of the victims of crime. It could also excuse the state’s inability or unwillingness to equalize the social and economic starting points for all members of society.

PROBLEM 9-5. ALIEN STATUS

Peter Onwuemene, a Nigerian citizen, and other Nigerians participated in a nationwide automobile insurance fraud scheme that caused losses of about $1 million to several insurance companies. A member of the group would obtain liability insurance on an old car from 10 to 15 insurance companies. Subsequently, the policy owner would report a collision with an expensive, late-model car owned by another member of the group, who would claim damage to his car.

Onwuemene was charged with four counts of mail fraud. He pled guilty to one of the counts in return for the government’s agreement to recommend dismissal of the others. Onwuemene faced a sentencing range under the federal sentencing guidelines of 6 to 12 months. The presentence investigation report recommended 6 months’ incarceration and a work release program. At sentencing, Onwuemene agreed to pay restitution of $3,723.

The district court sentenced him to 12 months’ imprisonment, the top of the sentencing range, because the crime was serious and could have resulted in a much greater loss if the victims had failed to discover it and because Onwuemene “failed or refused” to identify the other participants in the fraud. The court added:

The other thing that I feel that warrants imposition at the high end of the guideline range: You are not a citizen of this country. This country was good enough to allow you to come in here and to confer upon you…a number of the benefits of this society, form of government, and its opportunities, and you repay that kindness by committing a crime like this. We have got enough criminals in the United States without importing any.

NOTES

1. Immigration status and sentencing. Large-scale immigration into North America and Western Europe has caused an ever-increasing number of immigrants to become involved in the criminal justice system. May a court consider an offender’s immigration status at sentencing? Because of the possibility (or even likelihood) of deportation, a court could impose a lesser sentence than it would on a citizen offender. Federal courts, however, have generally rejected downward departures based on a noncitizen’s deportability. See, e.g., United States v. Restrepo, 999 F.2d 640 (2nd Cir. 1993); United States v. Lopez-Salas, 266 F.3d 842 (8th Cir. 2001). But see United States v. Gallo-Vasquez, 284 F.3d 780, 784 (7th Cir. 2002) (district court may depart downward when “defendant’s status as a deportable alien…may lead to conditions of confinement, or other incidents of punishment, that are substantially more onerous than the framers of the guidelines contemplated in fixing the punishment range for the defendant’s offense.”).

Alternatively, a court may view an immigrant’s offense as more heinous because he abused his guest status, as did the trial court in Problem 9-5. When judges explicitly refer to alien status, some federal courts have held that they are violating the Constitution by sentencing an offender on the basis of factors such as race, national origin, or alienage. See United States v. Onwuemene, 933 F.2d 650 (8th Cir. 1991) (consideration of defendant’s alien status violates his constitutional rights); United States v. Borrero-Isaza, 887 F.2d 1349, 1352 (9th Cir. 1989) (imposing stricter sentence on defendant because of his national origin and alienage violated right to due process). One state court tried to impose a higher sentence on a member of an ethnic community:

[S]ometimes it is necessary in sentencing to send a message to the community, and I am sending a message by this sentence to a small segment of the Albanian community that they now live in the United States and they are governed by our laws, and we are not going to tolerate whatever the customs may be in Albania, and that includes the customs of dealing with family members as well as the use of guns.

Courts have denied probation sentences to undocumented offenders who would be deported upon completion of their sentence because they are deemed a flight risk and cannot work legally in the United States. See, e.g., People v. Hernandez-Clavel, 186 P.3d 96 (2008), cert. granted, June 30, 2008, 2008 Colo. LEXIS 700. On the other hand, state courts have considered an offender’s immigration status in crafting a sentence. See, e.g., State v. Svay, 828 A.2d 790, 791 (Me. 2003) (“immigration status and the effect that criminal convictions and criminal sentences can have on deportation are factors that a sentencing court can consider”); State v. Quintero Morelos, 137 P.3d 114 (Wash. Ct. App. 2006) (affirming reduction of sentence to less than a year to prevent deportation). Should immigration status generally be considered at sentencing in light of other consequences that may befall a non-citizen either directly or indirectly, such as denial of intermediate sanctions, restrictions on prison-based programming, and deportation. See Francesca Brody, Extracting Compassion from Confusion: Sentencing Noncitizens after United States v. Booker, 79 Fordham L. Rev. 2129 (2011).

2. Noncitizen offenses. A number of immigration offenses, such as reentry of a convicted felon, can be committed only by noncitizens. Do such statutes not discriminate based on national origin? Because of increases in congressional funding and changes in law enforcement priorities and federal sentencing, between 2000 and 2010 the percentage of noncitizens sentenced in federal court increased by almost 15%, with the largest percentage of non-citizens convicted of immigration offenses or drug trafficking. About 85% of the offenders prosecuted for unlawfully entering or reentering the United States are Mexican nationals, and 78% of all federal immigration offenders hail from Mexico, according to U.S. Sentencing Commission data.

Felony re-entry offenders are now nationally able to benefit from the “fast-track” program, which allows them to receive a decreased sentence if they plead guilty and waive certain procedural rights. Before the expansion to all federal districts, the availability of this program only in border districts caused substantial sentencing
disparity nationally.

3. Immigrants and crime. With the growth of immigration, new groups add to the existing racial and ethnic diversity in the United States and Europe. Overall first-generation immigrants have lower crime rates than the native population. Nevertheless, in Western Europe and North America crime and incarceration rates for members of some minority groups greatly exceed those for the majority population. The same minority groups are also socially and economically disadvantaged (but not all disadvantaged groups are also high-crime groups). While some discrimination may be present, the principal cause of the disparities appears to be differences in offending patterns rather than official bias. How should the criminal justice system react to such increasing diversity and disparity?

One approach would be to exempt certain immigrant groups from the coverage of select substantive criminal law provisions that are legally and culturally foreign to them. So far, no one has seriously considered this idea. Another notion is to consider an offender’s ethnicity at the sentencing stage. For example, when a recent immigrant from a country that allows the marriage of adult men to teenage girls is convicted of statutory rape, the sentencing court may consider as a mitigating circumstance that the immigrant and his teen “wife” viewed the marriage as legitimate. Feminists, however, have objected that such exemptions generally come at the expense of women’s rights, as in many societies around the world women and girls have fewer legal rights than is the case in the United States. Can a color-blind society permit courts and prosecutors to consider ethnicity when it prohibits them from basing their sentences on race or national origin? Should the court be allowed to consider the laws prevalent in the defendants’ home countries and their cultural immersion in such values? How should home and host country values and laws be reconciled? Should such special treatment exist for all first-generation immigrants? For all members of an ethnic group? For all members of an ethnic group growing up in a distinctly ethnic environment?

