Race, Prediction, and Discretion

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"[I]t is unnecessary to speak directly of race, because talking about crime is *talking about race."*[1]

ABSTRACT

Many scholars and political leaders denounce racism as the cause of disproportionate incarceration of black Americans. All players in this system have been blamed, including the legislators who enact laws that disproportionately harm blacks, police who unevenly arrest blacks, prosecutors who overcharge blacks, and judges who fail to release and oversentence black Americans. Some scholars have blamed the police and judges who make arrest and release decisions based on predictions of whether defendants will commit future crimes, claiming that prediction leads to minorities being treated unfairly. Others complain that racism results from misused discretion. This Article explores where racial bias enters the criminal justice system through an empirical analysis that considers the impact of discretion and prediction.

With a close look at the numbers and consideration of factors ignored by others, this Article confirms some conventional wisdom but also makes several surprising findings. This Article confirms what many commentators have suspected—that police arrest black defendants more often for drug crimes than white defendants. It also finds, contrary to popular belief, that there is little evidence to support the belief that drugs are linked to violent crime. Also, judges actually detain white defendants more than similarly-situated

* Associate Professor of Law, Brigham Young University Law School. Frank McIntyre was a major collaborator in performing the empirical modeling and tables involved in this project. A coauthored piece discussing some of the results revealed below is forthcoming. *See* Frank McIntyre & Shima Baradaran, Race, Prediction, and Pretrial Detention (last revised July 10, 2012), *available at* http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1987071. I would like to thank Professors David Abrams, Ron Allen, Sara Sun Beale, Larry Laudan, Michael Tonry, Randall Kennedy, Angela Davis, Cynthia Lee, Bernard Harcourt, Katherine Barnes, Christopher Slobogin, Michelle Alexander, Ian López, Tracey Meares, Dan Kahan, Sheri Lynn Johnson, Eric Jensen, Keith Hiatt, Ned Snow, Max Minzner, Dan Markel, Brooks Holland, Gordon Smith, Mehrsa Baradaran, Stewart Young, Jordan Barry, Laura Appleman, Ming Hsu Chen, Lawrence Rosenthal, John Pfaff, Sonja Starr, JJ Prescott, Brigham Daniels, and Jeff Robison for their helpful feedback. I would also like to thank the participants in the Rocky Mountain Junior Scholars Conference and the International Law and Society Meeting for their insightful feedback on an earlier draft. Hyrum Hemingway, Mary Bevan, Jessica Wright, Alex Mason, Kathryn Duque, Leilani Fisher, and Joey Leavitt provided excellent research assistance in this effort. Special thanks to Cory Bilton, Nicole Durkin, and the editors of *The George Washington Law Review* for excellent work on this Article.

1 Melissa Hickman Barlow, *Race and the Problem of Crime in* Time *and* Newsweek *Cover Stories, 1946 to 1995*, 25 SOC. JUST. 149, 151 (1998).

black defendants for all types of crimes. The important and surprising findings in this Article challenge long-held conventions of race and help mitigate racial disparity in criminal justice.

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INTRODUCTION

Many commentators would agree that racial bias exists in the U.S. criminal justice system.[2] Most would also agree that race discrimination in the criminal justice system is not explicit or purposeful.[3]

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2 *See, e.g.*, MICHELLE ALEXANDER, THE NEW JIM CROW: MASS INCARCERATION IN THE AGE OF COLORBLINDNESS 16 (2010) ("The fact that more than half of the young black men in many large American cities are currently under the control of the criminal justice system (or saddled with criminal records) is not—as many argue—just a symptom of poverty or poor choices, but rather evidence of a new racial caste system at work."); GREGG BARAK ET AL., CLASS, RACE, GENDER, AND CRIME: THE SOCIAL REALITIES OF JUSTICE IN AMERICA 286 (3d ed. 2010) (describing discrimination based on race as "produc[ing] more prosecutions and harsher punishments," and mass-mediated representations of race as "reproduc[ing] . . . the structural relations of oppression associated with crime"); MICHAEL TONRY, *The Malign Effects of Drugs and Crime Control Policies on Black Americans*, *in* THINKING ABOUT PUNISHMENT: PENAL POLICY ACROSS SPACE, TIME AND DISCIPLINE 81, 111 (2009) ("[I]nsensitivity to the interests of black Americans continues to characterize American crime policies."); Sheri Lynn Johnson, *Unconscious Racism and the Criminal Law*, 73 CORNELL L. REV. 1016, 1017, 1023–31 (1988) (explaining that even the Supreme Court has recognized that race impacts jury decisions and a defendant's ability to defend himself against the government, and further explaining that ignorance of racism blinds judges, and indirect, covert, and unconscious racism often goes unnoticed in the criminal justice system); Ian F. Haney López, *Institutional Racism: Judicial Conduct and a New Theory of Racial Discrimination*, 109 YALE L.J. 1717, 1722, 1725, 1806 (2000) [hereinafter López, *Institutional Racism*] (discussing judicial institutional racism in criminal justice cases resulting from unconscious societal bias, even though judges lack discriminatory intent); Ian F. Haney López, *Post-Racial Racism: Racial Stratification and Mass Incarceration in the Age of Obama*, 98 CALIF. L. REV. 1023, 1028 (2010) [hereinafter López, *Post-Racial Racism*] ("Even the most cursory engagement with American criminal justice at the start of the twenty-first century drives home the twin points that the United States puts people under the control of the correctional system at an anomalously high rate, and that it shuts behind bars an overwhelmingly disproportionate number of black and brown persons."); Lisa L. Miller, *The Invisible Black Victim: How American Federalism Perpetuates Racial Inequality in Criminal Justice*, 44 LAW & SOC'Y REV. 805, 805 (2010) ("One of the most discouraging facts of racial inequality at the dawn of the twenty-first century in the United States is the disproportionate impact of crime, violence, arrest, and incarceration on African Americans and Latinos compared to whites."); Naomi Murakawa & Katherine Beckett, *The Penology of Racial Innocence: The Erasure of Racism in the Study and Practice of Punishment*, 44 LAW & SOC'Y REV. 695, 701 (2010) (stating that racial power in criminal justice is "a systemic and institutional phenomenon that reproduces racial inequality and the presumption of black and brown criminality"); Angela J. Davis, *Benign Neglect of Racism in the Criminal Justice System*, 94 MICH. L. REV. 1660, 1674 (1996) (reviewing MICHAEL TONRY, MALIGN NEGLECT: RACE, CRIME, AND PUNISHMENT IN AMERICA (1995)) (mentioning literature suggesting the "existence of racial bias at various stages of the criminal process, including the arrest, prosecution, trial, and sentencing phases"); Jennifer Haberkorn, *In Previous Roles, Holder Took Both Sides in Civil Rights Cases*, WASH. TIMES, Feb. 22, 2009, at A6 (noting that Eric Holder, the first black Attorney General, "called the United States a 'nation of cowards' for not discussing more openly the country's troubled racial history and vowed that the department, under his leadership, would take a greater role in fighting racism"); Charles Hurt, *Minority Appeal: Barack vs. Hill in D.C. Duel*, N.Y. POST, June 29, 2007, at 8 ("The criminal-justice system is not colorblind."(quoting Barack Obama)).

3 ALEXANDER, *supra* note 2, at 100. Indeed the bulk of criminal procedure in the last 100 years has attempted to overturn the systemic racism that has existed in much of the United

Despite the efforts to create equality in criminal laws, blacks are imprisoned at far higher rates than whites. In 2010, blacks comprised 38% of all prisoners, though they only constituted 12% of the national population.[4] And about one in twenty-three black men was in prison in 2010, compared with one in 147 white men.[5] Scholars have claimed that racism enters the system at every step, including arrest, conviction, and sentencing. These theories have placed blame on all actors involved, including legislators, police, media,[6] lawyers, juries,[7] and judges.[8]

States. WILLIAM J. STUNTZ, THE COLLAPSE OF AMERICAN CRIMINAL JUSTICE 43–45, 264–71 (2011) (noting that more trials with local juries, laws that accurately define what prosecutors seek to punish, and an equal protection guarantee like the one that died in the 1870s would help to make prosecution and punishment less discriminatory); Marc Mauer & David Cole, *Five Myths About Americans in Prison*, WASH. POST, June 17, 2011 (noting that "African Americans . . . make up 34 percent of those arrested for drug offenses and 45 percent of those serving time for such offenses in state prisons" because "[i]nner-city, open-air drug markets are easier to bust than those that operate out of suburban basements").

4 PAUL GUERINO ET AL., BUREAU OF JUSTICE STATISTICS, U.S. DEP'T JUSTICE, PRISONERS IN 2010, at 26 (2011), *available at* http://www.bjs.gov/content/pub/pdf/p10.pdf.

5 LAUREN E. GLAZE, U.S. DEP'T JUSTICE, CORRECTIONAL POPULATION IN THE UNITED STATES 2010, at 8 (2011), *available at* http://bjs.ojp.usdoj.gov/content/pub/pdf/cpus10.pdf.

6 MICHAEL TONRY, PUNISHING RACE: A CONTINUING AMERICAN DILEMMA 7 (2011) (pointing out that studies by media scholars demonstrate that the mass media portrays criminals as blacks and victims as white and that "most white people assume the typical offender to be black"); Tracey L. McCain, *The Interplay of Editorial and Prosecutorial Discretion in the Perpetuation of Racism in the Criminal Justice System*, 25 COLUM. J.L. & SOC. PROBS. 601, 613–14, 621–28 (1992) (discussing pretrial racism in the media and prosecutorial discretion that perpetuates discrimination in criminal justice).

7 Numerous studies suggest that prosecutors are more prone to strike black potential jurors and defense attorneys are more prone to strike white potential jurors. Shamena Anwar et al., *The Impact of Jury Race in Criminal Trials*, 127 Q.J. ECON. 1017, 1023 (2012); *see, e.g.*, David C. Baldus et al., *The Use of Peremptory Challenges in Capital Murder Trials: A Legal and Empirical Analysis*, 3 U. PA. J. CONST. L. 3, 10 (2001); Shari Seidman Diamond et al., *Achieving Diversity on the Jury: Jury Size and the Peremptory Challenge*, 6 J. EMPIRICAL LEGAL STUD. 425, 425–26 (2009); Mary R. Rose, *The Peremptory Challenge Accused of Race or Gender Discrimination? Some Data from One County*, 23 LAW & HUM. BEHAV. 695, 696 (1999); Samuel R. Sommers & Michael I. Norton, *Race-Based Judgments, Race-Neutral Justifications: Experimental Examination of Peremptory Use and the* Batson *Challenge Procedure*, 31 LAW & HUM. BEHAV. 261, 262 (2007); Billy M. Turner & Rickie D. Lovell, *Race and Peremptory Challenges During Voir Dire: Do Prosecution and Defense Agree?*, 14 J. CRIM. JUST. 61, 68 (1986). In a recent study, conviction rates for blacks and whites in the absence of potential black jurors were 81% and 66%, but when there was at least one potential black juror, those rates were 71% and 73%, suggesting that the application of criminal justice is highly uneven in the studied counties. Anwar et al., *supra*, at 1032, 1049.

8 López, *Institutional Racism*, *supra* note 2, at 1726 ("Institutional analysis suggests that judicial conduct pursuant to such unexamined decision making often produces discrimination, racial and otherwise."). Other scholars have explained that family relationships may be at the root of the link between race and crime. *See* Amy L. Anderson, *Individual and Contextual Influences on Delinquency: The Role of the Single-Parent Family*, 30 J. CRIM. JUST. 575, 585 (2002);

To understand the disproportionate incarceration of black Americans and where racial bias may enter, special attention should be given to the first points of entry into the criminal justice system: arrest and detention. The first point of contact with police and prosecutors is the decision to arrest or charge a defendant with a crime. Scholars have claimed that implicit bias in this decision results in arrest differences between blacks and whites that account for the differences in incarceration.[9] Indeed, arrest rates are higher for blacks in virtually all categories of crimes,[10] particularly drug crimes where black defendants make up 52% of arrestees,[11] even though whites commit these crimes at equal or higher rates.[12] Subsequent to the arrest, a defendant's first introduction to incarceration may occur after charges are made and a judge determines whether to release or detain pretrial. Commentators over the years have denounced race discrimination in the detention decision, evidenced by more blacks being detained pre-

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Lynn D. Wardle, *The Fall of Marital Family Stability and the Rise of Juvenile Delinquency*, 10 J.L. & FAM. STUD. 83, 88 (2007).

9 Robert D. Crutchfield, *Warranted Disparity? Questioning the Justification of Racial Disparity in Criminal Justice Processing*, 36 COLUM. HUM. RTS. L. REV. 15, 20 (2004) (expanding on the extent to which racial differentials in arrests actually represent crime involvement given the potential bias in some jurisdictions); Anthony G. Greenwald & Linda Hamilton Krieger, *Implicit Bias: Scientific Foundations*, 94 CALIF. L. REV. 945, 966 (2006) ("[I]mplicit race bias is pervasive and is associated with discrimination against African Americans."). However, a few scholars have found that racism is not to blame as much as other factors that cause more blacks to be incarcerated. *See* Alfred Blumstein, *On the Racial Disproportionality of United States' Prison Populations*, 73 J. CRIM. L. & CRIMINOLOGY 1259, 1261 (1982) (asserting that attacking discrimination in the criminal justice system will not likely have the desired effect on reducing prison populations); 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, 680, 682 (1985) (presenting a study that does not prove or disprove that racism exists but stating that if racism does exist it would only account for a small part of the disparate levels of blacks in state prisons). *But see* Matt DeLisi & Bob Regoli, *Race, Conventional Crime, and Criminal Justice: The Declining Importance of Skin Color*, 27 J. CRIM. JUST. 549, 555 (1999) (presenting research indicating that the criminal justice system does not systematically discriminate against African Americans). Note that at least one scholar has mentioned that arrest rates are not helpful in determining the fairness of criminal justice decisions because there may be bias in police arrests. Langan, *supra*, at 669.

10 Alfred Blumstein, *Racial Disproportionality of U.S. Prison Populations Revisited*, 64 U. COLO. L. REV. 743, 747 (1993).

11 Clarence Lusane, *In Perpetual Motion: The Continuing Significance of Race and America's Drug Crisis*, 1994 U. CHI. LEGAL F. 83, 99.

12 Jamie Fellner, *Race, Drugs, and Law Enforcement in the United States*, 20 STAN. L. & POL'Y REV. 257, 269–70 (2009) (remarking that even though whites commit drug crimes in greater numbers, blacks are disproportionately arrested and incarcerated when comparing the two populations); *see also* William J. Stuntz, *Unequal Justice*, 121 HARV. L. REV. 1969, 1971 (2008).

trial compared to whites charged with the same crimes.[13] The detention decision is an obvious source of potential bias as 44.8% of black defendants are detained pretrial while only 33.1% of white defendants are.[14]

Beyond the influence of implicit bias, an important commonality between arrest and detention is that both of these decisions require prediction of future behavior.[15] The arrest and charging decisions often include consideration of whether the defendant is likely to flee or commit a crime if released.[16] This is the same question judges must ask in determining whether to release a defendant on bail before trial.[17] Thus, not only are arrest and detention the first points of contact with the criminal justice system, but they also involve prediction and discretion that are identified as sources of racial bias.[18] This leaves the questions of whether racial bias can be detected in the criminal justice system, where it may enter, and what role prediction and discretion may have in perpetuating racial disparity.

This Article examines the role of race, prediction, and discretion in the criminal justice system and sheds light on where discrimination may afflict the system. Our criminal justice system, from police arrests to judicial determinations and sentencing, is often based on predictions of whether crimes are likely to occur Many players in the system—including police, prosecutors, and judges—exercise discretion while fulfilling their duties. This Article explores whether police and judges are inappropriately—even if subconsciously—considering

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13 *See, e.g.*, Marvin D. Free, Jr., *Racial Bias and the American Criminal Justice System: Race and Presentencing Revisited*, 10 CRITICAL CRIMINOLOGY 195, 220 (2002) (finding evidence of discrimination in key criminal justice decision points); Cassia Spohn, *Race, Sex, and Pretrial Detention in Federal Court: Indirect Effects and Cumulative Disadvantage*, 57 U. KAN. L. REV. 879, 898–99 (2009) (finding that being under the control of the criminal justice system increased the odds of pretrial detention for blacks but not for whites, and being employed or having more education decreased the likelihood of detention for whites but not for blacks, suggesting that judges "interpret the legally relevant criteria set forth in the bail statute in ways that disadvantage black offenders."); *c.f.* Stephen Demuth, *Racial and Ethnic Differences in Pretrial Release Decisions and Outcomes: A Comparison of Hispanic, Black, and White Felony Arrestees*, 41 CRIMINOLOGY 873, 898 (2003) (finding that Hispanic defendants are more likely to be detained than white and black defendants, and racial/ethnic differences are most pronounced in drug cases).

14 Demuth, *supra* note 13, at 891.

15 Alan M. Dershowitz, *The Law of Dangerousness: Some Fictions About Predictions*, 23 J. LEGAL EDUC. 24, 27–29 (1970).

16 *Id.*

17 Shima Baradaran, *Restoring the Presumption of Innocence*, 72 OHIO ST. L.J. 723, 741–42 (2011).

18 *See supra* notes 6–8 and accompanying text.

race, whether their predictions lead to bias against black defendants, and whether any bias can be identified using empirical methods. The Article includes several significant findings. Perhaps most importantly, it finds that allegations of judicial bias are often masking a concern for public safety. It also finds that although police use discretion to over-arrest black defendants for drug crimes, judges detain white defendants more often than they should for all crimes. Despite the fact that more black defendants are detained and incarcerated, this Article concludes that judges as a whole actually do not reveal bias against black defendants. Judges decide to release defendants based on whether a defendant is likely to pose a threat to society, and thus detain black defendants because they pose a larger risk of violent crime. Judges do, however, demonstrate higher sensitivity to crime in white communities, a factor ignored by major studies alleging judicial bias. Once accounted for, this factor indicates a surprising potential bias not against black *defendants*, but against *white* defendants and black *communities*.

This Article proceeds in four parts. Part I engages the discussion among academic and political commentators of where racism infects the U.S. criminal justice system. In this discussion it examines two major areas of disparity between black and white defendants: drugs and violent crimes. Part II examines the prominent camps alleging racial bias in criminal justice. One camp asserts that when police and judges participate in statistical analysis and prediction, it inevitably leads to discrimination against minority defendants.[19] The other camp claims that improperly used discretion by police and judges leads to excessive arrest and punishment of black Americans.[20] Part III introduces the data and model used to analyze detention decisions from 1988 to 2006 and discusses some basic findings from the data. Part IV engages the arguments of the two camps from Part II by analyzing results from this empirical analysis, which show race's impact on arrest and detention decisions made by police and judges. It finds that nationally, police do not demonstrate racial bias in arrests, with the ex-

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19 BERNARD E. HARCOURT, AGAINST PREDICTION: PROFILING, POLICING, AND PUNISHING IN AN ACTUARIAL AGE 149–54 (2007).

20 Robert J. Smith & Bidish J. Sarma, *How and Why Race Continues to Influence the Administration of Justice in Louisiana*, 72 LA. L. REV. 361, 405–06 (2012) (presenting hypothetical of how police choose to patrol lower socioeconomic area, resulting in increased arrests for black defendants, and how prosecutorial discretion then results in a harsher penalty, and how it relates to exclusion of black Americans from juries); Stuntz, *supra* note 12, at 1976–78 (discussing discretion on all levels of the criminal justice system resulting in disparities in treatment of white and black defendants, mostly in reference to drug crimes).

ception of drug crimes, where they appear to target black defendants. It also finds, surprisingly, that judges actually over-detain and incarcerate white defendants, not black defendants. Contrary to the two prominent threads of commentary, this Article finds that the system of prediction used by judges and police actually seems to disadvantage white defendants and black victims, rather than black defendants, due in part to the focus of judges on avoiding violent crime against whites.

I. IS THERE RACISM IN THE CRIMINAL JUSTICE SYSTEM?

According to some, the extraordinary disparity in imprisonment of blacks and whites has become the major race and crime problem of our time.[21] Studies have found that policies and practices exist in the criminal justice system targeting blacks and their communities.[22] Studies and case law both document racial disparities in various stages related to the criminal justice system, including legislation,[23] racial

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21 RANDALL KENNEDY, RACE, CRIME, AND THE LAW x–xi (1997) ("[A]t the end of the twentieth century, racially discriminatory decision-making remains influential though controversial. . . . [N]othing has poisoned race relations more than racially discriminatory policing pursuant to which blacks are watched, questioned, and detained more than others."); Paul Butler, *One Hundred Years of Race and Crime*, 100 J. CRIM. L. & CRIMINOLOGY 1043, 1045 (2010); Adam Gopnik, *The Caging of America: Why Do We Lock Up So Many People?*, THE NEW YORKER, Jan. 30, 2012, at 73–74 ("Mass incarceration on a scale almost unexampled in human history is a fundamental fact of our country today—perhaps the fundamental fact, as slavery was the fundamental fact of 1850. . . . [It has become] a way of reimposing Jim Crow."); Barbara Lee, *Race Is Still a Factor in America*, HUFFINGTON POST (Aug. 10, 2011, 10:02 PM), http://www.huffingtonpost.com/rep-barbara-lee/race-is-still-a-factor-in_b_923908.html ("Simply put, race is a factor in the growing economic inequalities we have in this country, and we can no longer afford to sweep this issue under the rug. . . . African-American males and Latinos continue to be overrepresented in the criminal justice system—more than 6.5 times and 2.6 times more likely to be incarcerated than their white counterparts, respectively."); Jacob Weisberg, *The Man Who Won't Be Used*, SLATE MAG. (Aug. 1, 2000, 4:06 PM), http://www.slate.com/articles/news_and_politics/ballot_box/2000/08/the_man_who_wont_be_used.html (reporting that Republican Colin Powell bemoaned that "racism and the legacy of racism still hobbles African-Americans. . . . [He] decried the way the country fails to provide a basic education or meaningful economic opportunities for young black men, choosing to deal with them instead through the criminal-justice system.").

