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Pain and Race: A New Understanding of Race-Based Sentencing Disparities

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ARTICLE

**PAIN AND RACE:
A NEW UNDERSTANDING OF RACE-
BASED SENTENCING DISPARITIES**

MARGARETH ETIENNE*

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ABSTRACT

As recently as the 19th century, it was widely believed that racial groups varied in their physiological experiences to pain.¹ Prominent medical experts argued that whites were presumed more sensitive to pain than African-Americans and Native Americans.² I argue here that the perception of a racially based insensitivity to pain persists among judicial decision-makers and may be in part to blame for the intractable problem of racially disparate sentences in American criminal courts. This article re-conceptualizes a familiar debate by bringing together medical research in the area of pain treatment and legal research in the area of race and sentencing. It considers broadly the implications of our apparent de-sensitivity to the pain of racial and ethnic minorities.

INTRODUCTION

A growing literature has emerged chronicling the problem of race-based disparity in sentencing and the failure of judges, lawmakers, and others to arrest it. This literature has hypothesized various explanations for this disparity: institutional bias, structural biases in sentencing policy and procedure, the correlation between race and extra-legal factors such as poverty, higher rates of criminality among racial minorities, and racial discrimination. Given the lack of consensus over the reasons for the disparity, strategies to eliminate unwarranted disparities have to date proven unsuccessful. Significant sentencing disparities persist among criminal defendants of different races, and understanding the reasons for this remains one of the most studied questions in criminology. Even the most ambitious sentencing reform of the century—the move from indeterminate to determinate sentencing that has dominated state and federal criminal courts—has failed to resolve or significantly ameliorate the problem of racial inequity in sentencing. We have yet to figure out why.

Various theories have been posited to explain the problem of race-based sentencing disparities. Without addressing all the other explanations and hypotheses that have been offered elsewhere, I present in this paper a novel perspective on an old criminal law problem. Borrowing from a recent spate of the healthcare research on pain treatment, I consider the enterprise

1. Kathryn E. Lasch, *Culture and Pain*, 10 *Pain Clinical Updates* 5 (2002) (citing Elizabeth B. Clark, "The Sacred Rights of the Weak": *Pain, Sympathy, and the Culture of Individual Rights in Antebellum America*, 82 *J. Am. History* 463 (1995)).

2. Native Americans in particular were seen as "virtually impervious to physical trauma." *Id.*

of sentencing as it relates to the assessment and imposition of pain. My thesis is simple: psychologists and other social scientists now realize that individuals have different capacities for perceiving pain and identifying pain in others. Beyond this, psychologists have also found that race and ethnicity are significant factors in pain perception and treatment. Specifically, people perceive the pain experienced by people who are ethnically or racially “other” *differently* than they perceive the pain of people in their own ethnic and racial groups. Arguing that the enterprise of sentencing is essentially the state-sanctioned imposition of pain, I contend that the developing scholarship on pain research has tremendous implications for understanding disparate sentences in the criminal justice system.

This article is modest in its purpose. I aim to make the case for using the pain disparity scholarship (1) as a model in thinking about race-based sentencing disparity and (2) in framing and prioritizing future research on the subject. My argument proceeds in four parts. In Part I, I provide a brief review of the existing scholarship on race-based sentencing disparity. The claim of racially motivated disparities in sentencing is one of the most studied, yet under-resolved, questions in criminology. Most of the research falls into two primary categories: researchers either seek to verify the existence of race-based disparity or, having accepted the disparity as true, attempt to determine its causes. The focus of Part II is how pain research may help us gain a better grasp of the enterprise of sentencing. I explore the enterprise of sentencing and how it relates to the assessment and imposition of pain. In Part III, I examine the connection between pain and race. In particular, I focus on how studies on pain from the healthcare field can be marshaled to shed light on the problem of race-based sentencing disparities. These studies are consistent with the historical evidence on the treatment of minorities. In Part IV, I briefly consider the wide-ranging implications of this new theory for understanding sentencing disparity, leaving a truly comprehensive treatment of these implications for future research. I conclude that additional qualitative research is needed to fully validate the pain theory and to explore responsive solutions for racial disparity in sentencing.

I. THE INTRACTABLE PROBLEM OF RACE-BASED DISPARITIES IN THE CRIMINAL JUSTICE SYSTEM AND POSSIBLE EXPLANATIONS

It is no longer news to anyone that the incarceration rate in the United States is extraordinarily high and steadily climbing. Nor is it novel that this high incarceration rate impacts racial minorities disproportionately.³ The statistics are staggering. The often-cited report from the Sentencing Project, a non-profit group critical of the incarceration trend, employs government

3. Marc Mauer, *Why Are Tough on Crime Policies So Popular?*, 11 *Stan. L. & Policy Rev.* 9, 15 (1999) (“one of the most troubling features of the wave of harsh sentencing policies and prison-building over the past quarter century is its profound impact on the African-American community”).

data to show that one in three African-American males in their twenties are under the control of the criminal justice system.⁴ In some cities, the ratio is closer to one in two⁵ but the trend is clearly national. Although African-Americans represent approximately 13% of the American population, they consist of 43% of state and federal prisoners.⁶ Minority youth are also over-represented in the juvenile justice system. According to a 1995 study, although minorities make up 32% of the nation's youth population, they account for roughly 68% of the youths institutionalized or incarcerated.⁷ The bottom line is that African-Americans face a significantly higher probability of being prosecuted and imprisoned than whites in almost every type of crime.⁸ Numerous theories and hypotheses abound to explain this fact. I consider the most common explanations below.

A. *Blacks Are Imprisoned More Because They Commit More Crimes*

One argument is that the rate of criminality among blacks is higher than for other groups. That the arrest and incarceration rates for African-Americans are higher than for their white counterparts is a fact that many do not like to admit but nonetheless appears to be accurate. For example, in 1991, blacks constituted under 13% of the general population but accounted for 44.8% of those arrested for violent felonies and nearly 50% of those in prison.⁹ Though these disproportionate arrest rates for African-Americans have remained stable over the last decade, the disproportionate incarceration rates have increased steadily.¹⁰

However, it is now fairly well established—at least among criminologists if not law enforcement agencies—that arrest rates are poor indicators of criminality.¹¹ Law professor David Harris argues persuasively that the use of race as one among many factors in arrests leads to an overall higher arrest rate for African-Americans but a lower yield rate in terms of de-

4. Marc Mauer & Tracy Huling, *Young Black Americans and the Criminal Justice System: Five Years Later 1* (The Sentencing Project 1995) (available at http://www.sentencingproject.org/pdfs/rd_youngblack_5yrslater.pdf). This report was a follow-up from an earlier report issued in 1990: Marc Mauer, *Young Black Men and the Criminal Justice System: A Growing National Problem 3* (The Sentencing Project 1990).

5. *Id.*

6. Bureau of Just. Statistics, *Sourcebook of Criminal Justice Statistics* (U.S. Dept. of Just. 2001) (available at <http://www.albany.edu/sourcebook/>).

7. Melissa Sickmund, Howard N. Snyder & Eileen Poe-Yamagata, *U.S. Dept. of Justice, Juvenile Offenders and Victims: 1997 Update on Violence*, <http://www.ojjdp.ncjrs.org/pubs/juvmoff/minority.html> (1997).

8. Derrick Bell, *Race, Racism and American Law* 340–42 (3d ed., Little, Brown & Co. 1992).

9. Michael Tonry, *Malign Neglect—Race, Crime and Punishment in America* 49 (Oxford U. Press 1995).

10. *Id.*

11. See Delbert S. Elliott, *Lies, Damn Lies, and Arrest Statistics*, <http://www.colorado.edu/cspv/publications/papers/CSPV-015.html> (accessed Oct. 8, 2006). See generally David A. Harris, *Profiles in Injustice: Why Racial Profiling Cannot Work* (The New Press 2002).

tecting wrongdoing.¹² That is, overall more African-Americans are arrested at disproportionately higher rates than whites, but the arrests of whites are far more productive in yielding evidence of criminality.¹³ Further proof that criminality does not explain the higher incarceration of African-Americans and Latinos is the interesting fact that the incarceration rate has continued to climb steadily in the last fifteen years even as the crime rate has fallen and stagnated.

