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Eric P. Baumer

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Reassessing and Redirecting Research on Race and Sentencing

Eric P. Baumer

Drawing on a systematic assessment of the accumulated empirical literature and interviews with 25 race and sentencing scholars, this paper argues that the standard approach adopted in research on race and sentencing in criminology is insufficient for addressing the key underlying questions that motivate this work, including whether, where, how, and why race may matter. In light of this assessment, the paper lays out some additional directions for empirical research in this area that would bolster the validity and reliability of our knowledge about how race shapes sentencing and enhance the policy relevance of this work.

Keywords race; sentencing; disparity; imprisonment; judicial

Introduction

There is much to admire about the history of research on race and sentencing: it has generated important theoretical insights about the application of law (e.g. Blumstein, Cohen, Martin, & Tonry, 1983; Sampson & Lauritsen, 1997; Steffensmeier, Kramer, & Streifel, 1993; Ulmer, 1997), has yielded a rich body of interesting and policy relevant empirical findings (e.g. Engen, 2009; Ulmer, Light, Eisenstein, & Kramer, 2010), and has provided a useful canvas upon

Eric P. Baumer received his PhD in Sociology at the University at Albany, State University of New York in 1998. His research interests include community influences on attitudes and behavior, the sociology of punishment, and comparative criminology. Most of his research has focused on temporal and spatial dimensions of crime and justice. He is currently working on a study of temporal and spatial variation in the magnitude of racial, ethnic, and gender differences in sentencing outcomes supported by the National Science Foundation (NSF), and a project on foreclosure and crime funded by the National Institute of Justice (NIJ). Recent publications have appeared in *Criminology*, *Law & Society Review*, *American Sociological Review*, and the *American Journal of Sociology*. Correspondence to: E. Baumer, College of Criminology and Criminal Justice, Florida State University, Tallahassee, FL 32306, USA. E-mail: ebaumer@fsu.edu

which significant advances have been made about thorny methodological problems (e.g. Bushway, Johnson, & Slocum, 2007). More generally, the extant research on race and sentencing has slowly but surely made significant strides in advancing our understanding of the criminal sentencing process, and it continues to contribute in positive ways to identifying the specific conditions under which race shapes sentencing outcomes (Spohn, 2000; Ulmer, 2012).

While it is important to acknowledge the positive contributions of scholarship in the area of race and sentencing, it is also an opportune time to reflect critically on what we have learned from this body of work, and to consider the types of research that could significantly enhance our understanding as we move toward 2020. It is especially fitting to do so now because a variety of contemporary social and legal conditions in the USA (e.g. the Great Recession and its impact on state corrections budgets; legislative shifts in whether and how race can be used in sentencing; notable indicators of progress in race relations) have drawn renewed attention to punishment policies in general and racial disparities, in particular. Additionally, though, it is a good time to reflect and pave a path forward because we are now witnessing the largest ever influx of new (potential sentencing?) scholars into the field, spurred by a tripling in the number of doctoral degree producing programs during the last decade. If ever there was a time to take stock and provide some guidance about the most fruitful avenues of future inquiry in a research area, including race and sentencing, the time is now.

With this backdrop in mind, the present paper¹ focuses on two specific issues. First, it provides an overview and critique of the existing literature on race and sentencing, highlighting the positive contributions of the approach that has dominated existing efforts (i.e. regression-based or “archival” studies of sentencing outcomes among convicted defendants), but also illuminating its limitations for advancing an in-depth understanding of the role of race in shaping sentencing outcomes and the various meta-goals (i.e. underlying objectives) that seem to drive why we study the topic. This effort updates prior reviews of the race-sentencing literature, but departs notably from them as well by making explicit these meta-goals and situating the critique of the research literature against them. Second, the paper lays out some additional directions for empirical research in this area that would bolster the validity and reliability of our knowledge about how race shapes sentencing, highlighting some current examples of promising moves in these directions and calling for the next generation of scholars to pursue them much more vigorously.

To address these issues, I draw from two primary sources. One is a comprehensive assessment of empirical studies of race and sentencing published in refereed journals or in other outlets since the late 1990s, an effort that builds on

1. An earlier version of the paper was presented at the 2010 Symposium on *The Past and Future of Empirical Sentencing Research* at the University at Albany-State University of New York, directed by Professors Shawn Bushway and Diana Mancini and sponsored by the National Science Foundation (NSF). For more details about the symposium, see http://www.albany.edu/scj/symposium_home.php.

and updates several excellent reviews of the literature in this area (e.g. Mitchell, 2005; Pratt, 1998; Spohn, 2000). More than 50 of such studies were located and, compared to previous eras, they include data from a larger universe of jurisdictions, encompass a greater diversity of defendants (e.g. Hispanic defendants in addition to black and white nonHispanic defendants), and focus more on illuminating the nuances or the possibility of contextualized race/ethnicity effects. These studies were evaluated systematically to elucidate the typical rationale or underlying motivation provided for the effort, the nature of the samples, and key features of measurement and methods. An elaborate coding of the studies (e.g. a formal meta-analysis) was not undertaken because, as I explain below, it makes little sense to do that until some fundamental conceptual and methodological issues that undermine the validity of the results of these studies are addressed more regularly and systematically in the literature.

A second source upon which I draw is the community of scholars that has published research on race and sentencing over the past three decades, a pioneering group that collectively has helped to raise the issue of race and sentencing to a prominent place in the literature, and who are uniquely positioned to comment on potentially profitable new directions. I drew a random sample of 35 authors from the works on race and sentencing published during the 2000s and papers highlighted in Spohn's (2000) comprehensive review of research published in the 1980s and 1990. The sampled authors were asked (by e-mail and/or phone) to discuss some general issues about the past, present, and future possible directions of research on race and sentencing (see Appendix A for the formal request and specific questions). Twenty-five of these scholars participated in phone or in-person interviews, most offering very candid views on the existing research on race and sentencing, and on potentially fruitful avenues of future inquiry. Where relevant in the paper, I report on the collective thoughts of these scholars, noting when called for important areas of apparent heterogeneity in their views.

The paper proceeds as follows. After outlining some broader conceptual and empirical considerations for the study of race and sentencing in an initial section of the paper, I turn my attention to a summary and assessment of the utility of recent research on race and sentencing both in general and in light of what I see as the specific meta-goals of such studies. Outlining these meta-goals—in other words, identifying the broader research questions that motivate studies of race and sentencing or that often are the underlying objectives of such research—is a vital first step before critiquing the problems and prospects of existing efforts, though it is something rarely done in the literature. After providing a detailed review of typical approaches to studying race and sentencing and commenting on their capacity for addressing the key underlying issues to which they tend to be directed, I outline several alternative ways we might address those issues that would significantly enhance our knowledge about the intersection of race and sentencing. I close with a plea for the new generation of scholars who are taking up the challenge of criminology to apply their hard earned talents to help broaden what we know about race and sentencing and how we can address the apparent racial inequality in crime and justice.

The Underlying Objectives and Utility of the “Typical” Study of Race and Sentencing

The typical approach to research on race and sentencing outcomes relies on archival data on convicted defendants using conventional regression approaches. Such studies will be familiar to most readers: the samples are typically restricted to convicted felons identified as black or white, the outcomes often include the “in/out” decision and/or sentence length, and the focus is on estimating a regression coefficient for race, sometimes conditional on other attributes (e.g. prior record and victim race), and sometimes net of controls for the probable sample selection bias that is present, an issue that apparently is frequently mishandled (Bushway et al., 2007). Hundreds of such studies have been conducted during the past three decades (e.g. Hagan, 1974; Spohn, 2000), and they represent by a long mile the “modal” approach to studying race and sentencing.

The research within this tradition often references widely documented racial disparities observed in levels of incarceration as an important stimulant to the work, and it is typically directed, explicitly or implicitly, at one or more of the following four “meta-goals”: (1) detecting racial disparities; (2) detecting racial discrimination; (3) assessing *how* or *why* race influences legal decision-makers and/or legal decisions; and (4) evaluating whether a given policy intervention has modified observed racial disparities or discriminatory outcomes. There may be other ancillary goals of the extant research on race and sentencing, but based on a systematic review of stated rationales in the research published during the 2000s, one or more of these underlying issues were typically identified as paramount.