4. What sentencing practices and values? Some have argued that immigrant offenders should be punished based on the sentence that would be appropriate in their home countries. The reason given is that the sentencing regime in the United States is too
lenient to deter offenders from countries where the death penalty is available for more offenses, where physical punishments such as flogging are practiced, and where longer prison terms may be imposed for select offenses.

In a number of federal cases, courts have departed from the applicable guideline range because of the offender’s adoption of American values. See, e.g., United States v. Melendez-Torres, 420 F.3d 43 (1st Cir. 2005) (cultural assimilation generally recognized as proper basis for downward departure in certain illegal reentry cases); United States v. Rodriguez-Montelongo, 263 F.3d 429, 432-434 (5th Cir. 2001) (cultural assimilation considered a mitigating factor). Under the federal guidelines such a departure is now explicitly permitted. U.S. Sentencing Guidelines Manual 2L1.2 cmt. n.8 (2012). Is this an appropriate ground for departure from the guidelines?

C. CLASS

In the United States legal scholars, sociologists, political scientists, and public commentators tend to pay less attention to class differences than do those in other Western countries. Race-based analysis has replaced much of the focus on class. While racial distinctions and poverty do not go hand in hand, they do overlap.

Class is relatively difficult to define. If a person’s class is determined by annual income, some members of the Rockefeller family may be categorized as poor. If it is based on educational attainment or status of employment, to what economic class do the stay-at-home spouses of executives of major corporations belong? The intellectual tradition in the United States combined with these definitional difficulties and related challenges in data collection make it difficult to find empirical studies on class.

Courts are also reluctant to identify “class.” White-collar offenses are often associated with high-class defendants, while blue-collar defendants are generally viewed as lower-class. The relationship between class and type of crime is not perfect; many embezzlers are members of the middle class, for example. To the extent that courts do discuss class, they focus on high-status offenders. A prosecutor may request a higher sentence for “someone who had choices,” or a defense lawyer may argue that “family” or
“community” contributions and good works justify a lower sentence. Consider the relevance of class in the following case.

United States v. Frank Serafini

233 F.3d 758 (3d Cir. 2000)

RENDELL, J.

In this appeal, Frank Serafini challenges his conviction and sentence for one count of perjury in violation of 18 U.S.C. §1623. Serafini, a popular state legislator in northeastern Pennsylvania, was convicted based on his false testimony before a federal grand jury; the grand jury was investigating a scheme wherein corporate political contributions were funneled through third-party conduits in violation of federal election laws. In his grand jury testimony, Serafini had denied that he was reimbursed for a contribution he had made to Senator Bob Dole’s presidential campaign. [The government appeals] Serafini’s sentence, contesting…the District Court’s three-level downward departure for exceptional civic or charitable contributions pursuant to U.S.S.G. §5H1.11. [We conclude that the District Court’s downward departure was] not an abuse of its discretion….

Serafini was subpoenaed to testify before a grand jury that was investigating possible violations of the Federal Election Campaign Act (FECA). The principal targets of the probe were Renato Mariani, president of Empire Sanitary Landfill, Inc. (Empire), and Serafini’s nephew, Michael Serafini. The apparent violations were that Michael Serafini and his secretary had solicited numerous employees, business associates, and family members to make $1,000 contributions to Senator Bob Dole’s presidential campaign, and that Michael reimbursed them for these contributions; the resulting transactions between Michael and these “conduits” therefore allegedly violated FECA….

Serafini was called before the grand jury to answer questions about Michael’s having solicited Serafini for a $1,000 contribution and allegedly having reimbursed him for that

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5 FECA prohibits corporations from making contributions in connection with any federal election. FECA also makes it unlawful for any person to make a contribution in the name of another person (referred to in this opinion as a “conduit”), or for any person to permit his or her name to be used as a conduit. FECA limits individual contributions to federal candidates to $1,000 per election per candidate. [This law has been changed substantially through recent Supreme Court rulings.]
contribution.…The [government] sought and received an order immunizing Serafini so that the government could compel his testimony before the grand jury; the resulting subpoena ordered him to produce “[all] documents relative to political contributions you were reimbursed for.” During Serafini’s appearance before the grand jury, the Assistant U.S. Attorney informed him that he could be prosecuted if he provided false testimony. Although Serafini did acknowledge that Michael had solicited and obtained from him a $1,000 contribution to Dole, he denied that a $2,000 check given to him by Michael that same week was in part a reimbursement for that contribution. Instead, Serafini maintained that the $2,000 probably represented Michael’s reimbursing Serafini for payments that Serafini made to a mechanic who had fixed Michael’s Porsche. [Serafini repeatedly asserted that he was not reimbursed for any contributions.

The jury convicted Serafini of perjury.]…. [The] adjusted offense level resulted in a guideline range of 18 to 24 months’ imprisonment. However, the District Court granted a three-level downward departure for Serafini’s community and charitable activities. The government argues that the District Court’s departure is an abuse of discretion.…

The District Court…correctly determined that departing on the basis of civic and charitable good works was discouraged, but not forbidden, by the Guidelines. U.S.S.G. §5H1.11 (“Military, civic, charitable, or public service; employment-related contributions; and similar prior good works are not ordinarily relevant in determining whether a sentence should be outside the applicable guideline range”). The District Court recognized that, in order to depart downward on this basis, it must find that this factor existed “to an exceptional degree or, in some way, that makes the case different from the ordinary case in which the factor is present.” The District Court made a finding that Serafini’s civic and charitable contributions did exist to such an exceptional degree, or in an extraordinary manner.…

At the sentencing hearing, the District Court was presented with several character witnesses, and more than 150 letters. The letters submitted to the Court fall into three categories: (i) the first category presents Serafini as a good person; (ii) the second category refers to his activities as a state legislator; and (iii) the third category refers to his assistance, in time and money, to individuals and local organizations.
As to the first category, these can be quickly dismissed with the observation that being a “good person,” a quality indeed to be admired, does not qualify as extraordinary or exceptional civic or charitable conduct.

As to Serafini’s activities as a state legislator, they are work-related and political in character. For example, a letter from the Fire Chief of Greenfield Township Volunteer Fire Company stated that he “had worked tirelessly to obtain grant monies to help the community afford the lifesaving equipment they need.”...Conceptually, if a public servant performs civic and charitable work as part of his daily functions, these should not be considered in his sentencing because we expect such work from our public servants. [To] the extent this second group of letters does not evidence extraordinary community service under Guideline §5H1.11, but instead, reflects merely the political duties ordinarily performed by public servants, we are of the view that they cannot form the basis of a departure.

