# RACE AS A DETERMINANT OF CRIMINAL SENTENCES: A METHODOLOGICAL CRITIQUE AND A CASE STUDY

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In this article I argue that several conceptual and methodological deficiencies have plagued research on racial discrimination. Discrimination is usually conceptualized as a function of societal or institutional forces rather than as an attribute of individual decisionmakers, resulting in research designs that analyze decisions of courts, rather than those of individual judges. However, a finding of no discrimination in aggregate court data does not preclude the possibility that individual judges discriminate against or in favor of minorities. Thus the selection of the unit of analysis, and other methodological choices, can significantly affect substantive conclusions. Finally, research has largely been concerned with description, rather than explanation, and has therefore failed to illuminate the decisional processes that produce discrimination.

Each of these critiques is substantiated with data from the Fulton County (Georgia) Superior Court. My findings suggest three patterns of sentencing among judges: pro-black, anti-black, and nondiscriminatory. Anti-black judges are strongly tied to traditional southern culture, concerned about crime, prejudiced against blacks, and relatively punitive in their sentencing philosophies. In addition, they tend to rely more heavily on the defendant's attitude and prior record in making their sentencing decisions. Thus, discrimination seems to flow from both the attitudinal predispositions of the judges and the process they employ to make decisions.

## I. INTRODUCTION

One of the more important ethical issues confronting the American system of criminal justice is the degree to which sanctions are imposed inequitably upon different groups in the population. Most scholars assume that inequities exist but empirical evidence is far from consistent, especially that concerning racial discrimination in sentencing. Although great quantities of data have been collected, few empirically based generalizations have been generated.

Because many factors confound the relationship between the defendant's race and the sanction received, the first objective of this research is to demonstrate that methodological practices have contributed significantly to the seeming inconsistencies in the empirical findings. As Hagan (1974) correctly observed, weak statistical tests and the failure to control for relevant confounding variables have been responsible for erroneous conclusions concerning discrimination. However, the additional problem of choosing the proper unit of analysis must

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also be resolved because its impact may be equally serious. Because description is only the initial step in understanding racial discrimination, I will also seek to identify some possible causes of discriminatory behavior by significant actors in judicial settings.

## II. THEORIES OF RACIAL DISCRIMINATION

Research on racial discrimination in the courts can be classified in terms of whether a societal or individual perspective is adopted.[1] The first approach, prevalent among sociologists, begins with the argument that courts as institutions are systematically biased in the way in which they allocate values and manage conflict; they cannot be neutral (see, e.g., Turk, 1976). Like other political, social, and economic institutions, courts are simply resources used by different segments of society to advance their own interests. Because power and access to power are distributed unequally in society, courts become an instrument of the powerful for maintaining their power.

However, authors identify the privileged groups in different ways. Marxists perceive power as distributed along class lines.

> In essence—that is to say, from the purely sociological viewpoint—bourgeois society supports its class dominance by its system of criminal law and thereby holds the exploited classes in obedience. . . . The criminal jurisdiction of the bourgeois state is organized class terror, differing only in degree from the so-called extraordinary measures applied to the elements of civil war. [Pashukanis, 1951: 212-13]

Others find an equal level of bias but in favor of groups that are more pluralistic, less monolithic.

The perspective that courts are systematically used by some groups to oppress others has important implications for both the conceptualization of racial discrimination and the design of empirical research. Discrimination is conceptualized as flowing from the *institutional structure*, from the very nature of the institution itself—its structure, procedural rules, informal norms, and the like. Even though the institutional process is impersonal and universalistic, the outcomes are systematically biased. This is what is meant by "institutional racism."

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1. For a representative sample of the research on racial discrimination in the criminal justice system, see Atkinson and Neuman (1970); Baab and Furgeson (1967); Burke and Turk (1975); Carroll and Mondrick (1976); Castberg (1971); Chiricos and Waldo (1975); Clarke and Koch (1976); Goldman (1963); Greenwood *et al.* (1973); Jaros and Mendelsohn (1967); Levin (1972); Mileski (1971); Terry (1967); Thornberry (1973); Tiffany *et al.* (1975); Uhlman (1977); and the studies reviewed by Hagan (1974).

   For more general, theoretical works adopting the societal perspective, see Quinney (1974, 1977); Turk (1976); Chambliss and Seidman (1971); and the many other works cited in Reasons (1975).

There are several implications that follow from this theoretical stance. First, it assumes there is little *intra*institutional variation in decisionmaking. All decisions made by the same process have the same result. Second, preferences of the individual decisionmaker have little impact: structure, not personality, determines outputs. Finally, because discrimination is institutional, attempts to explain it focus upon institutional or societal variables.[2]

An alternative theoretical perspective seeks to explain discrimination in terms of the beliefs and values of the individual decisionmaker. using theories of decisionmaking and interpersonal prejudice.[3] It blames discrimination on the racist judge, not the racist institution, and therefore advocates a change in personnel as the appropriate reform.

This perspective requires an altogether different theoretical structure and research design. Adopting one of the many theories of discrimination (see generally Allport, 1954), such research examines the personal attributes of the individual for clues as to why discrimination exists. Although individual prejudice may have societal antecedents, the primary focus of research is upon the process by which individual tendencies get translated into discriminatory behavior.[4]

It is essential to differentiate these two approaches in view of the marked differences between them in both theory and research design. Such a distinction has frequently been overlooked in empirical research, and the societal perspective adopted to the neglect of questions about individual discrimination. Therefore, although most available research concludes that little discrimination exists at the institutional level (Hagan, 1974), the failure to study discrimination by individual decisionmakers, together with methodological problems discussed below, make firm conclusions on the question premature.

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2. Several good studies adopting this viewpoint can be found in Chambliss (1975). Most research on racial discrimination in the incidence of the death penalty also falls within this category.
3. Some authors blend these approaches, at least at the theoretical level. Levin (1972), for instance, argues that the local political culture structures the recruitment process, resulting in a homogeneous group of judges. Because the judges are assumed to be similar, little intrainstitutional variance is expected. Thus, Levin does not ignore the individual level of analysis but finds it unnecessary to examine the behavior of individual decisionmakers.
4. Although some discrimination studies have examined the behavior of individual judges, none has used empirical data on the attitudes of judges to explain discrimination.