Has the modal approach adopted in the field of criminology and criminal justice to study race and sentencing been highly useful for advancing understanding of the general issue that seems to motivate much of the research (i.e. advancing understanding of racial inequalities observed in incarceration rates in the USA) and the more specific objectives just noted? Based on my review of the literature and the interviews conducted with scholars from the sentencing research community, the answer seems quite clear. Although the modal approach to studying race and sentencing has produced interesting and, in some instances, highly relevant bits of information for theories of legal decision-making and for policy-makers, the analysis of archival conviction data, which dominates current efforts to study race and sentencing in the field, is not highly useful for shedding light about the sources or meaning of racial disparities in contemporary prison populations, nor is it (alone) well suited for detecting race differences in sentencing, identifying the presence (or absence) of racial discrimination in sentencing, or advancing knowledge about why race may (or may not) influence legal decision-makers. This does not mean that the model approach should be abandoned; quite to the contrary, my overall argument in this paper is that it is vital that this approach be supplemented significantly

with alternative approaches. Let me elaborate on the reasons for these positions, building the discussion around each of the objectives to which I am assuming the modal approach to studying race and sentencing has been and continues to be directed. After judging the modal approach on "its own merits," I offer some suggestions for redirecting current efforts in ways that I think would be more productive.

Understanding Racial Inequality in Incarceration Rates

As noted, the highly visible and relatively large racial disparities observed in the application of laws and legal sanctions in the USA is often cited as a motivating rationale in the introductory comments and occasionally the concluding comments of studies that fit within what was defined above as the typical criminological study of race and sentencing. A fair question to pose at the outset of any assessment of the literature on race and sentencing, therefore, is the following: is the typical approach to studying race and sentencing useful for advancing understanding of the racial inequalities observed in punishment patterns in the USA?

There are substantial racial disparities in the application of law in the USA. The literature is replete with persuasive anecdotal accounts to that affect (e.g. Alexander, 2010), but also concrete figures that give a strong impression of race differences in the creation and application of laws, including the often-cited crack/powder cocaine sanction disparities (Kennedy, 1997), well-documented racial disparities in the application of death sentences (e.g. Baldus, Brain, Weiner, & Woodworth, 2008), and aggregate racial disparities in imprisonment rates (e.g. Keen & Jacobs, 2009). Perhaps, the most vivid example is observed in comparing race-specific imprisonment realities (Western, 2006). To illustrate, Figure 1 shows black-white male disparities in aggregate "stock" incarceration rates (i.e. the ratio of black-to-white male incarceration rates) since the late 1800s (Reitz, 2006; K.R. Reitz, Personal Communication, August 2010). As the figure reveals, there has been a significant racial disparity between black and white men in prison incarceration rates during the whole of the past century; black rates were nearly four times higher than white rates by early 1900, and a 100 years later the disparity had approximately doubled, with black rates exceedingly high and about eight times those of whites.

The symbolic importance of the pattern displayed in Figure 1 should not be understated or under appreciated. It serves as a powerful summary and visual reminder of the stark racial inequalities that exist in the USA, and it provides rich fuel to perceptions of the *possibility* of racial bias in the application of law that have profound reverberations throughout society. Several scholars have linked perceptions of racial bias in the application of law to broader images of perceived illegitimacy of legal institutions (e.g. Kennedy, 1997), and an impressive literature suggests that the perceived illegitimacy of law and the applica-

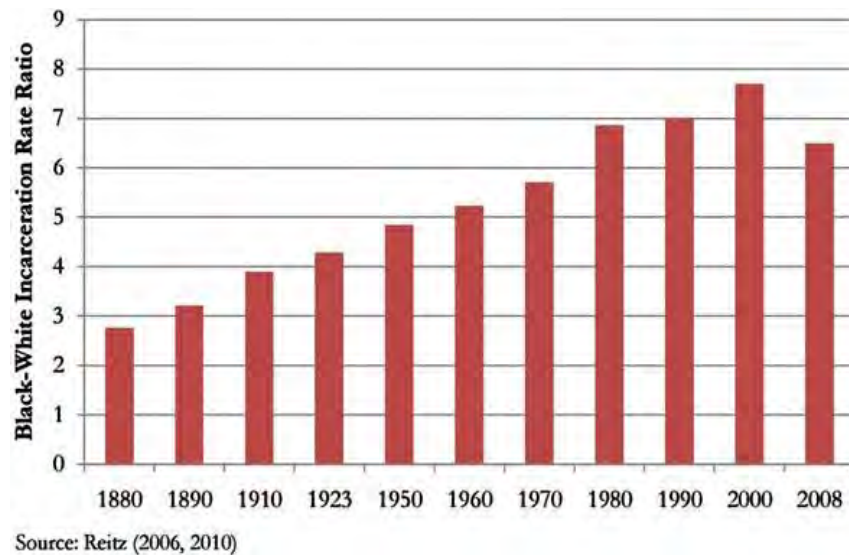


Figure 1 Black-white male incarceration disparity ratios, 1880-2008.

tion of criminal sanctions may have a variety of adverse consequences for crime rates, the deterrent capacity of the criminal justice system, strained race relations, and the generation and reproduction of social inequalities (Anderson, 1999; Gottschalk, 2008; LaFree, 1998; Ruth & Reitz, 2003; Western, 2006). For these reasons, the aggregate patterns shown in Figure 1 auger loudly for rigorous scientific research to help unpack their sources, to inform the public discussion about race, crime, and punishment, and to point at ways those observed race differences can be ameliorated. While there is some existing research directed squarely to these objectives (e.g. Keen & Jacobs, 2009), the modal approach used to study race and sentencing in the USA is not highly relevant for advancing knowledge about racial disparities in incarceration rates.

The racially disparate patterns shown in Figure 1 can arise in a large number of ways, can be located at a variety of decision-making points, and are open to a wide variety of interpretations. At one extreme, they could reflect racial differences in criminal participation and no bias in the application of criminal law; at the other, they could reflect racial equality in the prevalence, incidence, and nature of offending, yet significant racial bias in how the law is applied to those who engage in criminal activity. In this latter scenario, bias can come in many forms and can be exercised by many different actors (see also Frase, 2009). While there are significant data limitations that impede our ability to fully decompose aggregate racial disparities in incarceration rates (Frase, 2010), the available data indicated that during the 1970s and 1980s little of this disparity was due to sentencing differentials and a large majority—75-80%—was due to differential selection into the criminal justice system, namely racial disparities in rates of offending and arrest (Blumstein, 1982, 1993; Harris, Steffensmeier, Ulmer, & Painter-Davis, 2009; Langan, 1985). Times have changed, however. For instance, Tonry and Melewski (2008) update the analysis reported by Blumstein with data from the early part of the

2000s and show that during this period the percentage of the racial disproportionate representation of blacks in prison explained by racial disparity at the arrest stage had fallen to about 60%. I obtained similar figures when replicating for 2004 the decomposition reported by Tonry and Melewski (2008) and also updating the calculations based on 2008 data. The contribution of arrest rate differences to black-white incarceration disparities has declined substantially since the 1980s, approximating 55% during the 2000s.

These “decompositions” identify the possibility of *post-arrest* racial bias in aggregate incarceration rates, but they alone cannot tell us where precisely the portion of this racial bias unaccounted for in race arrest disparities may arise. In theory, there are several possible stages through which suspect race could yield race-based differences in incarceration rates. This includes the often-cited decision-making points such as prosecutorial screening, pre-trial bail and detention, the likelihood of conviction (via trial or plea), the probability of imprisonment (via new commitments or revocations), and sentence length. But it also includes less frequently noted stages such as the conglomerate of decisions through which penalties are prescribed or mandated (e.g. the prescription of penalties for specified offenses by legislatures and/or sentencing commissions), which may be correlated with race if the severity of legislated penalties parallel group differences in offending patterns.