However, unlike the first and second categories of letters the Court received, the third category of letters provided an adequate basis for the District Court’s conclusion that Serafini’s community service warranted a downward departure. Many of the letters that fall within this last group contain substantive descriptions of Serafini’s generosity with his time as well as his money. Several constituents and friends described situations in which Serafini extended himself to them in unique and meaningful ways during times of serious need. In particular, three letters are especially noteworthy.

William Drazdowski, an accountant and “a close personal friend” of the defendant, explains Serafini’s role in providing a $300,000 guarantee to Dr. Edward Zaloga so that he could secure new cutting edge data from certain Tokyo physicians for the treatment of his brother’s brain tumor. Dr. Zaloga testified at the sentencing hearing that he telephoned Serafini at 1:00 A.M. seeking his assistance in raising the money. Just thirty minutes later, Serafini called back and informed Dr. Zaloga “that everything was in place.”...In reading the Zaloga letter, both Serafini’s readiness to help and his reluctance to seek gratitude make a strong impression. Such behavior is hardly part of the normal duties of a local politician.
Another letter came from George E. Seig, who also testified at the sentencing hearing. He sustained a serious injury as a result of an accident while he was a college student. The physicians’ prognosis was that he would never be able to carry on any form of normal social functioning. After a year of frustrating physical therapy, Seig lost all ambition to return to school. Then, he was contacted by Serafini’s office who told him that Serafini had heard of the tragic incident and wanted Seig to come work for him. The record reflects that Serafini’s offer of employment went far beyond just hiring a young person on his staff. Serafini took Seig under his wing, mentored him, and strongly encouraged him to attend college. He even loaned him money until Seig could repay it. The letter from Seig—now an attorney—reflects his immense gratitude and his feeling that Serafini is responsible for turning his life around.

A third letter came from a widow who approached Serafini in tears because she was about to lose her house. He wrote her a personal check for $750 to forestall foreclosure. She expressed doubt about her future ability to repay him, but Serafini insisted that she need not do so unless she could afford it.

The remaining letters, taken as a whole, depict Serafini as an exceptionally giving person…. For example, the letters describe Serafini’s volunteer work as an usher at St. Mary’s Church; at the Abington Heights School District; and at Lackawanna Trail High School. In addition, he helped to establish a fund to defray the cost of a bone marrow transplant for a man suffering from leukemia. Several letters note that Serafini was generous with his time even with people who lived outside his district. The letters also describe Serafini’s financial contributions to organizations such as The Arc (a nonprofit agency serving people with mental retardation and their families); the Rotary Run Against Drugs; the Scranton Lackawanna Human Development Agency; the Little League; the Boy Scouts; St. Francis of Assisi Kitchen; the Abington Heights School District; and the leukemia sufferer’s fund mentioned above. A letter from an official at the University of Scranton refers to Serafini’s financial assistance to college students, and a letter from a high school social studies teacher describes Serafini’s contributions to a scholarship for graduating seniors.…. The District Court concluded that the letters and testimony demonstrated that Serafini
had distinguished himself, “not by the amount of money [he has] given, but by the amount of time that [he has] devoted.” The District Court found that these efforts made Serafini’s community and charitable activities “exceptional” when compared to what an average person in Serafini’s circumstances would have done:

Those weren’t acts of just giving money, they were acts of giving time, of giving one’s self. That distinguishes Mr. Serafini, I think, from the ordinary public servant, from the ordinary elected official, and I had ample testimony, today, that says that Mr. Serafini distinguishes himself, that these are acts not just undertaken to assure his re-election, but are taken because of the type of person he is.…

We realize, as did the District Court, that Serafini’s largesse was in part financial, and in part, devotion of himself and his time. Since he is a wealthy individual, we must ensure that a district court does not run afoul of the prohibition against considering socioeconomic differences in relying on financial contributions as a basis for a departure. See U.S.S.G. §5H1.11. However, the District Court here recognized this particular aspect of Serafini’s situation, but nonetheless found all his contributions, not merely monetary ones, exceptional.

It is not our role to decide in the first instance whether Serafini’s civic and charitable contributions were exceptional given Serafini’s role as a public servant and his apparent wealth. Our review is far more deferential. We conclude that the District Court had an adequate basis for its factual finding, and that the District Court’s decision was not clearly out of line with other reported cases. See, e.g., United States v. Woods, 159 F.3d 1132, 1136 (8th Cir. 1998) (upholding defendant’s downward departure for charitable activities, which included bringing two troubled young women into her home and paying for them to attend a private high school, as well as helping to care for an elderly friend, where the court found no basis to overturn the district court’s finding that these efforts were exceptional)....

ROSENN, J., dissenting.

…I believe that when it came to sentencing, the voluminous letters from the defendant’s political constituents, colleagues, and other friends misled the Court to depart
The Sentencing Guidelines are clear that a defendant’s record of charitable work and community service are a discouraged justification for a sentencing departure. The historical note to the Civic and Charitable Amendment to the Guidelines (§5H1.11) “expresses the Commission’s intent that the factors set forth in this part are not ordinarily relevant in determining whether a sentence should be outside the applicable guideline range....” This appears to be a recognition that in our culture and society, every person is expected reasonably to contribute charity to the poor and to non-profit organizations dedicated to educational, health, and religious purposes.1 ... 

The defendant is not only a wealthy individual, but his federal income tax returns show substantial income from sources other than his salary as a state official. Included are substantial royalties from the Empire Landfill. A financial analysis of his pertinent income returns for the period 1991 through 1996 reveals the following undisputed evidence.

<table>
<thead>
<tr>
<th>Year</th>
<th>$ Total Income</th>
<th>$ Charitable Deductions</th>
<th>Charity as % of Income</th>
</tr>
</thead>
<tbody>
<tr>
<td>1991</td>
<td>724,019</td>
<td>13,407</td>
<td>1.8</td>
</tr>
<tr>
<td>1993</td>
<td>857,000</td>
<td>22,604</td>
<td>2.6</td>
</tr>
<tr>
<td>1994</td>
<td>855,000</td>
<td>16,620</td>
<td>1.9</td>
</tr>
<tr>
<td>1995</td>
<td>908,172</td>
<td>17,385</td>
<td>1.9</td>
</tr>
<tr>
<td>1996</td>
<td>1,101,276</td>
<td>20,310</td>
<td>1.8</td>
</tr>
</tbody>
</table>

Except for 1993, in which his contributions exceeded 2%, all of his contributions are less than 2% per annum. Donating less than 2% of one’s income to charity—even 2.6%—is lackluster and pedestrian by any measure; it is not exceptional. It is far below the average measure of giving in the United States by people in the defendant’s

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As noted, the majority and the District Court were persuaded by Serafini’s non-financial charitable acts. But much of Serafini’s civic participation was either honorary or obligatory because of his job as a Representative. Numerous letters submitted on his behalf were written by constituents or other beneficiaries of his public position. Neither Drazdowski, an accountant, nor Dr. Zaloga claim that Serafini personally made the guarantee; nor does the defendant. There is no information how the guarantee was accomplished, to whom it was made, who made it, and the substance of the guarantee, or the relationship between Dr. Zaloga and the defendant. [The] entirely obscure and mysterious incident may very well have its genesis in defendant’s political agenda. In any event, it hardly rises to the level of significant community service.

