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RACIAL AND ETHNIC DISPARITY AND CRIMINAL JUSTICE: HOW MUCH IS TOO MUCH?

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I. INTRODUCTION: WHY IS THE “HOW MUCH IS TOO MUCH” QUESTION IMPORTANT?

Race differences in criminal involvement and racial patterns in the criminal justice system have been important topics since the beginning of American criminology.¹ The question of whether there are meaningful racial disparities in the justice system has been important since the 1960s.² In recent decades, a considerable literature focused on racial profiling by police and racial differences in imprisonment, sentencing, and other areas of criminal and juvenile justice processing has grown. There are both studies that report no significant racial differences in criminal justice processing and studies that report substantial differences. Taken together, how meaningful are observed differences? Wilbanks concludes that they are not.³ He maintains that even in the studies that report statistically significant racial differences in criminal justice outcomes, the effect sizes are too small to really matter. In other words, Wilbanks argues that these

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¹ Hans von Hentig, *Criminality of the Negro*, 30 J. AM. INST. CRIM. L. & CRIMINOLOGY 662 (1940); F. Emory Lyon, *Race Betterment and the Crime Doctors*, 5 J. AM. INST. CRIM. L. & CRIMINOLOGY 887 (1915); Booker T. Washington, *Negro Crime and Strong Drink*, 3 J. AM. INST. CRIM. L. & CRIMINOLOGY 384 (1912).

² See generally Donald Black & Albert J. Reiss, Jr., *Police Control of Juveniles*, 35 AM. SOC. REV. 63 (1970); Irving Piliavin & Scott Briar, *Police Encounters with Juveniles*, 69 AM. J. SOC. 206 (1964).

³ WILLIAM WILBANKS, *THE MYTH OF A RACIST CRIMINAL JUSTICE SYSTEM* (1987).

differences are not “too much.” Other criminologists have been heard to say that while the difference is statistically significant, it really isn’t enough to make a real, cognizable difference in daily life. We cannot help but wonder, though, if the minority driver pulled over a few extra times by profiling officers, or the Latino sentenced to just a bit more time in prison, or the African American with just a slightly higher probability of receiving a capital sentence would agree that small effect sizes can be dismissed as inconsequential.

We began this Article by acknowledging that there is a wide range of research results, but we do not concede that only small effect sizes have been observed. Some studies find no racial or ethnic differences.⁴ Others find modest differences,⁵ and some report rather substantial racial disparities in criminal justice processing.⁶ Clearly, if we compare American criminal justice practices in the last decades of the twentieth century and the first of the twenty-first with earlier periods, the former probably looks to be fairer and more just than the latter. That does not necessarily mean that we have reached that Promised Land that Martin Luther King spoke hopefully of in his “I Have a Dream” speech.⁷

A. EARLY AMERICAN HISTORY OF DISPARITY

There was racial disparity in the American criminal justice system during the antebellum period, but it did not look like most would expect. Crutchfield and Finke examined records of the U.S. Census in the nineteenth century for the Southern states.⁸ Until the start of the Great Migration, the massive movement of African Americans out of the rural South into the cities of the South, North, and West, one could only really study race and imprisonment below the Mason-Dixon line. Elsewhere in America there were not enough people of color in the Census to study. Crutchfield and Finke found that prior to the Civil War, very few blacks

⁴ *Id.*

⁵ Rodney L. Engen & Sara Steen, *The Power to Punish: Discretion and Sentencing Reform in the War on Drugs*, 105 AM. J. SOC. 1357 (2000); Gary Kleck, *Racial Discrimination in Criminal Sentencing: A Critical Evaluation of the Evidence With Additional Evidence on the Death Penalty*, 46 AM. SOC. REV. 783 (1981).

⁶ Traci Schlesinger, *Racial and Ethnic Disparity in Pretrial Criminal Processing*, 22 JUST. Q. 170 (2005).

⁷ Martin Luther King, Jr., *I Have a Dream* (Aug. 28, 1963), reprinted in MARTIN LUTHER KING, JR., *I HAVE A DREAM: WRITINGS AND SPEECHES THAT CHANGED THE WORLD* 102 (James M. Washington ed., 1992).

⁸ Robert D. Crutchfield & Roger Finke, *Convict Lease Systems: The Political Economy of Post-Civil War Development* (1983), presented at the meetings of the American Society of Criminology, Denver, CO (on file with author).

were sent to Southern prisons.⁹ Instead, the prison populations before 1870 were nearly all white. There are two explanations for this pattern. First, antebellum Southern states did not seem to make heavy use of penitentiaries as a form of punishment.¹⁰ This is not surprising. The penitentiary “movement,” which began in Pennsylvania and New York in the 1830s, spread slowly to other regions and nations of the world.¹¹ Prior to the war, it had not made as much of an in-road into the practices of the South as it would later. The second reason that few blacks, compared to whites, were imprisoned in the South was slavery. Most African Americans were not free. To lock up a slave was to “punish” his master by depriving the latter of labor. The Southern economic and social system dictated that when possible, punishment should be meted out by the owner rather than the state.¹² This practice was clearly a result of economic consideration.

Adamson studied the convict lease systems that emerged in the post-bellum South.¹³ He found a system that endeavored, in part, to “replace” slavery. Convicts, disproportionately black, were leased to plantation owners to work the same fields that they had as slaves before emancipation. They were also sent to work for private industries in the particularly dangerous tasks of mining and railroad building.¹⁴ A superficial examination of the numbers of people who were sentenced in this system suggests that it did not “replace” slavery.¹⁵ But if seen as a system that supported the emerging racial order, which was based on share cropping and tenant farming, the convict lease system supported these new quasi-slavery arrangements. Freedmen who walked away from share cropping or tenant farmer arrangements were subject to strict loitering and Black Code laws that, in some circumstances, landed them in prison, workhouses, or convict lease systems.¹⁶

Much of the early criminological literature on race focused on racial differences in criminal involvement,¹⁷ but in the 1950s, scholars began to

⁹ *Id.*

¹⁰ Christopher R. Adamson, *Punishment After Slavery: Southern State Penal Systems, 1865-1890*, 30 SOC. PROBS. 555, 557-58 (1983).

¹¹ See MICHAEL IGNATIEFF, *A JUST MEASURE OF PAIN: THE PENITENTIARY IN THE INDUSTRIAL REVOLUTION 1750-1850*, at 143-173 (1978).

¹² Adamson, *supra* note 10, at 555.

¹³ *Id.*; Christopher R. Adamson, *Hard Labor and Solitary Confinement: Effects of the Business Cycle and Labor Supply on Prison Discipline in the United States, 1790-1835*, in 6 RES. L., DEVIANCE & SOC. CONTROL 19, 19 (Steven Spitzer & Andrew T. Scull eds., 1984).

¹⁴ Adamson, *supra* note 10, at 562-63.

¹⁵ Crutchfield & Finke, *supra* note 8.

¹⁶ Adamson, *supra* note 10, at 558-62.

¹⁷ See generally Lyon, *supra* note 1; James Edward McKeown, *Poverty, Race and Crime*, 39 J. CRIM. L. & CRIMINOLOGY 480 (1948); Julian B. Roebuck, *The Negro Drug*

show some interests in race and the criminal justice system. Dobbins and Bass studied the differential effects of unemployment on white and black inmates in Louisiana.¹⁸ They found that unemployment was more related to the imprisonment of whites than of blacks.¹⁹ Early in the 1960s, the first signs that criminologists recognized racial conflict appeared. For example, Rudwick published a paper with recommendations for how police departments might do a better and *fairer* job when policing “Negros,”²⁰ and he also wrote about the need to have black police officers in Southern cities to make sure that Negro neighborhoods were adequately policed.²¹ In 1964, Cross published “Negro, Prejudice, and the Police” calling for police officers to recognize the social circumstances of blacks and for the fair treatment of individuals. That same year, Piliavin and Briar published their now classic paper, reporting that demeanor, which is related to race, was an important factor determining when police exercised the discretion to formally arrest.²² Black and Reiss followed with their report that demeanor was important, but less so than the wishes of victims, and that there are racial differences in the preferences of those victims; black victims more frequently demanded arrest.²³

B. RACE, CRIME, JUSTICE, AND CRIMINOLOGY

The contemporary debate on racial and ethnic differences in criminal justice processing began with Christianson’s state-by-state enumeration of black and white imprisonment rates.²⁴ He showed that in all states, the proportion of blacks imprisoned exceeded their representation in the general population. He concluded that this disproportionate imprisonment was evidence of disparate treatment in criminal justice processing based on race.