The most important point that emerges here is that the observed race differences in incarceration rates displayed in Figure 1 appear to occur both because of race differences in arrests, but also because of race differentials in how arrested persons are processed through each stage of the criminal justice system. The predominant focus in the criminological literature on whether and how race affects the in/out and sentence length decisions is one important component of efforts to advance understanding racial inequality in punishment in the USA, but that focus leaves a lot of issues unaddressed. Thus, with respect to the question posed at the beginning of this section, it would appear that while the typical approach to studying race and sentencing is *useful* for helping to clarify the widely referenced disparities in overall imprisonment rates, *this approach alone is highly insufficient*. This is largely because the aggregate patterns of racial inequality displayed in Figure 1 reflect group-based disparities across multiple stages of the criminal justice system, while the predominant focus in most studies of race and sentencing is narrowly centered on assessing racial disparities in the *sentencing of convicted defendants*.

Reassessing the Modal Approach

Striving for the Meta-Goals of Research on Race and Sentencing

Though the typical approach to studying race and sentencing does not appear to contribute greatly to broader efforts of advancing understanding racial disparities in the application of law, an arguably more just way to judge the

merits of this body of scholarship would be to evaluate it relative to the more explicit objectives to which it tends to be directed. Earlier, I identified four main objectives of the typical approach: (1) detecting racial disparities; (2) detecting racial discrimination; (3) assessing *how and why* race influences legal decision-makers and/or legal decisions; and (4) evaluating whether a given policy intervention has modified observed racial disparities or discriminatory outcomes. How does the research stack up on these matters?

As hinted above, though I agree with others that there is much to applaud in the vast body of research on race and sentencing (Ulmer, 2012), the typical study of sentencing outcomes among convicted defendants that has dominated the landscape is significantly limited for purposes of detecting race differences in sentencing, identifying the presence (or absence) of racial discrimination in sentencing, or advancing knowledge about why race may (or may not) influence legal decision-makers. Not all of the scholars with whom I spoke agreed with this sentiment. In fact, a few commented that the current direction of research on race and sentencing was just fine, and they were especially heartened by the growing attention to conditional influence of defendant race on sentencing outcomes (e.g. conditional on victim race, defendant, and victim sex, etc.). However, the much stronger collective sentiment voiced was that the typical approach one sees in the literature suffers from two significant general limitations that mute its general contributions to the field, in addition to several specific limitations that impede its ability to adequately address the issues identified as key meta-goals of this research. Let me describe the two general problems first.

Some General Limitations

A majority of the sentencing scholars with whom I spoke referenced two general issues that, in their view, represent significant limitations of the modal approach adopted to study race and sentencing (i.e. regression-based studies of sentencing outcomes among convicted defendants). The two general issues that these scholars highlighted were (1) an overly narrow treatment of “race” and (2) the relatively narrow scope conditions that tend to define in the modal tradition “when and where” race may shape sentencing outcomes. To frame the discussion, consider the heuristic model displayed in Figure 2, which captures the essence of most of the pertinent stages and potential mechanisms through which race may influence sentencing outcomes (other individual, family, situational, and jurisdictional attributes have been omitted from the figure for clarity, but they are obviously important for identifying the types of relationships displayed).

Almost all of the scholars I interviewed considered the modal approach to studying race and sentencing to reflect a very narrow treatment of race. One of the interviewees was especially troubled by the tendency that he or she saw in much of the research within the modal paradigm to treat race as

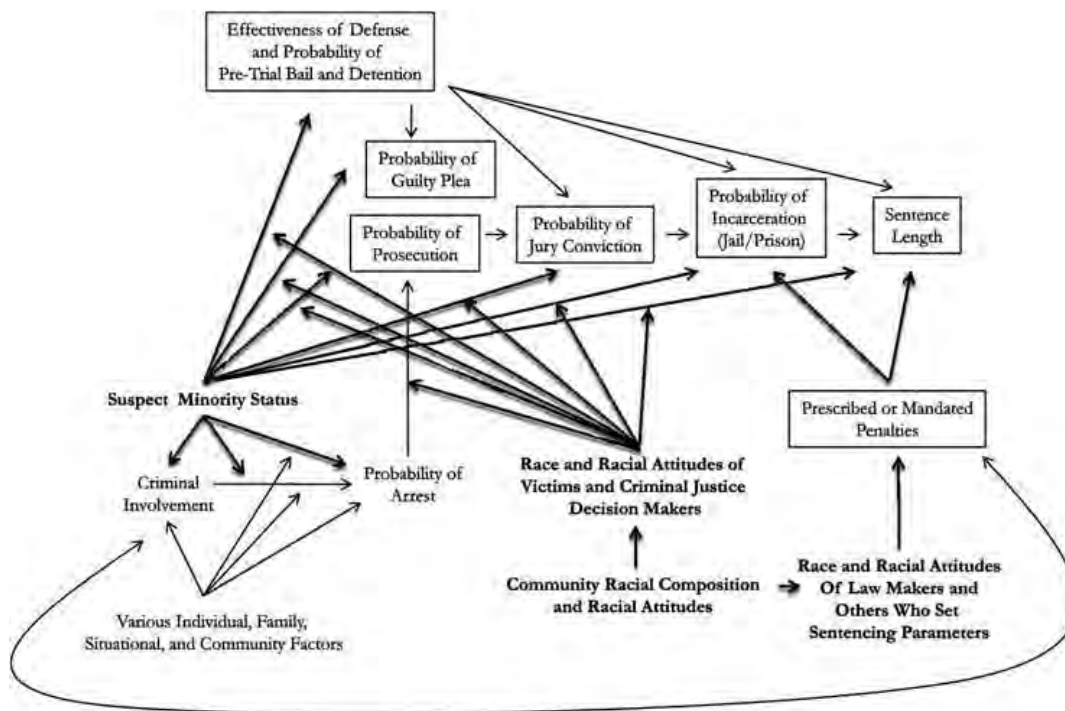


Figure 2 Heuristic model of racial influences on sentencing outcomes.

“merely a demographic attribute, with little attention to the complex meanings of race and racial context in the criminal justice system.” But the more general concern expressed by sentencing scholars was that they were disappointed about the overwhelming focus of race/sentencing studies on *defendant race*. Though they acknowledged exceptions and showed respect for the reality of data constraints, they considered this as a major limiting factor given that research on capital cases (e.g. Baldus & Woodworth, 2003), mock juries (e.g. Sommers, 2006, 2007), and selected other studies of noncapital cases (e.g. Baumer, Messner, & Felson, 2000; Britt, 2000; Fearn, 2005; King, Johnson, & McGeever, 2010; Spohn & Spears, 1996; Ulmer & Johnson, 2004) highlight the importance of many other dimensions of race in criminal justice processing, including victim race (especially in tandem with defendant race), and the race of judges, jurors, attorneys, victims, and other community members. Beyond this, however, as illustrated in Figure 2, race can influence outcomes at each of the noted stages in multiple ways, both in terms of the source of the racial influence and its meaning. Suspect race is one possible source, but the social science literature also has emphasized the potential importance of the race and racial attitudes of others—those who create and apply the law, crime victims, and the residents of the location in which the law is created and applied (e.g. King, Johnson, & McGeever, 2010; Myers & Talarico, 1987; Sommers, 2007; Ulmer & Johnson, 2004). In general, the modal approach to studying race and sentencing tends to conceptualize “race” and the ways in which it may shape criminal justice outcomes in simplistic terms.

All of the researchers interviewed also noted that the overwhelming focus on the in/out and sentence length outcomes among convicted defendants was misplaced, driven by data availability rather than theoretical or substantive importance. As others have lamented, there is too little attention devoted in contemporary scholarship on race and sentencing to the analysis of race effects on prosecutorial screening, pre-trial decisions, plea bargaining, and trial decisions (see also Sampson & Lauritsen, 1997). Though it is perhaps understandable that there is a dearth of studies that have focused on how defendant race can influence trial outcomes since a relatively small fraction of criminal cases are adjudicated at trial, the relative inattention to the other outcomes mentioned was considered especially problematic both because they are important in their own right and because they are very consequential for decisions downstream in the process. While some research has attended to these issues (e.g. Albonetti, 1990; Demuth, 2003; Frenzel & Ball, 2008; Schlesinger, 2005), by and large the research literature continues to focus overwhelmingly on the final sentencing stages. This has long been the case and has continued even as the decisions applied post-conviction have become less strongly shaped by the actors directly involved in the delivery of sentences (e.g. judges, juries, and attorneys), and increasingly dictated by *legislators and sentencing commissions*. Given that contemporary race differences in incarceration rates appear to be due in large measure to disparate racial impacts of decisions made by these parties (e.g. the adoption of laws and policies that have differential racial impacts, such as mandatory minimums, and sentencing guidelines defined by features that may be highly correlated with race, including offense and prior record), it is especially important not only to attend more squarely to how race shapes the creation of laws and sanctions, but also that we make strides to distinguish in analyses of archival data on race and sentencing between racial influences on the decisions of criminal justice actors and links between race and mandated penalties (see also Bushway & Piehl, 2001), a point to which I return below.

