

Disparities in sentencing decisions

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How can the life of such a man
Be in the palm of some fool's hand ...
Put in a prison cell, he could-a been
The champion of the world.

Bob Dylan (1975), *Hurricane*

Introduction

The constitutions of many countries require that defendants be treated equally before the law. Nonetheless, academic scholars and members of the public have repeatedly noted and criticized apparent disparities among sentences in substantially similar cases (Frankel, 1972; Gaudet, Harris & St. John, 1934; Hogarth, 1971; Kapardis, 2003; Partridge & Eldridge, 1974). Research on sentencing disparities has focused primarily on differences in the duration of incarceration or community service sanctions. Within these domains, sentencing disparities have been documented at different levels of analysis (Sporer, 1982): within judges across time, between judges in a single jurisdiction (presumably due to specific judges' attitudes toward particular types of offenses), between jurisdictions, between states and between countries.

Some disparities may derive from differences in attitudes toward the role of punishment in society, in particular, variations in sentencing philosophies held by different judges. Variability may also arise from attitudes toward specific types of crimes and interactions with a judge's personal experience (e.g. a judge with teenage daughters who must sentence a repeat offender regarding child sexual abuse). The appearance of the offender, such as attractiveness or baby-facedness, may contribute to a judge's evaluation of the case. Emotionally evocative factors may mediate a judge's decision, such as the ordeal a victim had to endure, or

Social Psychology of Punishment of Crime, edited by Margit E. Oswald, Steffen Bieneck and Jörg Hupfeld-Heinemann
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even accidental consequences of the defendant's action. Some of these factors may not act in isolation, but may interact with each other in complex ways. This chapter describes psychological factors known to contribute to some variability in sentencing decisions and seeks to understand the theoretical principles responsible for them. We conclude by reviewing some measures and policies intended to reduce sentencing disparities.

Distinguishing legal from extra-legal factors in sentencing decisions

One challenge in reviewing the literature on extra-legal influences on sentencing is the absence of any uniform definition of extra-legal factors. To some extent, this is a consequence of the extensive variability from one jurisdiction to another in designating formal legal factors to consider in determining an appropriate penalty for an offender. Traditionally studied extra-legal factors include offender race and ethnicity; non-traditional extra-legal factors include contextual elements and losses or damages resulting from the offense, although some of these may comprise formal legal factors in certain jurisdictions. Pre-trial publicity may also be an extra-legal factor, although this has been primarily studied in criminal and civil cases with juries (see Vidmar, 2002), not with judges. From a psychological perspective, we propose that the most useful definition is one qualified by the requirement that the decision maker must be unaware of the influence of those factors on his or her sentencing decisions. Research on the factors that operate without conscious awareness most clearly distinguishes the contribution to this debate of psychology as a discipline from findings by researchers grounded in other disciplines. With this criterion in mind, we distill generalizable results of studies of disparities in sentencing decisions attributable to characteristics of the judge, the offender, the victim and unintended consequences of the criminal conduct.

Professional versus lay participation in sentencing decisions

Trial judges hold a central position in the criminal justice system, within both inquisitorial and adversarial systems (van Koppen & Penrod, 2003). In most adversarial legal systems, such as the United States, UK, Canada, Australia and New Zealand, separate or bifurcated hearings on guilt and sentencing are commonplace, irrespective of whether the same decision maker is involved at each stage. With the exception of a few states in the United States and a few other countries where juries make the ultimate decision upon punishment, judges decide on the final sentence of an offender, whether or not a jury trial precedes sentencing. Although sentencing decisions are made primarily by legal professionals, such as judges and magistrates, confinement of the task to experienced legal professionals has not diminished controversy over sentencing disparities and is itself a source of some alleged extra-legal biases in sentencing determinations (Meyer & Jesilow, 1996).

A common view is that the task of sentencing is too complex for laypersons (Findlay, 2006). However, a recent comparison of judge and jury performance in criminal cases revealed that differences in case outcomes were attributable to

the lower conviction threshold applied by the judges and not to the evidentiary or legal complexity of the cases (Eisenberg *et al.*, 2005). Comparisons of professional versus lay-juror sentencing decisions in Germany revealed significant differences in philosophy of punishment between the two groups, but sentencing differences were trivial (Rennig, 1991). Some commentators consider the representation of lay views in sentencing (the idea that jurors or lay judges should be represented in the judiciary) as a form of democratic participation and equality before the law and, hence, a goal to be achieved in sentencing procedures (Rennig, 1993). In communities where sentences by judges have been criticized, mechanisms to increase citizen involvement in the sentencing process as a means of diffusing this responsibility have been proposed (New South Wales Law Reform Commission, 2007). Some research revealed that lay judges endorsed the importance of lay participation and the necessity to adhere to the law, which, surprisingly, professional judges endorsed only to a limited degree (Rennig, 1993).

Discretion and sentencing disparity

The role of the judge in determining a criminal sentence is best characterized by the principle of discretion (Diamond & Zeisel, 1975; Sporer, 1982). Discretion provides the judge with the flexibility to take into consideration the idiosyncracies of any particular case. As a consequence, the subjective nature of the judicial decision-making process has been emphasized (Hogarth, 1971; Kapardis, 2003; Oswald, 1994; Rennig, 1993; Sporer, 1982; Wagenaar, van Koppen & Crombag, 1993). Depending on the methodology used and the seriousness of cases, different studies in different countries have observed different levels of disparities in sentencing decisions not only in simulation studies (e.g. Sporer, 1982, 1984, 1986) but also with real judges (e.g. Diamond & Zeisel, 1975; Oswald, 1994).

