March 8, 2012

Race, Prediction & Discretion

Shima Baradaran

Available at: https://works.bepress.com/shima_baradaran/6/
RACE, PREDICTION AND DISCRETION

Shima Baradaran*

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 that 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. They claim 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 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.

“It is unnecessary to speak directly of race because speaking about crime is talking about race.”1

* Associate Professor of Law, Brigham Young University Law School. Frank McIntyre was a major collaborator in performing the empirical modeling involved in this project. I would like to thank Professors David Abrams, Ron Allen, Larry Laudan, Michael Tonry, Randall Kennedy, Angela Davis, Cynthia Lee, Bernard Harcourt, Katherine Barnes, Christopher Slobogin, Michelle Alexander, Ian Lopez, Tracey Meares, Dan Kahan, Sheri Lynn Johnson, Eric Jensen, Ned Snow, and Brigham Daniels for their helpful feedback.

Many scholars, political leaders, and experts would agree that racial bias exists in the U.S. criminal justice system. Most would also agree that race
number of black and brown persons.”); Id. at 1717, 1722, 1725, 1806 (discussing judicial institutional racism in criminal justice cases resulting from unconscious societal bias, even though judges lack discriminatory intent); Michael Tonry, Thinking About Punishment: Penal Policy Across Space, Time and Discipline 111 (Michael Tonry ed. 2009). (“The blatant insensitivity to the interests of black Americans continues to characterize American crime policies.”); Angela Davis, Benign Neglect of Racism in the Criminal Justice System, 94 Mich. L. Rev. 1660, 1674 n.52 (1996) (discussing literature suggesting the existence of racial bias at various stages of the criminal process, including arrest, prosecution, trial, and sentencing); Gregg Barak et al., Class Race Gender Crime 286 (3d ed. 2010) (describing discrimination based on race as producing more prosecutions and harsher punishments and mass-mediated representations of race as “reproducing both the structural relations of oppression associated with crime”); Michelle Alexander, The New Jim Crow: Mass Incarceration in the Age of Colorblindness 16 (2010) (“[T]he fact that more than half of the young black men in many large American cities are 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.”); 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 racism in criminal justice is “a systemic and institutional phenomenon that reproduces racial inequality and the presumption of black and brown criminality”); 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.”); Jennifer Haberkorn, In Previous Roles, Holder Took Both Sides in Civil Rights Cases, Wash. Times, Feb. 22, 2009, at A06 (Eric Holder, 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.”).

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 States. William J. Stuntz, The Collapse of American Criminal Justice (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, Five Myths About Americans in Prison, Wash. Post, June 17, 2011 (noting that African Americans make up almost half of those arrested for drug offenses and serving time for such offenses in state prisons because inner-city, open-air drug markets are easier to bust than those operating out of suburban basements).

men. Scholars have claimed that racism enters the system at every step, including arrest, conviction and sentencing. These theories have cast blame on all actors involved including legislators, police, media, lawyers, juries, and judges.

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 criminal justice: arrest and detention. The first point of contact with police and prosecutors is in the decision to arrest or charge a defendant with a crime. As a result, scholars have also claimed that arrest differences between blacks and whites and implicit bias account for the differences in incarceration. Indeed, arrest rates are higher for blacks in

8 Anthony Greenwald & Linda Hamilton Kreiger, *Implicit Bias: Scientific Foundations*, 94 CAL. L. REV. 945, 966 (2006) (Implicit race bias “is pervasive and associated with bias against African Americans.”); Robert D. Crutchfield, *Symposium on Race, Crime and Voting: Social, Political, and Philosophical Perspectives on Felony Disenfranchisement in America: Warranted Disparity? Questioning the Justification of Racial Disparity in Criminal Justice Processing*, 36 COLUM. HUM. RTS. L. REV. 15, 20 (2004) (expanding the extent to which racial differentials in arrests actually represent crime involvement given the potential bias in some jurisdictions). 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 Patrick A. Langan, *Criminology: Racism on Trial: New Evidence to Explain the Racial Composition of Prisons in the United States*, 76 J. CRIM. L. & CRIMIN. 666 (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); Alfred Blumstein, *On the Racial Disproportionality of United States’ Prison Populations*, 73 CRIM. L. & CRIMIN. 1259-81 (1973) (asserting that attacking discrimination in the criminal justice system will not likely have the desired effect on reducing prison populations); but see Bob Regoli & Matt DeLisi, *Race, Conventional Crime, and Criminal Justice: The Declining Importance of Skin Color*, 27 J. CRIM. JUST. 549–57 (1999) (presenting research that indicates 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 since there may be bias in police arrests.
virtually all categories of crimes, particularly drug crimes where black defendants make up 52% of arrestees, even though whites commit these crimes at equal or higher rates. Subsequently, 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 pretrial compared to whites charged with the same crimes. The detention decision is an obvious source of potential bias as 41.6% of black defendants are detained pretrial while only 34.4% of white defendants are.

Another important commonality between arrest and detention is that both of these decisions require prediction of future behavior. The arrest and charging decision often includes a consideration of whether the defendant is likely to commit a crime if released. This is the same question judges must ask in determining whether to release a defendant on bail before trial, and in deciding whether to incarcerate the defendant.

12 Cassia Spohn, *Race, Sex, and Pretrial Detention in Federal Court: Indirect Effects and Cumulative Disadvantage*, 57 U. KAN. L. REV. 879, 898–99 (2009) (Being under the control of the criminal justice system increased the odds of pretrial detention for blacks but not for whites. Being employed or having more education decreased the likelihood of detention for whites but not for blacks. This suggests that judges interpret the legally relevant criteria set forth in the bail statute in ways that disadvantage black offenders.); Marvin D. Free, *Racial Bias and the American Criminal Justice System: Race and Presentencing Revisited*, 10 CRITICAL CRIM. 195 (2002) (There is evidence of discrimination in key criminal justice decision points.); Stephen Demuth, *Racial and Ethnic Differences in Pretrial Release Decisions and Outcomes: A Comparison of Hispanic, Black, and White Felony Arrestees*, 41 CRIMINOLOGY 873 (2003). (Hispanic defendants are more likely to be detained than white and black defendants, and racial/ethnic differences are most pronounced in drug cases).
Thus, not only are arrest and detention the first points of contact with the criminal justice system, they involve prediction and discretion and are both identified as sources of racial bias. 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 or not. Many players in the system—including police, prosecutors, and judges—exercise discretion in fulfilling their duties. This Article explores whether police and judges are inappropriately—even if subconsciously—considering 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 that allegations of judicial bias are often masking a concern for public safety. It also finds that while police use discretion to overarrest 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, judges 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, and once accounted for, 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 alleges that prediction harms black defendants and the other blames unchecked discretion for implicit and subconscious bias. Some scholars assert that police and judges participating in statistical analysis and prediction inevitably leads to discrimination against minority defendants. Other scholars claim that improperly used discretion by police and judges

---

16 See supra note 8 and accompanying text.
17 BERNARD HARCOURT, AGAINST PREDICTION: PROFILING, POLICING, AND PUNISHING IN AN ACTUARIAL AGE (2007)
leads to excessive arrest and punishment of black Americans. 18 This Article engages these arguments in Part III, by analyzing results from an empirical analysis to examine how race impacts arrest and detention decisions made by police and judges. It finds that nationally, police do not demonstrate racial bias in arrests, except for drug crimes, where they appear to target black defendants. It also finds, surprisingly, that judges actually overdetain 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 between blacks and whites with regard to imprisonment has become the major race and crime problem of our time. 19 Studies have found that policies and practices exist in the criminal justice system targeting blacks and their communities. 20

18 Stuntz, supra note 9, at 1977–78 (discussing discretion on all levels of the criminal justice system resulting in disparities in treatment between white and black defendants, mostly in reference to drug crimes); Robert Smith & Bidish Sarma, How and Why Race Continues to Influence, 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).

19 RANDALL KENNEDY, RACE, CRIME AND THE LAW (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. & CRIMIN. 1043, 1045 (2010); Rep. Barbara Lee, Race Is Still a Factor In America, THE HUFFINGTON POST, Aug. 12, 2011 (“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 MAGAZINE, Aug. 21, 2000 (Republican 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.”); Adam Gopnik, The Caging of America: Why Do We Lock Up So Many People?, THE NEW YORKER, Jan. 30, 2012 (“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.”).

20 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
Studies and case law both document racial disparities in various stages of the criminal justice system, including legislation, racial profiling, prosecutorial decisions to charge and plea bargain, and mandatory minimum sentences. 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. 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. Police
arrests and profiling are consistently attacked for being racially motivated.\textsuperscript{25} 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.\textsuperscript{26} 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.\textsuperscript{27} For instance, Charles recommended longer confinement sentences for black defendants, Chang, \textit{supra} note 20. Although Blacks make up 28\% of the prison population, they make up approximately 3\% of Washington State’s population. \textit{Id.} at 7, 15 n.48; Julie Stewart, \textit{Don’t Blame Judges for Racial Disparity}, \textsc{Huffington Post} (Feb. 8, 2012) (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).

\textsuperscript{25} Robert A. Rankin, \textit{Clinton Calls for Understanding, He Urged Blacks and Whites To Talk, Listen and Learn. He Criticized Louis Farrakhan, Though Not by Name}, \textsc{The Phil. Inquirer}, Oct. 17, 1995, at A01 (President Clinton was quoted as saying that while most police are honest lawmen, “we have to root out the remnants of racism in our police departments.”); \textsc{Matthew R. et al., Bureau of Justice Statistics, Contacts Between Police and The Public} (April 29, 2007), available at http://bjs.ojp.usdoj.gov/index.cfm?ty=pbdetail&iid=653 (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.); \textsc{Cardin, Specter Introduce Bill to Return “Equal Protection Under Law” To U.S. Justice System}, Feb. 27, 2009 (In response to a 2007 study Senator Spector stated that “[t]hese types of disparities and the perception of bias are unacceptable and we should take bold steps to correct these injustices.” Senator Cardin declared that “[w]e 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 and white 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. \textsc{See} Katherine Barnes, \textit{Measuring Racial Profiling} (July 7, 2011) (unpublished manuscript) (on file with the author).

