

# THE EFFECTS OF THE OFFENDER'S RACE, ETHNICITY, AND SEX ON FEDERAL SENTENCING OUTCOMES IN THE GUIDELINES ERA

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## I

### INTRODUCTION

Social scientists have conducted dozens of studies designed to untangle the relationship between race and sentence severity.<sup>1</sup> In fact, this issue “may well have been the major research inquiry for studies of sentencing in the 1970s and early 1980s.”<sup>2</sup> Many of these early studies focused on the direct effect of race on sentencing, asking whether black, and occasionally Hispanic, offenders were sentenced more harshly than white offenders. Recent research, however, has taken a more theoretically and methodologically sophisticated approach.<sup>3</sup>

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1. See, e.g., 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 (Darnell Felix Hawkins ed., 1995); Cassia Spohn, *Thirty Years of Sentencing Reform: The Quest for a Racially-Neutral Sentencing Process*, in 3 POLICIES, PROCESSES, AND DECISIONS OF THE CRIMINAL JUSTICE SYSTEM 427 (Julie Horney ed., 2000).

2. Marjorie S. Zatz, *The Changing Forms of Racial/Ethnic Biases in Sentencing*, 24 J. RES. CRIME & DELINQ. 69, 69 (1987).

3. See, e.g., Celesta A. Albonetti, *The Joint Conditioning Effect of Defendant's Gender and Ethnicity on Length of Imprisonment Under the Federal Sentencing Guidelines for Drug Trafficking/Manufacturing Offenders*, 6 J. GENDER RACE & JUST. 39 (2002) [hereinafter Albonetti, *The Joint Conditioning Effect*]; 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 LAW & SOC'Y REV. 789 (1997) [hereinafter Albonetti, *Sentencing Under the Federal Sentencing Guidelines*]; Chandra D. LaFrentz & Cassia Spohn, *Who Is Punished More Harshly? An Examination of Race/Ethnicity, Gender, Age and Employment Status Under the Federal Sentencing Guidelines*, JUST. RES. & POL'Y, Fall 2006, at 25; Tracy Nobiling, Cassia Spohn & Miriam DeLone, *A Tale of Two Counties: Unemployment and Sentence Severity*, 15 JUST. Q. 459 (1998); Cassia Spohn & David Holleran, *The Imprisonment Penalty Paid by Young, Unemployed Black and Hispanic Male Offenders*, 38 CRIMINOLOGY 281 (2000); Ann Martin Stacey & Cassia Spohn, *Gender and the Social Costs of Sentencing: An Analysis of Sentences Imposed on Male and Female Offenders in Three U.S. District Courts*, 11 BERKELEY J. CRIM. L. 43 (2006); Sara Steen, Rodney L. Engen & Randy R. Gainey, *Images of Danger and Culpability: Racial Stereotyping, Case Processing and Criminal Sentencing*, 43 CRIMINOLOGY 435 (2005); Darrel Steffensmeier, Jeffery Ulmer & John Kramer, *The Interaction of Race, Gender, and Age in Criminal Sentencing: The Punishment Cost of Being Young, Black, and Male*, 36 CRIMINOLOGY 763 (1998).

Rather than asking *whether* race and ethnicity make a difference, recent studies attempt to identify the circumstances *under* which or the contexts in which race matters.

Most researchers testing for the indirect or interactive effects of race and ethnicity on sentencing have focused on determining whether the combination of the offender's race or ethnicity and other legally irrelevant offender characteristics—especially sex and age—produces greater sentence disparity than race or ethnicity alone. The bulk of this research has been conducted using data from state courts in the United States. Although the results are somewhat inconsistent, these studies generally demonstrate that certain categories of racial minorities—males, the young, and the unemployed—are singled out for harsher treatment. Some studies found that each of these offender characteristics had a direct effect on sentence outcomes, but that the combination of race or ethnicity and one or more of the other characteristics was a more powerful predictor of sentence severity than any characteristic individually.<sup>4</sup> Other studies using data from federal courts found that race and ethnicity had an effect only when the offender was male<sup>5</sup> or that the effects of sex, employment status, and other offender characteristics were confined to members of a particular racial or ethnic group.<sup>6</sup>

Research exploring the indirect effects of the offender's race, ethnicity, and sex on sentence severity by way of earlier decision points is much more limited. This is especially true of research focusing on offenders adjudicated in federal district courts. Although some research has examined whether black and Hispanic offenders receive harsher sentences than white offenders as a result of pretrial detention<sup>7</sup> or a lower likelihood of receiving a downward departure,<sup>8</sup> the literature lacks research that systematically analyzes whether racial minorities and males experience a cumulative disadvantage in sentencing as a result of unwarranted disparity at these earlier, more discretionary decision points.

The purpose of this paper is to examine the direct, indirect, and interactive effects of race, ethnicity, and sex on sentence severity. Using data on offenders convicted of drug-trafficking offenses in three U.S. district courts, this article

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4. See, e.g., Nobiling et al., *supra* note 3, at 475–79; Spohn & Holleran, *supra* note 3, at 294–99; Steffensmeier et al., *supra* note 3, at 777–81.

5. See Pauline K. Brennan & Cassia Spohn, *The Joint Effects of Offender Race/Ethnicity and Sex on Sentence Length Decisions in Federal Courts*, 1 RACE & SOC. PROBS. 200, 213 (2009).

6. See Albonetti, *Sentencing Under the Federal Sentencing Guidelines*, *supra* note 3, at 818 (finding educational achievements reduce sentencing for white offenders more than for black or Hispanic offenders and that citizenship status has a greater impact for black or Hispanic offenders than for white offenders).

7. See LaFrentz & Spohn, *supra* note 3; Cassia Spohn, *Race, Sex and Pretrial Detention in Federal Court: Indirect Effects and Cumulative Disadvantage*, 57 U. KAN. L. REV. 879 (2009).

8. See Albonetti, *The Joint Conditioning Effect*, *supra* note 3; David B. Mustard, *Racial, Ethnic, and Gender Disparities in Sentencing: Evidence From the U.S. Federal Courts*, 44 J.L. & ECON. 285 (2001); Darrel Steffensmeier & Stephen Demuth, *Ethnicity and Sentencing Outcomes in U.S. Federal Courts: Who is Punished More Harshly?*, 65 AM. SOC. REV. 705 (2000).

explores (1) whether black and Hispanic offenders are sentenced more harshly than white offenders and whether male offenders are sentenced more harshly than female offenders; (2) whether black and Hispanic offenders are more likely than white offenders and whether male offenders are more likely than female offenders to be held in custody prior to adjudication and, as a result, receive harsher sentences; (3) whether black and Hispanic offenders are less likely than white offenders and whether male offenders are less likely than female offenders to receive downward departures for providing substantial assistance and, as a result, receive harsher sentences; and (4) whether the effects of the offender's race and ethnicity are conditioned by the offender's sex.

The next section discusses the federal sentencing process, with a focus on the ways in which the federal sentencing guidelines constrain the discretion of judges, as well as the decision rules that guide judges' pretrial detention decisions and prosecutors' substantial assistance decisions. This is followed by a brief review of the literature assessing the factors that influence decisions regarding pretrial detention, substantial assistance departures, and sentence outcomes.

#### A. The Federal Sentencing Process

The federal sentencing guidelines, promulgated by the United States Sentencing Commission in 1987, differ from guidelines enacted by the states in a number of important ways. Although both state and federal guidelines are based on the seriousness of the offense and the offender's prior criminal record, most states use twelve or fewer categories of offense seriousness. By contrast, the federal guidelines use a forty-three-level sentencing grid.<sup>9</sup> They require the sentencing judge "to follow complex and abstract rules and to make minute arithmetic calculations in order to arrive at a sentence."<sup>10</sup> Critics charge that this process is overly rigid and mechanical—that is, that the "traditional judicial role of deliberation and moral judgment" has been replaced with "complex quantitative calculations that convey the impression of scientific precision and objectivity."<sup>11</sup>

Although the federal sentencing guidelines are fairly rigid, they are not inflexible. The guidelines provide for a spread of about twenty-five percent between the minimum and the maximum sentence for each combination of offense seriousness and prior record, and judges have discretion to impose a sentence within this range.<sup>12</sup> In addition, defendants who plead guilty may

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9. U.S. SENTENCING GUIDELINES MANUAL ch. 5, pt. A (2011).

10. KATE STITH & JOSÉ A. CABRANES, FEAR OF JUDGING: SENTENCING GUIDELINES IN THE FEDERAL COURTS 83 (1998).

11. *Id.* at 82; see also MICHAEL H. TONRY, SENTENCING MATTERS (1996); George W. Heaney, *The Reality of Guidelines Sentencing: No End to Disparity*, 28 AM. CRIM. L. REV. 161 (1991).

12. In 2005, the Supreme Court of the United States ruled that the federal guidelines are advisory, rather than mandatory. Although judges must still take into account the recommended guideline range for each offender, they are not bound to impose a sentence within that range. *United States v. Booker*,

qualify for a two or three level reduction in the guideline range for “acceptance of responsibility,” resulting in a sentence reduction of approximately twenty-five percent. If the case involves unusual circumstances, the judge can depart from the sentence range indicated by the guidelines, either upward or downward. There are, however, very limited grounds for these upward or downward departures. The relevant statute states that judges may depart from the guidelines only on a finding that “there exists an aggravating or mitigating circumstance of a kind, or to a degree, not adequately taken into consideration by the Sentencing Commission in formulating the guidelines.”<sup>13</sup> Moreover, the guidelines expressly state that the offender’s race, ethnicity, and sex are not to be taken into account by the judge in determining the appropriate sentence and that other factors “are not ordinarily relevant to the determination of whether a sentence should be outside the applicable guideline range.”<sup>14</sup> Included among the “specific offender characteristics” that are “not ordinarily relevant” are the defendant’s age; education and vocational skills; mental and emotional conditions; physical conditions, including drug or alcohol dependence or abuse; employment record; family ties and responsibilities; and community ties.<sup>15</sup> These provisions, then, effectively preclude judges from considering what many regard as the “commonsense bases for distinguishing among offenders.”<sup>16</sup>

Although the relative lack of discretion inherent in the federal sentencing guidelines would seem to rule out unwarranted disparity based on legally irrelevant offender characteristics, the sentencing process in federal district courts is complicated by the existence of the substantial assistance departure. Defendants who provide “substantial assistance”—that is, information that leads to the prosecution and conviction of another offender—are eligible for a downward departure in sentencing.<sup>17</sup> Because the meaning of “substantial assistance” is not defined and because there are few, if any, guidelines regarding the factors Assistant U.S. Attorneys (AUSAs) should use in determining whether to file a motion for a substantial assistance departure, the decision is largely unregulated and highly discretionary.