## III. METHODOLOGICAL PROBLEMS IN DISCRIMINATION RESEARCH

Extant research on racial discrimination is beset by problems of design, measurement, and analysis.

(1) Much research fails to consider rival hypotheses, or at least to control for extraneous variables that might affect the relationship between the race of the defendant and the sanction imposed. Failure to control for legally relevant attributes of the defendant[5] may lead to a correlation between race and sanctions that is essentially spurious. Blacks may receive more severe sanctions because they are more likely to commit serious crimes or because they are more likely to have prior records.[6] This problem has very seriously affected the findings of many previous studies (e.g., Hagan, 1974). Race may also be spuriously related to sanctions because it is related to other "extralegal" attributes of the defendant, such as class, that themselves are strongly related to sanctions.[7]

(2) There is little uniformity in the measures of the severity of sanctions. Sentence severity, for instance, has been measured by a variety of variables, including length of probation, length of incarceration, amount of fine, a dichotomy of some or no incarceration, and grouped categories of sentence severity. Different measures make comparison difficult and (perhaps more importantly) include different quantities of measurement error.

(3) Much research employs weak statistical tests that do not indicate the degree to which sanctions are influenced by the race of the defendant.

(4) Most studies treat the court as the unit of analysis, rather than the individual sentencing judge. Aggregation to the level of the court may obscure discrimination by individual judges. This would occur if there were an approximately equal number of cases tried by pro-black and anti-black judges, or if the number of cases tried by anti-black judges in a particular

5. Like Hagan (1974), this research distinguishes between two classes of stimuli affecting judges' decisions: those that are legally relevant and those that are not because they are not considered to be legitimate criteria for legal decisionmaking.
6. These are obviously not the only legally relevant stimuli that may be related to the race of the defendant. For instance, the strength of evidence in the case may be related to race if white attorneys lack the motivation or ability to enter the black community to uncover evidence favorable to black defendants.
7. For example Nagel (1970: 41) asserts that : "Generally, the poor suffer even more discrimination than Negroes in criminal justice, and Negroes may suffer more from lack of money than from race."

sample were relatively small.[8] This is essentially an ecological fallacy problem.

(5) Finally, the predominant approach is to frame the question of discrimination dichotomously: does discrimination exist or does it not? It would be more appropriate to ask how much discrimination exists, a question that would naturally lead to an investigation of the determinants of variance in discriminatory behavior.

All of these problems are the consequences of relatively simple methodological difficulties, and thus can be resolved without using complex techniques. In this article I demonstrate the impact of each of the problems on substantive conclusions about racial discrimination in sentencing and suggest ways in which each might be remedied. Finally, the consequences of the substantive conclusions for future research are discussed.

## IV. THE RESEARCH SETTING

This study is based on data from the Superior Court of Fulton County (Atlanta, Georgia). This is the basic trial court, with exclusive jurisdiction in felony cases. There are two divisions, criminal and civil, staffed by a total of ten judges. The Chief Judge assigns the judges of the Superior Court to the Criminal Division on a quasi-rotational basis.

The cases utilized in this analysis consist of a random sample of 0.5 of the indictments filed within each of five terms: March-April, 1968, September-October, 1968, March-April, 1969, September-October, 1969, and September-October, 1970. The indictments included felonies and very serious misdemeanors. The cases were not necessarily tried within the term in which they were initiated. Of the 1,976 cases selected, 173 (slightly less than 9 percent) had not been disposed of by the time the data were collected and therefore have been excluded. In 160 cases the defendant was either found not guilty or the case was dismissed before trial. Of the remaining 1,443 cases, 1,219 were felonies and the rest misdemeanors. Only felony cases have been considered in this analysis.[9] An additional twenty-five

8. A good example of the significance of the unit of analysis problem can be found in Eisenstein and Jacob (1977). They observe vastly different patterns of decisionmaking by individual "workgroups," a variation that would not have been noted had the unit of analysis been the city rather than the workgroup. Since this variation is not predicted by "organization theory," the level at which the analysis is conducted crucially affects the substantive conclusions that can legitimately be drawn.

9. There are several reasons for excluding misdemeanor cases. First, they display no variance in sentences: all defendants received the maximum sentence, one year, presumably because only the most serious misdemeanors are heard by the Superior Court. Further, by eliminating misde-

cases in which nominal life sentences were imposed were excluded because the length of the effective sentence could not be specified.[10]

This court system is strongly oriented toward plea negotiations, which are widespread and overt. Bargaining is almost entirely restricted to sentence length and type (i.e., probation, suspended sentence, incarceration) and rarely involves charge reduction.

## V. THE MEASUREMENT PROBLEM

The basic measurement objective in sentencing studies is to construct an index of severity composed of variance that cannot be attributed to legally relevant stimuli. This is essentially a problem of "residualization." The indicator should also reflect some meaningful measure of the severity of different types of penalties, such as fines, probation, and incarceration. The most common solution to this latter problem is to use the simple dichotomy of some or no incarceration. Suspended sentences and probation are considered lenient while prison or jail sentences are severe. But such a dichotomy introduces a great deal of measurement error: the same severity score is given to sentences of one and ten years on probation and of one and ten years in prison, while one year in prison followed by five on probation is equivalent to a year in prison alone, despite the fact that a large percentage of defendants are returned to prison for violating the terms of probation. Finally, there is little variance in the measure when the crimes are serious, and especially when the defendants have prior records: almost all sentences will involve imprisonment and will therefore be classified as severe. In this sample, for instance, of the 394 defendants with prior records who were convicted of crimes punishable by ten or more years in prison a mere one-fourth received only a suspended sentence or probation.

One alternative to the dichotomy is to use the number of years in prison as the measure of sentence severity, but this equates all sentences without imprisonment and fails to differentiate among prison sentences in terms of post-incarceration probation. Another approach is to construct an artificial measure of severity (e.g., Baab and Furgeson, 1967; Cook, 1973), but

meanor cases from analysis the single class of charges (misdemeanors) that permits very little discretion under Georgia law is eliminated. All felony charges allow considerable discretion in sentence length. Finally, felony and misdemeanor convictions carry very different stigmas (and even different legal consequences, such as disqualification from voting).

10. But see footnote 25.

this may obscure a great deal of variance, is rarely an interval measure, and is susceptible to the charge of arbitrariness.