In determining a criminal sentence, certain factors must be explicitly considered by law, for example, the type of crime, degree of intent, the offender's life circumstances and particular motivations. All these factors render the offender and his or her action an "ambiguous stimulus" to be judged (Sherif, 1936; Sporer, 1982). This ambiguity is captured by the notion of decision making under conditions of uncertainty (Englich, this volume), which makes the influence of extra-legal factors particularly likely. A well-known principle from *Gestalt* psychological theories in social psychology states that internal factors will play a larger role the more ambiguous a stimulus – the defendant and the crime to be judged – is perceived to be (Sherif & Sherif, 1969). The specific biasing effect of heuristics in sentencing decisions is discussed in more detail by Englich (this volume).

A preliminary methodological note

Although one may suspect that personality attributes and social attitudes are potential determinants of judges' sentencing behavior, studying real judges, their attitudes and their decision processes poses one of the most difficult methodological challenges in the psychology and law arena. For one thing, judges enjoy their constitutionally guaranteed independence and are reluctant to have their

decisions scrutinized by others. Of course, appellate courts and the public review their judgments (but cannot analyze the decision-making process *per se*). Media influences on jurors' decisions have been extensively documented, and it is likely that judges, too, are sensitive to community pressures in highly publicized cases. For example, in a highly publicized case in which a well-known German politician (who apparently had accumulated large debts due to his gambling addiction) was convicted of armed robbery of a jewelry store, the judges gave him an even more severe sentence than was demanded by the prosecution.

Consequently, it is very difficult to get permission to enlist judges as research participants or to recruit them to participate. Data protection/privacy issues further prohibit inquiries into decisions in individual cases where these are not made in open court (Bliesener, 2006). Judges who are aware of the controversies over disparate decisions are reluctant to volunteer to have their decisions investigated, or they will respond in socially desirable ways, reflecting expectations that they proceeded according to the law (Konecni & Ebbesen, 1984; Rennig, 1993).

Studying judges by means of survey questionnaires and post-decisional interviews normally leads to low response rates, thus jeopardizing the representativeness of the samples. One potential way around the limitations in investigating judges themselves is to study (potential) jurors, assuming that judges' decisions follow the same psychological principles and regularities as laypeople's decision making (Bornstein, 1999; Kerr & Bray, 2005). Many studies of juror and jury decision making have used sentencing decisions instead of, or in addition to, dichotomous guilty/not guilty verdicts. Although mock jurors (mostly students) are likely to differ from professional judges in many respects, arguably, the psychological theories and principles that govern sentencing decisions apply equally to both groups (Lind & Walker, 1979; Sporer, 1982). Considering the social desirability problems and judges' recalcitrance in the face of scientific scrutiny, studying basic decision processes using ecologically valid case materials with laypeople (potential lay judges or jurors) may actually be more fruitful, particularly when the goal of a study is to estimate the effect of extra-legal factors on their decisions. At the extreme, when judges know that certain factors are not supposed to influence them, they would be very likely to give answers in line with the law or in accord with social desirability.

This chapter reviews research on sentencing disparities related to characteristics of the judge, the offender, the victim and situational and case facts. Where some studies of juror/jury decision making have included sentences as dependent variables, such as recommended term of imprisonment, these findings are also discussed.

► Judge characteristics

Authoritarianism and belief in a just world

Due to their social status and training, judges are likely to be conservative (Stephenson, 1992). While Stephenson argued that conservative attitudes go

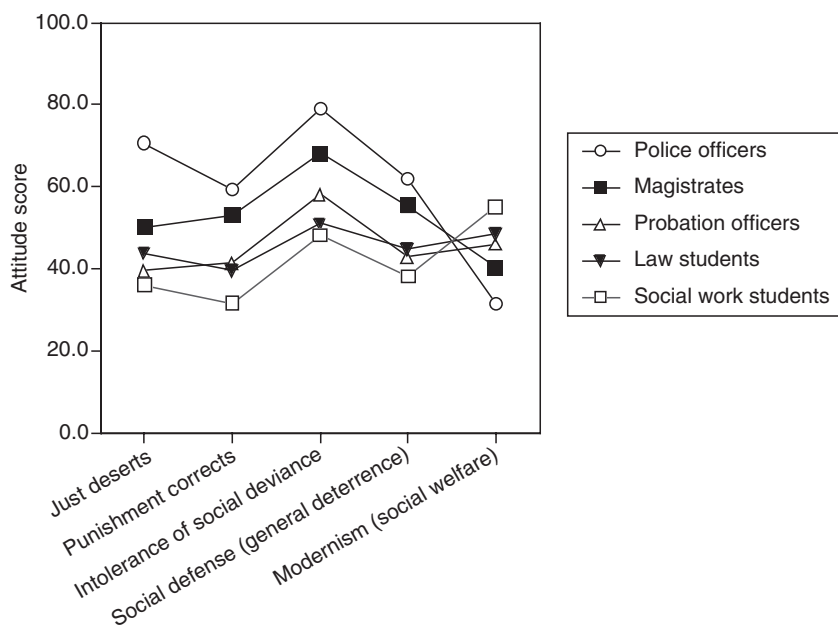


Figure 20.1 Differences between judges and other groups regarding sentencing-related attitudes (Hogarth, 1971, p. 135).

hand in hand with respect for authority and law, resistance to change and distrust of foreigners, more recent research has shown that conservatism and authoritarianism should be considered separate psychological constructs (Duckitt & Fisher, 2003). In one classic study of Canadian magistrates, police officers, probation officers, law and social work students, Hogarth (1971) observed that judges were second only to police officers in authoritarianism and in endorsing retribution as a major goal of sentencing (see Figure 20.1). Early research accounted for punitive sentences in terms of the authoritarian attitudes of judges and juries.