The discretionary nature of the substantial assistance departure is further illustrated by the fact that if the court grants the motion, as is typical, the sentencing judge has discretion to determine the amount of the sentence reduction. Section 5K1.1 states that the judge’s decision regarding the appropriate reduction may rest on factors such as the significance and usefulness of the defendant’s assistance; the truthfulness, completeness, and reliability of the information provided; the nature, extent, and timeliness of the

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543 U.S. 220, 264 (2005).

13. 18 U.S.C. § 3553(b)(1) (2006).

14. U.S. SENTENCING GUIDELINES MANUAL § 5H, introductory cmt. (2011).

15. *Id.* at § 5H1.1–1.12.

16. TONRY, *supra* note 11, at 77.

17. U.S. SENTENCING GUIDELINES MANUAL § 5K1.1 (2011) (“Upon motion of the government stating that the defendant has provided substantial assistance in the investigation or prosecution of another person who has committed an offense, the court may depart from the guidelines.”).

defendant's assistance; and any danger or risk that resulted from the defendant's assistance.<sup>18</sup> Consideration of these factors and others may result in a sentence that is substantially less than the presumptive sentence under the sentencing guidelines; it even may result in a sentence that is less than the *mandatory minimum sentence* that would be applicable absent the substantial assistance departure.<sup>19</sup>

The discretion inherent in the substantial assistance departure opens the door for consideration of factors, including the characteristics of the offender, that judges are precluded from considering at sentencing. In fact, sentencing scholars contend that substantial assistance departure decisions are a "wellspring of sentencing disparity"<sup>20</sup> and have the potential to produce the type of unwarranted disparity that the guidelines were intended to eliminate.<sup>21</sup>

The federal sentencing process is further complicated by the fact that certain offender characteristics are explicitly *relevant* to bail and pretrial detention decisions. Pretrial detention decisions in federal courts are structured by the Bail Reform Act of 1984, which permits judges to detain a defendant as a means of insuring the safety of the community and the appearance of the defendant in court.<sup>22</sup> Section 3142(b) of the Act states that the defendant must be released on personal recognizance or unsecured personal bond unless the judicial officer determines "that such release will not reasonably assure the appearance of the person as required or will endanger the safety of any other person or the community."<sup>23</sup>

Section 3142(g) specifies the factors that judges must take into consideration in making decisions regarding pretrial release or detention. These factors are (1) the nature and circumstances of the offense charged, including whether the offense is a crime of violence or involves a controlled substance; (2) the weight of the evidence against the defendant; (3) the history and characteristics of the defendant; and (4) the nature and seriousness of the danger to any person or the community that would be posed by the defendant's release.<sup>24</sup> The defendant's "history and characteristics" include the defendant's "character, physical and mental condition, family ties, employment, financial resources, length of residence in the community, community ties, past conduct, history relating to drug or alcohol abuse, criminal history, and record concerning appearance at court proceedings."<sup>25</sup> Also included in this section is "whether, at

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18. *Id.*

19. 18 U.S.C. § 3553(e) (2006).

20. STITH & CABRANES, *supra* note 10, at 140.

21. See, e.g., John H. Kramer & Jeffery T. Ulmer, *Sentencing Disparity and Departures from Guidelines*, 13 JUST. Q. 81 (1996); Mustard, *supra* note 8, at 311; Ilene H. Nagel & Stephen J. Schulhofer, *A Tale of Three Cities: An Empirical Study of Charging and Bargaining Practices Under the Federal Sentencing Guidelines*, 66 S. CAL. L. REV. 501, 554–57 (1992).

22. 18 U.S.C. § 3142(e) (2006).

23. 18 U.S.C. § 3142(b).

24. 18 U.S.C. § 3142(g)(1)–(4).

25. 18 U.S.C. § 3142(g)(3).

the time of the current offense or arrest, the [defendant] was on probation, on parole, or on other release pending trial, sentencing, appeal, or completion of sentence for an offense under Federal, State, or local law.”<sup>26</sup> Although the offender’s race, ethnicity, and sex are not included in this list of factors explicitly, many of the factors that judges are required to take into account—such as family ties, employment, financial resources, community ties, and criminal history—are linked to race, ethnicity, and sex. Thus, the offender’s race, ethnicity, and sex may influence the likelihood of pretrial detention indirectly.

## B. Research on the Federal Sentencing Process

### 1. Bail and Pretrial Detention

There is very limited research examining bail and pretrial release or detention decisions in the federal guidelines era. This is largely due to the fact that until recently the publicly available data files from the United States Sentencing Commission did not include the offender’s pretrial status.<sup>27</sup> An exception is Spohn’s analysis of the likelihood of pretrial detention in three federal district courts, which revealed that the offender’s pretrial status was predicted by a mix of offender and case characteristics.<sup>28</sup> The odds of pretrial detention were higher for offenders whose crimes and criminal histories were more serious and for offenders who were under some form of criminal justice control at the time of the offense. Pretrial status also was affected by offenders’ stakes in conformity and community ties: pretrial detention was less likely for offenders who were more educated, employed, and married. Spohn’s study also revealed that black offenders were more likely than white offenders, and male offenders were more likely than female offenders, to be held in custody prior to adjudication.

In turn, the offender’s pretrial status may affect federal sentence outcomes. Research demonstrates that offenders who are detained prior to trial are sentenced more harshly than those who are released<sup>29</sup> and are less likely to

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26. 18 U.S.C. § 3142(g)(3)(B).

27. There is, on the other hand, a large body of research examining bail and pretrial detention decisions in state courts. *See, e.g.,* Celesta A. Albonetti, Robert M. Hauser, John Hagan & Ilene H. Nagel, *Criminal Justice Decision Making as a Stratification Process: The Role of Race and Stratification Resources in Pretrial Release*, 5 J. QUANTITATIVE CRIMINOLOGY 57 (1989); Stephen Demuth, *Racial and Ethnic Differences in Pretrial Release Decisions and Outcomes: A Comparison of Hispanic, Black, and White Felony Arrestees*, 41 CRIMINOLOGY 873 (2003); Charles M. Katz & Cassia Spohn, *The Effect of Race and Gender on Bail Outcomes: A Test of an Interactive Model*, 19 AM. J. CRIM. JUST. 161 (1995); Traci Schlesinger, *Racial and Ethnic Disparity in Pretrial Criminal Processing*, 22 JUST. Q. 170 (2005).

28. Spohn, *supra* note 7; *see also* Cassia Spohn & Steven Belenko, *Do the Drugs, Do the Time? The Effect of Drug Abuse on Offenders Sentenced in Three U.S. District Courts*, 40 CRIM. JUST. & BEHAV. (forthcoming 2013).

29. *See, e.g.,* Brian D. Johnson & Sara Betsinger, *Punishing the “Model Minority”: Asian-American Criminal Sentencing Outcomes in Federal District Courts*, 47 CRIMINOLOGY 1045, 1066 (2009); LaFrentz & Spohn, *supra* note 3; Spohn, *supra* note 7; Jeffery T. Ulmer, James Eisenstein &

receive downward departures or departures for providing substantial assistance.<sup>30</sup>

The results of these studies demonstrate that federal judges' pretrial detention decisions are based on offender and case characteristics that are generally consistent with the provisions of the Bail Reform Act of 1984. The research also highlights the importance of controlling for pretrial detention in models predicting the likelihood of a substantial assistance departure, the likelihood of incarceration, and the length of the sentence, as pretrial detention has a strong negative effect on the likelihood of departure and a strong positive effect on sentence severity.

## 2. Substantial Assistance Departures

There is a growing body of research investigating the factors that influence the likelihood a defendant in federal district court will receive a substantial assistance departure and the magnitude of the sentence discount when these departures are provided. Nagel and Schulhofer conducted a qualitative study focused on guideline circumvention in three U.S. district courts in 1989 and 1990.<sup>31</sup> They found substantial assistance departures were used to mitigate the sentences of "salvageable" defendants, and that AUSAs' decisions to file motions for substantial assistance departures were based on their assessments of the value of the case and the sentence deserved.<sup>32</sup> Their analysis also revealed that the standards used to determine the type of assistance that qualified as "substantial assistance" varied among the jurisdictions. One jurisdiction had a relatively strict standard that required the defendant to assist in making an arrest and be willing to testify. Another had a more flexible standard in which the AUSA would file the motion even when the defendant did not provide information that led to additional prosecutions. A third had a standard that was relaxed for more sympathetic defendants. As Nagel and Schulhofer pointed out, "[t]he problem with such equity judgments is that they are made by individual prosecutors without regard to the nationally set sentencing rules, thereby introducing sentencing disparity and compromising the uniformity and certainty goals of the guidelines."<sup>33</sup>

Considerable evidence supports Nagel and Schulhofer's conclusion that substantial assistance departures are a primary source of unwarranted sentencing disparity. A number of studies reveal that the offender's race, ethnicity, and sex affect both the likelihood of a substantial assistance departure

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Brian D. Johnson, *Trial Penalties in Federal Sentencing: Extra-Guidelines Factors and District Variation*, 27 JUST. Q. 560, 577 (2010).

30. See Johnson & Betsinger, *supra* note 29, at 1066; Cassia Spohn & Robert Fornango, *U.S. Attorneys and Substantial Assistance Departures: Testing for Interprosecutor Disparity*, 47 CRIMINOLOGY 813, 827 (2009); Ulmer et al., *supra* note 29, at 577.

31. Nagel & Schulhofer, *supra* note 21.

32. *Id.* at 535.

