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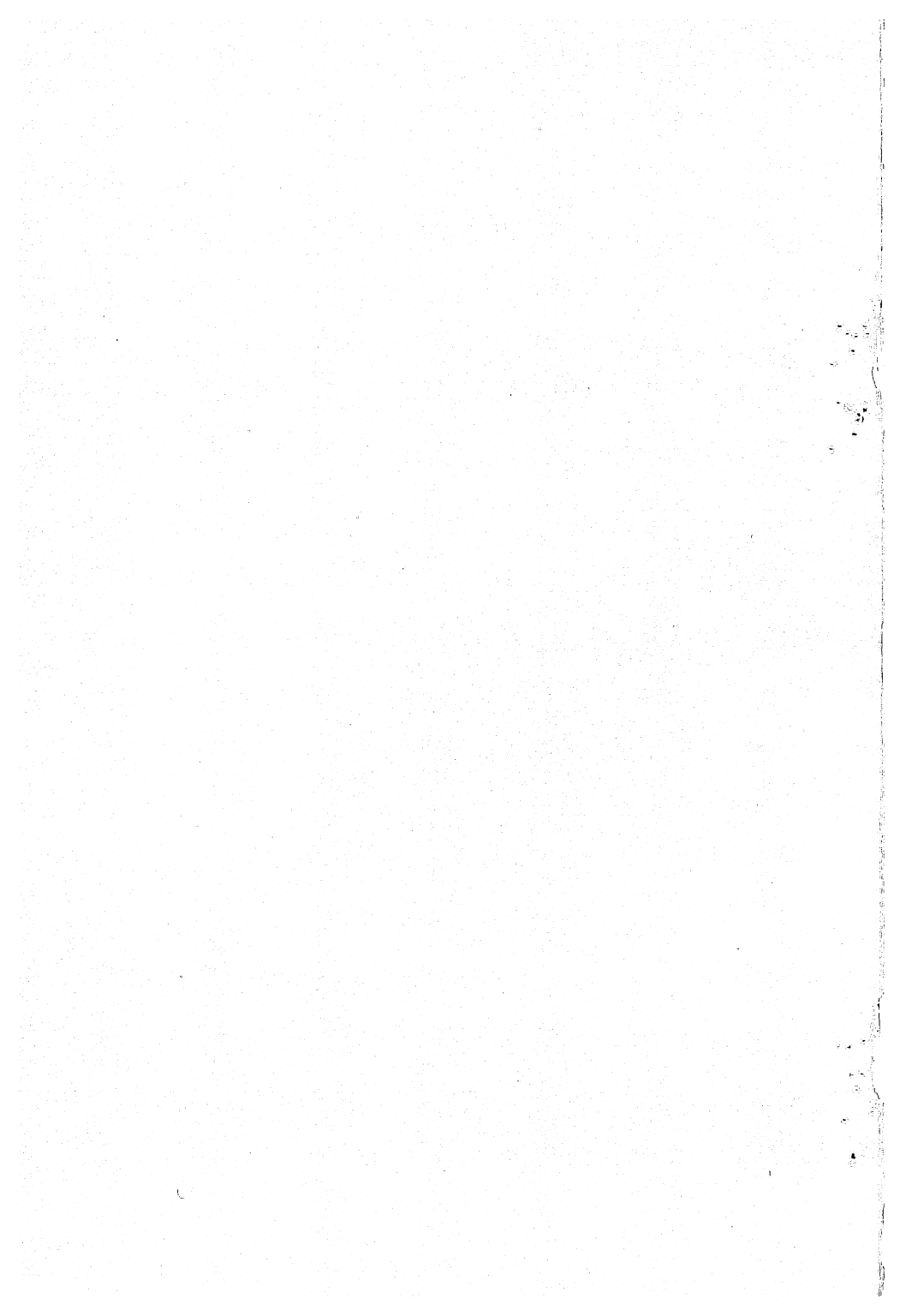
# Sentencing in the Federal Courts: Does Race Matter?

## The Transition to Sentencing Guidelines, 1986-90

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# **Sentencing in the Federal Courts: Does Race Matter?**

**The Transition to Sentencing  
Guidelines, 1986-90**

*Summary*

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## **Overview of Findings**

This is the summary of a study that examined racial and ethnic disparities in sentences imposed on Federal offenders before and after implementation of the sentencing guidelines authorized by the Sentencing Reform Act of 1984 and the mandatory minimum imprisonment provisions of the Anti-Drug Abuse Act of 1986. Patterns in sentences for whites, blacks, and Hispanics were analyzed statistically by accounting for various characteristics of offenders and their crimes that may be correlated with race or ethnicity, and by simulating the sentences that would have been imposed under alternative sentencing schemes.

The study's major findings are as follows:

- During 1986-1988, before full implementation of sentencing guidelines, white, black and Hispanic offenders received similar sentences, on average, in Federal district courts.
- Among Federal offenders sentenced under guidelines from January 20, 1989, to June 30, 1990, there were substantial aggregate differences in sentences imposed on white, black, and Hispanic offenders.
  - During this period, 85% of Hispanic offenders and 78% of black offenders were sentenced to imprisonment, compared with 72% of white offenders.
  - On average, black offenders sentenced to prison during this period had imposed sentences that were 41% longer than for whites (21 months longer). For incarcerated Hispanics, the average imposed sentence did not differ significantly from the average sentence for whites.