In summary, the vast majority of the scholars who have helped establish the modal approach to studying race and sentencing as a prominent area of inquiry now see the need to broaden significantly the treatment of race and the outcomes considered. These are not uncommon critiques of the extant research on race and sentencing (e.g. Blumstein et al., 1983), and one can make a case that contemporary research has slowly but surely made progress in both areas (Ulmer, 2012). However, it would be highly beneficial if the next generation of scholars delved deeper into the various ways in which “race” might shape sentencing (e.g. Bushway & Piehl, 2001; Johnson, 2006; King et al., 2010; Ulmer & Johnson, 2004), especially across multiple stages of the criminal justice process (e.g. Baumer et al., 2000; Wooldredge, 2012). Issues of data availability and data limitations have long been the primary rationale provided for the overwhelming focus on sentencing decisions among convicted defendants. There is a growing sense among sentencing scholars that the time has come to reallocate efforts. Though it is now relatively straightforward to access data on convicted

defendants and to execute the “modal approach,” our knowledge about how race shapes criminal justice outcomes would be enhanced significantly if the next generation of scholars resisted the urge to restrict efforts to that task, seeking to instead “stand on the shoulders of their predecessors” to engage in the riskier but more rewarding endeavor of gathering the needed new data to study the broader dimensions of race at pre-sentencing stages of the process.

Contributions of the Typical Approach to Advancing Understanding of the Meta-Goals

Leaving aside for now the ways in which the modal approach to studying race and sentencing might be fruitfully expanded, how useful is this approach (i.e. studying sentencing outcomes among convicted defendants) for addressing the meta-goals to which it is squarely directed? In other words, how might we judge the modal approach on its own merits? Has the typical approach to studying race and sentencing made a significant contribution to detecting racial disparities, detecting racial discrimination, assessing *how and why* race influences legal decision-makers and/or legal decisions, and evaluating whether a given policy intervention has modified observed racial disparities or discriminatory outcomes?

Detecting Racial Disparities with Archival Data on Convicted Defendants

The modal study of race and sentencing is criminology is, by definition, focused on identifying whether there is a significant racial disparity in sentencing outcomes among those convicted of a crime (usually a felony). Indeed, this is typically the major purpose of such research and often the sole purpose. Further, it is by far the most important “meta-goal” identified herein, for the capacity to adequately detect the presence of racial disparities in sentencing outcomes among convicted defendants is a necessary condition for satisfactorily addressing the other meta-goals—identifying instances of racial discrimination, assessing how or why race matters, and judging the efficacy of policy interventions directed at altering racial disparities in these sort of sentencing outcomes.

On its face, comparing outcomes among convicted defendants of different races is a reasonable approach to *detecting racial disparities* in sentencing. However, in practice it is quite challenging to cleanly detect meaningful group disparities in sentencing, or most other outcomes for that matter, using the standard nonexperimental regression approaches that have dominated the literature on race and sentencing and which serve as the main engine of the modal approach. A brief overview and critique of the accumulated knowledge that has emerged from the modal research paradigm on race and sentencing illuminates why this is the case.

As others have documented (e.g. Hagan, 1974; Kleck, 1981; Zatz, 1987), a large fraction of the collective literature in this area suffers from serious

methodological limitations (e.g. inadequate controls for prior record) that render it unfit for assessing whether, net of other well-established predictors of sentencing outcomes, there are significant racial disparities. Several contemporary reviews of this literature have filtered through the pertinent studies and identified those that meet some basic methodological thresholds, typically defined in terms of having reported a measure of association between race/ethnicity and one or more indicators of sentence severity, the application of multivariate regression techniques, and explicit controls for crime seriousness and prior criminal record. These more sophisticated studies focus on slightly different time periods and apply different methods for synthesizing the results, ranging from general interpretive content analyses (Sampson & Lauritsen, 1997), to tabulations of the proportion of studies with significant race coefficients (Spohn, 2000), to formal meta analyses (Mitchell, 2005; Pratt, 1998). Nevertheless, the general conclusions drawn across these recent reviews are quite consistent, even if the implications drawn from them are somewhat divergent.

The consistent finding from recent overviews on studies of race and sentencing in samples of convicted defendants is that there are often relatively small but statistically significant direct race differences in the probability of imprisonment to the disadvantage of blacks (compared to whites), and comparatively smaller and statistically nonsignificant direct race differences in prison sentence lengths between these groups. Using words like “often” and “relatively small” casts a sheen of vagueness to this general assessment, but providing additional details unfortunately does not clarify things much because the broader story is that defendant race effects appear to be highly contingent on sample composition, crime type, model specification, and the jurisdiction from which they are generated, to name just a few factors (Mitchell, 2005). Nonetheless, to put something more concrete on the line, Spohn’s (2000) review of studies published during the 1980s and 1990s indicates that of the 95 black-white race comparisons contained in the 40 state-level studies she reviewed, 43.2% yielded significant differences in which blacks received more severe sanctions than whites; the comparable figure that emerged from 22 estimates in eight Federal-level studies was 68.2%. Spohn (2000) further showed that racial disparities in this direction were greater for the probability of imprisonment (i.e. the in/out decision) than sentence length determinations. This was also true in her replication of the analysis for Hispanic/white defendants, though the gap between these groups was smaller than those observed for blacks and whites (see especially Exhibit 2, p. 456).

Spohn (2000) does not formally evaluate effect sizes for the significant differences she observed, but this is the focus of the meta-analyses of black-white sentencing differences reported by Pratt (1998) and Mitchell (2005). These studies reveal evidence consistent with conclusions drawn from Spohn (2000) and many other previous overviews (e.g. Chiricos & Crawford, 1995; Sampson & Lauritsen, 1997; Zatz, 2000): the influence of defendant race on sentence length appears to be relatively weak, the presence and magnitude of racial disparities in decisions about imprisonment vs. noncustodial sanctions is

significant, relatively modest overall, and highly variable across studies (see also Hagan, 1974). However, the recent overviews also illuminate that race effects are highly contingent on various other factors, especially age, gender, socioeconomic status (SES), offense type, and jurisdictional location. The latter findings, which have been referred to in the literature as “interactive” or “subtle” race effects are important and suggest that the assumption of main effects that is part and parcel to the whole enterprise of assessing racial disparities may be limiting.

Building on these efforts, I evaluated more than 50 studies published since 2000 (in any form, including electronically available working papers) that examine the influence of race on sentencing outcomes among convicted defendants. I coded basic features of these studies, including the typical rationale or underlying motivation provided for the study, the nature of the sample, the sample size, and key features of measurement and methods. This exercise revealed that, compared to previous eras, sentencing studies conducted during the present decade included data from a larger universe of jurisdictions, encompassed more diverse samples of defendants (e.g. Hispanic defendants), and were focused more on illuminating the nuances or contextualized nature of race and ethnicity effects. A review of these studies generally affirmed what past reviews have concluded: (a) defendant race is often a significant but relatively weak correlate of sentence severity overall and (b) defendant race yields some substantively meaningful conditional effects that should be further explored. I did not follow the lead of predecessors, who formally coded the findings in a comprehensive meta-analysis, because I became convinced that until some fundamental conceptual and methodological issues are better addressed in this literature, it does not make much sense to summarize systematically the recent findings in this area. Based on my reading of the literature and commentary provided by the sentencing scholars interviewed for the study, I argue that three features of the typical analysis of archival samples of convicted defendants limit significantly its utility for purposes of *detecting racial disparities* in sentencing: conceptual ambiguity, omitted variable bias, and sample selection bias.