The Seig letter attests to Serafini’s offer to employ Seig, a young friend of the family, on the defendant’s legislative staff, a loan to him of an unstated sum of money, and encouragement to Seig to attend college. The third letter reports a personal check of $750 from the defendant to a widow who was about to lose her home through foreclosure. The widow expressed doubt about her ability to repay and defendant insisted she need not do so unless able.

These three “noteworthy” letters do reflect commendable action by the defendant, but neither they, nor the other letters, show community service to an exceptional or extraordinary degree. A few acts of personal kindness to individual friends do not add up to community service; they do not fulfill the purpose of the Guidelines. The District Court relied considerably on the defendant’s gift “of time.” I can find no evidence of the amount of time given to community service, as distinguished from some personal favors to friends and political constituents.…

The 1999 Statistical Abstract of the United States reveals that in the year 1995, persons in the United States with income of $100,000 or more contributed an average of 4.4 hours per week to volunteer work without monetary pay. In this case, although

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2 According to the Statistical Abstract of the United States, the average American household contributed 2.2% of its income to charity in 1991....In 1995, households with greater than $100,000 income contributed 3.4% of their household income to charity....
Serafini earned many times more than $100,000 in 1994 and 1995, we have no record that he gave any amount of time to volunteer work, whether it was for one or more weeks during the year, or for fifty-two weeks.

The cases support the foregoing analysis. Courts may not leniently interpret the requirement of extraordinary circumstances to grant a downward departure. See, e.g., United States v. Rybicki, 96 F.3d 754, 758 (4th Cir. 1996) (defendant was a highly-decorated Vietnam veteran, had saved an innocent civilian during the My Lai massacre, and had served with the Secret Service; these deeds did not warrant a departure); United States v. McHan, 920 F.2d 244, 247 (4th Cir. 1990) (defendant’s work history, family ties and responsibilities, and extensive contribution to the town’s economic well-being could not justify downward departure)…. 

Measured by any reasonable standard, whether it be tithing to his church and community, or other charitable contributions of money or community time, Serafini’s charitable and community service was far from exceptional or extraordinary….I therefore conclude that it was impermissible under the Guidelines for the District Court to depart from the Sentencing Guidelines. 

NOTES

1. Higher class status and sentencing advantage. Is membership in a privileged class a basis for increased or decreased sentencing, or should it be irrelevant? Should monetary charity ever be considered a basis for adjusting a sentence downward? If money is a poor indicator of anything other than class, are there aspects of social or community behavior not tied to class that should nonetheless be relevant to sentencing? For a different perspective on a downward departure in the case of a wealthy white-collar defendant based on charitable giving and good deeds, see United States v. Thurston, 338 F.3d 50 (1st Cir. 2003) (review of downward departure de novo).

2. Lower class status and sentencing disadvantage. The striking reality of the U.S. criminal justice system is the disproportionate presence of members of the lower class. Should the disproportionate presence of the poor in U.S. courts, prisons, and jails prompt changes in our sentencing systems or our social systems? In a survey of federal judges
conducted in 2002, only 54-60% of them believed that there was “almost always” neutrality with regard to the offender’s socioeconomic status, in contrast to 62-68% who believed the same with regard to race and almost 90% who shared that belief with regard to religion or creed.

3. White-collar v. street-crime. Many so-called white-collar offenses are being committed by offenders at the lower end of the socio-economic strata, who often resemble street-level property offenders more than the upper echelon of white-collar offenders. A recent study has indicated that white-collar offenders continue to be treated more leniently than street-level property offenders, with those at the upper end of the socio-economic spectrum continually protected by a “status shield.” Nevertheless, recent corporate scandals have had an impact on sentences. How long that effect will last is an open question. Shanna Van Slyke & William D. Bales, A contemporary study of the decision to incarcerate white-collar and street property offenders, 14(2) Punishment & Soc’y 217 (2012).

D. GENDER

Criminal laws used to distinguish explicitly between men and women. Some, such as rape laws, made it impossible for women to commit the crime; others relegated women automatically to victimhood. See, e.g., M. v. Superior Court of Sonoma County, 450 U.S. 464 (1981) (state statute criminalizing only the male’s conduct in sexual intercourse with an underage woman did not violate the equal protection clause); People v. Liberta, 474 N.E.2d 567 (N.Y. 1984) (statute that prohibited only forcible rape of women by men violated the equal protection clause; conviction could stand as court extended coverage to rape of men by women). Because such legislation treated women differently, often in a manner appropriate to a child, feminists urged their abolition. Ultimately these arguments succeeded; the few gender-based distinctions that remain mostly revolve around the childbearing functions of women. For example, until recently Ohio mandated the imposition of nonprison sentences involving prenatal care and drug rehabilitation for pregnant drug abusers who were willing to enter treatment.

Although gender equality has become the nominal hallmark of our criminal justice
system, issues of differential treatment continue to rear their head in substantive criminal law and sentencing. Most common are charges of preferential sentencing. Traditionally, women have benefited from the paternalism and chivalry of a largely male judiciary. Women often receive lesser sentences because men believe they need protection and help.

While some of this discrimination may be due to gender stereotypes, judges may implicitly recognize the reality of the lives of many female offenders. They are dominated or abused by fathers, husbands, or boyfriends who involve them in criminal activities; their offenses are designed to benefit their families; and, perhaps most significant, their incarceration sends children into foster homes.

But prosecutors and judges do not favor all women. Rather, they distinguish between “good” and “bad” women. As crime victims the former—or their male representatives—are taken seriously; as offenders the former group appear to receive substantially lower sentences than men convicted of the same offenses. The criminal justice system, however, is often not so generous to women who violate social norms—prostitutes, for example, or women who assault and kill their children or mates—by engaging in behavior that is considered “unnatural.” Minority and poor women also tend to be included among those who receive harsher sentences.