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- Nearly all of the aggregate differences among sentences for whites, blacks, and Hispanics during this period can be attributed to characteristics of offenses and offenders that current law and sentencing guidelines establish as legitimate considerations in sentencing decisions.
  - Some characteristics of offenses or offenders that are correlated with race or ethnicity strongly influence sentences under current Federal law and sentencing guidelines. Modifications of specific laws and/or guidelines would essentially eliminate the racial/ethnic differences, as detailed below.
  - The main reason that blacks' sentences were longer than whites' during the period from January 1989 to June 1990 was that 83% of all Federal offenders convicted of trafficking in crack cocaine in guideline cases were black, and the average sentence imposed for crack trafficking was twice as long as for trafficking in powdered cocaine. Excluding offenders convicted of trafficking in crack cocaine, the remaining difference in length of incarceration sentences imposed on blacks and whites was 13 months.
  - White, black, and Hispanic offenders convicted of trafficking in crack cocaine differed in a number of ways, including the amount of drug sold, the seriousness of the offenders' prior criminal records, whether or not weapons were involved (and whether there were secondary offenses of conviction for firearms offenses), whether offenders pleaded guilty rather than went to trial, and whether charges were reduced in exchange for a guilty plea. *Within the category of crack trafficking* our statistical analyses estimated that these differences accounted for all of the observed variation in imprisonment sentences.
  - Excluding offenders convicted of trafficking in powdered or crack cocaine from the totality of offenders sentenced under the guide-



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lines, the remaining difference in the length of incarceration sentences imposed on blacks and whites for all other offenses was 7 months. This residual difference is explained by characteristics of offenders convicted for bank robbery and Federal weapons offenses.

- Mandatory minimum sentences for trafficking in a given weight of crack are the same as minimum sentences for trafficking in 100 times the same weight of cocaine powder. If legislation and guidelines were changed so that crack and powdered cocaine traffickers were sentenced identically for the same weight of cocaine, this study's analysis suggests that the black/white difference in sentences for cocaine trafficking would not only evaporate but would slightly reverse.
- If, as an alternative policy change, the mandatory minimum sentences for cocaine trafficking were to remain unchanged, but the guidelines were to be revised so as to require no more than the mandatory minimum specified by law, the observed 30% longer sentence for black cocaine traffickers would, according to this study's analysis, have been reduced to 11% longer sentences.

### **Details of Aggregate Patterns**

From 1986 through 1988, just before full implementation of sentencing guidelines authorized by the Sentencing Reform Act of 1984 (effective for offenses committed beginning November 1, 1987), 53% percent of white as well as black offenders who were not subject to the Act's provision received prison sentences. Those sentences were roughly comparable in length: a maximum of 51 months, on average, for whites, and 55 months for blacks. Hispanics, on the other hand, were more likely to be imprisoned (69%), but their maximum imprisonment sentences were identical to those imposed on whites (51 months, on average).

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After the implementation of sentencing guidelines and new mandatory minimum sentences in the Federal district courts, differences in the average sentences imposed on whites, blacks, and Hispanics became more pronounced. Sentences received by black and Hispanic Federal offenders in guideline cases were harsher, on average, than those imposed on whites. Seventy-eight percent of all black offenders and 85% of Hispanic offenders who were convicted of Federal crimes during this period and were subject to the Act's provisions were sentenced to incarceration, while 72% of the whites were so sentenced. For those sentenced to prison, blacks had the longest average prison sentence: 71 months as compared with 50 months for whites and 48 months for Hispanics.

On the surface, at least, this pattern seems contrary to what one would expect following implementation of sentencing guidelines.

### **Hypotheses Tested in the Study**

The observed aggregate difference in sentences imposed on whites, blacks, and Hispanics could exist for several reasons, and do not necessarily indicate the presence of unwarranted disparities. One possibility that we explored is *whether the widening differences observed in 1990 at the aggregate level—for all whites, all blacks, and all Hispanics combined—reflect changing proportions of blacks and Hispanics convicted of offenses that are more severely punished*. If this were true, the larger spread between average sentences imposed on blacks, whites, and Hispanics in 1989-1990, as compared to 1986, would have been caused by an increasing concentration of blacks and Hispanics convicted of these more heavily punished offenses rather than by unwarranted disparities.

