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## EQUALITY UNDER THE LAW

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At the School of Criminology he has been affiliated with three research projects, the most recent of which deals with drug use in the Haight-Ashbury section of San Francisco. His doctoral dissertation concerns personality attributes of self-reported delinquents.

With increasing frequency the question has been raised as to whether or not defendants receive differential judicial treatment as a function of their race. The present article reviews the empirical studies that have addressed themselves to this question and attempts to reconcile their divergent findings in the light of temporal, geographical, and methodological variability across studies.

On the facade of the Supreme Court building in Washington, D.C., the words "Equal Justice Under Law" stand out in large marble letters. For many decades, but most noticeably in the last decade, many have maintained that "Equal Justice Under Law" is nothing but a facade for certain segments of our population. Many critics<sup>1</sup> have put forth the hypothesis that justice in the United States, as it has been and as it is still being administered, is not free of bias. More specifically, they have hypothesized that a significant minority within our citizenry receives differential treatment even within the context of the judiciary of the United States. This minority is, of course, the American Negro.

It has been maintained that equal justice for Negroes, even under the law, has more often been an ideal than a reality. More than three centuries ago the Negro was brought to this country in a position of subservience. Although many Negroes have tried to raise themselves from this position, they have been consistently and systematically denied the opportunity in many spheres of activity. The attempt to subvert the Negro's endeavor to improve himself has not been undertaken solely by the stereotypical southern bigot. Even among the framers of the Constitution there were those who preferred to see the Negro remain in a position of social, economic, and political subordination.

<sup>1</sup> Bullock, *Significance of the Racial Factor in the Length of Prison Sentence*, 52 J. CRIM. L.C. & P.S. 411-17 (1961); Vines & Jacob, *Studies in Judicial Politics*, in VIII TULANE STUDIES IN POLITICAL SCIENCE 77-98 (1963); LEMERT & ROSENBERG, *THE ADMINISTRATION OF JUSTICE TO MINORITY GROUPS IN LOS ANGELES COUNTY* (1948).

Miller points out that James Madison said that it was "wrong to admit, in the Constitution, that there could be property in man"; so the Constitution makes no mention of slaves, slavery, or race. Yet the Constitution protected slavery in states in which it existed. It provided for the return of slaves to their masters, devised a formula for counting slaves in the apportionment for members of Congress, prohibited Congress from taxing slavery out of existence, and preserved the African slave trade for twenty years. Furthermore, the slave trade and taxing clauses could not even be amended before 1808.<sup>2</sup> These provisions within the Constitution are certainly dissonant with the proposition upon which much of the American system was founded—that "all men are created equal".

In the 1857 case of *Dred Scott v. Sanford*, the Supreme Court of the United States was given an opportunity to delineate the civil status of the Negro in America. Chief Justice Taney affirmed that the Constitution was made by and for white men. It was the opinion of his Court that Negroes "were not intended to be included under the word 'citizen' in the Constitution, and can therefore claim none of the rights and privileges which that instrument provides for and secures to citizens of the United States".<sup>3</sup> Nothing could have been more clear. The Negro was not a citizen of the United States, and consequently he had none of the rights of the citizens of this country.

Within this same decision, the Supreme Court

<sup>2</sup> Miller, *Race, Poverty, and the Law*, 44 CALIF. L. REV. 388 (1966).

<sup>3</sup> *Scott v. Sanford*, 245 U.S. 197 (1857).

further declared that it was the privilege and duty of the separate states, rather than that of the central government to legislate and enumerate the civil rights of the Negroes within its boundaries. Thus, the fate of the Negro was placed squarely in the hands of the states.

Given these attitudes held by some of the legislators (framers) and by at least a majority of the Supreme Court in 1857, one need not strain to understand how the Negro was relegated to the role of a second-class citizen.