22 Gary Ford, *The New Jim Crow: Male and Female, South and North, from Cradle to Grave, Perception and Reality: Racial Disparity and Bias in America's Criminal Justice System*, 11 RUTGERS RACE & L. REV. 324, 329 (2010) ("Other recent empirical studies provide support for blacks' perception that the justice system systematically treats blacks unfairly and much more punitively than whites. The studies demonstrate that blacks were far more likely than white defendants to be arrested, prosecuted, and incarcerated; specifically, they show that blacks were 'six times as likely to be incarcerated.'"); Ruth D. Peterson & Lauren J. Krivo, *Race, Residence, and Violent Crime: A Structure of Inequality*, 57 U. KAN. L. REV. 903, 903 (2009) (drawing on arguments by race scholars who "contend that the social organization of U.S. society is structured to produce and reinforce a racial order where whites are privileged over other groups").

23 Racial disparities found in legislation include the crack-cocaine sentencing disparity that

profiling, prosecutorial decisions to charge and plea bargain,[24] and mandatory minimum sentencing.[25] Both law and criminology scholars have concluded that arrest practices in certain jurisdictions are based on race, and that judges engage in racial discrimination in pretrial detention and sentencing determinations.[26] Studies also show that as compared to blacks, white offenders are less likely to be arrested, prosecuted, and incarcerated, while black offenders are more likely to be sentenced to lengthy incarceration and probation.[27] Police arrests

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creates disproportionately longer sentences for black drug offenders. Lisa Rossi, *Obama Condemns Jena Charges*, DES MOINES REG., Sept. 22, 2007, at 4B ("Those kind of inequities, I don't think anybody believes in. It's not a black issue or a white issue. I think all Americans are upset when they see the justice system not working the way that it should." (quoting President Barack Obama)).

24 McCain, *supra* note 6, at 617 ("The breadth of prosecutorial discretion creates a significant opportunity for abuse of prosecutorial powers against minorities."); Robert J. Smith & Justin D. Levinson, *The Impact of Implicit Racial Bias on the Exercise of Prosecutorial Discretion*, 35 SEATTLE U. L. REV. 795, 795–97 (2012) (discussing how implicit racial bias impacts everyday prosecutorial decisionmaking).

25 *Racial Disparities in the Criminal Justice System: Hearing Before the Subcomm. on Crime, Terrorism, & Homeland Security of the H. Comm. on the Judiciary*, 111th Cong. 8–10 (2009) [hereinafter *Racial Disparities*] (statement of Rep. Steve Cohen); HUMAN RIGHTS WATCH, TARGETING BLACKS: DRUG LAW ENFORCEMENT AND RACE IN THE UNITED STATES 48 n.87 (May 2008) ("Because of mandatory sentencing legislation, the decision regarding what charges to bring effectively determines the sentence.").

26 JAMES AUSTIN ET AL., NAT'L POL'Y COMM., THE USE OF INCARCERATION IN THE UNITED STATES: NATIONAL POLICY WHITE PAPER 18–20 (drft. 2000); Research Working Group & Task Force on Race and the Criminal Justice System, *Preliminary Report on Race and Washington's Criminal Justice System*, 87 WASH. L. REV. 1, 28 (2012) [hereinafter *Preliminary Report on Race*] (discussing disparate treatment of minority defendants in pretrial release decisions, with blacks being held longer than whites charged with similar crimes); M. Marit Rehavi & Sonja B. Starr, *Racial Disparity in Federal Criminal Charging and Its Sentencing Consequences* 22 (U. of Michigan Law & Econ., Empirical Legal Studies Ctr., Paper No. 12-002, 2012), *available at* http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1985377 (finding that black arrestees face significantly more severe charges "conditional on arrest offense and other observed characteristics").

However, apparent discrimination in pretrial release decisions could be based on the fact that blacks have longer records. Given the apparent goal of pretrial release decisions to deter violent crime, prior record can be a useful empirical element in predicting violence. *See infra* notes 228–30 and accompanying text.

27 JAWJEONG WU, CITIZENSHIP STATUS, RACE, ETHNICITY, AND THEIR EFFECTS ON SENTENCING 156 (2011); Ford, *supra* note 22, at 336; Mona Lynch, *Crack Pipes and Policing: A Case Study of Institutional Racism and Remedial Action in Cleveland*, 33 LAW & POL'Y 179, 179 (2011) (examining racially disparate police tactics against low-level drug offenders). For instance, in Washington, which has the highest proportionate rate of incarceration of black defendants, prosecutors were 75% less likely to recommend alternative sentences for black defendants than for similarly situated white defendants, and in King County, prosecutors recommended longer confinement sentences for black defendants. *Preliminary Report on Race*, *supra* note 26, at 25. Although blacks make up 28% of the prison population, they make up approximately 3% of Washington State's population. *Id.* at 11–12; Julie Stewart, *Don't Blame Judges for Racial Dis-*

and profiling are consistently attacked for being racially motivated.[28] Also, blacks are three times more likely to be arrested for a drug offense than whites and nearly ten times more likely to go to prison for a drug offense.[29] Considering these remarkable figures, there is significant support for the claim that racism exists in the criminal justice system.

Some blame these policies and decisions on unconscious bias by judges and police, and other criminal justice actors.[30] For instance,

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parity, HUFFINGTON POST (Feb. 8, 2012, 3:42 PM), http://www.huffingtonpost.com/julie-stewart/dont-blame-judges-for-rac_b_1260907.html (arguing that prosecutorial discretion is to blame for the fact that black defendants are charged with crimes that have mandatory minimum sentences more often than white defendants for the same conduct).

28 MATTHEW R. DUROSE ET AL., U.S. DEP'T JUSTICE, CONTACTS BETWEEN POLICE AND THE PUBLIC, 2005, at 1 (2007), *available at* http://bjs.ojp.usdoj.gov/content/pub/pdf/cpp05.pdf (showing that in 2005, the total number of white drivers stopped by the police exceeded that of black drivers, but black drivers were much more likely to be searched once they had been stopped); Robert A. Rankin, *Clinton Calls for Understanding, He Urged Blacks and Whites To Talk, Listen and Learn. He Criticized Louis Farrakhan, Though Not by Name*, PHILA. INQUIRER, Oct. 17, 1995, at A1 (reporting that President Clinton said that while most police are honest lawmen, "[w]e have to root out the remnants of racism in our police departments."); Press Release, Senator Ben Cardin, Cardin, Specter Introduce Bill to Return Equal Protection Under the Law To U.S. Justice System (Feb. 27, 2009), *available at* http://www.cardin.senate.gov/newsroom/press/release/cardin-specter-introduce-bill-to-return-equal-protection-under-the-law-to-us-justice-system (reporting that in response to a 2007 study, Senator Cardin stated that "[t]hese types of disparities and the perception of bias are unacceptable and we should take bold steps to correct these injustices. . . . We must follow President Obama's call to insist on a full measure of justice in every aspect of American life."). Other recent studies have found that black drivers were more likely to be pulled over than other minorities, even though they had a lower probability of carrying large amounts of drugs than other minorities. *See* Katherine Y. Barnes, *Assessing the Counterfactual: The Efficacy of Drug Interdiction Absent Racial Profiling*, 54 DUKE L.J. 1089, 1113, 1132–35 (2005).

29 *See* HUMAN RIGHTS WATCH, *supra* note 25, at 3, 45. Indeed, in many high profile federal charges and executions, discussions of racial bias are at the forefront. *See, e.g.*, *Clinton Postpones Federal Execution; Issuing a Stay: The Last Federal Execution Involved a Hanging in 1963 in Iowa*, TELEGRAPH HERALD, Dec. 8, 2000, at B9 ("In deciding to stay Garza's execution until June 2001, Clinton said he wanted to give the Justice Department more time to gather and properly analyze information about racial and geographic disparities in the federal death penalty system . . . [and that examination of] the possible racial and regional bias should be completed before the United States moves forward . . . [because] 'there is no room for error'"); Eric Houston, *Crime and Punishment: Minorities Get Most Serious Felony Charges, Study Says*, SEATTLE POST-INTELLIGENCER, Nov. 4, 1995, at A1 ("'People of color get the short shrift of it,' said state Supreme Court Justice Charles Smith, who announced the findings yesterday at a news conference. 'The system is designed to prevent racial bias but, subjectively, bias enters into it'").

30 *Racial Disparities*, *supra* note 25, at 8–10; Charles R. Lawrence, III, *The Id, the Ego, and Equal Protection: Reckoning with Unconscious Racism*, 39 STAN. L. REV. 317, 318 nn.1–2 (1987); McCain, *supra* note 6, at 602 ("Due to the prevalence of conscious and unconscious racism in the American criminal justice system, the prospects of a fair trial for African-Americans are diminished."). Others have pinned some fault on the media for over-coverage of crimes committed by black Americans, which leads to unjust charges. Yet others have blamed the structure of the

Charles Lawrence has argued that racial discrimination is both a crime and disease that affects everyone.[31] Indeed, he argues that "Americans share a common historical and cultural heritage in which racism . . . plays a dominant role."[32] Because this "cultural belief system has influenced all of us, we are all racists."[33] Scholars have specifically noted that judges and police are not "immune from our culture's racism" and thus, like others, may not be aware that they have racist beliefs.[34]

In order to further explore these suspicions of where racial bias enters criminal justice,[35] the next Section takes a closer look at two major areas of disparity between black and white defendants: drugs and violent crimes. It examines practices that appear to discriminate on the basis of race to find out, as Randall Kennedy has argued, "what the facts are, whether we like them or not."[36]

A. Drugs and Race

An inquiry into racial bias cannot be separated from the widespread public perception that racial minorities (and racial bias) are closely associated with drug crime.[37] At the outset, it should be noted that although drug crimes are a cause of the great increase in prisoners, they are not the primary cause of the exploding prison population.[38] But even still, the incarceration disparities for drug crimes match public perceptions, as the racial disparity for drug offenses is

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criminal justice system for racism. HUMAN RIGHTS WATCH, *supra* note 25, at 55; López, *Post-Racial Racism*, *supra* note 2, at 1057 ("Racial stratification is also cumulative across time, built into our social architecture's literal and metaphorical concrete."); Miller, *supra* note 2, at 810–11 (blaming federalism for racism in criminal justice as federalism limits the authority and political incentives of the central government to address a wide range of social problems that give rise to crime, and it diffuses political power across multiple venues); Peterson & Krivo, *supra* note 22, at 912 (arguing that crime is often higher in minority neighborhoods where it is "difficult to maintain effective social control because disadvantaged and unstable neighborhoods are characterized by a high degree of social isolation from mainstream society").

31 Lawrence, *supra* note 30, at 321.

32 *Id.* at 322.

33 *Id.* "[R]equiring proof of conscious or intentional motivation as a prerequisite to constitutional recognition that a decision is race-dependent ignores much of what we understand about how the human mind works." *Id.* at 323.

34 *Id.* at 380.

35 We seek, as other commentators have, to understand the extent of racial disparities, the causes and solutions, and to determine whether perception of these disparities is greater or lesser than the problem itself. *Racial Disparities*, *supra* note 25, at 8–10.

36 KENNEDY, *supra* note 21, at 146.

37 HUMAN RIGHTS WATCH, *supra* note 25, at 4.

38 STUNTZ, *supra* note 3, at 47.

much higher than for other offenses.[39] In 2010, black males had an imprisonment rate that was nearly seven times higher than white males.[40] For drug-related offenses, black defendants were 13.4 times more likely to be arrested,[41] and 11.8 times more likely to be imprisoned than white defendants.[42] And the racial disparity between blacks and whites has impacted total incarceration disparities: "[b]etween 1990 and 2000, drug offenses accounted for 27 percent of the total increase in black inmates in state prison and only 15 percent of the increase in white inmates."[43]

Some scholars insist that efforts to decrease racial disparities and limit police discretion are undermined by a focus on drug offenses marshaled by the war on drugs.[44] One famous example of the racial disparity in drug crime is the law enforcement focus on punishing crack cocaine as opposed to the more prevalent powder cocaine.[45] According to some, the focus on crack is evidence of the racial stereotypes that have permeated society, influenced public perceptions of drugs, crime, and danger, and shaped policy responses.[46] Heightened media and political attention focusing on substance abuse and the drug trade in minority neighborhoods has enhanced the public's perception that illegal drugs are more prevalent in minority neighborhoods than in wealthier white neighborhoods.[47] With this shift in public attention to the antidrug war, police have begun to focus on behavior that constitutes the most common crime and "enjoy nearly unlimited discretion in deciding where to look for drug offenders and

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39 HUMAN RIGHTS WATCH, *supra* note 25, at 3.

40 GUERINO ET AL., *supra* note 4, at 7 (this includes black non-Hispanic males).

41 *See Summary and Recommendations*, HUMAN RIGHTS WATCH, UNITED STATES: PUNISHMENT AND PREJUDICE: RACIAL DISPARITIES IN THE WAR ON DRUGS (May 2000), *available at* http://www.hrw.org/legacy/reports/2000/usa/Rcedrg00.htm#P54_1086; *see also* Graham Boyd, *Collateral Damage in the War on Drugs*, 47 VILL. L. REV. 839, 846 (2002); Abbe Smith, *Can You Be A Good Person and A Good Prosecutor?*, 14 GEO. J. LEGAL ETHICS 355, 370 n.104 (2001); Mauer & Cole, *supra* note 3; Keith Rushing, *The Reasons Why So Many Black People Are in Prison Go Well Beyond Profiling*, HUFFINGTON POST (June 23, 2011, 4:55 PM), http://www.huffingtonpost.com/keith-rushing/the-reasons-why-so-many-b_b_883310.html.

42 HUMAN RIGHTS WATCH, *supra* note 25, at 3. Among all African Americans entering the prison system, 38.2% were convicted of drug offenses compared to 25.4% among whites. *Id.* at 14.

43 *Id.* And according to 2009 studies, among blacks currently serving state prison sentences, 21.1% were convicted of drug offenses as compared to 13.9% among whites. GUERINO ET AL., *supra* note 4, at 29 app. tbl.17B.

44 *See* Boyd, *supra* note 41, at 845–50.

45 HUMAN RIGHTS WATCH, *supra* note 25, at 4.

46 *Id.* at 4–5; Murakawa & Beckett, *supra* note 2, at 707.

47 HUMAN RIGHTS WATCH, *supra* note 25, at 41.

against whom to use proactive tactics."[48] As a result, scholars have argued that the rise of the war on crime and drugs has been one of the most important causes of the rising level of racial inequality in arrests and prison admissions.[49]

The next Section examines this assertion to determine whether drug arrests or other crimes constitute the major cause of racial inequality in arrests and detentions.

B. Violent Crime, Drugs, and Race

Many scholars and policy advocates inappropriately blame high incarceration rates on drug offenses, without considering the impact of violent crime on the prison population.[50] This country incarcerates an overwhelmingly high number of drug inmates, but this does not explain high incarceration rates. As James Forman has argued, even if we released all of our drug offenders tomorrow, "the United States would still have the world's largest prison system."[51] Although drug offenses have contributed to the increases in the U.S. prison population, the proportion of prisoners incarcerated for drug crimes is relatively low. While drug offenders account for 61% of the expansion in the federal prison population,[52] they constitute only 35.5% of the nation's prisoners overall.[53] Indeed, according to the Bureau of Justice Statistics, in 2010 there were 1,402,624 state prisoners and 209,771 federal prisoners, with 83,436 of these state and federal prisoners in local jails.[54] With state prisoners, violent offenders constituted 53.2% of the population, property offenders 19.2%, drug offenders 17.8%, and public order offenders 8.9%.[55] Jail inmates seem to be held more equally across the four crime categories.[56] In federal prisons, though,

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48 Murakawa & Beckett, *supra* note 2, at 707.

49 Arthur H. Garrison, *Disproportionate Incarceration of African Americans: What History and the First Decade of Twenty-first Century Have Brought*, 11 J. INST. JUST. & INT'L STUD. 87, 92 (2011) (asserting that "the war on drugs . . . drastically increased the disproportionate representation of African-Americans in federal and state prisons"); Lizbet Simmons, *Buying into Prison, and Selling Kids Short*, 6 MODERN AM. 51 (2011) (noting that a significant component of the prison population expansion during the war on crime was the result of disproportionately high incarceration rates for African Americans).

50 *See* STUNTZ, *supra* note 3, at 55, 268, 271.

51 James Forman, Jr., *Racial Critiques of Mass Incarceration: Beyond the New Jim Crow*, 87 N.Y.U. L. REV. 21, 48 (2012).

52 ALEXANDER, *supra* note 2, at 99.

53 *See infra* Appendix Table 1 (35.5% is the sum of 17.1% and 18.4% in Table 1)

54 GUERINO ET AL., *supra* note 4, at 2, 33 app. tbl.22.

55 *Id.* at 29 app. tbl.17B.

56 DORIS J. JAMES, U.S. DEP'T JUSTICE, PROFILE OF JAIL INMATES, 2002, at 1 (2004), *available at* http://bjs.ojp.usdoj.gov/content/pub/pdf/pji02.pdf (comparing data from 1996 to 2002).

drug offenders are the majority of prisoners at 51%, but federal prisons only hold 13% of all inmates.[57] Overall, violent offenders make up a plurality of the prison population at 47%, with drug inmates constituting 22% of all inmates.[58] And proportionally, while blacks constituted around 12% of the population in 1992, 44.8% of all persons arrested for violent crimes were black.[59] Black arrest rates for robbery are ten times higher than white rates and murder-arrest rates among blacks are seven times higher than white rates.[60] And, on top of that, blacks are disproportionately the victims of high violent crime rates, as crime is mostly intraracial.[61]

Thus, the black-white disparities in violent crime arrests and victimization rates are much higher than in drug arrests. Black Americans are disproportionately affected by violent crime in their communities, and black defendants are dramatically more likely to be arrested for violent crimes than white defendants. Overall, the impact on the prison population for violent crime is also twice as high as it is for drug crimes.[62]

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57 *See* GUERINO ET AL., *supra* note 4, at 1–2, tbl.1 (This 13% comes from the total number of federal prisoners in 2010 (209,771) divided by the total number of prisoners in 2010 (1,612,395).

58 *See id.* at 2, 29 app. tbl.17B, 30 app. tbl.18. While some violent crime is drug related, the Bureau of Justice Statistics estimates that in 2007 only 3.9% of murders were drug related. BUREAU OF JUSTICE STATISTICS, U.S. DEP'T JUSTICE, *Drugs and Crime Facts*, http://bjs.ojp.usdoj.gov/content/dcf/duc.cfm (last visited Sept. 23, 2012, 1:51 PM) (explaining that murders that occurred specifically during a narcotics felony, such as drug trafficking or manufacturing, are considered drug related).

59 MICHAEL TONRY, MALIGN NEGLECT: RACE, CRIME, AND PUNISHMENT IN AMERICA 65 (1995).

60 GARY LAFREE, LOSING LEGITIMACY: STREET CRIME AND THE DECLINE OF SOCIAL INSTITUTIONS IN AMERICA 48–52 (1998) (arguing that social institutions are the key to understanding the U.S. crime wave; crime has increased along with growing political distrust, economic stress, and family disintegration); *see* KENNEDY, *supra* note 21, at 11 ("[C]rime afflicts African-Americans with a special vengeance; at most income levels, they are more likely to be raped, robbed, assaulted, and murdered than their white counterparts.").

61 DAVID M. KENNEDY, DON'T SHOOT: ONE MAN, A STREET FELLOWSHIP, AND THE END OF VIOLENCE IN INNER-CITY AMERICA 31 (2011) (stating that one out of every 200 young black men is killed every year); Forman, *supra* note 51, at 43 ("[M]ore than 90% of black homicide victims are killed by blacks, and more than 75% of all crimes against black victims are committed by blacks.").

62 GUERINO ET AL., *supra* note 4, at 29, tbl.17B; HENRY RUTH & KEVIN R. REITZ, THE CHALLENGE OF CRIME: RETHINKING OUR RESPONSE 33 (2003) (showing that black arrest rates for rape are about four times higher than whites, and burglary and theft are about double white arrest rates). The report rates of serious crimes, like murder, are generally viewed as the most reliable among the Uniform Crime Reports.

The next Section points out that much of the scholarship argues that racial bias in the criminal justice system stems from two systemic problems: prediction and discretion.

II. MALDISCRETION AND PREDICTION HARM MINORITIES

There are two major criticisms that scholars claim cause racial disparity in the U.S. criminal justice system.[63] The first criticism is what I refer to as "maldiscretion": it combines the critiques of several scholars who allege implicit bias and the exercise of improper discretion. The second criticism, which I refer to as "prediction," claims that using statistical methods to make predictions in criminal justice is harmful to minorities.