B. *The “War on Drugs” Impacts Blacks Disproportionately*

An early goal of drafters of the Federal Sentencing Guidelines was the increase of all federal sentences and drug sentences in particular,¹⁴ although of late, guideline sentences have been described as draconian by numerous critics.¹⁵ One element of the drug sentencing guidelines that has faced particular criticism is the differing sentencing rates for crack cocaine versus powder cocaine—two forms of the same drug.¹⁶ “Crack cocaine,” most often possessed by blacks, is punished 100 times more harshly than possession of “powder cocaine,” which is more often possessed by whites.¹⁷ For instance, 500 grams of powder cocaine yields the same five year minimum sentence of 5 grams of crack cocaine.¹⁸ Supporters of this sentencing differential insist that it adequately reflects the different impact of the two drugs on society. Opponents characterize it as racist, or at least racially biased, and credit it in part for causing the significant increase in the African-American federal prison population.

While the crack versus powder differential continues to be a central feature in the debate regarding the guidelines and racial equity, it does not fully explain the racial disparity that exists in federal sentencing generally or even in drug sentencing particularly. In addition to increasing sentences, one goal of federal sentencing reform was to eliminate unwarranted disparity. However, most of the studies on the subject have found that unex-

12. David A. Harris, *The Reality of Racial Disparity in Criminal Justice: The Significance of Data Collection*, 66 L. & Contemp. Probs. 71, 81–82 (Summer 2003).

13. *Id.*

14. *Id.* at 72. “Indeed, in a policy statement outlining its approach to determining the severity of sentences, the Sentencing Commission explains that it had “not simply copied estimates of existing practices” in assessing drug penalties but rather followed the congressional mandate of “impos[ing] increased and mandatory minimum sentences.” U.S. Senten. Commn., *Federal Sentencing Guidelines Manual, Policy Statement* 1A1.1 (Nov. 1, 2005) (available at www.ussc.gov/2005guid/TABCON05.htm).

15. See e.g. Myron H. Thompson, *Sentencing and Sensibility*, N.Y. Times A23 (Jan. 21, 2005) (available at <http://select.nytimes.com/search/restricted/article?res=F00E12FC3A5C0C728EDDA80894DD404482>) (comparing the pre-Booker federal guidelines to Draco’s laws in ancient Athens that spawned the adjective “draconian”); Harris, *supra* n. 12, at 72 (explaining that “draconian sentences” for drug crimes have been a feature of the guidelines since their inception).

16. Tonry, *supra* n. 10, at 41.

17. *Id.*

18. U.S. Senten. Commn., *Federal Sentencing Guidelines Manual, Drug Quantity Table* 2D1.1 (Nov. 1, 2005) (available at www.ussc.gov/2005guid/TABCON05.htm).

plained racial disparity persists in the post-guideline era.¹⁹ In a brief survey of such research, Professor Max Schanzenbach notes that the most comprehensive study “found significant racial and sex disparities in length of prison sentence even after accounting for position on the guidelines sentencing grid . . . and offender demographics.”²⁰ The racial disparity persisted when all other sentencing characteristics were controlled for and was indeed evident even when blacks and whites were sentenced within the same guideline range, or arguably for crimes involving the same drug type. Blacks sentenced within the same range as whites still ended up with longer prison sentences.²¹

In other words, although the disparity is greatest for drug offenses, it exists across all crimes and demographics.²² This evidence suggests that it is not merely the internal structure of the guidelines or the policy decisions adopted by its drafters that cause the disparity. Judges themselves, even when their discretion is severely constrained by guidelines, exacerbate whatever racial inequity might already exist in the sentencing laws. There are numerable aspects of “the mechanism by which the federal guidelines permit the exercise of discretion [that] operates to the disadvantage of minority defendants.”²³

C. *Extra-legal Factors that Correlate with Race*

A final argument to explain the apparent race-based disparities in sentencing is that the disparity is not based on race at all but on other factors that correlate positively with race. The most commonly offered example is poverty and the related inability to access high quality legal counsel. A significant proportion of minority defendants are indigent and qualify for appointed counsel.²⁴ Appointed counsel, so the argument goes, are often more overworked and under-resourced than their private counterparts and thus are often unable to provide the same quality of representation. High quality representation can certainly make a significant difference in prosecution and sentencing outcomes. Zealous attorneys are not only better at putting forth affirmative defenses but are also better able to ward off poten-

19. See Max Schanzenbach, *Racial and Sex Disparities in Prison Sentences: The Effect of District-Level Judicial Demographics*, 34 J. Leg. Stud. 57, 61–62 (2005).

20. *Id.* at 62 (citing David B. Mustard, *Racial, Ethnic and Gender Disparities in Sentencing: Evidence from the U.S. Federal Courts*, 44 J. L. & Econ. 285–314 (2001)).

21. *Id.*

22. *Id.*

23. Celesta A. Albonetti, *Sentencing under the Federal Sentencing Guidelines: Effects of Defendant Characteristics, Guilty Pleas, and Departures on Sentence Outcomes for Drug Offenses, 1991-1992*, 31 L. & Socy. Rev. 789, 818 (1997).

24. Charles J. Ogletree, Jr., *An Essay on the New Public Defender for the 21st Century*, 58 L. & Contemp. Probs. 81, 83, 93 (Winter 1995) (noting that a disproportionate number of public defender clients are minorities).

tial abuses from law enforcement, prosecutors, and other decision-makers.²⁵ More nuanced empirical research is needed to isolate the effects of factors such as poverty, residence, and education on sentences. At the very least, it is clear that even when race is not a direct factor in sentencing, defendants who are poor are likely to receive the harshest sentences. Because poverty tends to correlate with race and ethnicity, this provides an indirect race effect on minority sentences.

In addition to offender characteristics that correlate with race, other extra-legal characteristics are said to interact with race to produce more severe sentences for African-Americans and other minorities. Studies suggest “that minorities receive more severe sentences when they possess attributes that reinforce stereotypes of more dangerous offenders, such as being male and/or unemployed.”²⁶ It may be that some of the disparities seen in the sentences of minorities are not really disparities based on race, but rather disparities based on the quality of counsel, pretrial release, juvenile records, or some other factor that may correlate with race and has not been adequately captured in existing empirical studies.²⁷

D. The Reality of Racial Prejudice in Sentencing

While each of these hypotheses about the cause of race-based sentencing disparity has some valid explanatory power, none is wholly sufficient. Indeed, even combined they do not adequately explain the extent of minority overrepresentation in the criminal justice system. It has taken approximately eighty years of research, in four distinct waves, to conclude that sentencing decision-makers—who increasingly include prosecutors, juries, and probation officers as well as judges—either consciously or unconsciously use race as a factor in imposing longer and more severe sentences on African-American defendants. Given the failure of credible explanations to fully account for the persistent problem of race-based disparities in sentencing, it is difficult to ignore the unfortunate probability that racial prejudice is at least in part to blame. Indeed, painstaking reviews of decades of research on the subject are now providing what is as close as we can get to proof that racial discrimination is present in the sentencing process.

The research on race and sentencing occurred in four waves.²⁸ Most of the research conducted between the 1920s and 1960s concluded that racial

25. William H. Edmonson, *A “New” No-Contact Rule: Proposing an Addition to the No-Contact Rule to Address Questioning of Suspects after Unreasonable Charging Delays*, 80 N.Y.U. L. Rev. 1773, 1785 (1995) (explaining that prosecutorial abuses against indigent minorities can compound the existing problems of racial disparity in the criminal justice system).