Whether anecdotal evidence of differential treatment amounts to gender-based discrimination is more difficult to determine. The number of women committing crimes (especially violent crimes) is small. Possible sentencing discrimination remains hidden behind a process that makes it difficult to determine whether similar offenders receive similar sentences. Consider the following case, in which the defendant challenged a blatantly gender-based policy.

Virginia Salaiscooper v. Eighth Judicial District

34 P.3d 509 (Nev. 2001)

PER CURIAM

Petitioner Virginia Anchond Salaiscooper contends that, in prosecuting her for
solicitation of prostitution, Clark County District Attorney Stewart Bell is engaging in impermissible unconstitutional selective prosecution that violates her right to equal protection under the law. More specifically, Salaiscooper contends that the district attorney intended to discriminate against females by implementing a policy that prohibited his deputies from entering into plea negotiations with female defendants charged with solicitation of prostitution, thereby foreclosing any possibility that they could attend a diversion class in order to avoid solicitation convictions.…

The policy at issue was summarized in a December 1999 memo from Clark County District Attorney Stewart Bell to his deputies. The memo provided:

In light of some changes in policy at the Las Vegas Metropolitan Police Department with regard to work card licensing for exotic dancers charged with prostitution, it has been agreed…that (except in cases of first time male offenders who opt for the diversion program) we will not negotiate the nature of cases of soliciting prostitution, nor will we agree that they may be in the future dismissed for any reason.

The policy was implemented due to the American Civil Liberties Union’s (ACLU) objection to the fact that the Las Vegas Metropolitan Police Department (Metro) was revoking adult entertainment industry employees’ work cards based merely on an arrest for solicitation of prostitution. The ACLU contended that revoking a work card needed to work in the entertainment industry without an underlying conviction violated due process. In response to the ACLU’s objection, the district attorney implemented a no-plea-bargain policy that prohibited his deputies from entering into a plea agreement with a defendant charged with solicitation of prostitution allowing a plea to a lesser charge. The plain language of the policy prohibiting plea bargains excepted first time male defendants.

Because the justice court was concerned with the gender-specific language used in the policy, it ordered an evidentiary hearing where both sides could present evidence to support or refute a specific finding of discriminatory purpose.…

The State called…Dr. Roxanne Clark Murphy, a clinical psychologist and the Program Coordinator for the First Offender Program for Men in Las Vegas. Murphy testified that
she developed the First Offender Program in collaboration with Metro and that it boasted an extremely low recidivism rate of less than one percent. Murphy explained that the diversionary program was designed for buyers of sex that are statistically almost always male. Murphy also described the requisite for entrance into the program was that a defendant must be a first-time offender charged with soliciting a prostitute.

Murphy testified that the vast majority of sellers of sex are females. Murphy also stated that it would take a minimum of a year to successfully rehabilitate a seller of sex. Murphy explained that, in order for a diversion program to be an effective deterrent, it would need to be a residential program that would protect women from their pimps, teach them job skills, and provide substance abuse and psychological counseling. Murphy further explained that more effort is required to rehabilitate and deter sex sellers than buyers because many prostitutes have been sexually abused, selling sex since the age of 13 to 14, disassociated from their actions through the use of drugs and alcohol, and/or controlled by a violent pimp or procurer.

Judge Togliatti issued a lengthy order stating that the Las Vegas Justice Court had unanimously found that the policy did not discriminate on the basis of gender and that its distinction based on buyers of sex and sellers of sex was constitutionally permissible. In so finding, Judge Togliatti qualified this conclusion by stating that the judges were relying on the district attorney’s representations that his policy applied to all sellers of sex regardless of gender, and consequently ordered Mr. Bell to clarify this fact in writing to his deputies within ten days.

In response to the court’s order, Mr. Bell filed a clarification of policy in the justice court, affirming that he had distributed a memo clarifying that the First Offender Program for Men was available only to buyers of sex regardless of whether they were male or female. Accordingly, under the clarified policy, if a female buyer of sex was charged with solicitation of prostitution, she, like a male buyer of sex, would have the option of attending the First Offender Program, thereby avoiding a solicitation conviction.

Salaiscooper argues that, in enacting the policy, the district attorney engaged in impermissible and unconstitutional selective prosecution that violated her right to equal
protection under the law. Specifically, Salaiscooper argues that the policy’s distinction between buyers and sellers of sex is “nothing more than a facade” concealing “conscious, intentional discrimination” against women, and thereby violates the Equal Protection Clauses of the United States and Nevada Constitutions. We conclude that Salaiscooper’s argument lacks merit.

The government’s decision to deny an arrestee admission into a diversion program is a decision to prosecute and [on review is treated] as a claim of selective prosecution. A defendant alleging unconstitutional selective prosecution has an onerous burden. Indeed, a district attorney is vested with immense discretion in deciding whether to prosecute a particular defendant that “necessarily involves a degree of selectivity.” In exercising this discretion, the district attorney is clothed with the presumption that he acted in good faith and properly discharged his duty to enforce the laws. Although the district attorney’s prosecutorial discretion is broad, it is not without limitation. The Equal Protection Clause constrains the district attorney from basing a decision to prosecute upon an unjustifiable classification, such as race, religion or gender.

The requisite analysis for a claim of unconstitutional selective prosecution is two-fold. First, the defendant has the burden to prove a prima facie case of discriminatory prosecution. To establish a prima facie case, the defendant must show that a public officer enforced a law or policy in a manner that had a discriminatory effect, and that such enforcement was motivated by a discriminatory purpose. A discriminatory effect is proven where a defendant shows that other persons similarly situated “are generally not prosecuted for the same conduct.” A discriminatory purpose or “evil eye” is established where a defendant shows that a public administrator chose a particular course of action, at least in part, because of its adverse effects upon a particular group. If a defendant proves a prima facie case, the burden then shifts to the State to establish that there was a reasonable basis to justify the unequal classification. Where the classification is based on gender, the court applies an intermediate standard of scrutiny; in other words, the court must conclude the unequal classification in the policy is “reasonable, not arbitrary, and [rests] upon some ground of difference having a fair and substantial relation to the object of the legislation.”
In the instant case, the justice court found that the district attorney had a valid, gender-neutral motivation for creating the policy classification—to draw a distinction between buyers and sellers of sex in order to deter acts of prostitution. More specifically, the justice court found that it was reasonable for the district attorney to prohibit sellers of sex from attending the one-day diversion program because it would have no deterrent effect. The justice court opined that the classification was therefore necessary because buyers of sex should not be precluded from participating in a successful diversion program merely because such treatment would be ineffective in rehabilitating the sellers. Finally, the justice court found that there was “nothing sinister” about the district attorney’s primary goal of obtaining solicitation of prostitution convictions against sellers of sex so that he could revoke their work cards and, ultimately, stop prostitutes from working in the adult entertainment industry.