\textsuperscript{26} \textsc{See} Barnes, \textit{supra} note 22, at 26. Indeed, in many high profile federal charges and executions, discussions of racial bias are at the forefront. \textsc{See e.g., Clinton Postpones Federal Execution; Issuing a Stay: The Last Federal Execution Involved a Hanging in 1963 in Iowa}, \textsc{Telegraph Herald}, Dec. 8, 2000, at B9 (“In deciding to stay Garza’s execution until June 2001, Clinton stated that there is “no room for error” and 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 examine] the possible racial and regional bias should be completed before the United States moves forward.”); Eric Houston, \textit{Crime and Punishment; Minorities Get Most Serious Felony Charges, Study Says Seattle Post-Intelligencer}, \textsc{Seattle Post-Intelligencer}, Nov. 4, 1995, at A1 (“People of color get the short shift of it,” said state Supreme Court Justice Charles Smith, who announced the findings yesterday at a news conference.” The commission’s cochairmen said, “The system is designed to prevent racial bias but, subjectively, bias enters into it.”).

\textsuperscript{27} Charles R. Lawrence, \textit{The Id, the Ego, and Equal Protection: Reckoning with Unconscious Racism}, 39 \textsc{Stan. L. Rev.} 317, 318 nn.1–2, 321 nn.15–16 (1986); McCain, \textit{supra} note 5, at 614, 616–17 (“Due to the prevalence of conscious and unconscious racism in the American criminal justice system, the prospects of a fair trial for African-Americans
Lawrence has argued that racial discrimination is both a crime and disease that affects everyone. Indeed, he argues that “Americans share a common historical and cultural heritage in which racism . . . plays a dominant role.”

Since this “cultural belief system has influenced all of us, we are all racists.” Scholars have specifically noted that judges and police are not “immune from our culture’s racism” and thus, like others, have racist beliefs that they may not be aware of.

In order to further explore these suspicions of where racial bias enters criminal justice, 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.”

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. At the outset, it should be noted that although drug crimes are a cause of the great increase in prisoners, they are not the

---

28 Lawrence, supra note 25, at 317–18, 321.
29 Id. at 322.
30 Id. “Requiring proof of conscious or deliberate 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.
31 Lawrence, supra note 25, at 380
32 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 less than the problem itself and to determine its causes. Targeted News Service, Steve Cohen, Congressman Testifies on Racial Disparities in the Criminal Justice System, TARGETED NEWS SERVICE, Oct. 29, 2009 at TN-9.
33 KENNEDY, supra note 15, at 146.
34 TARGETING BLACKS, supra note 18, at 4.
primary cause of the exploding prison population. But even still, the incarceration disparities for drug crimes match public perceptions as racial disparity for drug offenses is much higher than other offenses. In 2010, black males had an imprisonment rate that was nearly 7 times higher than white males. For drug related offenses, black defendants were 13.4 times more likely to be arrested, and 11 times more likely to be imprisoned than white defendants for drug offenses. And the racial disparity between blacks and whites has impacted total incarceration disparities; “[b]etween 1990 and 2000, drug offenses accounted for 27% of the total increase in black inmates in state prisons as compared to 15% of the increase in white inmates.”

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. 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. 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. Heightened media and political attention focusing on substance abuse and the drug trade in minority neighborhoods has increased the public’s perception that illegal drugs are more prevalent in minority neighborhoods than in wealthier white neighborhoods. 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

35 STUNTZ, supra note 3, at 47.
36 TARGETING BLACKS, supra note 18, at 3.
37 PAUL GUERINO ET AL., supra note 4, at 7 (This includes black non-Hispanic males).
39 TARGETING BLACKS, supra note 18, at 3. Among all African Americans entering the prison system, 38.2% were convicted of drug offenses compared to 25.4 percent of whites. Id.
40 Murakawa & Beckett, supra note 2, at 707; see also id. at 14. And according to 2009 studies, among black currently serving state prison sentences, 21.1% were convicted of drug offenses as compared to 13.9% among whites. PAUL GUERINO ET AL., supra note 4, at 29, Appendix Table 17b.
41 Boyd, supra note 36.
42 TARGETING BLACKS, supra note 18, at 4.
43 Id. at 4-5; Murakawa & Beckett, supra note 2, at 707.
44 TARGETING BLACKS, supra note 18, at 41.
discretion in deciding where to look for drug offenders and against whom to use proactive tactics.\textsuperscript{45} 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.\textsuperscript{46}

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.

\textbf{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.\textsuperscript{47} This country incarcerates an overwhelmingly high number of drug inmates, but this does not explain high incarceration rates. As James Foreman has argued, even if we released all of our drug offenders tomorrow, “the United States would still have the world’s largest prison system.”\textsuperscript{48} While 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 percent of the expansion in the federal prison population,\textsuperscript{49} they constitute only a quarter of the nation’s prisoners overall.\textsuperscript{50} Indeed, according to the Bureau of Justice, in 2010 there were 1,395,356 million state prisoners, 87,420 in jails, and 209,771 in federal prisons.\textsuperscript{51} With state prisoners, violent offenders constituted 52.4% of the population, property offenders 19.3%, 18.7% drug offenders, and 8.5% for public order offenders.\textsuperscript{52} Jail inmates seem to be held more equally across the four crime

\begin{thebibliography}{99}
\bibitem{45} Murakawa & Beckett, \textit{supra} note 2, at 707.
\bibitem{46} Arthur H. Garrison, \textit{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, \textit{Buying into Prison, and Selling Kids Short}, 6 MOD. AM. 51 (2010) (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).
\bibitem{47} See \textit{Stuntz, supra} note 3
\bibitem{49} \textit{Id} at 99.
\bibitem{50} \textit{Guerrino et al., supra} note 4, at 1, 14, 33.
\bibitem{52} \textit{Guerrino et al., supra} note 4, at 29, Appendix Table 17b.
\end{thebibliography}
categories. Though in federal prisons, drug offenders are the majority of prisoners at 51%, federal prisons only hold 13% of all inmates. Overall, violent offenders make up a plurality of the prison population at 47%, with drug inmates constituting 22% of all inmates. And proportionally, while blacks constituted around 12% of the population in 1992, 44.8 percent of all persons arrested for violent crimes were black. 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. And on top of that blacks are disproportionately the victims of high violent crime rates, as crime is mostly intraracial.

Thus, the black-white disparities in violent crime arrests and victimization rates are much higher than 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.

---

54GUERINO ET AL., supra note 4, at 1–2, Table 1.
55Based on my calculation that includes that 8% of federal prison inmates were in for violent offenses and BJS 2006 and 2008 Data, see supra notes 48–51. Heather Couture, Paige M. Harrison, William J. Sabol, Prisoners in 2006, BUREAU OF JUSTICE STATISTICS (Dec. 5, 2007), http://bjs.ojp.usdoj.gov/index.cfm?ty=pbdetail&iid=908 (Focuses on jurisdictional statistics of race, gender and types of crimes.) While some violent crime is drug related, the BJS estimates that in 2007 only 3.9% of murders were drug related. Uniform Crime and Reporting Program of the FBI, Drug and Crime Facts, BUREAU OF JUSTICE STATISTICS (2007), http://bjs.ojp.usdoj.gov/content/dcf/duc.cfm (The Uniform Crime Reporting Program (UCR) of the Federal Bureau of Investigation (FBI) reported that in 2007, 3.9% of the 14,831 homicides in which circumstances were known were narcotics related. Murders that occurred specifically during a narcotics felony, such as drug trafficking or manufacturing, are considered drug related.)
57KENNEDY, supra note 15, at 10 (“Crime 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.”); See GARY LA FREE, LOSING LEGITIMACY: STREET CRIME AND THE DECLINE OF SOCIAL INSTITUTIONS IN AMERICA, 48–51 (1998) (argues that social institutions are the key to understanding the U.S. crime wave. Crime increased along with growing political distrust, economic stress, and family disintegration.)
58DAVID M. KENNEDY, DON’T SHOOT: ONE MAN, A STREET FELLOWSHIP AND THE END OF VIOLENCE IN INNER-CITY AMERICA (2011) (one out of every two hundred young black men is killed every year); Foreman, supra note 43, at 30. Over “90% of black homicide victims are black and more than 75% of all crimes against black victims are committed by blacks.” Id. at 31.
than white defendants. Overall, the impact on the prison population for violent crime is also twice as high as it is for drug crimes.\textsuperscript{59}

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.\textsuperscript{60} 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 discretion. According to these scholars the singular focus on eliminating explicit race discrimination has served to be a blessing and curse.\textsuperscript{61} As a result, formal institutional racism was nearly eliminated, but replaced with unrestrained discretion. This discretion is what has allowed disproportionate punishment of black Americans without any detection or accountability for racial bias.

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

\textsuperscript{59} Henry Ruth & Kevin 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.).
\textsuperscript{60} Recent critics also point to several diseased areas of the criminal justice system including its federalist structure, inequitable legislative policy, lacking legal counsel. These criticisms should all be studied individually, but are not addressed here.
\textsuperscript{61} Doris Marie Provine, Race and Inequality in the War on Drugs, 7 Ann. Rev. Law 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”).
A. Maldiscernion

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

Scholars, like Ian Lopez and Michelle Alexander, have criticized the emphasis on colorblindness for allowing racially discriminatory results. Lopez asserts that colorblindness ensures racial disparities in criminal justice can never demonstrate racism without evidence of the express and malicious use of race. He 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. Police exercise the greatest discretion, particularly in drug enforcement. And rather than limiting racial profiling, the Supreme Court has essentially given the green light to police to make race-based arrests.

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. 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. The intent standard continues to limit legal challenges to racial inequalities in the criminal justice system. The standard of racial intent proves difficult to establish and allows relatively unchecked police discretion. Indeed, the Court has worked hard to ensure that prosecutors can exercise broad discretion, but has limited the ability of individuals to bring claims of racial bias. Thus courts are not open to claims by defendants and private parties that the criminal justice system discriminates against black Americans.

69 Additionally, scholars have recognized framing racism as only intentional harm perpetrated at a distinct moment in time does not capture all the ways race shapes penal beliefs, practices, and outcomes. See Murakawa & Beckett, supra note 2, at 703.

70 ALEXANDER, supra note 2, at 121.

71 Id. at 121–34 (relying on United States v. Brignoni-Ponce, 422 U.S. 873 (1975), it seems it would be permissible under Equal Protection Clause of the 14th Amendment 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. Id. at 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. 114(1983); Rizzo v. Goode, 423 U.S. 366 (1976).