The need to control for legally relevant stimuli further complicates the construction of an adequate measure. A frequent response is to use multileveled contingency tables. These, however, often lead to extremely small cell sizes, and do not allow generalization (e.g., Castberg, 1971; Levin, 1972). The gymnastics required to reconcile the many cells in such a table are well known, and may explain why researchers instead try to justify assuming away the problem of controlling for legally relevant stimuli (e.g., Zeisel, 1968).

There has been no satisfactory, generalizable measure of sentence severity in the voluminous literature on the subject. Consequently, I have constructed a new measure of severity. The method is designed to remove statistically the influence on length and type of sentence of two legally relevant variables, the seriousness of the charge and the prior record of the defendant. I have constructed this measure in the following way:

(1) First, all charges are assigned a charge seriousness score, namely the statutory sentence. Fortunately, all felonies except auto theft have a minimum sentence of one year, so the maximum is an accurate measure of the seriousness of the crime as perceived by the lawmakers. The categories have been scored ordinally because, in the absence of a comprehensive revision of the criminal code, interval assumptions are probably not valid. The number of cases in each of the six categories is 115, 226, 112, 191, 335, and 11.

(2) A dichotomous dummy variable is used to measure whether the defendant has been convicted of a previous felony.[11] Although it would have been desirable to include information about the number of prior convictions, such data were not available. Sixty-five percent of the defendants have been convicted previously of a felony.

(3) Next, the cases are categorized by the type of sentence: 548 received probation or a suspended sentence, 206 were incarcerated without subsequent probation, and 288 were given mixed sentences.

(4) In the first category the length of sentence is measured by the number of years on probation, and in the second and third categories by the number of years in prison.

11. On the use of dummy variables, see Johnston (1972). It has become commonplace in political and social research to use ordinal and dummy variables with methods that technically require interval level data. The major effect is probably limited to the attenuation of correlation coefficients, see, e.g., Labovitz (1970).

(5) *Within each category* the length of the sentence is regressed on the measure of charge seriousness and the prior record dummy variable using the equation

$$Y_i = a + b_{YX}X_i + b_{YZ}Z_i$$

where $Y$ = the length of the sentence, $X$ = the charge seriousness, and $Z$ = the prior record of the defendant. This step produces regression coefficients that indicate the relative impact of the legally relevant variables on the length of the sentence for each disposition type. These are shown in Table 1.

TABLE 1

THE IMPACT OF LEGALLY RELEVANT VARIABLES ON SENTENCE SEVERITY FOR DIFFERENT TYPES OF SENTENCES

| Disposition | $N$ | $R$ | $a$ | $b_{YZ}$ (Charge)[a] | $b_{YZ}$ (Record) |
|---|---|---|---|---|---|
| Probation | 548 | .27 | 2.28 | .27[b] | .24[b] |
| Mixed | 288 | .33 | .21 | .78 | — [c] |
| Incarceration | 206 | .42 | −.42 | 1.34[b] | .71 |

a. The correlation between the seriousness of the charge and the prior record of the defendant is less than .1 for each of the type of sentence.

b. Significant at $p < .05$.

c. The impact of the prior record was not significant enough to be entered into the regression equation (i.e., $F < .001$).

(6) Using these equations, predicted scores ( $\hat{Y}$) are calculated. Residuals are then constructed by subtracting ( $\hat{Y}$) from the observed ( $Y$). This produces a length of sentence measure that indicates the deviation of the actual sentence from that which would be expected if only the two legally relevant variables were operative. The variance that is left in the length of sentence measure cannot be attributed to legal stimuli. Rather than create massive contingency tables a single score is given to each case. At this point the scores are still measured in years.

(7) The residuals are next standardized. This is done *within* each type of sentence using the formula

$$s_i = \frac{R_i - \bar{R}}{s_R}$$

where $s_i$ = the standardized sentence severity score and $s_R$ = the standard deviation of the residuals.

Step 7 is quite important: by standardizing the scores within sentence categories we put the residuals on a metric that permits meaningful comparison across these categories. Standardization corrects for the fact that the type of sentence

is related to the length of the sentence. The residuals for incarceration cases are likely to have large absolute values simply because the mean length of sentence is higher for this type of case. It is a frequent observation that the size of the mean is closely related to the size of the standard deviation or standard error. Standardization therefore makes the sentence severity scores comparable even though they refer to different types of sentences. However, it should be noted that the standardized sentence severity scores are not measured in years but in terms of standard deviations.

(8) The next step is to calculate two mean standardized sentence severity scores for each crime, for defendants with and without prior records.

(9) Finally, each case is characterized as either above or below the mean standardized sentence severity score for the type of crime and defendant. For example, the sample included 122 motor vehicle theft cases. The mean for defendants without previous felony convictions is -.082. If a sentence has a severity score greater than -.082 it is classified as "severe," if the score is less than -.082 it is classified as "lenient."

The last two steps represent an effort to be absolutely certain that all variance attributable to the two legally relevant stimuli has been removed. Relative severity is established within a category of cases that are very strictly comparable—the similarity of circumstances among these cases greatly increases our confidence that sentences characterized as severe are severe because of factors that are not legally justifiable. This is the kind of measure needed to test whether discrimination against blacks occurs in Atlanta.[12]

Since a rather significant claim is made for this measure it may be useful to present evidence of its validity. The basic claim is that the effects of the two legally relevant stimuli have been removed. Tables 2 and 3 present data pertinent to this point. For purposes of comparison the dichotomous variable of some or no incarceration is also shown. Clearly the effects of the two legally relevant stimuli have been removed from the severity scores; they do not differ at all in terms of the prior

12. Although this procedure results in a dichotomy, and consequently some loss of information, it does have the advantage of complete control of the impact of the two legally relevant stimuli. The dichotomization step (dichotomizing about the mean for each specific crime) has the effect of controlling for the average seriousness of the crimes as perceived by the judges. This may be, and sometimes is, at variance with the legally defined seriousness of the crime. Because previous research has suffered most from spuriousness in the analysis of the impact of race this strategy, though conservative, is desirable.

record variable and the differences among the categories of charge seriousness are small and indicate no monotonic relationship between sentence severity and charge severity. It is also apparent how sensitive the incarceration variable is to both legal stimuli. It is interesting to note the dissimilarity of the two measures; 42.7 percent of the suspended sentences and sentences of probation have been classified as "severe" and 71.6 percent of the sentences of incarceration have been classified as "severe." The methodology employed has successfully created a measure of sentence severity that allows a persuasive and rigorous test of discrimination.

