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Do Race and Ethnicity Matter in Prosecution?

A Review of Empirical Studies

First Edition

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From the Program Director

Vera's Prosecution and Racial Justice Program (PRJ) works in partnership with prosecutors to discover aspects of their decision making that result in unwarranted racial disparity, and to devise remedies that promote greater fairness and accountability. Our work focuses on improving prosecutorial practice and strengthening relationships between prosecutors and the communities they are sworn to serve.

No other actor in the criminal justice system drives case outcomes as profoundly as the prosecutor. Nevertheless, empirical research analyzing racial impacts of prosecutors' routine choices on the thousands of defendants and victims with whom they interact daily has been scarce. Furthermore, the small body of existing empirical research is written primarily for social scientists, rather than legal practitioners and lay audiences seeking to comprehend the aggregate effects of prosecutorial discretion on the racial compositions of our defendant, prison, and jail populations.

PRJ conducted this literature review to distill the current empirical research and provide a readily accessible reference guide. It is our hope that this document will serve as a resource for prosecutors, in particular, as they seek to understand the implications of routine policies and practices within their offices. As the reader will no doubt observe, the research raises as many questions as it resolves, emphasizing the need for additional study through collaborative initiatives such as PRJ.

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Introduction

Racial and ethnic minorities are represented disproportionately in the U.S. criminal justice system. Although the causes are many and complex, researchers and other observers have identified three institutions—the police, prosecutors, and the courts—that contribute to this problem. A significant body of research has focused on police practices, particularly stop and frisk,[1] and the ways in which these practices fall most heavily on racial and ethnic minorities. Even more studies have been devoted to sentencing—the decision about what penalty to impose and for how long. Relative to the attention that police and the courts have received from researchers analyzing disproportionate minority contact with the criminal justice system, there has been little study of prosecution. Given prosecutors' broad discretionary power, understanding the impact of their decisions on the higher incarceration rates of blacks and Latinos is crucial to determining whether, or how, race and ethnicity influence outcomes in the criminal justice system. This review of the existing literature examining the relationship of race and ethnicity to prosecutorial decision making suggests that defendants' and victims' race affect prosecutorial decisions. Most of the 34 studies reviewed here found influences on case outcomes, even when a host of other legal and extra-legal factors are taken into account.

However, the effect of race and ethnicity on prosecutorial decision making is inconsistent; furthermore, it is not always blacks or Latinos and Latinas who receive more punitive treatment. While a greater number of studies found that minority defendants are more likely to be prosecuted, held in pretrial detention, and receive other harsh treatment, researchers also found proof of prosecutors treating white defendants more harshly for certain offenses and at certain discretion points. In other words, the research findings vary noticeably by the type of data and analyses used.

Methodological Note

The review, which consists of two sections, examines 34 empirical studies on prosecution and race and ethnicity published between 1990 and 2011 in peer-reviewed journals. While the focus was on recent studies, some of these studies used pre-1990 data. The literature under review emerged from bibliographies of recent publications, as well as from searches for "prosecutorial discretion" and "race" in academic search engines. The document focuses on the following six discretion points: initial screening, pretrial release/bail procedure, dismissal, charge reduction, guilty plea, and sentencing. In some cases, it includes discretion points, such as pretrial release/bail procedure and sentencing, where prosecutors are integral, but not the sole, participants. Finally, the terms for racial and ethnic categories throughout the report conform to the terms used in the studies in question. For example, if a researcher referred to Latinos as "Hispanics," this study does too.

[1] Stop and frisk is a policing practice established in state law in which a police officer stops a person for questioning. If the officer has a "reasonable suspicion" that the person is engaged in criminal activity, the person is detained in what is known as a forcible stop. Frisking involves the officer running his or her hands over the suspect's outer clothing to search for contrabrand or weapons. In some instances, the police officer orders the stopped person to empty his or her pockets.

Understanding whether, and to what extent, race and ethnicity affect outcomes at any stage of prosecution is challenging in part because there is no accessible, comprehensive work that summarizes research findings for a broad audience. While academic journal articles have literature review sections, they are designed for other researchers and tend to be technical. Furthermore, most of the work reviewed is available only through academic search engines not open to the general public.

This review describes the existing body of empirical research about the impact of prosecutorial discretion on racial and ethnic disparities in the criminal justice system, with an emphasis on the researchers' findings. Its intent is to inform a diverse audience—including academics, practitioners, and interested generalists—about the current state of the debate on these subjects. In so doing, the authors hope to encourage additional empirical research on the relationship between race and prosecution by identifying areas that need further study; provide prosecutors and other criminal justice practitioners with a frame of reference in which to assess their own practices; and strengthen the general public's understanding of the criminal justice system.

The first section catalogs areas of prosecutorial discretion and identifies the areas that have attracted the most study. It also lists the racial and ethnic categorizations researchers used to define and compare racial and ethnic groups. The second section reviews the research findings, organized by prosecutorial discretion points, to determine the extent to which researchers attribute racial and ethnic disparities to prosecutorial decision making.

Section One: A Review of Research Methodologies

In order to better understand the research findings on the relationship of race and ethnicity to prosecutorial decision making, it is useful to review how studies differ in their methods for measuring these factors and their interaction. Researchers have analyzed a diverse group of offense categories. The studies included both misdemeanors and felonies, ranging from drug offenses to homicides. Nine of the 34 studies focused on sexual offenses. The data they used came from a wide range of jurisdictions in the United States. Most studies used data from state and local prosecutors' offices but some relied on federal data.

Discretion Points

The 34 studies reviewed analyze the role of race and ethnicity on prosecutorial decision making, along with how defendants' and victims' other characteristics might factor into prosecutors' determinations. In many studies, defendant and victim race and ethnicity were not the primary focus of research; rather, they were factors that researchers took into account when determining the effect of primary factors on their outcome of interest (for example, the impact of prior record on case acceptance for prosecution, while researchers controlled for the impact of race).

