

Panel I: Disparity in Sentencing—Race and Gender



Panelists

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Max Schanzenbach
Michael Yaeger
Cassidy Kesler
Judge John Gleeson,
EDNY

Moderator

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Notes from the Symposium Organizers

Race and gender are perhaps the most visible and discussed bases of disparity in society in general and in sentencing in particular. The first panel at the Symposium on the Federal Sentencing Guidelines focused on the most recent empirical research of these two types of disparity.

In the Sentencing Reform Act of 1984, Congress specifically directed the Sentencing Commission to develop guidelines that are "entirely neutral as to the race, sex, national origin, creed, and socioeconomic status of offender." In the fifteen years since the implementation of the Guidelines, several studies—including at least one presented at this Symposium—have indicated the continued existence of racial and gender disparities in sentencing. This panel was convened to present findings on the extent of such disparity as well as possible reasons for this disparity.

In accord with the statutory mandate, the Guidelines are facially neutral as to race and gender. In addition, the Guidelines were designed to reduce judicial discretion and hence also to reduce the potential influence of individual biases. Given these two factors, the continued existence of racial and gender disparities, as found in the literature, indicates either that remaining judicial discretion is being exercised in a racially or gender biased manner, or that there are other sources of such disparity within the sentencing system that have yet to be fully identified and examined.

Other possible sources of racial and gender bias include non-judge actors whose decisions affect sentencing outcomes, such as prosecutors, defense attorneys, probation officers, and law enforcement agents. Although these sources have been discussed in the literature, there are few empirical studies of their impact.

Racial and gender disparity can also result from the operation of facially neutral Guidelines and other sentencing statutes, such as mandatory minimum laws. Drug type, the use of fines, and certain weapons enhancements are legally sanctioned factors in the consideration of sentence length. Yet, as this panel shows, these factors may result in disparate sentences for blacks and whites. Perhaps the most obvious example is the crack-cocaine differential. The differential racial impact of such sentencing factors warrants

scrutiny into their justification, their weight, and their relevance to a just sentencing system.

With respect to gender disparity in sentencing, it is important to acknowledge at the outset that women continue to be sentenced, on average, significantly more leniently than men. At the same time, certain gender neutral aspects of the structure of the Guidelines might actually work to the detriment of female offenders. This includes the inability of the Guidelines to account more fully for offenders with no prior arrest record. Although facially neutral as to gender, this aspect of the Guidelines disproportionately impacts female offenders, who tend to have no criminal record.

If the Commission is to be true to its mandate to be entirely neutral as to gender and race, then we need to examine how gender and racial biases are embedded within the Guidelines and other sentencing statutes. Further studies are needed on the impact of such biases, how they can be addressed, who should address them, and what the role of the Commission should be in this process.

Kevin Blackwell, a senior research associate at the United States Sentencing Commission, presented the preliminary findings of an advanced statistical model designed to correct errors made by others in earlier research. **Max M. Schanzenbach**, a 2001 graduate of Yale Law School who will soon receive his Ph.D. in economics from Yale, and **Michael L. Yaeger**, a current student at Yale Law School, presented their preliminary findings regarding the presence of racial disparity in sentences—both imprisonment and fines—for white-collar crimes. **Cassidy M. Kesler**, a current student at Yale Law School, presented her findings regarding the demographic differences between male and female offenders sentenced in the federal system. **Judge John Gleeson**, United States District Judge in the Eastern District of New York, commented on the research and its practical implications in light of his experience as both a prosecutor and a judge. The panel was moderated by Professor **Kate Stith** of Yale Law School.

I. Kevin Blackwell's Paper

Kevin Blackwell presented preliminary findings of a multivariate model he developed with Paul Hofer, who is also a senior research associate at the Sentencing

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Commission. Blackwell first reviewed the model typically used in disparity research: sentence length as a function of offense level, criminal history, and whatever independent variable is being studied. He criticized such models for ignoring other important controls on sentence length, namely statutory mandatory minimums that trump the range set by the Guidelines. In addition, he criticized such models for taking into account variables that are not necessarily relevant to sentence length, such as the number of counts listed in the indictment.

Specifically, Blackwell evaluated three of the most recent disparity studies.² Each of these studies found that race, ethnicity, and/or gender had a significant effect on offenders' sentences even after controlling for various legally relevant factors. In other words, these studies found that race, ethnicity, and/or gender were entering into the sentencing decision, arguably through improper use of discretion, despite the statutory prohibition on their consideration. He questioned these results given the omissions he found in their statistical models.