26. John Wooldredge, Timothy Griffin & Fritz Rauschenberg, *(Un)Anticipated Effects of Sentencing Reform on the Disparate Treatment of Defendants*, 39 L. & Soc’y. Rev. 835, 837 (2005) (citations omitted).

27. See Schanzenbach, *supra* n. 19, at 62.

28. See Marjorie S. Zatz, *The Changing Forms of Racial/Ethnic Biases in Sentencing*, 24 J. Research Crime & Delinquency 69, 71–75 (1987) (describing each of four waves of research).

disparities in sentencing were the result of discrimination.²⁹ These studies were often criticized for their simplicity or lack of methodological rigor and failure to adequately control for factors such as prior record and crime seriousness.³⁰ Studies between the 1960s and 1970s were more sophisticated and tended to reverse the conclusions in the earlier studies, finding that there was little remaining discrimination based on race once crime seriousness and prior criminal history were considered.³¹ The third wave of studies in the 1970s and 1980s concluded largely that some racial discrimination still existed but had become more subtle or merely interacted with other variables such as pretrial release on bail, quality of counsel, unemployment, and gender, among others.³² The fourth (and current) wave of research questions the existence and extent of race-based sentencing disparities in the post-guideline, or “determinate sentencing” era.³³

While this fourth wave is still ongoing, existing studies confirm the conclusion that race and ethnicity play a *direct* and significant role in sentencing disparities. In one of the most extensive reviews of the literature, Theodore Chiricos and Charles Crawford examined 38 other empirical studies conducted between 1979 and 1991³⁴—the period marking the emergence of determinant sentencing systems in state and federal courts. In their 1995 review, Chiricos and Crawford presented significant evidence that race had a direct impact on imprisonment. They concluded that, overall, race was a lesser factor in the length of sentences but a considerable factor in the decision whether to incarcerate,³⁵ noting decisively “[w]e are past the point of simply asking *whether* race makes a difference.”³⁶

29. For a detailed review of the disparity in the literature since the turn of the twentieth century, see Cassia C. Spohn, *Thirty Years of Sentencing Reform: The Quest for a Racially Neutral Sentencing Process*, in *Criminal Justice 2000* vol. 3, 427, 438–42 (U.S. Dept. of Just. 2000).

30. See John Hagan, *Extra-Legal Attributes and Criminal Sentencing: An Assessment of a Sociological Viewpoint*, 8 L. & Socy. Rev. 357 (1974) (finding, based on review of 17 of the 20 studies conducted from 1928 to 1973, that the studies were methodologically unsound and failed to determine important extra-legal factors that might explain the disparity in sentencing). See also Gary Kleck, *Racial Discrimination in Criminal Sentencing: A Critical Evaluation of the Evidence with Additional Evidence on the Death Penalty*, 43 Am. Sociological Rev. 783, 792 (1981) (criticizing 6 of 17 studies finding racial disparity for their failure to control for criminal history).

31. Kleck, *supra* n. 30, at 792; William Wilbanks, *The Myth of a Racist Criminal Justice System* 112 (Brooks/Cole Publ. Co. 1987) (reviewing several studies using controls when interpreting sentencing variation based on race).

32. See Zatz, *supra* n. 28, at 74–78; Robert J. Sampson & Janet L. Lauritsen, *Racial and Ethnic Disparities in Crime and Criminal Justice in the United States*, in *Ethnicity, Crime, and Immigration: Comparative and Cross-National Perspectives* 311, 347–48 (Michael Tonry ed., U. Chi. Press 1997).

33. Spohn, *supra* n. 29, at 441–42 (citing Zatz, *supra* n. 28).

34. Theodore G. Chiricos & Charles Crawford, *Race and Imprisonment: A Contextual Assessment of the Evidence*, in *Ethnicity, Race, and Crime: Perspectives Across Time and Place* 281, 281 (Darnell Hawkins ed., St. U. N.Y. Press 1995).

35. *Id.* at 300.

36. *Id.* at 301.

Chiricos and Crawford's literature review is illuminating but does not include the last fifteen years of studies conducted during the height of the determinate sentencing era. In a more recent examination of forty state and federal studies of sentencing outcomes, criminologist Cassia Spohn reconsidered the question of race and ethnic disparity. Spohn's research found conclusively "that race and ethnicity do play an important role in contemporary sentencing decisions."³⁷ Black and Hispanic offenders are more likely to be incarcerated and in some jurisdictions to receive higher sentences than their white counterparts.³⁸ This is especially true for minorities who are male, young and/or unemployed—but not for similarly situated whites.³⁹ Spohn concluded that state and federal guidelines notwithstanding, "judges and prosecutors are reluctant to place offenders into cells of a sentencing grid defined only by crime seriousness and prior criminal record" but not race, gender or age.⁴⁰ Like Chiricos and Crawford, Spohn notes that future research should attend to understanding *how* and *why* race plays a role in sentencing rather than *whether* it does so.⁴¹

Recognizing that racial bias plays a role in sentencing is only the starting point in an inquiry regarding racial justice. The legal response to such bias is inadequate in part because of a failure in understanding how decision-maker bias might work and how it could possibly be addressed. Presently, the law remedies only the effects of racial animus, and only in those individual cases where the animus (and its distinct harm) can be clearly proven. The Supreme Court long ago rejected general allegations of disparate impact or indirect discrimination without proof of intentional discrimination.⁴² And claims of unconscious discrimination often fall on deaf ears because they are too difficult to tackle. Unfortunately, the problem of race-based disparities is not unique to sentencing. Other fields have had greater success in analyzing, if not eradicating, the problem. In this paper, I review the work done in healthcare and consider its usefulness in framing future research for similar disparity concerns in the context of sentencing.

37. Spohn, *supra* n. 29, at 458.

38. *Id.*

39. *Id.* at 476.

40. *Id.* at 479.

41. See Chiricos & Crawford, *supra* n. 34, at 301; Spohn, *supra* n. 29, at 480–81.

42. See *McClesky v. Kemp*, 481 U.S. 279, 279 (1987) (affirming death sentence despite statistical evidence of racial disparities as great as 22 to 1, where defendant failed to show specific intent to discriminate against him as an individual by "decision-makers in his case").

II. WHY IS PAIN RELEVANT TO SENTENCING?

A. *Measuring Pain as a Function of Race: A Sample Case*

At the outset, it is worth making explicit the relationship between sentencing, race, and pain. The 1934 capital murder case of *Brown v. Mississippi*⁴³ is instructive in making sense of the interconnectedness. In *Brown*, three African-American men were charged and convicted of killing their landlord. All three men were convicted based solely on their confessions which had been extracted by vicious beatings.⁴⁴ One man confessed after having been hung repeatedly by a rope attached to a tree.⁴⁵ After each denial, he was strung back up and finally released after the second hanging.⁴⁶ When he continued to protest his guilt, he was severely whipped by a deputy and warned that he would be whipped until he “agreed to confess to such a statement as the deputy would dictate.”⁴⁷ The other two men were stripped and laid over chairs while their backs were cut with leather straps. The whippings continued until they too confessed “in every matter of detail as demanded”⁴⁸ by the deputy and others present. At trial, the defendants’ attorney argued that the confessions should be excluded because they were involuntary. One of the law enforcement officers testified in rebuttal that although the men were beaten, the beatings were not so brutal as to result in unreliable statements. Referring to one of the men, the deputy explained that the beatings inflicted on him were “‘not too much for a negro; not as much as I would have done if it were left to me.’”⁴⁹

Brown is often cited in discussions concerning the Supreme Court’s jurisprudence on confession and interrogation law. Fortunately, the types of forced confessions described in *Brown*—as well as the terroristic and overt discrimination emblematic of the Jim Crow South—are largely things of the past. What has been overlooked about *Brown*, and what makes it continually worthy as a classroom text, is the lesson it teaches about race-based disparities in the criminal justice system. Implicit in the deputy’s statement in *Brown* is the understanding that a different quantity of force is needed to successfully extract a confession from a “Negro” than for a white man. Accordingly, in assessing the reliability of a confession obtained by force, the decision-makers in the criminal justice system may believe that a black man can withstand, and indeed may require, greater pain than would be used against a white man to obtain the same result—whether that result be rehabilitation, deterrence or retribution.