33. *Id.*

and the magnitude of the sentence discount.<sup>34</sup> For example, Mustard found that blacks, Hispanics, males, and those with lower levels of education and income were less likely to receive downward departures—and, when they did, received smaller sentence discounts—than whites, females, and offenders with higher levels of education and income.<sup>35</sup> Steffensmeier and Demuth similarly found that Hispanic drug offenders received smaller sentence discounts for providing substantial assistance than did either black or white drug offenders.<sup>36</sup> Albonetti's research revealed that white females received the greatest benefit from substantial assistance departures,<sup>37</sup> and Stacey and Spohn's study revealed that female offenders with children were significantly more likely than female offenders without children to receive a downward departure for providing substantial assistance.<sup>38</sup> As Steffensmeier and Demuth noted, these findings clearly raise concerns about "the equal application of the law and the wherewithal of the sentencing guidelines in reducing sentencing disparities of any kind."<sup>39</sup>

Further, an emerging body of empirical research has confirmed that the use of substantial assistance departures varies across federal court contexts<sup>40</sup> and across prosecutors.<sup>41</sup> For example, Hartley and his colleagues found that use of substantial assistance departures for offenders charged with crack and powder cocaine offenses varied significantly across federal circuits,<sup>42</sup> and Maxfield and Kramer concluded that use of these departures varied across district courts.<sup>43</sup>

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34. See, e.g., Ronald S. Everett & Roger A. Wojtkiewicz, *Difference, Disparity, and Race/Ethnic Bias in Federal Sentencing*, 18 J. QUANTITATIVE CRIMINOLOGY 189, 206–07 (2002); Richard D. Hartley, Sean Maddan & Cassia C. Spohn, *Prosecutorial Discretion: An Examination of Substantial Assistance Departures in Federal Crack-Cocaine and Powder-Cocaine Cases*, 24 JUST. Q. 382 (2007); Brian D. Johnson, Jeffery T. Ulmer & John H. Kramer, *The Social Context of Guidelines Circumvention: The Case of Federal District Courts*, 46 CRIMINOLOGY 737 (2008); Kimberly Kempf-Leonard & Lisa L. Sample, *Have the Federal Sentencing Guidelines Reduced Severity? An Examination of One Circuit*, 17 J. QUANTITATIVE CRIMINOLOGY 111, 117–20 (2001); Spohn & Fornango, *supra* note 30, at 827–28; LINDA DRAZGA MAXFIELD & JOHN KRAMER, SUBSTANTIAL ASSISTANCE: AN EMPIRICAL YARDSTICK GAUGING EQUITY IN CURRENT FEDERAL POLICY AND PRACTICE 14, 19 (1998).

35. Mustard, *supra* note 8, at 308–11.

36. Steffensmeier & Demuth, *supra* note 8, at 722–24.

37. Albonetti, *The Joint Conditioning Effect*, *supra* note 3, at 52.

38. Stacey & Spohn, *supra* note 3, at 73.

39. Steffensmeier & Demuth, *supra* note 8, at 725.

40. See, e.g., Hartley et al., *supra* note 34; Johnson et al., *supra* note 34; MAXFIELD & KRAMER, *supra* note 34; Cassia Spohn, *Sentencing Decisions in Three U.S. District Courts: Testing the Assumption of Uniformity in the Federal Sentencing Process*, JUST. RES. & POL'Y, Fall 2005, at 1; Jeffery T. Ulmer, *The Localized Uses of Federal Sentencing Guidelines in Four U.S. District Courts: Evidence of Processual Order*, 28 SYMBOLIC INTERACTION 255 (2005); U.S. SENTENCING COMM'N, FIFTEEN YEARS OF GUIDELINES SENTENCING: AN ASSESSMENT OF HOW WELL THE FEDERAL CRIMINAL JUSTICE SYSTEM IS ACHIEVING THE GOALS OF SENTENCING REFORM (2004).

41. See, e.g., Spohn & Fornango, *supra* note 30, at 828–29.

42. Hartley et al., *supra* note 34, at 395.

43. See MAXFIELD & KRAMER, *supra* note 34, at 7–19; see also Chantale Lacasse & A. Abigail Payne, *Federal Sentencing Guidelines and Mandatory Minimum Sentences: Do Defendants Bargain in the Shadow of the Judge?* 42 J.L. & ECON. 245, 252–53 (1999) (finding differences in two district courts);



More recently, Johnson, Ulmer, and Kramer used a multi-level modeling strategy to investigate whether districts varied in their use of sentencing departures.<sup>44</sup> They found significant differences between districts in the likelihood of substantial assistance departures and in the weight attached to the various predictors of these decisions.<sup>45</sup> They also found that differences in district courts' use of substantial assistance departures could be attributed in part to the size of the district's caseload and the racial composition of the district's population.<sup>46</sup> Spohn and Fornango used a similar modeling strategy to examine whether U.S. Attorneys varied in their use of substantial assistance departures.<sup>47</sup> They found that although the differences between prosecutors in the likelihood of obtaining a departure largely reflected differences in the types of cases and offenders handled by each prosecutor, small, but statistically significant, differences across prosecutors remained even after they controlled for offender and case characteristics and for the district in which the case was adjudicated.<sup>48</sup> These findings led them to conclude that the prosecutors in the district courts they examined "do not have *identical* views of the circumstances that justify a substantial assistance departure."<sup>49</sup>

The research conducted to date, then, reveals that legally irrelevant factors affect the likelihood of receiving substantial assistance departures and the magnitude of the sentence discount. Research also reveals that there is significant inter-circuit, inter-district, and inter-prosecutor variation in the use of substantial assistance departures, which can be at least partially attributed to court contextual factors.<sup>50</sup>

### 3. Sentence Outcomes

The goals for reform varied among those who called for implementation of the federal sentencing guidelines. Liberals argued that structured sentencing practices would enhance fairness and hold judges accountable for their decisions, while conservatives asserted that the reforms would lead to harsher penalties that eventually would deter criminal behavior. Reformers on both sides of the political spectrum, however, agreed that the changes were designed to curb discretion and reduce unwarranted disparity.<sup>51</sup> Accordingly, the *Federal Sentencing Guidelines Manual* states that one of the three objectives Congress sought to achieve in enacting the Sentencing Reform Act of 1984 was "reasonable uniformity in sentencing by narrowing the wide disparity in

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Spohn, *supra* note 40, at 14–22 (finding significant differences across three district courts); Ulmer, *supra* note 40, at 263–65 (finding differences across four courts).

44. Johnson et al., *supra* note 34.

45. *Id.* at 760.

46. *Id.* at 762–63.

47. Spohn & Fornango, *supra* note 30, at 821–25.

48. *Id.* at 827–29.

49. *Id.* at 835–36 (emphasis in original).

50. Johnson et al., *supra* note 34, at 762–63.

51. STITH & CABRANES, *supra* note 10.

sentences imposed for similar criminal offenses committed by similar offenders.”<sup>52</sup>

Despite Congress’s stated objective, research on federal sentencing outcomes in the guidelines era reveals that unwarranted disparity has not been eliminated. Much of this research focuses on racial and ethnic disparities. For example, Spohn reviewed eight methodologically sophisticated studies of sentences imposed under the federal sentencing guidelines.<sup>53</sup> She found that each of these studies revealed that racial or ethnic minorities were sentenced more harshly than whites, either for all offenses or for some types of offenses.<sup>54</sup> These findings are confirmed by several more recent studies of federal sentencing decisions.<sup>55</sup> For example, Everett and Wojtkiewicz found that blacks, Hispanics, and Native Americans received harsher sentences than whites,<sup>56</sup> and Pasko found that Hispanics were sentenced more harshly than whites.<sup>57</sup> Steffensmeier and Demuth, who compared sentence outcomes for whites, blacks, white Hispanics, and black Hispanics, similarly found that the likelihood of incarceration was substantially less and the mean prison sentence significantly shorter for white offenders than for racial minorities, especially Hispanics.<sup>58</sup>

There is also substantial evidence that the sex of the offender influences federal sentence outcomes. In fact, a report on the first fifteen years of federal guidelines sentencing by the United States Sentencing Commission reported that “the gap in average prison terms between male and female offenders has widened in the guidelines era.”<sup>59</sup> A number of studies demonstrated that female offenders were sentenced more leniently than male offenders,<sup>60</sup> that women were more likely than men to receive downward departures,<sup>61</sup> and that females who did get departures received bigger sentence discounts than their male counterparts.<sup>62</sup> The results of these studies, all of which controlled for crime seriousness, the offender’s criminal history, and other legally relevant factors,

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52. U.S. SENTENCING COMMISSION MANUAL ch. 1, pt. (A)(3) (2011).

53. Spohn, *supra* note 1.

54. *Id.* at 458–61.

55. See, e.g., Everett & Wojtkiewicz, *supra* note 34, at 206; Johnson & Betsinger, *supra* note 34, at 1076; Kempf-Leonard & Sample, *supra* note 34, at 120; Mustard, *supra* note 8, at 311; Lisa Pasko, *Villain or Victim: Regional Variation and Ethnic Disparity in Federal Drug Offense Sentencing*, 13 CRIM. JUST. POL’Y REV. 307, 314 (2002); Steffensmeier & Demuth, *supra* note 8, at 724–26; Ulmer et al., *supra* note 29, at 576.

56. Everett & Wojtkiewicz, *supra* note 34, at 201.

57. Pasko, *supra* note 55, at 314.

58. Steffensmeier & Demuth, *supra* note 8, at 724–26.

59. U.S. SENTENCING COMM’N, *supra* note 40, at 127.

60. See Albonetti, *Sentencing Under the Federal Sentencing Guidelines*, *supra* note 3, at 808; Everett & Wojtkiewicz, *supra* note 34, at 201; Johnson & Betsinger, *supra* note 34, at 1072; Mustard, *supra* note 8, at 308; Ulmer et al., *supra* note 29, at 576.

61. See Johnson & Betsinger, *supra* note 34, at 1069–72; Mustard, *supra* note 8, at 308; Spohn & Fornango, *supra* note 30, at 827; Stacey & Spohn, *supra* note 3, at 73.