Another possibility that we explored is *whether the guidelines failed to have the desired effect of producing greater uniformity*. The guideline ranges leave judges some latitude, especially for longer

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prison sentences. Judges may also depart from the ranges but are required to justify such departures in writing. Judges' sentencing decisions may thereby be influenced by a variety of considerations not deemed legitimate by Congress or the Sentencing Commission, such as the offender's racial or ethnic background. If this were true, whites, blacks, and Hispanics could receive sentences below or above the prescribed guideline ranges at different relative frequencies. Still a third possibility that we explored is *whether the guidelines themselves created racial or ethnic differences in sentencing*. The Sentencing Reform Act of 1984 mandated that the U.S. Sentencing Commission design a system of guidelines that scale the severity of the recommended sentences to the gravity of the crime and the seriousness of the offender's criminal history. The resulting guidelines—a matrix that grades offense gravity down one side and seriousness of the offender's criminal history across the other—could partially disadvantage blacks or Hispanics by giving greater leverage to those characteristics that they score worse on.

Finally, we examined *whether the differences were outgrowths of mandatory minimum sentencing provisions* that began to be passed in 1984, and were expanded in 1986 and 1988. This could happen if these laws were applied to black and Hispanic offenders more often than to whites.

### **Relationship of This Study to Other Evaluations of Sentencing Guidelines**

Other studies about the effects of the guidelines on Federal sentencing practices include Heaney (1991), Karle and Sager (1991), Katzenelson and McDanal (1991), U.S. Sentencing Commission (1991), and General Accounting Office (1992). These relied upon different sources of data, used a variety of analytic approaches, and reached varying conclusions. Because a number of these studies either framed their investigations in ways which did not directly

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address the question of racial and ethnic disparity, or examined only a few Federal jurisdictions, or because the analyses in them suffered from methodological shortcomings, we chose to develop our own strategy for evaluating the effects of the guidelines on the uniformity of sentences given to the three principal racial and ethnic categories of Federal offenders: non-Hispanic whites, non-Hispanic African-Americans, and Hispanics of whatever race.

*The study was not an evaluation of judicial compliance with the guidelines.* It attempted to explore the effects of the express content of the guidelines on racial and ethnic disparity, without assuming that each factor and weighting chosen by either the Sentencing Commission or Congress is necessarily legitimate. The study aimed to understand the causes of observed racial differences without casting value judgments, and without accepting or rejecting any part of the process. Earlier studies that evaluated judicial compliance with guidelines in force at the moment measured the variation of sentences around the calculated (or approximated) guideline range for each offender. In general, these studies found little, if any, evidence of systematic judicial discrimination by race or ethnicity.

In this study, our focus was specifically limited to sentencing outcomes. There are many other questions we did not attempt to answer. We did not investigate the possibility of bias in legal processes leading to a defendant's conviction. It is possible that there exist biases in guilty plea negotiations or in charging practices, but we did not analyze these decisions. For our purposes, the conviction charges were considered as "givens." Nor did we examine time actually served in prison following the sentencing decision. While the study included nearly all of the variables recognized as appropriate for consideration in determining sentences, plus many whose use is prohibited or discouraged, a few variables, such as the defendant's pretrial status, the competence of his or her attorney, and the strength of the government's case, were not considered. (Information about these characteristics was not available in the data we analyzed.)

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Moreover, we did not undertake a full analysis of sentencing in *non-guideline* cases to estimate the prevalence and extent of disparities in these decisions.

The study summarized here builds upon research by others and aims to remedy certain shortcomings in some of those studies. To permit generalization, we examined sentences passed on large numbers of offenders convicted in guidelines cases and in preguidelines cases. Our selection of offenders and cases to compare was also designed to yield strong inferences about the effect of guidelines, minimizing biases that may exist in other comparison populations. Rather than relying on simple measures of dispersion that are affected by the reductions in average prison sentences (an artifact of the conversion to “real time” sentencing under the guidelines), we employed models for estimating the amount of variance associated with illegitimate characteristics—especially whether the offender was white, black, or Hispanic. Finally, we attempted to disentangle the effects of guidelines and mandatory minimum sentencing laws on judicial sentencing decisions in guidelines cases.

### **Information Sources**

The period chosen for study spanned four and a half years, from January 1, 1986, to June 30, 1990. All sentences imposed during 1986 and all but a handful in 1987 were governed by the law prevailing prior to passage of the Sentencing Reform Act of 1984. (These cases are called “non-guideline” here.) Because the sentencing guidelines implemented on November 1, 1987, are applicable only to convicted offenders who committed offenses after that date, many of the offenders whose cases reached disposition in the years following November 1987 were not sentenced under the guidelines. Moreover, because some judges questioned the constitutionality of the guidelines, there was uneven compliance with the new law until January 18, 1989, when the U.S. Supreme Court upheld, in *Mistretta v. United States*, the constitutionality of the Sentencing Reform Act of 1984 and

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the guidelines. Consequently, for the purposes of assessing sentencing practices prior to the guidelines' implementation, we examined sentences given in all Federal district courts during 1986 and 1987 to all Federal offenders having non-guideline cases. To assess the effects of the guidelines' implementation, sentences given to all offenders in Federal district courts between January 20, 1989, and June 30, 1990, in guideline cases were examined.