72 Lopez, supra note 2, at 1023, 1063.

73 This is evident in cases such as Washington v. Davis, 426 U.S. 229 (1976); Pers. Adm’r of Massachusetts v. Feeney, 442 U.S. 256 (1979); and McCleskey v. Kemp, 481 U.S. 279 (1987). Murakawa & Beckett, supra note 2, at 679, 701 (In McCleskey v. Kemp, the Supreme Court upheld a capital sentence despite evidence of significant racial disparity, exemplifying the logic of colorblindness as seen in the judicial system. 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. However, the Supreme Court rejected McCleskey’s claim of discrimination.)

74 Murakawa & Beckett, supra note 2, at 708.

75 ALEXANDER, supra note 2, at 112. For example, in United States v. Armstrong, 517 U.S. 456 (1996), the Court held that a defendant claiming selective prosecution must “offer in
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. Scholars have bemoaned the rejection in recent years of racial discrimination cases in all areas of criminal justice. This has allegedly resulted in police, prosecutors, and judges using racially discriminatory practices without detection or intervention by the courts. And some have taken the next step to argue that excess discretion has caused the rise of mass incarceration, particularly among the black population.

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

I. 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. While 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. However,

advance the very evidence that generally can be obtained only through discovery of the prosecutor’s file.” *Id.* at 114.

76 *Id.* at 100.

77 *Id.* at 135. In fact, research on race in criminal justice has claimed that at each decision point includes an element of discretion, subject to “covert, overt and unconscious biases.” See Garrison, *supra* note 44, at 104.

78 “Racial disparities are now caused not by discriminatory statutes, but instead by the racialized exercise of discretion, selective prosecution, and selective sentencing by judges.” *Lopez, supra* note 2, at 1023, 1046.

79 Granting police unlimited discretion in who to stop, search, and arrest for drug offenses “ensures that conscious and unconscious racial beliefs and stereotypes will be given free reign.” 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.

80 *Lopez, supra* note 2, at 1023, 1046 n.106.

with violent crime, there is usually immediate harm and the police intervene.\textsuperscript{82} As a result, violent crimes are usually reported to the police.\textsuperscript{83}

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.\textsuperscript{84} For instance, in 2002 there were a reported 19.5 million illicit drug users in the U.S. and only 1.5 million drug arrests, and 175,000 admitted to prison for a drug offense.\textsuperscript{85} With few reports of drug crimes, police must act proactively to apprehend drug criminals. Thus, police exercise a lot of discretion and have little public accountability when dealing with drug crimes, because such crimes are seldom reported and rarely have victims.

2. Discretion and Violent Crime

Scholars often criticize discretion by police and prosecutors in drug arrests, but race scholars seldom bring up disproportionately higher violent crime arrest rates among blacks. The fact is that more of our prison population is incarcerated due to violent crime arrests, and more blacks proportionately 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 disproportionately victimized by violent crime.\textsuperscript{86} Furthermore, violent crime arrests are not only more accurate to the number of these crimes that occur (as these are nonconsensual crimes that are often reported), but it is also more difficult to determine whether the violent crime arrest rate disparity among blacks is due to racial bias. As a result, scholars have seldom examined whether judges are using discretion to overdetain, oversentence, or otherwise more harshly punish black defendants for violent crime.\textsuperscript{87}

\textsuperscript{82} BUREAU OF JUSTICE STATISTICS, REPORTING CRIME TO THE POLICE: 1992-2001 (2003), available at http://bjs.ojp.usdoj.gov/content/pub/ascii/rcp00.txt (reporting that 90\% of violence in which the victim was shot was reported to the police).

\textsuperscript{83} Id.

\textsuperscript{84} ALEXANDER, supra note 2, at 101.

\textsuperscript{85} ALEXANDER, supra note 2, at 101. See also SUBSTANCE ABUSE AND MENTAL HEALTH DATA ARCHIVE, NATIONAL SURVEY ON DRUG USE AND HEALTH (2002), http://dx.doi.org/10.3886/ICPSR03903.V3.

\textsuperscript{86} Forman, supra note, 43 at 39, 40 n.119. Through research, the author has come to believe that many African-American youths’ acts of violence have often been closely connected to being in an environment that felt unsafe. Id. at 41 n.121. 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 42.

\textsuperscript{87} 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
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.” 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. Criminal justice actors often predict which defendants are going to commit an additional crime in determining whether to arrest defendants, to release them on bail, 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. Whether this prediction is done effectively by judges, police, and other actors is a disputed matter that will not be addressed here. However, some scholars, like Bernard Harcourt have argued that such predictions actually increase crime rates and harm black defendants. Arguments against

---

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 Langan, No Racism in the Justice System 117 PUB. INT. 48, 51 (1994) (examining data from Justice Department Survey about racial bias in criminal justice system and concluding no racial bias exists).


89 HARCOURT, supra note 13. See also 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 “incorporates variables that are correlated with race”); John S. Goldkamp, Prediction in Criminal Justice Policy Development, 9 CRIME & JUST. 103, 130 (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. 167 (1987) (suggesting that the expanded use of racially correlated factors in prediction “may actually increase racial disparities in sentencing, probation supervision, and prison time served”); 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”).

90 HARCOURT, supra note 13, at 17.

91 See Shima Baradaran and Frank McIntyre, Predicting Violence, 90 TEX. L. REV. 497, 502–03 (2012) (sets 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) (assesses the claims and counterclaims made about the psychological and prediction criteria for preventive detention.)
prediction include that it encourages discrimination against black defendants and allows judges to inappropriately consider race in determining who will commit an additional crime. In other words, judges use race as a proxy for risk. Second, prediction results in a self-perpetuating overrepresentation of certain minority offenders as compared to the offending population as a whole. As a result, the use of predictive methods leads to injustice in the criminal system. These criticisms are addressed in order.

I. 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). Indeed, some claim that racial profiling actually does not lower crime rates, which is arguably the proper role of law enforcement activity. And when judges rely on predictive methods, the public is more likely to blame them when they release an individual who commits a heinous crime. With pretrial

---

92 HARCOURT, supra note 13, at 3.
93 Id.
94 Id.
95 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 police tendency to search racial minorities and their cars more frequently does not of itself demonstrate racism, but rather could be an effort to maximize successful searches. See id. at 111–12. See also Yoram Margolioth, Looking at Prediction for an Economics Perspective: A Response to Harcourt’s Against Prediction, 33 LAW & SOC. INQUIRY 243, 243–49 (2008). Harcourt claims that profiling is unlikely to be efficient when it is uses to target minority groups. 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 they should be targeted. It doesn’t matter which group is larger, only the relative elasticities. Id.; HARCOURT, supra note 13, at 111.
96 Id. at 139. Others disagree and believe that criminal profiling has been effective in deterring crime. Russell L. Jones, Book Review: Bernard E. Harcourt’s Against Prediction: Profiling, Policing, and Punishing in an Actuarial Age (2006), 4 J.L. ECON. & POL’Y 219, 219 (2007-08) (“Scholars who support criminal profiles suggest that more streamlined suspect pools permit law enforcement officers to better target limited resources to protect the nonoffending 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. 266, 272 (2001). HARCOURT, supra note 13, at 139.
97 Id. at 123–24.
98 Another potential result of a predictive system is that judges fear predicting incorrectly 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
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.99

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).100 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.101 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.102 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.103

because society is weary of the heinous crimes that are committed by released defendants. See 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 Homeless Man’s Jailing Questioned, THE LEDGER, July 11, 2006, at A1 (discussing judicial scrutiny after a man with a record of probation violations was convicted of kidnapping and killing an 11 year-old girl); 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 4 months in jail after he was denied bail, with the case of a man who was granted bail after raping and beating a woman, drove to court with another woman in his trunk that he later killed); George E. Dix, Bail System Requires a Fresh Approach, TEX. LAW., Nov. 15, 1993, at 9 (questioning the Texas practice of reliance on money bail, thus allowing 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 the pursue preventative detention); William H. Freivogel, Drug, Gun Culture Tests the Definition of Excessive Bail, ST. LOUIS POST-DISPATCH, Dec. 10, 1991, at C1. (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).

99 HARCOURT, supra note 13, at 219.
100 Id. at 123.
101 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.
102 Id. at 124.
103 Id. Harcourt argues that a similar effect can happen in the sentencing and parole context. Id. at 139-44. Yoram Maragolioth & Tomer Blumkin, Targeting the Majority: Redesigning Racial Profiling, 24 YALE L. & POL’Y REV. 317 (2006). Rather than speaking in terms of
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 racial profiling affects crime rates is largely lacking. To determine the effect of profiling on crime, the unintuitive 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. Without a clear answer, it is hard to discuss the alternatives—particularly when Harcourt argues that crime will increase with more or less arrests. Thus, there is no evidence to support 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. This has nothing to do with minority defendants committing more crimes, but simply the fact 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. As law elasticity, Margolioth 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. Given the implicit permission granted by courts for police to make race-based decisions discussed in that last section, these decisions are now less closely monitored. Eda Katharine Tinto, The Role of Gender and Relationship in Reforming the Rockefeller Drug Laws, 76 N.Y.U. L. Rev. 906, 942 n.174 (2001) (arguing that options such as drug treatment are less costly and more effective at reducing drug crime than imprisonment). Harcourt, supra note 13, at 136-39; Dorothy E. Roberts, Punishment and its Purposes, 56 STAN. L. REV. 1271, 1273 (2004) (demonstrating statistics that while whites use illegal drugs more often a larger proportion of blacks were imprisoned for drug charges in 1998); Tracey Meares, The Legitimacy of Police Among Young African-American Men, 92 MARQ. L. REV. 651, 654 (2009). Harcourt calls this the ratchet effect. Harcourt, supra note 13, at 145, 220. “Incarceration 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
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. Whether a person obtains a criminal record (and the size of that record) are related to both criminal activity and race. Thus, more blacks are represented in the arrest population, and this overrepresentation self-perpetuates and becomes 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. 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. 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 options. 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. Thus, the argument goes, blacks become more heavily represented in the criminal justice system due to prediction rather than 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

Banks, Beyond Profiling: Race, Policing, and the Drug War, 56 STAN. L. REV. 571, 589 (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.