In contrast, Kleck reviewed a number of studies of individual sentencing. In that review, he found some evidence of modest disparate

Addict as an Offender Type, 53 J. CRIM. L., CRIMINOLOGY & POLICE SCI. 36 (1962); von Hentig, *supra* note 1; Washington, *supra* note 1.

¹⁸ D. A. Dobbins & Bernard M. Bass, *Effects of Unemployment on White and Negro Prison Admissions in Louisiana*, 48 J. CRIM. L., CRIMINOLOGY & POLICE SCI. 522, 522-25 (1958).

¹⁹ *Id.* at 523.

²⁰ Elliott M. Rudwick, *Police Work and the Negro*, 50 J. CRIM. L., CRIMINOLOGY & POLICE SCI. 569 (1959).

²¹ Elliott M. Rudwick, *The Negro Policeman in the South*, 51 J. CRIM. L., CRIMINOLOGY & POLICE SCI. 273, 276 (1960).

²² Piliavin & Briar, *supra* note 2, at 210.

²³ Black & Reiss, *supra* note 2, at 71.

²⁴ Scott Christianson, *Legal Implications of Racially Disproportionate Incarceration Rates*, 16 CRIM. L. BULL. 59 (1980).

sentencing in some jurisdictions, but not in others.²⁵ Kleck's general conclusion was that there is not substantial evidence of unfair racial differences in how defendants are sentenced.

Critics of Christianson countered his conclusions by arguing that he had not accounted for racial differences in criminal involvement, especially for the crimes most likely to lead to state prison sentences. Blumstein used racial differences in arrest for violent crimes to measure disparate criminal involvement.²⁶ For the most serious crimes, Blumstein reasoned that there would be less of the discretion in systemic decisionmaking that Piliavin and Briar and Black and Reiss discussed, making the disparities for serious crimes reasonable measures of actual crime differences. Blumstein concluded that 80% of the racial difference in imprisonment rates can be accounted for by African Americans' higher arrest rates for violent crimes.²⁷

Langan avoided the question of whether arrest rates are themselves biased by using responses from the National Crime Survey (NCS).²⁸ For the surveys, respondents who had been victims of face-to-face victimization were asked, among other things, the race of the perpetrator. Langan compared racial differences in these victim reports to racial distributions in prisons and concluded that Blumstein was essentially correct: about 80% of the racial differences in American prisons can be accounted for by higher rates of black criminality.²⁹ Crutchfield, Bridges, and Pitchford examined each state using the Blumstein approach.³⁰ They reported that the 80% estimate was correct as an average, but that it masked gross differences across the states.³¹ In some states, all or nearly all of the observed racial disparities in imprisonment could be accounted for using racial differences in violent crime arrests. But in other states, a far lower proportion of the difference could be accounted for accordingly. Other analyses indicated that just as Christianson found in the post-bellum South, state variations in

²⁵ Kleck, *supra* note 5.

²⁶ Alfred Blumstein, *On the Racial Disproportionality of United States' Prison Populations*, 73 J. CRIM. L. & CRIMINOLOGY 1259, 1259-60 (1973).

²⁷ *Id.* at 1267-68.

²⁸ Patrick A. Langan, *Racism on Trial: New Evidence to Explain the Racial Composition of Prisons in the United States*, 76 J. CRIM. L. & CRIMINOLOGY 666, 671-73 (1985).

²⁹ *Id.* at 679-80.

³⁰ Robert D. Crutchfield, George S. Bridges & Susan R. Pitchford, *Analytical and Aggregation Biases in Analyses of Imprisonment: Reconciling Discrepancies in Studies of Racial Disparity*, 31 J. RES. CRIME & DELINQ. 166, 170 (1994). Both Blumstein, *supra* note 26, and Langan, *supra* note 28, aggregated state and federal imprisonment and crime measures for the United States rather than analyzing state-level patterns.

³¹ Crutchfield, Bridges & Pitchford, *supra* note 30, at 173.

black/white disparities in imprisonment are related to economic, social, and political conditions, and not just to crime.³²

These studies (other than Kleck's study and the research he reviewed) are based on aggregate data. They do not look at what happens to individuals in the criminal justice system. They do, however, capture the accumulation of individual decisions from arrest to imprisonment. Wilbanks, like Kleck, focused on individual-level studies.³³ These studies allow for a close examination of the processing of individual defendants. After reviewing these studies, Wilbanks wrote:

[M]any studies of possible discrimination focus on the extent to which the results are statistically significant. However, statistical significance may be confused in the minds of the public (or the researchers) with practical significance. Statistical significance tells us only whether the results found in the sample are likely to have occurred by chance if the relationship in the "population" (from which the sample was drawn) was zero. Statistical significance is a function of two factors, the strength of the relationship and the sample size. If the sample size is great enough, even a very small relationship is statistically significant.³⁴

What is missing that allows one to draw this conclusion is the pattern that the aggregated studies reveal: some substantial racial disparities exist that cannot be explained by purely legally relevant factors like the severity of the crime and the criminal history of the offender.³⁵ Because these aggregate studies are population analyses, they are not subject to Wilbanks's criticism of studies with large sample sizes. The studies of individual sentencing also do not take into account differences in juvenile justice processing, which may play a part in later decisions in some jurisdictions,³⁶ including arrest, bail, prosecution, and parole decisions. Perhaps the accumulation of decisions at all of the decision points in criminal justice processing produces the patterns that are observed in aggregate studies that do not show up, or only modestly so, in individual sentencing studies.

³² George S. Bridges & Robert D. Crutchfield, *Law, Social Standing and Racial Disparities in Imprisonment*, 66 SOC. FORCES 699, 709-11 (1988); George S. Bridges, Robert D. Crutchfield & Edith E. Simpson, *Crime, Social Structure and Criminal Punishment: White and Nonwhite Rates of Imprisonment*, 34 SOC. PROBS. 345, 354-55 (1987).

³³ WILBANKS, *supra* note 3; Kleck, *supra* note 5.

³⁴ WILBANKS, *supra* note 3, at 47.

³⁵ Blumstein, *supra* note 26; Crutchfield, Bridges & Pitchford, *supra* note 30; Langan, *supra* note 28.

³⁶ In some states, some consideration of juvenile court records is allowed in adult criminal court prosecutions, and with increased treatment of juveniles as adults, we must consider disparity there, too. *See, e.g.*, WASH. STATE SENTENCING GUIDELINES COMM'N, ADULT SENTENCING MANUAL 2009 SUPPLEMENT 22 (2009), available at http://www.sgc.wa.gov/PUBS/Adult_Manual/AdultSentencingManualSupplement2009.pdf.

An accurate assessment of the degree of racial disparity unjustified by criminal involvement differences requires that we both consider multiple jurisdictions and examine multiple decision points in the criminal justice process. Studying multiple jurisdictions is important because, as found by Crutchfield and his colleagues,³⁷ there may be unwarranted disparity in some but not in others. Crutchfield et al.'s study was of state-level imprisonment rates. Clearly the processing of criminal defendants takes place in sub-state government courts, departments, and agencies. Thus, state-level comparisons may gloss over important, possible intra-state variation in how cases are processed. In some places there may be unwarranted disparity, while in others, there is not. Where problematic differences exist, it is likely that the level, amount, or effect sizes that researchers report will also vary. Kleck, in reviewing sentencing differences by race, reports some jurisdictions with no disparity, a few with a disparity, and a few multiple jurisdiction studies with "mixed" results.³⁸ Only by looking at multiple jurisdictions, as he did, can one make an accurate description of a sentencing or other system disparities. This does not mean that every study must include multiple jurisdictions; however, in drawing conclusions about what we learn from the research literature, we should take caution to include studies of as many different jurisdictions as possible.

Studying multiple decision points is important for two reasons. First, if unwarranted racial disparity exists in a state or a county's processing of defendants, it can occur anywhere in the process. It might be at arrest, the decision to prosecute, a bail hearing, a court decision, a finding of guilt, sentencing, or parole. In two different jurisdictions, disparity might exist, but in one it might appear in a decision that is rendered early in processing, and in the other at a later stage. Frequently, studies of the processing of individual cases have focused on sentencing. It is possible that differential decisions were made earlier in the system. If we do not consider the varying risk of getting to sentencing, the cases considered may be problematic because of selection bias.

In addition to considering multiple jurisdictions, we must examine multiple decision points in the criminal justice process in order to accurately assess the presence or absence of racial disparity in case processing. Disparity may occur at many different points between a person's first contact with law enforcement and the prison door. Ideally, studies should account for patterns of decisions that were made prior to the decision point that is being studied. Studies that do not account for

³⁷ Crutchfield, Bridges & Pitchford, *supra* note 30, at 173.