Blackwell presented what he believes to be a more accurate model for studying the sources of disparity. This model aims to discover whether, where, and how discretion may be exercised above and beyond what is permitted by the Guidelines. To accomplish this goal, as well as to properly control for factors ignored by earlier studies, the model incorporates legally relevant factors in a single independent variable — the “presumptive sentence.”

Using this new model to study various decisions and outcomes in the sentencing process, Blackwell concluded that racial differences in federal sentencing are significant, but small as compared to gender differences and differences arising from legally relevant considerations. For example, Blacks and Hispanics are sentenced to approximately two months more than White offenders after controls are introduced. Meanwhile, male offenders are sentenced to 12 months more than female offenders after controls are introduced.

II. Max M. Schanzenbach and Michael L. Yaeger's Paper

Following Blackwell, **Max M. Schanzenbach** and **Michael L. Yaeger** presented the results of their study on racial disparity in the sentencing of white-collar offenders. Schanzenbach and Yaeger focused on white-collar crime for several reasons. First, there is an extensive pre-Guidelines literature on the sentencing of white-collar offenders in the federal system.³ Second, it is arguably more plausible to attribute disparity in white-collar sentencing to judges and prosecutors rather than police or Congress. Police do not typically initiate independent investigations of white-collar crime. In addition, political pressures — at least before the

business scandals of 2002 — did not typically affect white-collar sentences. For example, mandatory minimums are not generally attached to white-collar crimes. Third, fines have an unusually prominent place in white-collar sentencing, and judges have a good deal of discretion at the bottom of the fine table. Fines may be more efficient than incarceration in that the offender is allowed to remain a productive member of society but still suffers the shame of a conviction.

Schanzenbach and Yaeger used a model similar to Mustard's,⁴ but with a degree of skepticism. After controlling for offense level and criminal history score, they found an unexplained disparity in sentence length between blacks and whites and between Hispanics and whites. This racial disparity lessened, however, when they controlled for fines. This finding suggests that fines and income level, rather than race, may be the key factors influencing disparity in white-collar sentences. Perhaps their most interesting finding was that the ratio of “fine levied” to “reduction of prison time” was different for black and white offenders. Essentially, they found that black offenders must pay larger fines in comparison to white offenders to receive the same reduction in prison time.

One possible explanation for this disparity is that judges intentionally discriminate between black and white offenders. However, if this were the case, the same racial bias would likely be present in the group that does not pay fines. Alternatively, judges may be accounting for implicit sanctions, such as loss of reputation, which are linked to status differentials and correlated to race. Similarly, the disparity could be influenced by liquidity of assets, another factor that is linked to class. Ultimately, these findings highlight the important and somewhat overlooked role of fines in white-collar sentencing, emphasize the possible connection between racial disparity and fines, and urge further research.

III. Cassidy M. Kesler's Paper

Cassidy M. Kesler then presented her research on the demographic differences between male and female offenders. Unlike Blackwell and Schanzenbach and Yaeger, Kesler's goal was not to discover disparities in sentencing through a multivariate model. Rather, she compiled aggregate gender data that can be used to inform future studies on gender disparity, and that suggest what such studies might find. Using the Commission's original dataset for the most recent year available to the public when the paper was written (fiscal year 1999), Kesler sought to supplement the Commission's Sourcebook and fill a gap in the literature by making available gender demographics that are not otherwise published. Kesler suggested that demographic differences between male and female offenders — what she terms “gender-related” factors — may

explain and even justify as warranted some sentencing differentials.

Some of Kesler's findings confirm the results of earlier studies. She found that female offenders are more likely than males to commit non-violent offenses, which are more often associated with lower offense levels, and are less likely to receive full downward adjustments for acceptance of responsibility.⁵ She also found that women go to trial less frequently than men and are more likely to be assigned the lowest criminal history category than men.⁶ Because of ambiguities in the Commission's variable "number of dependents," she was unable to determine whether female offenders are more likely to be single parents than male offenders.

In other important respects, however, Kesler's findings differ from, and add to, the existing literature. She explored the relationship between the different rates at which male and female offenders are convicted for immigration offenses, on the one hand, and the different ethnic and citizenship distributions of male and female offenders, on the other. In addition, Kesler found that female offenders are more likely than their male counterparts to be in the lowest sentence zone, Zone A, and also more likely to receive sentencing options other than imprisonment. Both of these sentencing differentials may be connected to the fact that female offenders are more likely than males to commit nonviolent crimes, which are typically assigned lower offense levels.