62. See MAXFIELD & KRAMER, *supra* note 34, at 19; Mustard, *supra* note 8, at 311.

clearly suggest that federal judges evaluate female offenders differently than male offenders.

Only a handful of federal sentencing studies have examined the interaction between the offender's race and ethnicity and other extralegal variables, including the offender's sex. The research that does exist demonstrates that offender characteristics have both indirect and interactive effects on federal sentence outcomes. Albonetti's research on drug offenders, for example, revealed that the offender's sex affected sentencing decisions for white offenders and black offenders, but not for Hispanic offenders,<sup>63</sup> and that sex, race, and ethnicity conditioned the effects of guideline departures, offense seriousness, and criminal history.<sup>64</sup> In a later study, Albonetti found that white females received the greatest benefit from substantial assistance departures<sup>65</sup> and that the guideline offense level had a more pronounced effect on sentence length for white females than for black females.<sup>66</sup> LaFrentz and Spohn found that although race and ethnicity alone did not have a direct effect on sentence length, race and ethnicity interacted with sex and employment status to produce an effect.<sup>67</sup> Black and Hispanic females got shorter sentences than their male counterparts, but white females were treated no differently than white males. Further, unemployed whites received longer sentences than employed whites, but there were no differences in the sentences imposed on unemployed and employed Blacks and Hispanics.

In summary, research on the federal sentencing process suggests that structured sentencing reforms have not eliminated unwarranted disparity in sentencing. Sentence outcomes in the guidelines era are affected by legally irrelevant offender characteristics, including race, ethnicity, and sex.

### C. The Current Study

As noted earlier, the purpose of this paper is to examine the direct, indirect, and interactive effects of the offender's race, ethnicity, and sex on sentence severity. Using data on offenders convicted of drug-trafficking offenses in three U.S. district courts, the study tests a series of hypotheses about the effects of race, ethnicity, and sex on decisions regarding pretrial detention, substantial assistance departures, and sentence length.

The theoretical perspective guiding this research is the focal concerns perspective, which posits that punishment severity reflects decision-makers'

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63. Albonetti, *Sentencing Under the Federal Sentencing Guidelines*, *supra* note 3, at 814; *see also*, Brennan & Spohn, *supra* note 5 (finding that sex affected sentence length for black and Hispanic offenders but not for white offenders); Cassia Spohn & Pauline K. Brennan, *The Joint Effects of Offender Race/Ethnicity and Gender on Substantial Assistance Departures in Federal Courts*, 1 RACE & JUST. 48, 64–65 (2011) (finding that offender sex affected substantial assistance departures for black offenders and Hispanic offenders but not for white offenders).

64. Albonetti, *Sentencing Under the Federal Sentencing Guidelines*, *supra* note 3, at 817–18.

65. Albonetti, *The Joint Conditioning Effect*, *supra* note 3, at 52.

66. *Id.* at 53.

67. LaFrentz & Spohn, *supra* note 3, at 38–39.

assessments of the blameworthiness of the defendant, their desire to protect the community by incapacitating dangerous offenders, and their concerns about the practical consequences, or social costs, of sentencing decisions.<sup>68</sup> Because both prosecutors and judges confront uncertainty about the outcomes of cases<sup>69</sup> and rarely have enough information to accurately determine a defendant's dangerousness or threat, they develop a "perceptual shorthand" based on stereotypes and attributions that are themselves linked to ascribed offender characteristics.<sup>70</sup> Thus, "court actors use legal factors such as the offense seriousness and prior record as initial punishment benchmarks but then make situational attributions about defendants' character and risk based on more subtle, subjective decision-making schema."<sup>71</sup>

The first three hypotheses, which are based on the principles inherent in the focal concerns perspective and on the findings of prior research, propose that the offender's race, ethnicity, and sex will directly affect the likelihood of pretrial detention, the likelihood of a substantial assistance departure, and the length of the prison sentence.

H1: Black and Hispanic offenders will be more likely than white offenders to be held in custody prior to adjudication. Male offenders will be more likely than female offenders to be held in custody prior to adjudication.

H2: Black and Hispanic offenders will be less likely than white offenders to receive a downward departure for providing substantial assistance. Male offenders will be less likely than female offenders to receive a downward departure for providing substantial assistance.

H3: Black and Hispanic offenders will receive longer sentences than white offenders. Male offenders will receive longer sentences than female offenders.

The next two hypotheses posit that the offender's race, ethnicity, and sex will affect sentence severity indirectly through their effects on the likelihood of pretrial detention and substantial assistance departure.

H4: Offenders held in custody prior to trial will receive longer sentences than offenders released prior to trial. Black and Hispanic offenders will have a higher likelihood of pretrial detention than will white offenders; as a result, they will receive longer sentences than white offenders. Male offenders will have a higher likelihood of pretrial detention than will female offenders; as a result, they will receive longer sentences than female offenders.

H5: Offenders who receive a substantial assistance departure will receive shorter sentences than offenders who do not receive a substantial assistance departure. Black and Hispanic offenders will have a lower likelihood of receiving a substantial assistance departure than will white offenders; as a result, they will receive longer sentences than white offenders. Male offenders will have a lower likelihood of receiving a substantial assistance departure than will female offenders; as a result, they will receive longer sentences than female offenders.

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68. See Steffensmeier et al., *supra* note 3, at 766–79.

69. Albonetti, *supra* note 27, at 249.

70. Darnell F. Hawkins, *Causal Attribution and Punishment for Crime*, 2 DEVIANT BEHAVIOR 207, 208 (1981); see also, George S. Bridges & Sara Steen, *Racial Disparities in Official Assessments of Juvenile Offenders: Attributional Stereotypes as Mediating Mechanisms*, 63 AM. SOC. REV. 554 (1998).

71. Johnson et al., *supra* note 34, at 745.

The final hypothesis tested is that the offender's race and ethnicity will affect case outcomes for male offenders but not for female offenders. This hypothesis reflects an assumption that all female offenders, regardless of race or ethnicity, will be viewed as less dangerous, less threatening, and less likely to recidivate than male offenders. It also reflects an assumption that black and Hispanic male offenders—especially in the context of drug trafficking—will be viewed as more dangerous, threatening, and culpable than white male offenders.

H6: Black male and Hispanic male offenders will have higher likelihoods of pretrial detention and lower likelihoods of receiving substantial assistance departures than white males and will receive longer sentences than white male offenders. There will be no racial or ethnic differences in the likelihood of pretrial detention, the likelihood of receiving a substantial departure, or the length of the sentence for female offenders.

## II

### DATA AND METHODS

The data for this study consist of a subset of data collected for a study of charging and sentencing decisions in three U.S. district courts: the District of Minnesota, the District of Nebraska, and the Southern District of Iowa. The data file includes detailed information on all offenders sentenced in these courts during fiscal years 1998, 1999, and 2000. This study selects all cases in which the offender was convicted of a drug-trafficking offense involving powder cocaine, crack cocaine, methamphetamine, or other drugs, such as heroin and marijuana, but excludes cases (N = 25) with offenders who were Asian or Native American, and those with missing data on the independent variables. The resulting data file contains 1,567 cases: 558 from the Southern District of Iowa, 450 from the District of Minnesota, and 579 from the District of Nebraska.

The data from these three district courts, rather than data from all district courts in the United States, are appropriate for two reasons. First, many of the variables used as covariates for this study—the offender's employment status, marital status, and number of dependent children; whether the offender was under the control of the criminal justice system at the time of the crime; and whether the offender had a history of hard drug use or was using hard drugs at the time of the crime—are not included in the publicly available data files from the United States Sentencing Commission. Because I had access to the presentence reports in these three district courts, however, I was able to collect data on these variables, which are theoretically relevant to the decisions analyzed in this paper. Second, there is mounting evidence that sentence outcomes vary significantly among federal district courts.<sup>72</sup> This variation calls into question the conclusions of studies of federal sentencing decisions that use

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72. See, e.g., Paul J. Hofer, Kevin R. Blackwell & R. Barry Ruback, *The Effect of the Federal Sentencing Guidelines on Inter-Judge Sentencing Disparity*, 90 J. CRIM. L. & CRIMINOLOGY 239, 287 (1999); Paula M. Kautt, *Location, Location, Location: Interdistrict and Intercircuit Variation in Sentencing Outcomes for Federal Drug-Trafficking Offenses*, 19 JUST. Q. 633, 653 (2002); Lacasse & Payne, *supra* note 43, at 252–53; Spohn, *supra* note 40, at 15–16.

data aggregated across all district courts. As Weisselberg and Dunworth noted, “[i]t is extremely difficult, and perhaps, unhelpful to draw general, systemwide conclusions about the effect of the guidelines upon the district courts.”<sup>73</sup> Because of these concerns, this study uses data from three relatively homogeneous district courts and controls for the district in which the case was adjudicated.

#### A. Dependent and Independent Variables

Descriptive statistics for the dependent and independent variables are presented in Table 1. There are three dependent variables. The first is a dichotomous measure of whether the offender was in custody (coded 1) or released (coded 0) prior to adjudication by plea or by trial. The second is a dichotomous variable indicating whether the offender received a downward departure for providing substantial assistance (yes = 1; no = 0). The third dependent variable is the length of the prison sentence imposed on offenders sentenced to prison.<sup>74</sup> Because the values were positively skewed, I logged the sentence length variable. In these three district courts, 63.9 percent of the offenders were in custody prior to adjudication; 38.3 percent received substantial assistance departures; and the mean sentence was 90.45 months.

The primary independent variables are the offender’s race, ethnicity, and sex. The offender’s race or ethnicity is measured with three dummy variables (Black, Hispanic, and White), with white offenders as the reference category. The offender’s sex is measured with a dichotomous variable (male = 1; female = 0). The analysis also controls for other offender and case characteristics that previous research has shown to influence federal sentencing decisions and decisions regarding pretrial release. This includes dummy variables for the offender’s employment status (employed = 1; unemployed = 0), citizenship status (U.S. citizen = 1; non-citizen = 0), and marital status (married = 1; not married = 0). Other control variables include the offender’s number of dependent children and number of criminal history points, which ranges from zero to forty-four. Three dummy variables are included to measure the offender’s educational achievement (no high school degree, high school degree, some college or college degree), with those without a high-school degree as the reference category. The offender’s age is an interval-level variable measured in years.