The data used for this study were drawn from the Federal Probation Sentencing and Supervision Information System (FPSSIS). These data files, developed and maintained by the Administrative Office of the U.S. Courts, include information about all offenders convicted in Federal district courts during this period, and contain detailed information about their prior criminal histories; the characteristics of the offenses for which they were being sentenced; their personal, familial, and social backgrounds; and the sentences they received. Because this data set spanned the years preceding and immediately following the implementation of the guidelines, and because it recorded information on offenders and their sentences consistently throughout this period, it is the single best source of data available for practices before and after implementation of sentencing guidelines.

Following June 30, 1990, the U.S. Sentencing Commission assumed responsibility for collecting the type of information previously recorded in the FPSSIS files. However, the types of information collected by the U.S. Sentencing Commission and the categories used to record the information are not entirely consistent with the earlier FPSSIS files, and reporting was uneven in early months of the new data collection system. For these reasons, we did not attempt to extend the analysis of sentencing in guideline cases past June 30, 1990, when the FPSSIS system was changed.

To distinguish the effects of the guidelines' structure on sentencing differences from the effects of judges' compliance with the guidelines, a second data set was used. This special analysis data set had been

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constructed earlier by the U.S. Sentencing Commission for its use in developing the guidelines, and described a randomly selected sample of 10,000 Federal offenders sentenced between October 1, 1984, and September 30, 1985. Information about each of these offenders that appears in FPSSIS data was included in the special analysis data set. The Sentencing Commission augmented these data with information drawn from paper records so that guideline ranges could be simulated for each of these sampled offenders. For our simulation analysis, we adapted a computer program developed by the Commission and the Bureau of Prisons for use with these data.

### **Our Approach to Evaluating Uniformity and Disparity**

Whereas the Sentencing Commission's method of evaluating the effects of the guidelines was to assess the dispersion of sentences imposed for different types of offenses before and after the guidelines' implementation, and the extent to which judges comply with the guidelines (U.S. Sentencing Commission, 1991), our approach did not take the guideline range as the standard against which sentences should be evaluated. Rather, we examined the actual sentences imposed (whether the offender was sentenced to prison or not, and separately, the length of imprisonment term if such a term was imposed), and we considered the guideline range as one constraint among many that may affect the sentencing decision. Judges do not mechanically comply with the guidelines, for some depart from the prescribed range, either by passing sentences above the range or below it.

Moreover, the guidelines specify a minimum and a maximum number of months and thereby permit variation within the range; this variation can be quite large, especially for the most serious combinations of offense severity and offenders' prior criminal record. Substantial racial or ethnic differences may exist even while complying with the guidelines, and there may be systematic racial or ethnic differences in

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the extent to which judges depart from the guidelines. By examining the differences in the actual sentences given to these offenders, regardless of the guideline ranges, we were able to identify potential disparities in sentencing practice. We then considered if differences in guideline ranges account for what may appear to be systematic racial or ethnic differences in sentencing.

In general, our approach was to identify racial and ethnic differences in sentences imposed on offenders convicted of similar types of offenses, and to attempt to account for these differences statistically by holding constant the other differences among whites, blacks, and Hispanics that may explain the differences in sentences.

The Sentencing Commission's own evaluation of variation before and after implementation of the guidelines concluded that the guidelines were reducing unwarranted disparities (U.S. Sentencing Commission 1991). But an evaluation by the General Accounting Office challenged some of the Commission's conclusions (GAO 1992). Neither of these evaluations focused on disparity according to the defendant's race or ethnicity.

### **Did Aggregate Differences in Sentences Result from Larger Proportions of Blacks Convicted of More Severely Punished Offenses in Guideline Cases?**

Part of the difference between sentences imposed on whites and blacks under the guidelines resulted from the larger proportion of blacks convicted of Federal drug trafficking crimes under the guidelines in the 1989-90 period than were convicted in 1986-1988. In 1986, 19% of all blacks convicted in Federal court were convicted of drug trafficking. By the first half of 1990, that percentage had grown to 46%. The numbers of whites convicted of trafficking had also increased between 1986 and 1990, but not as dramatically: from 26% of all convicted whites in 1986 to 35% in the first half of 1990. Because drug trafficking was one of the most heavily penalized



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Federal offenses in 1990, this larger increase in blacks so convicted resulted in their receiving longer average sentences than whites.

To measure more precisely the extent to which the increasing differences in sentences imposed on white, black, and Hispanic offenders in guideline cases stemmed from changes in the mix of crimes for which they were convicted, we analyzed what the average sentences would have been in 1990 if the numbers of offenders convicted of each type of crime had not changed since 1986. This analysis showed that the differences observed in 1990 would have been much narrower if the mix of offenders remained exactly the same as in 1986: 8 months, instead of the 25-month difference actually observed in 1990. This 8-month difference was, however, larger than the 1.6-month difference that existed in 1986.

### **Were Sentences Dissimilar Because Whites, Blacks, and Hispanics Differed in Ways That Were Legitimately Relevant To Sentencing?**

To understand the reasons whites, blacks, and Hispanics received different sentences in guideline cases, we conducted closer analyses of sentences imposed for six types of crimes: drug trafficking, bank robbery, weapons offenses, fraud, embezzlement, and larceny. These six offense categories accounted for 73% of all offenders sentenced in guideline cases in the Federal district courts during 1989 and the first half of 1990, and for 77% of all sentences to prison. In comparing drug traffickers, we examined separately the sentencing of persons convicted of trafficking in heroin, powdered cocaine, crack cocaine, marijuana, and other controlled substances.