TABLE 2

RELATIONSHIP OF SENTENCE SEVERITY MEASURES TO PRIOR RECORD[a]

| | Prior Record | No Prior Record |
|---|---|---|
| Percentage "severe" | 42 (359) | 42 (641) |
| Percentage incarceration | 64 (379) | 20 (691) |

a. The figures in parentheses are the total number of cases within each prior record classification. The difference in the *N*s is attributable to the inability to classify some cases as "severe" or "not severe" due to missing data on the legal stimuli.

TABLE 3

RELATIONSHIP OF SENTENCE SEVERITY MEASURES TO CHARGE SERIOUSNESS[a]

| | Charge Seriousness | | | | | |
|---|---|---|---|---|---|---|
| | 1 | 2 | 3 | 4 | 5 | 6 |
| Percentage "severe" | 43 (115) | 48 (226) | 41 (122) | 32 (191) | 45 (335) | 36 (11) |
| Percentage incarceration | 20 (130) | 40 (282) | 53 (136) | 44 (218) | 69 (410) | 89 (27) |

a. The figures in parentheses are the total number of cases within the charge severity category. The difference in the *N*s is attributable to the fact that missing data on the prior record variable, which is necessary to compute the severity score, make it impossible to score every case for which sentencing information is available.

To summarize: Previous studies of racial discrimination have suffered from an inability to control effectively for legally relevant stimuli. Therefore their findings are inaccurate to the extent that blacks and whites exhibit different patterns of criminal behavior.[13] A solution to the problem is provided here

13. There is a substantial relationship in these data between the race of the

by means of a linear regression technique that effectively partials out the variance in the length of the sentence attributable to two legally relevant stimuli. This results in a measure of severity whose variance can only be attributed to extralegal stimuli.[14] This is the measure used in order to determine the degree of discrimination in sentencing.

## VI. INSTITUTIONAL DISCRIMINATION

At the institutional level the findings are unequivocal: no racial discrimination in the sentences given in the Fulton Superior Court is apparent (see Table 4). This is quite unexpected for the deep South, despite Atlanta's carefully cultivated image as a city "too busy to hate." It should also be noted how misleading it would be to conclude that there is racial discrimination on the basis of differences in frequency of incarceration alone.

TABLE 4

RELATIONSHIP OF DEFENDANT'S RACE TO MEASURES OF SENTENCE SEVERITY[a]

| | Blacks | Whites |
|---|---|---|
| Percentage "severe" | 41.4 (582) | 42.8 (402) |
| Percentage incarceration | 59.6 (703) | 39.6 (487) |

a. The figures in parentheses are the total number of cases within each of the racial categories.

The data in Figures 1 and 2 also support this conclusion. These figures show the flow of different types of defendants through the criminal justice system. Although there are slight differences between the races,[15] the overall pattern reveals in-

defendant and both prior record and the severity of the charge. Over 70 percent of the black defendants, but only 56 percent of the white defendants, have a prior record. The following data show the relationship between race and charge seriousness:

| | | Blacks | Whites |
|---|---|---|---|
| Percentage in each class of charge severity | 1 | 5 | 20 |
| | 2 | 26 | 20 |
| | 3 | 11 | 11 |
| | 4 | 21 | 14 |
| | 5 | 36 | 32 |
| | 6 | 3 | 2 |

14. It should be noted that the unexplained variance actually includes measurement and sampling error variance as well. This probably has little biasing effect on the results.

15. Blacks are apparently incarcerated before trial with greater frequency than whites, but it is not clear whether this reflects discrimination. Because few defendants are denied bail altogether discrimination would be

significant differences in the treatment they receive from the criminal justice system. Even the greater use by white defendants with no prior conviction of pleas of *nolo contendere* is largely a function of the type of charge: marijuana related cases.

Further analysis reinforces this finding. When I examined the six crimes for which there are at least 50 cases I found that blacks receive more severe sentences in assault, robbery, and drug cases but that whites receive more severe sentences in motor vehicle theft, forgery, and burglary cases. Even when (somewhat dubious) inferences are made about the race of the victim from the type of crime no consistent differences appear between intra- and interracial offenses. Controlling for the socioeconomic class of the defendant (measured by whether the defendant's attorney was appointed or privately retained) does not alter the finding of no difference. The court term during which the defendant was tried also has no effect. Thus, once controls for the differences in the criminal behavior of blacks and whites are implemented it appears that the decisions of the Fulton County Superior Court, as an institution, are generally nondiscriminatory.

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apparent only if the bail required for blacks were significantly higher than that required for whites, controlling for legally relevant variables. To answer this question adequately would require information about the defendant's ties to the community (assuming that the only legitimate function of bail is to ensure that the defendant appears at trial), but those variables were not available from court records. The analysis is further restricted by significant missing data: only 20 percent of the cases include information on the amount of bail. Nevertheless, some analysis may be useful, if the data limitations are borne in mind.