A meta-analysis of the literature correlating authoritarian personality with juror verdicts suggested that authoritarian jurors were significantly more conviction prone than jurors who were less authoritarian (Narby, Cutler & Moran, 1993). This relationship was stronger in community members or other samples eligible for jury duty than in student participants. However, all the studies reviewed by Narby *et al.* used culpability determinations such as verdicts (dichotomous or Likert scales), not sentencing decisions, as dependent variables. In a simulation study investigating a case of armed robbery, 2.5% of the variance in the proposed prison sentence and 4.3% of the variance of the parole eligibility measure were accounted for by the Authoritarianism Scale (Sporer, 1982). More specific (and more subtle) legal attitude and juror bias scales have since been developed, which show stronger relationships (Narby *et al.*, 1993).

Another individual difference measure used to predict juror decision making is the belief in a just world. According to Lerner (1970), people who believe in

a just world perceive that people get what they deserve and deserve what they get. This belief can lead jurors either to punish defendants harshly or to derogate crime victims (Gerbas, Zuckerman & Reis, 1977; Moran & Comfort, 1982). For example, Walster (1966) observed that the more serious an accident, the more likely persons will assign responsibility to someone possibly responsible for the accident. In more general terms, when a crime is more serious, observers tend to assign responsibility to someone – the defendant or the victim.

Generally, the predictive value of attitudes of jurors (we know less about judges) is higher when the attitudes are measured in relation to specific types of offenses, for example, sexual assault or drug offenses (Greene *et al.*, 2002). Field studies of real-life cases are not always conclusive, as case-specific attitudes may also be affected by pre-trial publicity, which in turn may affect both jurors' attitudes toward the offender and their culpability and sentencing decisions.

Sentencing philosophies

Besides attitudes toward punishment, punishment goals and sentencing philosophies have long been recognized as major determinants of sentencing decisions (Hogarth, 1971; Oswald *et al.*, 2002; McFatter, 1978; Sporer, 1982). Five distinct goals or philosophies of sentencing are generally distinguished: (1) retribution: the punishment should be proportional to the severity of the offense and the offender's culpability; (2) general deterrence: preventing the general public from committing crimes in the future; (3) specific deterrence: preventing the offender from committing crimes in the future; (4) incapacitation: protecting society for a period of time by removing the offender from the community; (5) rehabilitation: changing the offender's behavior through treatment or corrective measures to prevent him or her from committing future crimes. In recent years, alternative sentencing procedures have pursued the goal of restorative justice, e.g. by reconciling victim and offender through victim compensation and offender–victim mediation procedures (Goodman-Delahunty, ForsterLee & ForsterLee, 2005).

The endorsement of these penal philosophies varies both among judges and the general public and is related to socioeconomic status and general political and social attitudes, including authoritarianism and conservatism (Kapardis, 2003; Stephenson, 1992). In a multifaceted questionnaire study, Rennig (1993) compared the sentencing goals of professional versus lay judges in lower and superior courts (Figure 20.2). Both groups endorsed largely similar goals in sentencing, in particular with respect to retribution, and individual and general deterrence. The lay judges placed a significantly higher value on the goal of incapacitation. Penal philosophies can account for variability in sentencing decisions: generally, retribution and general and specific deterrence and incapacitation are positively correlated with the length of punishment proposed. In laboratory simulations using a single case of armed

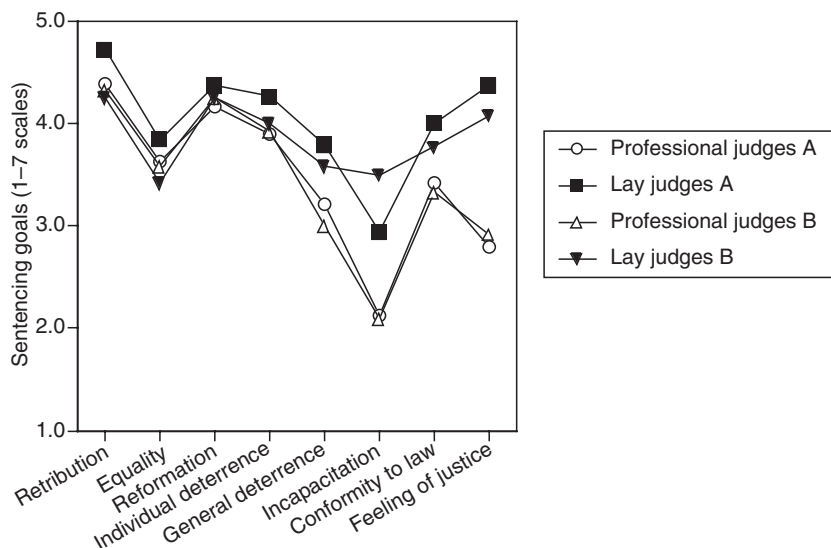


Figure 20.2 Differences between professional and lay judges regarding sentencing goals (Rennig, 1993, p. 539).

robbery, sentencing philosophies explained relatively little variance in the imposed length of prison sentence, but were better predictors of the decision as to when the defendant should be eligible for parole (Sporer, 1982). In another simulation study by McFatter (1978), experimentally manipulated punishment philosophies had the expected effects on severity of sentences imposed. Deterrence was associated with the highest sentences, and rehabilitation with the lowest sentences. Interestingly, the sentences imposed to accomplish rehabilitation following less severe offenses (e.g. car theft) were as high as those to accomplish retribution. Only for more serious types of crimes (robbery, manslaughter, rape and murder) did retribution lead to more severe sentences, as expected.