Further, Kesler found that female offenders are twice as likely as male offenders to have no prior criminal record — not even arrests — a difference that she argued is not reflected in the current criminal history categories. Kesler found that women are more likely to receive a downward adjustment for a mitigating role in the offense and less likely to receive an upward adjustment for an aggravating role. Perhaps most significantly, she found that the differential in departure status between male and female offenders has decreased since 1994.⁷

Kesler suggested avenues of future research, including an advanced statistical study on gender disparity and a study on the role of gender in law enforcement and prosecution decisions. She urged the Commission to regularly publish more detailed gender information, to clarify ambiguous variables, and to reconsider the criminal history categories as well as the weight given to role-in-the-offense.

IV. Judge John Gleeson's Comments

In his comments, **Judge John Gleeson** addressed each of the three empirical studies presented before turning to the larger questions posed by Professor Stith and Commissioner O'Neill in their opening remarks. Judge Gleeson noted that Blackwell's presentation confirms that certain institutionalized features, rather than simple individual bias, produce racial disparity.

Statutory mandatory minimums are chief among these features and must be addressed. Judge Gleeson emphasized the alternative forms of sentencing in Schanzenbach and Yaeger's research. Additional financial penalties, such as restitution and forfeitures, may impact both fines and prison time.

Judge Gleeson highlighted the importance of Kesler's distinction between gender-related and gender-based disparity. Judge Gleeson noted the limited weight given to role-in-the-offense results in gender-related disparity whether the role was aggravating or mitigating. He also noted the importance of the criminal history data, and specifically the fact that offenders with no prior criminal record are grouped with other offenders in the lowest criminal history category. Although he recognized that criminal history was a key area of compromise in the drafting of the Guidelines, Judge Gleeson criticized the lack of downward departure from Criminal History Category I. At least some gender disparity in sentencing may be explained by the inability of the Guidelines to account for the large differential between male and female offenders who have no prior record.

Turning to the larger questions posed by the opening speakers, Judge Gleeson attempted to answer Commissioner O'Neill's question whether the Guidelines are working. The Guidelines have been successful in the sense that they facilitate transparency in sentencing as well as discussions of the kind had at the Symposium. Judge Gleeson also seconded Professor Stith's intuition that prosecutorial discretion is neither per se good nor bad, though there is much uncertainty as to how, and to what extent, prosecutorial discretion should be exercised.

V. Major Themes

Four major themes emerged during this panel and the ensuing discussion: (1) the role of "extralegal" factors in sentencing; (2) the impact of bail and pretrial services on sentencing; (3) the sources of racial disparity; and (4) the role of implicit sanctions.

A. Extralegal Factors

In her comments, **Professor Stith** focused on the role of extralegal factors in sentencing, meaning factors that generally should not be considered in sentencing determinations under the Guidelines. Blackwell's research examines certain extralegal variables, such as family status and dependents. But should all of these factors be seen as extralegal? The Guidelines do not specifically forbid all consideration of such factors in the same way that they forbid consideration of race and gender. In addition, given Kesler's point that an offender's prior record may not be fully accounted for in the lowest criminal history category, is consideration of that prior record at sentencing "legal" or "extralegal"?

Similarly, should sentencing decisions be influenced by the type of drug involved, even when drug type was already included in calculation of the offense level? Stith suggested that some factors that Blackwell designates as “extralegal” may on further consideration be seen as relevant to sentencing decisions and thus be “legal” factors. Moreover, some of these factors, in addition to being relevant to sentencing, may be sources of racial or even gender disparity if not taken into account.

B. Bail and Pretrial Services

Blackwell commenced a discussion about the impact of bail and pretrial services on sentencing by pointing out, in response to Schanzenbach and Yaeger’s research, that bail decisions might have a significant impact on time spent in prison. Poor offenders who cannot make bail before sentencing are often sentenced to “time-served.” Blackwell noted, however, that studying the impact of bail on sentence length would require reliable income information, which is not always available.

Maria McBride,⁸ Paula Xinis,⁹ and Judge Paul Friedman¹⁰ all pointed out that under the Bail Reform Act of 1984,¹¹ a defendant’s wealth should not, and does not, impact pretrial detention. However, the Bail Reform Act creates presumptions of dangerousness and flight risk for violent offenders and drug offenders that can impact bail determinations. These presumptions are generally not rebutted. In addition, the wealth of a particular district’s pretrial services has an impact on bail determinations and possibly also on sentence length. Wealthier offices have more alternatives to pretrial detention, such as electronic monitoring and halfway houses. If a pretrial services office lacks funding, defendants are detained at a higher rate. Thus, at times, bail may be more a factor of the wealth of the court offices than of the defendant’s wealth.