For the purposes of this review, the studies are organized according to six discretion points:

- **Initial screening—**when a reviewing prosecutor decides whether to accept a case for prosecution and, in some instances, how to charge the offense;
- **Pretrial release or bail procedure—**whether a defendant is held in detention while the case is pending and whether a defendant is offered or awarded bail;
- **Dismissal—**whether a case or charge is dismissed at any point after initial screening by a prosecutor or a judge;
- **Charge reduction**—whether the seriousness or the number of charges are reduced at any point after initial screening;
- **Guilty plea**—whether a defendant pleads guilty; and
- **Sentencing—**whether a prosecutor's decisions affect the length or nature of a convicted person's penalty.[1]

The review also considers whether studies focused on the juvenile justice system.

The six discretion points are best understood as parts of a continuum, particularly the last four. Dismissal, charge reduction, guilty plea, and sentencing are interrelated; a decision made at one point will likely have an effect on subsequent points. As a result, measuring racial and ethnic disparity by looking at individual discretion points can be misleading; for example sentencing—which has often

[2] Although sentencing is generally considered the purview of judges, many decisions by prosecutors, such as whether to ask for a substantial assistance departure or what charges to file, can directly affect the length of a sentence. While some studies include a section on sentencing, they were not discussed because the effect of prosecutorial decision making on sentencing was unclear.

been measured in isolation from earlier discretionary decisions—is directly influenced by charging decisions.

The greatest number of studies focused on initial screening and sentencing. The smallest number of studies examined dismissals and guilty pleas. As shown in Figure 1 (page five), initial screening is the most researched discretion point; over half of the studies examined it. Six studies focused on sentencing, and the same number looked into charge reduction. Five studies examined pretrial release or bail procedure. Dismissal was the subject of three studies. Only one study investigated guilty pleas. Finally, four of the 34 studies examined two or more discretion points.

In the studies under review, the availability of data affected which discretion points researchers examined. For example, researchers can often readily obtain sentencing data from court systems. Data on plea offers is relatively difficult to gather because most prosecutorial offices do not have electronic case-management systems that would capture this information. Also, because case or charge dismissals can happen at almost any point in a case, it may be difficult for researchers to find a data source that captures dismissals.

Plea bargaining has received the least empirical scrutiny. Given that prosecutors make plea offers in more than 90 percent of cases (though this may vary by office), it is unlikely that prosecutors' decisions to make offers contribute to the disparate treatment of minorities. An examination of the types of plea offers that prosecutors make in each case might produce more useful data. For example, some offers may be for custodial punishment, while others may include only probation and fines.

Racial and Ethnic Categorizations

Most of the studies compared black and Latino defendants with white defendants (see Figure 2 on page six). Researchers used different terms for racial and ethnic categories. A total of 25 studies used "black" and five used "African American." Fourteen studies used "Hispanic," and only one used "Latino and Latina." With the exception of one study that used "Caucasian" and another that used "Anglo," all other studies used "white." Compared to whites, blacks, and Latinos, Asians are by far the least-studied racial group: they are specifically included in only two studies. Also, 11 studies, most of which focused on sex crimes and domestic violence, included the victims' race and ethnicity. Finally, none of the studies included prosecutors' or other criminal justice practitioners' race or ethnicity in the analyses; it is not clear if this information is absent because it was not readily available, or because there was not enough variation in race (assuming that most prosecutors are white).

Figure 1: Studies by Discretion Points

Publications (Year, Author)	Initial Screening	Pretrial Release / Bail Procedure	Dismissal	Charge Reduction	Guilty Plea	Sentencing	Juvenile
1. 2011, Freiburger & Jordan	✓						✓
2. 2011, Pyrooz et al.	✓						
3. 2010, Holleran et al.	✓						
4. 2010a, Franklin	✓						
5. 2010b, Franklin			✓				
6. 2010, Bishop et al.	✓						✓
7. 2010, Shermer & Johnson				✓		✓	
8. 2009, Freiburger et al.		✓					
9. 2009, Johnson & Betsinger						✓	
10. 2009, Spohn & Fornango						✓	
11. 2008, Leiber & Johnson	✓						✓
12. 2007, Hartley et al.						✓	
13. 2007, Riedel & Boulahanis	✓						
14. 2007, Ulmer et al.						✓	
15. 2005, Henning & Feder	✓	✓					
16. 2004, Demuth & Steffensmeier		✓					
17. 2004, Wooldredge & Thistlethwaite	✓		✓				
18. 2004, Kingsnorth & MacIntosh	✓						
19. 2003, Demuth		✓					
20. 2003, Johnson						✓	
21. 2002, Kingsnorth et al.	✓						
22. 2001, Spohn & Holleran	✓						
23. 2001, Spohn et al.	✓						
24. 1999, Sorensen & Wallace	✓						
25. 1998, Kingsnorth et al.	✓						
26. 1997, Spears & Spohn	✓						
27. 1996, Spohn & Spears	✓						
28. 1996, Albonetti & Hepburn	✓						
29. 1995. Farnworth & Teske				✓			
30. 1993, Spohn & Horney			✓	✓			
31. 1992, Albonetti				✓			
32. 1991, Farnworth et al.				✓			
33. 1991, Patterson & Lynch		✓					
34. 1990, Albonetti					✓		
TOTAL	**18**	**5**	**3**	**5**	**1**	**6**	**3**