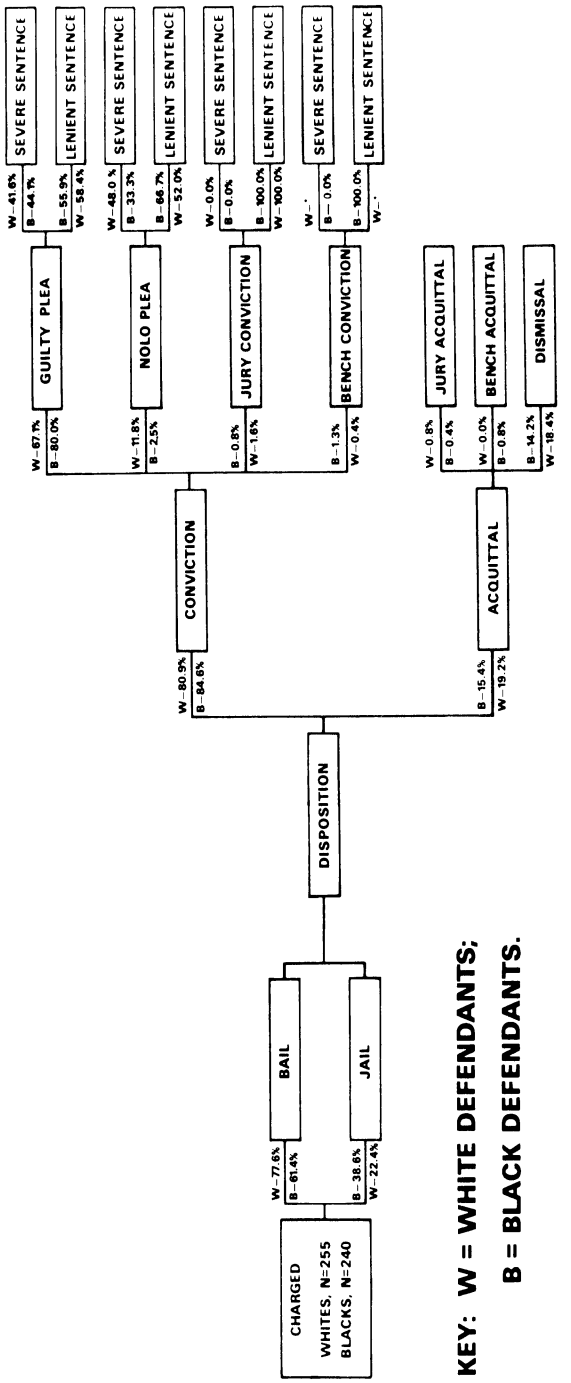
In order to control for the seriousness of the crime and the prior record of the defendant I used a regression technique very similar to the one already described. I dichotomized cases with similar legal characteristics in terms of whether the bail granted was above or below the mean amount. My analysis of the data reveals that 37.4 percent of the white defendants (total N=182), but only 24.8 percent of the black defendants (total N=117) received above average bail. A difference of 12 percentage points is not highly significant (although it is statistically significant), but blacks seem to receive *lower* bail, not higher. This does not prove that blacks do not suffer discrimination, but if they do, it is through a more subtle process.

Blacks may, however, be victims of economic discrimination. When the amount of bail was above average 73 percent of the black and 91 percent of the white defendants were able to post bail; when it was below average the respective percentages were 89 and 97. Thus, the severity of the bail has no impact on the percentages of white defendants released but a significant impact on the release of black defendants (23.5 percentage points).

Finally, for blacks high bail is associated with severe sentences (high bail—45.5 percent severe; low bail—22.9 percent severe), perhaps suggesting that circumstances of the offense (e.g., degree of aggravation) affect both decisions. For whites, however, high bail is associated with *less* severe sentences (high bail—31.9 percent severe; low bail—44.6 percent severe). Why this should be the case is unclear but, at a minimum, it suggests that different criteria are used in making decisions affecting the different races.

**FIGURE 1**

**FLOW OF CASES — DEFENDANTS WITH NO PRIOR RECORD**




**KEY: W = WHITE DEFENDANTS;**
**B = BLACK DEFENDANTS.**

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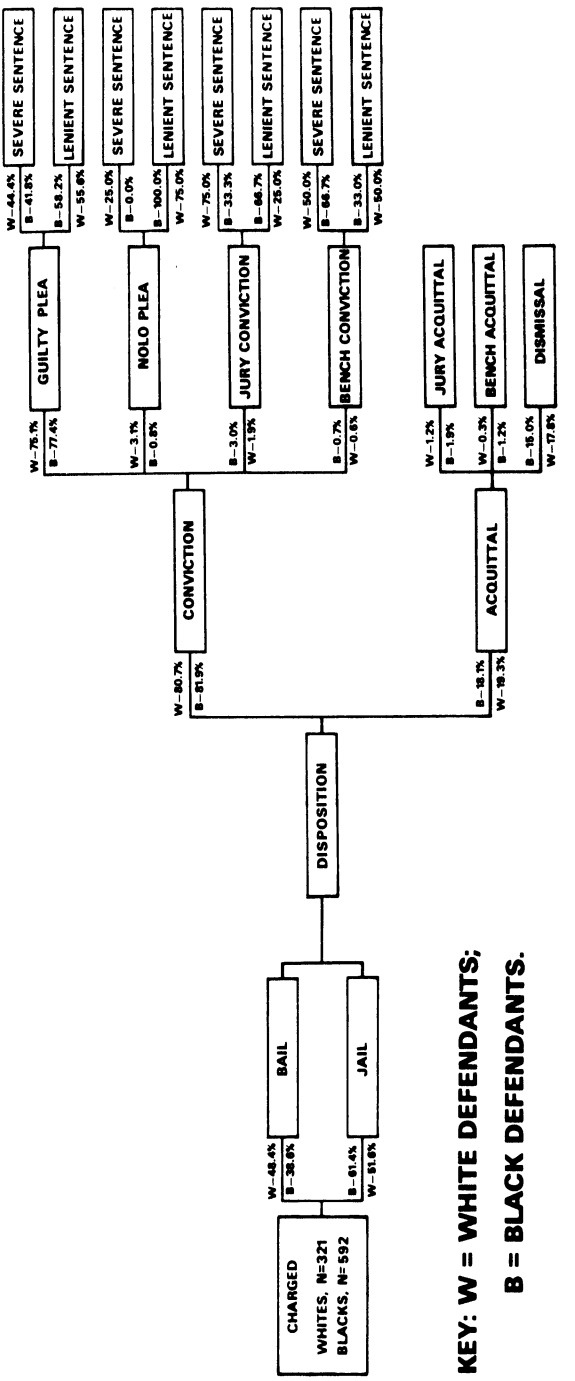
**FIGURE 2**

**FLOW OF CASES — DEFENDANTS WITH PRIOR RECORDS**

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## VII. INDIVIDUAL DISCRIMINATION

The fact that we observed no racial discrimination in the aggregate of Superior Court decisions does not preclude the possibility that individual judges discriminate. The overall output could mask the existence of an even mixture of pro-black and anti-black judges. Thus, it is important to examine the behavior of individual judges to understand fully discrimination in sentencing.[16]