108 Harcourt, supra note 13, at 147.
109 Garrison, supra note 44, at 104.
111 Id. at 162
112 Id. at 162-63, 164-65, 167; Roberts, supra note 104, 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”); Meares, supra note 101, at 654.
113 Harcourt, supra note 13, at 168. Indeed, scholars have found that incarceration rates increase when a defendant has a more serious criminal history. Id.
defendants in prison and increased crime levels. This overrepresentation may turn race into a proxy for suspecting individuals as criminals. Indeed, Harcourt argues that race can become a proxy for the risk of committing crime and lead to overrepresentation of blacks in the criminal justice system.

The next section addresses these two criticisms, by asking whether there is 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 previous 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. It may also be the case that

114 See supra notes 90 through 100 and accompanying text.
115 HARCOURT, supra note 13, at 220–21.
116 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 15, at 160–62.
117 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 13, 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 209. 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 60% 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% 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. at 214. According to Harcourt, this implies the existence of the ratchet effect and the fact that profiling harms minorities. Id. at 208. 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 Samuel R. Gross & Katherine Y. Barnes, Road Work: Racial Profiling and Drug Interdiction on the Highway, 101 MICH. L. REV. 651 (2002); Barnes, supra note 100, at 1107–10. After controlling for several variables, including characteristics of the driver such as gender and race, characteristics of
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 how prediction and discretion may impact 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.

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, parole and probation, some sentencing determinations, and death penalty cases. 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. None of these

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.”


119 Id. at 433.


122 Norval Morris & Marc Miller, Predictions of Dangerousness, 6 CRIME & JUST. 1, 2–4 (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 (1984-85) (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).

123 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 Infirmitities Related to
situations permit the actors to take race into account, but they can (and often do) consider other factors such as criminal history, the nature of the current charge, the defendant’s previous experience with the court system, and sometimes her employment history, family status, and other characteristics. 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 Prediction of Dangerousness, 55 TEX. L. REV. 1343, 1348–52 (1976-77). 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. Michael 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 dangerous determinations to determine if the inmate would pose a risk to society if released. See Pearson v. Muntz, 606 F.3d 606 (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).

See Monahan, supra note 111, 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”) (quoting Steve Lash, Texas Death Case Set Aside, HOUS. CHRON., 1A (June 6, 2000)). The federal sentencing commission stated that in addition to race, “sex, religion, national origin, socioeconomic status, and disadvantaged upbringing” are also 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, 438 (2005) (arguing that sentencing disparities are due in part to racial stereotypes that affect perceptions of danger).

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

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 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. John Monahan, supra note 111, at 397.
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 they determine to pose a risk. By examining over 150,000 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 discrimination. 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.127 This pretrial decision is highly indicative of whether the defendant receives a custodial sentence or is convicted at trial.128 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.129 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,130 prosecutors’ decisions to charge,131 and judges’

---

127 Baradaran, supra note 11, at 17–35 (discussing the expansion of what judges consider pretrial).
128 See, e.g., MARY T. PHILLIPS, NEW YORK CITY CRIMINAL JUSTICE AGENCY, INC., PRETRIAL DETENTION AND CASE OUTCOMES, PART 2: FELONY CASES 25–36 (Mar. 2008) (confirming earlier studies demonstrating the link between pretrial detention and an increased likelihood of conviction).
129 Baradaran, supra note 11, at 25–32 (discussing the trend in federal and state law to detain defendants who are likely to commit a crime).
decisions to issue black defendants long sentences. In all of 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. 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, the next section broadly examines discretion and prediction in the context of police arrests.

131 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); 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); 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); 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 falls into one of three categories: (i) “lack of sufficient proof of legal guilt, (ii) . . . preserv[ing] limited resources, or (iii) . . . conclu[ding] that the prospective defendant is insufficiently blameworthy”).


133 Joseph Goldstein, Police Discretion Not to Invoke the Criminal Process: Low-Visibility Decisions in the Administration of Justice, 69 YALE L. J. 543, 543 (“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 decisionmakers—prosecutor, grand and petit jury, judge, probation officer, correction authority, and parole and pardon boards.”). See also Stuntz, supra note 120, 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 official”).
and judicial decisions to detain defendants to determine whether there is racial bias in these decisions.\textsuperscript{134}

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 racist 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 their race? These difficult questions will be addressed below.

\textbf{A. Data}

This Article relies on a nationally representative dataset of seventy-five large urban counties from 1990 to 2006.\textsuperscript{135} The counties in the sampling frame cover approximately 38\% of the U.S. population.\textsuperscript{136} The dataset includes over 56,000 observations of felony defendants from the time of arrest through trial over the 16 year period.\textsuperscript{137} Over this period, judges released a little over 34,000 defendants, with an average release period of about 250 days.\textsuperscript{138}

\textsuperscript{134} We 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.
\textsuperscript{135} These data come from the Bureau of Justice’s State Court Processing Statistics from 1990 to 2006. The survey was originally known as the National Pretrial Reporting Program and tracks defendants arrested on felony charges. \textit{See Bureau of Justice Statistics, State Court Processing Statistics (SCPS), available at http://bjs.ojp.usdoj.gov/index.cfm?ty=dcdetail&iid=282. Data are taken from May of each year, with sampling done in the large jurisdictions. The survey provides weights that allow one to reconstruct a sample representative of the 75 counties.}
\textsuperscript{136} Every two years, the ten largest U.S. counties are automatically surveyed, as are thirty other counties drawn from the next 65 largest counties.
\textsuperscript{137} The original dataset contains just over 130,000 observations, but due multiple factors, the sample for this article contains only 56,675 observations. For an in-depth discussion of the process used to create the same, \textit{see Frank McIntyre & Shima Baradaran, Race and Pretrial Detention (forthcoming), available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1987071.}
\textsuperscript{138} Those defendants who are held wait in jail an average of 73 days (a median of 41 days). Those who are released have a median of 100 days. In addition, for those who are released and rearrested, the median time from release to rearrest is 63 days, with the average being...
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, as well as basic information about the defendant’s age, gender, 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. The results are robust with respect to selection bias, and standard errors. The next section examines an important question: Are black defendants more likely to be arrested for crimes while released?

### 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, which confirms that arrest and conviction rates vary systematically by race.

The pretrial release data indicates that the most common initial crimes for which defendants are arrested are drug crimes (a total of 35% of all defendants), followed by property crimes (29%) and violent crimes.

90 days. For those who are rearrested the median time to trial is 153 days with a mean of 164 days.

139 Table 2, discussed below, gives summary statistics for the covariates used in the probit model. Misconduct refers to failures to appear in court.

140 Table 1 summarizes characteristics about the original offenses and subsequent outcomes of defendants in the sample.

141 For a discussion of the potential for selection bias, see McIntyre & Baradaran, supra note 134. For a discussion of the more serious concern that judges might be relying on unobserved characteristics, see Baradaran & McIntyre, supra note 88, at 538.

142 For a discussion of the robustness of the standard errors, see McIntyre & Baradaran, supra note 134.

143 Bureau of Justice, Special Report, Pre-Trial Release and Misconduct 1, 4, 5 (1985) (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, 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 1 (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 84, 519–21.

144 Figure 1 plots empirical rearrest probabilities by age, race, and gender.
Sixty-two percent of felony defendants in the sample are black. Of individuals rearrested while on pretrial release, rearrest rates for black defendants are noticeably higher (4%) compared to white defendants (2%). Though rearrests sharply decline among black men as they age, they do not fall as abruptly for the other groups.

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. It also shows that black defendants are substantially more likely to be rearrested for a violent crime than defendants of other races.

Figure 1: Rearrest Rates by Age & Race

Although arrest rates are higher for black defendants, they do not necessarily commit more of each type of crime. Violent crime arrest rates, however, tend to reflect actual crime rates better than drug crime arrest rates. 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. But black defendants are more often

145 Tables 1 and 2 provide summary statistics for the $X_{ite}$ variables in our sample and then again for the subset of released defendants.

146 See supra note 140.

147 Though the analysis finds that being Hispanic has no predictive power, but see Qudsia Siddiqi, 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 29 (2009), black defendants are substantially more likely to be rearrested for a violent crime: on average about 0.8 percentage points more likely. See Appendix Table 1.

148 So, the question remaining is why are arrest rates a decent measure of harm even though it 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.

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

150 See M. Dwayne Smith, The Era of Increased Violence in the United States: Age, Period, or Cohort Effect?, 27 Soc. Q., 239, 240 (1986) (Homicide statistics are most accurate with
arrested for drug crimes even though all races commit drug crimes equally.\textsuperscript{151} 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.\textsuperscript{152} 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.\textsuperscript{153} The next section examines whether judges consider race when predicting whether a defendant will commit another crime and deciding whether to release him.

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.\textsuperscript{154} Examining judges’ decisions to release or detain a defendant,

\textsuperscript{151} Stuntz, supra note 9, at 1971; Jamie Fellner, Race, Drugs, and Law Enforcement in the United States, 20 STAN. L. & POL’Y REV. 257, 266–74 (2009) (noting statistics on number of drugs by black and white individual and the disparity in drugs arrest of black individuals).

\textsuperscript{152} 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., ARRESTING BLACKS FOR MARIJUANA IN CALIFORNIA: POSSESSION ARRESTS (2006-2008) (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).

\textsuperscript{153} 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. Marc Miller & Martin Guggenheim, Pretrial Detention and Punishment, 75 MINN. L. REV. 335, 398–99 (1990) (citing four studies on pretrial crime that show very low rearrest rates for those released on bail: 25\%, 13\%, 3\%, and 1\%, respectively).

\textsuperscript{154} We use a standard probit model and specify the probability of being rearrested or fleeing to be a function of the type of felony in the original arrest, age, year, and various characteristics about the person’s prior record. We estimate the model both with and without an indicator variable for race. We also allow rearrest rates to vary depending on the overall crime level in the county and the year. For each person \(i\) living in county \(c\), in year \(t\), suppose that the value \(y_{ite}^f\) 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 \(y_{ite}^f\) be zero for all those who do not get rearrested for crime \(j\). We wish to predict this \(y_{ite}^f\) for any given person.

We can then estimate the probit model as:
the model analyzes factors such as the risk that a defendant is going to commit additional crimes. 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. 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.