Among those convicted of these six types of offenses, we found that blacks, whites, and Hispanic offenders differed in important ways that were legitimately expected to affect a judge's sentencing decision. That is, their crimes varied in gravity, as did their criminal records, even among offenders convicted of the same types of crimes. To

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determine if these differences accounted for the dissimilar sentencing of whites, blacks, and Hispanics, we conducted multivariate statistical analyses of sentencing outcomes. Attention was limited to two aspects of the sentences: (1) a sentence to imprisonment versus any other outcome; and, (2) if an imprisonment sentence was imposed, the length of that imprisonment term. Because many characteristics associated with sentencing outcomes were also correlated with the offender's being white, black, or Hispanic, multivariate statistical models were constructed for each type of crime. These models produced estimates of the extent to which variation in sentences imposed was associated with the offender being white, black, or Hispanic, after holding constant other characteristics that correlated with sentencing outcomes.

### **Drug Trafficking**

Incarceration rates were high for all Federal offenders convicted of drug trafficking (95%), but the rates for white offenders were slightly lower than for blacks and Hispanics (92% for whites, 96% for blacks, and 97% for Hispanics). There was a much larger difference in the length of imprisonment sentences imposed. Whites received sentences averaging 70 months, compared with 96 months for blacks and 68 months for Hispanics. However, virtually all of these dissimilarities were accounted for by differences among charged offenses, rather than by offenders' race or ethnicity.

Black drug traffickers were more likely than either whites or Hispanics to have a conviction offense that included cocaine trafficking—a severely punished offense. Approximately 71% of all black drug traffickers prosecuted in Federal district court in guideline cases during this period were convicted of cocaine offenses, compared with 50% of all white traffickers and 43% of all Hispanic traffickers. Moreover, blacks convicted of heroin trafficking outnumbered whites and Hispanics (although the numbers of all these offenders were very small in comparison to cocaine traffickers). In contrast, the most

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serious conviction offense involved marijuana for only 3% of all black traffickers, compared with 19% of all white traffickers, and 39% of all Hispanic traffickers.

Even though black cocaine traffickers received longer average sentences than either whites or Hispanics (102 months, versus 74 and 96 months, respectively), this resulted in part from the fact that a large proportion of all black cocaine traffickers (27%) were prosecuted for crack cocaine rather than powdered cocaine hydrochloride, the form most commonly sold in the United States. Only small proportions of white and Hispanic cocaine traffickers were prosecuted for crack trafficking: 4% and 3%, respectively. In anti-drug abuse legislation passed in 1986 and 1988, Congress mandated that trafficking in crack be punished much more severely than trafficking in powdered cocaine. The Sentencing Commission and the courts implemented this policy: the average prison sentence imposed in Federal guidelines cases on crack traffickers was 141 months, compared with 79 months for those convicted of trafficking in powdered cocaine.

The higher proportion of blacks charged with crack trafficking was the single most important difference that contributed to the overall aggregate longer sentences imposed on blacks, relative to whites and Hispanics in guidelines cases. As discussed above, the average imprisonment sentence imposed on all black offenders in guideline cases during this period was 41%—or twenty-one months—longer than whites' average sentence. If those convicted of trafficking in crack cocaine are ignored, the black/white difference was smaller: prison sentences imposed on all other blacks and whites differed by 26%, or 13 months.

What happened to blacks under the guidelines, in other words, was that increasingly large numbers of them were being prosecuted and sentenced for an offense that had been singled out by Congress for especially stern punishment—a change in law that occurred at approximately the same time that guidelines came into effect.

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The predominance of blacks in crack trafficking cases does not tell the whole story, however. Even among those convicted of trafficking in this drug, there were some racial/ethnic differences in sentences imposed. Hispanics received the longest average sentences for crack cocaine trafficking (162 months), whites the shortest (130 months), compared with blacks' average of 140 months. However, white, black, and Hispanic offenders differed in a number of ways that were associated with these sentencing outcomes. These included the amount of drug sold, the seriousness of the offenders' prior criminal records, whether or not weapons were involved (and whether there were secondary offenses of conviction for firearms offenses), whether offenders pleaded guilty, thus avoiding trial, and whether charges were reduced in exchange for a guilty plea. Our statistical analyses estimated that these differences accounted for all of the observed variation in Federal imprisonment sentences within the category of crack trafficking.

Among those convicted of trafficking in powdered cocaine, Hispanic offenders received prison sentences averaging one-third longer than either black or white offenders (95 months compared to 73 and 71 months, respectively). A linear model that takes into account the quantity of drugs sold, the applicability of mandatory sentences, and other facts reported in the data, explains most of this difference. The relatively small remaining difference (10%) may not be meaningful even though it is statistically significant. Because these particular estimates are based on more than 5,000 observations, even relatively small differences may be reported as statistically significant. Furthermore, additional refinements to the model or the data may reduce the indicated residual effects even further. Any finding that is sensitive to minor changes in model specifications such as these must be interpreted with caution.