³⁸ Kleck, *supra* note 5, at 789-92.

selection bias may draw erroneous conclusions. For instance, courts in a county may sentence everyone who is convicted of drug offenses to similarly severe sentences, but African-American or Latino defendants may be more likely to be arrested than white drug offenders, or once arrested, they may be more likely to have charges filed against them. Simply examining differences at sentencing, without controlling for differential exposure to the chance of being convicted, will produce erroneous conclusions. Although inferior to formally controlling for selection bias, reviewers should, at a minimum, examine studies of multiple decision points in the criminal justice system. Researchers must begin studying these multiple points and formally controlling for differing risks of reaching each succeeding decision point if we are to ever fully understand patterns of racial disparity in the criminal justice process.

Another shortcoming of the extant literature is that it nearly completely focuses on disparities between blacks and whites in the criminal justice system. To the extent possible, we must begin to more fully consider the experiences of other racial and ethnic groups. African Americans are no longer the largest minority group in the United States—Latinos are, yet our research has not adequately considered them, Native Americans, or Asian Americans.

In this Article, we will be mindful of the necessity to examine multiple jurisdictions and multiple decision points in both the juvenile and criminal justice systems and the treatment of more than just blacks and whites in the justice systems. Both the juvenile and criminal justice systems are looked at because in some jurisdictions, juvenile court records can be considered when a person is processed in the adult system. Also, presumably, experiences in the juvenile justice system affect the behavior of individuals later in life.

II. RACIAL DISPARITY IN THE JUVENILE JUSTICE SYSTEM

In 2005, more than thirty-one million youth were under juvenile court jurisdiction. The total delinquency case rate for black juveniles (108.4 per 1,000 juveniles) was more than double the rate for whites (44.4 per 1,000

Table 1
Racial Disparities in the Juvenile Justice System Studies

Study	Jurisdiction	Decision Point	Dependent Variable	Race Relationship Significant?
Bridges & Steen (1998)	3 Washington counties	disposition	probation reports	yes
Brown & Alarid (2004)	11 Missouri counties	referral, detention, adjudication, disposition	referred, detention adjudication, placement	mixed
DeJong & Jackson (1998)	Pennsylvania	intake, disposition	referred, residential placement	yes (blacks and Latinos more likely to be referred), no (no racial difference in residential placement)
Graham & Lowery (2004)	Urban locations	intake, probation	racial stereotypes	yes
Leiber (2009)	Black Hawk County, Iowa	intake, petition, adjudication, disposition	release, diversion, petition adjudication disposition	yes (detention, petition, and adjudication, some dispositions) no (diversion, some dispositions)
Leiber & Fox (2005)	20 Iowa counties	intake, petition, adjudication, disposition	pretrial detention, Intake 1 petition, disposition	yes (detention, diversion, and sentencing) no (refer youth at intake petition)
Leiber & Johnson (2008)	4,182 Iowa juvenile court case files	intake, disposition	intake decisions, disposition	yes

juveniles) and for American Indians (53.3 per 1,000 juveniles).³⁹ African Americans aged ten to seventeen comprise about 15% of their age group in the population, yet they represent about 25% of all juvenile arrests, 30% of referrals to juvenile court, 40% of all incarcerated juveniles, and close to 60% of waivers to adult criminal court.⁴⁰ In this Part, we will discuss how each of the procedural decision points is important to the understanding of racial disparity and over-representation of minorities in the juvenile justice system.

Police Contacts, Arrests, Referrals, and Intake Decisions. Law enforcement agencies refer the majority of cases to the juvenile court, although in some jurisdictions, others—parents, schools, and social service workers—petition young people as well. As of 2005, 81% of all delinquency cases were referred by law enforcement agencies; they refer 91% of property offenses and drug law violations, 87% of person offenses, and 61% of public order offenses.⁴¹ At the point of contact, police officers exercise a great deal of discretion over which juveniles are processed into the system. When offenses are minor, police officials exercise more discretion as to whether or not to arrest juveniles or refer them to the juvenile court.

Research on the role of police and arrests on disproportionality in the juvenile justice system is limited.⁴² Crutchfield and colleagues found that racial differences in contact with police (obviously a necessary precondition for arrest) and arrest were only partially explained by self-reported delinquency.⁴³ Variations in the social environments of children, in particular having family members who are known to the justice system, getting in trouble in school, and associating with deviant peers and adults, helps explain observed racial differences in contact and arrest. Earlier,

³⁹ CHARLES PUZZANCHERA & MELISSA SICKMUND, NAT'L CTR. FOR JUVENILE JUSTICE, JUVENILE COURT STATISTICS 2005, at 20 (2008). In OJJDP data, Hispanic ethnicity is not treated as a separate category. Individuals who identify as Hispanic are included with whites or blacks, and in some instances, there is a separate "ethnicity" item.

⁴⁰ MICHAEL A. JONES & EILEEN POE-YAMAGATA, AND JUSTICE FOR SOME 28 (Nat'l Council on Crime and Delinq. ed., 2000); NAT'L RESEARCH COUNCIL & INST. OF MED., JUVENILE CRIME, JUVENILE JUSTICE 34 (Joan McCord, Cathy Spatz Widom, and Nancy A. Crowell eds., 2001).

⁴¹ PUZZANCHERA & SICKMUND, *supra* note 39, at 31.

⁴² Alex R. Piquero, *Disproportionate Minority Contact*, 18 FUTURE OF CHILD. 59, 60 (2008). Exceptions to this include George S. Bridges & Sara Steen, *Racial Disparities in Official Assessments of Juvenile Offenders: Attributional Stereotypes as Mediating Mechanisms*, 63 AM. SOC. REV. 554 (2008) and Sandra Graham & Brian S. Lowery, *Priming Unconscious Racial Stereotypes About Adolescent Offenders*, 28 LAW & HUM. BEHAV. 483 (2004).

⁴³ Crutchfield, et al., *Racial Disparities in Early Criminal Justice Involvement*, 1 RACE & SOC. PROBS. 218, 228 (2009).

Smith found that neighborhood context explains variations in police officers' decisions to arrest.⁴⁴ According to Smith, police are more likely to arrest suspects in racially mixed or minority neighborhoods. African-American suspects are treated more harshly, compared to others, across neighborhoods, but they are treated with more leniency when arrested in predominately white neighborhoods. White suspects, however, are treated more favorably compared to African Americans across the board regardless of which neighborhood context they are arrested in.

In a study of property crime cases in Missouri, Brown and Alarid reported that black juveniles are at a significant disadvantage compared to whites at the earlier stages of the juvenile justice process.⁴⁵ Even when controlling for legal factors, such as prior delinquency and seriousness of the current offense, blacks were more likely to be formally referred and detained.⁴⁶ Brown and Alarid found that although black youths had more contact with the justice system through a higher referral rate, whites were more likely to be adjudicated delinquent for more serious offenses.⁴⁷ Blacks were referred at higher rates initially for less serious offenses compared to whites.⁴⁸

DeJong and Jackson included Hispanic juveniles in their analyses of a random sample of juvenile cases in all counties in Pennsylvania outside Philadelphia.⁴⁹ They found that referred black and Hispanic juveniles are marginally younger than white juveniles, more likely to be referred for drug charges, and more likely to live in single-mother households.⁵⁰ Controlling for legal characteristics, DeJong and Jackson found that juveniles with more arrests, particularly for serious and drug offenses, are more likely to be petitioned to the court. Bivariate relationships between race and various

⁴⁴ Douglas A. Smith, *The Neighborhood Context of Police Behavior*, 8 CRIME & JUST. 313, 331 (1986).

⁴⁵ Katherine E. Brown Ray & Leanne Fital Alarid, *Examining Racial Disparity of Male Property Offenders in the Missouri Juvenile Justice System*, 2 YOUTH VIOLENCE & JUV. JUST. 107, 108 (2004). Data come from court cases in Missouri juvenile jurisdictions in 1994. Missouri is 85% white and 15% non-white. *Id.* at 111. Of the non-white population, 11.2% are black and the remaining 3.8% are American Indians, Hispanics, Asian Americans, and Pacific Islanders combined. *Id.* Non-violent property crimes included burglary, stealing, tampering, fencing, vandalism, victimless arson, fraud, and trespassing. *Id.* at 110. The analysis of non-violent offenses will not likely be affected by the violent youth trend that existed between 1986 and 1994. This provides conservative estimates that suggest the possibility of a discriminatory process. Girls and other races were omitted from analysis. *Id.*

⁴⁶ *Id.* at 119.

⁴⁷ *Id.* at 116.

⁴⁸ *Id.* at 119.

⁴⁹ Christina DeJong & Kenneth C. Jackson, *Putting Race Into Context: Race, Juvenile Justice Processing, and Urbanization*, 15 JUST. Q. 487, 492 (1998).