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 police officer observing a young black man driving a shiny new car in a low income neighborhood may signal to the officer that he may 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

\[
\begin{align*}
y_{itc}^j &= 1 \quad \text{if } \alpha_t^j + \alpha_c^j + X_{itc}^j \beta^j + \epsilon_{itc}^j > 0 \\
y_{itc}^j &= 0 \quad \text{else}
\end{align*}
\]

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). \(\alpha_t^j\) is a set of year parameters that track secular changes over time for crime \(j\); they are common across all counties and defendants. \(\alpha_c^j\) tracks a county specific component to crime rates. See McIntyre & Baradaran, supra note 134. Table 4 contains the results when controlling only for failure to appear or violent felony rearrests.

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. 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.
information they need. But is it appropriate 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, and also accounts for racial differences affecting judges’ decisions made within a given county in a given year. 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.

---

158 KENNEDY, supra note 15, at 137. Kennedy also discusses the debate among scholars whether police using race as a proxy for risk is “reasonable race discrimination” and 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.
159 For a discussion of how the model would be affected by this, see McIntyre & Baradaran, supra note 134.
160 Notice that this model includes county-year fixed effects, so the racial differences consider differences between judges within a given county in a given year by specifying that \( \gamma \) is a function of the county, \( k \). A separate \( \gamma_k \) could then be estimated for each county. This methodology is used below to get results specific to Cook county.
161 Each number gives the average change in probability based on a person having that characteristic, holding fixed all their other characteristics. See Table 3. Note that for the probit and all other calculations, the survey weights are used to correct for the fact that some districts were over or under-represented. In practice, the results are largely 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.\(^{162}\) In addition, judges making a decision to release an individual must predict whether the individual presents a threat to community safety upon release.\(^{163}\) With regard to community safety, black defendants are twice as likely as white defendants to be arrested for violent crimes.\(^{164}\) Thus, to know whether judges consider race when deciding whether to release defendants before trial, this model must determine whether judges’ release decisions are still discriminatory when community safety is accounted for.\(^{165}\) The model therefore contemplates whether disparity in detention is explained by racial bias or judges’ considerations of how likely the defendant is to commit a violent crime, or some combination of the two. 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.\(^{166}\)

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

\(^{162}\) See Table 4, column (7).

\(^{163}\) Baradaran & McIntyre, supra note 86, at 510 (At least 25 states have statutes which 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 7.

\(^{164}\) See supra note 153 and accompanying text.

\(^{165}\) Table 5 re-estimates Table 4, column (7), including county-year effects, but instead estimates flexible 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, which yields obvious and large signs of a nonlinear effect.

\(^{166}\) For instance, a defendant with a 1% chance of rearrest for a violent felony has a thirteen percentage point increase in the probability of being held for each extra percentage point increase in danger. On average, those with a one percent chance of rearrest are held about 33% of the time. Moving to a two percent chance of rearrest, while holding other characteristics constant, leads to a hold rate of \((33 + 9 = 42\%)\), an almost 30% increase in the hold rate. So judges are behaving as if it is important to stop these crimes. On the other hand, a one percentage point increase for someone starting from a 5% chance of rearrest, which is the third row, leads to only a more modest 2.65 percentage point increase in the chance he is held. This number drops even further for those with a 7% probability of rearrest.
possible explanations and considers the likelihood of rearrest for violent crime, the gap between black and white defendants disappears.  

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. Thus, judges use race as a proxy for determining pretrial misconduct, but they do not detain blacks at higher levels due to any animosity or bias towards black individuals. In other words, judges treat people differently due to race because race is a proxy for risk of violence.

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. For example, 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 arrested for a 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), judges do not overdetain black defendants compared to white defendants. Thus, when considering that judges must consider a defendant’s likelihood of harming public safety, they do not demonstrate racial bias.

2. Racial Bias with 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. 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.

---

167 See Table 5. The estimated racial gap is now slightly negative and statistically inseparable from zero.
168 This is the kind of discrimination that Harcourt warned about. See HARcourt, supra note 14.
169 It can also be a proxy for other unobserved characteristics.
170 See Table 6, which adds the linear or nonparametric probabilities for either the probability of rearrest for drug crimes or nonviolent felonies more generally.
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.\footnote{And both drug rearrests and nonviolent felony rearrests more generally suggest that judges are at least somewhat interested in stopping these crimes, but not nearly as much as they are interested in stopping violent crime. The average effect of a one percentage point increase in drug rearrest is only a 1.22 percentage point increase in the chance of being held. This is half the 2.11 percentage point rise in hold rates associated with nonviolent felonies generally and much less than the 6-10 percentage point rise associated with violent crime.} Thus it 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.\footnote{Unfortunately, while flight and violence risk predictors are not correlated, the same cannot be said for these two additional predictors, both of which are correlated with both flight risk and dangerousness. The outcome of this correlation appears to be that things that separately predict flight risk, holding fixed the risk of a drug or nonviolent felony, sometimes predict higher release rates by judges. This is hard, though not impossible, to rationalize in a framework with fully informed judges capable of making complex calculations in their head. Rather than attempt that interpretation, though, it is sufficient to say that it may simply represent mild limits on cognitive ability. Tables A and B demonstrate that judges do still detain flight risks more, if only slightly. The results here indicate that they may have trouble evaluating how this flight risk probability rises, “holding fixed” another correlated probability such as drug crimes or nonviolent felonies more generally. Given how little judges seem to care about flight risk in the first place, this may not be a surprising result.} In short, it seems that racial differences in detention rates are not related to drug crimes.

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. Part IV 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.
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. One reason that crimes committed by blacks and whites may be treated differently is that they tend to have different victims. If black criminals are more likely to harm black victims, a judge may discriminate by not ascribing as much benefit to stopping crimes against black victims as against white victims. This analysis detects this bias, demonstrating that potential crimes by black defendants are not as large of a concern to judges as those by white defendants.\(^{173}\)

The results show that judges are more sensitive to increased probabilities of crime 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. 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 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.

\[E. \text{ Differential Rearrest Rates}\]

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.\(^{174}\) If this is true, judges may be expected to more aggressively hold individuals with higher probabilities of rearrest.\(^{175}\) This is particularly relevant to the

\(^{173}\) This regression demonstrates a difference in the marginal benefits of stopping a crime between a black and white defendant. See Table 7.

\(^{174}\) 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.

\(^{175}\) This would depend on if those who commit fewer crimes have the same ratio of rearrests to crimes as those who commit more. For example, if career criminals are less likely to get
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 and so for them there were four crimes per rearrest. If a judge were to use this information optimally, she would treat increased probability of rearrest more aggressively among white defendants than black ones, since each rearrest of a white defendant yields four crimes rather than two.176

Ideally this analysis could go one step further and consider that some crimes are better observed than others. For example, violent crimes are more likely to be reported than drug crimes.177 If more stringent monitoring has a larger 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.178

caught, then as the probability of a person getting rearrested goes up, it becomes 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 analysis is attempting to do is recover the judge’s actions in this situation and interpret them, rather than actually needing to come up with the optimal solution.

176 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 black defendants, since the values should be higher by the ratio of \(\frac{4}{2}\) for white vs. black defendants.

177 While the Bureau of Justice Statistics does not collect data on drug crimes in its National Crime Victimization Survey, serious violent crimes are reported to police more than any other crime, except motor vehicle theft. JENNIFER L. TRUMAN, BUREAU OF JUSTICE STATISTICS, NATIONAL CRIME VICTIMIZATION SURVEY, 2010 10 (Sept. 2011). 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”).

178 Though it should be noted that some experts claim that prosecutors prefer to prosecute drug crimes than violent crimes because they are easier to prove and often provide a larger sentence. See, e.g., 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:
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. For white defendants, though, drug crimes result in significantly higher probabilities of being held. 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 at least judges believing it to be so. Thus, judges either account for blacks being more likely to be arrested (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. White defendants are actually more likely to be detained pretrial than black defendants. Indeed, judges hold whites more aggressively as their likelihood for rearrest for a violent crime goes up, 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 more aggressively detaining white defendants than black defendants.

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 (2009) (suggesting that the threat of sentence reduction may incentivize prosecutors to engage in less misconduct); Markus Dirk Dubber, Policing Possession: The War on Crime and the End of Criminal Law, 91 J. CRIM. L. 829, 858–59 (2001) (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”).

179 See Table 7.
180 The ratio gap in the coefficients is much higher at 7.4 than it is for violent crimes, which is 1.5.
181 See HARCOURT, supra note 14.
182 Id. (stating that the more blacks are arrested for crimes, the more likely they are to be imprisoned as compared to white defendants).
The results in this section demonstrate that, contrary to the assertions of several scholars, judges actually overdetain white defendants rather than black defendants. The reason that judges overdetain 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 white defendants. So, relative to their risk, blacks are actually detained at a lower rate than whites. Thus, after considering the likelihood of rearrest, judges actually detain white defendants at higher levels than black defendants.

This section 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.\textsuperscript{183} Thus far, the article has considered whether judges demonstrate racial bias in detention decisions.\textsuperscript{184} The evidence presented

\textsuperscript{183} Table 7 redoes the work in Table 6 but separately by race.

\textsuperscript{184} 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 what initial charge to bring against a defendant and it might seem that the initial charge becomes 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
thus far is consistent with two different stories: judges care more about crimes by white defendants (against white victims) or judges decide to detain black defendants less because they know 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. This comparison helps demonstrate whether police are more 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.


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. 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

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 may upset the predictions. Judges could then reestimate their model under this new mix. 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 this is 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, as prosecutors often take the lead in reducing sentences below the sentencing guidelines, more often than judges. See U.S. SENTENCING COMMISSION, THIRD QUARTER FY11 QUARTERLY SENTENCING UPDATE (2011) (demonstrating that federal prosecutors are the primary driver behind lower-than-recommended sentences (27.7%) as compared to judge-initiated sentences (16.9%)).

185 Philip J. Cook & John H. Laub, The Unprecedented Epidemic in Youth Violence, 24 CRIM. & JUST. 27, 32–33 (1998) (explaining that criminologists study trends and patterns in crime often 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).