In addition, the models include three dummy variables that measure the offender’s drug use or abuse: whether the offender had a history of hard drug use, but was not using hard drugs at the time of the crime (yes = 1; no = 0); whether the offender was under the influence of hard drugs at the time of the crime (yes = 1; no = 0); and whether the offender had never used hard drugs

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73. Charles D. Weisselberg & Terence Dunworth, *Inter-District Variation Under the Guidelines: The Trees May Be More Significant Than the Forest*, 6 FED. SENT’G REP. 25, 27 (1993).

74. There were only thirty-three offenders convicted of drug-trafficking offenses who were not sentenced to prison; therefore, I do not model the likelihood of a prison sentence.

Table 1: Frequency Distribution: Dependent and Independent Variables.

	N	%	Mean
<b>Dependent Variables</b>			
Pretrial Detention	1001	63.9	
Substantial Assistance Departure	600	38.3	
Length of Prison Sentence (months)			90.45
Length of Prison Sentence (logged)			1.81
<b>Offender Characteristics</b>			
Race/Ethnicity			
White (reference)	652	41.6	
Black	405	25.8	
Hispanic	510	32.5	
Male	1327	84.7	
Age at Sentencing			31.86
Unemployed	676	43.1	
Non-citizen	381	24.3	
Education			
No high school degree (reference)	688	43.9	
High school degree	639	40.8	
Some college or college degree	240	15.3	
Married	386	24.6	
Number of Dependent Children			1.75
Criminal History Points			4.28
History of Drug Use but Not Using During Crime	347	22.1	
Using Hard Drugs at Time of Crime	806	51.4	
<b>Case Characteristics</b>			
Presumptive Sentence (months)			116.42
Presumptive Sentence (logged)			1.96
Most Serious Count is Drug Conspiracy	1197	76.4	
Drug Type			
Powder cocaine	216	13.8	
Crack cocaine	353	22.5	
Methamphetamine	843	53.8	
Other drugs (reference)	155	9.9	
Role Adjustment			
No role adjustment (reference)	1146	73.1	
Aggravated role adjustment	133	8.5	
Mitigated role adjustment	288	18.4	
Under Criminal Justice Control at Time of Crime	546	34.8	
District Court Where Case Adjudicated			
Southern Iowa (reference)	558	34.4	
Nebraska	579	36.9	
Minnesota	450	28.7	

(yes = 1; no = 0), which is the reference category. “Hard drugs” are defined as powder cocaine, crack cocaine, methamphetamine, and opiates such as heroin. Information on the offender’s drug use was obtained during the presentence investigation—either from the offender or from family members and other individuals interviewed during the investigation—and documented in the presentence report. As shown in Table 1, more than half (51.4%) of these drug-trafficking offenders were under the influence of hard drugs at the time of the crime; 22.1 percent had a history of hard drug use but were not using drugs during the crime, and 26.5 percent had never used hard drugs.<sup>75</sup>

The models also control for several case characteristics, which differ somewhat depending upon the dependent variable being analyzed. The presumptive sentence, which, like the actual sentence, is positively skewed and therefore logged, is included in all of the analyses. Other case characteristics included in all of the models are dichotomous indicators of whether the most serious charge against the offender was a drug conspiracy charge (yes = 1; no = 0) and whether the offender was under some type of criminal justice control—such as being out on bail, on probation, or on parole—at the time of the crime (yes = 1; no = 0). The analyses also include the type of drug involved in the offense, which is measured by four dummy variables (powder cocaine, crack cocaine, and methamphetamine, with other drugs as the reference category); any adjustment to the presumptive sentence the offender received for playing an aggravated or mitigated role in the offense (no role adjustment is the reference category); and the jurisdiction in which the case was adjudicated (Minnesota and Nebraska, with Southern Iowa as the reference category). The analysis of sentence length controls for whether the offender received a downward departure for providing substantial assistance (yes = 1; no = 0) or a regular downward departure (yes = 1; no = 0). The analyses of the likelihood of a substantial assistance departure and sentence length include whether the offender was in custody prior to the sentencing stage (in custody = 1; released = 0).

Although prior research on federal sentence outcomes controlled for the offense seriousness score and the offender’s criminal history score, the present study controls for the presumptive sentence, which is the approach recommended by Engen and Gainey<sup>76</sup> and the United States Sentencing Commission.<sup>77</sup> The presumptive sentence, which is based on the offense

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75. Further analysis revealed that many offenders had a history of using more than one type of drug and that some were under the influence of more than one drug at the time of the crime. The most common type of drug that offenders had ever used was powder cocaine (61.1% of offenders had used this drug), followed by methamphetamine (44.6%), crack cocaine (20.3%), and heroin (7.4%). About one third (31.1%) of the offenders reported that they were under the influence of methamphetamine at the time of crime and one fourth (24.5%) reported being under the influence of powder cocaine. In contrast, very few offenders reported being under the influence of either crack cocaine (7.7%) or heroin (1.6%) at the time of the crime.

76. Rodney L. Engen & Randy R. Gainey, *Modeling the Effects of Legally Relevant and Extralegal Factors Under Sentencing Guidelines: The Rules Have Changed*, 38 CRIMINOLOGY 1207, 1209 (2000).

77. U.S. SENTENCING COMM’N, *supra* note 40, at 120.



seriousness score and the criminal history score, is the minimum sentence that the judge could impose without departing from the guidelines. To account for mandatory minimum sentences that were prevalent in drug cases, the presumptive sentence is measured as the guideline minimum unless a mandatory minimum sentence was triggered and indicated a longer sentence than the guideline minimum. In such cases, the presumptive sentence is measured as the mandatory minimum sentence. If there was a mandatory minimum sentence but the safety valve was applied,<sup>78</sup> the presumptive sentence is the guideline minimum.

The data displayed in Table 1 reveal that three quarters of the offenders adjudicated in these three district courts were either white (41.6%) or Hispanic (32.5%), and 25.8 percent of the offenders were black. Most offenders (84.7%) were male and their average age was about thirty-two years old. The typical offender had at least one dependent child, was employed at the time of the offense, was a U.S citizen, had not attended college, and was not married. The mean number of criminal history points assigned to these offenders was 4.28. The mean presumptive sentence was 116.42 months, and three quarters (76.4%) of the offenders were facing drug conspiracy charges. More than half (53.8%) of the offenders were convicted of an offense involving methamphetamine, and most of the remaining offenders were convicted of an offense involving either crack cocaine (22.5%) or powder cocaine (13.8%). Almost two-thirds (63.9%) of the offenders were in custody at the time of the sentence hearing, and about a third (34.8%) were under criminal justice control at the time of the crime. Most offenders received neither an aggravated (8.5%) nor a mitigated (18.4%) role adjustment.

Binary logistic regression is used to analyze the likelihood of pretrial detention and the likelihood of a substantial assistance departure, which are dichotomous variables. Ordinary least squares regression is used to analyze the length of the sentence (logged).

### III RESULTS

#### A. The Direct Effects of the Offender's Race, Ethnicity, and Sex

The first three hypotheses tested concern the direct effects of the offender's race, ethnicity, and sex on the three case outcomes: pretrial detentions, substantial assistance departures, and sentence length. The results of the analysis of the likelihood of pretrial detention, which are presented in Table 2, reveal that race, ethnicity, and sex all affected the odds of pretrial custody as predicted. Black offenders were nearly two-and-a-half times more likely than

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78. The safety valve provision requires the court to impose a sentence pursuant to the guidelines without regard to any statutory minimum sentences in cases in which the defendant does not have more than one criminal history point and did not use violence or credible threats of violence or possess a firearm or other dangerous weapon in connection with the offense.

white offenders ( $\text{Exp}(B) = 2.36$ ), and Hispanic offenders were more than one-and-a-half times more likely than white offenders ( $\text{Exp}(B) = 1.68$ ) to be detained prior to adjudication. Male offenders had odds of pretrial detention ( $\text{Exp}(B) = 2.26$ ) that were more than twice those for female offenders. The fact that these legally irrelevant factors had a direct effect on pretrial detention suggests that, consistent with the focal concerns perspective, they are linked to judges' attributions of dangerousness, threat, and likelihood of non-appearance at court proceedings.

The data presented in Table 2 also reveal that the odds of pretrial detention were affected by the seriousness of the offense, as measured by the presumptive sentence; by the offender's criminal history; and by a number of other legally relevant factors. Offenders were more likely to be detained if they played a major role in the drug-trafficking offense, and thus received an aggravated role adjustment to the offense severity score, or were under some type of criminal justice control at the time of the crime. A somewhat counterintuitive finding is that drug offenders whose crimes involved methamphetamine were less likely to be detained than those whose crimes involved marijuana, heroin, or other drugs. In addition, the odds of pretrial detention were affected by the jurisdiction in which the case was adjudicated: offenders in Nebraska and Minnesota were less likely than those in Southern Iowa to be in custody prior to adjudication.

The likelihood of pretrial detention also was affected by several offender characteristics in addition to the offender's race, ethnicity, and sex, including the offender's employment status, citizenship status, marital status, education, and use of drugs at the time of the crime. The odds of pretrial detention were higher for unemployed offenders than for employed offenders, for non-citizens than for citizens, and for offenders who were using drugs at the time of the crime than for those who were not. By contrast, the likelihood of detention was lower for married offenders than for those who were unmarried and for offenders with some college or a college degree than for those without a high school degree. These findings suggest that judges consider—as they are authorized to do by the Bail Reform Act—the offender's stakes in conformity, community ties, and substance abuse history in deciding whether the offender poses a threat to society or is unlikely to appear for all scheduled court appearances.

The results of the analysis of the likelihood of a substantial assistance departure provide mixed support for the hypothesis that race, ethnicity, and sex would have direct effects on receipt of a departure. As shown in Table 3, the odds of a substantial assistance departure were affected by the offender's sex, but not by the offender's race or ethnicity. Male offenders ( $\text{Exp}(B) = .625$ ) were significantly less likely than female offenders to receive a downward departure for providing substantial assistance, but the likelihood of receiving this type of departure did not differ for white, black, and Hispanic offenders.