⁵⁰ *Id.* at 494.

legal characteristics show that overall juvenile offenders who are male, black, and older are formally referred at higher rates when compared to female, white, and younger juveniles.⁵¹

There are also variations in referral rates across jurisdictions. Brown and Alarid report that in Missouri, race is a significant factor in referrals.⁵² In one of the state's largest urban counties, race plays a significant role, but it has no significant bearing in any decision process in one small rural county.⁵³ This finding affirms the importance of contextual variability. In 1998, DeJong and Jackson found that after controlling for county, Latinos, but not blacks, are more likely to be referred.⁵⁴ These Latinos were more likely to come from rural counties.

However, at least one study has found that race is not a direct predictor of referral to juvenile court when controlling for pre-hearing release and diversion. In one juvenile court jurisdiction in Iowa, researchers found that African Americans overall are more likely to be referred and less likely to participate in diversion given pretrial detention.⁵⁵ Pretrial detention decreases the odds of diversion relative to court referral by 96%.⁵⁶ For whites, however, pretrial detention decreases the likelihood of court referral by 33%.⁵⁷ In fact, not one single African American that was secured in pretrial detention received diversion.⁵⁸ African Americans are 48% less likely to participate in diversion than they are to be released.⁵⁹ The decision for pretrial detention has significant impacts at different decision levels.

Pretrial Detention. Juvenile courts may decide to place a youth in pretrial detention if officials believe that doing so ensures the protection of the community or the protection of the juvenile himself, guarantees the juvenile's appearance in future court hearings, or allows for further evaluation of the juvenile.⁶⁰

Between the years 1985 and 2005, 38% of all U.S. delinquency cases resulted in detention.⁶¹ During that time, 29% of all delinquency cases

⁵¹ *Id.* at 496-97.

⁵² Ray & Alarid, *supra* note 45, at 119.

⁵³ *Id.* at 119.

⁵⁴ DeJong & Jackson, *supra* note 49, at 497.

⁵⁵ Michael J. Leiber, *Race, Pre- and Postdetention, and Juvenile Justice Decision Making*, CRIME & DELINQ. (manuscript at 12) (forthcoming 2011).

⁵⁶ *Id.*

⁵⁷ *Id.*

⁵⁸ *Id.* at 5, 12.

⁵⁹ *Id.* at 12.

⁶⁰ ROBERT W. TAYLOR, ERIC J. FRITSCH & TORI J. CAETI, *JUVENILE JUSTICE: POLICIES, PROGRAMS, AND PRACTICES* 103 (2006).

⁶¹ PUZZANCHERA & SICKMUND, *supra* note 39, at 33.

involving black youth resulted in detention.⁶² African Americans represent 31% of drug offenses and are detained 49% of time.⁶³ They are twice as likely as whites and Native Americans to be detained for drug offenses.⁶⁴ Similar trends are exhibited in terms of property offenses. African Americans represent 29% of property offenses and 39% of detainment for all youth arrested for property offenses.⁶⁵

Based on a study of cases in an Iowa county, Leiber reported that African-American juveniles are almost two times more likely to be secured in pretrial detention than their white counterparts, even after controlling for legal and extra-legal factors.⁶⁶ Coming from a single-parent household increases the probability of referral to juvenile court, especially for African Americans.⁶⁷ This effect is echoed at the decision to place a youth in pretrial detention. Being in a single-parent household increases the likelihood of pretrial detention for African Americans 2.5 times relative to whites.⁶⁸

Leiber also found that the nature of the crime charged also has an effect on pretrial detention. For example, being charged with property offenses decreases the probability of pretrial detention for whites by 77%, while having no influence for African Americans.⁶⁹ African Americans involved in a violent or drug offense decrease their likelihood of being released at intake by 18% and 16%, respectively.⁷⁰ These offenses are related to release for whites. Whites experience an inverse but non-significant relationship with detention. However, the probability of being placed in pretrial detention increases by 10% for African Americans.⁷¹ Although it appears to be counterintuitive, Leiber found that for African Americans, an indication of problems in school decreases the odds of pretrial detention by 55%.⁷² Though not statistically significant, whites also

⁶² *Id.*

⁶³ *Id.*

⁶⁴ *Id.* at 35.

⁶⁵ *Id.* at 33.

⁶⁶ Leiber, *supra* note 55, at 4, 6-7. Five-hundred and fifty juvenile court cases resulting in detention were selected in Black Hawk County, Iowa. For comparison, 449 juvenile court non-detained cases were selected randomly. The total sample size was 927. *Id.*

⁶⁷ *Id.* at 10.

⁶⁸ *Id.*

⁶⁹ *Id.*

⁷⁰ Michael J. Leiber & Kristan C. Fox, *Race and the Impact of Detention on Juvenile Justice Decision Making*, 51 CRIME & DELINQ. 470, 483 (2005).

⁷¹ *Id.* at 481.

⁷² Leiber, *supra* note 55, at 10.

experience a decrease in pretrial detention when there is an indication of problems at school.⁷³

Petitions and Waivers. From the point of referral, prosecutors decide whether to petition for formal processing in the juvenile court or (attempt to) waive the case to the adult criminal system. Overall, the proportion of all delinquency cases petitioned to court increased for all racial groups in 2005.⁷⁴ However, cases involving black juveniles were more likely to be petitioned than any other racial group. In 2005, 53% of white, 62% of black, 56% of American Indian, and 59% of Asian-American juveniles were petitioned for adjudication.⁷⁵ In terms of offense type, racial disparity was most prominent among petitioned drug offenses: 71% involved black youth and only 52% involved white juveniles.⁷⁶

In a study of juvenile jurisdictions by county in Iowa, Leiber found that black juveniles are twice as likely as white juveniles to be petitioned as delinquent.⁷⁷ Family is an important predictor of petitioning. Black juveniles from single-parent households were 5.5 times more likely to be petitioned compared to others.⁷⁸ Furthermore, black juveniles under court authority at the time of petition are 4.75 times more likely than others to be petitioned.⁷⁹ Leiber also found that the likelihood of adjudication decreases by 83% for white females compared to African-American females.⁸⁰

Adjudication and Disposition. After being petitioned, the case reaches the point of adjudication. According to the National Center for Juvenile Justice, between 1985 and 2005, delinquency cases involving black youth were less likely to result in delinquency adjudications than cases involving white youth.⁸¹ The likelihood of being adjudicated delinquent decreased between 1985 and 1995 for both black and white juveniles (58% to 53% and 66% to 58%, respectively).⁸² The likelihood of being adjudicated delinquent increased from 1995 to 2000 for both groups. This increasing trend was dampened for black youth by 2% by the end of 2005, when the

⁷³ *Id.*

⁷⁴ PUZZANCHERA & SICKMUND, *supra* note 39, at 39.

⁷⁵ *Id.*

⁷⁶ *Id.*

⁷⁷ Leiber, *supra* note 55, at 14.

⁷⁸ *Id.*

⁷⁹ *Id.*

⁸⁰ *Id.*

⁸¹ PUZZANCHERA & SICKMUND, *supra* note 39, at 49.

⁸² *Id.*

likelihood of adjudication for black youth reached 62%.⁸³ By the end of 2005, white youth adjudicated delinquent increased to 68%.⁸⁴

If a juvenile is deemed delinquent, the judge may place him or her in a residential placement or give him other probation, which is the most common outcome. By 2005, 62% of all white delinquents were placed on probation compared to 56% of black delinquents.⁸⁵ The greatest disparity exists for drug offenses: 67% of whites that were adjudicated delinquent for drug offenses were given probation as opposed to 57% of black drug offenders.⁸⁶ The more lenient disposition is more probable for whites than it is for blacks.⁸⁷

Residential placement may include institutionalization or placement in a camp, ranch, or group home.⁸⁸ The likelihood of residential placement for black and Native-American youth was 26%, for white youth it was 21%, and for Asian-American youth it was 22%.⁸⁹ Again, the greatest disparity between black and white youth comes with drug offenses. Blacks were given residential placement 29% of the time compared to 15% of the time for whites. However, while controlling for legal and extra-legal factors, evidence is provided by Leiber that being black is not the only predictor of post-adjudication detention.⁹⁰ In fact, black youth were more likely to receive the more lenient outcome of community-based corrections than were white youths.⁹¹

The outcomes of dispositions vary depending on offense type. According to DeJong and Jackson, offense type has an effect on the results of disposition for youths in Pennsylvania. There, blacks referred for drug offenses are treated more harshly at disposition than blacks charged with other offenses.⁹² Whites, however, are no more or less likely to be placed in a secured facility at the time of disposition.⁹³

In addition to offense type, there also exist cumulative effects on adjudication and disposition outcomes in the juvenile justice system. For

⁸³ *Id.*

⁸⁴ *Id.*

⁸⁵ *Id.* at 57.