Maldiscretion claims that the reason black Americans are incarcerated at disproportionate rates is that police, prosecutors, and judges misuse their discretion. According to these scholars, the singular focus on eliminating explicit race discrimination has served to be a blessing and curse.[64] As a result of that focus, formal institutional racism was nearly eliminated, but was replaced with unrestrained discretion. This discretion is what has allowed disproportionate punishment of black Americans without any detection or accountability for racial bias.

Prediction critics assert that using statistical methods to make predictions in criminal justice and prevent future crimes is harmful to minorities. Police and judges often use predictive methods in determining whether to arrest, release, or sentence an individual. Scholars

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63 Recent critics also point to several diseased areas of the criminal justice system, including its federalist structure, inequitable legislative policy, and lack of legal counsel. *See, e.g.*, TASK FORCE ON RACE & CRIM. JUST. SYS., PRELIMINARY REPORT ON RACE AND WASHINGTON'S CRIMINAL JUSTICE SYSTEM 14 (2011), *reprinted in* 87 WASH L. REV. 1, 22–25 (2012) (finding that "[p]olicies can produce foreseeable, if unintended, harms that run along racial lines"); Matthew P. Main, *Promoting Self-Sufficiency? How HRA's Exclusion of Incarceration from the Definition of "Temporary Absence" Contradicts Statutory Mandates and Hurts New York Families*, 14 CUNY L. REV. 105, 137–38 (2010) (identifying obstacles that low-income defendants face in the criminal justice system, including "an inability to afford adequate legal defense to advocate on their behalf" and being "unjustifiably targeted"); William J. Stuntz, *The Political Constitution of Criminal Justice*, 119 HARV. L. REV. 780, 843–44 (2006) (arguing that "America's criminal justice system has a federalism problem" because Congress "criminalizes too much," "sentences too harshly," and "devotes far too much legislative energy to making law for the occasional federal prosecution, instead of regulating—and appropriating funds for—the local officials who do the real work of catching and punishing criminals"). These criticisms should all be studied individually, but are not addressed here.

64 Doris Marie Provine, *Race and Inequality in the War on Drugs*, 7 ANN. REV. L. SOC. SCI. 41, 41 (2011) (explaining that "a pervasive ideology of color blindness discourages serious discussion of inherent racial bias in the criminal justice system").

argue that allowing police and judges to use this information about individuals to determine who is likely to commit a crime increases crime rates, increases punishment for minorities, and leads to injustice.

A. Maldiscretion

Scholars complain that unchecked discretion by police, prosecutors, and judges causes racial discrimination in criminal justice.[65] These critics assert that we operate today on the assumptions that our criminal justice system is colorblind and that rigid legislative policies alone cause racial disparities in prison populations.[66] A related assumption is that racism only occurs by select bad actors and that the era of institutional racism is over.[67] As a result of these assumptions, the courts have closed their doors to claims of race discrimination unless there is rigorous proof of intent to discriminate.[68] Consequently, without court intervention, judges, prosecutors, and police have enjoyed unbridled discretion, which has led to race disparities in criminal justice. These disparities include black defendants being arrested more often, convicted more often, and sentenced for longer periods than white defendants.[69]

Scholars, like Ian López and Michelle Alexander, have criticized the emphasis on colorblindness for allowing racially discriminatory re-

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65 KENNEDY, *supra* note 21, at 5–6 (describing scholars who believe that limiting government power is important and that "left unchecked, officials will virtually always tend to overstep their authority"); *see also* Clyde E. Murphy, *Racial Discrimination in the Criminal Justice System*, 17 N.C. CENT. L.J. 171, 188 (1988) (suggesting that the criminal justice system has not escaped the effects of racism and discrimination that have historically existed in America); Robert J. Sampson & Janet L. Lauritsen, *Racial and Ethnic Disparities in Crime and Criminal Justice in the United States*, 21 CRIME & JUST. 311, 355–56 (1997) (asserting that indirect discrimination affects the criminal justice system and stems from initial disadvantages amplified over time).

66 "Partly through colorblindness and partly through the accumulated weight of cultural beliefs and historical practices, most Americans accept that major American institutions are race-neutral" and recognize and accept the inequalities that exist in these institutions as legitimate features of social reality. López, *Post-Racial Racism*, *supra* note 2, at 1066.

67 Murakawa & Beckett, *supra* note 2, at 696, 698.

68 ALEXANDER, *supra* note 2, at 100–01.

69 David A. Harris, *The Stories, the Statistics, and the Law: Why "Driving While Black" Matters*, 84 MINN. L. REV. 265, 297 (1999) (describing a situation where less white defendants are convicted and sent to prison than black defendants who also received higher sentences than whites for the same crimes); Darrell Steffensmeier, Jeffery Ulmer & John Kramer, *The Interaction of Race, Gender, and Age in Criminal Sentencing: The Punishment Cost of Being Young, Black and Male*, 36 CRIMINOLOGY 763, 786 (1998) (analyzing statewide sentencing outcomes in Pennsylvania for 1989–1992, and finding that "young black males receive more severe sentences than any other race, age, and gender combination").

sults.[70] López asserts that colorblindness ensures that racial disparities in criminal justice can never demonstrate racism without evidence of the express and malicious use of race.[71] Alexander argues that discretion is the real problem because it allows interactions that are not expressly predicated on race, despite any close correlation it may have to blatant racism.[72] Police exercise the greatest discretion, particularly in drug enforcement.[73] And rather than limiting racial profiling, the Supreme Court has essentially given the green light to police to make race-based arrests.[74]

Scholars argue that maldiscretion plagues not only police, but also prosecutors and judges when charging defendants and making incarceration decisions. They point out that the insistence by the government and the courts that race plays no role has led to a closing of the courts to claims of race discrimination in many contexts.[75] The standard of colorblindness is often referred to in the judicial system as the standard of racial intent, and has become the most common test of alleged equal protection violations. It is narrowly construed and requires purposeful discrimination.[76] The intent standard continues to limit legal challenges to racial inequalities in the criminal justice sys-

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70 *See* ALEXANDER, *supra* note 2, at 100–21; López, *Post-Racial Racism*, *supra* note 2, at 1064.

71 López, *Post-Racial Racism*, *supra* note 2, at 1064.

72 *See* ALEXANDER, *supra* note 2, at 101. Additionally, scholars have recognized that "framing racism as intentional harm perpetrated at a discrete moment in time does not capture all the ways race shapes penal beliefs, practices, and outcomes." Murakawa & Beckett, *supra* note 2, at 702–03.

73 ALEXANDER, *supra* note 2, at 121.

74 *Id.* at 128 (relying on *United States v. Brignoni-Ponce*, 422 U.S. 873 (1975), it seems it would be "permissible under the equal protection clause of the Fourteenth Amendment for the police to use race as a factor in making decisions about which motorists to stop and search"). Both *Whren v. United States*, 517 U.S. 806 (1996), and *Alexander v. Sandoval*, 523 U.S. 275 (2001), "wiped out racial profiling litigation nationwide" by requiring intent to discriminate by race. *See* ALEXANDER, *supra* note 2, at 105–06, 134. Also, the Supreme Court has made it clear that it believes that complaints about the police are overblown and that overseeing complicated policing is better left to the executive branch. *See* City of Los Angeles v. Lyons, 461 U.S. 95, 108 (1983); Rizzo v. Goode, 423 U.S. 362, 378–80 (1976).

75 López, *Post-Racial Racism*, *supra* note 2, at 1063.

76 This is evident in cases such as *McCleskey v. Kemp*, 481 U.S. 279 (1987), *Personnel Administrator of Massachusetts v. Feeney*, 442 U.S. 256 (1979), and *Washington v. Davis*, 426 U.S. 229 (1976). Murakawa & Beckett, *supra* note 2, at 697, 701–02. In *McCleskey v. Kemp*, the Supreme Court upheld a capital sentence in spite of evidence of significant racial disparity, exemplifying the logic of colorblindness as seen in the judicial system. *Id.* The Supreme Court recognized the compelling evidence of an inequitable criminal justice system, the fundamental unfairness present in drug sentencing laws, and the disparity in drug law enforcement policies and practices. *See McCleskey*, 481 U.S. at 286–88. However, the Court rejected McClesky's claim of discrimination. *Id.* at 292–93.

tem. The standard of racial intent proves difficult to establish and allows relatively unchecked police discretion.[77] Indeed, the Court has worked diligently to ensure that prosecutors can exercise broad discretion, but has limited the ability of individuals to bring claims of racial bias.[78] Thus, courts are not open to claims by defendants and private parties that the criminal justice system discriminates against black Americans.[79]

As a whole, at all steps in the process—stops, searches, plea bargaining, charging, and sentencing—the Court has made it much more difficult to bring claims of racial bias, resulting in unchecked discretion by criminal justice actors.[80] Scholars have bemoaned the rejection in recent years of racial discrimination cases in all areas of criminal justice.[81] This has allegedly resulted in police, prosecutors, and judges using racially discriminatory practices without detection or intervention by the courts.[82] And some have taken the next step to argue that excess discretion has caused the rise of mass incarceration, particularly among the black population.[83]

While scholars have lamented the existence of subconscious discrimination in arrest and detention, there has been little rigorous study of whether unintentional discrimination exists in criminal justice. To test whether criminal justice actors use their discretion to discriminate against certain groups, Part III sets forth an empirical analysis of a large sample of U.S. counties. The next two Sections

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77 Murakawa & Beckett, *supra* note 2, at 708.

78 ALEXANDER, *supra* note 2, at 112. For example, as a result of the Court's holding in *United States v. Armstrong*, 517 U.S. 456 (1996), a defendant claiming selective prosecution must "offer in advance the very evidence that generally can be obtained only through discovery of the prosecutor's file." ALEXANDER, *supra* note 2, at 114 (emphasis removed).

79 *Id.* at 100.

80 *Id.* at 135. In fact, research on race in criminal justice has claimed that each decision point includes an element of discretion, subject to "covert, overt and unconscious biases." *See* Garrison, *supra* note 49, at 103–04.

81 "Racial disparities have not been caused by discriminatory statutes; instead, such results have been achieved through the racialized exercise of discretion, including selective enforcement by police departments, selective prosecution, and selective sentencing by judges." Butler, *supra* note 21, at 1055–56.

82 "[G]rant[ing] law enforcement officials extraordinary discretion regarding whom to stop, search, arrest, and charge for drug offenses [ensures] that conscious and unconscious racial beliefs and stereotypes will be given free rein." ALEXANDER, *supra* note 2, at 100. Prosecutors also have discretion to charge individuals, to decide whether to plea bargain, and to overcharge defendants with counts that carry mandatory sentences in order to encourage them to plead guilty. *Id.* at 20–57.

83 ALEXANDER, *supra* note 2, at 99–100.

discuss how discretion may impact decisions by police and judges to arrest and incarcerate differently for drug and violent crimes.

1. *Discretion and Drug Crime*

There is an important difference between violent crime and drug crime. Drug crime, unlike violent crime, usually consists of a consensual activity. Although some have argued that this leads to problematic enforcement, it may actually help determine whether bias exists in the criminal justice system. Typically, no one calls the police when drugs are sold or used.[84] However, with violent crime, there is usually immediate harm and the police intervene.[85] As a result, violent crimes are usually reported to the police.[86]

On the other hand, given the consensual nature of drug crimes, they are underreported and police choose to apprehend only about 10% of drug users.[87] For instance, in 2002 there were a reported 19.5 million illicit drug users in the United States and only 1.5 million drug arrests, and 175,000 admitted to prison for a drug offense.[88] With few reports of drug crimes, police must act proactively to apprehend drug criminals. Thus, police exercise significant discretion and have little public accountability when dealing with drug crimes, because such crimes are seldom reported and rarely have victims.[89]

2. *Discretion and Violent Crime*

Scholars often criticize the exercise of discretion by police and prosecutors in drug arrests, but race scholars seldom address disproportionately higher violent crime arrest rates among blacks. They fail to do so even though more of our prison population is incarcerated due to violent crime arrests than for any other type of crime, and more blacks than whites are in prison for violent crime arrests. Indeed, black individuals living in urban communities are not only disproportionately entering prisons for violent crimes, but are

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84 *See* Markus Dirk Dubber, *Policing Possession: The War on Crime and the End of Criminal Law*, 91 J. CRIM. L. & CRIMINOLOGY 829, 885, 936 (2001) (discussing "victimless [drug] possession cases" differing from those with victims and injuries).

85 Timothy C. Hart & Callie Rennison, U.S. DEP'T JUSTICE, REPORTING CRIME TO THE POLICE: 1992–2001, at 4 (2003), *available at* http://bjs.ojp.usdoj.gov/content/pub/pdf/rcp00.pdf (reporting that 90% of violence in which the victim was shot was reported to the police).

86 *Id.*

87 *See* ALEXANDER, *supra* note 2, at 101.

88 *Id. See generally* SUBSTANCE ABUSE AND MENTAL HEALTH DATA ARCHIVE, NATIONAL SURVEY ON DRUG USE AND HEALTH (2002), http://dx.doi.org/10.3886/ICPSR03903.V3.

89 ALEXANDER, *supra* note 2, at 101–02.

disproportionately victimized by violent crime.[90] Furthermore, violent crimes can be more accurately compared to the number of these crimes that occur (as these are nonconsensual crimes that are often reported). However, it is more difficult to determine whether the disparity among blacks and whites in violent crime arrest rates is due to racial bias. As a result, scholars have seldom examined whether judges are using discretion to over-detain, over-sentence, or otherwise more harshly punish black defendants for violent crime.[91]

Another important reality with violent crime rates—which is less true with drug crimes—is that black community members often support policies that increase black imprisonment rates. For instance, many black leaders view tough crime policies as "pro-black."[92] Thus, as judges imprison more black defendants, they simultaneously increase the prison racial gap between blacks and whites, but also arguably protect black victims at higher levels. This paradox is clear in the empirical analysis in Part III.

B. Prediction

Some scholars claim that prediction is partially to blame for racial bias in criminal justice.[93] Criminal justice actors often predict which

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90 James Forman, Jr., *Community Policing and Youth as Assets*, 95 J. CRIM. L. & CRIMINOLOGY 1, 28 (2004). Through research, Forman has come to believe that many African American youths' acts of violence have often been closely connected to other youths feeling unsafe in that environment. *Id.* at 27–28. Many of the youths' experiences with violence have left them begging for more accountability and help from the criminal justice system, thus reinforcing the case for a more punitive crime policy. *Id.* at 28.

91 *See* Shawn D. Bushway & Anne Morrison Piehl, *Judging Judicial Discretion: Legal Factors and Racial Discrimination in Sentencing*, 35 LAW & SOC'Y REV. 733, 740–42 (2001) (reviewing studies of judicial discretion used to stray from sentencing guidelines and related claims of racial bias); Ojmarrh Mitchell, *A Meta-Analysis of Race and Sentencing Research: Explaining the Inconsistencies*, 21 J. QUANTITATIVE CRIMINOLOGY 439, 462–64 (2005) (reviewing studies on racial discrimination in criminal sentencing and concluding lack of racial neutrality). *But see* Patrick A. Langan, *No Racism in the Justice System*, 117 PUB. INT. 48, 51 (1994) (examining data from a Justice Department Survey about racial bias in the criminal justice system and concluding that no racial bias exists).

92 Randall Kennedy, *The State, Criminal Law, and Racial Discrimination: A Comment*, 107 HARV. L. REV. 1255, 1258–59 (1994) ("[S]ome of the policies most heatedly criticized by certain sectors of black communities are supported and enforced by other African-Americans within these same communities."); *see also* Forman, *supra* note 90, at 42–44.

93 HARCOURT, *supra* note 19, at 4; *see also* JOHN MONAHAN, PREDICTING VIOLENT BEHAVIOR: AN ASSESSMENT OF CLINICAL TECHNIQUES 32 (1981) (noting that some of the "principal statistical correlates of future violent behavior are . . . sex, age, race, [and] socioeconomic status"); John S. Goldkamp, *Prediction in Criminal Justice Policy Development*, 9 CRIME & JUST. 103, 129–30 (1987) (noting that critics of prediction "fear that reliance on empirical modeling may institutionalize discriminatory practices"); Joan Petersilia & Susan Turner, *Guideline-Based Justice: Prediction and Racial Minorities*, 9 CRIME & JUST. 151, 167 (1987) (suggesting that the

defendants are going to commit an additional crime in determining whether to arrest defendants, to release them on bail, or to release them on parole, or in determining their sentence. This prediction is often based not only on individual evaluation, but also on a group's criminality and past behavior.[94] Whether this prediction is done effectively by judges, police, and other actors is a disputed matter that will not be addressed here.[95] However, some scholars, like Bernard Harcourt, have argued that such predictions actually increase crime rates and harm black defendants.[96] Arguments against prediction include that it encourages discrimination against black defendants and allows judges to inappropriately consider race in determining who will commit an additional crime.[97] In other words, judges use race as a proxy for risk. Arguments also include that prediction results in a self-perpetuating overrepresentation of certain minority offenders as compared to the offending population as a whole.[98] As a result, the use of predictive methods leads to injustice in the criminal system.[99] These criticisms are addressed in order.

1. *Prediction Increases Crime Rates*

Scholars suggest that police and judges should not attempt to predict which defendants will commit crimes because doing so may increase crime rates. When police rely on predictive methods, success is amplified by increased arrests (rather than decreased crime).[100] In-

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expanded use of racially correlated factors in prediction "may actually increase racial disparities in sentencing, probation supervision, and prison time served"); Michael Tonry, *Prediction and Classification: Legal and Ethical Issues*, 9 CRIME & JUST. 367, 399 (1987) (noting that the use of prediction may indirectly result in the occurrence of race effects if the prediction system "incorporate[s] variables that are correlated with race").

94 HARCOURT, *supra* note 19, at 17.

95 *See* Shima Baradaran & Frank L. McIntyre, *Predicting Violence*, 90 TEX. L. REV. 497, 502–03 (2012) (setting forth factors that can help determine who may commit pretrial crime and whether more defendants can safely be released pretrial without increasing crime rates.); Christopher Slobogin, *A Jurisprudence of Dangerousness*, 98 NW. U. L. REV. 1, 3–4 (2003) (assessing the claims and counterclaims made about the psychological and prediction criteria for preventive detention.)

96 *See, e.g.*, HARCOURT, *supra* note 19, at 3.

97 *See id.*

98 *Id.*

99 *See id.*

100 Some economists argue that profiling may be the most efficient use of law enforcement resources, because it maximizes the success rate of police activity and reduces the offense rate of higher offenders. Thus, in highway searches, for example, police officers' tendencies to search racial minorities and their cars more frequently does not in and of itself demonstrate racism, but rather could be an effort to maximize successful searches. *See id.* at 111–12; *see also* Yoram Margalioth, *Looking at Prediction from an Economics Perspective: A Response to Harcourt's*

deed, some claim that racial profiling actually does not lower crime rates,[101] which is arguably the proper role of law enforcement activity.[102] And when judges rely on predictive methods, the public is more likely to blame them when they release an individual who then commits a heinous crime.[103] With pretrial detention, if judges detain high-risk defendants in greater numbers than low-risk defendants, they may allow low-risk defendants to commit more crimes while on release, leading to more actual crime.[104]

Against Prediction, 33 LAW & SOC. INQUIRY 243, 248–49 (2008). Harcourt claims that profiling is unlikely to be efficient when it is used to target minority groups. HARCOURT, *supra* note 19, at 123–24. However, the efficiency of profiling does not depend on relative group size, but instead on elasticities. If the minority group's elasticity is higher than the majority, profiling aimed at the minority will increase deterrence. However, if the majority's elasticity is higher, then the majority should be targeted. It does not matter which group is larger, only the relative elasticities. Margalioth, *supra*, at 247.

101 *See* HARCOURT, *supra* note 19, at 138. Others disagree and believe that criminal profiling has been effective in deterring crime. Russell L. Jones, *Bernard E. Harcourt's Against Prediction: Profiling, Policing, and Punishing in an Actuarial Age*, 4 J.L. ECON. & POL'Y 219, 219 (2007) (book review) ("Scholars who support criminal profiles suggest that more streamlined suspect pools permit law enforcement officers to better target limited resources to protect the non-offending population."); *see* Brandon del Pozo, *Guided by Race: An Ethical and Policy Analysis of Racial Profiling in Law Enforcement Decisionmaking*, 1 QUEENSLAND U. TECH. L. & JUST. J. 266, 272 (2001).

102 HARCOURT, *supra* note 19, at 124.

103 Judges fear incorrectly predicting which defendants will commit crimes. This in turn leads judges to fear releasing individuals and being personally blamed for pretrial crimes or crimes on parole. This fear is legitimate because society is weary of the heinous crimes that are committed by released defendants. *See* John A. Wilson, *Don't Blame Bail Reform*, WASH. POST, Sept. 20, 1992, at C8 (discussing community outrage at the carjacking and murder of a woman after a man was released pending trial on felony drug charges); *see also* George E. Dix, *Bail System Requires a Fresh Approach*, TEX. LAW., Nov. 15, 1993, at 12 (questioning the Texas practice of reliance on money bail, which allows potentially dangerous defendants who can pay the ability to make bail); Editorial, *When a Life Becomes Cheaper Than a BMW*, WASH. TIMES, Sept. 14, 1992, at E2 (discussing a crime where two men dragged a woman from her car and killed her when one of these men could have been detained under the city's new bail law, but the prosecutor chose not to pursue preventative detention); William H. Freivogel, *Drug, Gun Culture Tests the Definition of Excessive Bail*, ST. LOUIS POST-DISPATCH, Dec. 10, 1991, at 1C (arguing for a bill that would deny bail to potentially dangerous young suspects who don't have criminal records by using the example of a young man who shot and killed a woman while on bail for assault charges); Jason Geary, *Homeless Man's Jailing Questioned*, LEDGER (July 11, 2006, 12:01 AM), http://www.theledger.com/article/20060711/NEWS/607110400?p=1&tc=pg (discussing judicial scrutiny after a man with a record of probation violations was convicted of kidnapping and killing an eleven-year-old girl); Dirk Johnson, *Pretrial Detention: 2 Sides of an Issue*, N.Y. TIMES, July 13, 1987, at A13 (analyzing the debate over preventative detention by comparing the case of a convicted burglar who, before being acquitted, spent four months in jail after he was denied bail, with the case of a man who was granted bail after raping and beating a woman, and who then drove to court with another woman in his trunk who he later killed).