C. Sources of Racial Disparity

Peter Goldberger¹² raised the concern that Blackwell’s finding that racial differences in sentencing are small as compared to differences arising from legally relevant considerations masks the racial biases that are embedded in legally relevant considerations. Specifically, starting points that researchers may consider objective, such as whether there is a role adjustment or acceptance of responsibility, are actually the result of subjective decisions and are often steeped with prior bias. The skills and biases of all participants in the system, including police, the prosecutor, and the defense attorney, potentially contribute to disparity in sentencing.

Blackwell replied that he would like to study how defense counsel, and specifically public defenders compared to private defense attorneys, contribute to sentencing disparities. He pointed out that the racial disparities he found were actually quite small, and

further, that his focus on institutionalized factors was an attempt to account for all potential sources of disparity. Paul Hofer provided some examples of institutionalized sources, including the crack-cocaine sentencing differential. In addition, the type of weapons enhancement applied to offenders may also create racial disparity. If judges are aware of these “legitimate” and embedded sources of racial disparity, they might attempt to account for potentially disparate impacts in sentencing determinations.

D. Implicit Sanctions

Marc Miller¹³ was concerned by Schanzenbach and Yaeger’s suggestion that implicit sanctions account for some of the racial disparities in white-collar sentencing. Do we want judges to consider implicit sanctions? Can implicit sanctions justify or excuse the racial disparity they cause? Yaeger responded that there is evidence that judges—at least before the Guidelines and likely after—may account for loss of status when they sentence a defendant. However, judges might correct this habit if they realized that it results in racial disparity.

Schanzenbach pointed out that implicit sanctions are also troubling because they are not transparently recorded or reported. Professor Stith noted that if judges are considering implicit sanctions in sentencing, the question arises whether they, the Guidelines, or other actors should also consider other collateral consequences, such as deportation.

VI. Conclusion

Overall, this panel suggested that the biases of individual judges are not the sole or even primary source of racial and gender disparity in sentencing. Instead, other actors and institutional features are likely significant contributors. Panel II continued this theme by focusing on such other sources of disparity, including prosecutorial discretion.

Notes

- ¹ 28 U.S.C. § 994(d) (1994).
- ² He found that Albonetti (1997), Steffensmeier & Demuth (2000), and Mustard (2001) failed to properly control for mandatory minimums and departures. Celesta A. Albonetti, *Sentencing Under the Federal Sentencing Guidelines: Effects of Defendant Characteristics, Guilty Pleas, and Departures on Sentence Outcomes for Drug Offenses*, 31 L. & Soc’y Rev. 789 (1997); Darrell J. Steffensmeier & Stephen Demuth, *Ethnicity and Sentencing Outcomes in U.S. Federal Courts: Who is Punished More Harshly?*, 65 AMER. SOC. REV. 705–29 (2000); David B. Mustard, *Racial, Ethnic and Gender Disparities in Sentencing: Evidence from U.S. Federal Courts*, 44 J.L. & ECON. 285 (2001).
- ³ See, e.g., STANTON WHEELER ET AL., *SITTING IN JUDGMENT: THE SENTENCING OF WHITE COLLAR CRIMINALS* (1988).
- ⁴ See Mustard, *supra* note 2.
- ⁵ See Phyllis J. Newton et al., *Gender, Individuality and the Federal Sentencing Guidelines*, 8 FED. SENT. REP. 148, 150 (1995).

⁶ *Id.*

⁷ See Ilene H. Nagel & Barry L. Johnson, *The Role of Gender in a Structured Sentencing System: Equal Treatment, Policy Choices, and the Sentencing of Female Offenders under the United States Sentencing Guidelines*, 85 J. CRIM. L. & CRIMINOLOGY 181, 216 (1994).

⁸ Chief U.S. Probation Officer for the District of Connecticut.

⁹ Assistant Federal Defender, District of Maryland.

¹⁰ United States District Judge, District of Columbia.

¹¹ 18 U.S.C. § 3142 (1994).

¹² Private defense attorney, Philadelphia, Pennsylvania.

¹³ Professor of Law, Emory Law School.