First, one of the limitations of the modal approach to studying race and sentencing for purposes of detecting race disparities that the researchers I interviewed referenced is something I will refer to as “conceptual ambiguity.” Ultimately, the matter boils down to the tendency for studies of convicted defendants to ignore the reality that oftentimes the sentencing outcomes being modeled are *prescribed/mandated* penalties, rather than the result of judicial discretion. But the larger issue is the relative inattention to distinguishing between the various sentencing actors who might be influenced by defendant race. In other words, these studies are modeling the effects of race (perhaps imperfectly, as I argue below), but on whose decisions or at what decision-making stage? As typically studied, the two sentencing outcomes considered in the modal research strategy—in/out and sentence length among a sample of convicted defendants—can be products of decisions made at

different points in time and by a variety of people, including legislators, sentencing commissions, prosecutors, defense attorneys, and judges. Is the typical approach modeling differential decisions across racial groups by judges, which seems to be commonly assumed, or is it modeling racial disparities in outcomes shaped by prosecutors as well, given that plea decisions are so common? If race influences prosecutors and judges in the same manner, perhaps this ambiguity in locating the specific source or stage of influence is not very consequential, but this may not be the case, as criminal justice decision-makers often are influenced by the actions or perceived actions of others. For example, the charges files by prosecutors may be shaped, at least in part, by the anticipated consequences of a known sentencing grid or perceived level of leniency or harshness of a presiding judge, and in jurisdictions where judges have some discretion at sentencing, their decision might be shaped in part by the prosecution charging actions.

A potentially more problematic issue, in my judgment, is that the modal research strategy used today for detecting racial disparity at sentencing blends decisions made by personnel within the criminal justice system (i.e. judges, prosecutors, defense attorneys, and juries), and the key people outside the system who dictate punishment realities for convicted defendants (i.e. legislative bodies and sentencing commissions). The latter decision-makers prescribe or, in some cases, mandate the penalties associated with a given conviction charge and prior record, and thus part of the variation observed across conviction cases in any given sentencing study will reflect variance associated with their choices (and not just judicial or prosecution choices) unless it is explicitly partialled out (Reitz, 1998). Bushway and Piehl (2001) illustrate with data from Maryland that accounting for the “expected sentence” (i.e. the “legislated” sentence) in any given case yields conclusions about defendant race that depart meaningfully from situations in which this issue is not addressed, presumably because of correlations between race, offense type, and prescribed sentences by, in this case, a sentencing commission. Similar observations have emerged in research on sentencing from other guidelines states as well (e.g. Engen & Gainey, 2000; Ulmer, 2000; Wooldredge, 2010), though this is not merely an issue in states with sentencing commissions. Judges and prosecutors in all states operate under some set of statutory guidelines for sentencing in given cases, and where possible these constraints should be modeled explicitly to better isolate variation in sentencing outcomes that can be attributed to these actors. Very few studies within the modal research paradigm on race and sentencing attend to this issue, which limits their contribution to detecting racial disparities at sentencing, or at least makes the meaning of the findings murky.

A second major limitation builds on and broadens the last theme: almost all of the sentencing researchers interviewed acknowledged that omitted variable bias was a problematic issue in the extant literature on race and sentencing. Interestingly, there was a wide range of views on this issue. Some (about one-fifth) wrote it off as part and parcel to large-scale quantitative research and did not consider it to have a “major impact” on the underlying objectives,

while nearly a quarter of those interviewed commented that this was a very problematic issue, a view captured well by one who noted that “if standard contemporary methodological benchmarks were applied to the typical study of race and sentencing, we would have to treat most of the findings as highly tentative.” Overall, the collective sentiment voiced among these scholars was that the omission of key covariates was a major weakness of the “modal approach” for purposes of detecting racial disparities, especially given the predominant use of a standard regression-based framework.

While all research areas much concede some ground to scientific rigor in light of data constraints, it seems clear that the modal approach of analyzing archival data on sentencing outcomes among convicted defendants using non-experimental data and standard regression modeling yields uncertain evidence about the presence (or absence) of racial disparities because the data available for the task is likely to omit key attributes that vary in prevalence across racial groups and which are related to sentencing decisions (see also Paternoster & Brame, 2008). Even the most sophisticated studies of archival data on sentencing outcomes among convicted defendants omit some potentially very important confounders. As noted above, the prescribed sentence is frequently omitted, which can render estimates ambiguous, but other commonly excluded covariates include the socioeconomic and marital status of defendants, victim attributes, witness cooperation, and the nature and quality of physical evidence. Many of these things may be correlated both with defendant race and sentencing outcomes, and Mitchell (2005) provides some empirical evidence that their omission is consequential for the assessment of racial disparities across different types of sentencing outcomes.

Omitted variable bias is a perennial problem in a wide variety of social science areas in which race is studied, but its adverse influence seems underappreciated in the sentencing literature. For instance, in many areas of inquiry, omitting an indicator such as SES would preclude a study from being taken seriously for what it can tell us about race differences. The implications of omitting SES from sentencing studies, which is all too frequent, may be less damaging to the bottom line but when considered together with the other indicators our data often do not encompass (e.g. marital status, evidence quality, and victim attributes), researchers should be more cautious about drawing strong conclusion about race effects from the typical regression-based study of sentencing. This point echoes Paternoster and Brame (2008), who make a particularly compelling argument that what continues to be the dominant approach to estimating race differences in most noncapital sentencing studies—standard multivariate regression modeling—is inferior to other approaches, and their research along with Berk, Li, and Hickman’s (2005) analysis show that the different research strategies can yield different findings.

The bottom line is that given the limitations of existing sentencing databases with respect to omitted variables and given the inherent limitations of standard regression-based approaches for making group comparisons, it is difficult to know what to make of the vast majority of existing studies of race and

sentencing. For instance, the general finding reported in previous overviews is that some studies show significant racial disparities while others do not. This could be a highly meaningful pattern, or it could merely be picking up on differences across studies in the capacity to adjust for group-based differences on key covariates. This ambiguity prompts researchers to be cautious in applying the modal approach to draw inferences about whether there are racial disparities in sentencing decisions and, as I elaborate below, to consider alternative methods to bolster the conclusions they do draw from that approach.

A final issue that raises serious doubts about the empirical validity of the modal approach to studying race and sentencing for purposes of detecting racial disparities is the high degree of selection bias that tends to exist in samples of convicted defendants. This issue was mentioned by all of the scholars with whom I spoke, but like the matter of omitted variable bias, not all of them considered it to be highly pertinent to the inferences drawn about racial disparities. For instance, though several of the scholars acknowledged recent research that has documented the lack of uniformity in how sample selection bias is addressed in the sentencing literature and how “corrections” for the problem are often mishandled (Bushway et al., 2007), only about half considered this to be highly problematic for the overall conclusions that we can draw about racial disparities from this literature. This strikes me as a naïve reaction.

It is well known that group-based comparisons of sentence duration decisions may be biased because of differential group-based selection into the sentence length phase of the process (Blumstein et al., 1983), but the issue of differential selection and the potential for bias because of it exists at each of the stages of the process (e.g., studies of race effects on prosecutorial screening may be biased by unmodeled race differences in arrest probabilities; studies of race effects on the probability of conviction—through plea or trial proceedings—may be biased by unmodeled race differences in arrest and prosecution rates). While these issues are often mentioned by researchers, they are often addressed in an inappropriate or incomplete manner (Bushway et al., 2007). Sample selection bias is a thorny problem for which there is no concrete solution in this research literature, but the documented track record on how scholars have handled the problem raises serious questions about the utility of the modal approach to contribute meaningfully to efforts directed at detecting racial disparity in sentencing outcomes, and more generally, the lack of uniformity across studies in whether and how selection bias is modeled renders overall summaries of the modal research strategy highly suspect.