There were, however, many Americans who disagreed with the Taney Court; there began a movement, in effect, to reverse this state of affairs. In 1865, less than ten years after the *Dred Scott* decision, President Lincoln was instrumental in bringing about the abolition of slavery.<sup>4</sup> In the following year, Congress drafted the Fourteenth Amendment, and by 1868 three-fourths of the states had ratified it.<sup>5</sup> In effect, this amendment was a reversal of the earlier *Dred Scott* decision. It made former slaves citizens and gave them full civil rights. Also, this amendment gave back to the central government some of the powers that the *Dred Scott* decision had given up to the states. That is:

No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.<sup>6</sup>

Finally, in 1870, the Fifteenth Amendment proclaimed that the right of any citizen to vote could not be abridged or denied because of race, color, or previous condition of servitude.<sup>7</sup>

These three amendments removed the support that the Constitution (and thus the nation) had previously given to the proponents of slaves, slavery, and racism. These amendments reversed the interpretation of the Constitution that the Supreme Court had earlier proclaimed concerning the civil rights of Negroes. At this point every American was constitutionally equal. Unfortunately, however, the second-class stigma that had come to be associated with the Negro was not soon to be forgotten. Thirteen years of legislation

could hardly be expected to effectively blot out two hundred years of precedent.

When the problem of the Negro in his quest for equality is placed within this historical framework, it is not at all difficult to understand his plight today. It was much easier for the Civil War amendments to reverse the law that had been laid down by the Supreme Court thirteen years before than it was for white Americans to reverse their traditional perceptions of the Negro in American society. For many of us this reversal has not even come about one hundred years later.

In addition to being black, the Negro faces another severe problem—he is also generally poor. Any phenomenon that affects the poor as a group will include a disproportionate number of Negroes because a disproportionate number of Negroes live below the poverty line in the United States.<sup>8</sup>

Being poor puts one at a distinct disadvantage in any type of court action within the courts of the United States. It is difficult, and sometimes impossible, to be afforded true justice in the United States without strong financial support. Beginning with the very first steps in the judicial process, it is necessary to have benefit of counsel if one expects to be victorious. The intricacies and subtleties of the law demand it. Even if one has expert knowledge of the law, it may be unwise of him to undertake his own defense. When Clarence Darrow, one of the finest criminal lawyers in the history of the United States, was being prosecuted for trying to fix a jury, he immediately recognized the fact that he needed a good lawyer.<sup>9</sup>

As a defendant, the poor man is at an obvious disadvantage. Often he does not have benefit of counsel during the initial interrogation,<sup>10</sup> during which many confessions are still made. Then he is usually unable to post bail, so he is held in custody pending trial. During this time he is unable to help himself at all by doing the necessary sleuthing to help to prove his innocence. He is likewise unable to hire anyone else to act in his behalf. Finally, at the trial, his attorney frequently is no legal match for the experienced (or even the inexperienced) prosecutor. If he is convicted by the judge or jury, the defendant usually has a right to an appeal to a

<sup>8</sup> Address by Lyndon Johnson, Howard University, June 4, 1965, cited in Miller, *supra* note 2.

<sup>9</sup> LEWIS, GIDEON'S TRUMPET 171 (1964).

<sup>10</sup> This is true at least in minor offenses, and often in major offenses, in spite of the recent Court rulings. See SKOLNICK, JUSTICE WITHOUT TRIAL 145-47 (1966), for an example of police circumvention of constitutional requirements.

<sup>4</sup> U.S. CONST. Amend. XIII.

<sup>5</sup> *Id.* amend. XIV.

<sup>6</sup> *Ibid.*

<sup>7</sup> *Id.* amend. XV.

higher court. However, if the defendant is unaware of this right and he fails to appeal, the case goes no further. Assuming that the defendant becomes aware of his right to appeal, he may file for an appeal. But in order to do this successfully, the defendant must have some legal basis for an appeal. Without legal assistance, it is unlikely that the defendant will find legal grounds for an appeal. And so, the financial status of the defendant can be a determining factor in whether he is convicted or acquitted.