104 HARCOURT, *supra* note 19, at 219.

Particularly with police, Harcourt argues that focusing on maximizing arrest rates will only increase arrests of black individuals. He argues that arrests only decrease overall crime if those who are profiled more often (blacks) have the same or greater likelihood to stop committing crimes as those who are less profiled (whites).[105] However, he argues that minority groups may actually be less likely to respond to higher policing for the same reasons they tend to have higher offense rates.[106] Thus, law enforcement may need to devote a considerable amount of resources before the offense rates of minorities decrease. But if police divert resources toward minorities and away from whites, the offense rate among whites may increase even more quickly or in greater magnitude than the decrease in offense rates among minorities.[107] Thus, Harcourt argues that because there are more whites than minorities in society, the overall rate of crime in society can increase when higher offending racial groups are targeted.[108]

These claims are made without any evidence supporting either of these scenarios, or any evidence that individuals have responded to prediction at all. There is no evidence that crime rates increase or decrease due to police profiling, and a comprehensive view of the extent to which racial profiling affects crime rates is largely lacking.[109] To determine the effect of profiling on crime, the intuitive question is whether more arrests in one area lead to less crime in that area. The answer to this question is not clear. And indeed, some argue that more drug arrests do not lead to less crime.[110] Without a clear answer, it is hard to discuss the alternatives—particularly when Harcourt ar-

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105 *Id.* at 123.

106 *Id.* For example, if minorities offend at a higher rate because they are more socioeconomically disadvantaged, this may cause them to be less responsive to policing efforts to decrease their offense rate. *Id.*

107 *Id.* at 124–25.

108 *Id.* Harcourt argues that a similar effect can happen in the sentencing and parole context. *Id.* at 140–44. Rather than speaking in terms of elasticity, Margalioth and Blumkin engage in marginal analysis between individuals who are equally likely to commit a crime or abide by the law (marginal offenders), arguing that law enforcement should seek to minimize crime by deterring marginal offenders because they will be more responsive than the higher offending group. Yoram Margalioth & Tomer Blumkin, *Targeting the Majority: Redesigning Racial Profiling*, 24 YALE L. & POL'Y REV. 317, 318–19 (2006).

109 Given the implicit permission granted by courts for police to make race-based decisions discussed in the last Section, these decisions are now less closely monitored. *See supra* text accompanying notes 74–83.

110 Eda Katharine Tinto, *The Role of Gender and Relationship in Reforming the Rockefeller Drug Laws*, 76 N.Y.U. L. REV. 906, 942–43 (2001) (arguing that options such as drug treatment are less costly and more effective at reducing drug crime than imprisonment).

gues that crime will increase with more or less arrests. Thus, there is no evidence to support or dismiss the claim that crime increases with prediction.

The question still remains whether prediction harms minorities. There is some evidence, particularly with drug crimes, that police target and search blacks more often and more rigorously than whites.[111] This has nothing to do with minority defendants committing more crimes, but simply shows that they undergo more scrutiny and are arrested more often. In response, this Article engages criticism that prediction may be unfairly applied against certain races—whether at the point of arrest, detention, or sentencing. Thus, Part III considers how prediction affects black defendants and white defendants and whether it contributes to the disproportionate number of blacks in prison.

2. *Prediction Increases Punishment of Blacks*

Another argument against prediction is that statistical methods lead to the increased punishment and incarceration of blacks.[112] As law enforcement dedicates more of its resources to patrolling and investigating blacks in urban areas, the resulting arrest population is not a proportional representation of all offenders, but rather disproportionately represents black citizens.[113] Whether a person obtains a criminal record (and the size of that record) is related to both criminal activity and race.[114] Thus, more blacks are represented in the arrest population, and this overrepresentation self-perpetuates and becomes

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111 HARCOURT, *supra* note 19, at 138–39; Tracey Meares, *The Legitimacy of Police Among Young African-American Men*, 92 MARQ. L. REV. 651, 654 (2009); Dorothy E. Roberts, *The Social and Moral Cost of Mass Incarceration in African American Communities*, 56 STAN. L. REV. 1271, 1273, 1275 (2004) (offering statistics demonstrating that while whites use illegal drugs more often, a larger proportion of blacks were imprisoned for drug charges in 1998).

112 Harcourt calls this the ratchet effect. HARCOURT, *supra* note 19, at 145, 220. "[I]ncarceration plays a role in constructing the meaning of race in American society by defining race and crime in terms of each other," and this definition of blacks as criminals may also prompt people to associate other negative characteristics with blacks. R. Richard Banks, *Beyond Profiling: Race, Policing, and the Drug War*, 56 STAN. L. REV. 571, 598 (2003). Banks views the criminal justice system as playing a role in the socialization of young black males and in the development of black popular culture. *Id.* It can also become a self-fulfilling prophecy, as racial stereotypes cause police to monitor blacks for criminal behavior more frequently and extensively than whites, resulting in a greater portion of arrested and incarcerated individuals being black. Katherine Y. Barnes, *Assessing the Counterfactual: The Efficacy of Drug Interdiction Absent Racial Profiling*, 54 DUKE L.J. 1089, 1093 (2005). Thus, "[o]ver decades, a stereotype that blacks are more likely to engage in criminal activity can transform itself into large and statistically significant differences" between blacks and whites. *Id.*

113 HARCOURT, *supra* note 19, at 147.

114 Garrison, *supra* note 49, at 104.

increasingly aggravated as law enforcement officers and judges rely on arrest and prison data to determine who is more likely to commit crimes in the future.[115] This in turn exaggerates the public and police perception that blacks commit more crimes, as well as the association between being black and being a criminal.[116] In addition, considering previous convictions makes it more difficult for people with prior records to enter into society successfully and limits their access to education and employment.[117] Furthermore, increasing punishments for repeat offenders also leads to blacks being overrepresented in the prison population, and leads to them receiving longer sentences and increased supervision in parole determinations.[118] Thus, the argument goes, blacks become more heavily represented in the criminal justice system due to prediction rather than due to their committing more crimes.

According to some scholars, relying on prior criminal history is a particularly problematic practice in criminal justice decisions. Harcourt and others argue that predicting which defendants are likely to commit crimes based on prior criminal history will lead to the overrepresentation of certain defendants in prison as well as increased crime levels.[119] This overrepresentation may turn race into a proxy for suspecting individuals as criminals.[120] Indeed, Harcourt argues that race can become a proxy for the risk of committing crime, leading to overrepresentation of blacks in the criminal justice system.[121]

The next Section addresses these two criticisms by asking whether prediction has a compounding effect for blacks in the criminal justice system that disproportionately increases their punishment rates, and whether judges inappropriately use race as a proxy for risk of committing crime. The argument that minorities are punished more for previ-

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115 *See* HARCOURT, *supra* note 19, at 147–49, 152–56.

116 *Id.* at 162.

117 *Id.* at 162–65; Meares, *supra* note 111, at 662; Roberts, *supra* note 111, at 1293 (incarceration "aggravates the already severe labor-market problems of their mostly low-income, poorly educated inmates in lasting ways" and "creates powerful barriers to finding legal employment by discouraging potential employers, interrupting employment history, eroding job skills, and undermining social connections to stable job opportunities" (internal quotation marks omitted)).

118 HARCOURT, *supra* note 19, at 168. Indeed, scholars have found that incarceration rates increase when a defendant has a more serious criminal history. *Id.*

119 *See supra* notes 93–104 and accompanying text.

120 HARCOURT, *supra* note 19, at 220–21.

121 *Id.* It may also result in what other scholars have called a "racial tax," where police use blackness as a proxy for risk rather than hiring more police officers, inconveniencing more people at checkpoints, and prohibiting police from taking race into account. KENNEDY, *supra* note 21, at 160–62.

ous crimes is a persuasive one. It may be the case that police are more heavily scrutinizing minority defendants and arresting them at much higher levels, despite equal amounts of crime among white defendants.[122] It may also be the case that judges are detaining more defendants based on their race, which they falsely associate with higher criminality.

To contribute to the understanding of how race impacts criminal justice decisions, the next Section empirically examines whether and how prediction and discretion may contribute to black defendants being arrested and detained more than white defendants. To do so, it closely examines police decisions to arrest defendants for violent crimes and drug crimes, as well as judicial decisions to release or detain defendants pretrial. It will examine these decisions to determine whether judges or police improperly take account of a defendant's race.

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122 Harcourt used racial profiling in highway searches for drugs in Maryland as a case study for his three criticisms of using actuarial methods to profile and predict crime. He first cited several self-report studies indicating slightly less personal drug use among blacks and Hispanics than among whites, HARCOURT, *supra* note 19, at 199–204, as well as public health data indicating slightly greater personal drug use among minorities than among whites, *id.* at 207. He also referenced car search data, finding a higher rate of white motorists than black motorists carrying drugs for personal use but a higher rate of black motorists than white motorists carrying drugs for trafficking or dealing purposes. *Id.* at 208–09. He then examined the Maryland data and determined that, assuming minority motorists have a slightly higher drug offense rate and slightly lower elasticity of offending in response to policing, *id.* at 212–14, racial profiling on the highways likely increased overall crime, because "numerically more white motorists offend[ed due to] a perceived sense of immunity," *id.* at 214. Harcourt then compared the percentage of searches that police performed on minorities to the types of drug offenses the police discovered during these searches. *Id.* at 213. He found that 63% of the searches were performed on minorities, and that 84% of all motorists found with drugs were carrying only trace or personal-use amounts of drugs (68% of motorists found with drugs had trace or personal-use amounts of marijuana only). *Id.* The data mentioned earlier concerning personal drug use suggests that personal drug use, especially use of marijuana, is relatively the same among minorities and whites. This implies that police "subject a disproportionate number of minority motorists to criminal justice supervision to equalize offending rates." *Id.* According to Harcourt, this implies the existence of the ratchet effect and the fact that profiling harms minorities. *Id.* at 214.

Several researchers have expressed concerns similar to Harcourt's about racial profiling, the "ratchet effect," and the negative impact that predicting crime has on minority groups, particularly young black males using similar data. *See* Barnes, *supra* note 112, at 1107–10; Samuel R. Gross & Katherine Y. Barnes, *Road Work: Racial Profiling and Drug Interdiction on the Highway*, 101 MICH. L. REV. 651, 659–60 (2002). After controlling for several variables, including characteristics of the driver such as gender and race, characteristics of the vehicle such as luxury cars and large commercial trucks, state or region in which the car was registered, characteristics of the encounter such as traffic violations, time of day, and direction of travel, Barnes discovered that "the driver's race is the most salient factor in a trooper's decision to search a stopped vehicle." *Id.* at 1110–13.

III. EXAMINING DATA OF PREDICTION AND DISCRETION IN CRIMINAL JUSTICE

Before turning to the data, it is important to note when prediction and discretion occur in the criminal justice system. Prediction occurs in pretrial detention, civil commitment decisions,[123] cases involving sexual offenders,[124] parole and probation,[125] some sentencing determinations,[126] and death penalty cases.[127] In all of these cases, criminal justice actors predict whether an individual is likely to commit a crime if released, thereby determining whether releasing the individual is safe.[128] None of these situations permit the actors to take race into account,[129] but they can (and often do) consider other factors

123 John Monahan, *A Jurisprudence of Risk Assessment: Forecasting Harm Among Prisoners, Predators, and Patients,* 92 VA. L. REV. 391, 406–07 (2006).

124 *Id.* at 433.

125 *See* Daniel Weiss, *California's Inequitable Parole System: A Proposal to Reestablish Fairness*, 78 S. CAL. L. REV. 1573, 1575 (2005).

126 Marc Miller & Martin Guggenheim, *Pretrial Detention and Punishment*, 75 MINN. L. REV 335, 380 (1990).

127 Norval Morris & Marc Miller, *Predictions of Dangerousness*, 6 CRIME & JUST. 1, 2–5 (1985). This list should not be taken as exhaustive. *See id.* at 7–10; *see also* Elyce H. Zenoff, *Controlling the Dangers of Dangerousness: The ABA Standards and Beyond*, 53 GEO. WASH. L. REV. 562, 562 n.2 (1985) (including sentencing, probation, parole, sexual offenses, civil commitment, and death penalty cases in a long list of decisions that rely on findings of dangerousness). Some find it alarming that "the use of dangerousness in death penalty deliberations and in setting prison terms is increasing." *Id.* at 589. Civil commitment laws for sexually violent predators generally require a risk that the individual will engage in repeated acts of sexual violence if not incarcerated. Melissa Hamilton, *Public Safety, Individual Liberty, and Suspect Science: Future Dangerousness Assessments and Sex Offender Laws*, 83 TEMP. L. REV. 697, 703–04 (2011) (using Kansas law as an example).

128 Under Texas capital felony law, the jury is required to decide, among other things, whether the individual convicted of a capital crime would likely "commit criminal acts of violence that would constitute a continuing threat to society." George E. Dix, *Administration of the Texas Death Penalty Statutes: Constitutional Infirmities Related to the Prediction of Dangerousness*, 55 TEX. L. REV. 1343, 1352 (1977). If the jury answers "yes" to that inquiry and others, the judge is required to impose the death penalty. *Id.* Other states have similar schemes that include jury determinations of dangerousness before imposing the death penalty. *See* Mitzi Dorland & Daniel Krauss, *The Danger of Dangerousness in Capital Sentencing: Exacerbating the Problem of Arbitrary and Capricious Decision-Making*, 29 LAW & PSYCHOL. REV. 63, 64 n.5 (2005). In California, both the governor and the parole board make dangerousness determinations to decide if the inmate would pose a risk to society if released. *See* Pearson v. Muntz, 606 F.3d 606, 611 (9th Cir. 2010) (per curiam). With regard to expert testimony about dangerousness, the trial judge acts as the gatekeeper, determining what testimony can be considered by the jury in making its determination of dangerousness. M. Neil Browne & Ronda R. Harrison-Spoerl, *Putting Expert Testimony in its Epistemological Place: What Predictions of Dangerousness in Court Can Teach Us*, 91 MARQ. L. REV. 1119, 1130–40 (2008).

129 *See* Monahan, *supra* note 123, at 392–93 (noting that Texas Attorney General John Cornyn conceded to the Supreme Court that using race as a factor in sentencing "'seriously undermined the fairness, integrity or public reputation of the judicial process'"). The Federal

such as criminal history, the nature of the current charge, the defendant's previous experience with the court system,[130] and sometimes her employment history, family status, and other characteristics.[131] Examining data related to prediction in the pretrial detention context may inform decisions in other predictive contexts such as parole, probation, and sentencing, where criminal justice actors make similar determinations.

The mechanics of pretrial detention are important in understanding prediction and discretion. Although defendants in most jurisdictions should presumptively be released on bail when charged with a crime, judges often consider several factors in determining whether to release a defendant. In most U.S. jurisdictions, judges must predict whether the defendant will appear in court and whether she will be a threat to the community on release. Judges often set high bail amounts or prohibit release for defendants that they deem a threat to the community or a flight risk. Judges have broad discretion to predict who will commit a crime and may detain defendants who they determine pose a risk. By examining over 130,000 detention decisions over a fifteen-year period in forty U.S. states, this Article determines how these predictive decisions treat black defendants. It provides insight into whether scholars are correct to warn against racial bias in prediction and discretion, and why blacks experience higher rates of pretrial detention than whites.

Besides pretrial racial treatment gaps, another related reason to examine pretrial release decisions is to shed light on potential discrim-

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Sentencing Commission stated that in addition to race, "sex, religion, national origin, socioeconomic status, and disadvantaged upbringing" are not relevant during sentencing. *Id.* at 397. *But see* Sara Steen et al., *Images of Danger and Culpability: Racial Stereotyping, Case Processing, and Criminal Sentencing*, 43 CRIMINOLOGY 435, 437–38 (2005) (arguing that sentencing disparities are due in part to racial stereotypes that affect perceptions of danger).

130 For instance, whether they have failed to appear for a court date.

131 For example, the gravity of the offense and a convict's criminal record determine whether and for how long a convict should be imprisoned in the Minnesota/Pennsylvania-type system. Morris & Miller, *supra* note 127, at 39. The nature of the current offense, prior convictions, prior misconduct not resulting in conviction, and reputation were all used in Texas. Dix, *supra* note 128, at 1385–94. The Violence Risk Appraisal Guide (VRAG) considers criminal history, failures during a prior conditional release, marital status, as well as other factors to predict dangerousness. Daniel A. Krauss et al., *Limited Expertise and Experts: Problems with the Continued Use of Future Dangerousness in Capital Sentencing*, *in* MENTAL DISORDER AND CRIMINAL LAW: RESPONSIBILITY, PUNISHMENT AND COMPETENCE 135, 140–41 (Robert F. Schopp et al. eds., 2009). While "education, vocational skills, employment record, family ties, community ties, age, mental and emotional condition, and substance abuse" were all listed as factors by the federal sentencing commission that "are not ordinarily relevant in the determination of a sentence," they are still used at times. Monahan, *supra* note 123, at 397.

ination. The pretrial decision is often a good preview of an actual trial. In the pretrial decision, the judge examines the defendant's alleged crime, her prior record, and the evidence against her, then determines whether she should be released or detained pretrial.[132] This pretrial decision is highly indicative of whether the defendant receives a custodial sentence or is convicted at trial.[133] With this information culled pretrial, the judge is also charged (in most jurisdictions) to detain defendants who are likely to commit a crime if released.[134] The pretrial decision, then, is a good place to begin the inquiry into racial bias in the criminal justice system more broadly.

Critics of maldiscretion often support their criticism by pointing to police decisions to arrest,[135] prosecutors' decisions to charge,[136] and judges' decisions to issue black defendants long sentences.[137] In all of

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132 Baradaran, *supra* note 17, at 728–38 (discussing the expansion of what judges consider pretrial).

133 *See, e.g.*, MARY T. PHILLIPS, NEW YORK CITY CRIMINAL JUSTICE AGENCY, INC., PRETRIAL DETENTION AND CASE OUTCOMES, PART 2: FELONY CASES 25–36 (2008) (confirming earlier studies demonstrating the link between pretrial detention and an increased likelihood of conviction).

134 Baradaran, *supra* note 17, at 746–51 (discussing the trend in federal and state law to detain defendants who are likely to commit a crime).

135 *See* David Cole, *The Paradox of Race and Crime: A Comment on Randall Kennedy's "Politics of Distinction,"* 83 GEO. L.J. 2547, 2566 (1995) (arguing that "[r]acial stereotypes are likely to influence the police officer's decision about whom to watch or stop"); Kenneth B. Nunn, *The "Darden Dilemma": Should African Americans Prosecute Crimes?*, 68 FORDHAM L. REV. 1473, 1489–91 (2000) (arguing that police disproportionately target African Americans and overpolice black neighborhoods); Stuntz, *supra* note 63, at 791 (noting that "[w]hom the police catch depends on where they look" and "[w]here they look is largely up to them").

136 *See* Josh Bowers, *Legal Guilt, Normative Innocence, and the Equitable Decision Not to Prosecute*, 110 COLUM. L. REV. 1655, 1656–57 (2010) (arguing that the reasoning behind prosecutorial discretion in charging falls into one of three categories: (i) "lack [of] sufficient proof of legal guilt, (ii) . . . preserv[ing] limited resources, or (iii) . . . conclud[ing] that the prospective defendant is insufficiently blameworthy"); David Cole, *What's Criminology Got to Do with It?*, 48 STAN. L. REV. 1605, 1617 (1996) (noting that prosecutorial discretion extends to plea bargaining and decisions of whether or not to prosecute); Ellen S. Podgor, *Race-ing Prosecutors' Ethics Codes*, 44 HARV. C.R.-C.L. L. REV. 461, 464 (2009) (noting that "there are few legal restrictions to prosecutors in their decisions of whom to charge, what charges to use, and when to proceed or not proceed against an individual"); Andrew E. Taslitz, *Judging Jena's D.A.: The Prosecutor and Racial Esteem*, 44 HARV. C.R.-C.L L. REV. 393, 423 (2009) (noting that prosecutorial discretion extends to whether or not to charge a juvenile as an adult).

137 *See* Christopher M. Alexander, *Indeterminate Sentencing: An Analysis of Sentencing in America*, 70 S. CAL. L. REV. 1717, 1730 (1997) (discussing a study that indicated that African American males "receive longer sentences than similarly situated offenders of other races"); Margareth Etienne, *Pain and Race: A New Understanding of Race-Based Sentencing Disparities*, 3 U. ST. THOMAS L.J. 496, 502 (2006) (explaining that "[i]t has taken approximately eighty years of research, in four distinct waves, to conclude that sentencing decision-makers . . . either consciously or unconsciously use race as a factor in imposing longer and more severe sentences on African-American defendants").

these decisions, criminal justice actors decide whether to bring an individual into the criminal justice system or whether to let the defendant go free. As the defendant moves from police up the chain toward judges, the actor's discretion decreases.[138] Unfortunately, there are no national datasets that discuss prosecutors' charging decisions and whether they contain racial bias. Thus, I focus solely on how discretion and prediction affect the decisions of police and judges.