The lower court’s findings with respect to the district attorney’s motivation and intent underlying the policy are findings of fact to be given deference, and they should not be reversed if supported by substantial evidence. The district court correctly concluded that there is substantial evidence in support of the justice court’s factual findings. In particular, Dr. Murphy testified that the diversion class would not be an effective deterrent for sex sellers because they would need a one-year rehabilitation program in light of the deeply-entrenched culture of drug abuse, psychological abuse, and violence associated with prostitution. Moreover, [there was testimony] that the district attorney needed solicitation convictions against sellers of sex so that Metro could revoke their work cards and eradicate prostitution from the strip clubs. Because the State presented evidence that the purpose of the policy’s buyer/seller distinction was to deter acts of prostitution, the justice court’s findings that the policy did not run afoul of the Equal Protection Clause is supported by substantial evidence.

Other jurisdictions have reached an analogous conclusion, holding that it is constitutionally permissible to treat prostitutes differently than the customers who patronize them. In People v. Superior Court of Alameda County, 562 P.2d 1315, 1320 (Cal. 1977), the Supreme Court of California, sitting en banc, held that it was permissible for law enforcement officials to target sellers of sex, because the “sexually unbiased
policy of concentrating its enforcement effort on the profiteer” was not initiated by an intent to discriminate. The court reasoned that the policy was created because of the belief that focusing criminal prosecution on the sellers of sex had the most deterrent effect: “Prostitutes, the municipal court found, average five customers per night; the average customer does not patronize prostitutes five times a year. Because of an effective grapevine, arrest of one prostitute by an undercover officer will deter others, at least for a time.”

Like the law enforcement officials in Alameda, [the] State presented evidence in support of its belief that a one-day class would not stop a prostitute from selling sex….In light of our conclusion that the policy does not violate the Equal Protection Clauses of the United States and Nevada Constitutions, we conclude that extraordinary relief is not warranted in this matter. The legislature has vested the district attorney with prosecutorial discretion, and we conclude it is within the purview of the district attorney’s prosecution powers to treat buyers of sex differently than sellers of sex. After all, the decision to prosecute, including the offer of a plea bargain, is a complex decision involving multiple considerations, including prior criminal history, the gravity of the offense, the need to punish, the possibility of rehabilitation, and the goal to deter future crime. Unless a defendant can prove that a district attorney’s decision to prosecute arose from an impermissible desire to discriminate on the basis of race, gender or other protected class, our federal and state constitutions do not compel our intervention. Because there is no evidence of a discriminatory motive in the case before us, we deny Salaiscooper’s petition.

PROBLEM 9-6. SENTENCING AND MOTHERHOOD

Amrhu Dyce, an immigrant in her twenties, pled guilty in federal court to conspiracy to commit possession with intent to distribute crack cocaine. She had carried drugs from New York City to North Carolina, largely to increase her limited household budget. Under the federal sentencing guidelines, Dyce faced an imprisonment range of 121 to 151 months. At sentencing she argued for a substantial downward departure based on her “extraordinary” family responsibilities, claiming that her case fell outside the heartland of cases for which the U.S. Sentencing Commission had declared family responsibilities
“not ordinarily relevant.” At the time of the sentencing hearing, Dyce had three small children. She breastfed the youngest, a newborn (a practice the U.S. government recommends at least for the first year of a baby’s life while the World Health Organization suggests two years). The other two children were one and three years old. Dyce’s boyfriend, the father of her children, was not involved in her criminal activities but seemed incapable of raising one, let alone all three, of his children. Dyce’s mother and sister, who live in England, were willing and able to take in only the middle child.

Because of the father’s inability to bring up two children, the youngest and the eldest may have to be placed in foster care should Dyce be sentenced to prison. Should the court consider her family circumstances extraordinary so as to allow for a nonprison sentence? Should it matter whether residential treatment facilities are available that would allow Dyce to live in a restrictive environment but keep at least the infant, and possibly even the other two children, with her? May the court consider the separation of the family and the impossibility of visitation should one of the children be removed from the United States? See United States v. Amrhu Dyce, 91 F.3d 1462 (D.C. Cir. 1996).

NOTES

1. Backfiring. Much feminist criticism of law enforcement has centered on gender-specific offenses such as prostitution, domestic violence, and rape. Substantive law and enforcement practices have changed in all three, but the impact of the changes is often imperceptible or ambiguous.

Consider prostitution. As Salaiscooper indicates, much of the enforcement of gender-neutral statutes still centers on the providers of the service—largely women. What justifies this enforcement focus? Who is in the best position to ascertain the information to make this decision?

Imagine a reverse world in which legislation criminalizes only the purchasing of sexual services. What could justify the sole prosecution and sentencing of the largely male customers? Prostitution is frequently deemed particularly harmful to the female providers, many of whom were abused as children, are drug addicts, suffer from low self-esteem, and do not view themselves as having other employment options. Would such
legislation, if adopted in a U.S. jurisdiction, run afoul of the equal protection clause? See Vermont v. George, 602 A.2d 953 (Vt. 1991). What effect do you expect such a change in enforcement practice to have on the supply of and demand for prostitution services? Sweden has adopted this model to protect women’s dignity. Many consider it successful despite—or perhaps because of—few prosecutions of male customers.

2. Criminal law defenses and sentencing. Feminists have charged that substantive criminal law, and especially the area of criminal defenses, focuses on men. This issue has been publicized most frequently with regard to abused women who kill their batterers. The women often argue that they acted in self-defense, and they frequently introduce the battered spouse syndrome to bolster their claim. Juries usually either reject the defense outright or find liability for a lesser, included offense. Once the defense has been fully or partially rejected, the lesser culpability of the defendant can be recognized merely through the sentence. See United States v. Whitetail, 956 F.2d 857 (8th Cir. 1992) (federal sentencing guidelines allow for consideration of battered spouse syndrome through downward departures).

The same situation occurs when a female defendant raises a duress defense. The defendant’s emotional, psychological, or sexual dependence on a male partner who abused the defendant may fail as a defense at the guilt phase, but still might allow the court to impose a lesser sentence. See United States v. Gaviria, 804 F. Supp. 476 (E.D.N.Y. 1992). On the other hand, some juries may want to acquit of the primary offense but then assure some albeit limited sentence by convicting of a secondary charge.