Although the decisions made in laboratory studies have no consequences, the pattern of the relationships between sentencing philosophies and severity of punishment converges with findings observed in the sentencing decisions of real judges. For example, in a study of Canadian magistrates and other comparison groups, Hogarth (1971) found endorsement of various punishment goals related to social attitudes. These groups differed systematically with respect to punishment-related attitudes (Figure 20.1), with judges obtaining values almost as high as police officers regarding justice (just deserts), punishment corrects (offenders deserve and need punishment), intolerance of social deviance and social defense (general deterrence as crime poses a threat to social order). These attitudes and the associated sentencing philosophies were also related to case dispositions, although there were noticeable differences regarding specific types of crimes. For example, for indecent assault to a female, it was considered particularly important to reform a specific offender and less important to deter other

potential offenders, while for robbery, this pattern was reversed (Hogarth, 1971, table 89, p. 288).

Although one would generally expect a negative relationship between the goal of rehabilitation and the length of prison term, an interesting exception was found by Wheeler *et al.* (1968, cited in McFatter, 1978) in juvenile courts. A rehabilitation orientation was associated with relatively severe sanctions for relatively minor offenses. Possibly, the judges believed that a too short sentence would not allow sufficient time for the treatment programs to reform juveniles to reintegrate into the community.

At least in recent years, despite the presumably more conservative attitudes of judges, members of the public have been more punitive than judges. One explanation for the higher punitiveness of the public may be that media reports rarely contain as much case-specific detail as judges review when determining a sentence. However, a recent study demonstrated the same trend when judges and the public were presented with identical case information (de Keijser, van Koppen & Elffers, 2007).

▶ Offender characteristics

Offender attractiveness

The discretion of the judge is a two-edged sword. Based on the rationale of “individualized sentencing,” it allows the judge flexibility to tailor the sentence not only to fit the crime but also to fit the criminal. Inherent in this latitude is the danger of potential bias, when sentencing decisions are influenced by extra-legal factors such as the appearance of the offender. Some evidence exists of inter-subjective agreement regarding criminal stereotypes or the association, above levels of chance, of certain types of crimes (e.g. murder, rape) with certain types of facial appearance (Goldstein, Chance & Gilbert, 1984; for reviews, see Bull & Rumsey, 1988; Sporer, 1989, 1992). The attractiveness–leniency bias is reviewed in more depth by English (this volume). This bias is eliminated when the defendant uses his or her attractive appearance to commit a criminal act, or when the perception of attractiveness affects the attributions of responsibility. For instance, Sigall and Ostrove (1975) demonstrated that when the crime is attractiveness-related, the advantages otherwise held by good-looking (female) defendants are lost. A woman who relied on her attractive appearance to conduct a swindle (grand larceny) was punished slightly more severely than an unattractive offender or an offender whose appearance was unknown (participants in the control group saw no photo of the offender).

Characterological attractiveness: once a bad guy, always a bad guy

A classic experiment by Landy and Aronson (1969) demonstrated that a defendant with a generally more negative character, including a prior criminal record

unrelated to the present offense, received harsher punishment from college participants in a case of negligent homicide than did offenders with a profile that was more positive or neutral in its description. Thus, one limitation on the attractiveness stereotype is the character of the defendant. Using a case of embezzlement, Izzett and Fishman (1976) showed that attractiveness *per se* – induced through a description of a male defendant as “warm, friendly, ... and a conscientious worker” versus a “cold and distant person, aggressive against fellow-workers” (p. 287) – had no significant effect on participants’ judgments, but whether the defendant embezzled the funds to meet medical expenses for his hospitalized wife (high external justification) or to pay off personal debts (low external justification) made a difference. The attractive defendant was sentenced more severely when external justification was low but more leniently when external justification was high. In the latter study, character-induced attractiveness was manipulated, whereas the majority of studies on offender attractiveness have manipulated physical appearance, depicted photographically. Similar findings emerged in the meta-analysis by Mazzella & Feingold (1994): physical and characterological attractiveness effects on punishment varied widely by type of crime. For theft ($d = 0.20$), rape ($d = 0.30$) and cheating ($d = 0.49$), attractive defendants received more lenient sentences, while no effect was found for fraud ($d = 0.08$), and harsher sentences were given in cases of negligent homicide ($d = -0.16$) to attractive defendants.

Baby-facedness

A couple of decades ago, the American public was shocked by the photograph of “Son of Sam” David Berkowitz, arrested for the heinous murder of six innocent people in New York: the defendant’s facial features and proportions more closely resembled those of a young infant than an adult male. Can a baby-faced appearance influence the disposition and sentencing of offenders in court? This and other case descriptions in legal treatises of sentencing disparity can only provide anecdotal evidence of this phenomenon (Cook & Campbell, 1979). Researchers who have specialized in studying the relationships between facial features and perceived attractiveness and stereotypes use facial metrics to measure the size and distances between certain facial features and relate these measures to various perceived character traits. For instance, perceived baby-facedness is indicated by larger eyes, thinner, higher eyebrows, a large forehead and a small chin, and a curved rather than an angular face, resembling a prototypical baby (Berry & McArthur, 1986). Baby-faced adults are not only perceived as more attractive (particularly women) but also as more honest. In a laboratory study simulating a civil case, baby-faced defendants (with attractiveness held constant) were regarded as less likely to be responsible for negligent conduct but were more likely to lose negligence cases (Berry & Zebrowitz-McArthur, 1988). These findings would lead one to predict increased determinations of criminal culpability but less severe sentences in a criminal context.

Observational versus experimental studies

How do the findings of these laboratory studies hold up in the real world? Although in laboratory studies many factors can be controlled and therefore causal links established, the punishment decisions that participants mete out have no consequences, and hence the ecological validity of these results is often questioned (for a thorough discussion of many of these issues, see Kerr & Bray, 2005).