This Study utilizes data comparing police decisions to arrest with crimes reported by victims. This comparison is useful for violent crimes but is not as accurate with victimless crimes, like drug use and sale. Thus, the conclusions in this area will be limited. Nevertheless, this Section broadly examines discretion and prediction in the context of police arrests and judicial decisions to detain defendants to determine whether there is racial bias in these decisions.[139]

The following Sections describe the dataset and the results of empirical models testing whether race is currently contemplated in arresting individuals and predicting who will commit crimes pretrial. Examining aggregate numbers of actual crimes and arrests, this analysis ascertains whether judges make decisions based on race, prior convictions, current crimes charged, or other factors. It also highlights the following questions: Do judges and police officers use their discretion to disproportionately arrest and detain black defendants? Are judges racially biased when deciding who to release pretrial or predicting who will commit crimes on release? Are judges in some localities more racially biased than others? And a more difficult question: is it appropriate for judges to consider the likelihood that a defendant may commit an additional crime, even if it is linked to that person's race? These difficult questions will be addressed below.

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138 *See* Joseph Goldstein, *Police Discretion Not to Invoke the Criminal Process: Low-Visibility Decisions in the Administration of Justice*, 69 YALE L.J. 543, 543 (1960) ("Police decisions not to invoke the criminal process largely determine the outer limits of law enforcement. By such decisions, the police define the ambit of discretion throughout the process of other decision-makers—prosecutor, grand and petit jury, judge, probation officer, correction authority, and parole and pardon boards."); Stuntz, *supra* note 63, at 791 (noting that "as a practical matter [the discretion of police officers] is nearly total"). *But see* Angela J. Davis, *Prosecution and Race: The Power and Privilege of Discretion*, 67 FORDHAM L. REV. 13, 18 (1998) (arguing that prosecutors' discretion gives them "more power than any other criminal justice officials").

139 I also do not discuss judicial sentencing because much of the race aggregated data has recently been presented by the U.S. Sentencing Commission, and we make note of it here and consider it with our conclusions. *See* U.S. SENTENCING COMM'N, REPORT TO CONGRESS: MANDATORY MINIMUM PENALTIES IN THE FEDERAL CRIMINAL JUSTICE SYSTEM xxix, xxxii–xxxiii (2011).

A. *Data*

This Article relies on a nationally representative dataset covering seventy-five large urban counties from 1988 to 2006.[140] The counties in the sampling frame cover approximately 38% of the U.S. population.[141] The dataset includes more than 56,000 observations of felony defendants from the time of arrest through trial over the eighteen-year period.[142] Over this period, judges released a little over 34,000 defendants, with an average release period of about 250 days.[143]

The dataset provides a rich source of information on initial crime accusations for violent, property, drug, and public order offenses. It also includes information regarding the prior criminal history of the defendant,[144] as well as basic information, like the defendant's age and race. The sample is restricted to men, so gender is not a factor. This Article assesses whether race is important to judges' decisions by using models that consider, and others that ignore, race as a predictor of future misbehavior.[145] The results are robust with respect to selection bias[146] and standard errors.[147] The next Section examines an important question: are black defendants more likely to be arrested for crimes while released?

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140 These data come from the Department of Justice's State Court Processing Statistics ("SCPS") from 1988 to 2006. SCPS, formerly known as the National Pretrial Reporting Program, tracks defendants who are arrested on felony charges. *See* BUREAU OF JUSTICE STATISTICS, U.S. DEP'T JUSTICE, STATE COURT PROCESSING STATISTICS (SCPS), *available at* http://bjs.ojp.usdoj.gov/index.cfm?ty=dcdetail&iid=282. The survey takes data from May of each year, with sampling done in the large jurisdictions, and provides weights that allow users to reconstruct a sample representative of the 75 counties.

141 Every two years, SCPS automatically surveys the ten largest U.S. counties, as well as thirty other counties drawn from the next sixty-five largest counties. *See id.*

142 The original dataset contains a little over 130,000 observations, but due to multiple factors, the sample for this Article contains only 56,675 observations. For an in-depth discussion of the process used to create this original dataset, see McIntyre & Baradaran, *supra* note *, at 3–5.

143 For data on defendants who are held in jail and defendants who are released and rearrested, see McIntyre & Baradaran, *supra* note *, at 3 n.10.

144 *See infra* Appendix Table 2. Table 2, discussed below, gives summary statistics for the covariates used in the probit model.

145 *See infra* Appendix Table 1. Table 1 summarizes characteristics about the original offenses and subsequent outcomes of defendants in the sample.

146 For a discussion of the potential for selection bias, see McIntyre & Baradaran, *supra* note *, at 25–26. For a discussion of the more serious concern that judges might be relying on unobserved characteristics, see Baradaran & McIntyre, *supra* note 95, at 538–42.

147 For a discussion of the robustness of the standard errors, McIntyre & Baradaran, *supra* note *, at 26.

B. *Arrest Rates by Race*

The first and most basic question is whether black defendants are more likely to be arrested for a crime while released on bail. It is important to answer this basic threshold question because if race is not a predictor of additional crimes, then judges who are trying to predict accurately should not consider race. Previous studies have found that judges consider race when deciding who will commit a new crime on release,[148] which confirms that arrest and conviction rates vary systematically by race.[149]

The pretrial release data indicate that the most common initial crimes for which defendants are arrested are drug crimes (a total of 35.5% of all defendants), followed by property crimes (30.3%) and violent crimes (24.9%).[150] The data indicate that 61.9% of felony defendants in the sample are black.[151] Of individuals in general rearrested while on pretrial release, rearrest rates for black defendants committing violent crimes are noticeably higher (4%) compared to white defendants (2%).[152] Though rearrests for violent crimes sharply decline among black men as they age, the percentages of rearrest for black men remain higher than those for white men for all age categories under fifty.[153]

This larger set of data refines previous studies that have argued that younger, black men were generally more likely to be rearrested on release than other groups of individuals.[154] It also shows that black defendants are substantially more likely to be rearrested for a violent crime than white defendants.[155]

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148 BUREAU OF JUSTICE STATISTICS, U.S. DEP'T JUSTICE, SPECIAL REPORT, FEDERAL OFFENSES AND OFFENDERS, PRE-TRIAL RELEASE AND MISCONDUCT 1, 4, 5 (1985), *available at* http://www.bjs.gov/content/pub/pdf/prm-foo.pdf (finding that race, sex, and prior criminal record, among other factors, are helpful to determine whether a person will commit a new crime on release, and finding higher levels of arrest for minority defendants); QUDSIA SIDDIQI, N.Y. CITY CRIMINAL JUSTICE AGENCY, PREDICTING THE LIKELIHOOD OF PRETRIAL FAILURE TO APPEAR AND/OR RE-ARREST FOR A VIOLENT OFFENSE AMONG NEW YORK CITY DEFENDANTS: AN ANALYSIS OF THE 2001 DATASET 49–50 (2009) (finding that black and Hispanic defendants were more likely to fail to appear and be rearrested for violent offenses); *see also* Baradaran & McIntyre, *supra* note 95, at 519–21.

149 *See infra* Figure 1. Figure 1 plots empirical rearrest probabilities by age, race, and gender.

150 *See infra* Appendix Table 1. Tables 1 and 2 provide summary statistics for the C_{iic} variables in our sample and then again for the subset of released defendants.

151 *See infra* Appendix Table 2.

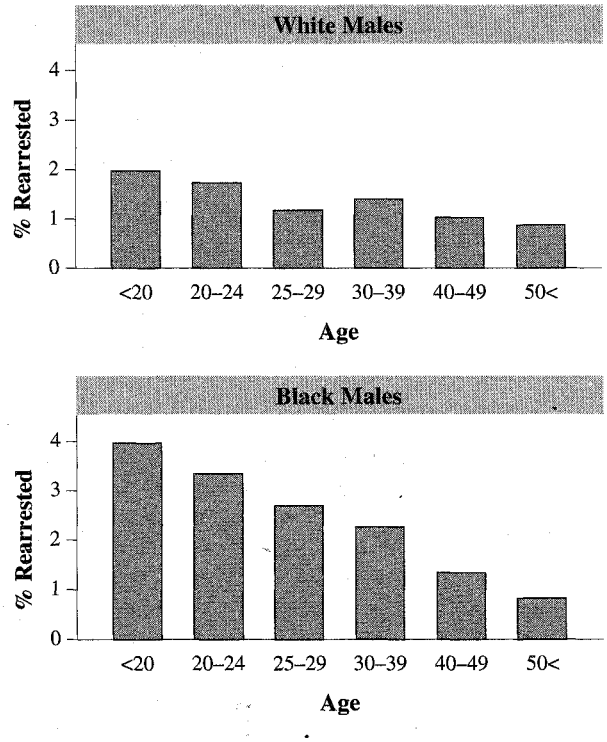
152 *See* Figure 1.

153 *Id.*

154 *See supra* note 148.

155 Though the analysis finds that being Hispanic has no predictive power and cannot be

FIGURE 1. PERCENT REARREST RATES FOR VIOLENT CRIMES BY AGE AND RACE



Although arrest rates are higher for black defendants, they do not necessarily commit more of each type of crime.[156] Violent crime arrest rates, however, tend to reflect actual crime rates better than drug crime arrest rates.[157] Thus, it is likely that black defendants who are arrested at higher rates for violent crimes do indeed commit more violent crimes. Violent crimes are often reported to police and are therefore good indicators of how often these crimes occur.[158] But black

tested, *but see* SIDDIQI, *supra* note 148, at 29, black defendants are substantially more likely to be rearrested for a violent crime: on average about 0.8 percentage points more likely. *See infra* Appendix Table 8.

156 So, the question remaining is why are arrest rates a decent measure of harm even though they may not accurately track crime rates? Arrest rates create a focus on violent crime, which is most likely to be reported, and arguably, society has greater incentive to control violent crime than other crime categories.

157 It is also assumed that arrest rates for property crimes present a more accurate reflection of actual crime rates than drug crimes do.

158 *See* M. Dwayne Smith, *The Era of Increased Violence in the United States: Age, Period, or Cohort Effect?*, 27 SOC. Q. 239, 240 (1986) (noting that homicide statistics are the most accurate with little disparity between number reported and number committed). *But see* Tim Newburn, *"Tough on Crime": Penal Penalty in England and Wales, in* CRIME, PUNISHMENT, AND

defendants are more often arrested for drug crimes even though all races commit drug crimes equally.[159] Also, the likelihood of being arrested for a drug crime is low compared to being arrested for violent crime, so rearrest rates for drug crimes may not always be adequate measures of crime rates.[160] For instance, an individual can make 100 drug sales and get arrested for one—but if he has one violent fight at a bar, his chances of arrest are relatively high.[161] The next Section examines whether judges consider race when predicting whether a defendant will commit another crime and deciding whether to release her.

C. *Modeling Prediction in Arrest and Detention*

This Section seeks to predict future misbehavior by using a probit model that considers various factors suggesting whether a person will be rearrested.[162] Examining judges' decisions to release or detain a

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POLITICS IN COMPARATIVE PERSPECTIVE 425, 432 (Michael Tonry, ed., 2007) (noting that in 2004 the percentage of violent crime reported to the police in England and Wales was 45%).

159 Fellner, *supra* note 12, at 266–74 (noting statistics on the number of drug crimes by black and white individuals and the disparity in drug arrests of black individuals); Stuntz, *supra* note 12, at 1971.

160 It may be that rearrest and conviction rates for black defendants are based on discriminatory policies that allow more blacks to be arrested due to higher enforcement rates against blacks than against defendants of other races. *See, e.g.*, HARRY G. LEVINE, ET AL., MARIJUANA ARREST RESEARCH PROJECT, ARRESTING BLACKS FOR MARIJUANA IN CALIFORNIA: POSSESSION ARRESTS IN 25 CITIES 2006–08, at 5–6 (2010) (discussing a large scale California study that reveals that while U.S. government surveys consistently find that young whites use marijuana at higher rates than young blacks, the people disproportionately arrested for marijuana possession are young blacks and Latinos).

161 Another precautionary note is that arrest rates in the data may be lower for individuals on pretrial release because arguably an individual who has already been arrested and is released on bail has more incentive to be careful than other individuals. *See* Miller & Guggenheim, *supra* note 126, at 397–99 (citing four studies on pretrial crime that show rearrest rates for those released on bail: 25%, 13%, 3%, and 1%).

162 The probit model used is the same probit model used in McIntyre & Baradaran, *supra* note *, at 3–4. It specifies the probability of being rearrested or fleeing as a function of several factors: type of felony in the original arrest, age, year, and various characteristics about the person's prior record. The model is estimated both with and without an indicator variable for race, and rearrest rates are allowed to vary depending on the overall crime level in the county and the year. The model can be described as follows:

> For each person i living in county C, in year t, suppose that the value y_{itc}^{j} equals one for those who are either rearrested for a specific kind of crime, j, or fail to appear, which for simplicity we consider as one of the set of possible crimes, j. Let y_{itc}^{j} be zero for all those who do not get rearrested for crime j. We wish to predict this y_{itc}^{j} for any given person.
>
> We can then estimate that probit model as:
>
> $$y_{itc}^{j} = 1 \quad if \quad a_t^j + a_c^j + X_{itc}\beta^j + \varepsilon_{itc}^{j} > 0$$
> $$y_{itc}^{j} = 0 \qquad\qquad else$$

defendant, the model analyzes factors such as the risk that a defendant is going to commit additional crimes.[163] The model is not perfect because judges will certainly take nonempirical factors into account in their release decisions, such as a defendant's demeanor or the effectiveness of counsel on both sides.[164] But, if precise, this model can accurately predict the *average* rearrest rates for a group of people with a given set of characteristics. The goal here is to predict future arrests rather than to show their causes.[165]

While, constitutionally, judges should not consider race in making determinations, policing judges' calculations is a puzzling matter. Even with a limited understanding of crime demographics, it is clear that individuals use race-based approaches to avoid or catch criminals. For instance, a young black man driving a shiny new car in a low income neighborhood may be a signal to a police officer that the youth could be engaged in drug trafficking. A female walking alone at night who observes two black teenagers approaching her may find a reason to cross the street. These individuals use race as a proxy for an increased risk of crime. The proxy here is being black, which is believed to be correlated with propensity for crime. Individuals often use proxies as shortcuts to obtain the information they need.[166] But is it appro-

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Where X_{itc} is a list of person i's observed characteristics (initial felony charge, past convictions and arrests, criminal status or prior incarcerations or failures to appear, age, and, sometimes, race). a_t^j is a set of year parameters that track secular changes over time for crime j; they are common across all counties and defendants. a_c^j tracks a county specific component to crime rates.

Id.

163 Appendix Table 4 contains the results when controlling only for failure to appear or violent felony rearrests.

164 But even if judges do not consider this exact model, the statistical framework is flexible enough to capture the patterns in the data, whether they conform to this model framework or not.

165 It is important to note that this analysis is not saying that the sole act of charging a person with robbery, as opposed to rape, changes the person in a way that affects their likelihood of future rearrest. Rather, it is saying that people charged with robbery systematically have different unobserved characteristics than those charged with rape. Although these characteristics are likely unseen, a person's initial charge is visible and correlated with the unseen characteristics. As many of the sharpest pitfalls in empirical work come from trying to determine causal effects, rather than simple predictions, the focus here on prediction makes this part of the job substantially easier. For example, it does not matter for the purposes of this analysis that those charged with more serious crimes may be let out under more restrictive bail conditions. These restrictions do no need to be accounted for because the *outcome* of these restrictions is observed with empirical rearrest rates, which is sufficient. The goal is to know what the rearrest rate actually will be, not what it hypothetically would be under laboratory-controlled circumstances.

166 KENNEDY, *supra* note 21, at 137. Kennedy also discusses the debate among scholars about whether police using race as a proxy for risk is "'reasonable' race discrimination," and

priate for police or judges to use race as a proxy to predict an individual's likelihood to commit a crime?

There are various reasons for which a judge might detain a black defendant and release a similarly situated white defendant, including bias or straightforward preference-based discrimination. This model considers these factors,[167] and also accounts for racial differences affecting judges' decisions made within a given county in a given year.[168] The model also determines the extent to which judges are more willing to hold black defendants versus white defendants.

Nevertheless, it can be difficult to discern discrimination from legitimate differences across defendants. For instance, a judge may detain more black defendants because they are more often unemployed, but it may appear that the judge is making these decisions based on race. Thus it can be difficult to distinguish discrimination from rational decisions to detain based on differences between defendants.

To parse out whether judges discriminate or rely on legitimate factors in detaining more black defendants, the model considers whether judges attribute different social or personal costs for incarcerating black versus white defendants. Next, it considers whether judges recognize that crimes are committed at different rates by different races, which links probabilities of rearrest to public safety considerations. As this Section makes clear, prediction is not necessarily discriminatory; the causes of different treatment of different individuals can be identified to determine whether the disparate treatment was due to racism or another factor. This Section also examines whether race impacts rearrest for various types of crimes, showing that an individual's prior record indicates likelihood of their rearrest for additional crimes.[169]

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concludes that just because blacks are statistically more likely to commit certain criminal offenses "does not mean that the legal system ought to permit police to engage routinely in racial discrimination." *Id.* at 144–45.

167 For a discussion of how the model would be affected by this, see McIntyre & Baradaran, *supra* note *, at 8.

168 Notice that this model includes county-year fixed effects, so the racial differences, considering differences between judges within a given county in a given year by specifying that y is a function of the county, k. A separate y_k could then be estimated for each county. This methodology is used below to get results specific to Cook county.

169 *See infra* Appendix Table 3. Each number shows the average change in rearrest probability based on a person having that characteristic, holding fixed all their other characteristics. Note that for the probit and all other calculations, the survey weights are used to correct for over- or under-representation of some districts. In practice, the results are mostly the same unweighted.

1. *Racial Bias in Violent Crime Detention*

Several considerations help determine whether judges discriminate in the detention decision. First, it is important to recall that judges detain black defendants at higher rates than white defendants.[170] In addition, judges making a decision to release an individual must predict whether the individual presents a threat to community safety upon release.[171] With regard to community safety, black defendants are twice as likely as white defendants to be rearrested during pretrial release for violent crimes.[172] Therefore, this model must incorporate judges' community safety concerns before determining whether their release decisions are still discriminatory.[173] The model therefore contemplates whether disparity in detention is explained by either racial bias or judges' considerations of how likely the defendant is to commit a violent crime, or some combination of the two.[174] It turns out that judges' decisions to detain are largely based on the probability of rearrest, particularly for a violent crime, even when the likelihood of rearrest is very low.[175]

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170 Our probit regression suggests that, whether or not black defendants are more likely to flee or commit crimes upon release, the fact that a defendant is black increases his predicted probability of being held by at least 4.12% on average. *See infra* Appendix Table 4, column (7), panel B (indicating the minimum average effect of a defendant's race on his predicted probability of being held); *see also infra* Appendix Table 4, columns (4)–(6), panel B (indicating that race has an even greater effect on the probability of being held if race is not a covariate in predicting the probability that a defendant will flee or commit crimes upon release).

171 *See* Baradaran & McIntyre, *supra* note 95, at 510 (noting that at least 25 states have statutes that allow judges to consider the totality of the defendant's character and present circumstances). Forty-five states and the District of Columbia permit courts to detain or conditionally release dangerous individuals. *Id.* at 512.

172 *See supra* notes 152–55 and accompanying text.

173 Appendix Table 5 reestimates Appendix Table 4, column (7), including county-year effects, but instead of making a linear estimation, it uses nonlinear functional forms for the probability of violence and failure to appear. This is done while controlling for the probability of flight, the county-year of the defendant, and their race. This yields large signs of a nonlinear effect because the nonlinear results are statistically significant and reveal obvious diminishing marginal returns.

174 By design, our model corrects for various sources of potential statistical bias including multicollinearity between variables.

175 For instance, a defendant with a 1% chance of rearrest for a violent felony has a 13% point increase in the probability of being held for each extra percentage point increase in danger. *See infra* Appendix Table 5. On average, those with a 1% chance of rearrest are held about 33% of the time. *See infra* Appendix Tables 4, 5. Moving to a 2% chance of rearrest, while holding other characteristics constant, leads to a hold rate of (33% + 7% =) 40%, an increase of more than 20% in the hold rate. On the other hand, a 1% point increase for someone starting from a 5% chance of rearrest, leads to only a more modest 2.65% point increase in the chance he is held. *See infra* Appendix Table 5. This number drops even further for those with a 7% probability of rearrest. *See infra* Appendix Table 5. Because the probability of being held in-

The empirical findings suggest that judges are most concerned with preventing violent crime, even though these crimes have low probabilities of rearrest. But this alone does not explain whether judges impose different detention rates for black and white defendants based on racial bias or something else. One key finding is that once the model accounts for other possible explanations and considers the likelihood of rearrest for violent crime, the gap between black and white defendants disappears.[176]

These results can be interpreted in at least two ways. First, judges could be using race as a direct factor to help them predict which defendants will commit crimes pretrial. This demonstrates statistical discrimination, not necessarily preference-based discrimination.[177] Thus, judges use race as a proxy for determining pretrial misconduct, but they do not detain blacks at higher levels due to racial animosity or bias. In other words, judges treat people differently due to race because race is a proxy for risk of violence.[178]

A second explanation for the results could be that there is no discrimination, statistical or otherwise. Rather, when they make detention decisions, judges observe things about the defendants that are not captured in the data. Judges in areas with many black defendants may know that rearrest rates are higher in those areas, though they may not know why. Under this explanation, the decision-making factors judges use are correlated with race, so the only way the statistical model has to account for them is to use a race proxy.