Consistent with the results of the analysis of pretrial detention, the likelihood of a substantial assistance departure was affected by a mix of offender and case characteristics. The odds of receiving a departure were higher for offenders with some college or a college degree than for offenders without a high school degree and for offenders who either had a history of drug use or were using drugs when the crime was committed. Similarly, the odds were lower

Table 2: The Likelihood of Pretrial Detention: Results of the Logistic Regression Analysis.

	B	SE	Exp (B)
<b>Offender Characteristics</b>			
Race/Ethnicity			
White (reference)			
Black	<b>.86*</b>	<b>.27</b>	<b>2.36</b>
Hispanic	<b>.52*</b>	<b>.22</b>	<b>1.68</b>
Male	<b>.82*</b>	<b>.18</b>	<b>2.26</b>
Age at Sentencing	-.01	.01	0.99
Unemployed	<b>.86*</b>	<b>.14</b>	<b>2.37</b>
Non-citizen	<b>3.22*</b>	<b>.31</b>	<b>25.12</b>
Education			
No high school degree (reference)			
High school degree	-.06	.15	0.94
Some college or college degree	<b>-.64*</b>	<b>.20</b>	<b>0.53</b>
Married	<b>-.64*</b>	<b>.16</b>	<b>0.53</b>
Number of Dependent Children	.06	.04	1.06
History of Drug Use but Not Using During Crime	.30	.21	1.35
Using Hard Drugs at Time of Crime	<b>.68*</b>	<b>.19</b>	<b>1.98</b>
<b>Case Characteristics</b>			
Presumptive Sentence (logged)	<b>2.10*</b>	<b>.30</b>	<b>8.16</b>
Most Serious Count is Drug Conspiracy	-.16	.16	0.85
Drug Type			
Powder cocaine	-.29	.29	0.75
Crack cocaine	-.63	.34	0.53
Methamphetamine	<b>-.51*</b>	<b>.25</b>	<b>0.60</b>
Other drugs (reference)			
Role Adjustment			
No role adjustment (reference)			
Aggravated role adjustment	<b>.83*</b>	<b>.32</b>	<b>2.29</b>
Mitigated role adjustment	.26	.18	1.30
Under Criminal Justice Control at Time of Crime	<b>.64*</b>	<b>.15</b>	<b>1.90</b>
District Court Where Case Adjudicated			
Southern Iowa (reference)			
Nebraska	<b>-.48*</b>	<b>.16</b>	<b>0.62</b>
Minnesota	<b>-.65*</b>	<b>.18</b>	<b>0.52</b>
Nagelkerke R <sup>2</sup>			<b>.456</b>

\*P<sub>≤</sub> .05. Significant Coefficients are in bold.

for non-citizens than for citizens. Whereas offenders facing longer presumptive sentences and those charged with a drug-trafficking conspiracy were more likely to receive a departure, offenders who played a major role in the offense had

Table 3: The Likelihood of a Substantial Assistance Departure: Results of the Logistic Regression Analysis.

	B	SE	Exp (B)
<b>Offender Characteristics</b>			
Race/Ethnicity			
White (reference)			
Black	-.23	.24	0.79
Hispanic	-.24	.20	0.78
Male	<b>-.47*</b>	<b>.16</b>	<b>0.62</b>
Age at Sentencing	-.02	.007	0.98
Unemployed	-.08	.12	0.92
Non-citizen	<b>-.70*</b>	<b>.22</b>	<b>0.50</b>
Education			
No high school degree (reference)			
High school degree	.14	.13	1.15
Some college or college degree	<b>.36*</b>	<b>.17</b>	<b>1.44</b>
Married	.18	.14	1.20
Number of Dependent Children	.06	.04	1.06
Criminal History Points	-.001	.01	0.99
History of Drug Use but Not Using During Crime	<b>.38*</b>	<b>.17</b>	<b>1.46</b>
Using Hard Drugs at Time of Crime	<b>.41*</b>	<b>.16</b>	<b>1.51</b>
<b>Case Characteristics</b>			
Presumptive Sentence (logged)	<b>.78*</b>	<b>.25</b>	<b>2.18</b>
Most Serious Count is Drug Conspiracy	<b>.36*</b>	<b>.14</b>	<b>1.44</b>
Drug Type			
Powder cocaine	-.21	.24	0.81
Crack cocaine	-.19	.30	0.83
Methamphetamine	.08	.20	1.09
Other drugs (reference)			
Role Adjustment			
No role adjustment (reference)			
Aggravated role adjustment	<b>-.44*</b>	<b>.22</b>	<b>0.65</b>
Mitigated role adjustment	.11	.15	1.12
In Custody at Time of Sentencing	<b>-.34*</b>	<b>.14</b>	<b>0.71</b>
Under Criminal Justice Control at Time of Crime	-.005	.13	0.99
District Court Where Case Adjudicated			
Southern Iowa (reference)			
Nebraska	<b>-.26*</b>	<b>.13</b>	<b>0.77</b>
Minnesota	<b>-.32*</b>	<b>.15</b>	<b>0.73</b>
Nagelkerke R <sup>2</sup>			.136

\*P ≤ .05. Significant Coefficients are in bold.

lower odds, as did offenders who were in custody during the pretrial process. Finally, offenders adjudicated in Nebraska and Minnesota were less likely than

Table 4: Results of the OLS Regression Analysis of Sentence Length (Logged).

	B	SE	Beta
<b>Offender Characteristics</b>			
Race/Ethnicity			
White (reference)			
Black	.04	.02	.04
Hispanic	.03	.02	.03
Male	<b>.04*</b>	<b>.01</b>	<b>.04</b>
Age at Sentencing	.00	.001	.01
Unemployed	.01	.01	.02
Non-citizen	.00	.02	.00
Education			
No high school degree (reference)			
High school degree	-.008	.01	-.01
Some college or college degree	-.009	.02	-.01
Married	.008	.01	.01
Number of Dependent Children	.001	.003	.005
Criminal History Points	.002	.001	.03
History of Drug Use but Not Using During Crime	.015	.01	.02
Using Hard Drugs at Time of Crime	.02	.01	.02
<b>Case Characteristics</b>			
Presumptive Sentence (logged)	<b>.92*</b>	<b>.02</b>	<b>.72</b>
Substantial Assistance Departure	<b>-.32*</b>	<b>.01</b>	<b>-.40</b>
Downward Departure	<b>-.14*</b>	<b>.02</b>	<b>-.10</b>
Most Serious Count is Drug Conspiracy	-.004	.01	-.004
Drug Type			
Powder cocaine	<b>.06*</b>	<b>.02</b>	<b>.05</b>
Crack cocaine	.04	.02	.04
Methamphetamine	<b>.05*</b>	<b>.02</b>	<b>.06</b>
Other drugs (reference)			
Role Adjustment			
No role adjustment (reference)			
Aggravated role adjustment	.03	.02	.02
Mitigated role adjustment	-.02	.01	-.02
In Custody at Time of Sentencing	<b>.06*</b>	<b>.01</b>	<b>.08</b>
Under Criminal Justice Control at Time of Crime	.01	.01	.01
District Court Where Case Adjudicated			
Southern Iowa (reference)			
Nebraska	<b>-.08*</b>	<b>.01</b>	<b>-.10</b>
Minnesota	<b>-.09*</b>	<b>.01</b>	<b>-.10</b>
R <sup>2</sup>			.77

\*P ≤ .05. Significant Coefficients are in bold.

those adjudicated in Southern Iowa to receive a substantial assistance departure.

The results of the analysis of sentence length (logged) are presented in Table 4. Contrary to Hypothesis 3, the offender's race or ethnicity did not affect the length of the sentence imposed by the judge. In fact, the only offender characteristic that affected sentence length was sex: male offenders received significantly longer sentences than did female offenders. Not surprisingly, the presumptive sentence was the strongest predictor (Beta = .71) of the actual sentence, followed by whether the offender received a substantial assistance (Beta = -.40) or regular (Beta = -.10) downward departure. Other significant predictors of the length of the sentence were the offender's pretrial status (those in custody received longer sentences) and the type of drug involved in the offense (offenders convicted of offenses involving powder cocaine and methamphetamine received longer sentences than offenders convicted of offenses involving marijuana and other drugs).

#### B. Indirect Effects of the Offender's Race, Ethnicity, and Sex

The results discussed thus far indicate that the offender's sex had a direct effect on each of the three case outcomes. Compared to female offenders, male offenders had higher odds of pretrial detention and lower odds of receiving substantial assistance departures. Males also received longer sentences than females. The offender's race and ethnicity, on the other hand, affected the odds of pretrial detention as predicted, but did not directly affect the likelihood of a substantial assistance departure or the length of the prison sentence.

The results of the analysis also reveals, consistent with Hypotheses 4 and 5, that being detained prior to trial and receiving a substantial assistance departure had strong and statistically significant effects on the length of the prison sentence. In fact, receipt of a substantial assistance departure was the second most powerful predictor of the length of the sentence; only the presumptive sentence had a stronger effect. Pretrial detention also had a significant effect on the length of the sentence and on the likelihood of a substantial assistance departure. Offenders detained prior to adjudication received longer sentences and had lower odds of receiving substantial assistance departures than did offenders who were released prior to adjudication.

The direct and indirect effects of the offender's race, ethnicity, and sex are diagrammed in Figures 1 and 2.<sup>79</sup> Although neither race nor ethnicity had a direct effect on sentence length (see Figure 1), both race and ethnicity had positive effects on the likelihood of pretrial detention, which, in turn, had a positive effect on the length of the sentence. In other words, black and Hispanic offenders were more likely than white offenders to be detained prior to adjudication and, as a result, received longer sentences than white offenders.

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79. Figures 1 and 2 are graphical representations of the direct and indirect ways in which race, ethnicity, and sex affect case outcomes. They do not represent results obtained from a formal path analysis or from structural equation modeling.