Stewart (1980) had “blind” raters observe and rate 67 defendants (30 Black, 2 Hispanic, 35 White) in actual courtroom cases according to physical attractiveness (embedded in a series of other judgments which unfortunately were not reported). While attractiveness did not correlate with race, it was significantly negatively related to minimum and maximum sentences (each $r = -0.40$). Seriousness of offense was also negatively correlated with attractiveness ($r = -0.32$), and after partialling out seriousness of the offense, a significant relationship between attractiveness and minimum sentence persisted ($r = -0.29$). While 77% of the unattractive defendants were incarcerated, only 46% of the attractive defendants were put into prison. Although race was also related to minimum and maximum sentences (non-White defendants receiving longer sentences), in a multiple regression analysis, race did not emerge as a reliable predictor after controlling for crime seriousness and attractiveness of the defendant. Of course, in any observational study, causal relationships cannot be ascertained, and the effects obtained may also be due to various confounding factors not coded (and hence not statistically controlled) in the study.

Baby-facedness was also found to play a role in dispositions of civil proceedings. In a follow-up study to the laboratory simulation mentioned above, Zebrowitz and McDonald (1991) coded the defendant’s actions as either intentional or negligent in a large number of cases in small claims courts in Massachusetts (drawing a maximum of \$1500 compensation). Raters observed and coded defendants’ and plaintiffs’ baby-facedness, attractiveness, age and gender. Dependent variables were the judgment for or against the defendant for cases where the defendant denied responsibility, and award (the percentage of the plaintiff’s claim the defendant was required to pay) for cases where defendants admitted responsibility. After controlling for legal factors such as the amount of supportive evidence, baby-facedness significantly increased prediction in combination with the type of action: for intentional actions, judgments were much less frequent against the defendant with increasing degree of baby-facedness. For negligent actions, a weaker opposite trend emerged, with baby-faced defendants being more likely to receive judgments against them than mature-looking defendants. The effects of the defendants’ baby-facedness on the amount of awards they had to pay depended on the baby-facedness of the plaintiffs: mature-faced defendants had to pay larger awards only when plaintiffs were relatively baby-faced.

In summary, if one is to generalize from laboratory studies to the sentencing decisions of judges – and this problem of external validity runs through all simu-

lation studies reviewed here – one may conclude that physical as well as characterological attractiveness has an effect on judicial sentencing. Converging evidence from a small number of observational studies also indicated that defendant attractiveness (including baby-facedness) may affect sentencing decisions. However, as some of these studies have shown, the full complexity of the situation, the interaction of the personality of the offender with situational variables such as type of offense and the judge's cognitive appraisal thereof have to be taken into consideration to avoid oversimplified conclusions.

Race

The influence of race on sentencing is complex, and a review of racial stereotyping in sentencing is presented in English (this volume). Overall, the effects of race in laboratory simulations are small, more pronounced among Black participants and more clearly visible when the race of the defendant is not made salient. But how does one reconcile these weak effects with the disparities in prison populations of different racial groups? Presumably, racial (and other) biases may operate at any or all successive decision points in the criminal justice system, from a victim reporting a crime, a police officer making an arrest, a prosecutor pressing charges or jurors' or judges' evaluations of a witness's credibility to the jury's verdict and judges' sentencing decision (for a review, see Sporer, 2001). Sentencing decisions in turn may be mediated by biases in pre-sentence reports, and finally, there may be disparities in decisions about parole. Thus, cumulatively, there may be stronger race biasing effects than jury verdict and sentencing studies alone convey. Although race may be hard to pin down as an extra-legal variable, it may nonetheless affect punishment in a vicious circle from arrests and bail to convictions, punishment and parole decisions.

Gender

A persistent finding evident in the imposition of jail and prison sentences, as well as other sanctions with respect to female offenders, is that they receive milder sentences than their male counterparts. An extensive archival analysis examined sentencing outcomes in over 54 large US urban courts in the period 1990–1996 to explore whether this trend prevailed in the presence of gender–race–ethnicity interactions. Records of over 20 000 male and 3729 female offenders were compared on legal variables (offense severity, criminal history, incarceration history in jail and prison, length of imprisonment) and extra-legal variables (race, ethnicity and gender in Hispanic-White, Black-White and Hispanic-Black groups). Results confirmed that, across all racial groups, female offenders received less harsh sentences (Steffensmeier & Demuth, 2006).

Gender-skewed sentencing outcomes are typically attributed to stereotypical views held by fact finders who perceive women as less dangerous, as less culpable, as having stronger community ties (e.g. through their children) and, thus,

as less likely to recidivate (Steffensmeier & Demuth, 2006). However, women who commit crimes that violate traditional gender role expectations that they will behave in a warm, nurturing fashion are punished more severely than their male counterparts (Finkel, Burke, & Chavez, 2000; Oberman, 2003; Viki, Massey & Masser, 2005).

► Victim characteristics

Victim character, race and gender

In comparison with the extensive research on offender characteristics, relatively few studies have examined the influence of victim characteristics. Nonetheless, some research on attributes of victim identity has confirmed the extra-legal bias these characteristics can exert on sentencing. For instance, when a victim was characterized as a dangerous criminal, the offender received less severe punishment than when a victim was portrayed as innocent (Alicke & Davis, 1989).

Early studies exploring victim race, gender and interactions with offender characteristics have revealed that Black offenders whose victims were White received more severe sentences than offenders with similarly situated Black victims, presumably because the judges were also White, and their in-group or worldview was more threatened by criminal conduct against persons from their in-group. With real judges as participants, a simulated trial involving a minority defendant who victimized a White victim confirmed that the judges expected the defendant to be more likely to commit future crimes than when the victim was Black (Foley, Adams & Goodson, 1996).