The implications of these two explanations are very different from a legal perspective, but they amount to a similar outcome: there is no evidence of a racial difference in detention rates after accounting for the likelihood that an individual will be rearrested for a violent crime.

In sum, it seems that judges disproportionately detain black defendants. However, when considering the potential for being arrested for a crime while released (which is higher for black defendants),

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creases as the probability of rearrest or flight increases, judges seem to be behaving as if it is important to avoid rearrest and flight. The fact that the probability of being held increases at a decreasing rate simply reveals that danger and flight probabilities conform to the basic economic phenomenon of diminishing marginal effects.

176 *See infra* Appendix Table 5. The estimated racial gap is now slightly negative and statistically inseparable from zero.

177 This is the kind of discrimination that Harcourt warned about. *See* HARCOURT, *supra* note 19, at 2–3.

178 Race can also be a proxy for other unobserved characteristics.

judges do not over-detain black defendants compared to white defendants. Thus, taking into account that judges must consider a defendant's likelihood of harming public safety, judges do not demonstrate racial bias.

2. *Racial Bias in Drug Crime Detention*

Since black defendants are disproportionately likely to be arrested on a drug charge, drug crimes are especially important in determining whether judges and police demonstrate racial bias.[179] As discussed in Part I.A., drug usage and sale rates among whites and blacks are often similar, but more blacks are arrested for drug possession and trafficking crimes than whites. This Section tests whether blacks are detained for drug crimes at higher levels than whites, which, if true, would demonstrate judicial bias. The results show that judges are not more likely to detain defendants with a high likelihood of rearrest for a drug crime: even though black defendants are more likely to be arrested for drug crimes, judges do not detain them at higher levels believing they will commit drug crimes on release.[180] It thus seems that judges' detention decisions are not intended to stop drug crimes.

Specifically, it does not appear that the racial differences in detention rates are related to strong efforts to stop drug crime, as controlling for the probability of rearrest for a drug crime has little effect on the ratio.[181] In short, it seems that racial differences in detention rates are not related to rearrest for drug crimes.

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179 *See infra* Appendix Table 6 (adding the linear or nonparametric probabilities for either the probability of rearrest for drug crimes or nonviolent felonies more generally).

180 Both drug rearrests and nonviolent felony rearrests more generally suggest that judges are at least somewhat interested in preventing these crimes. However, they are not nearly as interested in preventing drug and nonviolent crimes as they are in preventing violent crimes. The average effect of a 1 percentage point increase in drug rearrest is only a 1.22 percentage point increase in the chance of being held. Compare that to a 2.11 percentage point increase in hold rates associated with nonviolent felonies generally and a 6–10 percentage point increase associated with violent crime. *See infra* Appendix Table 6.

181 Flight and violence risk predictors are not correlated, but drug or nonviolent felony rearrest rates are both correlated with *both* flight risk and dangerousness. For more discussion of this correlation, see McIntyre & Baradaran, *supra* note *, at 15.

However, blacks may be arrested more often than whites because police target certain neighborhoods. Blacks may then be charged more often because they are arrested more often in the first place. Police may then actually arrest blacks more often for drug crimes, even though whites commit them as frequently. Section D expands this analysis to consider whether police demonstrate racial bias in arrests.

D. Racial Bias in Preventing Crime

To this point, this Article has examined racial bias in two judicial considerations: (1) costs of holding a defendant, and (2) probability of rearrest. The racial differences in detention evident in these two judicial considerations disappear when judges consider the probability of rearrest for a violent crime. This Section examines a third judicial consideration: the benefit of stopping a crime. Do judges have a preference for preventing crimes by white or black defendants, and do they show more concern for white or black victims?

A factor that may impact detention decisions is racial bias towards victims. Whether purposeful or not, judges may underdetain some defendants due to racial bias towards victims. Crimes committed by blacks and whites may be treated differently because they tend to have different victims. If black criminals are more likely to harm black victims, a judge may discriminate by not attributing as much benefit to preventing crimes against black victims as crimes against white victims. This analysis detects this bias, demonstrating that potential crimes by black defendants are not as big of a concern to judges as those by white defendants.[182]

The results show that judges are more sensitive to increased probabilities of crime committed on pretrial release for white defendants than black defendants. This is true both for violent crimes and drug crimes. White defendants' probability of being detained rises by 11.2% if crimes that defendants might potentially commit on release are likely to be violent, while for black defendants the probability of detention increases only 7.3%; the difference is statistically significant.[183] There are two explanations for this difference. First, judges may consider violent crimes by white defendants to be about 50% worse than black defendants' violent crimes. Second, black offenders may be about 50% more likely than white defendants to get caught

182 This regression demonstrates a difference in the marginal benefits of stopping a crime commited by a black or a white defendant. *See infra* Appendix Table 7.

183 *See infra* Appendix Table 7.

for a violent crime. Part IV examines these two outcomes in light of arrest and crime report rates to determine whether judges show racial bias against black victims or whether black offenders are more likely to be caught for violent crimes.

E. Differential Rearrest Rates

Another explanation for judges detaining black defendants more than white defendants could be that judges perceive benefits for holding defendants who are more likely to be arrested when released.[184] If this is true, judges may be expected to more aggressively hold individuals with higher probabilities of rearrest.[185] This is particularly relevant to the analysis of racial disparities if the ratio between crimes and arrests varies by race. If police indeed disproportionately enforce laws among minorities, arrest rates for blacks would comprise a higher fraction of actual crimes committed by blacks. The relationship between rearrest rates and crimes may therefore vary by race if judges implicitly account for it in their release decisions.

Suppose, for instance, that a judge knew, or believed, that for every black defendant rearrested while on bail or other release, another black defendant in a similar situation committed a crime but was not caught. In this scenario, there are two crimes per rearrest. Now suppose that released white defendants were less heavily monitored than black defendants, and so for white defendants there were four crimes per rearrest. If a judge used this information optimally, she would treat increased probability of rearrest more aggressively among white defendants than black ones, given that each rearrest of a white defendant yields four crimes rather than two.[186]

Ideally this analysis could go one step further and consider that some crimes are better observed than others. For example, it is as-

184 For example, if there were twice as many crimes committed as rearrests, then a defendant with a one percent higher chance of rearrest has a *two* percent higher chance of actually committing a crime.

185 This would depend on those who commit fewer crimes having the same ratio of rearrests to crimes as those who commit more. For example, if career criminals are less likely to get caught, then as the probability of a person getting rearrested goes up, the resulting group will not include many career criminals, making it technically ambiguous as to what is happening to the underlying crime rates. This is a vexing problem, but one that judges must deal with, if only implicitly, as they make release decisions. Thankfully, all this Article's analysis is attempting to do is recover the judge's actions in this situation and interpret them, rather than actually coming up with the optimal solution.

186 When the statistical model is estimated separately by race, the coefficients on the probabilities should be twice as high at a given point for white defendants as for black defendants, since the values should be higher by the ratio of $\frac{4}{2}$ for black defendants.

sumed that violent crimes are more likely to be reported than drug crimes because of the presence of a victim.[187] If more stringent monitoring has a bigger effect on rearrests for drug crimes than violent crimes, the model should forecast that, if judges act optimally, the largest racial gap between defendants would be for drug crimes, with a smaller or nonexistent gap for violent crime.[188]

Thus, there are two explanations for different rearrest rates. First, judges are biased and more concerned about victims of one race than victims of another. Second, judges optimally consider rearrest and the probability of committing a crime. Both explanations have the same statistical implication that judges hold black defendants at lower rates than white defendants.

The results demonstrate that there are differences in arrest and detention rates by race. Once violent crime risk is accounted for, a black defendant is not more likely to be detained.[189] Drug crimes, however, result in significantly higher probabilities of the criminal justice system holding a white defendant.[190] But, in line with a model of more stringent police monitoring for minorities, the probability of rearrest among blacks for drug crimes is higher than for whites, which is consistent with police drug monitoring being stricter among blacks, or

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187 *See supra* Part II.A.1. Indeed, the Bureau of Justice Statistics confirms in the National Crime Victimization Survey that serious violent crimes are reported to police more than any other crime, except motor vehicle theft and burglary. JENNIFER L. TRUMAN, U.S. DEP'T JUSTICE, NATIONAL CRIME VICTIMIZATION SURVEY: CRIMINAL VICTIMIZATION, 2010 10 (2011), *available at* http://bjs.ojp.usdoj.gov/content/pub/pdf/cv10.pdf; *see also* Wesley G. Skogan, *Dimensions of the Dark Figure of Unreported Crime*, 23 CRIME & DELINQ. 41, 48 (1977) (noting that "[t]he bulk of unreported personal crime also appears to be less serious than incidents which were brought to the attention of the police").

188 Some experts claim that prosecutors prefer to prosecute drug crimes over violent crimes because drug crimes are easier to prove and often provide a longer sentence. *See, e.g.*, Dubber, *supra* note 84, at 858–59 (noting that possession offenses are easy to prove, to the point that prosecutors may avoid charging more involved offenses when they can "get life imprisonment without parole for a possession conviction"); William M. Landes, *An Economic Analysis of the Courts*, 14 J.L. & ECON. 61, 63 (1971) (constructing a model on the assumption that prosecutors seek to "maximize the expected number of convictions weighted by their respective" sentences, with a preference for longer sentences); Daniel C. Richman, Old Chief v. United States: *Stipulating Away Prosecutorial Accountability?*, 83 VA. L. REV. 939, 966–67 (1997) (arguing that even though it is simplistic to assume that "all prosecutors are primarily interested in maximizing convictions . . . the need to maximize convictions will be an inescapable environmental constraint"); Sonja B. Starr, *Sentence Reduction as a Remedy for Prosecutorial Misconduct*, 97 GEO. L.J. 1509, 1513 (2009) (suggesting that the threat of sentence reduction may incentivize prosecutors to engage in less misconduct).

189 *See infra* Appendix Table 7.

190 *See infra* Appendix Table 7.

at least with judges believing it to be so.[191] Thus, judges either account for blacks' increased arrest rate (at seven times the rate of whites) or judges are indifferent to black drug crimes, as they are only likely to hold white defendants who are likely to commit new drug crimes.

These results indicate that, contrary to scholarly assertions, judges may hold defendants based on race, not rearrest probability.[192] White defendants are actually more likely to be detained pretrial than black defendants.[193] Indeed, judges hold whites more aggressively as their likelihood of rearrest for a violent crime increases, which is consistent with judges being more sensitive to white rearrest rates. This is also consistent with a higher concern for stopping crime among the white population (or disproportionately protecting white victims), and recognizing that white defendants who commit a crime are less likely to be caught. Judges, intentionally or not, compensate for higher black rearrests by detaining white defendants more aggressively than black defendants.

The results in this Section demonstrate that, contrary to the assertions of several scholars, judges actually over-detain white defendants rather than black defendants. The reason that judges over-detain white defendants is unclear until arrest rates are considered. The next Section adds a consideration of arrest rates to determine the role of prediction and discretion in racial bias.

IV. Discussion of Results on Racial Bias in Criminal Justice

Judges detain black defendants at statistically higher rates than white defendants, showing a racial disparity. In determining which defendants to detain, judges must decide whether a defendant poses a threat to the community. One factor they consider is whether the defendant is likely to be rearrested if released. Black defendants are more likely to be rearrested before trial, particularly for a violent crime. Thus, even though black defendants are detained at a higher rate, their rearrest rate is substantially higher than that for white defendants. Relative to their risk, blacks are actually detained at a lower rate than whites. Thus, after considering the likelihood of rearrest,

191 The ratio gap in the coefficients is much higher at 7.4 than it is for violent crimes, which is 1.5. *See infra* Appendix Table 7.

192 *See* Harcourt, *supra* note 19, at 219.

193 *Id.* (stating that the more blacks are arrested for crimes, the more likely they are to be imprisoned as compared to white defendants).

judges actually detain white defendants at higher levels than black defendants.

This Part first explores how police arrest rates (and racial disparities that result) may affect detention rates. Second, it debunks the assertion that judges use race as a proxy in predicting which defendants will commit crimes while released. Third, it suggests that defendants charged with drug crimes may be treated differently than defendants charged with violent crimes because judges see the former as less dangerous. Finally, it examines whether individual bias by judges may create racial disparity in detention or sentencing.

A. Comparing Arrest and Detention Rates to Determine Racial Bias

This Section considers whether arrest rate disparities create racial bias and specifically, whether police demonstrate racial bias in arrest rates for certain crimes.[194] Thus far, this Article has considered whether judges demonstrate racial bias in detention decisions.[195] The evidence presented thus far is consistent with two different stories: either judges care more about crimes by white defendants (against white victims), or judges decide to detain black defendants less often because they know that blacks are monitored more closely. While it is impossible to determine actual crime rates, examining data of arrest rates and comparing it to crime commission surveys is most illustrative.[196] This comparison helps demonstrate whether police are more

194 Appendix Table 7 redoes the work in Appendix Table 6 but separately by race.

195 While this Section considers arrests and detention decisions, it does not intend to explain the prosecutor's role in these considerations. Prosecutors have a great deal of discretion in deciding what initial charge to bring against a defendant, and it might seem that the initial charge is somewhat arbitrary. While this may be true, it does not affect the ability to estimate how that somewhat arbitrary choice of initial charge is related to later crime. If, in fact, there is no useful predictive information in the initial charge, the model will show this. If prosecutors game the initial charge to get a desired bail outcome, this would also not matter for our prediction unless judges started using a new model for determining bail. Thus, for example, if judges adopted a model akin to the one presented here, prosecutors might respond to the change with a different mix of initial charges which could upset the predictions. Judges could then reestimate their model under this new mix of charges. One, then, can imagine an iterative process as prosecutors adapt and judges respond, likely ending fairly quickly in a new stable equilibrium behavior by judges and prosecutors, which is what new predictive models would estimate. And while not the focus of this Article, this analysis demonstrates that prosecutors possibly hold a more important role than either judges or police officers when it comes to racial bias. This observation proves true in the sentencing front, for example, as prosecutors often take the lead in reducing sentences below the sentencing guidelines, more often than judges do. *See* U.S. SENTENCING COMMISSION, FY11 FINAL QUARTERLY DATA REPORT, TABLE 1 (2011) (demonstrating that federal prosecutors are the primary driver behind lower-than-recommended sentences (26.3%) as compared to judge-initiated sentences (17.4%)).

196 Philip J. Cook & John H. Laub, *The Unprecedented Epidemic in Youth Violence*, *in* 24

likely to arrest black defendants or whether judges are detaining black defendants more often than white defendants given their relative likelihood to commit additional crimes.[197]

1. *Violent Crime Arrests Match Violent Crime Commission by Race*

To determine whether police demonstrate racial bias in arrests, this Section relies on two sources providing data on arrests and reported crime. The Uniform Crime Reports ("UCR") provide a quasi census of arrests across the country, while the National Crime Victimization Survey ("NCVS") provides a large sample of estimated rates of crime. These reports provide data for violent crimes, including rape, robbery, and aggravated assault.[198] The relative number of black and white defendants being arrested for these crimes can be estimated from the UCR, and from the NCVS the number of people victimized by those crimes can be estimated, as well as the relative number of perceived white versus black perpetrators.[199]

Examining the data between arrests and reported violent crimes reveals no statistically significant racial bias. In 2004, the UCR reported approximately 35,000 robbery arrests, 203,000 aggravated assault arrests, and 12,000 rape arrests for white defendants, for a total of 250,000 arrests.[200] For black defendants the comparable numbers were 42,000, 102,000, and 6,000, for a total of 150,000 arrests.[201] Thus the arrest ratio was 1.67 white defendants per black defendant.[202]

CRIME AND JUSTICE: YOUTH VIOLENCE 27, 32 (Michael Tonry ed., 1998) (explaining that criminologists often study trends and patterns in crime by using arrest data which provides "reasonably accurate measures of the relative rates of offending by age, sex and race," and indeed, comparing arrest data with National Crime Victim Survey data, where available, provides some value).

197 Michael Tonry & Matthew Melewski, *The Malign Effects of Drug and Crime Control Policies on Black Americans*, *in* 37 CRIME AND JUSTICE: A REVIEW OF RESEARCH 1, 5–7 (Michael Tonry ed., 2008).

198 The data from these three crimes are aggregated because the violent crime data are the most reliable. Note that aggravated assault and robbery form the largest components of violent felony charges.

199 One consideration is that individuals may report more crimes committed by blacks than whites or, in some violent crime cases, the perpetrator may be reported as black when it is unclear that he is black. However, if arrest data overreport crimes committed by blacks as well, the two errors are likely to cancel out.

200 *See* DEP'T OF JUSTICE FED. BUREAU OF INVESTIGATION, CRIME IN THE UNITED STATES, 2004: PERSONS ARRESTED tbl.43a, *http://www2.fbi.gov/ucr/cius_04/documents/CIUS_2004_Section4adj.pdf.*

201 *See id.*

202 *See id.* Unfortunately, this same issue cannot be addressed with drug crimes, because accurate victimization numbers for drug crimes do not exist.

From the NCVS of 2004, there are a reported 1.7 million violent crimes.[203] Among those for whom the offender's perceived race was identified as white or black, 776,000 were white and 405,000 were black.[204] Thus, among offenses, the NCVS data suggest a ratio of 1.91 white defendants per black defendant. These ratios are close (1.67 and 1.91), demonstrating little evidence in the national data that black offenders are more likely to be arrested for violent crimes than white offenders. Thus, it is unlikely that racial disparities in arrests come from violent crimes.[205]

This finding addresses the concerns of scholars that increased monitoring and prediction increases arrests and detention of black defendants. At least with violent crime, the evidence demonstrates that increased monitoring of black defendants does not increase arrests rates among black defendants and does not distort the value of prior record.[206] Thus, it may be that the differential behavior by judges is due to either explicitly or implicitly valuing crimes by white defendants as more of a threat than those by black defendants. We cannot conclude from the data whether this represents caring more about the victims of white defendants or harboring some bias against white defendants.

What is arguably more important and still unclear is whether the disproportionate numbers of black drug arrests are due to drug crimes committed or racial bias in arrest rates. This Article does not affirmatively answer this question, leaving room for future scholars to closely examine whether black defendants are systematically arrested and detained more often for drug crimes than white defendants.[207] As the next Section demonstrates, the available evidence that exists certainly points to the conclusion that racial bias is the cause of higher black detention rates for drug crimes.

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203 *See* BUREAU OF JUSTICE STATISTICS, U.S. DEP'T JUSTICE, *Table 40: Personal Crimes of Violence*, 2004, http://bjs.ojp.usdoj.gov/content/pub/pdf/cvus/previous/cvus40.pdf; BUREAU OF JUSTICE STATISTICS, U.S. DEP'T JUSTICE, *Table 46: Personal Crimes of Violence*, 2004, *available at* http://bjs.ojp.usdoj.gov/content/pub/pdf/cvus/previous/cvus46.pdf. This excludes attempts or threats.

204 *See id.* For multiple-offender crimes we only included those where all of the offenders were identified as either white or black.

205 It is unknown whether or not these same ratios apply to rearrests of those released after being arrested for a felony charge.

206 The prior record here considers all prior violent crimes.

207 Another concern is that perhaps more crimes committed by blacks than whites are reported in violent crime cases. In this case, although it seems that the victimization and arrest data lined up, there is in fact bias because the black victimization numbers are too large.

2. *Drug Crimes, Arrest, and Racism*

The evidence demonstrates that either racial bias in arrests or detention rates—or both—may cause racial disparities in arrest rates for drug crimes. As discussed above, many scholars have concluded that racial disparity in arrest rates are largely responsible for the disparate rates at which blacks are sent to prison for drug offenses.[208] Federally sponsored household surveys of drug use among Americans suggest that whites and blacks use illegal drugs at about the same rates.[209] Despite drug use being roughly equal, rates of arrest are not, as blacks make up 35.1% of all drug arrests nationwide.[210] This may be explained partly by previous studies that demonstrate that drug arrests of urban black drug dealers are easier to make compared with white drug dealers.[211] Federal and financial incentives for stopping drug crime may also incentivize police to increase drug arrests.[212] And police in urban areas may rely primarily on drug arrests if they are judged individually by numbers of arrests, and indeed such crimes tend to be easier to prove and convict.[213] Thus, it appears that from arrest and commission rates, black defendants are likely to be dispro-

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208 *See, e.g.*, HUMAN RIGHTS WATCH, *supra* note 25, at 41.

209 *Id.* (noting that recent surveys of drug use have illustrated that "an estimated 49 percent of whites and 42.9 percent of blacks age 12 or older have used illegal drugs in their lifetimes; 14.5 percent of whites and 16 percent of blacks have used illicit drugs in the past year; and 8.5 percent of whites and 9.8 percent of blacks have used an illicit drug in the past month"). And far more whites use drugs (including using crack cocaine) than blacks. *Id.* at 42; *see also* Ford, *supra* note 22, at 337.