Through the combined efforts of the judicial and legislative branches of the governments on all levels this inequity has begun to be remedied. In *Betts v. Brady*<sup>11</sup> the Supreme Court, in 1942, decided that a lawyer was constitutionally required only if to be tried without one amounted to a "denial of fundamental fairness". To prove that he was denied "fundamental fairness", the poor man had to demonstrate that he was the victim of what the Court called "special circumstances". These might include his own illiteracy, ignorance, youth, or mental illness, the complexity of the charge against him, or the conduct of the prosecutor or the judge at the trial.<sup>12</sup> In this decision the Court made it perfectly clear that this provision of counsel would be made as a matter of right only in those cases where "special circumstances" existed. After twenty years of explaining and expanding these "special circumstances", the Court finally, in 1963, reversed itself in *Gideon v. Wainwright*.<sup>13</sup> This decision proclaimed that an indigent would have access to counsel in state criminal trials. In the 1966 case of *Miranda v. Arizona*,<sup>14</sup> the Supreme Court extended this provision to include the availability of counsel during interrogation. Through Supreme Court decisions, the indigent defendant is now in a position where he has the right to counsel from the time he becomes a prime suspect<sup>15</sup> through final appeal. Although the Court has not clearly enumerated what types of offenses are to be included in these decisions, the impact on the legal profession is obvious.

This increased demand for legal services has been met through the creation of public and private defender systems;<sup>16</sup> and more recently through the

public-private system,<sup>17</sup> which is privately administered but supported through both public and private funds. In 1960 there were nearly twice as many citizens with access to the services of a Defender's office than there had been in the previous decade.<sup>18</sup> Today an indigent, or a person of less than adequate means, may qualify for legal aid through the services of legal aid clinic, lawyer referral plans, neighborhood law offices, public and private defenders, and court assigned lawyers.<sup>19</sup>

Although these recent developments have been a giant step in the direction of equal justice for all, regardless of economic class, the rich and the poor defendant are still not afforded the same probability of being given equally harsh sentences. In a study of 2,955 felony convictions in Detroit's Recorder's Court,<sup>20</sup> it was found that of those who were able to make bail, 17% received prison sentences while the remaining 83% received non-prison sentences. (Non-prison sentences include probation and probation with a brief jail sentence at the beginning of probation.) Among those who had not been able to make bail, 67.5% received prison sentences while only 32.5% received non-prison sentences ( $\chi^2 = 683, p < .001$ ).

These figures are somewhat confounded by the fact that judges appear to set the bail higher in cases where the state has a strong case (e.g., where there were several witnesses, or the defendant was caught in the act). Thus, the same set of circumstances that result in the bail being made more difficult for the accused to make may also increase the probability that he will be convicted. The discrepancy is sufficiently large, however, to warrant further investigation of the hypothesis that at least some of the disparity between the treatment of offenders who had been able to make bail and the treatment of those who had not been able to make bail is the result of the differential economic status of the defendants making up the two groups.

Further support for the hypothesis that the relative wealth of the defendant may be a factor which determines the harshness of the treatment which is afforded him, is provided by another finding in the Detroit study. It was found that of

<sup>17</sup> *Id.* at 14.

<sup>18</sup> *Id.* at 12.

<sup>19</sup> MORELAND, EQUAL JUSTICE UNDER LAW 74-77 (1957).

<sup>20</sup> Saul R. Levin Memorial Foundation, Inc., Report of Study of Recorder's Court over 20-month Period, November 1, 1957 through June 30, 1959 (unpublished mimeograph).

<sup>11</sup> *Betts v. Brady*, 316 U.S. 462 (1942).

<sup>12</sup> LEWIS, *op. cit.* *supra* note 9, at 8.

<sup>13</sup> *Gideon v. Wainwright*, 372 U.S. 335 (1963).

<sup>14</sup> *Miranda v. Arizona*, 384 U.S. 436 (1966).

<sup>15</sup> *Escebedo v. Illinois*, 378 U.S. 478 (1964).