187 The data from these three crimes is aggregated because the violent crime data are the best. Note that aggravated assault and robbery form the largest components of violent felony charges.
people victimized by those crimes can be estimated, as well as the relative number of perceived white versus black perpetrators.\footnote{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. However, if arrest data overreport crimes committed by blacks as well, the two errors are likely to cancel out.}

Examining the data between arrests and reported violent crimes demonstrates no statistically significant racial bias. In 2009, the UCR reported 43,000 robbery arrests, 210,000 aggravated assault arrests, and 11,000 rape arrests for white defendants; for a total of 264,000 arrests. For black defendants the comparable numbers were 56,000, 112,000, and 5,000; for a total of 173,000 arrests. Thus the arrest ratio was 1.52 white defendants per black defendant.\footnote{Criminal Justice Information Services Division, Crime in the United States, Arrests by Race, 2009, Table 43 (Sept. 2010) http://www2.fbi.gov/ucr/cius2009/data/table_43.html. Unfortunately, this same issue cannot be addressed with drug crimes, because accurate victimization numbers for drug crimes do not exist.} From the NCVS, there are a reported 1.3 million violent crimes.\footnote{This excludes attempts or threats.} Among those for whom the offender’s perceived race was identified as white or black, 648,000 were white and 410,000 were black.\footnote{Personal Crimes of Violence, 2004, Table 40, Bureau of Justice Statistics, http://bjs.ojp.usdoj.gov/content/pub/pdf/cvus/previous/cvus40.pdf from the NCVS. For multiple offender crimes we only included those where all the offenders were identified as either white or black.} Thus, among offenses, the NCVS data suggest a ratio of 1.58 white defendants per black defendant. These ratios are almost identical (1.52 and 1.58), demonstrating no evidence in the national data that black offenders are more or less likely to be arrested for violent crimes than white offenders. Thus, it is unlikely that racial disparities in arrests come from violent crimes.

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

\footnote{The prior record here considers all prior violent crimes.}
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. 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.

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. Federally sponsored household surveys of drug use among Americans suggest that whites and blacks use illegal drugs at about the same rates. Despite drug use being roughly equal, rates of arrest are not, as blacks make up 35.1% of all drug arrests nationwide. This may be explained partly by previous studies that demonstrate that drug arrests of urban black drug dealers are easier to make compared to white drug dealers. Federal and financial incentives for stopping drug crime may also incentivize police to increase drug arrests. And police in urban

---

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

195 TARGETING BLACKS, supra note 18, at 41.

196 Id. Recent surveys of drug use have illustrated that an estimated 49% of whites and 42.9% of blacks age 12 or older have used illegal drugs in their lifetimes, 14.5% of whites and 16% of blacks have used illegal drugs in the past year, and 8.5% of whites and 9.8% of blacks have used illegal drugs in the past month. Id. And far more whites commit drug offenses (including using crack) than blacks. Id. at 42. See also Ford, supra note 16, at 337.

197 Id. at 45.

198 Michael Tonry, War on Crime and Racial Disparities, 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).

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. Thus, it appears that from arrest and commission rates, black defendants are likely to be disproportionately 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. 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. 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, other scholars and activists believe that crimes should be even more heavily enforced in black neighborhoods. Thus, the focus of judges on detaining individuals more likely to commit violent crimes may not be especially controversial, even

Incentives, and the War on Drugs, 83 PUB. CHOICE 21 (Apr. 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).


201 McIntyre & Baradaran, supra note 134.

202 Richard S. Frase, What Explains Persistent Racial Disproportionality in Minnesota's Prison and Jail Populations?, 38 CRIME & JUST. 201, 242 (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.”)

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, particularly as drugs are often linked with violence. The next section discusses whether there is support for this link.

3. The Link Between Drugs and Violence

Some experts have argued that aggressive policing of drug crimes in black neighborhoods is a positive development that will decrease violent crime rates. Here, an independent data analysis on pretrial drug crime is used to determine whether drug crimes are actually linked with violent crime. The results do not support the assertion that there is a relationship between drugs and violent crime. In examining which defendants charged with a crime are most likely to be rearrested for another crime while released pretrial, the highest rearrest rate is for accused drug dealers. While an alleged drug dealer is more likely than most other defendants to be rearrested pretrial, he is extremely unlikely to be rearrested for a violent crime. Though defendants with drug felonies are presumed to be dangerous in the federal system and in many states, they have one of the lowest rearrest

---

204 William J. Stuntz, Essay: Race, Class, and Drugs, 98 COLUM. L. REV. 1795, 1798 (1998) (noting that the overwhelming crack arrests in black neighborhoods is a “double-edged” sword that “looks racist”)
207 See Table 3. Several scholars have alleged that there is a link between drug crime and violence. See Graham C. Ousey & Matthew R. Lee, Examining the Conditional Nature of the Illicit Drug Market-Homicide Relationship: A Partial Test of the Theory of Contingent Causation, 40 CRIMINOLOGY 73, 75 (2002) (reviewing the systemic violence model, which asserts that drug-related violence is a product of the structure of the market for illicit drugs); Michelle D. Weiner et al., Short Communication: Explaining the Link Between Violence Perpetration, Victimization, and Drug Use, 30 ADDICTIVE BEHAV. 1261, 1262 (2005) (offering three models for explaining the link between drug use and violence: psychopharmacological, economically compulsive, and systemic); D.M. Gorman et al., Drug ‘Hot Spots,’ Alcohol Availability and Violence, 24 DRUG & ALCOHOL REV. 507 (2005) (assessing the relationship between areas of high alcohol outlet density and areas of illicit drug activity, and the relative influence of each on violent crime).
208 This is matched by alleged robbers and those charged with fraud at 21%.
rates for violent crimes.\textsuperscript{209} Indeed, only about 1\% of defendants charged with drug crimes (sales or possession) are rearrested for a violent felony.\textsuperscript{210} This rate of rearrest for drug offenses is about the same as the rearrest rate for people charged with minor driving related offenses.\textsuperscript{211} This is important in demonstrating that individuals charged with drug offenses may not pose a danger of violent crime to society, as is commonly believed.\textsuperscript{212}

While in the federal system, judges are bound to consider defendants charged with certain drug crimes as dangerous and detain them;\textsuperscript{213} in most states judges are free to make this release determination.\textsuperscript{214} The data analysis above demonstrates that in state courts, judges do not often consider drug offenders a threat to society and are much more likely to release them compared to those charged with violent crimes. This analysis clearly is limited to pretrial crime, and makes no assertions outside this context, but nonetheless makes an important finding that drugs and violent crime do not appear to be connected.

4. 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. Blacks are charged with felonies at higher rates than white defendants.\textsuperscript{215} 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.\textsuperscript{216} 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.

\textsuperscript{209} There is a presumption of detention in the federal system for those charged with drug felonies punishable with a sentence of 10 years or more. \textit{See} 18 U.S.C. §3142(f) (subjecting a defendant to detention when charged with a violent crime, a crime punishable by life imprisonment or death, and drug offenses which carry a maximum sentence greater than 10 years).

\textsuperscript{210} \textit{See} Table 2. Drug possession rearrest rates are 1.2\% and drug sales rates are slightly higher at 1.6\%.

\textsuperscript{211} \textit{See} Table 2. Driving related offenses had a rate of 1.2\%.

\textsuperscript{212} \textit{See supra} note 39, and accompanying text.

\textsuperscript{213} Baradaran, \textit{supra} note 11, at 28.

\textsuperscript{214} Baradaran & McIntyre, \textit{supra} note 84, at 506–13.


According to this analysis, black defendants are more likely to be detained pretrial, and are more likely to be rearrested while released pretrial. 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. So there is no racial gap in convictions for comparable white and black defendants. This is surprising, considering that black defendants are more likely to be arrested for a crime on bail. 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. 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,

---

217 See Part II supra.
218 Id.
219 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.
220 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 control for county differences and arrest charge. When we control for prior record though the gap is insignificantly different from zero (-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.
221 Though 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.
222 Harcourt, supra note 14. See also Marc Mauer, Sentencing Project, 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, in Race, Crime, and Justice: A Reader 327 (Shaun L. Gabbidon & Helen T. 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”).
thus 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 race as a proxy for prior record. 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 larger 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 that of white defendants.223

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.224 But given the apparent goal of pretrial release decisions to deter violent crime, prior record is a useful empirical element in predicting violence.225 This is truly independent of the race of the defendant.226 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. 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 be Higher Sensitivity to Violence*

---

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

224 See *supra* Part III.B.

225 *See* Table 3, prior arrests do predict future arrests.

226 Though we do acknowledge that black defendants may have longer records due to arrest and charging bias. Black individuals with longer records 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.
A key question when it comes to race and discretion is, simply, whether certain judges are more racist than others. There are several studies demonstrating judicial bias against black defendants in incarceration and sentence lengths.\textsuperscript{227} This is an important issue to examine in the efforts to determine where racial bias may be entering the criminal justice system.

One set of scholars has recently attempted to answer this question. A recent study by David S. Abrams, Marianne Bertrand, and Sendhil Mullainathan, (ABM) found that some judges treat black and white defendants differently and tend to incarcerate black defendants at higher rates.\textsuperscript{228} This study did not take into account unobservable characteristics between black and white defendants. Thus, it could not determine whether racism can be detected in the judiciary. For instance, in comparing judges, ABM 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.\textsuperscript{229}

In order to determine whether certain judges are biased, this section uses the same data as ABM, 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.

\textsuperscript{227} See, e.g. Jeffrey J. Rachlinski, Sheri Lynn Johnson, et al., \textit{Does Unconscious Racial Bias Affect Trial Judges?} 84 \textit{NOTRE DAME L. REV.} 1195, 1202 (2009) (pointing out that sentencing lengths and likelihoods of incarceration are sometimes related to judge bias); Adam Benforado, \textit{Frames of Injustice: The Bias We Overlook} 85 \textit{IND. L.J.} 1333, 1366 (2010) (noting that judges’ implicit biases significantly affect incarceration rates and sentence lengths); WILLARD GAYLIN, \textit{PARTIAL JUSTICE: A STUDY OF BIAS IN SENTENCING} (1974) (suggesting that judges’ sentencing decisions are shaped by the judges’ shaping experiences and influences).

\textsuperscript{228} David S. Abrams et al., \textit{Do Judges Vary in Their Treatment of Race?}, J. EMPirical LEGAL STUD. (forthcoming 2012) (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).