210 HUMAN RIGHTS WATCH, *supra* note 25, at 45.

211 Michael Tonry, *Racial Politics, Racial Disparities, and the War on Crime*, 40 CRIME & DELINQ. 475, 485–87 (1994) (noting that drug deals often take place outdoors in poor minority areas and are more likely to be sold to strangers and new acquaintances which increases the risk of being caught); STUNTZ, *supra* note 3, at 54 (noting that poor blacks (outside the South) are often concentrated in inner cities whereas poor whites are more dispersed).

212 Bruce L. Benson et al., *Police Bureaucracies, Their Incentives, and the War on Drugs*, 83 PUB. CHOICE 21, 38 (1995) (presenting empirical evidence suggesting that an increased focus on drug enforcement is a result of the Comprehensive Crime Act of 1984 that "included a section that mandated a sharing of assets seized" from drug crimes); Radley Balko, *Driven By Drug War Incentives, Cops Target Pot Smokers, Brush Off Victims Of Violent Crime*, HUFFINGTON POST (Nov. 25, 2011, 12:38 PM), http://www.huffingtonpost.com/2011/11/21/drug-war-incentives-police-violent-crime_n_1105701.html?page=1 (arguing that "'[t]he availability of huge federal anti-drug grants incentivizes [police] departments to . . . abandon real crime victims . . . in favor of ratcheting up their drug arrest stats'" (quoting Los Angeles Deputy Chief of Police Stephen Downing)).

213 *See* Mark A.R. Kleiman, *Toward (More Nearly) Optimal Sentencing for Drug Offenders*, 3 CRIMINOLOGY & PUB. POL'Y 435, 435, 439 (2004) (noting that "[s]entencing is one way prosecutors keep score" and drug crimes require less proof than violent crimes); Tonry, *supra* note 211, at 487.

portionately arrested for crimes committed equally by black and white defendants.

A question left unanswered, though, is whether the disproportionate arrests of black defendants for drug crimes causes the racial disparity between black and white detention rates. In other words, do drug arrest disparities explain why more black defendants are detained by judges than white defendants? The short answer is that the detention gap seems to be largely due to violent crime arrest rates rather than drug arrests.[214] In examining the data on judicial detention, it seems that judges are less concerned about drug crimes (or rearrests for drug crimes) and are unlikely to make detention decisions based on an increased risk for committing a drug crime.[215] Indeed, judges decide who to detain based on a prediction of whether that person will commit a violent crime when released. Thus, judges tend to focus on preventing violent crime rather than drug crimes. While examining police arrests above, it appears that police place a high emphasis on drug arrests (particularly among black defendants).

Judicial decisions to detain individuals who are more likely to commit violent crimes can be interpreted as racially biased against white defendants or black communities. While some scholars have attributed higher arrest rates in black communities to racism,[216] other scholars and activists believe that crimes should be even more heavily enforced in black neighborhoods.[217] Thus, the focus of judges on detaining individuals more likely to commit violent crimes may not be especially controversial, even though it creates a racial disparity between black and white defendants. However, the merit of police focusing on drug arrests for black defendants is certainly controversial,[218] particularly as drugs are often linked with violence.[219]

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214 *See supra* Part III.C.

215 McIntyre & Baradaran, *supra* note *, at 14.

216 Richard S. Frase, *What Explains Persistent Racial Disproportionality in Minnesota's Prison and Jail Populations?*, *in* 38 CRIME & JUSTICE: A REVIEW OF RESEARCH 201, 242 (Michael Tonry ed., 2009) ("It is also possible that in some states, black arrest rates are artificially suppressed by police decisions not fully to enforce the law in black neighborhoods—a form of bias against black victims.")

217 *See, e.g.*, VANESSA BARKER, THE POLITICS OF IMPRISONMENT: HOW THE DEMOCRATIC PROCESS SHAPES THE WAY AMERICA PUNISHES OFFENDERS 149–50 (2009) (demonstrating that Harlem activists fought hard to institute strict drug laws in the 1960s to cut rising crime rates and increase police support); Tracey L. Mears and Dan M. Kahan, *The Wages of Antiquated Procedural Thinking: A Critique of* Chicago v. Morales, 1998 U. CHI. LEGAL F. 197, 198–99 (explaining that "residents of inner city communities increasingly demand law enforcement measures in response to the crime problems they face").

218 William J. Stuntz, *Race, Class, and Drugs*, 98 COLUM. L. REV. 1795, 1798 (1998) (noting

3. *Charge and Conviction Rates Between Races*

Two additional considerations in determining whether judicial or police bias afflict criminal justice decisions are charge rates and conviction rates. The first is not addressed here, but is an area that is ripe for empirical inquiry. Black defendants are charged with felonies at higher rates than white defendants.[220] And indeed recent studies claim that mass incarceration rates, including of racial minorities, result from increased felony charges per defendant rather than longer sentences or increased crime rates.[221] Future researchers should inquire as to whether these charge rates result from racial bias or some other factor.

The remaining question that is addressed here is whether black defendants are more likely to be convicted than white defendants. According to this analysis, black defendants are more likely to be detained pretrial,[222] and are more likely to be rearrested while released pretrial.[223] But are black defendants also more likely to be convicted than white defendants? In a surprising finding, the results demonstrate that black defendants are not more likely to be convicted than similarly situated white defendants. While black defendants are charged with felonies at much higher rates than white defendants, once they are charged, their conviction rates are identical to white defendants.[224] This suggests that prosecutors may add to racial bias in charging defendants,[225] but there is no racial gap created with convictions of comparable white and black defendants.[226] This is surprising,

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that the overwhelming crack arrests in black neighborhoods are collectively a "double-edged" sword that "*looks* racist").

219 *Compare* Paul J. Goldstein, *The Drugs/Violence Nexus: A Tripartite Conceptual Framework*, 39 J. DRUG ISSUES 143, 143 (1985) (stating that drug use is known to be causally related to violent crime), *with* Eric J. Workowski, *Criminal Violence and Drug Use: An Exploratory Study Among Substance Abusers in Residential Treatment*, 37 J. OFFENDER REHABILITATION 109, 109–10 (2003) (noting that links between drug use and violence are often assumed).

220 *See* TRACEY KYCKELHAHN & THOMAS H. COHEN, U.S. DEP'T JUSTICE, STATE COURT PROCESSING STATISTICS, 2004: FELONY DEFENDANTS IN LARGE URBAN COUNTIES, 2004 2 tbl.1 (2008), *available at* http://bjs.ojp.usdoj.gov/content/pub/pdf/fdluc04.pdf.

221 John F. Pfaff, The Causes of Growth in Prison Admissions and Populations 37–38 (July 12, 2011), *available at* http://ssrn.com/abstract=1884674.

222 *See supra* Part III.C.

223 *See supra* Part III.C.

224 *See infra* Appendix Table 1; Baradaran & McIntyre, *supra* note 95.

225 This includes an analysis of individuals who pleaded guilty and those who were convicted at trial. It does not necessarily suggest that there is no bias by prosecutors in the charging decision. This question is left to future researchers.

226 We first examine the raw rates of felony convictions and see a racial gap of -4%, but once we control for county differences we have a 2.3% positive gap, and a 1% gap when we

considering that black defendants are more likely to be arrested for a crime on bail.[227] Indeed, the results demonstrate that once black defendants enter the court system, their chances of being convicted are identical. This seems to indicate that the bias in the judicial system, at least in the pretrial period, is not detectable in judicial interactions with courts.

B. Prior Record Is Not a Proxy for Race

Scholars have argued that prediction tools allow a defendant's prior record to act as a proxy for race.[228] A proxy in a statistical sense is a value used to stand in for another preferred value that is not available. Thus for prior record to be a proxy for race, judges would want to consider race in deciding to release or detain a defendant and are constrained from doing so. Therefore, they use prior record instead. This would allow judges to assess how risky a defendant is to release based on prior record, which acts as a proxy for race.

The analysis above finds little support that judges use prior record as a proxy for race. First, despite being legally constrained from considering race, it appears that judges may be using it anyway in forming their predictions of rearrest. As such, there is little need to use a "proxy." Part III demonstrated that judges are actually *more* aggressive with holding white defendants with longer prior records than black defendants. This is certainly not consistent with a model where judges merely use risk or prior record as a tool to hold more black defendants. Rather it appears that, empirically, black defendants' release is less affected by prior record than release of white defendants.[229]

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control for county differences and arrest charge. When we control for prior record though the gap is not statistically significant (-0.5%). We must control for prior record and the other factors above because it is a proxy for unobserved characteristics about a person that make them more or less likely to be convicted.

227 However, we would not have known if the gap was due to unobserved differences or racism. And we do not account for misdemeanor rates here so we would not have been able to account for those.

228 HARCOURT, *supra* note 19, at 32; *see also* MARC MAUER, RACE TO INCARCERATE 141 (2d ed. 2006) (noting that "whether one acquires a criminal record is itself very much a function of *race*, geographical location, and other factors" (emphasis added)); Alexander Alvarez & Ronet D. Bachman, *American Indians and Sentencing Disparity: An Arizona Test*, *in* RACE, CRIME, AND JUSTICE: A READER 319, 327 (Shaun L. Gabbidon & Helen Taylor Greene eds., 2005) (arguing that "for certain crimes and certain individuals, there may be a greater likelihood of official treatment and prosecution," creating a situation where "minority offenders have a greater chance of receiving a prior record while Caucasians may be more likely to escape this labeling process").

229 Another area of concern was whether police officers are monitoring black defendants

Second, there is strong evidence that the observed racial differences in pretrial release rates result from black and white defendants having different empirical risk profiles. And once the prior records of black defendants are accounted for, there is no longer clear evidence of racial bias. Black defendants, as a whole, have worse prior records than white defendants.[230] But given the apparent goal of pretrial release decisions to deter violent crime, prior arrest is a useful empirical element in predicting violence.[231] This is independent of the race of the defendant.[232] Even without taking race into account, prior record is a valuable empirical tool for predicting rearrest. In other words, the most prominent way race appears to enter the release decision is as a predictor of risk of future violent crime. Thus judges are not using risk as a backdoor way to consider race. Rather, at worst they are using race as a way to consider risk, without considering the defendant's record. Thus, while race and prior record are clearly correlated, it may be that judges are using race as a proxy for risk rather than risk as a proxy for race.

C. *Racial Bias May Actually Have Higher Sensitivity to Violence*

When it comes to race and discretion, a key question is whether certain judges are more racially biased than others. There are several studies demonstrating judicial bias against black defendants in incarceration and sentence lengths.[233] This is an important issue to examine in the efforts to determine where racial bias may be entering the criminal justice system.

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more heavily such that they are more likely to be arrested. If this is the case, then rearrests will be higher among black defendants than white defendants. While there is some indication that this is true for drug crimes, it has not been demonstrated with these data.

230 *See supra* Part III.B.

231 *See infra* Appendix Table 3 (prior arrests do predict future rearrests on pretrial release).

232 We do acknowledge that black defendants may have more prior arrests and convictions due to arrest and charging bias. Black individuals with more prior arrests and convictions are more likely to be rearrested because police are watching them more closely. In other words, blacks may be more likely to be arrested and incarcerated despite the fact that whites are committing the same number of crimes (though this is more likely to be a problem with drug crimes than violent crimes). Yet because our model accounts for interaction between race and prior arrests, the fact that race affects arrest rates does not negate the fact that arrest rates are an independent indicator of future arrest.

233 *See, e.g.*, WILLARD GAYLIN, PARTIAL JUSTICE: A STUDY OF BIAS IN SENTENCING 5 (1974) (suggesting that judges' sentencing decisions are shaped by the judges' shaping experiences and influences); Adam Benforado, *Frames of Injustice: The Bias We Overlook*, 85 IND. L.J. 1333, 1367 (2010) (noting that blacks receive higher bail amounts and longer sentences); Jeffrey J. Rachlinski et al., *Does Unconscious Racial Bias Affect Trial Judges?*, 84 NOTRE DAME L. REV. 1195, 1202 (2009) (pointing out that sentencing lengths and likelihoods of incarceration are sometimes related to judge bias).

One set of scholars has recently attempted to answer this question. A recent study by David S. Abrams, Marianne Bertrand, and Sendhil Mullainathan ("Abrams et al.") found that some judges treat black and white defendants differently and tend to incarcerate black defendants at higher rates.[234] This Study did not take into account unobservable characteristics between black and white defendants. Thus, it could not determine whether racial bias can be detected in the judiciary. For instance, in comparing judges, Abrams et al. do not consider that the defendants before certain judges may have characteristics that have nothing to do with bias that make them more likely to be incarcerated, such as a higher probability of being rearrested for a violent crime.[235]

In order to determine whether certain judges are biased, this Section uses the same data as Abrams et al., while also considering the potential differences between black and white defendants. Given the findings above, the concern is that since black defendants are more likely to be rearrested for a violent crime pretrial, the disparity between races for incarceration may actually be due to differences in the judge's willingness to incarcerate people who are more likely to commit a violent crime. Thus, Judge 1 may have a higher incarceration rate than Judge 2 for black defendants than white defendants. This may be because she discriminates against black defendants or because she is more aggressive in incarcerating those who are likely to be rearrested for violent crimes.[236] These possibilities cannot be untangled in Abrams et al.'s data, so the analysis here controls for the prior record of defendants.[237]

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234 David S. Abrams et al., *Do Judges Vary in Their Treatment of Race?*, J. LEGAL STUD. (forthcoming 2012) (manuscript at 3–4) (examining randomly assigned cases to identify judge fixed effects to find significant judge effects on incarceration rates between minorities but no significant impact on sentence lengths).

235 Abrams et al.'s research shows that pairs of judges exist that appear to treat black and white defendants differently. *See id.* at 22–23. However, the question of which judge is making better assessments is still open, and the possibility that both judges are discriminating against blacks cannot be ruled out. Nor, from these data, can the possibility that both judges are discriminating in favor of black defendants be ruled out. This is not to say that it is happening but simply to point out that Abrams et al. have nothing to say about average levels of discrimination. This is because, as Abrams et al. are careful to note, unobserved characteristics of black and white defendants may be different on average, and thus just because incarceration rates are different does not mean the differences are due to discrimination. *See id.* at 26.

236 For a discussion of cross-judge differences in treatment of drug crimes, see McIntyre & Baradaran, *supra* note *, at 22.

237 This is conducted in a regression. *See infra* Appendix Table 8. While Abrams et al. includes some limited controls for the offense, they have little information about prior records. Abrams et al., *supra* note 234.

One study found that differences in pretrial detention rates between black and white defendants were very high, at 44.8% and 33.1%, respectively.[238] In breaking down detention rates between types of crime, it appears that Abrams et al.'s judges in Cook County are very sensitive to violent crime.[239] The sensitivity to violent crime, if removed, eliminates the large racial gap in detention rates in Cook County. Indeed, drug crime charges do not encourage more holding among judges. Thus, once Cook County's aggressive stance on preventing violent crime is eliminated, Chicago's difference in treatment of black and white defendants disappears. As such, there is no longer support for Abrams et al.'s conclusion that judges discriminate against blacks in randomized trials.[240]

The broader point to take away from this analysis is that in determining racial bias, the propensity for violent crime must be considered.[241] Indeed, differences between judges may indicate a racial preference,[242] but this cannot be presumed unless the risk of violent crime is considered.[243] Abrams et al. are not alone in failing to consider the risk of violent crime in finding racial discrimination by judges. Indeed, there are examples of other studies that claim judicial discrimination against black defendants in criminal justice can be explained by the focus on the risk of violent crime.[244] Accordingly, stud-

238 Demuth, *supra* note 13, at 891.

239 A 1 percentage point increase in the violent crime rearrest probability leads to an average 46–52 percentage point increase in the chance of being held. *See infra* Appendix Table 8.

240 Thus, as Abrams et al. also acknowledge, the differences across judges that they find could be due to differences in how judges treat risk, not how judges treat race. *See infra* Appendix Table 8.

241 In the Cook County analysis, large racial differences in incarceration rates for black and white defendants disappeared once the risk of violent crime was considered. *See infra* Appendix Table 8.

242 Given that Cook County shows much higher racial gaps and has detention policies that are aggressive in discouraging violence, Cook County may not be representative of the rest of the country. Although there is a chance that in some counties individual judges may demonstrate bias against black defendants, risk of violent crime must first be considered.

243 If some of this carries over to the outcomes Abrams et al. look at, then (1) Cook County may not be terribly representative of other places, and (2) Cook County judges have a lot of room to vary on how they treat violence risk, creating even more concern that what Abrams et al. finds may have more to do with how judges evaluate violent crime than in how they evaluate race.

244 *See* Shawn D. Bushway & Jonah B. Gelbach, *Testing for Racial Discrimination in Bail Setting Using Nonparametric Estimation of a Parametric Model* 39 (Feb. 14, 2011), *available at* http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1990324. Looking at the differences of pretrial release between white and black felony defendants, this study concluded that judges value the lost freedom of blacks at thousands of dollars less than whites, resulting in higher detention rates for blacks. While this is an interesting approach to modeling judicial hold decisions, Bushway and Gelbach assume that the unobserved characteristics that differ across race are

ies on race discrimination can be improved by considering the risk of violent crime in determining where judicial bias enters the criminal justice system.

CONCLUSION: BEYOND PREDICTION AND DISCRETION

Race and crime are demographically intertwined in the United States. Black Americans are disproportionately arrested, detained pretrial, and incarcerated for longer periods of time than white Americans. The two predominant camps of commentators explain disparities in criminal justice with claims of racial bias. Some blame maldiscretion, or misused police and judicial discretion to arrest and detain. Others argue that racial bias results from judges and police using predictive methods to discriminate against black defendants.[245] These arguments taken together propose to account for the higher number of black arrests and detentions due to police over-arresting and judges over-detaining black individuals.[246] In examining assertions of racial bias in arrest and detention, this Article casts serious doubt on these prominent theories.

The evidence presented here does not eliminate the possibility of racial bias by police and judges. In fact it finds evidence of discrimination, but disproves the notion that prediction and discretion necessa-

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captured by different probabilities of failure to appear and that the judge's private information about these probabilities for a given defendant is revealed by the bail amount she sets. These assumptions allow them to estimate their model. However, this Article's data provide persuasive evidence that *rearrest rates for violent crimes also differ substantially by race*, even accounting for differences in failure to appear. Not accounting for important differences in violent crime likely biases their results towards finding more racial prejudice than actually exists, as this risk will be relabeled prejudice.

245 *See supra* notes 93–99 and accompanying text. This discretion and prediction, they argue, disadvantages black defendants because they are more likely to be arrested and have a more serious record. Because black defendants are arrested more often and have a more serious record, they are also more likely to be detained than white defendants.

246 *See* HARCOURT, *supra* note 19, at 44; *see also* Erica Beecher-Monas & Edgar Garcia-Rill, *Genetic Predictions of Future Dangerousness: Is There a Blueprint for Violence?*, 69 LAW & CONTEMP. PROBS. 301, 308 (2006) ("Predicting future dangerousness has become important as the criminal justice system has changed its focus from punishment to preventing violent recidivism."); J.W. Looney, *Neuroscience's New Techniques for Evaluating Future Dangerousness: Are We Returning to Lombroso's Biological Criminality?*, 32 U. ARK. LITTLE ROCK L. REV. 301, 302–04 (2010) (asserting that the significant increase in statutes requiring assessments of future criminal behavior at bail determinations, parole decisions, capital case sentencing, sexually violent predator assessments, involuntary civil commitments, and in sex offender registration "illustrates our criminal justice system's subtle shift in focus away from punishment and onto prevention").

rily harm black defendants more than white defendants.[247] The national data and empirical findings described here demonstrate that more black defendants are arrested and detained pretrial than white defendants. However, in carefully examining the factors judges consider in their decisions—which includes the risk of violence to society—the findings show that judges do not discriminate against black defendants, but actually hold white defendants at higher rates considering the threat they pose to society.[248]

Police arrests, however, suggest that racial bias informs drug arrests. Specifically, police arrest a disproportionate number of black individuals for drug crimes, even though black and white defendants commit those crimes in equal numbers. It does not appear, however, that police discriminate against blacks with respect to violent crimes, nor that the disproportionate number of black arrestees for drug crimes accounts for the large racial discrepancy in black and white defendants in detention. This detention gap seems to be largely due to higher black violent crime arrest rates, rather than drug arrests.

This evidence offers two key findings about racial bias in criminal justice. The first is that judges' prediction may harm white defendants and black victims, but not black defendants. If anything, it seems to allow judges to consistently disfavor white defendants.[249] Indeed, judges are more sensitive to increased probabilities of both violent and drug crime for white defendants than black defendants.[250] Thus, judges may already be accounting for the probabilities of future crime, or the likelihood of getting caught, and demonstrating a racial preference. Although this result could be simply due to a higher concern for crime among the white population, judges may also recognize that white criminals are less likely to be caught.[251] Judges may also be less

247 HARCOURT, *supra* note 19, at 193 (arguing that predictive methods harm black defendants more than white defendants); *see also supra* Part II.A–B.

248 Judges must consider the threat to the safety of the community posed by the defendant and the likelihood that the defendant will commit additional crimes on release. *See* Baradaran & McIntyre, *supra* note 95, at 504–13.

249 Additionally, a victim's race may be a factor in the punishment of the defendant. For example, one study concluded that individuals who kill whites are more likely to be executed than those who kill blacks. David C. Baldus et al., *Comparative Review of Death Sentences: An Empirical Study of the Georgia Experience*, 74 J. CRIM. L. & CRIMINOLOGY 661, 710 (1983) (finding that execution is more likely for those who kill white victims as opposed to black victims).

250 White defendants' probability of being held rises by 11.2% with an increase in violence risk, while for black defendants the rise is only 7.3%, the difference being statistically significant. *See infra* Appendix Table 7.