<sup>16</sup> BROWNELL, LEGAL AID IN THE UNITED STATES 126-34 (1951).

the defendants who had private counsel, 28% received prison sentences while the remaining 72% received non-prison sentences. On the other hand, of those defendants who had court-appointed counsel 57% received prison sentences and only 43% received non-prison sentences ( $\chi^2 = 222$ ,  $p < .001$ ). That is, a defendant who is unable to secure private counsel is twice as likely to receive a straight prison sentence as a defendant who is able to secure private counsel. Since most jurisdictions require that a defendant demonstrate his indigence in order to obtain a court-appointed counsel, the foregoing figures would seem to indicate that poor defendants receive significantly harsher sentences than those relatively less poor defendants who are able to retain private counsel.

Since "being black" is so highly correlated with being poor,<sup>21</sup> it is impossible to appreciate the magnitude of the Negro's plight in our courts without being aware of the disadvantages of being a poor defendant, for any conditions affecting the poor will disproportionately affect the Negro. Thus, the Negro is a victim of dual circumstances. "He is poor and black in a world that is attuned to the needs of the affluent and white".<sup>22</sup> Bearing this in mind, let us examine some of the studies that have tried to assess whether or not Negroes are treated equally before the courts in the United States.

Vines and Jacob,<sup>23</sup> in their study of more than 4,000 cases dealt with by the court in Orleans Parish (New Orleans), Louisiana, found an interesting pattern of differential treatment afforded white and Negro defendants. The authors used two measures of harshness of treatment: dismissal rate, and the percentage of offenders sentenced to a year or more in prison. It was found that in 1954, the year in which the Supreme Court took a giant step in the direction of civil rights for the Negro,<sup>24</sup> defendants of both races received nearly equal treatment at the hands of the judiciary. It was found that discrepancies in the dismissal rates<sup>25</sup> of whites and Negroes accused of crimes had grown steadily from an insignificant 1.6% in 1954 to 13.8% more dismissals for whites in 1958. This discrepancy represents a significantly ( $p < .05$ )

more harsh treatment of Negroes accused of crimes in Orleans Parish in the sense that a greater percentage of Negroes had to face trial or punishment (through a plea of guilty) more frequently than whites. When the percentage of defendants sentenced to a year or more of prison for all crimes is used as the dependent variable, a strikingly similar pattern emerges. The discrepancies between the percentages of Negro and white defendants sentenced to a year or more in prison increased monotonically from an insignificant 2.8% in 1954 to a significant 13.5% in 1960 ( $p < .05$ ). However, as the authors point out, if Negroes were committing more serious crimes than their white counterparts, then more severe punishments would be appropriate. An examination of specific categories of crimes "demonstrates that even when we hold the offense-type constant, Negroes often received heavier penalties than whites". Although Negroes receive harsher treatment in 70% of the categories examined, the authors unfortunately do not provide any statistical test of the significance of this finding.<sup>26</sup>

Several investigators have been interested more specifically in whether differential treatment is meted out not simply as a function of the race of the offender, but as a function of the racial composition of the offender-victim dyad. The first of these studies was carried out using court statistics available for murder indictments in North Carolina, Georgia, and Virginia between 1930 and 1940.<sup>27</sup> In this study Johnson tested the hypothesis that the order of severity of treatment by the court, from most to least severe, would be as follows: (1) Negro offender with a white victim (NW), (2) white offender with a white victim (WW), (3) Negro offender with a Negro victim (NN), (4) white offender with a Negro victim (WN). The rationale that he used for this prediction is that the white power structure would be primarily concerned with protecting white interests. Those in power could not let the Negro get away with stepping out of line by daring to harm a white man; to a lesser extent, whites who harmed whites also had to be dealt with. If a Negro harmed a Negro though, the white court was not likely to be overly upset. Finally, if a white man harmed a Negro there were likely to be extenuating circumstances; the Negro may have "sassed" a white man or

<sup>21</sup> Miller, *supra* note 2.

<sup>22</sup> *Id.* at 392.

<sup>23</sup> Vines & Jacob, *op. cit. supra* note 1, at 77-98.