Studies on the influence of victim gender reveal in general that crimes against female victims result in more harsh penalties when sentence length is the dependent measure. For example, archival data from a large random sample of murder cases in 33 large urban counties in the United States indicated that offenders who murdered women received longer prison sentences and, when the offender was male, longer sentences than any other victim gender/offender combination. Similar trends have emerged in vehicular homicides where victims are essentially random (Glaeser & Sacerdote, 2003). The same pattern was found in a sample of felony convictions in Texas: offenders committing violent offenses in which women were victimized received sentences that averaged 4.2 years longer than those of offenders who victimized males (Curry, Lee & Rodriguez, 2004).

Terror management theory and mortality salience

Further insights into the extra-legal influence of judge–victim interactions on sentence severity have come from research on terror management or mortality salience. In many legal cases, evidence that highlights the mortality of the victim,

and by implication, that of the judge, may stimulate thoughts of the judge's own death. Mock sentencing studies have investigated the influence of this extra-legal variable either by introducing explicit considerations of mortality in the arguments of counsel or by direct experimental interventions.

In a landmark study, 22 municipal court judges completed questionnaires on personality and attitudes, then read a mock case file and fixed bail for an alleged prostitute with one prior arrest, no prior failures to appear in court and a lack of verified community ties (Rosenblatt *et al.*, 1989). By random assignment, half of the judges were instructed to think about their own death and to imagine what it felt like to die before making the bail award. Judges who were reminded of their deaths before setting bail fixed an average of \$450 versus the \$50 average fixed by judges in the control condition. These results demonstrated that magistrates trained to be objective in applying the law were more punitive to an offender when thoughts of their own death threatened their faith in the legal statutes. Terror management theory posits that this difference occurs because awareness of one's mortality motivates judges or jurors to reaffirm and to defend their cultural worldview, and to respond less favorably (more punitively) to persons who threaten their beliefs. The mortality salience effect has been replicated in almost 200 studies, though none since 1989 have included real judges as participants. These effects were obtained in the form of increased conviction rates and longer sentences in the context of different crimes, including drunk driving, robbery and attempted murder (Pickel & Brown, 2003). More punitive responses emerged among participants who were highly authoritarian; the punitive impact of mortality salience was lessened by personal hardiness, secure attachment and secure relationships (Arndt *et al.*, 2005). The effect was reversed when the conduct of the offender coincided with or reinforced the worldview of the mock judge. For example, mortality salience provoked leniency when the perpetrator's law-breaking behavior was consistent with the perceiver's worldview (Lieberman *et al.*, 2001). Thus, when the crime victim represents a worldview threat, mortality salience can "attenuate rather than intensify the greater intolerance typically demonstrated toward law breakers" (Arndt *et al.*, 2005, p. 423). In the absence of mortality salience, participants exhibited more punitive reactions toward hate crime perpetrators (they set higher bail amounts); however, when participants were reminded of their mortality, they set lower bail amounts for perpetrators of hate crimes, compared with ambiguous crimes. "Thus, mortality salience not only eliminated the increased punitive reaction toward hate crime perpetrators, but actually led participants to be significantly less punitive to such alleged criminals" (Lieberman *et al.*, 2001, p. 559). For example, increased tolerance of transgressions and less punitive sentences were recommended by heterosexual and non-Jewish participants for an offender who committed a hate crime against gay or Jewish activists, presumably because the crime victims, and not the defendants, threatened the worldview of the mock judges (Lieberman *et al.*, 2001). These findings underscore how ingroup and outgroup considerations may produce similarity–leniency and "black sheep" effects, in which ingroup

members receive either more lenient or more severe punishment from members of their in-group than do similarly situated outgroup members (van Prooijen, this volume).

Harm to the victim

Evidence of the influence of unforeseeable consequences of criminal conduct on sentencing comes from experimental studies in which the scope of harm to the victim is varied. In a study that manipulated victim coping style, participants read about a robbery or rape in which the victim coped poorly or well. More punitive sentences were recommended when the victim coped poorly (Hills & Thompson, 1999). Similarly, when mock jurors learned that a victim experienced a severe versus a mild emotional injury following a robbery or a burglary, longer prison terms were imposed in response to more severe victim injuries (Nadler & Rose, 2003). Moreover, when suffering was experienced by a victim's relatives, mock jurors applied harsher sanctions (Myers & Greene, 2004).

Victim impact statements (VISs)

The admission of VISs in criminal sentencing proceedings in Australia, Canada, New Zealand, the United States and the UK (Garkawe, 2006; Orth, this volume), although somewhat controversial, conveys the full extent of the physical, financial, psychological and social effects of the crime on the victim. Archival studies (Erez & Roeger, 1995) have indicated that the VIS had little effect on the length of incarceration but might affect whether an offender was sentenced to probation or prison (Erez & Tontodonato, 1990). Outcomes of experimental investigations varying details of the victim status and emotional displays have been mixed.

Status of the victim

In one experimental mock jury study, Greene, Koehring and Quiat (1998) varied the respectability of the victim within a VIS. Mock jurors who had evidence concerning a highly respectable victim rated that victim as more likable, decent and valuable, experienced greater compassion for the victim's family and perceived the crime as more severe than mock jurors who had evidence regarding a less respectable victim. Along similar lines, in the context of a mock capital case, Greene (1999) varied whether the VIS described (1) personal qualities of the victim, (2) the deleterious effects (i.e. physical, psychological, financial) on the victims' relatives or (3) relatives' opinions about the crime and recommended sentence. Mock jurors exposed to all three forms of victim impact evidence held more favorable impressions of the victim. Mock jurors rated the survivors' suffering as greater when the victim was portrayed as more respectable (e.g.

successful, civic minded, a loyal husband and devoted father, a professional photographer) than when the victim was portrayed as a loner and divorced biker. The greater the victim's social status, the more jurors perceived surviving relatives to have experienced harm. Although no direct sentencing measure was included, sympathy for the victim's relatives would likely mediate the imposition of a more severe sentence (Greene *et al.*, 1998).