Race and ethnicity also affected sentence length through a more complex path: from race and ethnicity, to pretrial detention, to substantial assistance departure, and then to sentence severity. Black and Hispanic offenders were more likely than white offenders to be detained, which led to a lower likelihood of substantial assistance departure, and, consequently, a longer prison sentence.

The relationship between the offender’s sex and the three case outcomes is even more complex. Male offenders received longer sentences than similarly

Figure 1: The Indirect Effects of Race and Ethnicity on Sentence Length.

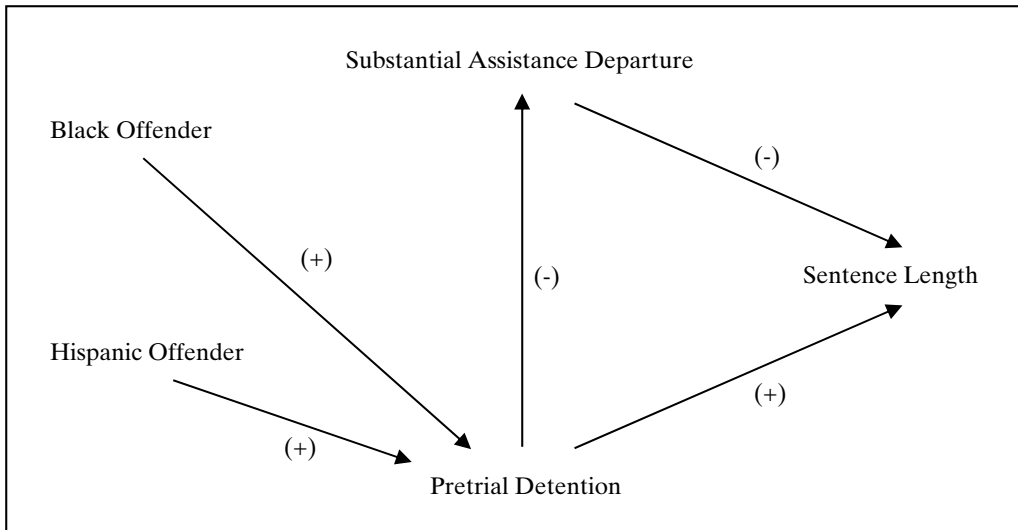
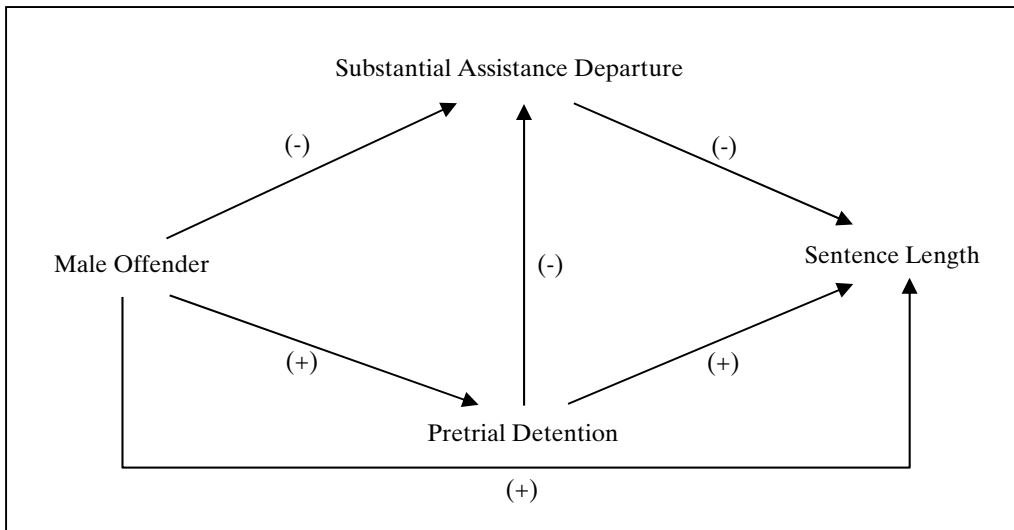


Figure 2: The Direct and Indirect Effects of Gender on Sentence Length.



situated female offenders (a direct effect). They also faced higher odds of pretrial detention and lower odds of substantial assistance departures than female offenders, which resulted in longer sentences (indirect effects). Male offenders' sentences, like those for black and Hispanic offenders, also were affected by the fact that offenders who were detained prior to adjudication had lower odds of receiving substantial assistance departures, which led to longer sentences.

### C. The Interactive Effects of the Offender's Race, Ethnicity, and Sex

The final hypothesis tested is that the offender's race and ethnicity would interact with the offender's sex. More to the point, this hypothesis predicted that race and ethnicity would affect the three case outcomes for male offenders but would have no effect on outcomes for female offenders. To test this hypothesis, the data were partitioned by the offender's sex and run through separate models of the likelihood of pretrial detention, the likelihood of a substantial assistance departure, and the length of the prison sentence for male and female offenders. The results of these analyses, which are presented in Table 5, provide mixed support for the hypothesis. As predicted, the race and ethnicity of the offender affected the likelihood of pretrial detention and the length of the sentence for male offenders but not for female offenders. Black and Hispanic male offenders were more likely than white male offenders to be detained prior to trial, and black and Hispanic males also received longer sentences than did similarly situated white males. In contrast, there were no racial or ethnic differences in the likelihood of pretrial detention or the length of the prison sentence among female offenders, and the race or ethnicity of the offender did not affect the odds of a substantial assistance departure for either male or female offenders.

These results were confirmed by analyses (results not shown) that used six

Table 5: The Effects of Race/Ethnicity on Case Outcomes: Data Partitioned by Gender of Offender.

	Pretrial Detention			Substantial Assistance Departure			Length of Prison Sentence (Logged)		
	B	Se	Exp(B)	B	Se	Exp(B)	B	Se	Beta
Males Only									
White (ref.)									
Black	<b>.90*</b>	<b>.32</b>	<b>2.47</b>	-.32	.28	0.73	<b>.05*</b>	<b>.02</b>	<b>.06</b>
Hispanic	<b>.54*</b>	<b>.25</b>	<b>1.72</b>	-.29	.22	0.75	<b>.04*</b>	<b>.02</b>	<b>.04</b>
Females Only									
White (ref.)									
Black	.49	.61	1.64	-.18	.54	0.84	.02	.07	.02
Hispanic	.36	.53	1.43	-.08	.51	0.92	.03	.06	.03

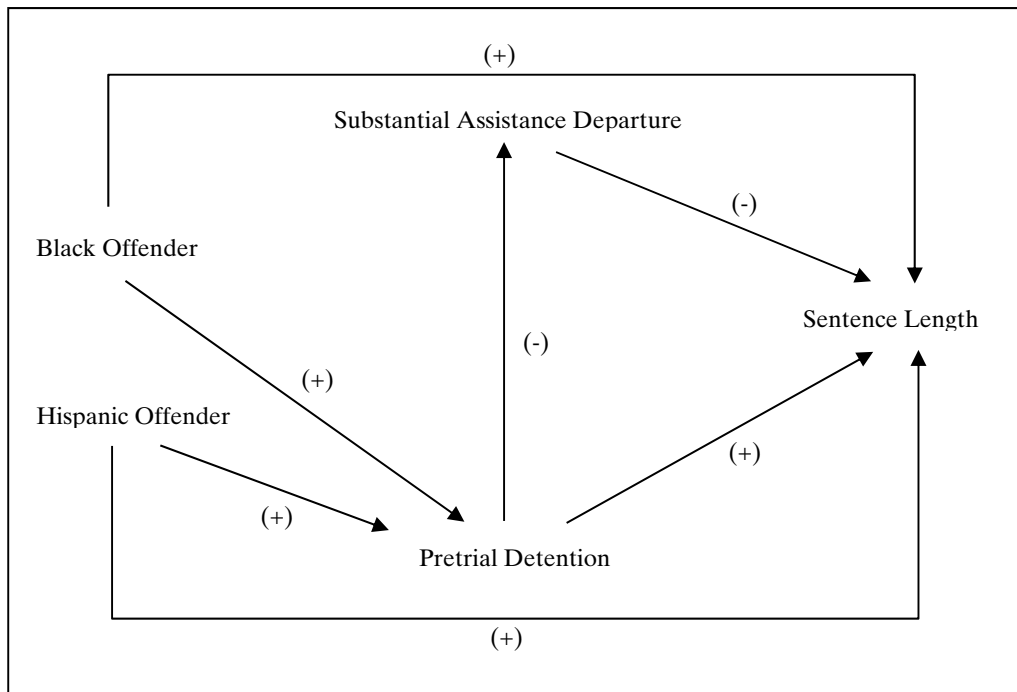
\* $P \leq .05$ . Significant Coefficients are in bold.



offender race and offender sex dummy variables—black male, Hispanic male, white male, black female, Hispanic female, and white female, with black male as the reference category. Compared to black male offenders, the odds of pretrial detention were significantly lower for white males and for females of all three races, but were no different for Hispanic males. The likelihood of substantial assistance departure did not vary for black males, Hispanic males, and white males, but all female offenders had a higher likelihood of departure than did black males. The pattern of results for sentence length was the same as for pretrial detention: white males and females regardless of race got shorter sentences than black males, but there were no differences in the sentences imposed on black and Hispanic males.

The direct and indirect effects of race and ethnicity on sentence severity for male offenders are shown in Figure 3. Black and Hispanic male offenders received longer prison terms than did white male offenders (a direct effect). Black and Hispanic male offenders also were more likely than white male offenders to be detained prior to trial. As a result, they received longer sentences than did white males, both because pretrial detention had a direct effect on sentence length and because pretrial detention decreased the odds of a substantial assistance departure, which increased sentence length. Further analysis of the data for all male offenders—regardless of race and ethnicity—revealed that pretrial detention created lower odds of receiving substantial

Figure 3: The Direct and Indirect Effects of Race and Ethnicity on Sentence Length: Males Only.



assistance departures and resulted in longer sentences. Thus, black and Hispanic males received harsher sentences than did white males not because pretrial detention affected subsequent outcomes only for black and Hispanic males, but because black males and Hispanic males were more likely than white males to be in custody prior to adjudication.