43. *Brown v. Mississippi*, 297 U.S. 278 (1936). The investigation began shortly after the crime was discovered on March 30, 1934. *Id.* at 281.

44. *Id.* at 282.

45. *Id.* at 281.

46. *Id.*

47. *Id.* at 282.

48. *Id.*

49. *Id.* at 284.

It is fitting to view the issue of disparate sentences from the interdisciplinary lens offered by pain research literature because the criminal justice system is essentially about the state-sanctioned infliction of pain. Sentencing is about punishment, and punishment is overwhelmingly about inflicting pain.⁵⁰ American criminal jurisprudence has been dominated by two prevailing theories of punishment. Utilitarian theories contend that government practices are morally desirable when they promote pleasure and reduce pain for its citizens.⁵¹ In the criminal context, utilitarian practices require that pain be distributed only in instances and amounts where it will efficaciously deter greater pain.⁵² For example, the infliction of punishment—or state-sponsored pain—will only be morally justified where it will lead to an overall reduction of future pain through deterrence or rehabilitation (that is, where it will reduce future crime and thus reduce future pain to society).⁵³ Under utilitarian theories of punishment, the pain prevented must be greater than the pain caused by the punishment.⁵⁴ Retributive theories maintain that the purpose of punishment should be to exact justice for the crime committed and deliver “just deserts” to the perpetrator.⁵⁵ In that sense, the crime must befit and be proportional with the punishment imposed.⁵⁶

In their decisions regarding punishment, judges must mete out the proper amount to satisfy the joint goals of deterrence and retribution. Utilitarians require that the benefit resulting from the punishment be greater than the harm caused by the punishment; retributivists, on the other hand, require that the punishment be commensurate with the harm caused by the original violation. These are, of course, gross generalizations of theories that are far more nuanced than they often appear. Whatever one’s leanings regarding these two theories of punishment, each requires some qualitative and quantitative assessment of how pain and suffering are experienced by the defendant as well as the victim. How can judges, prosecutors, probation officers, and other decision-makers in the criminal justice process help craft sentences that are fair, impartial, and individual if they—either wittingly or unwittingly—have difficulty assessing the pain of others accurately? And what if one’s ability to assess pain is influenced by the race of the subject? I

50. I think it is fair to say that we are well on our way to abandoning even the façade of rehabilitation as a principal goal of punishment.

51. Kent Greenawalt, *Punishment*, in *Encyclopedia of Crime and Justice* vol. 4, 1336, 1340 (Sanford H. Kadish et al., eds., Free Press 1983).

52. Jeremy Bentham, *An Introduction to the Principles of Morals and Legislation* 1, 15–16, 83–84 (John Browning ed., Clarendon Press 1843).

53. See *id.* at 83–84; Greenawalt, *supra* n. 51, at 1338–41.

54. Bentham, *supra* n. 52, at 83.

55. Joshua Dressler, *Hating Criminals: How Can Something that Feels So Good Be Wrong?*, 88 Mich. L. Rev. 1448, 1451 (1990).

56. See Immanuel Kant, *The Philosophy of Law* 194–98 (W. Hastie trans., Augustus M. Kelley Publishers 1974); Dressler, *supra* n. 55, at 1452.

argue that this would, and in fact does, have tremendous implications for the criminal justice system.

B. Punishment as the Imposition of Pain

The internal sensors and barometers that we all use to detect the pain that others feel have important legal implications beyond the law of confession and interrogation. Pain used by state actors to extract confessions (i.e. torture), while still the subject of debate, is generally accepted as illegal. But pain in the form of punishment is widely accepted and increasingly popular. Punishment involving extreme physical pain is in most cases constitutionally impermissible under most readings of the Eighth Amendment's prohibition against cruel and unusual punishment, but pain remains nonetheless extremely relevant to punishment. Even with the advent of sentencing guidelines that seek to restrict judicial discretion, state and federal judges retain a wide array of discretion in the types of sentences they impose. Next to the death penalty, incarceration tends to be the most punitive.⁵⁷ But incarceration is by no means the only method of imposing pain on criminal defendants. Sentences commonly include restrictions on associating with friends and family, limitations on movement and employment, boot camp or other physical labor, limits on procreation, forced labor, shaming, financial penalties, deportation, and even restrictions regarding friends and family with whom the defendant may associate. Judges sentence based on how much pain they deem appropriate given the characteristics of the offense and the offender. Punishment is certainly not the only goal of sentencing, but in a sentencing regime focused predominantly on punishment, assessing and imposing pain is a critically important skill for the jurist. After all, pain is the currency of punishment; doling out punishment is essentially trading in pain.

Imposing punishment is imposing pain whether one supports traditionally utilitarian or retributive justifications of punishment. Utilitarian sentencers are consequentialists who believe that punishment is a means to an end. Utilitarians argue that punishment is justified when it imposes the minimum amount of pain or suffering necessary to achieve a particular societal good. Such "societal goods" include specific and general deterrence of criminal activity, incapacitation of criminals, and rehabilitation. For example, in order to arrive at the proper punishment, a utilitarian jurist might try to determine the proper quantum of pain needed to deter a particular individual from recidivating. On the other hand, a retributive judge sentences in accordance to the "just deserts" of the offender. Based largely on the blameworthiness or culpability of the defendant, or perhaps the harm caused, such a judge will determine how much pain is rightly owed to the

57. Incarceration involves intentional pain such as the loss of liberty and unintentional (but widely known) pain such as physical and sexual abuse at the hands of other inmates and guards.

defendant. Because proportionality between crime and punishment is an important element of retributive theory, a retributive jurist may need to evaluate the amount of pain actually or potentially suffered by the victim in order to decide how much pain to “charge” the defendant.

This is where race enters the calculus. What if the decision-makers in the courtroom have difficulty accurately assessing the pain of racial and ethnic minorities? What if our ability to “feel” the pain of others is based, at least in part, on their race? Pain is a fascinating construct. We know it is real because we each feel our own pain quite acutely. But we know the pain of others only because it is reported to us. Thus, we must trust these reports or rely on external indicators to help us interpret the existence and extent of the pain others feel. Pain, like remorse, can be exaggerated, faked, and misinterpreted. There is no reason to believe that we are good at knowing pain when we see it. And yet, also like remorse, a judge’s ability to identify pain is critical to sentencing. There is little reason to think that any of us—including judges—can assess pain well.

This failing can provide at least a partial explanation for the intractable problem of racially disparate sentencing. It is not difficult to see how this human failing in pain perception and assessment might lead to unwarranted disparity in sentencing. But why would it lead to a disparity based on race? The social science evidence on evaluating and assessing pain indicates that race plays a significant role in our view of the seriousness of the pain suffered by others. From the perspective of jurists who may be (merely) exhibiting a lack of competency in judging pain—rather than in judging people and their conduct—racially disparate sentences may seem justified as being neither unwarranted nor indicative of intentional discrimination.⁵⁸

III. FEELING THE PAIN OF “OTHERS”

A. *Evidence in Healthcare: Racial and Ethnic Disparities in Pain Treatment*

As in legal scholarship, healthcare scholarship includes a growing body of literature discussing the unequal treatment of people of color. One emerging area of study has been in the area of pain research. Public health scholars have found that pain is widely undertreated in the United States despite the fact that our “capacity to treat pain has never been greater.”⁵⁹ The problem of undertreatment falls disproportionately on African-Americans and non-white Hispanics.⁶⁰ Current research reveals that racial and ethnic minorities

58. Indeed, if one considers an Aristotelian view of equality—one in which like things are treated alike and unlike things unlike—this difference in treatment is understandable even though it might be despised.