Reactions to emotional displays

An ongoing concern since VISs were admitted is the potential for emotional displays to influence the fact finder (Tsoudis, 2000; Tsoudis & Smith-Lovin, 1998). Research has indicated that most of the effects of emotional displays by the victim and the offender have influenced perceptions of the offender, but not the sentence *per se*. Although the VIS evoked an emotional response in participants, these emotional reactions failed to affect the sentencing judgments. In fact, sentencing judgments remained independent of the emotional ratings of participants (Myers, Lynn & Arbuthnot, 2002). These effects have been observed in both judges and lay jurors.

One recent study explored the influence of emotional displays during testimony by the offender on mock juror sentencing decisions. A defendant displaying a low as opposed to a higher level of emotion was perceived as more culpable and less credible. In a second experiment in which mock jurors watched videotaped testimony, the defendant's emotion level and the evidence strength (strong versus weak) were varied. The defendant's emotion level affected jurors' decisions only when the evidence against the defendant was weak such that a stronger display of emotion was associated with fewer convictions and shorter sentences. Path analyses revealed that the effects of emotion were mediated by perceptions of the defendant's level of honesty (Heath, Grannemann & Peacock, 2004).

► Unintended consequences of the defendant's actions

When determining guilt and an appropriate sanction, the judge has to evaluate both a defendant's actions and his or her general intentions. An interesting question in criminal law and in tort law is the extent to which a defendant is responsible for, and hence is to be punished for, unforeseen and unintended consequences. To demonstrate this, we briefly summarize two studies of our own that show that the more severe an outcome, the more likely the person initiating the chain of action will be held responsible (Sporer, 2005; Sporer & Goodman-Delahunty, 2007). This review summarizes only studies that used judicial sentencing and punishment as dependent variables, although attributional processes may play a key role in mediating punitive reactions. Almost all studies were conducted with students and/or jurors/juries, rather than judges.

Remote versus proximate causation

Across 22 studies, a recent meta-analysis reported a highly significant average $r = 0.29$, indicating that outcome severity was associated with harsher punishment (Robbennolt, 2000). Considering that the consequences manipulated in these studies would be deemed irrelevant for the purposes of punishment, their influence is clearly extra-legal, and often subtle (perhaps mediated by the emotional impact evoked by the fate of the victim). Recent research on third-party victimization such as indirect harm to relatives of crime victims, presented in court in a VIS, has shown that if an offender harms person A and the harm caused to person A negatively affects person B, sentences are more severe (Myers & Greene, 2004). The fact that decision makers are typically unaware that these consequences affect their judgment places in issue the efficacy of judicial directions or instructions to reduce or to counteract these effects.

In two studies of our own, we addressed this question by instructing half of the participants on the “principle of proximate cause” (Hart & Honoré, 1959), taken from civil law and adapted for application in criminal sentencing (Sporer, 2005; Sporer & Goodman-Delahunty, 2007). This principle states that judges “should take into consideration as legally relevant for punishment only those consequences that were directly causally related to the defendant’s actions and/or could be reasonably attributed to his general intentions” (Sporer, 2005). In this study, a legally relevant factor, age of the victim (12 versus 25 years) and accidental consequences (death of the father/husband of the girl/woman) and instruction to participants (no instruction versus principle of proximate cause instruction) were independently varied. The stimulus material included a detailed summary of a fictitious case of sexual assault in which a 35-year-old man forced an attractive 25-year-old woman (or 12-year-old girl) into his car and drove away to sexually assault her. This incident was observed by a neighbor’s child who ran immediately to the woman’s husband (or the victim’s father) who

... raging mad, jumped into his car and went down the road the direction the child had pointed out. As the road was quite slippery, he lost control over his car as he speeded along, slid off the road in a curve, hit a tree, and was immediately killed (... slid off the road in a curve and narrowly missed a tree. Neither he nor the car suffered any damage).

Dependent variables were the recommended prison sentence and the number of years in prison before the defendant could be released on parole. Participants assigned harsher prison sentences and parole eligibility to the rapist of the 12 versus 25-year-old. The prediction that negative accidental consequences of the defendant’s action – the extra-legal factor – would increase his punishment was also supported by the data. The average imprisonment suggested was 24.7 years when the husband (father) of the woman (child) was killed as an accidental consequence of the defendant’s action, and 18.6 years when he was not killed. Both the victim’s age and the accidental consequences affected the severity of

the sentence (Figure 20.3). The instruction on proximate cause did not moderate the effect of the accidental death.

In a follow-up study using a road accident vignette, the same factors were manipulated (Sporer & Goodman-Delahunty, 2007). The study was modeled after a real case in Scotland in which the mother of the victim (a child killed in a car accident) was also killed when she crossed the street to run to the scene of the accident. This time, the instruction manipulation was successful. The proximate cause instruction produced the expected interaction with accidental consequences for the amount of compensation to award to the relatives (Figure 20.4)

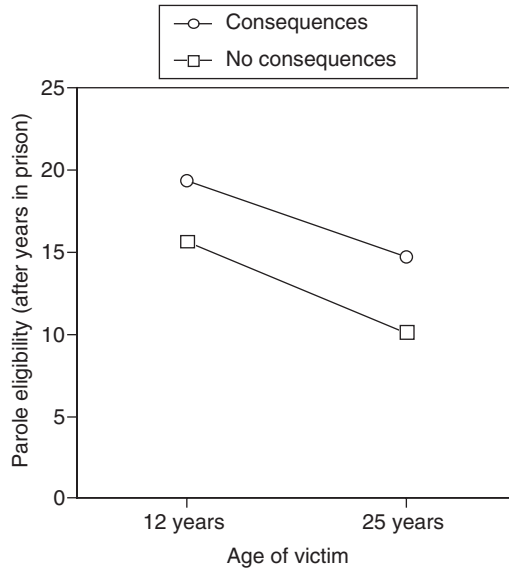


Figure 20.3 Parole eligibility (after years of imprisonment) as a function of age of the victim and accidental consequences (Sporer, 2005).