<sup>24</sup> Brown v. Board of Educ., 347 U.S. 483 (1954).

<sup>25</sup> Dismissal rates represents the percentage of cases in which the defendant has been charged and apprehended, but for some reason the prosecution discontinues the action.

<sup>26</sup> Vines & Jacob, *op. cit. supra* note 1, Tables 8, 9, & 10.

<sup>27</sup> Johnson, *The Negro and Crime*, 271 ANNALS 93 (1941).

"looked at" a white woman. For the 645 cases examined the hypothesis was generally supported. That is, when the percent convicted, the percent receiving death sentences, and the length of sentence are used as indicants, the order of severity of treatment is that predicted: NW, WW, NN, WN.

Garfinkel,<sup>28</sup> using data for all homicides in North Carolina between 1930 and 1940, improved on Johnson's methodological approach by breaking down murder into first and second degrees, as well as by including manslaughters in the analysis and using more dependent variables<sup>29</sup> on which to base conclusions.

Garfinkel's analysis provides additional support for Johnson's hypothesis. Virtually all independent variables—indictment (the offense as it was defined by the Grand Jury in its "True Bill"), charge, conviction rate, and severity of sentence—support the general proposition that defendants in NW cases are dealt with most harshly, followed by WW, NN, and WN. For example, of those convicted of first degree murder, 54% of the defendants in NW cases, 19% in WW cases, and 4% in NN cases, and none of those in WN cases received sentences of life imprisonment or death. Garfinkel's is a much more compelling study than Johnson's. The former uses a sample that is about 25% larger than the latter's, and Garfinkel's tabular breakdowns of homicides by degrees, and his inclusions of manslaughters provide a much more sophisticated and precise argument in support of the hypothesis being tested.

More recently, Bullock<sup>30</sup> has tested the hypothesis that Negroes receive differential treatment in our courts. In this study, however, the author made the assumption that the crimes of murder and rape are primarily intraracial and that the crime of burglary was interracial for Negro offenders and primarily intraracial for white offenders (*i.e.*, the victims of burglaries are primarily white). If the patterns of the murders examined by Johnson and Garfinkel in North Carolina, Virginia, and Georgia are comparable to those in Texas, Bullock's assumptions probably are not warranted in about 10% of the cases. Bearing this limitation in mind, let us examine the Bullock study.

Bullock analyzed data collected in 1958 from

<sup>28</sup> Garfinkel, *Research Note on Inter- and Intra-racial Homicides*, 27 *SOCIAL FORCES* (1949) 369-81.

<sup>29</sup> Indictment, charge, and conviction percentages, as well as the percentage of reductions in charges and the length of sentences.

<sup>30</sup> Bullock, *supra* note 1.

3,644 Negro and white prisoners at Texas State Prison who had been committed for burglary, rape, and murder. He found that several non-racial factors exert an influence on the length of sentence given. The factors that are among these are the type of offense, the nature of the plea, and the number of previous felonies. Bullock found that as the Texas Penal Code directs, a significantly more severe penalty ( $\chi^2 = 522$ ,  $p < .001$ ) is given for the crimes of murder and rape than for the crime of burglary. In addition, those who plead guilty receive significantly shorter sentences ( $\chi^2 = 212$ ,  $p < .001$ ) than those who plead not guilty. The Penal Code, however, does not provide that this factor should affect sentencing. Finally, the number of previous felonies has no significant effect on the length of prison sentence. Besides these legal factors, other non-legal factors affected the length of sentence imposed.

It was found that those committed from East Texas received significantly longer sentences ( $\chi^2 = 20$ ,  $p < .001$ ) than those committed from West Texas. It was also found that those committed from "large city" counties (those having at least one city of 50,000 or more population within its boundaries) received significantly longer sentences ( $\chi^2 = 8.4$ ,  $p < .01$ ) than those committed from "small city" counties.