59. Sandra H. Johnson, *Introduction: Legal and Regulatory Issues in Pain Management*, 26 J. L., Med. & Ethics 265, 265 (1998).

60. Vence L. Bonham, *Race, Ethnicity, and Pain Treatment: Striving to Understand the Causes and Disparities in Pain Treatment*, 29 J. L., Med. & Ethics 52 (2001).

tend to be undertreated for pain when compared with non-Hispanic whites.⁶¹ Scientific evidence shows that racial and ethnic disparities in pain assessment and treatment were found in all settings—whether post-operative, emergency room, clinical or experimental, and across all types of pain—whether acute, cancer, chronic, or experimental.⁶²

The disparities are consistent and astounding.⁶³ Studies reveal that African-Americans are more likely to be referred for the most painful medical treatments: blacks are more likely to undergo amputation of a lower limb, more likely to have testicles removed to treat prostate cancer, and more likely to be deprived of antibiotics upon admission for pneumonia.⁶⁴ Yet, they are less likely to be the recipients of even relatively inexpensive analgesics like aspirin. In an Emory University study of acute long bone fractures, 90 non-Hispanic whites and 127 African-Americans received analgesics in 74% and 57% of cases respectively.⁶⁵

Much like the criminal law research on racial disparity, the healthcare studies on disparity in pain treatment consider the problem from various angles. Public health experts examined severity of condition, discrimination by decision-makers, institutional racism, structural factors in various healthcare settings, and extra-medical factors that might correlate with race like poverty and issues of access. After confirming the existence of a true racial disparity—that is, an unjustified disparity remaining even after isolating numerous factors other than race—they sought to determine its causes.

The causes of the racial disparity in pain treatment are complex, and the research hypotheses vary to account for the complexities. Some studies examine the decision-maker or healthcare provider as a possible source of the disparity. Examples of this include failures in pain perception, discrimination, incompetence and lack of training. Other studies consider patient-related explanations such as communication barriers, insurance status, or different pain management expectations. Still others look to healthcare system factors such as access to treatment and the availability of medication. Interestingly, researchers found the disparity persisted even after accounting for patient characteristics and issues of access.⁶⁶ Failures in the assessment

61. *Id.* at 53.

62. Carmen G. Green et al., *The Unequal Burden of Pain: Confronting Racial and Ethnic Disparities in Pain*, 4 *Pain Med.* 277, 277 (2003).

63. While a few representative studies are described in this article, more detailed reviews of the literature on pain and race are available elsewhere. For a very thorough review of the literature on racial and ethnic disparities, see generally *id.*

64. René Bowser, *Racial Profiling in Healthcare: An Institutional Analysis of Medical Treatment Disparities*, 7 *Mich. J. Race & L.* 79, 85 (2001).

65. K. H. Todd et al., *Ethnicity and Analgesic Practice*, 35 *Annals of Emerg. Med.* 11, 11 (2000); see also K. H. Todd et al., *The Effect of Ethnicity on Physician Estimates of Pain Severity in Patients with Isolated Extremity Trauma*, 271 *J. Am. Med. Assoc.* 925, 925–28 (1994); K. H. Todd et al., *Ethnicity as a Risk Factor for Inadequate Emergency Department Analgesia*, 269 *J. Am. Med. Assoc.* 1537, 1537–39 (1993).

66. See e.g. Todd et al., *Ethnicity and Analgesic Practice*, *supra* n. 65, at 11.

of pain and pain intensity by the provider emerged as significant and persistent causal factors for the unwarranted treatment disparities.

B. The Decision-Maker's Failure in Assessing Pain as a Significant Cause of Disparity

Physician assessment lies at the core of most treatment decisions, and for pain treatment this is no different. Yet it is worth noting that pain is a sensation that cannot be seen or measured objectively.⁶⁷ Healthcare providers rely on the patient's subjective reports and on providers' own impressions of observable factors corroborating the patient's reports. Race appears to be one of the observable factors entering into the physician's calculus regarding appropriate pain treatment.⁶⁸ Yet, questions remain: What is the precise function of race in pain assessment and treatment? Are physicians failing to diagnose the pain (and its intensity) in the first instance? If so, is it attributable to patient miscommunication, disinterest, or some other factor? Or do physicians perceive the pain of their patients and then discriminate in the administration of analgesic treatment? Or perhaps physicians note the pain and fail to offer proper treatment for reasons outside of their control such as patient coping mechanisms, clinic capacity or drug availability? Healthcare experts in pain point to the need for additional research on these questions, but a number of existing studies suggest some possible answers.

One group of researchers, Emory University School of Medicine Professor, Dr. K. H. Todd and colleagues, attempted to discern the cause of these racial disparities in pain assessment. They found that disparities persisted even after controlling for gender, primary language, insurance status, injury severity, and other factors commonly associated with access to treatment.⁶⁹ Probable causes for these findings may be that patients did not adequately report the pain or that physicians did not understand their reports. Fortunately, at the time of the study, guidelines to routinize pain assessment were just starting to take hold in healthcare systems nationwide. Importantly, in a follow-up study after the guidelines were firmly in place, the researchers found that the medical records explicitly noted the existence of pain in nearly identical proportions for black and non-Hispanic white patients.⁷⁰ The researchers thus concluded that the disparity was not merely attributable to the lack of effective communication between patient and physician.⁷¹ At least in this study, the doctors were aware of the pain and noted patient reports in their medical records.

67. Allen Lebovits, *The Ethical Implications of Racial Disparities in Pain: Are Some of Us More Equal?*, 6 *Pain Med.* 3 (2005).

68. *Id.* at 3-4.

69. Todd et al., *Ethnicity and Analgesic Practice*, *supra* n. 65, at 11.

70. *Id.* at 14.

71. *Id.*

Some studies considered the possibility that racial disparity in pain treatment is attributed to a variation among ethnic groups regarding pain thresholds or expectations. This possibility was determined unlikely by the research findings. Studies of patient-controlled pain treatment mechanisms permit a critical view of patients' desires and expectations in eradicating pain. In one study involving patient-controlled delivery of analgesics, researchers studied 454 post-operative patients.⁷² While there were significant differences in the range of analgesics prescribed for ethnic groups of similarly situated patients, there were no group differences in the self-administered analgesic amount or the pain-intensity ratings.⁷³ That is, while doctors' prediction of how much painkiller would be needed varied by ethnic group, the actual amount of analgesic administered by the patients did not vary by ethnic group. This significantly undermines the argument that certain groups have physiologically higher capacities for pain or differing cultural attitudes about the desirability of coping with pain that might explain a reduced need for pain treatment.⁷⁴

The fact that pain is under-treated in minority patients is consistent across the literature and well established in a variety of treatment settings and with a variety of types of pain.⁷⁵ Although limited evidence exists regarding the cause of the under-treatment, provider-related causes remain a primary focus of investigation. Pain assessment by physicians is based largely on pain severity reports by patients as well as the social and experiential background of physicians and nurses. Interestingly, patients reporting high pain are more likely to have their reports discounted than patients reporting low pain; healthcare providers typically underestimate pain in patients reporting high pain.⁷⁶ A few studies *specifically* examine this link between racially based under-treatment and medical care providers.