⁸⁶ *Id.*

⁸⁷ *Id.*

⁸⁸ TAYLOR, FRITSCH & CAETI, *supra* note 60, at 106.

⁸⁹ PUZZANCHERA & SICKMUND, *supra* note 39.

⁹⁰ Leiber, *supra* note 55, at 19; Michael J. Leiber & Joseph D. Johnson, *Being Young and Black: What Are Their Effects on Juvenile Justice Decision Making?*, 54 CRIME & DELINQUENCY, 560 (2008).

⁹¹ Leiber & Johnson, *supra* note 90, at 570-71.

⁹² DeJong & Jackson, *supra* note 49, at 500-01.

⁹³ *Id.* at 500.

example, being detained before adjudication decreases the likelihood of post-adjudication detention by 46% for all groups.⁹⁴ Pretrial detention increases the likelihood of receiving post-adjudication detention by 79% for whites. The trend is similar for blacks, but it is not statistically significant. Pretrial detention also has a positive effect on disposition—it increases the likelihood of receiving residential placement at disposition by 16%. Additionally, being African American decreases the probability of receiving residential placement by 18%.⁹⁵

These trends raise the question of why we see a lower probability of black youth receiving probation and a higher probability of whites receiving residential placement. One study that attempts to explain this relationship focuses on attribution stereotypes as mediating mechanisms in the adjudication of juvenile offenders.⁹⁶ Attribution theory explores how internal (individual) and external (environmental) characteristics of juveniles affect delinquency cases.⁹⁷ Analyzing 223 narrative reports written by probation officers⁹⁸ in three counties in one western state between 1990 and 1991, Bridges and Steen find that the reports of black youth were more likely to include negative internal attributions than reports of whites.⁹⁹ Reports of whites were more likely to include negative external attributions than were those for black youth. This shows that probation officers were more likely to describe black and white youth in different lights: blacks were more likely to be seen as innately delinquent, whereas white delinquency was the result of the environment. When it comes to predicting recidivism, probation officers were more likely to describe blacks as having a higher risk of reoffending compared to whites. However, there were no statistically significant differences in sentence recommendations by race.

Bridges and Steen also find that risk assessments and sentence recommendations varied based on case characteristics and social, demographic, internal, and external attributions.¹⁰⁰ Youths with a

⁹⁴ Leiber, *supra* note 55, at 14.

⁹⁵ Leiber & Fox, *supra* note 70, at 489.

⁹⁶ Bridges & Steen, *supra* note 42.

⁹⁷ Graham & Lowery, *supra* note 42, at 484. See SUSAN T. FISKE & SHELLEY E. TAYLOR, *SOCIAL COGNITION* (2d ed. 1991).

⁹⁸ These reports are written at the time of disposition, typically following conviction. These reports include the probation officer's assessment of the likelihood of recidivism and recommendation for sentencing using summary information about a youth's social, demographic, and criminal history. Black and white youth were juxtaposed due to the lack of a sizable number of narratives regarding juveniles of other races. Bridges & Steen, *supra* note 42.

⁹⁹ *Id.* at 562.

¹⁰⁰ *Id.* at 564.

delinquent history were defined as dangerous enough for pretrial detention, and those who committed more serious, violent offenses were judged to have a higher risk of recidivism. Race, however, was not a significant predictor of this perception of recidivism. Negative attributions overall have strong and significant effects on the assessments of risk, independent of demographic and criminal histories, whereas negative internal attributions have a greater impact on the assessment of risk. Juveniles who are described as incorrigible and personally responsible for their crimes were more likely to be seen as future reoffenders. Race had no direct effect on the assessment of recidivism after controlling for criminal history and attributions made by probation officers.

In a follow-up study to Bridges and Steen, Graham and Lowery examined how police officers and juvenile probation officers perceive and treat juvenile offenders using unconscious racial stereotypes about juvenile offenders.¹⁰¹ Using an experimental model developed by Devine, a sample of police and probation officers was subliminally primed with words associated with black (a racial prime).¹⁰² Another sample was subliminally primed with words unrelated to race (a neutral prime). The process of exposing a person to a racial prime is believed to activate unconscious racial stereotypes, while the process of exposing a person to a neutral prime leaves them unaffected. The officers exposed to the racial prime are more consciously aware of stereotypes about blacks while those exposed to the neutral prime are not, leaving their biases unaffected by the experimental method. After priming, researchers asked the police and probation officers to read one of two vignettes about a hypothetical adolescent who allegedly committed either a property or personal crime, while omitting the race of the juvenile and leaving the type of offense as ambiguous as possible. They found that police officers exposed to the racial prime judged the hypothetical offenders to be more mature compared to officers exposed to the neutral prime. The probation officers exposed to the racial prime judged the alleged offender to be more mature, more violent, more culpable, more likely to reoffend, and more deserving of punishment. Based on these studies, we can conclude that unconscious stereotyping by juvenile justice officials, as informed by the attribution perspective, can partly explain these racial disparities and the severe punishment of black youth compared to whites.

In sum, evidence of racial disparities in the juvenile justice system exists. Racial and ethnic disparities have been observed in studies at the

¹⁰¹ Graham & Lowery, *supra* note 42, at 484.

¹⁰² See Patricia G. Devine, *Stereotypes and Prejudice: Their Automatic and Controlled Components*, 56 J. OF PERSONALITY & SOC. PSYCHOL. 5, 5 (1989) (discussing the experimental model).

national, state, and local level. In some instances there are no significant differences between white and minority juveniles in the handling of cases, but in general, there are differences and they range for small to moderate, to quite substantial.

III. DISPARITY IN THE ADULT CRIMINAL JUSTICE SYSTEM

The literature on the adult criminal justice system has not provided consistent and conclusive evidence for obvious discrimination or racial and ethnic bias. The majority of studies indicate that the overrepresentation of African Americans is due to disparate treatment. But even these results vary from weak to strong, depending on both the jurisdictions studied and the decision point focused on by the researchers. Recent scholarship has broadened the conversation to include Latinos, revealing a compounded disadvantage at some decision points due to unique circumstances of some defendants, such as language barriers and legal status.

Traffic Stops. Obviously, the potential for disparity begins with arrest, sometimes connected to ostensibly benign traffic stops. While the majority of stops result in either a warning or a ticket, these interactions can also serve as a gateway to the justice system. For minority racial and ethnic groups, studies have found that they are more likely to be stopped by law enforcement¹⁰³ and often for minor infractions.¹⁰⁴ Anecdotal evidence has caused the mainstream media to pick up on the street phrasing “driving while black/brown,” assuming that traffic stops are motivated by skin color and not driving behavior.¹⁰⁵ Young African-American and Latino males are seen as the primary targets because they are thought to have a higher proclivity for criminal behavior, by either individual police officers or as a systematic convention within departments.¹⁰⁶ Research finds scant

¹⁰³ See GARY CORDNER, BRIAN WILLIAMS & ALFREDO VELASCO, VEHICLE STOPS IN SAN DIEGO: 2001 (2001), available at www.sandiego.gov/police/pdf/stoprpt.pdf; LARRY K. GAINES, AN ANALYSIS OF TRAFFIC STOP DATA IN THE CITY OF RIVERSIDE (2003), available at www.riversideca.gov/rpd/AGTF/2003%20Final%20Report.pdf; Donna Coker, *Foreword: Addressing the Real World of Racial Injustice in the Criminal Justice System*, 93 J. CRIM. L. & CRIMINOLOGY 827, 827-80 (2003); Richard J. Lundman & Robert L. Kaufman, *Driving While Black: Effects of Race, Ethnicity, and Gender on Citizen Self-Reports of Traffic Stops and Police Actions*, 41 CRIMINOLOGY 195, 195-220 (2003); Patricia Warren et al., *Driving While Black: Bias Processes and Racial Disparity in Police Stops*, 44 CRIMINOLOGY 709, 709-38 (2006).

¹⁰⁴ Brian R. Kowalski & Richard J. Lundman, *Vehicle Stops by Police for Driving While Black: Common Problems and Some Tentative Solutions*, 35 J. CRIM. JUST. 165, 165-81 (2007).

¹⁰⁵ See, e.g., John Cloud, *What's Race Got To Do With It?*, TIME, July 31, 2001, at 42.

