COMMENT ON
McDONALD AND CARLSON

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A recent issue of the Federal Sentencing Reporter included a statistical analysis of ours that had been introduced in the United States of America v. John Washington and Gregory Jenkins (U.S. District Court, Central District of California). The analysis had been undertaken to support a discovery motion by the defendants.

Our major factual concern was whether the racial or ethnic background of suspects was related to the likelihood of federal prosecution in cases involving the sale or possession of cocaine powder or base. We concluded that once arrested for possession or sale of crack cocaine, African-American suspects from Los Angeles County were at greater risk from federal prosecution than White suspects.

We arrived at our conclusions by examining the representation of Whites, African-Americans, and Latino/as among (1) individuals who were arrested in Los Angeles County for the sale of cocaine base, (2) individuals who were charged by the Los Angeles County District Attorney with sale or cocaine base, and (3) individuals who were charged by the Federal Prosecutor in the Central District of California with sale of cocaine base. We hypothesized that in a “race-neutral” system, the three racial/ethnic groups should maintain comparable proportions from arrest to charging. For example, if 58 percent of the arrests for the sale of cocaine base were African-American, about 58 percent of state prosecutions for cocaine base sales should be African-American, and about 58 percent of the federal prosecutions for the cocaine base sales should be African-American. In fact, while 58 percent of the arrests were African-American, and 58 percent of the state prosecutions were African-American, 83 percent of the federal prosecutions were African-American. For Whites, the comparable percentages were 3 percent, 3 percent, and 0 percent; no Whites were charged under the federal system, although 227 were charged by the state. Formal statistical tests rejected the race-neutral (null) hypothesis.

We drew no conclusions about why the race-neutral hypothesis was rejected. Rather, we argued that without more data, there was no scientific way to determine why the apparent racial/ethnic disparities existed. For example, it might be important to know the amount of drugs involved and the role of the suspect in the crime. These factors could be related to the race or ethnic background of the suspect and also to the likelihood of federal prosecution. Then, statistical adjustments, taking these relationships into account, in principle could alter the association we reported here between race/ethnicity and the risk of federal prosecution.

Our plea for more information did not deter the government from offering a number of race-neutral explanations for our findings without providing any scientific evidence whatsoever. The government asserted, for instance, that prosecutorial guidelines were routinely employed, which limited federal cases to sales of at least 50 grams of cocaine base. Yet, the text of the guidelines was not provided and no evidence was introduced that such guidelines were systematically employed. Nor was there any evidence presented to support the claim that taking the 50 gram threshold into account would eliminate the racial/ethnic disparities. Such is the nature of litigation.

Judge Terry Hatter subsequently ruled that the government would have to provide empirical support for their various assertions. As a result, the government recently filed a supplemental response to defense motions for discovery, and the defendant’s rebuttal of that document currently is being drafted. The issues, therefore, remain unresolved.

In this context, the study of federal sentencing by McDonald and Carlson is instructive. First, the study illustrates, as a first approximation, the sorts of data one must have to explore the causes of racial and ethnic disparities. McDonald and Carlson analyze data from the Federal Probation Sentencing and Supervision Information System (FPSIS) for the period from January 1, 1986 to June 30, 1990. Cases sentenced under law prevailing before the passage of the 1984 Sentencing Reform Act serve as the baseline to which cases sentenced under the Sentencing Reform Act are compared. In addition, information was available on a number of potential explanatory factors: prior criminal histories, characteristics of the instant offense and social background, including race/ethnicity. Consequently, McDonald and Carlson are able to adjust statistically many possible differences between the two pools of offenders (i.e., pre and post guidelines) in an effort to isolate the impact of the legal reforms. In a similar fashion, an effort is made to isolate the impact of the racial or ethnic background of the defendant.

Second, McDonald and Carlson demonstrate that charging a drug suspect within the federal system really matters. Federal law mandates very stiff sentences for the possession or sale of crack cocaine, and these sentences are typically far more punitive than sentences for comparable drug offenses under state law. With so much at stake, it is all the more important for each step from arrest to sentencing be race-neutral. By “race-neutral” we mean that once

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legally legitimate explanations for sentencing disparities are taken into account, all racial and ethnic groups on the average receive similar sentences.

Third, when coupled with our results, the findings of Carlson and McDonald may mean that African-American offenders face a double whammy. Federal sentences for possession or sale of crack cocaine are far more serious than for possession or sale of powder cocaine. For example, mandatory minimum sentences from trafficking a given amount of crack cocaine are 100 times greater than the mandatory minimum sentences for trafficking the same amount of powder cocaine. Furthermore, among individuals arrested for possession or sale of crack cocaine, African-American offenders are apparently more likely to find themselves charged under federal statutes.

Finally, in a political climate where still tougher sanctions are in the offing, it will make sense to consider not just the cost-effectiveness of various sentencing options, but the distributional consequences as well. We must ask how the sentencing burdens will be distributed across racial and ethnic groups in our society and if that distribution is good social policy. If distributional questions are too difficult for Congress to address, they might be usefully considered by the U.S. Sentencing Commission.

FOOTNOTES


(continued from page 235)

would complicate and prolong the sentencing process in almost every case. The court can also find in many cases that the defendant is too poor to be expected to pay restitution.

Sentencing judges who follow my advice will shed the image of being paper tigers in ordering restitution orders that cannot be, and are not, fulfilled.

FOOTNOTES

1 USSC Annual Report, table 22, p. 66.
3 The Victim and Witness Protection Act of 1982, 18 U.S.C.A. §§ 3663-64 (West 1985 & Supp. 1993), authorizes a district court to order a defendant to pay restitution to any victim of an offense committed in violation of Title 18 or other specified Code sections.
5 United States v. Gilbreath, 9 F.3d 85 (10th Cir. 1993); United States v. Molen, 9 F.3d 1084 (4th Cir. 1993); United States v. Ahmad, 2 F.3d 245 (7th Cir. 1993); United States v. Boula, 997 F.2d 263 (7th Cir. 1993); United States v. Hicks, 997 F.2d 594 (9th Cir. 1993); Plumley v. United States, 979 F.2d 855 (9th Cir. 1992); United States v. Patty, 992 F.2d 1045 (10th Cir. 1993); United States v. Young, 953 F.2d 1288 (11th Cir. 1992); United States v. Bailey, 975 F.2d 1028 (4th Cir. 1992); United States v. Parrott, 992 F.2d 914 (9th Cir. 1993).
6 United States v. Welden, supra note 2; United States v. Merritt, 988 F.2d 1298 (2d Cir. 1992).
7 United States v. Johnson, 983 F.2d 216 (11th Cir. 1992).
8 See Hank Phillippi Ryan, "After the Verdict" (TV presentation aired by WHDH-TV, Boston) (May 24-25, 1993) (in two parts).
9 In its 1989, 1990 and 1991 Annual Reports, the Sentencing Commission included information on the frequency of restitution orders in each district. Since the 1992 Annual Report, the Commission has included only aggregate information on the imposition of fines and restitution, obscuring useful information about the separate use of these distinct monetary penalties. No data have been provided on amount and range of restitution orders, the success of collections, or how often courts relieve defendants of their restitution obligations.
10 United States v. Pryor, 957 F.2d 478 (7th Cir. 1992).
13 United States v. Rivera, 994 F.2d 942 (1st Cir. 1993).