One particularly noteworthy study, by Duke University Professor of Medicine, Dr. Kevin A. Schulman, appeared in a 1999 issue of the *New England Journal of Medicine*.⁷⁷ In this study, 8 actors acting as patients were videotaped and shown to 720 physicians. The physicians were told they were participating in a study of clinical decision-making, but they were not told the real purpose was to determine the effects, if any, of a patient's

72. Bernardo Ng et al., *The Effect of Ethnicity on Prescriptions for Patient-Controlled Analgesia for Post-Operative Pain*, 66 Pain 9 (1996).

73. *Id.*

74. Oddly, however, there are studies that suggest that African-Americans as a group have lower tolerances for heat pain, ischemic pain, cold pain, and pressure pain despite the fact that there were no measurable cross-racial differences of ratings of pain intensity. See Claudia M. Campbell et al., *Ethnic Differences in Responses to Multiple Experimental Pain Stimuli*, 113 Pain 20 (2005). If anything, such studies could justify overtreatment of pain for African-Americans rather than undertreatment.

75. Green et al., *supra* n. 62, at 286.

76. *Id.*

77. Kevin A. Schulman et al., *The Effect of Race and Sex on Physicians' Recommendations for Cardiac Catheterization*, 340 N. Eng. J. of Med. 618 (1999).

race and sex on the doctor's response to reports of chest pain. All the patients followed the same script in describing their chest pain, were clothed identically and given comparable occupations and insurance benefits. The doctors were asked to determine the likelihood that each patient had a narrowing of the arteries and to decide whether the patient should be referred to a cardiologist for catheterization—a costly state-of-the-art diagnostic measure. The resulting data revealed that physicians were far less likely to refer the black patients for the additional, potentially life-saving test based on their reports of pain even when ability to pay was not an issue.

The scientific evidence is clear and uncontested in the fields of medicine and healthcare that the pain of African-Americans is not treated as effectively, as aggressively, or as frequently as the pain of white patients. In essence, healthcare providers regularly fail to take black pain seriously in the clinical setting. One might ask at this juncture, how do we know whether this particular phenomenon in the clinical setting is related to the distinct problem of disparate sentencing in the legal context? Can we generalize broadly about these very distinct types of pain? Is there something qualitatively different about the failure to treat physical pain in the clinic as opposed to attempts to impose a very different type of pain in the courtroom? Undoubtedly. Further research is required in both the law and medicine to answer these questions with greater certainty, but historical evidence strongly suggests our attitudes about pain in medicine and in law are not as disconnected as they might appear. Scientific assumptions about race and pain have historically influenced social and legal attitudes about race and punishment.

C. The Desensitization to Black Pain: An Historical Link Between Medicine and Punishment

Like many other forms of discrimination against African-Americans, the inability to perceive black pain has a legacy in slavery. The slave narratives and testaments are replete with story after story of cruel and sadistic behavior by whites against blacks. These sorts of atrocities fill our history books from slavery through Reconstruction, Jim Crow, the Civil Rights era, and into the present. But these reports of calculated cruelty are only part of our history. What is just as relevant are the many centuries of learned disassociation and justified blindness, by many well-meaning whites, from the pain and suffering of people of African descent.

Abolitionists' narratives about the pain, cruelty, and humiliation inflicted on black slaves in the antebellum South played a crucial role in the anti-slavery movement. Consider the testimony of a well-known abolitionist, Sarah M. Grimké, describing this phenomenon as she witnessed it in one household. She explains:

A handsome mulatto woman, about 18 or 20 years of age, whose independent spirit could not brook the degradation of slavery, was in the habit of running away; for this offence she had been repeatedly . . . whipped. . . . This had been done with such inhuman severity, as to lacerate her back [such that] . . . a finger could not be laid between the cuts. . . . A heavy iron collar, with three prongs projecting from it, was placed round her neck, and a strong and sound front tooth was extracted, to serve as a mark to describe her, in case of escape.⁷⁸

Grimke noted that the mistress, who was by all accounts deeply religious, "charitable and tender-hearted," was able to spend time in the continuous presence of the slave as the slave conducted housework or sat nearby to sew. The slave, "with her lacerated and bleeding back, her mutilated mouth, and heavy iron collar" excited no feelings of compassion in her otherwise compassionate mistress.⁷⁹

In addition to this glaring example of insouciance for immense suffering, Grimke also discussed the utter disregard that slaveholders had for their slaves' smaller physical and psychic discomforts. Grimke refers to these as the "little things" in the minutiae of daily life.⁸⁰ Among the "little things" that Grimke reports are the fact that most families and their horses were provided with mosquito nets while the effect of the mosquitoes on blacks was never considered; one to two meals a day were provided for blacks with the first meal being at noon; slave children were kept seated on a cold staircase or outside the parlor door just to be available to snuff a candle or run an errand; slave relatives were separated for weeks or months at a time with no notice; parents often were not permitted to name their own children.⁸¹ Grimke aptly concludes that the reason "slaveholders think nothing of [these sufferings]" is that "they regard their slaves as *property*, the mere instruments of their convenience and pleasure. *One who is a slaveholder at heart never recognizes a human being in a slave.*"⁸² Imagine the difficulty of retraining oneself to believe that one's property has the capacity for pain—and that the capacity is the same as your own and others like you. That is the difficulty at issue here. The stories of otherwise good-hearted whites who fail even to see the pain of black human beings are to be differentiated, I think, from the stories of unfeeling sociopathic or sadistic whites who enjoy or rationalize the cruelty they bestow on blacks. Even whites who might not harbor racial animus toward blacks often grew desensitized to the pain of black people.

78. *Black Women in White America* 18 (Gerda Lerner ed., Pantheon Books 1972) (citing the testimony of Sarah M. Grimké in Theodore D. Weld, *American Slavery as It Is: Testimony of a Thousand Witnesses* (Am. Anti-Slavery Socy. 1839)).

79. *Id.* at 19.

80. *Id.*

81. *Id.* at 19–22.

82. *Id.* at 22.

Nor was developing greater empathy for black pain consistent with the medical literature of the day. As recently as the 19th century, it was widely believed that racial groups varied in their physiological experiences to pain.⁸³ Whites were presumed more sensitive to pain than African-Americans and Native Americans.⁸⁴ In 1851, the medical term “Dysaesthesia Aethiopsis” was coined by a respected New Orleans physician to describe, among other things, the genetic insensitivity to pain attributed to those of African descent.⁸⁵ According to the writings of this physician, this insensitivity to pain was particularly notable when blacks were “subject to punishment.”⁸⁶ As described previously in the case of *Brown v. Mississippi*,⁸⁷ one law enforcement officer’s beliefs about blacks’ relative insensitivity to pain was relevant to interrogation techniques. It requires no great deductive leap to conclude that similar perceptions would have also been relevant to sentencing.

And indeed they are. Reliable sentencing statistics before computerization are difficult to obtain because of the widely diverging attention to recordkeeping practices throughout the states. But it is clear that racial disparities existed in the late nineteenth century following slavery, and into the early twentieth century. The 1923 census reveals that racial disparities existed in 1923 but to a lesser extent than they do today.⁸⁸ In 1923, whites and African-Americans respectively constituted 67% and 31% of the incarcerated population. Whites and African-Americans constituted 90% of the overall population and African-Americans alone constituted 9% of the overall population. These disparities are great but not nearly as large as present-day disparities of the incarceration rate.⁸⁹

Additional disparities also existed in other aspects of punishment and sentencing where record keeping was more consistent. For example, the pardoning power of executives was utilized inequitably by race. A 1901 study of Virginia and Louisiana showed that in Virginia, 1 out of every 3.5 white men received pardons, while only 1 out of every 14 blacks obtained a pardon. In Louisiana, 1 out of 4.5 whites obtained clemency, while the rate of clemency for blacks was 1 out every 49.⁹⁰ As for prison conditions, the same study showed that there were no white women in prisons in Virginia and Louisiana because “judges . . . deemed the prison conditions unfit for

83. Lasch, *supra* n. 1, at 5.

84. *Id.* Native Americans in particular were seen as “virtually impervious to physical trauma.”