¹⁰⁶ Robin Shepard Engel & Jennifer M. Calnon, *Examining the Influence of Drivers' Characteristics During Traffic Stops with Police: Results from a National Survey*, 21 JUST. Q. 49, 49-90 (2004); Warren et al., *supra* note 103.

evidence for the differential offending hypothesis. Both qualitative and quantitative evidence has shown that these groups are more likely to be searched, but are less likely to have contraband in their vehicles compared with white men.¹⁰⁷

Using national survey results, Engel and Calnon investigated the presence of disparate treatment in all phases of driving-related interactions with law enforcement.¹⁰⁸ They found substantial disparities, with African-American and Latino males at increased risk for traffic citations, searches, arrests, and use of force when compared with white males. The odds of receiving a traffic citation are increased by 47% for African Americans and 82% for Latinos. African-American and Latino males are more likely to have their cars searched, an increase of 50% and 42%, respectively, with neither group more likely to be carrying contraband when compared with white drivers. While previous studies have focused almost exclusively on the black/white disparity, current research is addressing the law enforcement experiences of both immigrant and American-born Latinos, often finding that they are detrimentally affected not only by their ethnicity, but also their inability to communicate effectively in English and possible confusion about traffic rules and legal statutes.¹⁰⁹

In evaluating the differences between law enforcement practices of highway patrol and state troopers in North Carolina, Warren and colleagues found strong evidence of disparities in treatment by state troopers across counties according to the race of the driver.¹¹⁰ The authors cite the role of the officers' individual—and often subjective—assessments of a traffic violation as a reason for the disproportionate focus on African-America

¹⁰⁷ *Id.*; Richard J. Lundman, *Driver Race, Ethnicity, and Gender and Citizen Reports of Vehicle Searches by Police and Vehicle Search Hits: Toward a Triangulated Scholarly Understanding*, 94 J. CRIM. L. & CRIMINOLOGY 309, 309-50 (2004); David A. Harris, *Driving While Black: Racial Profiling on our Nation's Highways*, AMERICAN CIVIL LIBERTIES UNION (Jun. 7, 1999), <http://www.aclu.org/racial-justice/driving-while-black-racial-profiling-our-nations-highways>.

¹⁰⁸ Engel & Calnon, *supra* note 106, at 63.

¹⁰⁹ Brian Johnson, *The Multilevel Context of Criminal Sentencing: Integrating Judge- and County-Level Influences*, 44 CRIMINOLOGY 259, 259-98 (2006); Stephen Demuth, *Racial and Ethnic Differences in Pretrial Release Decisions and Outcomes: A Comparison of Hispanic, Black, and White Felony Arrestees*, 41 CRIMINOLOGY 873, 873-909 (2000); Cassia Spohn & David Holleran, *The Imprisonment Penalty Paid By Young, Unemployed Black and Hispanic Male Offenders*, 38 CRIMINOLOGY 282, 281-306 (2000); Darrell Steffensmeier & Stephen Demuth, *Ethnicity and Sentencing Outcomes in U.S. Federal Courts: Who is Punished More Harshly?* 65 AM. SOC. REV. 705, 705-29 (2000); Marjorie S. Zatz, *The Convergence of Race, Ethnicity, Gender and Class on Court Decision-Making: Looking Toward the 21st Century*, in CRIMINAL JUSTICE 2000: POLICIES, PROCESSES AND DECISIONS OF THE CRIMINAL JUSTICE SYSTEM, 503 (2000).

¹¹⁰ Warren et al., *supra* note 103.

Table 2
Racial Disparities in the Adult Justice System Studies

Study	Jurisdiction	Decision Point	Dependent Variable(s)	Race Relationship Significant?
Spohn & Holleran (2000)	local (Chicago, Kansas City, Miami)	detention	prison sentence (yes/no)	yes
Steffensmeier & Demuth (2000)	federal	detention, length of sentence	prison sentence (yes/no), sentence length	yes
Demuth (2003)	state (75 most populous counties)	bail/pretrial release	eligibility for pretrial release, financial or non-financial release, amount of bail, ability to post bail	yes
Steffensmeier, Ulmer & Kramer (1998)	state (Pennsylvania)	detention, length of sentence	prison sentence (yes/no), sentence length	yes
Paternoster & Brame (2008)	state (Maryland)	prison sentence	death sentence (yes/no)	yes
Schlesinger (2005)	state (large urban counties)	bail/pretrial release	decision to deny bail, decision to deny non-financial released bail amount, ability to post bail	yes
Bushway & Piehl (2001)	state (Maryland)	sentence length	length of sentence	yes
Johnson (2006)	state (Pennsylvania)	detention, length of sentence	prison sentence (yes/no), sentence length	yes
Albonetti (1997)	federal	length of sentence	sentence length	yes
Engen & Steen (2000)	state (Washington)	charging, detention, length of sentence	prison sentence (yes/no), sentence length	no
Steen, Engen, & Gainey (2005)	state (Washington)	detention, length of sentence	prison sentence (yes/no), sentence length	yes

Table 2
(continued)

Study	Jurisdiction	Decision Point	Dependent Variable(s)	Race Relationship Significant?
Ulmer & Johnson (2004)	state (Pennsylvania)	detention, length of sentence	prison sentence (yes/no), sentence length	yes
Beckett, Nyrop, Pflingst & Bowen (2005)	local (Seattle)	arrest	drug possession arrest	yes
D'Alessio & Stolzenberg (2003)	federal	arrest	odds of arrest	no
Alpert, Macdonald & Dunham (2005)	Local (Savannah)	arrest	formation of non-behavioral suspicion, decision to stop and question	no
Engel & Calnon (2004)	federal	traffic stop	citation issued, individual searched for contraband, arrest, threatened or actual physical force	yes
Lundman (2004)	federal	traffic stop	vehicle search, contraband possession	yes
Warren, Tomaskovic-Devey, Smith, Zingraff & Mason (2006)	state (North Carolina)	traffic stop	stops by state troopers, stops by local police	yes
Lundman & Kaufman (2003)	federal	traffic stop	total traffic stops, legitimate reason for stop, perceptions of proper police action	mixed
Kowalski & Lundman (2007)	local ("Midwest City")	traffic stop	traffic stops disaggregated by type	yes

men. However, weak evidence was found for racial disparities in highway stops because such stops are precipitated by an objective assessment of a speeding infraction and an inability to decipher race or ethnicity at higher speeds. Similar studies found that traffic stops exhibit the potential for race-based bias, resulting in moderate disparities in the rate of stops, searches, and arrests.¹¹¹ Such findings are important, even with moderate race effects, because traffic stops can represent a first entry point into the criminal justice system; if disparities are present here, they set the stage for compounding effects as the individual continues through the system.

Arrests. The research on arrests is limited and the results are divided, with one study of assault and forcible rape charges having shown no disparity between African-American and white defendants,¹¹² and another study of the decision to arrest for drug-related offenses having found large and substantial race effects.¹¹³ Beckett and colleagues emphasize the interplay between differential policing strategies for racial and ethnic groups and structural and socioeconomic factors that leave citizens vulnerable to detection, while D'Alessio and Stolzenberg assert that any increase in arrests for African Americans is a result of their heightened involvement in criminal activity.¹¹⁴ In their analysis of the National Incident-Based Reporting System (NIBRS) data on forcible rape, robbery, and assault incidents, D'Alessio and Stolzenberg found that the odds of arrest for white offenders is 22% higher for robbery, 13% higher for aggravated assault, and 9% higher for simple assault when compared with African Americans. The authors conclude that the odds of arrest for white offenders are similar to African Americans, with negligible differences that can be explained by differential involvement in officially reported crimes. Other studies report similar findings,¹¹⁵ even when expanding beyond law enforcement interactions to further steps in the criminal justice system.¹¹⁶

Pretrial Processing. For most arrestees, the first decision point in the criminal justice process is the court's decision to detain the suspect pretrial, release the suspect on his or her own recognizance (ROR), or allow the suspect to post bail in exchange for pretrial release. These decisions are

¹¹¹ Kowalski & Lundman, *supra* note 104; Lundman, *supra* note 107; Lundman & Kaufman, *supra* note 103.

¹¹² Stewart J. D'Alessio & Lisa Stolzenberg, *Race and the Probability of Arrest*, 81 SOC. FORCES 1381, 1393 (2003).

¹¹³ Katherine Beckett et al., *Drug Use, Drug Possession Arrests, and the Question of Race: Lessons from Seattle*, 52 SOC. PROBS. 435 (2005).

¹¹⁴ D'Alessio & Stolzenberg, *supra* note 112.

¹¹⁵ Geoffrey P. Alpert, John M. MacDonald & Roger G. Dunham, *Police Suspicion and Discretionary Decision Making During Citizen Stops*, 43 CRIMINOLOGY 407 (2005).