Both types of cocaine trafficking combined accounted for most of the dissimilarities in sentences imposed on whites and blacks. Among those convicted for all other types of Federal crimes, imprisonment

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sentences imposed on blacks averaged seven months—or 16%—longer than sentences imposed on whites. This difference was narrower than the 41% difference in length of imprisonment terms imposed on all offenders, including those convicted of cocaine trafficking. The remaining difference was explained by the dissimilar sentences imposed on whites and blacks convicted of bank robbery and Federal weapons crimes.

### **Bank Robbery**

Among black, white, and Hispanic bank robbers there was no significant difference in the odds of receiving a prison sentence; nearly all persons convicted of this crime went to prison in guideline cases. Blacks, however, received longer sentences on average: 105 months in prison, compared with 90 months for whites and 92 months for Hispanics.

Blacks convicted of bank robbery differed from whites and Hispanics in a number of ways that were associated with receiving longer sentences. They were, for example, somewhat more likely to have been previously convicted of bank robbery, were more likely to have used a weapon in the robbery, and were more likely to have injured somebody. These differences accounted in large part for the stiffer sentences imposed on blacks for this crime. However, among the subset of bank robbers who had one or two prison sentences on their record, blacks fared worse than other robbers. Once the effects of other measured differences were accounted for, their sentences were an estimated 12% longer.

### **Weapons Offenses**

Upon conviction for Federal weapons offenses, blacks and Hispanics were both sentenced to prison more frequently than whites and for longer periods of time. Ninety-one percent of all blacks went to prison, compared to 84% of all Hispanics and 78% of the whites.

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Blacks also received longer prison sentences: an average of 56 months, compared with 42 months for Hispanics and 36 months for whites. Although some of these differences could have resulted from whites, blacks and Hispanics differing from one another in ways that mattered at the point of sentencing, not all could be so explained. Controlling for various other differences among offenders in multivariate statistical models, the estimated odds of imprisonment for blacks and Hispanics were about twice that for whites.

Among those sentenced to prison, most of the dissimilarities in average length of imprisonment terms appear to be accounted for by differences among whites, blacks, and Hispanics in characteristics associated with getting longer rather than shorter terms. However, even when statistical controls were imposed for these relevant differences among offenders, sentences were an estimated 19% longer for blacks, compared to whites.

### **Fraud**

Forty-eight percent of all those convicted of fraud in guideline cases were white, 32% were black, and 20% Hispanic. There was some difference in the rates of incarceration for Hispanics: 53% of all Hispanics convicted of fraud were sentenced to prison, versus 59% of all blacks and 59% of all whites. However, Hispanics received incarceration terms that were shorter, on average, than others. These differences were entirely explained by characteristics of the offense and offender.

### **Larceny**

Among those convicted of Federal larceny offenses in guideline cases, whites were the least frequently sentenced to prison (42%) but for the longest periods of time, on average (20 months). Hispanics were the most frequently sentenced to prison (52%) but for the shortest times (14 months). Forty-seven percent all blacks convicted of Federal larceny offenses were sentenced to prison, for an average of 16 months.

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Characteristics associated with both the severity of sentence and the offender's race/ethnicity appear to have accounted for all the observed differences in sentences, except for the higher odds of imprisonment for blacks. After statistical controls were imposed to account for other differences, blacks were found to have 50% to 60% higher odds of receiving a prison sentence than whites.

### **Embezzlement**

The rates of imprisonment for Federal embezzlement offenses were nearly the same for all three populations of offenders, although blacks had imposed sentences that averaged 42% shorter than whites' sentences, and Hispanics' sentences were 15% shorter than whites'. There were differences in the gravity of crimes committed by blacks, Hispanics, and whites—the dollar value embezzled by blacks was lower than for whites, for example—and these differences appear to account for the dissimilar sentences imposed.

### **Did Guidelines Themselves Enlarge the Differences in Sentences?**

In 1989 and the first half of 1990, the aggregate differences in sentences imposed on whites, blacks, and Hispanics were wider than they were in non-guideline cases disposed during 1986-1988. Some researchers (e.g., Petersilia and Turner 1987) have raised the possibility that sentencing guidelines (in general) have different impacts upon blacks, whites, and Hispanics because of the weight given in many guideline systems to characteristics that may be correlated with race or ethnicity—such as the offender's prior record. The findings discussed above—that most of the dissimilar sentencing under the guidelines resulted from other legitimately relevant differences among offenders—do not preclude the possibility that the guidelines enlarged the gap between penalties applied to these different populations.

To explore the possibility that the decision rules embedded in the guidelines generated the differences observed among offenders in

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1989-1990, we conducted a simulation. Sentencing outcomes in cases disposed before implementation of the guidelines were examined, and we then simulated what these sentences would have been if they had conformed to guidelines that were in existence in 1989-1990. If differences in simulated guideline sentences were more pronounced than the differences in actual sentences imposed, one would have to conclude that the decision rules in the guidelines themselves made the difference.