85. Samuel A. Cartwright, *Report on Physical Peculiarities of the Negro Race*, 7 New Orleans Med. Surgical J. 705 (1851).

86. *Id.*

87. See *Brown*, 297 U.S. 278.

88. Joseph E. Kennedy, *Drug Wars in Black and White*, 66 L. & Contemporary Problems 153, 167 (2003) (citing U.S. Census Bureau, *Prisoners 1923* (1926)).

89. See Tonry, *supra* n. 10.

90. Mary Frances Berry & John W. Blassingame, *Long Memory: The Black Experience in America* 233 (Oxford U. Press 1982).

them.”⁹¹ However, the number of black women incarcerated in the two states was sixty.⁹² Clearly, the plight of these women was more a function of their race than their gender.

IV. IMPLICATIONS

Criminal justice reformers have made tremendous progress in addressing the problems of malicious and overt racial discrimination in the court system. While “[v]irtually no one believes that racial bias and enmity are absent”⁹³ altogether, it is clear that invidious bias is not the explanation for the disparity in how different races are treated. It seems that reformers and advocates have taken this to mean that decision-maker bias, even in its less direct and tangible forms, is not worthy of, or susceptible to, close examination. Not so. It is time we seek to better comprehend and dissect some of the less tangible causes of disparate treatment that minorities encounter in the legal process.

A. *Pain in Punishment: New Perspective on Sentencing Disparities*

The full impact of society’s collective numbness to the pain of racial and ethnic minorities at sentencing is immense. The vast literature on the racial disparity in sentencing⁹⁴ captures far better than I could here the many ramifications of the inability to take black pain seriously. A court’s inability—in dealing with large minority segments of the population—to make a fair assessment of the hardship caused by a particular measure and its impact is a critical phenomenon. In addition to the judge, other decision-makers throughout the criminal process will also contribute to racial disparity if they have the same difficulties assessing black pain. While a comprehensive treatment is beyond the scope of this paper, it is fruitful for future research to consider briefly some of the ramifications. An insensitivity to black pain will affect every stage of the process. What are some of the judicial decisions that might be impacted by a judge’s insensitivity to pain?

Arrest rates for African-Americans are disproportionately high given their population. Forty-five percent of violent crime arrests nationwide are of African-Americans⁹⁵ even though they constitute only 12% of the population.⁹⁶ This imbalance has remained the same for at least twenty years. Indeed, for as long as the FBI has collected and published national arrest statistics, blacks have had significantly higher arrest rates than whites compared to their share of the overall population.⁹⁷

91. *Id.* at 234.

92. *Id.*

93. Tonry, *supra* n. 9.

94. *See infra* n. 99, n. 100, n. 109 and accompanying text.

95. Mauer & Huling, *Five Years Later*, *supra* n. 4, at 1.

96. U.S. Census Bureau, *U.S. Summary 2000 2* (July 2002).

97. Tonry, *supra* n. 9, at 52.

African-American arrestees are less likely to be released on bond than white arrestees even when severity of crime and criminal history are controlled statistically.⁹⁸ Bond decisions are highly discretionary and often involve explaining to the judge the hardships that will befall the defendant and her loved ones if she is not released on bond and forced to spend the night in jail. Whether a defendant is out on bond at the time of sentencing is a significant factor in sentence severity. Not only can a defendant who was released better aid her attorneys in her defense but she is also better able to obtain employment, attend courses and provide the court with some indicia of rehabilitation.

Following the arrest stage, charging practices in regard to African-Americans also reveal racial disparities. Criminologists have found that even after controlling for arrest rates, criminal history, crime severity and a series of other factors, racial bias influenced the charging decisions by prosecutors in felony cases.⁹⁹ Prosecutors did not necessarily over-charge black defendants, but white defendants were consistently more likely to be the beneficiaries of dismissals and declinations.¹⁰⁰

At sentencing, African-Americans receive harsher sentences than whites. This is true in federal as well as in state courts, and holds true across all types of crime. It is also true in determinate as well as in indeterminate sentencing systems. However, the most significant race-based sentencing disparity involves not the *length* of incarceration but the decision about *whether* to incarcerate. African-American defendants are more likely to be incarcerated than similarly situated whites, who are more likely to benefit from a judge's discretion to impose an alternative sentence. Since the advent of the sentencing guidelines, the higher incarceration rates for minorities in federal court have led to an increase in race-based sentencing disparity.¹⁰¹ These high incarceration rates are devastating to the African-American community. Approximately one-third of all young black men are under criminal justice supervision.¹⁰² As for black women, from the 1990s

98. Ian Ayres & Joel Waldfogel, *A Market Test for Race Discrimination in Bail Setting*, 46 Stan. L. Rev. 987, 989–91 (May 1994) (noting a report that bail amounts for African-American detainees were on average 70% higher than for white detainees in Connecticut and describing similar imbalances in other states).

99. Cassia Spohn et al., *The Impact of the Ethnicity and Gender of Defendants on the Decision to Reject or Dismiss Felony Charges*, 25 Criminology 175 (1987) (a regression analysis of 33,000 studies showing that declinations occur more frequently for white defendants).

100. See Angela D. Harris, *Prosecution and Race: The Power and Privilege of Discretion*, 67 Fordham L. Rev. 13, 60 (1998); Spohn et al., *supra* n. 99, at 185.

101. U.S. Senten. Commn., *Fifteen Years of Guidelines Sentencing* xiv–xvi (Nov. 2004) (available at http://www.ussc.gov/15_year/15year.htm) [hereinafter *USSC Report*].

102. Nora V. Demleitner et al., *Sentencing Law and Policy: Cases, Statutes, and Guidelines* 589 (Aspen Publishers 2004). In some communities, the figures are even higher. In 1991, 42% of young black males in Washington D.C. and approximately 56% of young black males in Baltimore were under criminal justice supervision. See Tonry, *supra* n. 9, at 29–31.

to the present, they remain the fastest growing group in prisons and jails.¹⁰³ The bottom line is that although African-Americans comprised 13% of the population, as of June 2002, they comprised 44.2% of inmates in state and federal prisons and local jails.¹⁰⁴

Some argue that racial disparities in the criminal justice system are replicated in the juvenile justice system. But it may be the reverse. It is the disparities in the juvenile justice system that get replayed and reproduced in the adult criminal justice system. One reason blacks are overrepresented in adult prisons is that the disproportionately high prosecution of black youths leads to more extensive criminal histories for these populations. Criminal history, including juvenile criminal history, is one of the driving factors of sentence severity so it would be unsurprising that African-American adults have harsher sentences than white adults if African-American juveniles are being systematically prosecuted more consistently and more harshly than white juveniles. The sad reality is that young African-American men are more likely to fall under the supervision of the juvenile justice system than their white counterparts.¹⁰⁵ Some of this disparity in the juvenile system is due to differences in criminality but criminality alone cannot explain the level of the disparity.¹⁰⁶ Most studies on the disparity in juvenile court show that racial and ethnic status influence decision-making at all the critical decision stages in the system.¹⁰⁷ Not only are black juveniles more likely to face harsher dispositions in juvenile court, but they are also more likely to be transferred from juvenile to adult criminal court.¹⁰⁸ Of course, this contributes directly to the overrepresentation of African-Americans in adult state and federal prisons.