¹¹⁶ Engen & Steen, *supra* note 5.

predicated on a number of legal and demographic factors, with research finding that the implementation of seemingly benign decisions results in differences in detention rates for African Americans and Latinos as compared to whites.¹¹⁷ In this segment of the research, court and community factors are of utmost importance, shaping and shifting how judicial decisionmaking proceeds and the differential effects on African-American and Latino defendants. Reforms that have been enacted in recent decades have limited the discretion of some court actors in an effort to decide cases solely on an offender's legal characteristics, eliminating the possibility of racial or ethnic biases. The research evidence varies with respect to the success of these reforms, but there appears to be a moderate consensus on the continuing influence of judges, especially in the pretrial decision to detain defendants.¹¹⁸

Steen, Engen, and Gainey considered the pretrial decision to detain using the racial stereotypes approach, finding a moderate racial disparity in the decision to incarcerate but no race effects for sentence length.¹¹⁹ The authors contend that African-American defendants are more likely to possess stereotypically dangerous characteristics—being male, having a prior record, having been convicted of a drug felony—and thereby increase their odds of incarceration by 62% when compared with white defendants with similar attributes.¹²⁰ The authors argue that judicial perceptions of race did not appear to have a direct effect on sentence length, except in cases of drug distribution offenses that show an increase in sentences for white offenders compared to African Americans.¹²¹ Demuth observed that racial and ethnic differences are pronounced in the stages of pretrial processing, resulting in an overwhelming disadvantage for Latino defendants who are less likely to be granted release (50%) than white (67%) and African-American (55%) defendants.¹²² Demuth found that Latino defendants face a triple burden in the criminal justice system because they are the most likely to be required to post bail to gain release, they receive the highest bail amounts, and they are most likely to be unable to pay.¹²³ Only 28% of Latino defendants who are granted bail are released, compared

¹¹⁷ Demuth, *supra* note 109; Schlesinger, *supra* note 6.

¹¹⁸ Demuth, *supra* note 109, at 896; Schlesinger, *supra* note 6, at 187; Sara Steen, Rodney L. Engen & Randy R. Gainey, *Images of Danger and Culpability: Racial Stereotyping, Case Processing, and Criminal Sentencing*, 43 CRIMINOLOGY 435, 461 (2005).

¹¹⁹ Steen, Engen & Gainey, *supra* note 118.

¹²⁰ *Id.* at 451.

¹²¹ *Id.* at 461.

¹²² Demuth, *supra* note 109, at 892.

¹²³ *Id.*

with 40% of African-American defendants and 54% of white defendants.¹²⁴ In her multiple jurisdictional investigation, Schlesinger found similar evidence of a racial disparity,¹²⁵ most notably during the decision to deny bail, with African Americans being 24% more likely to be denied bail and 21% less likely to be granted non-financial release when compared with white defendants with similar legal characteristics.¹²⁶ For Latinos, the disparity widens compared with African Americans: the odds of non-financial release is 15% lower (25% when compared with whites), and when granted bail, the amount is 48% higher.¹²⁷ Schlesinger points to the language barrier and citizenship concerns as the source of much of the disadvantage for Latinos in the criminal justice system, compounding any bias that may be based solely on racial and ethnic differences.¹²⁸ The disparity for both African Americans and Latinos is even clearer when looking at pretrial decisions for drug offenses, with African-American defendants 80% more likely to be denied bail when compared to white defendants, and Latino defendants 67% more likely to be denied bail compared to whites and 29% less likely to receive non-financial release.¹²⁹ Given the concentration of drug offenses during the much maligned War on Drugs, the effects of such disparities, even for minor offenses, could have long-lasting consequences.

Trial/Pleas. The need for efficiency in the justice system has led to a consistent reliance on plea bargaining for quick resolutions in criminal processing, and a possible avenue for bypassing restrictions on judicial discretion. Steen, Engen, and Gainey found that white defendants who pled guilty received a 28% reduction in their sentence while African Americans received only a 13% reduction.¹³⁰ However, others have found a slight benefit to the defendant, regardless of race, when a guilty plea is entered.¹³¹ Ulmer and Johnson integrated local and court context variables into their analysis of sentencing outcomes and found that defendants who go to trial are almost twice as likely to be incarcerated with a six month increase in sentence length when compared with those who opt for non-negotiated pleas.¹³² Other researchers contend that modest effects of race are present

¹²⁴ *Id.*

¹²⁵ Schlesinger, *supra* note 6.

¹²⁶ *Id.* at 183.

¹²⁷ *Id.* at 184.

¹²⁸ *Id.*

¹²⁹ *Id.*

¹³⁰ Steen, Engen & Gainey, *supra* note 119, at 456.

¹³¹ Engen & Steen, *supra* note 5, at 1384.

¹³² Jeffrey T. Ulmer & Brian Johnson, *Sentencing in Context: A Multilevel Analysis*, 42 *CRIMINOLOGY* 137, 159 (2004).

in the plea bargaining stage of criminal processing under determinate sentencing reforms, even in the absence of disadvantage in earlier levels of prosecution.¹³³

Sentencing Decisions. Based on the reforms made, especially those that limit judicial discretion, decisions and outcomes based on extra-legal factors ostensibly should be eradicated.¹³⁴ Guideline systems direct judges to consider only legal factors such as crime type and severity, as well as criminal history, when determining a defendant's detention and sentencing outcomes. Like earlier researchers, Bushway and Piehl differentiated between warranted and unwarranted disparity, with variation due solely to legal factors seen as justifiable (warranted) differences, and unwarranted disparity as the result of the application of extra-legal factors such as race, gender, or income.¹³⁵ Researchers make the distinction between these disparity types by examining judicial discretion in sentencing, which may be indicated by deviations from the sentencing guideline recommendations. Such departures are seen most obviously in the pretrial decision to incarcerate and the determination of sentence length, with judges weighing legal factors such as criminal history more heavily against African Americans and Latinos compared with whites with similar legal characteristics.¹³⁶

In their analysis of Washington State Guidelines Commissions data on drug offenses, Engen and Steen found that race effects are not a factor in decisions on sentencing, incarceration, and sentence length.¹³⁷ Instead, the severity of charges at conviction changed significantly following changes in legislation that mandated the cessation of judicial discretion and increased the authority of the prosecution.¹³⁸ Potentially influential court and community characteristics were not controlled for in the analysis, which

¹³³ Brian D. Johnson, *supra* note 109; John Wooldredge, Timothy Griffin & Fritz Rauschenberg, *(Un)anticipated Effects of Sentencing Reform on the Disparate Treatment of Defendants*, 39 L. & SOC'Y REV. 835 (2005).

¹³⁴ Celesta A. Albonetti, *Sentencing Under the Federal Sentencing Guidelines: Effects of Defendant Characteristics Guilty Pleas, Departures on Sentencing Outcomes for Drug Offenses, 1991-1992*, 31 LAW & SOC'Y REV. 789 (1997).

¹³⁵ Shawn D. Bushway & Anne M. Piehl, *Judging Judicial Discretion: Legal Factors and Racial Discrimination in Sentencing*, 35 LAW & SOC'Y REV. 733, 734 (2001).

¹³⁶ Albonetti, *supra* note 136; Stephen Demuth, *Racial and Ethnic Differences in Pretrial Release Decisions and Outcomes: A Comparison of Hispanic, Black, and White Felony Arrestees*, 41 CRIMINOLOGY 873 (2004); Steen, Engen & Gainey, *supra* note 119; Steffensmeier & Demuth, *supra* note 109; Darrell Steffensmeier, Jeffery Ulmer & John Kramer, *The Interaction of Race, Gender, and Age in Criminal Sentencing: The Punishment of Being Young, Black, and Male*, 36 CRIMINOLOGY 763 (1998).

¹³⁷ Engen & Steen, *supra* note 5.

¹³⁸ *Id.* at 1384.

may have altered the overall conclusion, especially given contemporary research on sentencing and judicial guideline departures.

Albonetti evaluated the state of disparate criminal justice treatment after the sentencing reforms to determine if non-legal factors continued to be a significant factor in deciding the length of imprisonment for federal drug trafficking cases.¹³⁹ She found that extra-legal factors such as gender, race and ethnicity, citizenship status, and education have direct and significant effects on sentence outcomes even when controlling for guideline-defined, legally relevant variables.¹⁴⁰ The probability of incarceration and the length of the sentence were still largely influenced by the type of drug offense; however, race and ethnicity appeared to condition the effect of guideline-mandated factors. Albonetti's work, as well as others, highlighted a moderate level of disparity with the purported protections of sentencing reforms that were designed to limit the discretion of individual judges and deter the use of extra-legal factors in deciding punishments.¹⁴¹ The supposed objectivity of these pretrial decisions belies processes that, throughout the system, could result in an aggregate disadvantage for African-American and Latino defendants, even if single studies reveal only a minimal or moderate disparity.