My overall assessment on this issue is similar to that of the National Research Council (NRC) panel that reviewed the literature in the early 1980s: much of the relevant research suffers from measurement error and sample selection problems that raise “the threat of serious biases in the estimates of [defendant race] effects” (Blumstein et al., 1983, p. 109). A more general conclusion that emerged from my assessment of this literature, however, is that even if the noted conceptual and methodological issues are addressed adequately, as I elaborate below the modal approach to studying race and sentencing *alone* is insufficient

for providing satisfactory answers to the question of whether there are significant racial disparities in outcomes experienced by convicted defendants. As should become clear, I am not suggesting that the modal approach be abandoned; rather, I argue below that it is vital to supplement it with alternative approaches, something that is not being pursued vigorously in the contemporary literature.

Detecting Racial Discrimination, Determining How/Why Race Influences Sentencing, and Evaluating Policies

While detecting racial *disparities* seems to be the major focus of most of the studies that fall within the modal research paradigm on race and sentencing, this body of research is also frequently directed at more challenging “meta-goals,” including uncovering racial discrimination, determining more broadly why and how race influences sentencing decisions, and evaluating policies aimed at reducing observed racial disparities. How has existing research fared in pursuing these objectives?

Detecting Racial Discrimination

Many observers have acknowledged the important distinction between racial disparity and racial discrimination (see Spohn, 2000). A common definition of racial discrimination refers to “unequal treatment of persons or groups on the basis of their race or ethnicity” (Pager & Shepherd, 2008, p. 182). Racial disparity in sentencing decisions can signal racial discrimination by prosecutors, judges, juries, and lawmakers, but it also can occur for a variety of reasons that have nothing to do with unequal treatment by these individuals. In other words, racial *disparity* can arise for a variety of reasons besides racial *discrimination*. It can reflect racial disparity in offending or arrest that is not fully accounted for in regression models, and it can reflect inadequacies in adjusting for group differences in case attributes. To further complicate matters, observed racial disparities in sentencing among convicted defendants, as typically studied, could indicate *differential treatment discrimination* and/or *disparate impact discrimination*. Differential treatment discrimination is the fundamental type of discrimination with which we all are quite familiar; an example of differential treatment discrimination under the modal research paradigm on race and sentencing would be if two convicted defendants are identical in all respects other than their race/ethnicity, but one is punished more severely than the other. Disparate impact discrimination refers to scenarios in which people from different racial/ethnic groups are treated equally according to the rules, but the rules themselves are constructed in a fashion that favors one group over another. In the context of the modal research paradigm, disparate impact discrimination would be present if a white defendant and a

black defendant (for example), both convicted of illicit drug selling, were identical except for the specific drug for which they have been convicted of distributing, with one convicted of distributing powder cocaine and one convicted of distributing crack cocaine. The latter would under contemporary laws (and assuming comparable case attributes otherwise) be given a more severe sentence even if prosecutors and judges were racially neutral, yet this scenario would still contain a form of racial discrimination (i.e. disparate impact). Such possibilities should motivate closer examination of the role of race in shaping laws that have a disparate impact, for lawmaking that has such disparate implications could in theory be driven by differential treatment discrimination.

Whatever the merits of the modal approach to studying race and sentencing, it is not well organized to detect racial discrimination (of any form) by legal decision-makers and/or lawmakers. In part, this is due to the same methodological deficiencies of the modal approach noted above that impede its ability to satisfactorily detect racial disparities in sentencing outcomes. To wit, in the standard regression-based framework that defines the modal research strategy, it is difficult to know for sure whether a significant positive association between defendant race (as a main or interactive effect) and sentence severity reflects racial discrimination by legal actors, disparate racial impact of a nonracially discriminatory feature of a case or the law, or empirical misspecification. This is a common problem in other areas of scholarship in which race differences are of interest and where efforts are directed, in part, to identifying the conditions under which observed race differences reflect discrimination (see National Research Council, 2004).

Interestingly, one telltale sign of the weakness with the typical approach to race and sentencing in this regard that emerged in my review of studies published during the past decade is that they rarely contain a discussion of racial discrimination in the closing remarks. Many studies mention the possibility of racial discrimination as a motivating factor for doing research on race and sentencing, but regardless of the findings that emerge from archival studies of convicted defendants, it is rare for researchers to address the implications of those findings for racial discrimination. On the one hand, this is appropriate in light of the significant limitations of the typical approach for informing us about the presence of racial discrimination in sentencing, but on the other hand it illuminates a major weakness in scope of the typical approach.

Determining How/Why Race Influences Sentencing

A broader issue that emerges in the literature on race and sentencing concerns the factors that shape legal decision-making and, in particular, the mechanisms through which defendant (and or victim) race might be translated into differential decisions. This issue was highlighted by three-fourths of the sentencing researchers with whom I spoke as a major need for research that better captures how race operates in legal decision-making. While there is a rich body

of research in psychology and law on the factors that shape legal decisions, much of it experimental in nature (see Diamond, 1995; Richter & Weiner, 2007), the current modal approach to studying sentencing is not ideal for advancing our understanding of how and why legal decisions are made, either with respect to the role that race may play or with respect to decision-making more broadly. There are two manifestations of this issue, one that could be remedied fairly easily by modifications to the modal approach, but the other is likely to be much more elusive without a significant redirection in the current focus.

The first problematic aspect of the typical approach applied to study race and sentencing among convicted defendants concerns a form of over specification, reflected in the relative inattention to the largely indirect ways in which race may influence final sentencing outcomes. Many others have noted the potential importance of indirect effects of defendant race through factors such as prior record, pre-trial status, legal representation, and the nature of the disposition (e.g. Spohn, 2000). There also are good examples in the literature of empirical studies that explicitly test for indirect effects (e.g. Brennan, 2006; LaFree, 1985; Spohn, 1992, 2009; Spohn, Gruhl, & Welch, 1981-1982), but the vast majority of studies in the modal research tradition on race and sentencing forge ahead with a focus on estimating either main or interactive effects, neither of which address the many indirect pathways through which defendant race may influence sentencing outcomes. Without explicitly and routinely specifying both direct and possible indirect effects of defendant race, we are likely to misrepresent its importance (see also Spohn, 2000). As I just noted, there are several possible meaningful “mediators” through which defendant race may affect sentencing outcomes, and some datasets include indicators of these things, so one way the traditional approach could be enhanced is by explicitly modeling direct and indirect effects, drawing attention to the pertinent mediators rather than including them merely as controls that must be included to yield a meaningful estimate of the direct effect of defendant race.

The second, and larger, problematic feature of the typical strategy for addressing how and why race influences sentencing is not as easily remedied, for even when studies attend to possible indirect effects through case attributes or procedures, this research rarely tells us much about the reasons for the noted indirect (or direct) effects of race. Most sentencing studies in the contemporary era are grounded in the “focal concerns” perspective, which encompasses many ideas from the broader race literature on stereotypes, racial attitudes, and the link between perceptions of race and crime. Yet, few studies in the literature on race and sentencing get very close to measuring how or what judges, juries, or prosecutors actually think about defendants of different races, much less how such thoughts might shape their sanctioning decisions (see also Harris, 2009).

More than a decade ago, Bridges and Steen (1998, p. 554) aptly noted that despite extensive research built on the assumption that defendant attributes

shape the decisions of prosecutors, judges, and juries, “little evidence exists on how court officials’ perceptions of offenders influence their classification, assessment, and final recommendations for punishment.” To address this gap, Bridges and Steen (1998) analyzed narratives of probation officers’ written reports on youth offenders for evidence of negative assessments, and then evaluated whether such assessments help to mediate the effect of defendant race on sentence recommendations. Their results suggest that race is significantly associated with negative attributions among probation officers. The evidence is not strongly supportive of the idea that court official perceptions of youth from different racial groups mediate the influence of race on sentencing outcomes (in this case, recommendations), and others have critiqued the conclusions drawn from this study (e.g. Graham & Lowry, 2004), but it nonetheless serves as a good example of the type of research that can help to advance our understanding of how the perceptions of racial minorities held by legal decision-makers may influence sentencing outcomes. There are, of course, other good examples in the literature of studies that inspect more closely the thoughts and feelings of courtroom decision-makers (e.g. Eisenstein, Flemming, & Nardulli, 1988), but the typical quantitative study of sentencing does not advance significantly our understanding of why and how race might shape sentencing decisions.