In federal court, African-Americans are less likely to receive sentencing reductions for downward departures—which involve a finding by the court that some aspect of the offense or offender falls outside of the norm.¹⁰⁹ Most downward departures are granted upon motion of the government for providing substantial assistance to law enforcement. Of all fed-

103. Demleitner et al., *supra* n. 102, at 589.

104. *Id.* (citing Bureau of Just. Statistics, *Prison and Jail Inmates at Midyear 2002* (Apr. 2003) (available at <http://www.ojp.usdoj.gov/bjs/abstract/pjim02.htm>, NCJ 198877)).

105. Barry C. Feld, *Juvenile and Criminal Justice Systems' Responses to Youth Violence*, 24 *Crime & Just.* 189, 231–32 (1998).

106. *E.g.* Howard N. Snyder & Melissa Sickmund, *Juvenile Offenders and Victims: A National Report 92* (Off. Juv. Just. & Delinquency Prevention 1995) (available at http://eric.ed.gov/ERICDocs/data/ericdocs2/content_storage_01/0000000b/80/24/f3/a9.pdf).

107. *Id.* (discussing a review of the literature and noting that two-thirds of studies find race to be an influential factor in decision-making).

108. *E.g.* Bureau of Just. Statistics, *Sourcebook of Criminal Justice Statistics 2001* 456 (2003) (available at <http://www.ojp.usdoj.gov/bjs/abstract/scjs01.htm>, NCJ 196438).

109. See Rodney L. Engen et al., *Discretion and Disparity under Sentencing Guidelines: The Role of Departures and Structured Sentencing Alternatives*, 41 *Criminology* 99, 99–100 (2003) (arguing that departures are “windows of discretion” through which disparities arise, and finding that males and minority offenders are less likely to receive departures leading to sentences below the standard range).

eral sentences imposed, approximately 20% are reduced based on substantial assistance departures.¹¹⁰ Downward departures requested by the prosecutor, generally for substantial assistance, constitute over 80% of all downward departures.¹¹¹ Even here, only the judge can determine the extent of the sentencing reduction,¹¹² which often involves assessing the measures taken by the cooperating defendant to provide the information. Cooperating with authorities may require the defendant to jeopardize her communal and interpersonal relationships and even her life.¹¹³ Only the sentencing judge can determine what value to place on that sacrifice, or put differently, that pain.

The ability to assess pain is important for prosecutors, jurors, probation officers and other decision-makers in the sentencing process. It is critical, for instance, for prosecutors who must make charging decisions that will determine the final sentence. In federal cases governed by the guidelines and state cases involving mandatory minimums, the prosecutor's charging decision generally predetermines the sentence.¹¹⁴ One notable example of the prosecutor's immense discretionary power lies in his or her authority to decide whether to seek the death penalty in a homicide case. The failure to perceive black pain as commensurate with white pain surely helps explain why the race of the victim is such a significant factor in whether the death penalty is sought and imposed.¹¹⁵

B. *The Role of the Decision-Maker in Sentencing Disparity*

At each stage of the criminal justice system, racial disparities result from the decision-makers' inability or refusal to take seriously the pain of African-American defendants and victims. By the sentencing stage, the effects of earlier disparities take on exponential proportions. But let me be clear: the tremendous racial disparities that exist in sentencing are not solely—or even predominantly—attributable to decision-makers. As might be expected, virtually all the social science evidence indicates that offense sever-

110. U.S. Senten. Commn., *2000 Sourcebook of Federal Sentencing Statistics* 57–58, tbl. 29 (2002) (available at <http://www.ussc.gov/ANNRPT/2000/SBTOC00.htm>, USSCFY00) (showing that 9,506 defendants out of 52,660 received downward departures for substantial assistance in 2000); U.S. Senten. Commn., *2001 Annual Report* 53, fig. G (2001) (available at <http://www.ussc.gov/ANNRPT/2001/fig-g.pdf>) (graphical representation of datafiles USSCFY97-USSCFY01 showing that from 1997 to 2001, the percentage of all defendants receiving downward departures for substantial assistance decreased from 19.3% to 17.1%).

111. Frank O. Bowman, III, *When Sentences Don't Make Sense*, Wash. Post A27 (Aug. 15, 2003).

112. U.S. Senten. Commn., *2005 Federal Sentencing Guideline Manual* §5K1.1(a) (stating that “the appropriate reduction shall be determined by the court” for reasons that may include “any injury suffered, or any danger or risk of injury to the defendant or his family”).

113. See generally Alexandra Natapoff, *Snitching: The Institutional and Communal Consequences*, 73 U. Cin. L. Rev. 645 (2004).

114. See Harris, *supra* n. 100, at 23–24.

115. See generally *id.* at 24–50.

ity and criminal history are still the most significant factors in sentence determination. Yet unexplained racial bias by decision-makers, notably judges and prosecutors, remains a significant yet under-addressed piece of the disparity puzzle.

Some bias is caused by intentional racial discrimination, but often bias is the result of unconscious prejudice and stereotyping. As in the clinical setting, the failure of judges and prosecutors to take black pain seriously in the courtroom is more likely unconscious than intentional. Though the law is far more responsive to the former,¹¹⁶ both forms of bias lead to disproportionately harsher punishment for minorities. A minority patient in severe or chronic pain is less concerned about the precise reason why her pain is not being treated—she just wants the pain to stop. Similarly, a criminal defendant serving an unjustifiably harsher sentence than she deserves wants her sentence reduced. Whether the judge intentionally discriminated or unconsciously did so is only of secondary importance. Yet decision-maker bias is an aspect of the disparity question that scholars and practitioners have abandoned as an area of research.

One important reason decision-maker bias has not garnered the attention it deserves is because unconscious or disparate impact bias is difficult to quantify and even harder to prove. Healthcare researchers have not abandoned the investigation of decision-maker bias in the disparate treatment of pain. For this reason, the pain research in the healthcare literature can help law scholars and criminologists gain a new understanding of racial disparity in sentencing.

First, the pain research refocuses attention on decision-maker bias—a crucial factor in sentencing disparity that law scholars have long ignored in efforts to reform sentencing. One reason sentencing reformers have failed to advocate for changes aimed at decision-makers is that such efforts often seem futile. In addition, allegations of bias by decision-makers may be insulting, and many are reluctant to insult judges and prosecutors who toil away at trying to do their jobs well. In their own unabashed pursuit of answers, healthcare scholars appear unconcerned about the good intentions of treatment providers. These researchers look beyond intentions to ask critical questions about the decision-making process. Law scholars must consider anew the process that lies behind the sentencing enterprise.

Understanding both punishment as pain and disparate sentencing, at least in part, as the failure to properly perceive and quantify pain uniformly, helps create a novel framework from which to tackle the problem of racial inequality in sentencing. If pain assessment in healthcare can be compared with punishment assessment in criminal justice, what can the pain research reveal that might help improve the sentencing process?

116. See Schulman et al., *supra* n. 77, at 618–26.

What kinds of solutions would this new framework help inform? Might the inability to assess pain cross-racially support the argument for more minorities in judicial and prosecutorial positions? Is there any evidence—medical or otherwise—that minorities are better able to take seriously the pain of other minorities? Or perhaps the answer to eliminating the disparities in sentencing lies in improving judicial training? Another consideration is that physicians have moved to more standardized pain documentation and assessment techniques. Might this provide an argument in favor of more objective data in sentencing (e.g., guideline or other determinate sentencing mechanisms)?

All of these questions raise interesting avenues for future research—particularly qualitative research—much of which is still needed to better understand the “why” of racial disparity in sentencing. Recognizing that we may all have a racialized view of pain is a critical part of answering the “why” of race-based sentencing disparity, but it is only a beginning. Additional research into the connection between black pain and sentencing disparities will help us gain better understanding of the causes of the disparity as well as their solutions. This article is a call for such additional research.