IV. JUSTICE AND DISPARITY

This review confirms that racial and ethnic disparities exist in both the American juvenile and adult criminal justice systems. Recent research also confirms that the degree of this disparity varies across jurisdictions, and it appears at different decision points in different jurisdictions. Some studies find moderate to large differences between the ways in which whites, blacks, and Latinos experience justice systems. Others report small differences, some report that they do not uncover evidence of racial and ethnic disproportionality, and still others note disadvantages for whites. Both African Americans and Latinos continue to be overrepresented in prisons, but much of the difference is based on higher levels of involvement by people from these groups in crime. That said, Blumstein,¹⁴² who published the classic paper that concluded that 80% of black/white differences in imprisonment was "warranted" by higher black violent crime rates, has updated that work, looking at crime specific imprisonment

¹³⁹ Albonetti, *supra* note 134.

¹⁴⁰ *Id.* at 817.

¹⁴¹ Blumstein, *supra* note 26; Bushway & Piehl, *supra* note 135, at 755; Spohn & Holleran, *supra* note 109; Steen, Engen & Gainey, *supra* note 119, at 460; Steffensmeier & Demuth, *supra* note 109, at 724; Ulmer & Johnson, *supra* note 132, at 166.

¹⁴² Blumstein, *supra* note 26.

rates.¹⁴³ He has found great variability; in particular, far less than 80% of black/white differences in imprisonment for drug offenses can be accounted for by behavior differences (in fact, just under 50%). Since so much of America's three-decade imprisonment binge has been fueled by the War on Drugs, we should be more cautious if we conclude that a great deal of imprisonment differences can be accounted for with legally relevant variables.

What is also clear is that, as we expected, research on data gathered in recent decades provides evidence of disparity, and those disparities are far less than was observed earlier in the twentieth century.¹⁴⁴ Mann made note of studies that reported gross and large disparities in death penalty and non-death penalty sentences. It is clear that criminal justice practices in the United States have come a long way towards racial and ethnic justice in the past one hundred years. Unfortunately the evidence indicates that we still have distance to travel to reach that "more perfect union."

We did not find support here for the "small effect sizes thesis." The studies that we have reviewed (most published in the past two decades) yield mixed results. Some do not find evidence of a racial disparity, but others do. Among these results are small effects, but there are also studies that report larger, what we have called moderate, racial disparity, and still others found strong evidence of differences in treatment by race or ethnicity. We cannot dismiss, as did Wilbanks, the notion that we still have problems in our criminal justice processing.

We should also take note of the possible accumulating or compounding effects suggested by recent literature. Figures 1 and 2 display the results, at each stage of the juvenile and criminal justice process, of the studies that we reviewed. At a minimum, these figures display the importance of controlling for selection bias in any of these types of studies. Important decisions are made early in the process, by police, prosecutors, and courts, that determine who is "selected" to proceed to, and under what conditions, the next stage of processing. Failure to account for differential risk of being selected likely leads to biased results. For example, if whites are differentially sorted out prior to sentencing, and then a sentencing study reports no racial difference, we cannot know if there really is no difference between comparable cases, or if minority defendants, of varying types, are being sentenced similarly compared to only the worst of white defendants.

¹⁴³ *Id.*

¹⁴⁴ For a good review and treatment of this earlier period, see CORAMAE R. MANN, *UNEQUAL JUSTICE: A QUESTION OF COLOR* (1993).

Figure 1. Juvenile Justice Processing

(strong to moderate in initial/no disparity)

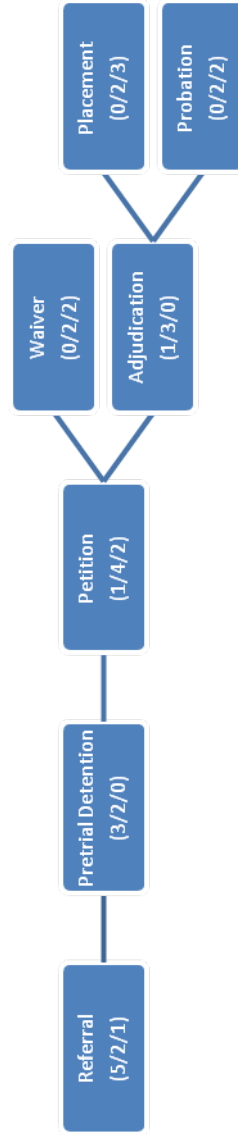
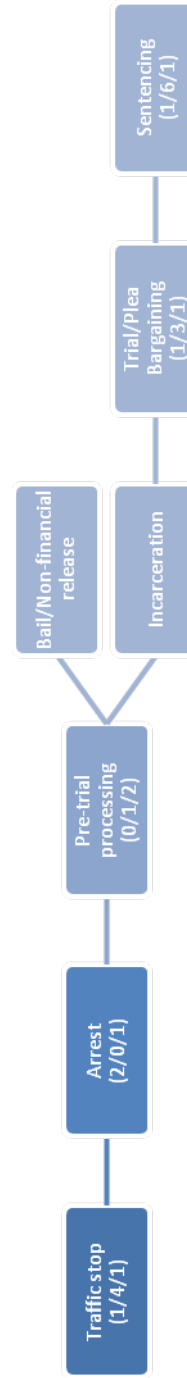


Figure 2. Criminal Justice Processing: Adults

(strong to moderate in initial/no disparity)



The numbers in the parentheses refer to the number of studies that report a strong and moderate, small, or no disparity, respectively, for each level in the criminal justice system.

Another consideration highlighted by these figures is the potential for compounding racial differences. Several small differences may accumulate so that the overall differences for people of color and whites going through the justice systems are in total rather substantial. And remember that in these studies, some results indicate not just small racial disparity, but some find moderate and even large differences in the way cases were processed.

Perhaps it is easy for some scholars to conclude that the effect sizes in studies are too small to matter. If so, we ask that they consider two points. First, is the concept of “justice” itself. Can a nation which recites an official Pledge of Allegiance, which includes the words “with liberty and justice for all,” reasonably conclude that any statistically significant differences in criminal justice outcomes based on anything but legal factors is acceptable? There are studies that find significant outcomes that are not simply a byproduct of large samples. Such differences run counter to the basic principles upon which the United States was founded, and of which our contemporary leaders are fond of making note in exhortations that we are now a “color blind” society.

If this is too philosophical for the taste of some, we offer a second, perhaps more pedestrian point. What if the small differences reported in these studies affected your son, daughter, father, or mother? What if it was you who was subject to a slightly higher probability of being stopped by police, whose vehicle was searched without real probable cause, who received just a few more days or months in prison? We suspect that you would not dismiss these differences as trivial.

After conducting a thorough study of race and sentencing in the United States, a National Academies Panel wrote:

[E]ven a small amount of racial discrimination is a matter that needs to be taken very seriously, both on general normative grounds and because small effects in the aggregate can imply unacceptable deprivations for large numbers of people. Thus even though the effect of race in sentencing may be small compared to that of other factors, such differences are important.¹⁴⁵

This brings us back to the aggregate studies that were discussed earlier.¹⁴⁶ As suggested by the National Research Council panel, the aggregate products of differences observed in individual processing amount to real differences to black and brown populations in the United States. Given the massive increase in American imprisonment that has, in part, been fueled by the War on Drugs, these aggregate patterns, especially

¹⁴⁵ NAT'L RESEARCH COUNCIL PANEL ON SENTENCING RESEARCH, RESEARCH ON SENTENCING: THE SEARCH FOR REFORM 92 (Alfred Blumstein et al. eds., 1983).

¹⁴⁶ Crutchfield, Bridges & Pitchford, *supra* note 30; Langan, *supra* note 28; RESEARCH ON SENTENCING: THE SEARCH FOR REFORM, *supra* note 145.

Blumstein's more recent work reporting that only one-half of racial disparities in drug imprisonments can be accounted for by behavior, should be particularly alarming.

There is another problem associated with allowing modest or even small racial disparities to persist without challenge. They add substance to the narrative of injustice; a long held belief by many in black and brown communities holds that rules and fair play do not apply to people of color when they are confronted by the state. People in these communities talk about it, comedians joke about it, and, rest assured, many are convinced of it. When politicians call on young people to believe that they can be whatever they want to be, some will counter with the narrative of injustice. When a people are told that hard work and persistence makes all of the difference, some hear instead the narrative of injustice. And when police departments attempt to explain what looks to the residents of African-American, Latino, Asian, or Native-American communities to be police misbehavior, those explanations are less likely to be accepted because of the persistence of the narrative of injustice. Minimizing the importance of racial and ethnic disparities by the scholarly community only reifies what is believed on the street; that criminal justice in America continues to mean "just us."