For this analysis, we modified a computer program developed by the U.S. Sentencing Commission and the Bureau of Prisons. Guideline ranges were simulated for offenders in the Sentencing Commission's special analysis data set. They were a randomly drawn sample of offenders sentenced in Federal district courts between October 1, 1984, and September 30, 1985—a time before the guidelines had been created by the Sentencing Commission. We then simulated sentences that would have been imposed if judges had always chosen the sentence at the midpoint of the guideline range that was later established based on the characteristics of the offender and the offense.

Comparing these simulated sentences for whites, blacks, and Hispanics, we found that the differences in the average sentences imposed on these offenders would have been narrower for nearly all types of crimes, compared to the differences observed in actual sentences. In other words, this test provided no evidence that the decision rules embedded in the guidelines affected blacks or Hispanics more adversely than whites. We were not, however, able to simulate the sentencing of crack cocaine traffickers under the guidelines, because the difference between crack and powdered cocaine had no legal significance in 1984-1985, and the data we analyzed did not distinguish the two drug types.

If the guidelines themselves did not generally increase the dissimilarities in sentencing, what did? One possibility is that the guidelines themselves were not tightly constraining, and that uneven—and



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perhaps even biased—compliance with them produced the growing gap between sentences imposed on whites and blacks. To test this hypothesis, we compared the guideline ranges for white, black, and Hispanic offenders convicted between January 20, 1989, and June 30, 1990. We then computed the averages of the midpoints of these ranges for each of several different categories of offenders: whites, blacks, or Hispanics, all of whom were further divided according to their principal offense of conviction. Analysis was limited to those offenses we studied intensely: cocaine trafficking, bank robbery, weapons, fraud, larceny, and embezzlement.

If judges had complied uniformly with the guidelines and imposed sentences at the guideline midpoints, the differences among whites, blacks, and Hispanics would have been comparable to the differences observed in actual sentencing outcomes. For all whites and blacks combined, the aggregate average midpoint guideline sentence for these six categories of offenses would have been identical to the average sentence actually imposed. Average sentences imposed on Hispanics would have been longer, and the difference in average sentences imposed on whites and Hispanics would have been larger, consequently. In short: it appears that the causes of the racial/ethnic differences in sentencing for these offenses are to be found in other differences among white, black, and Hispanic offenders and their crimes.

### **The Impact of Mandatory Minimum Sentencing Laws and the Guidelines' Rules for Punishing Crack Traffickers**

In the Anti-Drug Abuse Act of 1986, Congress for the first time distinguished between crack and powdered cocaine and established much tougher mandatory minimum imprisonment sentences for the former. Persons convicted of trafficking in (or even possessing with the intent to distribute) 50 grams or more of crack would be subject to no less than ten years in prison, or no less than twenty if they had

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been convicted of another drug crime in the past. Persons convicted of trafficking in 5 or more grams, but less than 50, faced minimum sentences of five years, or ten for second offenders. These punishments are identical to the minimum terms required of offenders convicted of selling 100 times that amount of powdered cocaine. To accommodate the principle of proportionality, the Sentencing Commission established additional breakpoints not specified in the legislation. For example, the guidelines range for a first offense of trafficking in 5 grams of crack is just over 60 months (namely, 63 to 78 months). The Sentencing Commission established additional breakpoints at 20 grams, at 35 grams, and at six weights above 50 grams. At each level the guidelines sentence is the same as that for 100 times the weight of cocaine powder.

### **Simulated Policy Alternatives**

As discussed above, the result of Congress' decision to impose much more serious penalties for crack trafficking than for other types of cocaine resulted in blacks receiving much longer sentences, because the vast majority (83%) of all offenders prosecuted for crack in the Federal courts were black. To estimate the effects of these laws, and the way the Sentencing Commission incorporated them into the guidelines, we conducted two simulations of possible legislative and guideline modifications. The first assumed that the sentencing of crack and powdered cocaine trafficking would be the same for the same weight, and that sentencing of crack offenders would strictly follow the guidelines pertaining to powdered cocaine. The second simulation tested what would have happened if judges had conformed strictly with the mandatory minimum sentencing requirements in the statute, but that the guidelines did not vary the recommended sentences above these mandatory minimum terms for intermediate weights of cocaine.

If crack and powder cocaine trafficking were treated identically, average sentences imposed on crack traffickers would have been

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much shorter than they actually were: 47 months in prison, rather than the 141-month average actually observed. Sentences for blacks, whites and Hispanics would each have been about two thirds shorter. As a result, the dissimilarities in sentences imposed on black and white cocaine traffickers (both types of cocaine together) would have diminished dramatically. The average sentence for black cocaine traffickers would have been 10% shorter than whites' average sentence, rather than the 30% longer average actually observed.<sup>1</sup> This change would have halved the difference in sentences imposed on all white and black offenders convicted of all crimes in Federal district court during this period. That is, rather than blacks receiving sentences that averaged 41% longer than whites' for all Federal offenses combined, their sentences would have been 22% longer.