Figure 2: Studies by Defendant and Victim Race and Ethnicity

Publications (Year, Author)	Defendant Race/Ethnicity											Victim Race/ Ethnicity Included
	White	Black	Nonwhite	African American	Hispanic	Latino/a	Asian	Minority	Caucasian	Anglo	Other	
1. 2011, Freiburger & Jordan	✓	✓										
2. 2011, Pyrooz et al.	✓		✓									✓
3. 2010, Holleran et al.	✓	✓										✓
4. 2010a, Franklin	✓	✓										
5. 2010b, Franklin	✓	✓			✓							
6. 2010, Bishop et al.	✓			✓								
7. 2010, Shermer & Johnson	✓	✓			✓							
8. 2009, Freiburger et al.	✓	✓										
9. 2009, Johnson & Betsinger	✓	✓			✓		✓				✓	
10. 2009, Spohn & Fornango	✓	✓			✓							
11. 2008, Leiber & Johnson	✓	✓										
12. 2007, Hartley et al.	✓	✓			✓							
13. 2007, Riedel & Boulahanis	✓	✓										✓
14. 2007, Ulmer et al.	✓	✓			✓							
15. 2005, Henning & Feder								✓	✓			
16. 2004, Demuth & Steffensmeier	✓	✓			✓							
17. 2004, Wooldredge & Thistlethwaite	✓			✓								
18. 2004, Kingsnorth & MacIntosh	✓	✓			✓		✓					✓
19. 2003, Demuth	✓	✓			✓							
20. 2003, Johnson	✓	✓			✓							
21. 2002, Kingsnorth et al.	✓			✓		✓						✓
22. 2001, Spohn & Holleran	✓	✓										✓
23. 2001, Spohn et al.	✓	✓			✓						✓	✓
24. 1999, Sorensen & Wallace	✓	✓										✓
25. 1998, Kingsnorth et al.	✓	✓			✓							✓
26. 1997, Spears & Spohn	✓	✓										✓
27. 1996, Albonetti & Hepburn	✓			✓	✓			✓		✓		
28. 1996, Spohn & Spears	✓	✓										✓
29. 1995, Farnworth & Teske	✓	✓										
30. 1993, Spohn & Horney	✓	✓										
31. 1992, Albonetti	✓											
32. 1991, Farnworth et al.	✓			✓	✓							
33. 1991, Patterson & Lynch	✓		✓									
34. 1990, Albonetti	✓	✓										
TOTAL	**33**	**25**	**2**	**5**	**14**	**1**	**2**	**2**	**1**	**1**	**2**	**11**

Section Two: A Review of Research Findings

While a review of the 34 studies discussed here suggests that defendants' and victims' race affect prosecutorial decisions, the findings are complex and somewhat difficult to interpret. Overall, research finds that the effect of race and ethnicity on prosecutorial decision making is inconsistent, and it is not always blacks or Latinos and Latinas who are treated more punitively. Some of this inconsistency stems from the fact that prosecutors' offices have varied practices that may influence the impact of race on case outcomes. Yet even within the same office, specific types of cases (for example, homicide versus possession of marijuana) are likely to be handled very differently, which in turn could increase or decrease the impact of race. Furthermore, researchers suggest that minorities receive either more severe and more lenient outcomes, depending on the stage in the case-processing continuum. Finally, the types of data and analyses researchers use have probably contributed to their varied and often contradictory conclusions.

Research suggests that legal factors such as seriousness of the offense, prior record, and the strength of evidence have a dominant effect on prosecutorial decisions. Additionally, extra-legal factors such as personal characteristics of a defendant or a victim also come into play. It is important to note that even universally recognized legal factors, such as prior arrest record, can turn on extra-legal factors, including race. Although the preponderance of the research found that race and ethnicity matter, delving into each discretion point illustrates how prosecutorial decision making intersects with race and ethnicity.

Initial Screening

Among the 18 studies on initial screening, 11 reported racial differences by race/ethnicity, and six found no difference.[3]

Three studies found differences based on the defendant's race. The first two studies showed inconsistent findings: while the first study indicates that blacks were less likely to be prosecuted, the second study reveals that minorities are more likely to have their case dismissed. Wooldredge and Thistlethwaite examined 2,948 misdemeanor assault cases against an intimate partner in Hamilton County, Ohio.[4] Compared to white defendants, African Americans were less likely to be charged and fully prosecuted, even after controlling for socioeconomic status variables (education, employment, public assistance, residential stability, and household composition). Henning and Feder examined the decision to prosecute versus dismiss, among other discretion points, in 4,178 domestic violence cases and found that prosecutors were more likely to dismiss a case at initial screening for Caucasian

[3] In one study, Rodney Kingsnorth and Randall MacIntosh focused on predictors of victims' support for prosecution as opposed to the effect of defendants' and/or victims' race on prosecutorial decision making. It found that while Asian American and white victims were equally likely to support prosecution, African America victims were significantly less likely to support prosecution (although they were as likely as whites to call for assistance and support arrest). See R.F. Kingsnorth and R.C. MacIntosh, "Domestic violence: Predictors of victim support for official action," *Justice Quarterly* 21, no. 2 (2004): 301-28.

[4] John D. Wooldredge and Amy Thistlethwaite. "Bilevel Disparities in Court Dispositions for Intimate Assault," *Criminology* 42 (2004): 417-56.

defendants as opposed to minority defendants (82.1 percent of whom were African Americans).[5] In the third study, Riedel and Boulahanis analyzed 1,086 homicide cases in Chicago from 1988 through 1995 and found that homicides involving white defendants were less likely to be resolved.[6] Cases involving African American defendants were more likely to be declared resolved even if no lawful arrest had been made. This finding does not necessarily suggest a more punitive treatment of either racial group.

Depending on the type of offense, victims' characteristics also matter:[7] of six studies that focused on a victim's race and ethnicity for initial screening, five discovered that cases with minority victims are treated more leniently; one study showed no differences by race. The first study, Sorensen and Wallace, examined prosecutorial decisions to (a) charge first-degree murder, (b) file aggravating factors as notice to seek the death penalty, and (c) proceed to capital trial before a jury.[8] These researchers found that cases involving a black defendant and a white victim were most likely to pass through each of the three stages. Compared to other racial combinations, cases involving black defendants and white victims were 143 percent more likely to be charged with first-degree murder; they were also more than twice as likely to be served with the notice of aggravated factors, and to proceed to capital trial. Furthermore, blacks who were convicted of killing whites were more than four times more likely to receive a death sentence.