#### D. Summary and Discussion

The purpose of this study was to move beyond research focusing on the direct effects of race, ethnicity, and sex on sentence outcomes for drug offenders adjudicated in federal district courts, and, in so doing, to identify more precisely the mechanisms by which these legally irrelevant factors influence sentence severity. As shown in Table 6, the results of the analysis support some, but not all, of the six hypotheses tested. In support of Hypothesis 1, the offender's race, ethnicity, and sex had direct effects on the likelihood of pretrial detention: black and Hispanic offenders were more likely than white offenders, and male offenders were more likely than female offenders, to be in custody prior to adjudication. By contrast, and contrary to Hypotheses 2 and 3, only the offender's sex directly affected the likelihood of a substantial assistance departure and the length of the sentence.

There is strong support for Hypothesis 4 but mixed support for Hypothesis 5. These hypotheses focus on the indirect effects of race, ethnicity, and sex on sentence length through their effects on pretrial detention and substantial assistance departure. As predicted, offenders detained prior to trial got substantially longer sentences than did offenders released during the pretrial period. Similarly, offenders who received substantial assistance departures received significantly shorter sentences than did offenders who did not receive this type of departure. Because black and Hispanic offenders had a higher likelihood of pretrial detention than white offenders and because male offenders had higher odds of pretrial detention than female offenders, the sentences imposed on black, Hispanic, and male offenders were longer than those imposed on white and female offenders. Stated another way, the offender's race, ethnicity, and sex affected sentence length indirectly through the likelihood of pretrial detention. However, the odds of receiving a substantial assistance departure varied by the offender's sex—males were less likely to receive these departures than females—but not by the offender's race or ethnicity. Thus, only the offender's sex affected sentence length indirectly through its effect on the likelihood of receiving a substantial assistance departure.

The results of the analyses also provide strong support for Hypothesis 6, which predicted that there would be racial and ethnic differences in outcomes for male offenders but not for female offenders: the offender's race or ethnicity affected two of the three outcomes for male offenders but none of the outcomes for female offenders. Black males and Hispanic males were more likely than white males to be detained prior to trial, and also received longer sentences

than white males. There were, on the other hand, no racial or ethnic differences in the likelihood of receiving a substantial assistance departure for either male or female offenders.

Table 6: Summary of Findings.

Hypotheses	Confirmed
<b>H1: Direct Effects of Race, Ethnicity, and Sex on Pretrial Detention</b>	
(a) Black and Hispanic offenders will be more likely than white offenders to be held in custody prior to trial	Yes
(b) Male offenders will be more likely than female offenders to be held in custody prior to trial	Yes
<b>H2: Direct Effects of Race, Ethnicity, and Sex on Substantial Assistance Departure</b>	
(a) Black and Hispanic offenders will be less likely than white offenders to receive a substantial assistance departure	No
(b) Male offenders will be less likely than female offenders to receive a substantial assistance departure	Yes
<b>H3: Direct Effects of Race, Ethnicity, and Sex on Sentence Length</b>	
(a) Black and Hispanic offenders will receive longer sentences than white offenders	No
(b) Male offenders will receive longer sentences than female offenders	Yes
<b>H4: Indirect Effects of Race, Ethnicity, and Sex on Sentence Length: Pretrial Detention</b>	
(a) Offenders held in custody prior to trial will receive longer sentences than offenders released prior to trial.	Yes
(b) Black and Hispanic offenders will have a higher likelihood of pretrial detention than white offenders and, as a result, will receive longer sentences than white offenders	Yes
(c) Male offenders will have a higher likelihood of pretrial detention than female offenders and, as a result, will receive longer sentences than female offenders	Yes
<b>H5: Indirect Effects of Race, Ethnicity, and Sex on Sentence Length: Substantial Assistance Departures</b>	
(a) Offenders who receive a substantial assistance departure will receive shorter sentences than offenders who do not receive a substantial assistance departures	Yes
(b) Black and Hispanic offenders will have a lower likelihood of receiving a departure than white offenders and, as a result, will receive longer sentences than white offenders	No
(c) Male offenders will have a lower likelihood of receiving a departure than female offenders and, as a result, will receive longer sentences than female offenders	Yes
<b>H6: Interaction Between Offender Race, Ethnicity, and Sex</b>	
(a) The offender's race and ethnicity will affect the likelihood of pretrial detention for male offenders but not for female offenders	Yes
(b) The offender's race and ethnicity will affect the likelihood of a substantial assistance departure for male offenders but not for female offenders	No
(c) The offender's race and ethnicity will affect the length of the sentence for male offenders but not for female offenders	Yes

Several of these findings merit comment. First, the results highlight the importance of examining outcomes other than the length of the sentence, as well as the importance of testing for both indirect and direct effects. Analysis of the full sample revealed that the offender's race or ethnicity did not have a direct effect on sentence length, but did affect the likelihood of pretrial detention. It also showed that the offender's sex directly affected all three outcomes examined. Black offenders and Hispanic offenders were sentenced more harshly than white offenders because they were more likely than white offenders to be detained prior to adjudication. Male offenders were sentenced more harshly than female offenders because of their sex (a direct effect) and because they were more likely than female offenders to be detained prior to trial and less likely than female offenders to receive downward departures for providing substantial assistance. Among the full sample of offenders, then, the offender's race and ethnicity only affected sentence severity indirectly, but the offender's sex affected the length of the sentence both directly and indirectly.

The results also confirm the importance of testing for the interactive effects of the offender's race, ethnicity, and sex. As noted above, analysis of the full sample revealed that the offender's race and ethnicity did not affect the length of the sentence imposed by the judge. However, analysis of the data partitioned by the sex of the offender revealed that the offender's race or ethnicity affected sentence severity for male offenders but not for female offenders. The effect of race or ethnicity on sentence outcomes for male offenders, therefore, was masked when all offenders—male and female—were analyzed together. In other words, the inclusion of female offenders in the analysis “diluted” the effects of race and ethnicity for male offenders. The results also show that the effect of race and ethnicity on pretrial detention was confined to male offenders. Black and Hispanic males were more likely than white males to be held in custody prior to adjudication, but the likelihood of pretrial detention did not vary by race or ethnicity for female offenders. Thus, both the direct and the indirect effects of race and ethnicity on sentence severity were conditioned by the offender's sex.

The fact that all three outcomes were affected by legally irrelevant offender characteristics suggests, first, that the more discretionary and less well-regulated decisions regarding pretrial detention and substantial assistance departures are a locus of unwarranted disparity and, second, that even the restrictive federal sentencing guidelines have not been able to eliminate this disparity. The guidelines instruct judges and other criminal justice officials to consider the harm done by the crime, the blameworthiness and culpability of the offender, and the offender's potential for reform as they attempt to tailor outcomes to fit crimes and the offenders who commit them. The ambiguity and uncertainty inherent in making these assessments opens the door to consideration of race-, ethnicity-, and sex-linked stereotypes, including dangerousness, threat, and amenability to rehabilitation.

The findings of this study also point to the importance of the jurisdiction in which the case was adjudicated. Although I examined case outcomes in three relatively homogenous district courts, I found that all three case outcomes varied significantly by jurisdiction. Compared to offenders adjudicated in the Southern District of Iowa, offenders whose cases were processed in the District of Minnesota and the District of Nebraska were less likely to be detained prior to trial and less likely to receive substantial assistance departures. They also received significantly shorter sentences. These jurisdictional differences are not surprising. Interviews with criminal justice officials in each of these jurisdictions<sup>80</sup> revealed that the U.S. Attorney for the Southern District of Iowa during this time period exercised less oversight over and had a looser policy regarding the use of substantial assistance departures. Further, judges in this jurisdiction had more liberal attitudes toward using departures to reduce sentences. This lends credence to researchers' contention that aggregating data across all district courts may distort the reality of decision-making in each district court.<sup>81</sup>

#### IV

#### CONCLUSION

The results of this study of the sentences imposed on black, Hispanic, and white male and female offenders convicted of drug trafficking in three federal district courts illustrate the complexities inherent in attempting to specify the roles that the offender's race, ethnicity, and sex play in the sentencing process. The results reiterate that attempting to determine "Does race, ethnicity, or sex matter?" is a theoretically and methodologically unsophisticated approach to understanding a complex phenomenon. It is overly simplistic to assume that racial minorities—females as well as males—will receive harsher sentences than whites regardless of the nature of the crime, the culpability of the offender, or the results of earlier case processing decisions. As the results of our study reveal, the more interesting question is "When do race, ethnicity, and sex matter?"

The answer to this question is also complex. The results of the study highlight the fact that the effect of the offender's sex is cumulative—male offenders get longer sentences than female offenders both because being male is associated with images of danger, threat and culpability and, consistent with the focal concerns perspective, because these images and attributions lead to harsher sentences.<sup>82</sup> But males also get longer sentences than females because they are disadvantaged at earlier stages in the process—they are more likely to be held in custody and are less likely to receive a substantial assistance

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80. The author of this paper conducted all of these interviews. They were face-to-face interviews using a standard set of open-ended questions. Information gleaned from the interviews is on file with the author.

81. See Kautt, *supra* note 72, at 639–40; Spohn, *supra* note 40, at 4.

82. See Steffensmeier et al., *supra* note 3, at 769.

departure. The results also illustrate that the offender's race or ethnicity has both direct and indirect effects, but that these effects are confined to male offenders only. Among female offenders, race and ethnicity does not affect sentence severity either directly or indirectly. This suggests, again consistent with the focal concerns perspective and with Spitzer's assertions regarding "social dynamite,"<sup>83</sup> that it is the combination of race, ethnicity, and sex that triggers attributions of dangerousness and threat in the minds of judges and other criminal justice officials. Future research should continue to explore the complex interconnections among race, ethnicity, sex, and earlier case processing outcomes. As Chiricos and Crawford suggested, "there is much yet to be learned about the issue of race and imprisonment."<sup>84</sup>

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83. Steven Spitzer, *Toward a Marxian Theory of Deviance*, 22 SOC. PROBS. 638, 645 (1975).

84. Chiricos & Crawford, *supra* note 1, at 301.