Because of this inclination of juries to be influenced by these particular characteristics, those possessing these characteristics will tend to receive longer sentences than those not possessing them. Bullock's data indicate that more Negroes than whites fall into these categories for which juries assess longer sentences. Thus even on the basis of non-racial factors, Negroes are more likely to receive more severe sentences than whites, simply because they possess (to a much greater extent than whites) the characteristics to which juries assign stiffer sentences. However, even when these non-racial characteristics are controlled, prisoners receive differential treatment according to race. Negro prisoners committed for murder received significantly shorter sentences ( $\chi^2 = 8.10$ ,  $p < .01$ ) than their white counterparts, while those Negroes imprisoned for burglary offenses received significantly longer sentences ( $\chi^2 = 14.45$ ,  $p < .001$ ) than their white counterparts. Thus, to the extent that we can accept Bullock's assumptions concerning the race of the victims, his findings indicate that NN murder cases are treated less severely than WW murder cases, while NW bur-

glary cases are treated more severely than WW burglary cases.

In their *Homicide in an Urban Community*,<sup>31</sup> Bensing and Schroeder examine 662 homicides that occurred in the urban area of Greater Cleveland between 1947 and 1954. In examining the offender-victim dyads by race, Bensing and Schroeder found that there were some rather striking differences in the handling of Negro and white defendants in intraracial cases. For example, far more Negroes than whites (46% vs. 0%) are convicted as charged in slayings involving a victim of the opposite race. While disparities of this size are glaring, the authors found by looking more deeply, that differences between Negro and white offenders probably accounted for a major part of the discrepancy. For example, among those convicted of first degree murder, it was found that in 74% of the NW cases the defendant was also facing "one or more felony murder counts such as killing a police officer, killing while perpetrating or attempting to perpetrate arson, robbery, burglary, or rape. Since only intent need be proved in felony murders, in theory, a conviction should be easier to obtain than in cases in which, in addition to intent to kill, premeditation and deliberation have to be proved beyond a reasonable doubt."<sup>32</sup> Differences in the circumstances of the NW as compared to the WN murders, and the fact that the disposition of the NN and WW cases was strikingly similar led the authors to conclude that there was no evidence of racial discrimination.

Edward Green, in his study of *Judicial Attitudes In Sentencing*,<sup>33</sup> touches on the factor of race and its effect on sentencing procedure in the criminal court of Philadelphia. His data indicate that of those sentenced (N = 333), Negro defendants received significantly more severe sentences than did white defendants ( $\chi^2 = 20.5, p < .01$ ). However, when the offense and the number of previous felony convictions are held constant, there are no significant differences in the severity of sentences given to white and Negro defendants for burglary (with no prior felony convictions,  $\chi^2 = 1.0, p < .30$ ; with one or more prior felony convictions,  $\chi^2 = 4.9, p < .10$ ), robbery (with one or no prior felony convictions,  $\chi^2 = 1.1, p < .50$ ), and theft (with one or no prior felony convictions,  $\chi^2 = 2.8,$

$p < .30$ ; with two or more prior felony convictions,  $\chi^2 = 5.9, p < .10$ ).

In a more recent study, Green<sup>34</sup> argues that the differences found in the treatment afforded white and Negro offenders when the race of the victim was also considered may have been due to racial discrimination. He points out, however, that a growing body of evidence more convincingly indicates that:

differential treatment is a product of the sub-cultural differences in patterns of crime resulting from enforced racial segregation. Rates of the predominantly intra-racial offense of homicide are consistently much higher for Negroes compared with whites than can be accounted for merely by discriminatory law enforcement practices. The greater proneness of the Negro to resort to violence in responding to slights or settling disputes<sup>35</sup> coupled with a tendency to carry "protective" weapons<sup>36</sup> subjects him to a much greater risk than the white of slaying or being slain in an intra-racial brawl. There is commonly a quality of intimacy in the relationship between the principals in an in-group homicide; the slaying of a Negro by a Negro is likely to be the culmination of an altercation between friends, lovers, or spouses. As Wolfgang points out in his discussion of the role of the victim in precipitating his own demise, the Negro victim much more frequently than the white victim, has provoked the slayer to assault him. Since the killing which resolves such a conflict is rarely premeditated, the legal element of "heat of passion" is more apt to be present, and the element of "intent to kill," problematic, thereby mitigating the seriousness of the offense.