Spohn, Beichner, and Davis-Frenzel found that prosecutors rejected sexual assault charges more often if the victim was a racial minority, or if the suspect was black.[9] Similarly, based on the analyses of sexual assault cases in Kansas City, Missouri, and Philadelphia, Spohn and Holleran found that prosecutors were least likely to file charges when the victim was black and the defendant did not use a weapon, and most likely to file charges when the victim was white and a weapon was used.[10] Kingsnorth, MacIntosh, and Sutherland found that domestic violence cases involving Latino victims (compared to white victims) were less likely to be prosecuted at intake, although a victim's race and ethnicity had no impact on post-intake decision making.[11] Pyrooz, Wolfe, and Spohn looked at 614 gang-related homicides in Los Angeles that occurred between 1976 and 1980 to determine the effect of Operation Hardcore, a specialized prosecution unit in the city.[12] The authors found that prosecutors

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[5] Kris Henning and Lynette Feder. "Criminal Prosecution of Domestic Violence Offenses: An Investigation of Factors Predictive of Court Outcomes," *Criminal Justice and Behavior* 32 (2005): 612-42.

[6] Marc Reidel and John G. Boulahanis. "Homicides Exceptionally Cleared and Cleared by Arrest: An Exploratory Study of Police Prosecutor Outcomes," *Homicide Studies* 11 (2007): 151-63. The researchers use the terms "barred to prosecution" to describe "a specific exceptional clearance category that refers to the cases that have not resulted in the death of the offender (either as a homicide, suicide, or justifiable homicide), but for whatever reason(s), a lawful arrest has not been made, yet the case has been cleared" (see, p. 153).

[7] For example, factors that influence decision making in sexual assault cases versus non-sexual offenses differ because in the sexual assault cases, prosecutorial decisions may be affected by stereotypes about rape and rape victims (see Estricht, 1987; Spohn, Beuchner, and Davis-Frenzel, 2001).

[8] Jon Sorenson and Donald H. Wallace. "Prosecutorial Discretion in Seeking Death: An Analysis of Racial Disparity in the Pretrial Stages of Case Processing in a Midwestern County," *Justice Quarterly* 16, no. 3 (1999): 559-578.

[9] Cassia Spohn, Dawn Beichner, and Ericka Davis-Frenzel. "Prosecutorial Justifications for Sexual Assault Case Rejection: Guarding the 'Gateway to Justice'," *Social Problems* 48, no. 2 (2001): 206-35.

[10] Cassia Spohn and David Holleran. "Prosecuting Sexual Assault: A Comparison of Charging Decisions in Sexual Assault Cases Involving Strangers, Acquaintances, and Intimate Partners," *Justice Quarterly* 18, no. 3 (2001): 651-88.

[11] Rodney F. Kingsnorth, Randall MacIntosh, and Sandra Sutherland. "Criminal Charge or Probation Violation? Prosecutorial Discretion and Implications for Research in Criminal Court Processing," *Criminology* 40, no. 5 (2002): 553-78.

[12] David C. Pyrooz, Scott E. Wolfe, and Cassia Spohn. "Gang-related Charging Decisions: The Implementation of a Specialized Prosecution Unit in Los Angeles," *Criminal Justice Policy Review* 22, no. 1 (2011): 3-26.

were more likely to reject cases when a non-white victim was assaulted. More specifically, cases involving non-white victims were more than twice as likely to be dropped compared to cases with white victims.

Spohn and Spears found that charges involving black-on-white sexual assaults were more likely to be dismissed. This finding was inconsistent with the researchers' expectations, which were based on previous research suggesting a more punitive treatment of cases involving black defendants and white victims.[13] They also found that cases were more likely to be dismissed if a victim engaged in risk-taking behavior (for example, provocative clothing or public drunkenness), a victim did not scream during the attack, or a defendant faced fewer charges. Moreover, while the race of a defendant and a victim did not influence a defendant's likelihood of receiving a prison sentence, blacks who sexually assaulted whites received sentences that were more than four years longer than those of white defendants in cases with white victims, and more than three years longer compared to cases with black defendants and black victims. It is not possible here to determine to what extent prosecutorial decisions contributed to the sentence length. Nevertheless, it appears that while prosecutors are more likely to dismiss black-on-white sexual assault cases, once they decide to pursue such cases, they may ask for harsher penalties. This finding illustrates why researchers should consider the case-processing continuum as they examine specific discretion points. A single decision, whether by the police, prosecutors, or other criminal justice practitioners, will likely affect the discretion points that follow.

Two studies concentrating on the juvenile justice system reported differences by race. Bishop, Leiber, and Johnson found that African American youths charged with felonies were more likely to be prosecuted compared to similarly charged white youths.[14] The researchers used this finding to support a theory that prosecutors might be stereotyping blacks as being more dangerous than whites, and therefore they feel a greater need to protect the community from minority offenders. However, race did not have a noticeable impact on charging decisions. In an earlier study, Leiber and Johnson analyzed the impact of race on receiving intake court referral and judicial disposition across property, person, and drug offenses.[15] They found that in some ways African American youths were treated more punitively: they were less likely to receive intake diversion and more likely to receive court referrals. However, this study also found that African Americans received more lenient treatment than whites, by virtue of the fact that they were more likely to be released rather than to participate in diversion.[16]

As mentioned earlier, six of the 18 studies did not find any direct influence of race on initial screening, although the first three studies, discussed below, reported some influence of race on prosecutorial decision making when combined with other demographic or prior arrest variables. The first two studies, both of which focused on felony drug offenses, found some evidence of more

[13] Cassia Spohn and Jeffrey Spears. "The Effect of Offender and Victim Characteristics on Sexual Assault Case Processing Decisions," *Justice Quarterly* 13, no. 4 (1996): 649-76.
[14] Donna M. Bishop, Michael J. Leiber, and Joseph D. Johnson. "Context of Decision Making in the Juvenile System: An Organizational Approach to Understanding Minority Overrepresentation," *Youth Violence and Juvenile Justice* 8, no. 3 (2010): 213-33.
[15] Michael J. Leiber and Joseph D. Johnson. "Being Young and Black: What are their Effects on Juvenile Justice Decision Making," *Crime and Delinquency* 54 (2008): 560-81.
[16] The goal is to provide rehabilitative services to defendants who present a low public safety risk, with the aim of directing criminal justice resources toward creating better outcomes for the community and the defendant.

punitive treatment of whites compared to minorities; the third study looked at juvenile justice data and suggested more punitive treatment of minorities**.**

In the first study, Albonetti and Hepburn examined the prosecutor's decision to divert felony drug defendants from criminal prosecution into a treatment program.[17] They researched whether minorities, African Americans and Hispanics, were less likely than Anglos to be diverted into treatment. They found no evidence of disparity either between African Americans and Anglos, or between Hispanics and Anglos. However, when the researchers looked into defendants with prior arrest, they found—contrary to their expectations—that Anglos had a lower rate of diversion into treatment compared to minority defendants. In other words, this research suggests more punitive treatment of white defendants with prior arrest history than minority defendants with prior arrests.