TABLE 5

RACIAL DISCRIMINATION IN THE SENTENCING BEHAVIOR OF FULTON COUNTY SUPERIOR COURT JUDGES

| Judge | Percentage "Severe" Sentences | | Discrimination Index |
|---|---|---|---|
| | Whites | Blacks | |
| A | 39.3 | 30.6 | + 8.7 |
| B | 52.5 | 49.4 | + 3.1 |
| C | 33.3 | 10.0 | +23.3 |
| D | 43.9 | 30.6 | +13.3 |
| E | 24.0 | 56.1 | −32.1 |
| F | 44.4 | 41.7 | + 2.7 |
| G | 30.8 | 55.6 | −24.8 |
| H | 12.5 | 31.3 | −18.8 |
| I | 66.7 | 11.1 | +55.6 |
| J | 29.6 | 38.7 | − 9.1 |
| K | 51.5 | 42.8 | + 8.7 |

Table 5 shows the "Index of Racial Discrimination" for each of the eleven judges who decided the cases in the sample. The Index is simply the percentage of whites receiving a severe

16. Before we can begin to analyze discrimination by the individual decisionmaker we must establish that defendants do not have other characteristics, associated with their race, that affect the severity of sentences. This is a concern for the problem of spuriousness: if judges are hearing cases in which the defendants differ in ways related to both race and sentence severity, then conclusions about the effect of race on sentence may be affected by a third variable, making any race-sentence correlation spurious. In order to avoid such spurious correlations we must demonstrate two things: (1) that black and white defendants do not differ in their other characteristics (as they did in their prior records); and (2) if they do, that those characteristics are not related to sentencing (as prior record was). The relationships between the defendant's race, sentence severity and other defendant characteristics are:

| Defendant Characteristics | Tau-Beta Sentence Severity | Tau-Beta Defendant's Race |
|---|---|---|
| Defendant's sex | .03 | .00 |
| Pretrial incarceration | −.06 | .14 |
| Defendant's plea | .03 | −.09 |
| Type of defense attorney | −.06 | −.07 |
| Whether charge reduction | −.09 | −.00 |

The Pearson correlations between the defendant's race and the amount of bail, number of charges on which the defendant was convicted, amount of fine, and age are all below .10. Thus it is safe to proceed in the analysis with the assumption that uncontrolled extraneous variables have no impact on the results.

sentence minus the percentage of blacks receiving a severe sentence. Very great variance does indeed exist. Judge I discriminates against blacks the least whereas Judge E is the most discriminatory. At least three of the eleven judges treat blacks a great deal more severely than they treat whites. Thus, we are forced to conclude that blacks are the victims of discrimination by some judges but the beneficiaries of discrimination by others. This finding demonstrates how important the unit of analysis may be for substantive conclusions.

## VIII. DETERMINANTS OF DISCRIMINATORY BEHAVIOR

Since all of these judges were interviewed by the author[17] it is possible to examine their behavior more closely for clues to the determinants of discrimination. A word of caution is in order however. A population of 11 (not conceived as a sample) presents serious problems for analysis. For instance, generalizability is questionable and "overdetermination" may occur. These problems are faced by almost all judicial analysis. Nevertheless the benefits of statistical analysis are so great that, if its limits are realized, a better understanding of judicial phenomena can be gained. This analysis will therefore follow the relatively conservative strategy adopted by Ulmer (1973) in his research on the behavior of fourteen United States Supreme Court justices. Like him, I make no claim for the generalizability of statistical coefficients (and hence inferential statistics are not appropriate).

The independent variables examined here are social backgrounds and attitudes. The relationship of these two concepts to judicial behavior has been the object of intensive analysis for over a decade (see generally Schubert, 1972). Most of the variables employed have been shown to be related to judges' behavior. Basically, social background theory asserts that circumstances of the environment in which judges were raised and in which they work and live shape their perspectives, or attitudes. These attitudes reflect a propensity to respond to stimuli in a particular fashion. Knowledge of the propensities of the judges may predict their behavior. The empirical question becomes: how well can we predict discriminatory behavior?

The social background variables utilized are: (1) party identification, measured as Democrats and non-Democrats (one Republican and four independents); (2) religious affiliation (fundamentalist Protestant and nonfundamentalist Protes-

17. The interviews were conducted in 1972 as part of a larger research project, and lasted approximately one to one and one-half hours each.

tant); (3) period of initial judgeship, coded as pre- or post-1960; (4) age; and (5) number of social and political groups in which the judge claimed membership.[18] The attitudinal variables are: (1) the judges' responses to the statement "inherited racial characteristics play more of a part in the achievement of individuals and groups than is generally known";[19] (2) ratings of crime as a national problem;[20] and (3) a four-item scale measuring sentencing philosophies.[21] The dependent variable is the score on the discrimination index.

The bivariate correlations ($r$) indicate that three variables are moderately related to discriminatory behavior: fundamentalist Protestants, judges with strong ties to the local community (as evidenced by a larger number of memberships in local organizations), and older judges discriminate against blacks the most (see Table 6). Three other variables, sentence philosophy, racial attitudes, and concern over crime also have some impact on discrimination.

Because the characteristics of the judges are moderately interrelated it is useful to try to determine the independent impact of each of the variables on discrimination. Toward this end, the racial discrimination index was regressed on the eight variables using stepwise multiple regression. The small $N$, as well as a moderate amount of multicollinearity (which may bias the regression coefficients), requires that the results be interpreted very cautiously and tentatively. Nevertheless, together these eight variables account for 93 percent of the variance in the discrimination scores. Although this figure is

18. The organizations are the ABA, ACLU, Legal Aid Society, Piedmont Driving Club, Lawyer's Club, Commerce Club, Atlanta Athletic Club, fraternal organizations, American Legion, and Atlanta Bar Association. The variable is a trichotomization of the raw number of memberships.

19. The scores are based on a Likert response set. This measure is certainly less than ideal as a indicator of racial attitudes; however, it is the only variable that deals directly with blacks.

20. The question used was: "Here is a list of issues that some people in the United States feel are major problems of this country. Please tell me which you consider to be the most important, the second most important, and so on." The list of issues included "communism; pollution; race relations; Vietnam War; crime; the economy; urban problems; campus unrest; and morality." The scores for the variable are simply the rank assigned by the judge to "crime."