\textsuperscript{229} ABM’s research shows that pairs of judges exist that appear to treat black and white defendants differently. However, the question of which judge is making better assessments is still open, nor can the possibility that both judges are discriminating against blacks 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 that it is happening but simply to point out that ABM have nothing to say about average levels of discrimination. This is because, as ABM 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.
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.\textsuperscript{230} These possibilities cannot be untangled in ABM’s data, so the analysis here controls for the prior record of defendants.\textsuperscript{231}

In this Chicago dataset, differences in pretrial detention rates between black and white defendants are very high, at 43\% and 29\% respectively.\textsuperscript{232} In breaking down detention rates between types of crime, it appears that judges in Cook County are very sensitive to violent crime.\textsuperscript{233} 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 ABM’s conclusion that judges discriminate against blacks in randomized trials.\textsuperscript{234}

The broader point to take away from this analysis is that in determining racial bias, the propensity for violent crime must be considered.\textsuperscript{235} Indeed, differences between judges may indicate a racial preference,\textsuperscript{236} but this cannot be presumed unless the risk of violent crime is considered.\textsuperscript{237} ABM

\textsuperscript{230}Just including controls for prior record would still be insufficient, as one must allow the control’s effect to vary by judge just as the racial differences are allowed to vary by judge. ABM are certainly aware of this issue, as they consider a specification that allows cross-judge differences in treating drug crimes. Their findings support the concern here, because they find that in fact judges do vary in their treatment of drug crimes. This suggests that these unobserved differences in judicial weighting may be a fruitful avenue for explaining some, or perhaps most, of the cross-judge differences in racial treatment ABM document.

\textsuperscript{231}This is conducted in a regression. See results in Table 9. While ABM includes some limited controls for the offense, they have little information about prior records. Abrams et al., supra note 218.

\textsuperscript{232}Cook County demonstrates very high differences in pretrial detention rates between black and white defendants.

\textsuperscript{233}A one 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 Table 9.

\textsuperscript{234}Thus, as ABM 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 Table 9.

\textsuperscript{235}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 Table 9.

\textsuperscript{236}And given that Cook County shows much higher racial gaps and has detention polices that are aggressive in discouraging violence, Cook County may also not be representative of the rest of the country. Though there is a chance that in some counties individual judges may demonstrate bias against black defendants, in order to determine this question the risk for violent crime must be considered.

\textsuperscript{237}If some of this carries over to the outcomes ABM look at, then (a) Cook county may not be terribly representative of other places, and (b) Cook county judges have a lot of room to vary on how they treat violence risk, creating even more concern that what ABM finds may have more to do with how judges evaluate violent crime than in how they evaluate race.
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 that can be explained by the focus on the risk of violent crime. Accordingly, studies 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. These arguments taken together propose to account for the higher number of black arrests and detentions due to police overarresting and judges overdetaining black individuals.

---

238 See Shawn D. Bushway & Jonah B. Gelbach, *Testing for Racial Discrimination in Bail Setting Using Nonparametric Estimation of a Parametric Model* (Aug. 20, 2011), available at [http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1990324](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 Gelback assume that the unobserved characteristics that differ across race are 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 large 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 it risk will be re-labeled prejudice.

239 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.

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 necessarily harm black defendants more than white defendants. 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.

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 the crime 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. Indeed, judges are more sensitive to increased probabilities of both violent and drug crime for white defendants than black defendants. Thus, judges may already be accounting for the probabilities of future crime, or the likelihood of getting caught, and demonstrating a racial preference. While 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

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”).

240 HARCOURT, supra note 14, at 173.
241 HARCOURT, supra note 14, at 173 (arguing that predictive methods harm black defendants more than white defendants). See supra Part II.A. & B.
242 Judges must consider the threat to the safety of the community posed by the defendant and the likelihood that defendant will commit additional crimes on release. See Baradaran & McIntyre, supra note  84, at 504–13.
243 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.
 Judges may also be less concerned with crime in the black community than the white, and be less willing to preventatively stop crime in black communities. Accordingly, judges may demonstrate bias against whites and blacks in detaining white defendants more readily than blacks. They 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.

The second key finding is that judges—but not police—are ultimately most concerned about violent crime in their decisions; and this is often masked 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. 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. This decision to arrest more black defendants for drug crimes appears to have little impact on reducing violent crime in those communities as there is little evidence to support the popular belief that drug criminals pose a threat of violence to society. 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,

---

244 This may also explain why black defendants are more likely to be rearrested than white defendants. See supra note 228.
247 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. Cf. Stuntz, supra note 2, at 269–71 (noting that police prefer arrests for drug crimes in urban areas, because they are easier to develop cause for than drug arrests in suburbia or violent crime).
249 See supra note 200 and accompanying text. This considers pretrial defendants and notes that those with drug charges are the least likely of any defendant to be charged with a violent crime.
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. Indeed, judges show higher sensitivity to violent crime in white communities by holding similarly situated white defendants at higher rates than black defendants. Conversely, judges demonstrate less concern about violent crime in black communities, which disproportionately harms black victims and potentially demonstrates racial bias against black communities. Thus, holding fewer black defendants to decrease the racial gap may result in harm to black communities.

Aside from the racial gap, what do these results mean for prediction and discretion? 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

250 See supra Part IV.C.
251 On the one hand, judges are demonstrating racial bias against white defendants by detaining them at higher rates than black defendants. Darnell Hawkins, Beyond Anomalies: Rethinking the Conflict Perspective on Race and Criminal Punishment, 65 SOC. FORCES 719, 719 (1987).
253 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.
254 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 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). TODD R. CLEAR, IMPRISONING COMMUNITIES: HOW MASS INCARCERATION MAKES DISADVANTAGED NEIGHBORHOODS WORSE (2007) (claiming that incarcerating more people for longer periods of time is the cause of mass incarceration). But see John Pfaff, The Myths and Realities of Correctional Severity, 13 AM. LAW & 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); UNITED STATES SENTENCING COMMISSION, REPORT TO CONGRESS: MANDATORY MINIMUM PENALTIES IN THE FEDERAL CRIMINAL JUSTICE SYSTEM, at xxxiii (Oct. 2011) (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.”).
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, has also been criticized as impractical, politically untenable, inefficient, and possibly arbitrary and capricious. But without considering the true effects of prediction on crime, it should not be abandoned. 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. Thus, this analysis demonstrates that the case against judicial and police prediction and discretion is far from clear.

255 See HARcourt, supra note 14.
256 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 CORN. L. REV. 689, 698–99 (2008) (suggesting that “randomly 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). Stenson, supra note 17, at 273. 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); Terry v. Ohio, 392 U.S. 1, 8–9, 28–31 (1968); Schneckloth v. Bustamonte, 412 U.S. 218, 219 (1973); Gregg v. Georgia, 428 U.S. 153, 189 (1976). 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’Y REV. 253, 256 (2008).
257 Other scholars have argued that profiling should not be discarded but should just be properly explored before abandoning it. Margolioth, supra note 92, at 244, 245; Barnes, supra note 248, at 697 (arguing that we should recognize the limits of prediction but not necessarily abandon it); 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. INQ. 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 (2002); Blumkin & Margalioth, supra note 98; David Bjerk, Racial Profiling, Statistical Discrimination, and the Effect of a Colorblind Policy on the Crime Rate, J. PUB. ECON. THEORY, 521–45 (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).
258 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
Finally, how do prediction and discretion affect high incarceration rates? According to some academics, prediction has led to increased prison rates. While prediction and discretion do contribute to high incarceration rates, this is largely due to judicial sensitivity to 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, and are at historic lows while incarceration rates continue to climb. And the proportion of violent crimes committed by black defendants remains consistent. But the black proportion of the prison population grew from 39% in 1979 to 54% in 1992, because inmates’ average time served has increased dramatically for the same crimes, and inmates are punished more often for all categories of crimes. 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.
Abandoning prediction and discretion is not the answer. Without knowing where arrests or convictions are most common and considering the racial make-up of those entering the system, 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.

defendants’ vehicles does not have to lead to more arrests and more jail time for defendants. See supra note 114.
<table>
<thead>
<tr>
<th>Original Offense</th>
<th>Percentage of All Defendants</th>
<th>Percentage Released</th>
<th>Percentage of those Released who Failed to Appear Multiple Times</th>
<th>Rearrested for any Felony</th>
<th>Rearrested for a Drug Crime</th>
<th>Rearrested for a Violent Felony</th>
</tr>
</thead>
<tbody>
<tr>
<td>All Defendants</td>
<td>100%</td>
<td>61.2%</td>
<td>3.4%</td>
<td>11.5%</td>
<td>4.3%</td>
<td>2.2%</td>
</tr>
<tr>
<td>Violent Crimes</td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Rape</td>
<td>1.8%</td>
<td>53.0%</td>
<td>0.6%</td>
<td>5.1%</td>
<td>0.9%</td>
<td>3.2%</td>
</tr>
<tr>
<td>Robbery</td>
<td>7.4%</td>
<td>41.6%</td>
<td>1.4%</td>
<td>13.1%</td>
<td>2.1%</td>
<td>6.2%</td>
</tr>
<tr>
<td>Assault</td>
<td>12.0%</td>
<td>61.8%</td>
<td>1.9%</td>
<td>9.0%</td>
<td>1.8%</td>
<td>3.9%</td>
</tr>
<tr>
<td>Other</td>
<td>3.7%</td>
<td>63.2%</td>
<td>1.4%</td>
<td>6.5%</td>
<td>1.4%</td>
<td>2.8%</td>
</tr>
<tr>
<td>Property Crimes</td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Burglary</td>
<td>9.3%</td>
<td>47.6%</td>
<td>3.3%</td>
<td>13.2%</td>
<td>1.8%</td>
<td>2.2%</td>
</tr>
<tr>
<td>Larceny-Theft</td>
<td>8.9%</td>
<td>63.8%</td>
<td>3.8%</td>
<td>11.3%</td>
<td>1.5%</td>
<td>2.1%</td>
</tr>
<tr>
<td>Motor Vehicle</td>
<td>3.2%</td>
<td>49.2%</td>
<td>4.4%</td>
<td>16.4%</td>
<td>3.1%</td>
<td>2.0%</td>
</tr>
<tr>
<td>Forgery</td>
<td>2.2%</td>
<td>66.0%</td>
<td>4.4%</td>
<td>10.0%</td>
<td>2.9%</td>
<td>1.3%</td>
</tr>
<tr>
<td>Fraud</td>
<td>2.0%</td>
<td>75.0%</td>
<td>3.0%</td>
<td>8.3%</td>
<td>0.9%</td>
<td>0.6%</td>
</tr>
<tr>
<td>Other</td>
<td>4.7%</td>
<td>71.8%</td>
<td>4.3%</td>
<td>13.4%</td>
<td>2.4%</td>
<td>2.5%</td>
</tr>
<tr>
<td>Drug</td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Sales</td>
<td>17.1%</td>
<td>64.3%</td>
<td>3.7%</td>
<td>13.9%</td>
<td>9.5%</td>
<td>1.6%</td>
</tr>
<tr>
<td>Possession/Other</td>
<td>18.4%</td>
<td>66.1%</td>
<td>5.4%</td>
<td>11.9%</td>
<td>7.3%</td>
<td>1.2%</td>
</tr>
<tr>
<td>Public Order</td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Weapons</td>
<td>3.4%</td>
<td>66.1%</td>
<td>2.7%</td>
<td>9.8%</td>
<td>3.3%</td>
<td>2.6%</td>
</tr>
<tr>
<td>Driving Related</td>
<td>2.8%</td>
<td>76.5%</td>
<td>1.2%</td>
<td>9.1%</td>
<td>1.1%</td>
<td>1.2%</td>
</tr>
<tr>
<td>Other</td>
<td>3.1%</td>
<td>58.7%</td>
<td>2.7%</td>
<td>8.7%</td>
<td>1.8%</td>
<td>1.2%</td>
</tr>
<tr>
<td></td>
<td>All defendants</td>
<td>Released Sample</td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>--------------------------------</td>
<td>----------------</td>
<td>-----------------</td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Black</td>
<td>61.9%</td>
<td>59.1%</td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Prior Arrests</td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>None</td>
<td>23.9%</td>
<td>31.1%</td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>One</td>
<td>8.0%</td>
<td>9.1%</td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Two or Three</td>
<td>12.8%</td>
<td>13.6%</td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Four or More</td>
<td>55.4%</td>
<td>46.2%</td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Prior Convictions</td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>None</td>
<td>37.6%</td>
<td>47.7%</td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>One</td>
<td>13.2%</td>
<td>13.7%</td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Two or Three</td>
<td>17.1%</td>
<td>15.6%</td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Four or More</td>
<td>32.3%</td>
<td>23.1%</td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Prior Incarceration</td>
<td>48.4%</td>
<td>36.9%</td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Multiple Charges</td>
<td>57.5%</td>
<td>57.4%</td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Prior Failure to Appear</td>
<td>31.6%</td>
<td>26.4%</td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Criminal Status</td>
<td>33.5%</td>
<td>24.0%</td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Felon</td>
<td>45.7%</td>
<td>34.7%</td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
</tbody>
</table>