In the second study, Franklin used a nationally representative sample of felony drug cases to understand whether the defendant's age and gender in combination with the defendant's race influence the prosecutor's decision to dismiss criminal charges.[18] The researcher found that race did not affect the decision to dismiss a charge. However, when looking into specific age categories, white defendants between 30 and 39 years old were significantly less likely to have their cases dismissed compared to 18- to 29-year-old black defendants. In other words, young black defendants received less punitive treatment, given that they were more likely to have their cases dismissed. As the author noted,"[t]his finding was particularly surprising since criminal stereotypes generally target young Blacks much more frequently than middle-aged Whites" (p. 189).

In the third study, Freiburger and Jordan examined the decision by prosecutors to formally petition a case to the juvenile court or decline to prosecute.[19] The study found that a juvenile's race by itself did not influence the likelihood of petition. Yet it suggested that the odds of being petitioned increased for black youths in extremely low-income neighborhoods. The researchers offered a few possible explanations for this finding. First, extremely low-income communities may be more tolerant of delinquent behavior, because such acts are perceived as typical child misbehavior. Second, these communities might have a greater police presence than other neighborhoods, resulting in more arrests, including disproportionately more arrests based on weaker evidence, which makes it harder for prosecutors to pursue these cases.

The following three studies focused on sexual assault cases, and none of them found any evidence of the impact of race on initial screening decisions. Spears and Spohn attempted to test a theory that criminal justice practitioners, including prosecutors, base their decisions on stereotypes of rape and take seriously only "real rapes" with "genuine victims."[20] While the researchers found some support for this theory—prosecutors were more likely to file charges if there were no concerns about the victim's moral character or behavior at the time of incident—the defendant's or victim's race did not influence the charging decision. In another study, Kingsnorth, Lopez, Wentworth, and Cummings

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[17] Celesta A. Albonetti and John R. Hepburn. "Prosecutorial Discretion to Defer Criminalization: The Effects of Defendant's Ascribed and Achieved Status Characteristics," *Journal of Quantitative Criminology* 12 (1996): 63-81.
[18] Travis Franklin. "The Intersection of Defendants' Race, Gender, and Age in Prosecutorial Decision Making," *Journal of Criminal Justice* (2010a) 38: 185-92.
[19] Tina L. Freiburger and Kareem L. Jordan. "A Multilevel Analysis of Race on the Decision to Petition a Case in the Juvenile Court," *Race and Justice* 1, no. 2 (2011): 185-201.
[20] Jeffrey Spears and Cassia Spohn. "The Effect of Evidence Factors and Victim Characteristics on Prosecutors' Charging Decisions in Sexual Assault Cases," *Justice Quarterly* 14 (1997): 501-24.

analyzed a sample of sexual assault cases and concluded that the offender and victim racial characteristics did not influence prosecutors' decision to prosecute versus reject or dismiss a case.[21] They also concluded that race did not influence the likelihood of a case going to trial versus ending in plea-bargaining. The researchers believe that one reason their findings are contrary to some earlier studies is that they used more recent data while previous research relied on data from the 1970s, when racial disparities might have been more pronounced. Holleran, Beichner, and Spohn looked into the congruence between the charge filed by police at arrest and the charge filed by a prosecutor at screening.[22] When researching whether police and prosecutors agreed on a forcible rape charge, or a prosecutor filed a lesser charge or dismissed a case, the researchers took into account both the suspect's race (white or black) and the complainant's race (white or black). Like the two previous studies on sexual assault, this study found that race had no effect on charging decisions.

Pretrial Release and Bail Procedure

Unlike research on initial screening decisions, studies on pretrial release are fairly consistent. Four of five studies analyzed showed at least some disparity in the application of bail and detention. Patterson and Lynch, Demuth, Demuth and Steffensmeier, and Freiburger, Marcum, and Pierce all showed that black and Hispanic defendants received harsher treatment than white defendants.[23]
In the first study, Patterson and Lynch analyzed non-narcotics felony cases to explore whether whites (including Hispanics) or nonwhites were more likely to receive bail below or at the standard amount for the charged offense as defined in the jurisdiction's bail schedule. This study concluded that, while there was no difference between whites and non-whites in their likelihood of receiving bail amounts that exceeded schedule limits, nonwhites were less likely to receive bail below the bail schedule amounts. In other words, whites are more likely to receive low bail, suggesting a greater likelihood of detention for non-whites.

Similarly, using data on felony arrests from the nation's 75 most populous counties, Demuth and Steffensmeier found that, while blacks were also treated more severely than whites, Hispanics received the harshest treatment of all three groups. First, Hispanic and black defendants were more likely than whites to be denied release. Second, white and black defendants were more likely to be released under non-financial terms (for example, release on their own recognizance) while Hispanics were more likely to receive a financial release option.[24] Third, Hispanics receive higher bail compared to both whites and blacks, whereas there was no difference in the average bail amount required for black and white defendants. Fourth, blacks and Hispanics were more likely to be held on bail (that is, less likely to post