21. The sentence philosophy scale is composed of the following items: "Our treatment of criminals is too harsh; we should try to cure not to punish them." "The death penalty is barbaric and should be abolished." "Criminals should be treated like sick persons." "More severe punishment of criminals will reduce crime." The scale responses used consist of collapsed Likert response sets. The Coefficient of Reproducibility for the eleven judges is .98 (one error). Scale scores are assigned by means of factor analysis (factor scores). The factor analysis (principal components extraction) very strongly supported the unidimensionality of the scale: four factors were extracted, accounting for 63, 17, 15, and 6 percent of the variance respectively. Since the eigenvalue of the second factor was .66 it was decided not to rotate the configuration.

TABLE 6

DETERMINANTS OF DISCRIMINATION IN SENTENCING

| | Judge Attributes[a] | Bivariate Correlation[b] | Beta[c] | $R^2$ Change[d] |
|---|---|---|---|---|
| 1. | Religion | .49 | .39 | .24 |
| 2. | Concern over crime | .28 | .46 | .20 |
| 3. | Party identification | .02 | .28 | .17 |
| 4. | "Inherited racial characteristics . . ." | −.28 | −.43 | .10 |
| 5. | Organizational memberships | −.45 | −.71 | .13 |
| 6. | Sentence philosophy | −.30 | −.35 | .10 |
| 7. | Year of initial judgeship | −.17 | −.21 | .00 |
| 8. | Age | .44 | .05 | .00 |

a. The intercorrelations of the independent variables are:

| | | | | | | | | |
|---|---|---|---|---|---|---|---|---|
| 1. | 1.00 | | | | | | | |
| 2. | −.30 | 1.00 | | | | | | |
| 3. | .10 | −.71 | 1.00 | | | | | |
| 4. | −.01 | .23 | −.31 | 1.00 | | | | |
| 5. | −.30 | −.38 | .53 | −.32 | 1.00 | | | |
| 6. | .04 | .04 | −.47 | .33 | −.59 | 1.00 | | |
| 7. | .15 | .07 | −.56 | −.10 | −.43 | .78 | 1.00 | |
| 8. | .65 | −.05 | −.26 | −.02 | −.73 | .50 | .58 | 1.00 |

b. The dependent variable is the index of discrimination.

c. Stepwise multiple regression was used. These betas are from the final step in which all of the variables are entered into the equation.

d. $R^2 = .93$.

extremely high it is to some degree a function of the fact that the number of variables ($k$) approaches the number of cases ($N$). Adjusted $R^2$ (which adjusts for the degrees of freedom) is .76, however, indicating that despite the small number of cases the relationship is still substantial. Three variables alone—religious affiliation, concern over crime, and party identification—contribute disproportionately to explaining the variance in the discrimination scores: they account for 60 percent of the variance (adjusted $R^2$=.50). This finding is much more difficult to ascribe to a statistical artifact.

The multiple regression presents a somewhat different picture of the determinants of discriminatory behavior. The judge's age has no independent impact, the original bivariate correlation with the index being largely a function of the correlation of age and organizational memberships. Organizational memberships, concern over crime, and racial attitudes all have at least a moderate independent impact. The effect of party identification is very weak because of its strong relationship with the attitudinal variables. Year of initial appointment has virtually no impact on discrimination.

These findings, though far from definitive, are quite suggestive of a model of racial discrimination by judges. Using Vines's (1964) notion that the more strongly a judge is tied to

the political culture of an area the more his attitudes will reflect that culture, and assuming traditional southern culture is anti-black[22] and generally conservative, causal linkages can be suggested. Judges more strongly associated with the local political culture are likely to be more punitive in their sentencing philosophies, more concerned about crime, and more prejudiced toward blacks. These attitudes in turn affect their sentencing behavior. However, the attitudes may interact among themselves (as well as with the political culture); an anti-black attitude may color perception of crime, possibly leading a judge to see it as a more threatening (a combination of anti-order, anti-white behavior) and largely commited by blacks. Thus, racial attitudes may be triggered by environmental stimuli resulting in discriminatory behavior. In combination with a generally punitive approach to sentencing, negative attitudes toward blacks may also give rise to extreme anti-black behavior. Conversely, anti-black attitudes may be ameliorated by a belief in rehabilitation and lack of concern about crime.

One further bit of data can be brought to bear on this question. The judges were asked: "How influential do you believe the following factors to be in your sentencing of a defendant found guilty in criminal court?" The factors were: "the recommendation of the district attorney," "the prior record of the defendant," "the type of crime," "the attitude of the defendant," and "the efforts of the defendant's attorney." It is possible that discriminatory judges rely more heavily on certain stimuli in making their sentencing decisions than nondiscriminatory judges. The data in Table 7 show the correlations of the discrimination index with the ratings of each case stimulus.

22. This assumption has also been made by Vines (1964) and Jacob (1963). Although it may be unjustified to characterize southern culture in this blanket fashion, it is not unreasonable to characterize *traditional* so ıthern culture in this way. One of the operational measures of attachment, organizational memberships, includes at least three organizations that exclude blacks from membership (organizations that received public attention during the confirmation hearings for Griffin Bell) and several others that are not noted for their receptiveness to blacks.

In general, however, it should not be assumed that the political culture of any area of the United States is favorable toward blacks. A more important relationship may lie in the interactions among three factors: the extent to which whites feel threatened by blacks, the political power of blacks, and discrimination. Jacob and Vines suggest that as blacks become more threatening to whites discrimination increases. However, both conducted their research in areas where blacks were systematically deprived of access to political power. Where blacks are viewed as a political resource (Pittsburgh, for instance, see Levin, 1972), discrimination is much less apparent. In the time period covered by these data, Atlanta blacks were in the process of becoming a significant political force (which of course culminated in the election of Maynard Jackson as mayor). Longitudinal data would be invaluable for examining the impact of changes in the political power of minorities on the operation of the court system.

Finally, a racist political culture may not be the only culture under which blacks suffer. "Universalistic," middle class norms may also work to the disadvantage of blacks (e.g., Levin, 1972; Wilson, 1968).