251 This may also explain why black defendants are more likely to be rearrested than white defendants. *See supra* Part III.D.

concerned with crime in the black community than the white, and be less willing to preventatively stop crime in black communities.[252] Accordingly, judges may demonstrate bias against whites *and* blacks in detaining white defendants more readily than blacks. Judges seem to discriminate against white defendants by deeming them more of a safety risk than similarly situated black defendants, and also are more willing to release more dangerous black defendants, which may disproportionately harm black victims.[253]

The second key finding is that judges—but not police—are ultimately most concerned about violent crime in their decisions, which is often interpreted as racial bias. Judges' focus on detaining defendants most disposed to arrest for violent crime contributes to the disparity between black and white defendants. Indeed, this Article demonstrates that other scholars have incorrectly claimed that judges expressed racial bias in incarcerating black defendants. Prior studies do not account for the risk of violent crime posed by defendants.[254] Once this is accounted for, the substantial racial gap disappears. Police, on the other hand, do not seem as focused on violent crime and arrest black defendants much more often than white defendants for drug crimes.[255] Both judges and police contribute to the racial gap between black and white defendants. Judges, however, create racial disparity due to concerns for public safety, while police make arrests irrespective of public safety but with a focus on drugs.

Given that discretion and prediction increase the racial gap, what should be done to decrease the racial disparity in criminal justice? Unfortunately, our results, though clear, are not prescriptive. It is uncertain, for instance, that judges should detain fewer defendants likely to commit violent crime, even though it would alleviate racial differences among defendants. Detention decisions, particularly for violent crime, disproportionately impact defendants' respective racial communities.[256] Indeed, judges show higher sensitivity to violent crime in white communities by holding similarly situated white defendants at

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252 *See* Doris Marie Provine, *Too Many Black Men: The Sentencing Judge's Dilemma*, 23 LAW & SOC. INQ. 823, 850–51 (1998) (describing the practice of race-based punishment as a form of community assistance).

253 *See* William Wilbanks, *Is Violent Crime Intraracial?*, 31 CRIME & DELINQ. 117, 118–19 (1985) (victimization survey data indicate that violent crime in the United States is intraracial).

254 As a result, this demonstrates that in counties with particularly aggressive policies against violent crime, black defendants were more likely to be held than white defendants.

255 *Cf.* STUNTZ, *supra* note 3, at 269–71 (noting that police prefer arrests for drug crimes in urban areas, because developing cause for an urban drug arrest is easier than either an urban arrest for violent crime or a suburban drug arrest).

256 *See supra* Part IV.C.

higher rates than black defendants.[257] Conversely, judges demonstrate less concern about violent crime in black communities, which disproportionately harms black victims and potentially demonstrates racial bias against black communities.[258] Thus, holding fewer black defendants to decrease the racial gap may result in harm to black communities.

Aside from the racial gap,[259] what do these results mean for prediction and discretion?[260] One approach is to prohibit judicial prediction. For instance, detention and incarceration rates for blacks might fall if judges were not allowed to consider a defendant's prior record in their decisions. But, absent prior records, judges lack statistically relevant factors on which to base decisions, which could lead them to exercise discretion in less favorable ways, biasing release decisions in ways unrelated to data. Of course, it is disputable whether differential racial treatment based on data is better than racial bias based on pure preference. Both yield racial gaps in detention and incarceration. The alternative, random judicial decisions,[261] has also been criticized

257 However, judges are demonstrating racial bias against white defendants by detaining them at higher rates than black defendants. Darnell F. Hawkins, *Beyond Anomalies: Rethinking the Conflict Perspective on Race and Criminal Punishment*, 65 SOC. FORCES 719, 719 (1987).

258 *See* David C. Baldus et al., *Racial Discrimination and the Death Penalty in the Post-*Furman *Era: An Empirical and Legal Overview, with Recent Findings from Philadelphia*, 83 CORNELL L. REV. 1638, 1724 (1998); *see also* Randall L. Kennedy, McCleskey v. Kemp*: Race, Capital Punishment, and the Supreme Court*, 101 HARV. L. REV. 1388, 1392–93 (1988) (examining racial bias in black-victim violent crime and its effect on the black community).

259 These results present a difficult problem in considering the racial gap between black and white defendants: should judges and police focus on reducing the racial gap in detention and arrest or focus primarily on reducing the threat of violent crime? While the racial gap cannot be closed with drug arrests alone, future scholars should also consider police discretion in drug arrests and how a decreased focus on such arrests would impact the communities affected.

260 This Article focuses largely on the racial gap in pretrial detention, though an equally important issue that impacts the racial gap in incarceration is our sentencing policies, for not only drug, but also violent offenses. As experts have persuasively demonstrated, we currently incarcerate too many people and sentence them for too long (and much longer than we ever have historically). *See* TODD R. CLEAR, IMPRISONING COMMUNITIES: HOW MASS INCARCERATION MAKES DISADVANTAGED NEIGHBORHOODS WORSE 3–7 (2007) (claiming that incarcerating more people for longer periods of time is the cause of mass incarceration). *But see* U.S. SENTENCING COMM'N, REPORT TO CONGRESS: MANDATORY MINIMUM PENALTIES IN THE FEDERAL CRIMINAL JUSTICE SYSTEM xxviii (2011) (stating that black defendants are less likely to qualify for relief from mandatory minimum penalties as a result of "criminal history or the involvement of a dangerous weapon in connection to the offense."); John F. Pfaff, *The Myths and Realities of Correctional Severity: Evidence from the National Corrections Reporting Program on Sentencing Practices*, 13 AM. L. & ECON. REV. 491, 518–19 (2011) (explaining that locking up those who would not have gone to prison in the past is the key cause of prison population growth rather than simply imprisoning people longer or putting people in prison for longer terms).

261 *See* HARCOURT, *supra* note 19, at 5–6.

as impractical, politically untenable, inefficient, and possibly arbitrary and capricious.[262] But without considering the true effects of prediction on crime, it should not be abandoned.[263] Indeed, examining these practices and their potential bias helps avoid discriminatory practices while allowing judges and police to make decisions that keep the public safe.[264] Thus, this analysis demonstrates that the case against judicial and police prediction and discretion is far from clear.

Finally, how do prediction and discretion affect high incarceration rates? According to some academics, prediction has led to increased prison rates.[265] While prediction and discretion do contribute to high incarceration rates, this is largely due to judicial sensitivity to

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262 An approach that asks judges to ignore relevant information that helps protect society is difficult to support. *See* Katherine Y. Barnes, Book Review, *Against Judgment*, 93 CORNELL L. REV. 689, 698–99 (2008) (suggesting that "[r]andomly punishing individuals certainly violates the core notion of fairness that Harcourt criticizes society for ignoring in its hunger for prediction" and while perhaps not the goal, substantial wasting of resources could inhibit criminal justice from reaching its "true goals, such as minimizing crime"). *But see id.* at 702 (arguing that while the concept advocated by Harcourt falls short of its promise, randomization is still quite useful and its correct use could overcome the pitfalls Harcourt has exposed in prediction). For a search to be reasonable under the Fourth Amendment, an officer must have reasonable suspicion, probable cause, or consent. *See* U.S. CONST. amend. IV; Illinois v. Gates, 462 U.S. 213, 230–31 (1983); Schneckloth v. Bustamonte, 412 U.S. 218, 219 (1973); Terry v. Ohio, 392 U.S. 1, 8–9, 28–31 (1968); *see also* Yoav Sapir, *Against Prevention? A Response to Harcourt's Against Prediction on Actuarial and Clinical Predictions and the Faults of Incapacitation*, 33 LAW & SOC. INQUIRY 253, 255–56 (2008).

263 Other scholars have argued that profiling should not be discarded but should just be properly explored before abandoning it. Barnes, *supra* note 262, at 696–97 (arguing that we should recognize the limits of prediction but not necessarily abandon it); Margalioth & Blumkin, *supra* note 108, at 244–45 . *But see* Bernard E. Harcourt, *A Reader's Companion to Against Prediction: A Reply to Ariela Gross, Yoram Margalioth, and Yoav Sapir on Economic Modeling, Selective Incapacitation, Governmentality, and Race*, 33 LAW & SOC. INQUIRY 265, 267–69 (2008) (arguing that while perfect information would allow profiling to be administered efficiently, comparative elasticities have been largely ignored and thus we should remain against prediction now and in to the foreseeable future); Nicola Persico, *Racial Profiling, Fairness, and Effectiveness of Policing*, 92 AM. ECON. REV. 1472, 1472–73 (2002); Margalioth & Blumkin, *supra* note 108; *see also* David Bjerk, *Racial Profiling, Statistical Discrimination, and the Effect of a Colorblind Policy on the Crime Rate*, J. PUB. ECON. THEORY, 521, 524 (2007) (demonstrating that when racially unequal investigation rates are due to statistical discrimination, imposing a colorblind policy on officers can have varying results depending on jurisdiction and specific crime involved).

264 And measuring the effect of prediction on crime rates could actually improve our ability to formulate policy, as it may help judges predict detention regime changes' effects on crime rates. In order to determine the effect of detention, a predictive detention regime based on potential group differences could allow judges to hold more of some people and fewer of others. The results would provide insight on how crime rates in these groups respond to the change in detention rates, making it possible to actually determine whether there is a difference in response between various groups.

265 HARCOURT, *supra* note 19, at 17.

violent crime. So how do we address high incarceration rates if we want judges to maintain their concern with violent crime? There is good news on this front. Violent crime arrests are not responsible for increased prison rates among black defendants since the 1970s,[266] and are at historic lows while incarceration rates continue to climb.[267] And the proportion of violent crimes committed by black defendants remains consistent.[268] But the black proportion of the prison population grew from 39% in 1979 to 54% in 1992,[269] because inmates' average time served has increased dramatically for the same crimes,[270] and inmates are punished more often for all categories of crimes.[271] Thus, broadly reforming sentence length and frequency of incarceration could still address the racial gap, without abandoning the concern for violent crime.

Fortunately, prediction and high incarceration need not go hand in hand. A better understanding of individuals arrested most often does not have to lead to increased incapacitation. A shift in criminal justice strategy away from incapacitation to public safety and broad reforms of sentencing laws can address crime without increased arrest and imprisonment.[272] Abandoning prediction and discretion is not the answer. Without knowing where arrests or convictions are most common and considering the racial makeup of those entering the system,

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266 ALEXANDER, *supra* note 2, at 99.

267 *Id.*

268 TONRY *supra* note 59, at 4 (noting that forty-five percent of those arrested for murder, rape, robbery, and aggravated assault have been black since 1970). Blacks made up 55.1 percent of those arrested for homicide, 42.8 percent of those arrested for rape, and 60.9 percent of those arrested for robbery. *Id.* at 4–6, 64–65 (explaining that the crime control policies of the 1980s had a foreseeable and disproportionate impact on the increase of black defendants in prison).

269 *Id.* at 4.

270 "According to Pew's analysis of state data reported to the federal government, offenders released in 2009 served an average of almost three years in custody, nine months or 36 percent longer than offenders released in 1990." THE PEW CENTER ON THE STATES, TIME SERVED: THE HIGHER COST, LOW RETURN OF LONGER PRISON TERMS 2 (June 2012), http://www.pewstates.org/uploadedFiles/PCS_Assets/2012/Prison_Time_Served.pdf.

271 STUNTZ, *supra* note 3, at 47 (noting that drug cases multiplied in the late twentieth century, but even without them "America's imprisonment rate would still have quadrupled over the past thirty-five years").

272 As pointed out by Meares and Kahan, sometimes isolating minority crime and diverting the potential defendants from prison to alternative sentences or even giving them the choice to give up drugs in order to stay out of jail have been proven alternatives. Dan M. Kahan & Tracey L. Meares, *The Coming Crisis of Criminal Procedure*, 86 GEO. L.J. 1153 (1998) (claiming that curfews, anti-loitering laws, and other forms of policing are milder alternatives to severe prison sentences). Indeed, police finding drugs more often in minority defendants' vehicles does not have to lead to more arrests and more jail time for defendants. *See supra* notes 115–16 and accompanying text.

it is unlikely that criminal justice actors will tailor their actions to achieve fewer arrests and reduced incarceration. Prediction and informed discretion create a clear picture of where racial bias enters the criminal justice system, and without this clarity, none of the pitfalls of prediction can be addressed.

APPENDIX[273]

TABLE 1. RELEASES AND REARRESTS BY OFFENSE

			% of Those Released Who			
Original Offense	**% of All Defs.**	**% Released**	**Failed to Appear Multiple Times**	**Were Rearrested for Any Felony**	**Were Rearrested for a Drug Crime**	**Were Rearrested for a Violent Felony**
All Defs.	100%	61.2%	3.4%	11.5%	4.3%	2.2%
Violent Crimes						
Rape	1.8%	53.0%	0.6%	5.1%	0.9%	3.2%
Robbery	7.4%	41.6%	1.4%	13.1%	2.1%	6.2%
Assault	12.0%	61.8%	1.9%	9.0%	1.8%	3.9%
Other	3.7%	63.2%	1.4%	6.5%	1.4%	2.8%
Property Crimes						
Burglary	9.3%	47.6%	3.3%	13.2%	1.8%	2.2%
Larceny-Theft	8.9%	63.8%	3.8%	11.3%	1.5%	2.1%
Motor Vehicle	3.2%	49.2%	4.4%	16.4%	3.1%	2.0%
Forgery	2.2%	66.0%	4.4%	10.0%	2.9%	1.3%
Fraud	2.0%	75.0%	3.0%	8.3%	0.9%	0.6%
Other	4.7%	71.8%	4.3%	13.4%	2.4%	2.5%
Drug						
Sales	17.1%	64.3%	3.7%	13.9%	9.5%	1.6%
Possession/ Other	18.4%	66.1%	5.4%	11.9%	7.3%	1.2%
Public Order						
Weapons	3.4%	66.1%	2.7%	9.8%	3.3%	2.6%
Driving Related	2.8%	76.5%	1.2%	9.1%	1.1%	1.2%
Other	3.1%	58.7%	2.7%	8.7%	1.8%	1.2%

273 These Tables have been prepared by Frank McIntyre and also appear, with explanations, in McIntyre & Baradaran, *supra* note *, at 15.

TABLE 2. SUMMARY STATISTICS FOR PRIOR RECORD AND AGE

	All Defendants	Released Sample
Black	61.9%	59.1%
Prior Arrests		
None	23.9%	31.1%
One	8.0%	9.1%
Two or Three	12.8%	13.6%
Four or More	55.4%	46.2%
Prior Convictions		
None	37.6%	47.7%
One	13.2%	13.7%
Two or Three	17.1%	15.6%
Four or More	32.3%	23.1%
Prior Incarceration		
Multiple Charges	48.4%	36.9%
Prior Failure to Appear	57.5%	57.4%
Criminal Status	31.6%	26.4%
Felon	33.5%	24.0%
Prior Violent Felony Conviction	45.7%	34.7%
Age		
Under 20	14.5%	16.7%
20–24	21.1%	22.1%
25–29	16.4%	16.2%
30–39	27.6%	25.6%
40–49	15.2%	13.8%
50 or More	5.2%	5.5%

TABLE 3. DETERMINANTS OF PRETRIAL MISBEHAVIOR OR REARREST

	Flight (1)	Violence (2)	Flight (3)	Violence (4)	Nonviolent Felony (5)	Drug Crime (6)
Black Def.			0.64%*	1.26%***	1.13%***	1.68%***
Violent Crimes						
Rape	-5.62%***	2.52%**	-5.60%***	2.50%**	-8.26%***	-6.11%***
Robbery	-5.04%***	3.88%***	-5.04%***	3.77%***	-4.99%***	-5.85%***
Assault	-3.91%***	2.73%***	-3.90%***	2.77%***	-5.82%***	-5.72%***
Other	-4.62%***	2.46%***	-4.58%***	2.64%***	-6.60%***	-5.62%***
Property Crimes						
Burglary	-2.63%***	0.85%**	-2.58%***	0.97%**	0.17%	-5.66%***
Larceny-Theft	-1.93%**	1.12%***	-1.88%**	1.21%***	-0.66%	-5.81%***
Motor Vehicle	-1.17%	0.72%	-1.17%	0.73%	3.12%**	-4.04%***
Forgery	-1.28%	0.36%	-1.26%	0.39%	-1.65%	-3.97%***
Fraud	-3.11%***	-0.59%	-3.08%***	-0.54%	-1.11%	-6.26%***
Other	-2.08%***	1.04%**	-2.02%**	1.15%***	-0.32%	-4.96%***
Drug						
Sales	-2.50%***	0.12%	-2.53%***	0.07%	0.88%	1.63%***
Other	baseline					
Public Order						
Weapons	-3.45%***	1.20%*	-3.48%***	1.15%*	-3.27%***	-4.09%***
Driving Related	-4.52%***	-0.04%	-4.44%***	0.11%	-3.35%***	-6.42%***
Other	-3.18%***	-0.27%	-3.13%***	-0.18%	-3.32%***	-5.62%***
Prior Arrests						
One	0.78%	0.56%	0.77%	0.56%	1.27%*	1.15%**
Two or Three	1.32%***	1.26%***	1.29%***	1.21%***	3.45%***	1.83%***
Four or More	1.05%**	2.09%***	1.00%*	2.00%***	4.47%***	2.14%***
Prior Convictions						
One	-1.21%**	-0.59%	-1.18%**	-0.51%	-2.05%***	-0.68%
Two or Three	-0.57%	-0.87%**	-0.53%	-0.81%*	-1.46%*	-0.38%
Four or More	-0.12%	-0.53%	-0.08%	-0.45%	0.95%	0.79%

Prior Incarceration	0.32%	0.54%*	0.29%	0.48%	1.27%*	0.73%
Multiple Charges	-0.06%	0.36%	-0.05%	0.38%	1.58%***	0.64%**
Prior Failure to Appear	2.47%***	0.52%**	2.44%***	0.49%**	1.85%***	0.65%**
Criminal Status	0.00%	0.48%**	0.00%	0.47%*	2.23%***	0.96%***
Felon	-0.63%**	-0.14%	-0.68%**	-0.23%	2.11%***	0.80%*
Prior Violent Felony Conviction	0.34%	1.22%***	0.31%	1.18%***	-0.64%	-0.84%**
Age						
20–24	-1.08%**	-1.62%***	-1.03%**	-1.52%***	-3.50%***	-1.67%***
25–29	-1.09%**	-2.14%***	-1.02%*	-2.00%***	-5.06%***	-2.67%***
30–39	-0.64%	-2.73%***	-0.56%	-2.54%***	-5.16%***	-2.68%***
40–49	-0.93%**	-3.20%***	-0.85%**	-3.02%***	-6.61%***	-3.11%***
50 or More	-2.26%***	-3.52%***	-2.20%***	-3.34%***	-8.58%***	-3.99%***

* Indicates a confidence level of .1
** Indicates a confidence level of .05
*** Indicates a confidence level of .01

TABLE 4. PROBIT MODEL OF DEFENDANTS' PROBABILITY OF BEING HELD[274]

	No Race Covariants			**Race a Covariate in Hold Probability Only**		**Race Also a Covariant in Flight/ Danger Probability**	
	(1)	**(2)**	**(3)**	**(4)**	**(5)**	**(6)**	**(7)**
Panel A: Coefficients							
Black Def.				33.38***	27.32***		12.25***
Flight Probability	1.54**		3.14***		2.86***	3.15***	2.73***
Danger Probability		14.46***	14.87***		14.32***	14.60***	13.80***
Panel B: Average Effect (%)							
Black Def.				11.49***	9.16***		4.12***
Flight Probability	0.54		1.06**		0.96*	1.06	0.92
Danger Probability		4.89***	5.02***		4.80***	4.92***	4.64***
Observation	56,375	55,818	55,564	56,675	55,564	55,564	55,564

274 For explanations of the contents of each numbered column in Table 4, see McIntyre & Baradaran, *supra* note *, at 9–12.

TABLE 5. PROBIT MODEL OF DEFENDANTS' PROBABILITY OF BEING HELD WITH NONLINEAR FUNCTIONAL FORMS

	Average Marginal Effect on Hold Rates
Black Def.	-1.52%
Danger Probability	
at 1%	13.22%***
at 3%	7.19%***
at 5%	2.65%***
at 7%	0.95%*
Flight Probability	
at 1%	0.46%
at 3%	0.29%
at 5%	0.14%
at 7%	-0.01%

TABLE 6. ADDITIONAL MISBEHAVIOR PROBABILITIES

	Linear		Nonparametric	
	(1)	(2)	(3)	(4)
Black Def.	2.43%*	3.20%**	-1.52%	1.33%
Danger Probability	4.75%***	3.52%***	10.36%***	6.62%***
Flight Probability	0.36%	-1.41%***	0.26%	-3.94%***
Drug Crime Probability	0.71%***		1.22%**	
Nonviolent Felony Probability		1.53%***		2.11%***

TABLE 7. NONPARAMETRIC RESULTS BY RACE

	White	Black	Ratio of Coefficients
Danger Probability	11.21%***	7.31%***	1.53
Flight Probability	-1.19%	1.05%	Not Statistically Separable
Drug Crime Probability	3.71%***	0.50%	7.42

TABLE 8. STATISTICS FOR COOK COUNTY, IL

	(1)	(2)
Black Def.	1.53%	-0.84%
Danger Probability	45.59%***	52.36%***
Flight Probability	1.07%	-0.33%
Drug Crime Probability	-0.60%	