[21] Rodney Kingsnorth, John Lopez, Jennifer Wentworth, and Debra Cumming. "Adult Sexual Assault: The Role of Racial/Ethnic Composition in Prosecution and Sentencing," *Journal of Criminal Justice* 26, no. 5 (1998): 359-71.
[22] David Holleran, Dawn Beichner, and Cassia C. Spohn. "Examining Charging Agreements Between Police and Prosecutors in Rape Cases," *Crime and Delinquency* 56 (2010): 385-413.
[23] E. Britt Patterson and Michael J. Lynch. "Bias in Formalized Bail Procedures," in *Race and Criminal Justice*, edited by Michael J. Lynch and E. Britt Patterson (New York: Harrow and Heston, 1991). Stephen Demuth. "Racial and Ethnic Differences in Pretrial Release Decisions and Outcomes: A Comparison of Hispanic, Black, and White Felony Arrestees," *Criminology* 41 (2003): 873-907. Stephen Demuth and Darrell Steffensmeier. "The Impact of Gender and Race-Ethnicity in the Pretrial Release Process," *Social Problems* 51, no. 2 (2004): 222-42. Tina L. Freiburger, Catherine D. Marcum, and Mari Pierce. "The Impact of Race on Pretrial Decision," *American Journal of Criminal Justice* 35 (2009): 76-86.
[24] Because most defendants required to pay bail to gain release cannot afford it, a financial release option is likely to result in the pretrial detention of many of these defendants.

bail) compared to whites, even after taking the bail amount into account alongside other factors. Finally, Hispanic males are most likely to be detained and receive the most disadvantageous decisions throughout the pretrial release process. These findings suggest that financial release options, which are particularly burdensome for minority defendants, have become a mechanism to deny release. This phenomenon has an especially punitive effect on people of color, given that pretrial detention has been long associated with a higher likelihood of receiving a custodial sentence.

In a more recent study, Freiburger, Marcum, and Pierce examined the effect of race (white and black) on pretrial decisions for drug offenders in Pennsylvania. They found that black defendants were less likely than white defendants to be released on their own recognizance. However, when the researchers looked into detention status for offenders who did not receive release on recognizance, they did not find any difference between blacks and whites. They also found that race did not affect the amount of bail a defendant received.

One study determined that there was no difference by race. Henning and Feder examined the effect of defendant and offense characteristics on four discretion points (including whether a defendant received bail or was released on his own recognizance) in domestic violence cases.[25] Race did not have an effect on whether a defendant would be released on bail or his own recognizance.

Dismissal

Each of the three studies on dismissal reached different conclusions. One study found no differences by race; another found evidence of favorable treatment of African American defendants; and the last one showed the opposite effect of race.

The one study that found no differences in dismissal by race—Spohn and Horney—sought to differentiate prosecutorial outcomes before and after Michigan's 1975 rape law reforms.[26] Neither victims' nor defendants' characteristics, including race, had an effect on dismissal either before or after the reforms.

In another study, Wooldredge and Thistlethwaite established that, in intimate misdemeanor assaults, African American defendants and people from low-income neighborhoods were less likely to be fully prosecuted (that is, have no charges dismissed) than white defendants and those from higher income neighborhoods.[27] This finding appears to favor African Americans. However, considering that the sample included all males arrested for assault against an intimate partner (a spouse, ex-spouse, or person who shares children with the suspect), and also given that the majority of such cases are intra- rather than inter-racial, this seemingly favorable treatment of African American defendants can also mean that prosecutors placed greater weight on pursuing cases involving white victims or victims with higher socio-economic status.[28]

Finally, in his analysis of the effect of race and ethnicity on felony case dismissal in 39 of the nation's 75 largest counties, Franklin found that a defendant's race and ethnicity had no effect on

[25] Henning and Feder 2005, 612-42. Also, see "Initial Screening Findings" for disparities found in prosecutors' likelihood to drop the case.
[26] Cassia Spohn and Julie Horney. "Rape Law Reform and the Effect of Victim Characteristics on Case Processing," *Journal of Quantitative Criminology* 9, no. 4 (1993): 383-409.
[27] Wooldredge and Thistlethwaite 2004, 417-56.
[28] Unfortunately, researchers were not able to capture any measures related to victim characteristics.

whether a prosecutor would dismiss a case.[29] Only after the author included county-level measures, such as geographical location, did some disparities emerge: African Americans were less likely than whites to have their cases dismissed in jurisdictions located in the South compared to all other regions combined.[30] Overall, the author argued that his initial intent—to document racial and economic threat theories—was not realized because of limitations of the data.[31]

Charge Reduction

Five studies examined the impact of race and ethnicity on charge reduction. Three found differences by race and two found no differences.

Farnworth, Teske, and Thurman reported differences in their analysis of 767 cases of possession of marijuana with intent to sell.[32] The analyses looked only into cases of defendants with a previous court record and identified Hispanics as a group that was treated most punitively. While black defendants were somewhat less likely than whites to receive charge reductions, white males were far more likely than Hispanic males to have their primary charges reduced to a misdemeanor. In other words, ethnic differences (between whites and Hispanics) were much larger than racial differences (between whites and blacks). Similarly, in their analyses of a sample of thefts and assaults in California, Farnworth and Teske found that white females charged with assault were particularly likely to receive charge reductions, compared to minority female defendants.[33] This finding only partly supported the researchers' hypothesis that women are treated leniently only when their charges are consistent with stereotypes about female offenders.

Finally, O'Neill-Shermer and Johnson used the federal prosecution[34] context to test the theory that minority offenders, and particularly those who are young and male, and charged with drug, violent offenses, and weapons offenses, would be especially unlikely to receive charge reduction.[35] When looking into all offenses combined, defendants' race and ethnicity did not influence federal charge reduction; however, differences appeared within individual offense categories. In weapons offenses, black and Hispanic defendants were less likely than white defendants to have their charges reduced. For drug offenses, researchers reported a more counterintuitive finding: compared to whites, Hispanics were about 20 percent more likely to have their charges reduced. According to the researchers, the

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[29] Travis Franklin. "Community Influence on Prosecutorial Dismissals: A Multilevel Analysis of Case and County-level Factors," *Journal of Criminal Justice* 38 (2010): 693-701.

[30] The South was defined in accordance with the U.S. Census Bureau and included: Texas, Oklahoma, Arkansas, Louisiana, Mississippi, Alabama, Florida, Georgia, South Carolina, North Carolina, Tennessee, Kentucky, Virginia, West Virginia, Maryland, and Delaware.