TABLE 7

CORRELATIONS BETWEEN INFLUENCES ON SENTENCING AND DISCRIMINATION IN SENTENCING

| Case Stimulus | Sentencing Discrimination $r$ |
|---|---|
| District attorney's recommendation | .09 |
| Prior record of the defendant | .63 |
| Type of crime | .01 |
| Defendant's attitude | .39 |
| Efforts of the defendant's attorney | −.40 |

Discriminatory judges tend to rely more heavily on the prior record and the attitude of the defendant and less heavily on the efforts of the defendant's attorney. These results may contribute to a more complete understanding of discrimination: blacks, who are more likely than whites to have prior records, suffer more when sentenced by judges who weigh the prior record of the defendant more heavily. This interpretation is also compatible with the attitudinal results above: judges with punitive sentencing philosophies, who are more concerned about crime, and more prejudiced toward blacks, tend to make their sentencing decisions on the basis of criteria, like prior record, that place blacks in a disadvantaged position. These judges also rely more heavily on the defendant's attitude and, given their traditional southern backgrounds, are unlikely to empathize with black defendants. Thus, these judges give more severe sentences to blacks in part because of the stimuli they choose to stress in making their decisions.

The speculative nature of these assertions cannot be emphasized too strongly. The data are simply not strong enough to support any firm conclusions except that judicial discrimination exists and is to some degree related to backgrounds and attitudes.[23] Nevertheless, it is crucial to a full understanding of racial discrimination to begin the process of building causal models. Racial discrimination is a complex phenomenon and models designed to explain it must take into account direct and

23. It is possible that the attitudes of the other actors in the criminal justice system—the prosecutor and the defense attorney—may also exert discriminatory influence because of the prevalence of plea bargaining. These data can be aggregated by prosecutor to generate a discrimination index for each prosecutor. When the index is regressed on the eight prosecutor attitudinal and background variables an $R^2$ of .59 results (adjusted $R^2$ = .17), a figure considerably below that for the judges. This means that knowing the judges' characteristics allows greater predictability than knowing the prosecutors' characteristics, which confirms the expectation that judges dominate sentencing.

indirect (e.g., interactive) influences from a multitude of variables. This modeling process can only proceed, however, by treating discrimination as a continuous (rather than dichotomous) variable and only by focusing on the judge (rather than the court) as the unit of analysis. Once microlevel models are tested it will be possible to proceed to more complex, cross-level models.

## IX. CONCLUSIONS

This research has focused upon racial discrimination in sentencing in criminal cases. It has employed a measure of sentence severity that corrects for two legally relevant stimuli in criminal cases but yet does not sacrifice parsimony in the process. Evidence has been presented to validate the measure. Using it I have shown that, in the aggregate, the sentences imposed in the Fulton County Superior Court appear not to discriminate against blacks. However, this is largely due to the fact that anti-black judges are balanced by pro-black judges. Treating discrimination as a dependent variable, multiple regression analysis demonstrated that a great deal of the variance in discrimination scores for the judges could be explained by their backgrounds and attitudes. This was interpreted as tentative support for the proposition that attachment to a discriminatory political culture results in anti-black attitudes, which in turn lead to discrimination in sentencing. Conversely, judges detached from the culture apparently develop attitudes that lead to pro-black discrimination in sentencing, perhaps as a compensatory reaction to the behavior of the traditional judges. Overall, the analysis supports an individual, rather than an institutional, interpretation of discrimination.

The findings also suggest that methodological issues must be a central concern for judicial researchers. Without proper controls we would have concluded that discrimination exists; with controls we would have reached the opposite conclusion had the analysis remained at the aggregate level. The latter conclusion would been incorrect, and the former correct but for the wrong reasons.

These methodological points apply to other research as well. For instance, my findings are at odds with Hagan's survey of research on racial discrimination (1974). Hagan concluded that discrimination, by and large, is a minor problem for the criminal justice system. It is possible, however, that his conclusions are affected by the choice of the institution as the unit of analysis (a problem of the original research, not of Hagan's re-

analysis) and that examination of the behavior of individual judges would produce a different result. Thus it is imperative that future research be mindful of Hagan's recommendations and sensitive to the problems raised by the choice of a unit of analysis.

Discrimination research has assembled a mass of data that, unfortunately, has generated little empirically based theory about discrimination. Much remains to be done to develop a more complete understanding of this process. Rigorous comparative research (across jurisdictions and across time) could determine the impact of political culture and public opinion on judicial behavior. The attitudes of other participants in the sentencing decision (prosecutors and defense attorneys) should also be considered. Decisions less visible than sentencing should be investigated[24] and more rigorous examination of the circumstances of the offense is certainly needed.[25] More sophisticated measurement and analysis techniques are also essential to unravel the complex process.

Finally, little research has been done that treats racial discrimination as an independent variable. What impact does discrimination have on the political and social system?[26] Court outputs, largely conceived as allocating tangible values, have a strong symbolic dimension that may well affect both compliance with law and the legitimacy of the system itself (Arnold, 1935).[27] Unequal treatment of members of a particular group

24. For instance, why are blacks more likely than whites to have a prior record and to be charged with serious crimes? A judicial system may not actively discriminate against blacks and yet perpetuate discrimination originating elsewhere in the criminal justice system, for instance, with the police. To investigate this question empirically would require data across all stages of the criminal justice process, and probably data across time (see Farrell and Swigert, 1978).

25. It should be noted that the cases examined here involve routine prosecutions. Blacks may suffer greater discrimination in atypical cases—the highly publicized, infamous crimes that arouse the interest and ire of white society. This is one possible explanation for the well-documented discrimination in the application of the death penalty. In order to assess this hypothesis I analyzed the 25 defendants who received life sentences (there were no death sentences). All of these defendants were males, all but one were incarcerated prior to trial, and all but one had a prior conviction. Three whites were given life sentences, all for the crime of murder. Of the 22 blacks sentenced to life imprisonment 16 were convicted of robbery, 2 of rape, and 4 of murder. The percentages of white and black defendants receiving life sentences were: robbery—0/20, rape—0/18, and murder—75/80. Thus discrimination does indeed appear to exist. However, the number of cases is too small to support further analysis.

26. Wahlke (1970) has strongly argued the necessity of treating institutional outputs as independent variables in legislative research.

27. My own research in Iowa suggests that changes in the amount of crime are very strongly affected by the commitment of the judicial system to plea bargaining. The conclusion I draw is that plea bargaining transmits symbols of manipulability that in turn affect the deterrent effect of crimi-

may have a profound impact on the ability of courts to perform their prescribed functions. Certainly the potential consequences of discrimination are so serious that more effort should be made to understand its origins.

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nal sanctions. This is compatible with recent research suggesting that the certainty of sanctions (i.e., resistance to manipulation) is a more effective deterrent than the severity of sanctions, see Gibson (1978).

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