Evaluating Policies

A final meta-goal I have associated with the so-called modal approach to race and sentencing is the evaluation of policy interventions geared toward modifying observed or assumed racial disparities. On the plus side, there are a growing number of studies that assess changes in racial sentencing disparities within specific states and at the Federal level (Everett & Wojtkiewicz, 2002; Gorton & Boies, 1999; Hofer, 2007; Koons-Witt, 2002; Miethe & Moore, 1985; Schanzenbach, 2005; Ulmer et al., 2010; United States Sentencing Commission, 2010; Wooldredge, 2010; for a succinct review, see Engen, 2009). To the extent that the problems noted herein with respect to validly estimating racial disparity at sentencing in the first place are relatively invariant across short periods, which seems like a plausible assumption, these studies can provide meaningful assessments even in the presence of significant questions of validity. Unfortunately, assessments of policy effects in research on race and sentencing are relatively rare (Engen, 2009). The vast majority of studies on race and sentencing are largely disconnected from public policy. Though this is not inherently problematic or undesirable since there are several legitimate motivations for studying the link between race and sentencing, this area of research seems especially ripe for inviting rigorous policy analysis (Tonry, 1995), and thus it would be beneficial if future studies within the modal research paradigm pursued such themes more routinely.

Redirecting Research on Race and Sentencing

Should we abandon the modal research approach of estimating race differences among convicted defendants? Though some of the scholars I interviewed favored this outcome, the majority view was that we should not abandon the effort, but instead we should strive to improve it and, importantly, to supplement it with a variety of other approaches. Doing so would enrich our capacity for deriving valid answers to the question of whether there are significant racial disparities in sentencing decisions, uncovering whether any observed disparity involves discrimination of some form (e.g. disparate treatment, disparate impact, or both) or arises for other reasons (e.g. by stimulating focal concerns), and providing more meaningful analysis of specified policies.

Enhancing Research on Detecting Racial Disparities

Our ability to detect meaningful racial disparities in sentencing outcomes based on the analysis of archival data on convicted defendants would be enhanced to the extent that we borrow more liberally from other areas of study. Interestingly, we do not have to look far to find some straightforward ways to improve our efforts. The methodological limitations of the modal approach reviewed above have been central to studies of racial bias in police stops and searches (e.g. Ridgeway, 2007) and, as it turns out, there also is a significant gap in the methodological rigor between the modal sentencing study of noncapital cases (the focus of this paper) and studies that focus on the application of death sentences (e.g. Baldus & Woodworth, 2003). Paternoster and Brame (2008) provide an excellent overview of the most pertinent methodological issues. They point out the potential significant biases that can emerge when trying to estimate group disparities from standard regression-based modeling of case level data, and outline some of the other more suitable approaches that have been used to model race effects on charging and sentencing in capital cases, including a multistage regression framework that has been applied by Baldus and colleagues (e.g. Baldus, Woodworth, Zuckerman, Weiner, & Broffitt, 1998) and different forms of propensity score matching (e.g. Berk et al., 2005). Some recent research that focuses on the role of juvenile waivers to adult courts provides a nice example how propensity score matching can enhance the capacity to make group comparisons in sentencing research (Kurlychek & Johnson, 2010), but I am not aware of any research that has supplemented the typical regression-based approach with such methods. It would be refreshing to see the modal approach to studying race and sentencing enhanced by adopting alternative estimation procedures for identifying group differences.

Beyond implementing enhancements to current methods of group comparison in sentencing studies, however, it would be worthwhile to borrow more directly from lessons learned in other social science domains. Scholars of housing, labor, and consumer credit markets, for example, have long-supplemented regression-based analyses of nonexperimental data with a variety of other approaches that would be interesting to consider in the area of sentencing. In these other research areas, both laboratory and field experiments have been instrumental for advancing understanding of whether there are meaningful group disparities in specified conditions or outcomes. Our confidence in findings from the typical nonexperimental study that has dominated the research landscape over the past three decades would be bolstered by a greater investment in these kinds of studies in the areas of race and sentencing. Laboratory experiments of sanctioning practices were at one time quite prominent as a tool for understanding how defendant (and other) attributes shaped punishment assessments, and such work remains vibrant in studies of mock juries (Sommers, 2007; Sweeney & Haney, 1992). However, given the relatively rare occurrence of jury trials in the overall sentencing process, it would be useful to expand this work to other settings and strategically targeted legal actors (e.g. prospective members of the legal profession, such as law students, as well as actual members of different court communities). The latter possibility moves experimental sentencing research into the field, something that to my knowledge has not been done extensively.

What types of research along these lines might be pursued? One possibility that about half of the sentencing scholars with whom I spoke mentioned was to conduct field experiments of various sorts. Though defendant race cannot in practice be experimentally manipulated, as others have pointed out the perceptions of people who evaluate members of different racial groups can be randomized (Paternoster & Brame, 2008). Again, if we look to other areas of study, we see a long history of efforts that capitalize on this feature in field experiments designed to estimate racial disparities in outcomes such as hiring and lending decisions, interactions in housing markets, and a variety of other outcomes (e.g. Goldin & Rouse, 2000; Pager, 2007; Turner & Skidmore, 1999; Yinger, 1995). Closer to home, Paternoster and Brame (2008, pp. 979-980) suggest in the context of capital cases that although so-called "audit" or "paired-testing" designs have not been implemented yet to study race and sentencing, it might be possible to compare outcomes across cases in which decision-makers are "racially blind," and "it is not inconceivable to conduct an actual experiment in which prosecutors would be asked to decide whether they would seek a death sentence after reading a hypothetical case record of the homicide with the perceived race of the defendant and victim experimentally manipulated." Although they are not without flaws (see Pager & Shepherd, 2008), both types of analyses would be quite interesting to pursue in noncapital cases as well and would represent a significant enhancement to current efforts to detect racial disparities in sentencing outcomes.

Enhancing Efforts for Detecting Racial Discrimination and Other Reasons for Observed Racial Disparities

Integrating experimental research, especially field studies, more centrally in the contemporary research agenda on race and sentencing would be useful not only for helping to bolster efforts to identify whether criminal justice decision-makers are prone to racially disparate decisions, they also would provide greater insight into *why* this is the case, whether because of racial discrimination or other reasons. One recent example of the kind of experimental study that represents a good supplement to existing efforts to detect racial discrimination is Rachlinski, Johnson, Wistrich, and Guthrie's (2009) study of unconscious racial bias among trial judges, in which judges were recruited from a variety of contexts and given Implicit Association Tests (IAT) and then evaluated in terms of how unconscious biases affect sanction choices in hypothetical cases. This study and others like it in the area of mock jury decision-making illustrate nicely the kind of research that could enhance current scholarship on race and sentencing (Eberhardt, Davies, Purdie-Vaughns, & Johnson, 2006; Graham & Lowry, 2004; Levinson, 2007; Levinson & Young, 2010). Such studies serve as an example that this type of research is feasible, and they stimulate interest in applying similar approaches to other samples (e.g. prospective law professionals and prosecutors). Additionally, it recasts the study of racial discrimination and sentencing away from a purely adversarial tone, illuminating how discrimination may arise in settings even when subjects are unaware of it and eager to remedy it. Finally, it explicitly attends to identifying specific ways that implicit racial bias can be countered in practice. Thus, an expanded research agenda for race and sentencing that encompassed such approaches may have important policy implications.

A more general need for future research is to explore in greater detail how racial attitudes shape legal decision-making. As noted earlier, by most theoretical accounts race is construed as having largely indirect effects on sentencing outcomes, both in the sense that race shapes final sentencing outcomes through other case attributes (e.g. pre-trial status, legal representation, and the nature of the disposition) and in the sense that race shapes legal decisions through its influence on assessments of risk, perceived dangerousness, blameworthiness, and the like. The former issue could be more routinely addressed within the modal research tradition, but it is rarely done (for exceptions, see Brennan, 2006; LaFree, 1985; Spohn, 1992, 2009; Spohn et al., 1981-1982). Thus, one way the traditional approach could be enhanced is by explicitly modeling direct and indirect effects, drawing attention to the pertinent mediators rather than including them merely as controls that must be included to yield a meaningful estimate of the direct effect of defendant race. Given the existing evidence of *conditional* race effects on sentencing, enhanced attention to indirect effects would be bolstered by explicit attention to the

interplay of both statistical mediation *and* moderation. This will require renewed theoretical consideration about whether proposed meditational processes operate similarly across racial groups, and/or about the implications of hypothesized moderation processes for assumed indirect effects. Expanded efforts along these lines also will require attention to pertinent methodological issues that have received scant attention to-date. Though not focused on sentencing, Preacher, Rucker, and Hayes (2007) provide a highly accessible treatment of the major methodological issues in this regard.