[31] These theories claim that racial and ethnic minorities, who are typically economically deprived groups, are perceived by those in power as crime-prone people threatening the privileged position of dominant groups. This fear may trigger more punitive responses by the criminal justice system toward minority groups.

[32] Margaret Farnworth, Raymond H. C. Teske, Jr., and Gina Thurman. "Ethnic, racial, and minority disparity in felony court processing," in *Race and Criminal Justice*, edited by Michael J. Lynch and E. Britt Patterson (New York: Harrow and Heston, 1991).

[33] Margaret Farnworth and Raymond H. C. Teske, Jr. "Gender Differences in Felony Court Processing: Three Hypotheses of Disparity," *Women and Criminal Justice* 6, No. 2 (1995): 23-44.

[34] Federal prosecutors cover the entire nation and are jurisdictionally arranged under 94 districts; these districts are nested in 11 circuits.

[35] Lauren O'Neill Shermer and Brian D. Johnson. "Criminal Prosecutions: Examining Prosecutorial Discretion and Charge Reductions in U.S. Federal District Courts," *Justice Quarterly* 27, no. 3 (2010): 394-430. This included drug, violent, weapon, property, fraud, public order, and immigration offenses.

more favorable treatment of Hispanics at this stage may suggest that initial charges for Hispanic drug offenders were particularly severe, and prosecutors were correcting earlier overcharging decisions.

Two studies found no effect of race and ethnicity on charge reduction. Albonetti found that the suspect's race did not influence the decision to reduce charges in 400 burglary and robbery cases that occurred between 1979 and 1980.[36] Likewise, Spohn and Horney found that the victim's race did not affect the decision to reduce the severity of a defendant's sexual assault charges.[37]

Guilty Plea

Only one study, by Albonetti, explicitly examined the impact of defendants' race on their likelihood to plead guilty and found at least limited evidence that blacks were less likely to plead guilty.[38] The analysis used data about 464 felony cases processed in Norfolk, Virginia, in the 1970s. It focused on male defendants only. When analyzing simple percentages, the researcher reported that black defendants were: more likely to be held in pretrial detention (72 percent versus 51 percent whites), use a weapon (43 percent versus 25 percent), face a prosecutor who has an eyewitness (70 percent versus 59 percent), be charged with an offense punishable by a five-to 20-year-prison sentence (40 percent versus 23 percent); but *less likely* to retain a private attorney rather than court-appointed counsel (38 percent versus 56 percent), and confess charges (46 percent versus 65 percent). When taking into account defendants' marital status, offense severity, prior record, presence of physical evidence, eyewitness identification, pretrial detention, counsel type, and whether a defendant confessed, Albonetti concluded that black defendants were less likely than white defendants to plead guilty.[39] According to the author, this may be the result of less favorable plea offers and court-appointed counsel's inability to negotiate a desirable settlement. Another explanation is that black defendants may have less confidence in the criminal justice system as a whole and in the system of plea bargains in particular. As Albonetti writes: "Compared to guilty plea, a trial disposition provides a more rigorous testing of the 'facts' of the case…and the opportunity to have an independent judicial review. … As a consequence, the defendant who chooses to go to trial places himself/herself in a less vulnerable position" (pp. 330-331).

Sentencing

The final discretion point, sentencing, was the focus of six studies, all of which found differences by race or ethnicity.

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[36] Celesta A. Albonetti. "Charge Reduction: An Analysis of Prosecutorial Discretion in Burglary and Robbery Cases," *Journal of Quantitative Criminology* 12 (1996): 63-81.
[37] Spohn and Horney 1993, 383-409.
[38] Celesta A. Albonetti. "Race and the Probability of Pleading Guilty," *Journal of Quantitative Criminology* 6, no. 3 (1990): 315-34.
[39] This finding was not statistically significant, which means that it should be generalized with caution. The author argues that "although the main effect of race is not significant at $P < 0.05$, the magnitude and direction of the effect are constant with my hypothesis" (Albonetti, 1990, p. 324).

Ulmer, Kurlychek, and Kramer examined the role of race and ethnicity, among other factors, in a prosecutorial decision to apply a mandatory minimum sentence to drug offenders in Pennsylvania.[40] While the study found no marked differences in prosecutors' decisions for white versus black defendants, young Hispanic males were more likely than young white males to receive mandatory sentences. The authors argued that their finding was consistent with the studies on judicial sentencing discretion, which showed that young Hispanic males in particular were singled out for more severe punishment because they "may have equaled or displaced Blacks (and Black males) as an object of crime fear and criminal stereotyping."

Three of the six studies looked at federal prosecutors' use of substantial assistance departure motions, in which a U.S. attorney requests that the court put aside the Federal Sentencing Guidelines and impose a lower-than-prescribed sentence on a defendant if he or she provides substantial assistance in the investigation or prosecution of a case against another person.

Hartley, Maddan, and Spohn found evidence of more punitive treatment of blacks and Hispanics based on analyses of the federal sentencing data on offenders convicted of crack-cocaine and powder-cocaine offenses.[41] It was important to look into the differential treatment of these two types of cocaine offenses because blacks are much more likely than whites and Hispanics to be convicted for offenses involving crack cocaine. Even if prosecutorial decision making contributed to no disparity, blacks would still end up with longer prison sentences given that crack-cocaine offenses lead to harsher penalties than offenses involving powder cocaine.[42] The analyses yielded a number of important findings. First, prosecutors were less likely to move for substantial assistance departure for crack-cocaine offenses. Second, regardless of the type of cocaine, black males were less likely than white males to receive a substantial assistance departure sentence. Third, in powder-cocaine cases, Hispanics had lower chances than whites of receiving a substantial assistance departure sentence. Finally, there was no difference in the odds of departure from the sentencing guidelines for black and Hispanic defendants.