3. More female offenders? The number of women in state and federal prison rose by 757% between 1977 and 2004. Women’s Prison Association, The Punitiveness Report—Hard Hit: The Growth in Imprisonment of Women, 1977-2004 (2005) (available at http://www.wpaonline.org/institute/hardhit/index.htm). During this period the number of women imprisoned increased at almost twice the male rate. Drug offenses accounted for almost half of the rise in women’s incarceration, and federal prisons outpaced state facilities in the growth of female admissions. African American and, to a lesser extent, Hispanic women bore the brunt of this development. Curiously, in the last few years the number of African-American women in prison has dropped substantially even though the
number of Hispanic and white women in prison has continued to increase.

What explains the explosion in female imprisonment? Some blame a change in enforcement strategies; some point to enforcement and sentencing practices, stemming largely from the war on drugs, that no longer discriminate in favor of women; some see a rise of women in the drug underworld, paralleling their rise in the legitimate business world; some blame the feminization of poverty. See Phyllis Goldfarb, Counting the Drug War’s Female Casualties, 6 J. Gender, Race & Just. 277 (2002).

Despite the increase in female convicts, the gender differences in incarceration rates remain striking. At year-end 2010, about 1.5 million men (943 per 100,000 residents) were incarcerated in state and federal prisons, but only about 113,000 women (67 per 100,000) were incarcerated. Why are so few women imprisoned, comparatively speaking? Victimization studies indicate that men commit more offenses, especially more violent crimes. In 1996 women accounted for 16% of all felons convicted in state courts: They made up almost one-quarter of property offenders but less than one-tenth of violent criminals. However, the number of women who commit violent crimes has been rising steadily, especially among adolescents. In 2009 over a third of female offenders sentenced to more than 1 year were incarcerated for a violent offense. Slightly over a quarter of women offenders are now serving time for a drug offense and around 30% are imprisoned for a property crime. Even if these numbers underestimate female offending somewhat, they raise the issue of whether biological differences or socialization, or both, explain why men are more violent and more likely to engage in crime generally.

4. Women are different. In contrast to people of different races, men and women truly differ. Some of these differences are clearly biological; others may or may not be. To what extent should the criminal justice system consider a woman’s ability to bear children? There is an international consensus that pregnant women should not be executed, but beyond that, criminal justice systems differ on whether and to what extent biological differences should be considered.

In imposing a 20-year prison sentence on a 25-year-old woman and a 25-year-old man, should a court consider that this makes it virtually impossible for the woman to bear a
child (putting aside expensive modern reproductive technologies) but not for the man to
father a child? Cf. Gerber v. Hickman, 291 F.3d 617, 623 (9th Cir. 2002) (“[T]he right to
procreate while in prison is fundamentally inconsistent with incarceration.”); Goodwin v.
Turner, 908 F.2d 1395, 1396 (8th Cir. 1990) (Bureau of Prisons’ restriction on allowing
inmate to ejaculate into a clean container so that his semen could be used to artificially
inseminate his wife “is reasonably related to legitimate penological interest of treating all
prisoners equally”). Since 2007 the British Home Office has granted one inmate access to
“artificial insemination facilities.” Five more petitions are under consideration, 16 have
been rejected. The prisoners most likely to benefit are those with long prison sentences,
whose spouses would likely be too old to conceive a child upon their release. The policy
extends also to female inmates, but it is unclear whether any of them have requested
access to artificial insemination.

Concerned that women will become pregnant to avoid incarcerative sentences, courts
have declined to consider pregnancy, childbirth, and the presence of a young child as
mitigating sentencing factors. If courts should not and cannot consider such biological
differences in their sentencing, is there a societal responsibility to create institutional
facilities that would allow female offenders to keep their children with them?

5. Pregnancy and drugs. In 19 states and the District of Columbia, pregnant women
have been prosecuted for substance abuse. Some prosecutors have argued that the small
amount of drugs that travels from the mother to the child either during the pregnancy or
through the umbilical cord at birth constitutes drug trafficking—and a more severe form
at that, since the drugs are delivered to a minor. In South Carolina, Charleston
prosecutors filed child neglect charges against women who had just given birth in a state
hospital. The U.S. Supreme Court struck down this policy because the hospital’s practice
of collecting urine samples, without the patient’s consent, to obtain evidence of the
patient’s criminal conduct constituted an unreasonable search. It reached this result even
though the state’s interest in deterring pregnant women from using cocaine is high. See
Ferguson v. City of Charleston, 532 U.S. 67 (2001). In other cases prosecutors have
charged “exposure of a child to controlled substances” or various types of homicide if the
child was stillborn. Particularly disturbing is the fact that the vast majority of such drug
prosecutions are aimed at poor African American women, generally because they frequent public hospitals and because of the allegedly more destructive impact of crack on a fetus. Seema Mohapatra, Unshackling Addiction: A Public Health Approach to Drug Use During Pregnancy, 26 Wisc. J. L., Gender & Soc’y 242 (2011).

6. Gender equality redux. Gender equality is writ large in the legal system. Does it make sense if there is no such equality in the larger society? While many male inmates are also fathers, data on state prisoners indicate that 90% of fathers who were incarcerated had wives who cared for their children. For female offenders, less than one-quarter had husbands who cared for their children. Because of changes in foster care and adoption laws, a likely consequence of long-term imprisonment for single parents who cannot find another caregiver for their children is loss of parental rights. While differences in caregiving may not be solely biological, should a court consider them? Such consideration would also benefit men who are not able to find stable caregiving arrangements for their minor children during imprisonment. Alternatively, should the large numbers of single parents in the criminal justice system (and society at large) counsel against consideration of single-parent status at sentencing?

Federal courts that consider family circumstance in their departure jurisprudence frequently note the defendant’s financial contribution to the family. Women who do not appear to be gainfully employed, even if they are the sole caregiver for minor children, are thus at a disadvantage. Does such an approach not privilege one type of parenting over another? May it not also discriminate against minority groups in which the mother is expected to stay at home with her children?

In light of the known consequences of imprisonment on children, should parental status be considered at sentencing? Even if the result may be gender inequity?

7. The numbers disadvantage in imprisonment. Because there are substantially fewer prisons for women than for men, often the conditions of incarceration differ by gender. In the federal system especially, the small number of female offenders and the location of women’s prisons often necessitate incarceration far from family and friends. This is particularly difficult for women with young children and women whose families cannot
afford lengthy trips, for financial or other reasons. Should courts consider such well-known facts in deciding whether to impose a prison sentence?