Identifying the intervening theoretical mechanisms that link defendant race to sentencing (or other criminal justice) outcomes is a much more challenging endeavor. The dual foundations of this challenge are careful attention to the attitudes, perceptions, and attributions of legal decision-makers, along with assessments for how these cognitive elements shape decisions. This could be pursued meaningfully using a wide variety of methodologies, including experiments with real and “mock” decision-makers (e.g. Rachlinski et al., 2009; Sommers, 2007), quantitative coding and analysis of case narratives (Bridges & Steen, 1998), and rich qualitative research on how race-based focal concerns shape decisions (e.g. Eisenstein et al., 1988; Harris, 2009; Ulmer 1997). Several of the researchers with whom I spoke specifically identified a need for detailed surveys of criminal justice decision-makers, and they noted that this type of supplementary data would be especially valuable if paired with the more typical quantitative comparisons that predominate in the literature on race and sentencing. Additionally, future research on race and sentencing would benefit from a closer coupling with research on decision-making that is being pursued in other disciplines, including recent contributions on the cognitive foundations and realities of legal decision-making (Simon, 2004) and the role that neurological features may play in how people assess evidence and arrive at sanctioning decisions (e.g. Buckholtz et al., 2008).

Enhancing Efforts for Illuminating the Policy Relevance of Research on Race and Sentencing

Many of the scholars interviewed during this project noted that it would be useful to expand the range of policies explored in case-level sentencing studies. For instance, several states have enacted habitual offender laws during the past two decades (e.g. Arkansas, Florida, Maine, Maryland, North Carolina, Pennsylvania, South Carolina, Tennessee, Virginia, Washington, Wisconsin) and, while mandatory incarceration provisions have been around for some time, the volume of such laws implemented since the early 1990s has increased substantially and exhibits significant variability across states. The precise nature of what their effects might be on racial disparities in sentencing outcomes is ambiguous. On the one hand, mandatory penalties and habitual offender laws tend to be triggered more frequently for offenses and situations that are unequally distributed across racial groups. On the other

hand, controlling for conviction offenses and prior record, mandatory penalties and habitual offender laws could reduce judicial discretion and, by doing so, they could reduce racial disparities. To my knowledge, past research has not examined the influence of mandatory penalties or habitual offender laws specifically on the probability of incarceration or the magnitude of any observed effect of racial disparities on that probability. Thus, this represents an additional area in which existing research on race and sentencing might be enhanced.

Conclusions

I have focused in this paper on providing an overview and critique of the modal approach that has emerged in the literature on race and sentencing (studies of sentencing outcomes among convicted defendants), and on outlining some additional directions for empirical research in this area. My goal was not to provide a final word on these issues, but rather to contribute to discussions on how research on race and sentencing might be improved and expanded. The breadth, depth, and complexity of race, sentencing, and their interconnections almost guarantee that I have left many important issues unaddressed. I will leave it to others to point those out and add to the collective discussion. Here, let me simply highlight two important points that emerge from the present work.

First, although the modal approach to studying race and sentencing has produced important insights, the analysis of race effects on sentencing outcomes among convicted defendants is not well suited by itself for detecting race differences in sentencing, identifying the presence of racial discrimination in sentencing, or advancing knowledge about *why* race may influence legal decision-makers. Put bluntly, there are good reasons to be skeptical of the conclusions drawn from many of the existing studies. But this is not a call for researchers to abandon the modal paradigm. Instead, it is a call for the most pertinent limitations of the approach to be addressed with renewed vigor. The relevance of such studies would be enhanced with greater attention to and better solutions for issues of omitted variable bias, differential sample selection and other forms of unequal group comparisons, and underspecified causal linkages.

Second, there are several ways we can supplement existing analyses of sentencing outcomes among convicted defendants that might better address the underlying meta-goals that appear to motivate this work. Some of the recommendations I outlined above are merely methodological enhancements to how comparisons of defendants of different races might be done; some call attention to the need for multiple methodologies to be used for assessing the thought processes of legal decision-makers; and others call for a more central role of experimental work of various kinds. All of these should be viewed as supplements to rather than replacements of the existing quantitative analysis of archival data that currently dominates sentencing research.

These two themes—improving and expanding research on race and sentencing—are not earth shattering observations, especially to seasoned sentencing scholars who have been around a good while. But as I noted at the beginning of the paper, the demographic transition currently taking place in the field makes it an opportune time to light the way ahead for the large number of smart folks now entering the field. Improving and expanding current research on race and sentencing will take a larger concentration of scholars who are interested in uncovering whether, why, and where racial disparities may be present in the criminal justice system, and who are not satisfied simply with the status quo approach of pursuing these issues. If you are new to the field, consider this a plea for you to consider research on sentencing as one of the focal concerns to which you apply your craft. For those already established, your actions will speak much louder than my words: your leadership role is vital for translating what is outlined herein—which may be well-known recommendations—into *action*.

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260 BAUMER

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Appendix A. Invitation Letter Distributed to Sample of Scholars Who Have Published on Race and Sentencing Outcomes

Dear Professor:

Hello, I hope this note finds you doing well. I am writing to request your input on the past, present, and future of research on race and sentencing. The National Science Foundation (NSF) has funded an upcoming symposium on sentencing, one focus of which is to sketch out some fruitful avenues of future inquiry for race and sentencing research (full details on the symposium can be found at <http://www.albany.edu/scj/SentencingSymposium.htm>). I have been asked to write an essay that focuses on this issue, and I am eager to provide a snapshot of the collective wisdom of those who have been active researchers in the area. In my judgment, your research on race and sentencing has been influential and I would appreciate and benefit from your input. Would you be

able and willing to spare some time over the next few weeks for a brief phone conversation to chat about the following five questions?

1. Much research on race and sentencing seems to be motivated by well-documented disparities in levels of incarceration between blacks and whites; by some estimates, incarceration rates among blacks are seven times greater than incarceration rates among whites. To date, what is your assessment of the accumulated scientific evidence on the meaning of these disparities? In other words, in your judgment what do the observed race disparities in incarceration rates reflect?
2. One of the dominant approaches to studying race and sentencing during the past few decades has been to analyze data on persons who have been convicted of one or more crimes and estimate whether there is a statistically significant race difference in the likelihood of incarceration and/or the sentence lengths received. At a recent American Society of Criminology (ASC) meeting, several members of an ad hoc working group on sentencing research suggested that, although this line of research has made many positive contributions, it had become stalled and that it was time to consider alternative ways of advancing knowledge on the connections between race and sentencing. What are your thoughts on this issue? Specifically, do you agree that the contemporary approach to studying race and sentencing has run its course and, more generally, what do you see as the major strengths and weaknesses of this approach?
3. In your judgment, is there any ongoing research on race and sentencing that you see as particularly innovative?
4. What, if any, current research on race and sentencing do you see as highly relevant to policy-makers?
5. As you think about the future on race and sentencing, what strikes you as some useful new directions that researchers interested in race and sentencing might pursue?

I know your time is precious, so I promise to keep our phone conversation brief, focusing on your general sense of these issues rather than an exhaustive account. Would you kindly let me know by replying to this e-mail, indicating when and at what number it would be convenient to call and get your input on the above mentioned issues? If you are not in a position to speak briefly by phone, I would very much appreciate your responses to the above listed issues via e-mail. Either way, your comments will not be linked to you in any way during the course of this research or made public with reference to your name. With your permission, though, I would like to aggregate your thoughts on these issues with the input I get from others to characterize the overall sense of the research community.