Johnson and Betsinger analyzed 165,632 cases from 88 federal districts eligible for discounts.[43] Unlike the vast majority of other studies that focused on the comparison of blacks and Latinos with whites, these researchers looked into whether Asian Americans were more likely to receive federal guidelines departures (as well as be incarcerated and get a longer prison sentence) compared to white, black, Hispanic, and "other" offenders.[44] The study concluded that Asian offenders were much more

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[40] Jeffrey T. Ulmer, Megan C. Kurlychek, and John H. Kramer. "Prosecutorial Discretion and the Imposition of Mandatory Minimum Sentences," *Journal of Research in Crime and Delinquency* 44, no. 4 (2007): 427-58. The mandatory minimums give prosecutors sentencing discretion because they have the power whether or not to charge a defendant with a mandatory-eligible crime. In Pennsylvania, prosecutors also decide whether to apply the mandatory minimum to an eligible charge. Therefore, the authors claim that their study is "an examination of prosecutorial sentencing" (p. 428).

[41] Richard D. Hartley, Sean Maddan, and Cassia C. Spohn. "Prosecutorial Discretion: An Examination of Substantial Assistance Departures in Federal Crack Cocaine and Powder Cocaine Cases," *Justice Quarterly* 24, no. 3 (2007): 382-407.

[42] Yet this also means that a SAD would have a more beneficial impact on black defendants in a form of a greater sentence discount.

[43] Brian D. Johnson and Sara Betsinger. "Punishing the 'Model Minority': Asian-American Criminal Sentencing Outcomes in Federal District Courts," *Criminology* 47, no. 4 (2009): 1045-89.

[44] Theses scholars analyzed two types of departures. The first type of departure focuses on substantial assistance that can be requested by prosecutors and granted by courts (Federal Rule 5K1.1). The second type of departure involves the judicial discretion to sentence offenders below the guidelines (Federal Rule 5K2). This review will not discuss the latter, because it does not require a prosecutorial motion.

likely to receive a substantial assistance departure sentence than white, black, and Hispanic offenders, even across offense categories such as violent crimes, drug crimes, and fraud cases. More specifically, Asian Americans were 30 percent more likely than whites and more than twice as likely as blacks and Hispanics to get a substantial assistance departure sentence. This finding is important because receiving a substantial assistance departure sentence reduces the likelihood of incarceration as well as the final sentence length. The authors concluded that this finding "is consistent with the theoretical argument that relative to other minority groups, Asians benefit from more positive and less stigmatizing stereotypes in society," and these stereotypes may have contributed to a more lenient treatment of Asian-Americans by the criminal justice system.[45]

In the third study, Spohn and Fornango extended existing research on substantial assistance departure sentence (SAD) by including prosecutor characteristics, which did not include data on prosecutors' race and ethnicity.[46] They used data on all offenders sentenced in three district courts (Minnesota, Nebraska, and Iowa's southern district). The researchers found that black defendants were less likely than white defendants to receive a SAD. Yet they also concluded that the "disparity for the most part does not result from idiosyncratic decisions made by individual prosecuting attorneys."[47]

One study looked at the role of defendants' race and ethnicity in lower-than-prescribed sentences, standard guidelines sentences, and higher-than-prescribed sentences across four modes of conviction (non-negotiated pleas, negotiated pleas, bench trials, and jury trials) in Pennsylvania.[48] It found that, in comparison with similarly situated white defendants, the odds of a downward departure was 25 percent less for blacks, and 56 percent less for Hispanics. Blacks had lower chances of downward departures in sentencing for negotiated pleas (24 percent lower), and bench and jury trials combined (43 percent lower). For negotiated pleas, blacks were also more likely to receive upward departures (32 percent higher). Hispanic defendants followed the same pattern; for negotiated pleas, they were less likely to receive a downward departure and more likely to receive an upward one.

Finally, as discussed under *Charge Reduction*, O'Neill-Shermer and Johnson found that black and Hispanic offenders were less likely than white offenders to receive charge reductions.[49] This, in turn, had a direct effect on the length of their sentences. In fact, the study showed that a charge reduction was associated with recommended sentence lengths, which were significantly shorter. Black and Hispanic offenders all received significantly longer prison sentences, even after taking into account the impact of charge reductions.

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[45] See p. 1069.
[46] Cassia Spohn and Robert Fornango. "U.S. attorneys and substantial assistance departures: Testing for interprosecutor disparity." *Criminology* 47, no. 3 (2009): 813-46.
[47] See p. 835.
[48] Brian D. Johnson. "Racial and Ethnic Disparities in Sentencing Departures Across Modes of Conviction," *Criminology* 41, no. 2 (2009): 449-89.
[49] O'Neill-Shermer and Johnson 2010, 394-430.

Conclusion

This review found evidence in the body of research discussed above that prosecutorial decision making is associated with racial and ethnic disparities in case outcomes. Most of the 34 studies reviewed here suggest that defendants' or victims' race directly or indirectly influence case outcomes, even when a host of other legal and extra-legal factors are taken into account. This is not to suggest, however, that the research shows that prosecutors always treat blacks and Latinos or Latinas more punitively: while a greater number of studies found that minority defendants are more likely to be prosecuted, held in pretrial detention, and to receive other harsh treatment, researchers also found proof of prosecutors treating white defendants more harshly for certain offenses and at certain discretion points. In other words, the research findings vary noticeably by the type of data and analyses used.

When drawing conclusions from the characterizations of researchers' findings presented in this review, readers should consider the following four caveats. First, studies that did not find any differences by race and ethnicity should not be used as evidence for the absence of any discriminatory practices, because data and analytical limitations may have contributed to the absence of findings. Second, many of the studies were based on limited sample sizes in a single or a few jurisdictions that yielded insufficient evidence for supportable generalizations of findings. Third, some studies that suggest that minorities are treated more leniently should be also viewed with an eye toward whether more lenient treatment of blacks and Latinos may stem from a general devaluation of their communities or corrective action by prosecutors in response to aggressive or improper policing practices. Fourth, it is also possible that studies finding differences by race and ethnicity were more likely to be published, and thus are overrepresented in this review.[50] Finally, while we made every effort to accurately summarize findings from the 34 studies in this review, we strongly recommend reading the studies in their entirety as they appeared in peer-reviewed journals (see References, p.18).

[50] Given that social scientists rarely find statistically significant differences, it is safe to assume that published studies are only a small portion of the research in the field of prosecution and racial justice.

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