The circumstances surrounding the NW homicides, on the other hand, are conditioned by the social distance which characterizes race relations in the United States. The relatively small percentage of interracial homicides in empirical studies attests to the slight probability of a fatal clash between white and

<sup>34</sup> Green, *Inter- and Intra-Racial Crime Relative to Sentencing*, 55 J. CRIM. L.C. & P.S. 348 (1964).

<sup>35</sup> Wolfgang & Ferracuti, *Subculture of Violence, An Interpretive Analysis of Homicide*, 1962 INT'L ANNALS OF CRIM. 56.

<sup>36</sup> Moses, *Differentials in Crime Rates Between Negroes and Whites*, 12 AM. SOC. REV., 411 (1947); Schultz, *Why the Negro Carries Weapons*, 53 J. CRIM. L.C. & P.S. 476 (1962).

<sup>31</sup> BENSING & SCHROEDER, *HOMICIDE IN AN URBAN COMMUNITY* (1960).

<sup>32</sup> *Id.* at 52.

<sup>33</sup> GREEN, *JUDICIAL ATTITUDES TOWARD SENTENCING* 56-63 (1961).

Negro.<sup>37]</sup> A NW slaying is less likely than a NN slaying to have arisen out of an altercation between intimates. Rather in most instances the killing is an unpremeditated act committed in the course of a predatory crime such as robbery,<sup>38]</sup> thus automatically<sup>39]</sup> elevating the offense to the level of first degree murder.<sup>40</sup>

Based on this reasoning, Green hypothesizes that differences in the treatment of offenders attributed to racial considerations by previous investigators, will be accounted for by non-racial differences among the four offender-victim categories for which the statutes provide differential treatment. Or, as Green puts it, the hypothesis is that "*patterns of criminal behavior constituting a given offense differ intrinsically not only between the races but within each race according to the race of the victim and that such differences are legally sufficient to account for the apparent racial differential in sentencing.*"<sup>41</sup> Green's analysis shows that Negroes with Negro victims are very different from Negroes with white victims. The latter possess to a much greater extent those attributes for which the Pennsylvania statutes provide more severe penalties. For example, the NW robberies when compared to the NN robberies are more often compounded by the fact that they are armed robberies (61% vs. 13%), that they involve more than one bill of indictment<sup>42</sup> (73% vs. 38%), and that the defendant has prior convictions for robbery or for felonies against the person (33% vs. 18%). When the effects of these variables are partialled out, a very different picture emerges. Although Green uses no statistical tests, the observed mean length of sentence is virtually identical to the

<sup>37</sup> WOLFGANG, PATTERNS IN CRIMINAL HOMICIDE (1958); Johnson, *supra* note 27; Garfinkel, *supra* note 28; BENSING & SCHROEDER, *op. cit. supra* note 31.

<sup>38</sup> In a study of homicide in Cleveland, Ohio, 20 out of the 27 N-W first degree murder cases were felony murders. Bensing & Schroeder, *op. cit. supra* note 31. To warrant a conviction of felony murder it is unnecessary to prove premeditation; proof of intent is sufficient.

<sup>39</sup> The character of the white versus white homicides, it is thought, would be likely to vary according to the social class of the slayer and his victim. The lower class pattern would correspond to the general run of the NN slayings, crimes of passion predominating. The middle class pattern would more often involve the element of rational planning. See Wolfgang & Ferracuti, *supra* note 35.

<sup>40</sup> Garfinkel *supra* note 28, at 349.

<sup>41</sup> Green, *supra* note 34, at 349-50.