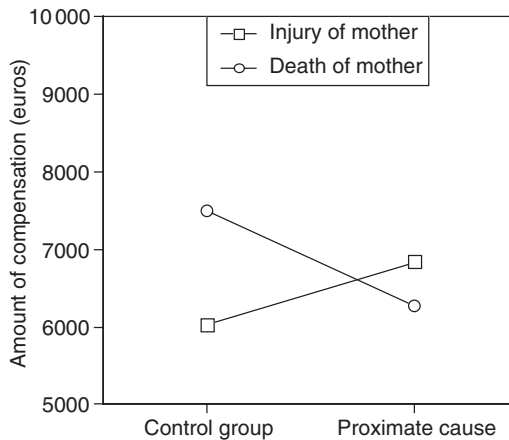


Figure 20.4 Amount of compensation (in euros) as a function of accidental consequences and instructions (Sporer & Goodman-Delahunty, 2007).

but not for the recommended prison sentence nor for parole eligibility. Together, these results indicate that accidental consequences of an offender's action can have powerful effects on sentencing severity, and this effect cannot readily be overcome by special judicial instructions to disregard this type of information. The latter finding is consistent with other research demonstrating the inefficacy of many judicial directions (Lieberman & Sales, 1997).

► Legal safeguards to minimize extra-legal influences

The two major legal safeguards to reduce the influence of extra-legal factors on sentencing disparities are implemented at the legislative and the appellate levels of the legal system. Another mechanism to reduce disparities in sentencing is to remove the responsibility from individual judges and to allocate it to groups of judges or sentencing tribunals.

Legislative reforms and appellate review

Legislative reforms that limit judicial sentencing discretion often take the form of sentencing guidelines (Hartley, Maddan & Walker, 2006). Although most judges dislike sentencing guidelines (Meyer & Jesilow, 1996), when the exercise of discretion is reduced, biases attributable to some extra-legal factors have been attenuated. For example, under a legislative scheme for community-based sentences, where the number of hours to be worked by first-time offenders was prescribed by the offense type, ethnicity and gender did not predict hours of service (Meeker, Jesilow & Aranda, 1992), but did predict more onerous and less desirable outcomes for Hispanics and males where discretion remained, namely, whether the service hours were performed for independent agencies or picking up trash along highways for the State Department of Transportation. A comparison of sentences in Arkansas before and after the voluntary guideline structure was introduced showed that the influence of traditional extra-legal factors race and gender was negligible after the guidelines (Hartley *et al.*, 2006). Findings of this nature have led to commentary that judicial discretion has simply been displaced by sentencing guidelines, not eliminated (Auerhahn, 2007). Clearly, the use of guidelines does not dispel all extra-legal disparities, and the manner in which guidelines are applied varies by location and region (Weidner, Frase & Schultz, 2005). Some critics have noted that guidelines serve to restrain the rationale provided by a judge for a sentence, to avoid reversals on appeal, rather than to restrain the sentence.

Although the traditional legal procedure to adjust sentencing disparities is appellate review, limited data are available on the efficacy of this procedure or the proportion of appeals upheld. In jurisdictions where written reasons for a sentence are not required, their absence makes it difficult to review the decision on appeal.

Sentencing councils

In the United States, sentencing councils have been proposed and evaluated in both laboratory (Sporer, 1982, 1984, 1986) and field (Diamond & Zeisel, 1975) studies. Converging evidence from both types of research shows a reduction in variability in sentencing when decisions are made in groups rather than by individuals, as one would expect from conformity effects in social psychological studies (Lloyd-Bostock, 2000; Sherif, 1936). As predicted from basic social psychological research on group polarization, decisions by sentencing councils are also more lenient (Sporer, 1986). Other models of shared sentencing decisions with the same aim include tribunals. For example, in Germany, misdemeanors and felonies with a restricted sentencing frame (e.g. less than three years of imprisonment) are decided by a tribunal of three judges (one professional judge and two lay judges), while more severe crimes are decided by a panel of five (three professional and two lay) judges.

► Conclusions

Research on judicial and jury decision making shows that legal factors, primarily the evidence, account for most variance in legal decisions, whereas extra-legal factors typically account for less than 10% of the observed variance (Visher, 1987). Most disparities in judgments by the same fact finder arise because of unreliability due to random variability of timing as opposed to systematic idiosyncrasies or overall attitudinal harshness or leniency in the judge (McFatter, 1986). Some disparities in sentencing are the inevitable consequence of the fact that the decisions are performed by humans: "... sentencing is a human process ... it involves a discretionary exercise applied within the constraints of the judicial process and ... the process requires the balancing of many, often conflicting, considerations or factors that cannot always be assigned individual weight" (Traynor & Potas, 2002, p. 17).

The foregoing examples of unconscious influences on sentencing related to characteristics of the judge, the offender, the victim and unintended consequences of the criminal conduct serve to illustrate that theoretical insights from basic psychological research can be fruitfully applied to solve legal problems. Of course, reforms based on psychological principles ought to be evaluated by systematic research in the field to arrive at the best solutions ("evidence-based policy").

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