Female prisons also offer different conditions than all-male institutions. Many have fewer or different educational programs, and most have only limited employment options. This may further disadvantage women who entered the system with educational and vocational deficits. Nevertheless, courts have not found equal protection violations based on different prison conditions. See Klinger v. Department of Corrections, 31 F.3d 727, 731 (8th Cir. 1994) (substantial differences between men’s and women’s prisons did not constitute an equal protection violation because male and female prisoners “were not similarly situated for purposes of prison programs and services”). At the same time, women often enjoy better prison facilities and more privacy than men. In those cases, courts, relying on Klinger, have also found no constitutional violations. See Oliver v. Scott, 276 F.3d 736 (5th Cir. 2002).

8. Female recidivism and risk-based sentencing. Women commit fewer violent offenses and have lower recidivism rates than men. If the risk of future offending were the focus of sentencing, most women would receive lesser sentences than most men for a similar offense. Does risk-based sentencing violate the equal protection clause? Without risk-based sentencing, doesn’t equal treatment put women at a disadvantage?

9. Women on death row. Women constitute only about two percent of the death row population in 2012. As a group they were more likely to escape execution and benefit from sentence commutation than men. Why women are sentenced to death less frequently and less likely to be executed remains subject to debate. See Laura M. Argys & H. Naci Mocan, Who Shall Live and Who Shall Die? An Analysis of Prisoners on Death Row in the United States, 33 J. Legal Stud. 255 (2004).

10. Women as crime victims. Men are disproportionately the victims of crime. While this finding may contradict public perception, it holds true for most offenses. Women make up the majority of domestic violence and rape victims, however—both destructive, usually violent offenses that are vastly underreported. Normatively, the victimization of women is considered substantially more heinous than that of men. Why?
Women are often the targets of crime because offenders consider them more vulnerable. Imagine, for example, a young man choosing a robbery victim: The 5′2″, 90-pound woman is a more attractive target than most men, possibly barring Woody Allen. Should offenders who pick vulnerable female targets be subject to sentence enhancements? Or is a new substantive criminal law provision more appropriate? Consider one proposed definition for hate crime: “a crime in which the defendant intentionally selects a victim, or in the case of a property crime, the property that is the object of the crime, because of the actual or perceived…gender…of any person.”

PROBLEM 9-7. SAUCE FOR THE GANDER

Gilberto Redondo-Lemos was charged in Arizona federal court for acting as a drug courier. He alleged that prosecutors in the U.S. Attorney’s office violated his right to equal protection by offering more favorable plea bargains to female couriers.

The district court held an evidentiary hearing. At the hearing, the assistant U.S. Attorney (AUSA) handling the Redondo-Lemos prosecution said that she offered, in exchange for a guilty plea, to recommend the lowest sentence allowed by the federal sentencing guidelines and the mandatory minimum. She testified that she assessed the strength of her case, followed the factors set out in departmental memos dealing with plea bargains generally, was not motivated by defendant’s gender, and knew of no office policy of plea bargaining on the basis of gender.

Another AUSA’s testimony concerned a case against a couple where the evidence was actually stronger against the woman. The AUSA nonetheless agreed to let the husband plead guilty to a lesser charge in exchange for allowing the wife to go free and take care of their three children. The AUSA noted that, after 25 years of experience, he’d observed that it was “usually the Mexican men that will stand up and take responsibility,” and he’d come to expect it. The AUSA noted that when couples are faced with a choice, they usually select the woman to care for the children and that allowing this choice reflects no government policy of gender discrimination. The government argued that it was the private party, not the government, who made the decision and “discriminated.” The government simply practiced compassion when it allowed parents to decide which parent
would be the better caregiver for children who otherwise would be effectively orphaned.

In ten additional cases that concerned the district judge, the responsible AUSAs testified that they based their plea bargaining decisions on the strength of the evidence, the legality of the stops and searches, the defendant’s cooperation, the level of the defendant’s involvement, and special circumstances of particular defendants. In one case, the AUSA allowed a woman who was overdue in her pregnancy to plead guilty to a misdemeanor. Because the Marshal’s Service indicated it couldn’t give her proper medical care, she was sentenced to time served, while her male partner, who had a record, pleaded guilty and was sentenced to 90 months in prison. The AUSA explained that she would have responded the same way had the Marshal’s Service expressed concern about medical care for a male defendant.

The court considered two sets of statistics to show intentional discrimination in plea bargaining with male “mules” in the District of Arizona. Statistics from the local probation office showed that male drug offenders in the District of Arizona were sentenced to an average of 36 months compared to 32 months for females and that only 11% of all males received probation compared with 35% of females. A U.S. Sentencing Commission report showed that nationwide, 61.5% of men who committed crimes subject to mandatory minimum sentences received them, while only 50% of women did.

The district court rejected the explanations by the AUSAs as “mere general assertions that the AUSAs did not discriminate.” In the case of the couple, the court found the discriminatory plea to be unjustified. Based on that case and the two sets of statistics, the district court found intentional invidious discrimination and sentenced Redondo-Lemos below the statutory minimums for the offenses of which he was convicted.

Suppose the government appeals the finding of invidious discrimination and the remedy of ordering sentences below the statutory minimum. How should the appellate court rule? See United States v. Redondo-Lemos, 27 F.3d 439 (9th Cir. 1994).

NOTES

1. Male claims of bias. A striking feature of gender bias claims is that they are often
raised by men rather than women. Why? Claims of gender bias face the problems of definition and proof confronted by Warren McCleskey and others making claims of bias based on race and other factors.

2. The centrality of plea bargaining. Defendants who plea bargain face two obstacles in challenging bias in their prosecution and sentence. First, by plea bargaining they may have waived some right to challenge any bias in treatment and sentence; second, bias challenges to charges and pleas are almost always based on claims of systematic rather than individual bias. Are the doctrines of equality able to make the leap from individual to collective treatment, from individual bias to disparate outcome, which may or may not be based on biased judgments and rules by the decision maker whose actions are challenged?

3. Information on sentencing disparities. Does the focus on legally compelling claims of bias obscure important policy issues with respect to equal treatment? How should policymakers, scholars, or judges concerned with issues of bias in sentencing or the criminal justice system address or illuminate those issues?

4. The interplay of various forms of discrimination. In United States v. Guzman, 236 F.3d 830 (7th Cir. 2001), the court vacated a sentence because the district court had held that the Mexican immigrant’s gender and “cultural heritage” made it more likely that she had supported her boyfriend’s criminal activity. As women benefit from such stereotypes in some cases, why should they present a cause of action in others? Why may the use of gender stereotypes not ever be appropriate? See Deborah W. Denno, Gender, Crime, and the Criminal Law Defenses, 85 J. Crim L. & Criminology 80 (1994). Can the same be said for race- and ethnicity-based stereotypes?