<sup>42</sup> The number of Bills of Indictment is the number of separate and unconnected offenses for which the defendant is convicted. *Id.* at 350.

theoretical mean ("the value that would occur if all cases of equivalent gravity, irrespective of race, receive the same sentence") for the crimes of robbery and burglary.<sup>43</sup> Green's analysis strongly argues that the variation in sentencing according to the racial composition of the offender-victim dyad exists as the result of legally relevant differences among the dyads, rather than as a result of racial discrimination on behalf of the court.

Thus far, Vines and Jacob, Johnson, Garfinkel, and Bullock have concluded that there is evidence of racial discrimination in our courts, while Green in two studies and Bensing and Schroeder have concluded that there is no evidence of racial discrimination in our courts. What are some of the differences between those studies finding negative evidence of racial discrimination and those studies finding positive evidence of racial discrimination that may account for the discrepant findings? Let us briefly examine four of these factors.

The four studies finding support for the hypothesis that Negro offenders are treated differentially used data collected from southern states—Louisiana, North Carolina, Georgia, Virginia and Texas; those studies finding no support for the hypothesis used data collected from northern states—Pennsylvania and Ohio. The implications of this difference between those studies finding support and those studies finding no support for the hypothesis is obvious; stereotypical notions of the differential treatment of Negroes in the North vs. the South are sufficiently well-known to warrant their absence from our present discussion.

Secondly, those studies finding no support for the hypothesis generally exercised much more care in controlling for relevant non-racial variables in their analyses. Interestingly, before these relevant non-racial variables were controlled, it appeared as though the racial composition of the offender-victim dyad were indeed exerting a significant influence on the decision. However, after the effects of some of the relevant non-racial aspects of the offense were partialled out, the evidence of discrimination disappeared.<sup>44</sup>

A third difference between the first and second groups of studies is that those studies finding

<sup>43</sup> *Id.* Tables 3 & 6.

<sup>44</sup> Green, *ibid.*, found for example, the number of previous felonies, whether the robbery offenses were armed or unarmed, and the bills of indictment, to be relevant nonracial factors that influenced the severity of the sentence administered.



evidence of racial discrimination use data about ten years older than those studies finding no evidence of racial discrimination. Specifically, Green's two studies use data on cases subsequent to the 1954 *Brown* decision, while Johnson, Garfinkel, and Bullock use data from cases, the vast majority of which were decided prior to the *Brown* decision.<sup>45</sup>

Finally those studies finding support for the hypothesis examined primarily homicides, while those studies finding no support for the hypothesis examined primarily property crimes.<sup>46</sup>

The dissonant findings of the two groups of studies may be accounted for by geographical and/or temporal considerations, in addition to the types of crimes analyzed and/or the lack of control of relevant non-racial variables. Although Green's studies seem to have pretty well established that in Philadelphia at least there is no evidence of racial discrimination on the part of the court within the crimes of burglary and robbery, more

<sup>45</sup> There is one exception to this observation in each group. Vines and Jacob, who found positive evidence, used data for the years 1954-60. Bensing and Schroeder, who found negative evidence, used data for the years 1947-53. It is possible that this may be accounted for by the fact that the former used data from the South while the latter used data from the North.

<sup>46</sup> Again, the findings of Vines and Jacob and Bensing and Schroeder are at odds with this observation.

empirical work needs to be done before conclusions with respect to homicide in the North and South, and property crimes in the South can be drawn and a statement regarding the presence or absence of racial discrimination on the part of the court can be made. Green's finding that non-racial variables may account for the apparent, though perhaps artifactual, discrimination that the less-controlled studies have unearthed has seriously called into question the validity of the findings of the earlier works. The wisest course of action would seem to be to continue to study the problem, controlling for the non-racial variables that Green has found relevant, and searching for other variables that may not be randomly distributed among the offender-victim dyads.

If further analyses should indicate that discrimination on the part of the court does not exist, then we should turn our efforts toward seeking equality in more remote, but nonetheless essential spheres of the adjudication process (*e.g.*, providing competent lawyers and investigators for indigents). If, however, inequities are uncovered in judicial transactions, the court must resolve them so that the rest of the nation and the world will have an example of true equality on which to base individual transactions.