Had the Sentencing Commission merely adopted the plateaus established for mandatory minimum sentences in the statute, and not provided graduated ranges above and below these levels, the difference in white and black sentences would also have narrowed, but not quite as dramatically. For trafficking in any kind of cocaine, blacks' sentences would have averaged 11% longer than whites', rather than the 30% longer average actually served.

### **Conclusion**

The guidelines themselves appear not to have created the larger gap in sentences imposed on whites, blacks, and Hispanics in guideline cases disposed during 1989 and the first half of 1990. The important exceptions to this are the mandatory minimum sentencing laws passed for drugs, especially crack cocaine, and the particular way the Sentencing Commission arrayed guideline ranges above the statutory

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<sup>1</sup> These comparisons exclude offenders for whom the form of cocaine could not be determined.

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minima. These two policy decisions resulted in blacks receiving longer sentences, on average, than whites. Sentencing differences that did not result from tougher sentencing of crack traffickers generally flowed from the fact that whites, blacks, and Hispanics convicted under other Federal laws were dissimilar in ways that were relevant to sentencing decisions.

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The authors are responsible for all the study's findings and interpretations. The information in the study does not necessarily represent policies or positions of the Bureau of Justice Statistics.

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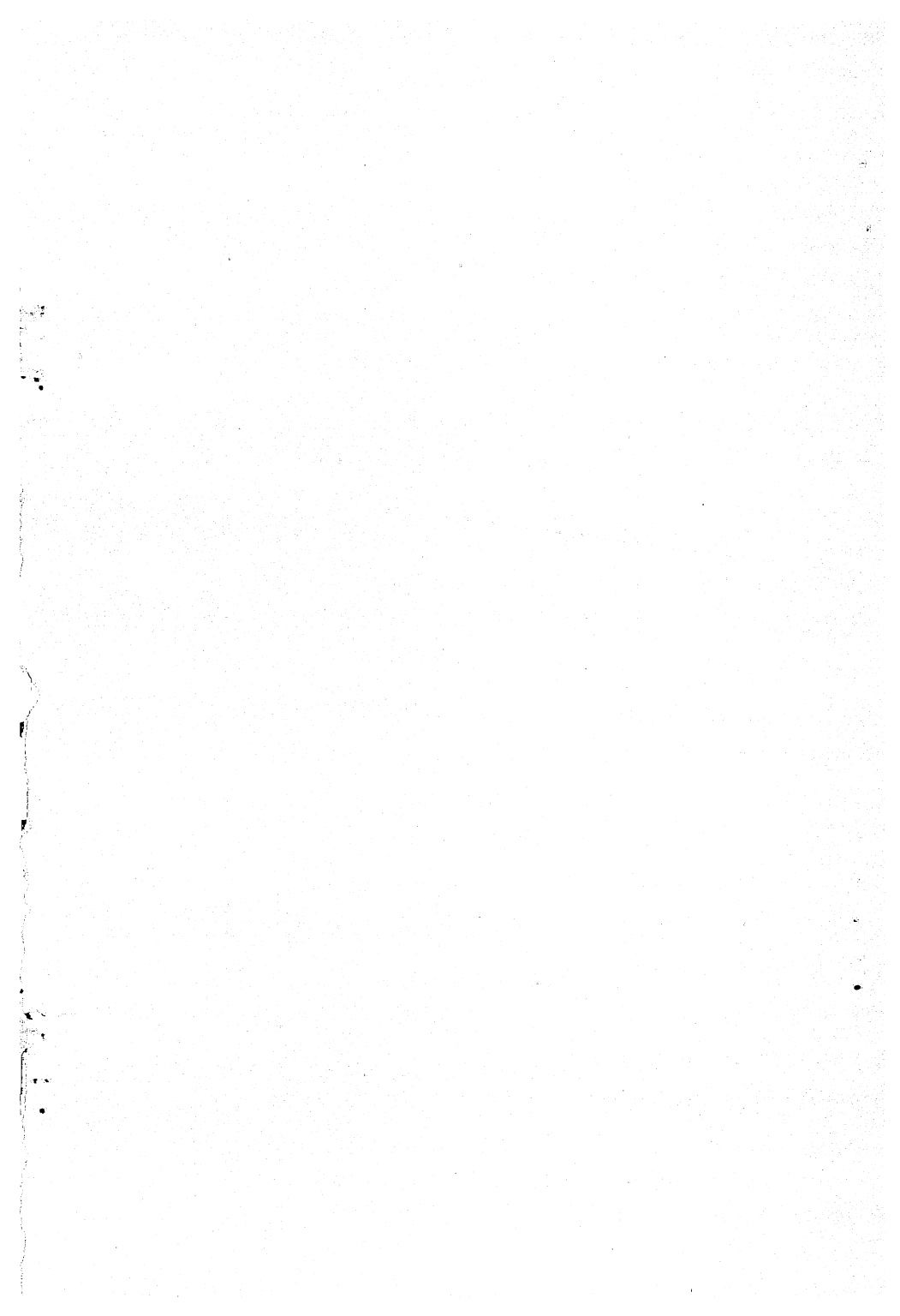
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