Prior Violent Felony Conv.

<p>| 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%            |</p>
<table>
<thead>
<tr>
<th>Black Defendant</th>
<th>Initial Felony Charge</th>
<th>Violent Crimes</th>
<th>(1) Flight</th>
<th>(2) Violence</th>
<th>(3) Flight</th>
<th>(4) Violence</th>
<th>(5) Non-violent Felony</th>
<th>(6) Drug Crime</th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td></td>
<td><strong>Rape</strong></td>
<td>-5.62%***</td>
<td>2.52%***</td>
<td>-5.60%***</td>
<td>2.50%***</td>
<td>1.13%***</td>
<td>1.68%***</td>
</tr>
<tr>
<td></td>
<td></td>
<td><strong>Robbery</strong></td>
<td>-5.04%***</td>
<td>3.88%***</td>
<td>-5.04%***</td>
<td>3.77%***</td>
<td>-8.26%***</td>
<td>-6.11%***</td>
</tr>
<tr>
<td></td>
<td></td>
<td><strong>Assault</strong></td>
<td>-3.91%***</td>
<td>2.73%***</td>
<td>-3.90%***</td>
<td>2.77%***</td>
<td>-5.82%***</td>
<td>-5.72%***</td>
</tr>
<tr>
<td></td>
<td></td>
<td><strong>Other</strong></td>
<td>-4.62%***</td>
<td>2.46%***</td>
<td>-4.58%***</td>
<td>2.64%***</td>
<td>-6.60%***</td>
<td>-5.62%***</td>
</tr>
<tr>
<td></td>
<td></td>
<td><strong>Property Crimes</strong></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td></td>
<td></td>
<td><strong>Burglary</strong></td>
<td>-2.63%***</td>
<td>0.85%***</td>
<td>-2.58%***</td>
<td>0.97%***</td>
<td>0.17%</td>
<td>-5.66%***</td>
</tr>
<tr>
<td></td>
<td></td>
<td><strong>Larceny-Theft</strong></td>
<td>-1.93%**</td>
<td>1.12%**</td>
<td>-1.88%**</td>
<td>1.21%***</td>
<td>-0.66%</td>
<td>-5.81%***</td>
</tr>
<tr>
<td></td>
<td></td>
<td><strong>Motor Vehicle</strong></td>
<td>-1.17%</td>
<td>0.72%</td>
<td>-1.17%</td>
<td>0.73%</td>
<td>3.12%**</td>
<td>-4.04%***</td>
</tr>
<tr>
<td></td>
<td></td>
<td><strong>Forgery</strong></td>
<td>-1.28%</td>
<td>0.36%</td>
<td>-1.26%</td>
<td>0.39%</td>
<td>-1.65%</td>
<td>-3.97%***</td>
</tr>
<tr>
<td></td>
<td></td>
<td><strong>Fraud</strong></td>
<td>-3.11%***</td>
<td>-0.59%</td>
<td>-3.08%***</td>
<td>-0.54%</td>
<td>-1.11%</td>
<td>-6.26%***</td>
</tr>
<tr>
<td></td>
<td></td>
<td><strong>Other</strong></td>
<td>-2.08%***</td>
<td>1.04%**</td>
<td>-2.02%**</td>
<td>1.15%***</td>
<td>-0.32%</td>
<td>-4.96%***</td>
</tr>
<tr>
<td></td>
<td></td>
<td><strong>Drug</strong></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td></td>
<td></td>
<td><strong>Sales</strong></td>
<td>-2.50%***</td>
<td>0.12%</td>
<td>-2.53%***</td>
<td>0.07%</td>
<td>0.88%</td>
<td>1.63%***</td>
</tr>
<tr>
<td></td>
<td></td>
<td><strong>Other</strong></td>
<td>baseline</td>
<td>-</td>
<td>-</td>
<td>-</td>
<td>-</td>
<td>-</td>
</tr>
<tr>
<td></td>
<td></td>
<td><strong>Public Order</strong></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td></td>
<td></td>
<td><strong>Weapons</strong></td>
<td>-3.45%***</td>
<td>1.20%*</td>
<td>-3.48%***</td>
<td>1.15%*</td>
<td>-3.27%***</td>
<td>-4.09%***</td>
</tr>
<tr>
<td></td>
<td></td>
<td><strong>Driving Related</strong></td>
<td>-4.52%***</td>
<td>-0.04%</td>
<td>-4.44%***</td>
<td>0.11%</td>
<td>-3.35%***</td>
<td>-6.42%***</td>
</tr>
<tr>
<td></td>
<td></td>
<td><strong>Other</strong></td>
<td>-3.18%***</td>
<td>-0.27%</td>
<td>-3.13%***</td>
<td>-0.18%</td>
<td>-3.32%***</td>
<td>-5.62%***</td>
</tr>
<tr>
<td></td>
<td></td>
<td><strong>Prior Arrests</strong></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td></td>
<td></td>
<td><strong>One</strong></td>
<td>0.78%</td>
<td>0.56%</td>
<td>0.77%</td>
<td>0.56%</td>
<td>1.27%</td>
<td>1.15%**</td>
</tr>
<tr>
<td></td>
<td></td>
<td><strong>Two or Three</strong></td>
<td>1.32%***</td>
<td>1.26%***</td>
<td>1.29%***</td>
<td>1.21%***</td>
<td>3.45%***</td>
<td>1.83%***</td>
</tr>
<tr>
<td></td>
<td></td>
<td><strong>Four or More</strong></td>
<td>1.05%**</td>
<td>2.09%***</td>
<td>1.00%*</td>
<td>2.00%***</td>
<td>4.47%***</td>
<td>2.14%***</td>
</tr>
<tr>
<td></td>
<td></td>
<td><strong>Prior Convictions</strong></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td></td>
<td></td>
<td><strong>One</strong></td>
<td>-1.21%***</td>
<td>-0.59%</td>
<td>-1.18%**</td>
<td>-0.51%</td>
<td>-2.05%***</td>
<td>-0.68%</td>
</tr>
<tr>
<td></td>
<td></td>
<td><strong>Two or Three</strong></td>
<td>-0.57%</td>
<td>-0.87%**</td>
<td>-0.53%</td>
<td>-0.81%*</td>
<td>-1.46%*</td>
<td>-0.38%</td>
</tr>
<tr>
<td></td>
<td></td>
<td><strong>Four or More</strong></td>
<td>-0.12%</td>
<td>-0.53%</td>
<td>-0.08%</td>
<td>-0.45%</td>
<td>0.95%</td>
<td>0.79%</td>
</tr>
<tr>
<td>Variable</td>
<td>0.32%</td>
<td>0.54%*</td>
<td>0.29%</td>
<td>0.48%</td>
<td>1.27%*</td>
<td>0.73%</td>
<td></td>
<td></td>
</tr>
<tr>
<td>--------------------------</td>
<td>-------</td>
<td>--------</td>
<td>-------</td>
<td>-------</td>
<td>--------</td>
<td>-------</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Prior Incarceration</td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Multiple Charges</td>
<td>-0.06%</td>
<td>0.36%</td>
<td>-0.05%</td>
<td>0.38%</td>
<td>1.58%***</td>
<td>0.64%**</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Prior Failure to Appear</td>
<td>2.47%***</td>
<td>0.52%**</td>
<td>2.44%***</td>
<td>0.49%**</td>
<td>1.85%***</td>
<td>0.65%**</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Criminal Status</td>
<td>0.00%</td>
<td>0.48%**</td>
<td>0.00%</td>
<td>0.47%*</td>
<td>2.23%***</td>
<td>0.96%***</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Felon</td>
<td>-0.63%***</td>
<td>-0.14%</td>
<td>-0.68%***</td>
<td>-0.23%</td>
<td>2.11%***</td>
<td>0.80%*</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Prior Viol. Felony Conv.</td>
<td>0.34%</td>
<td>1.22%***</td>
<td>0.31%</td>
<td>1.18%***</td>
<td>-0.64%</td>
<td>-0.84%**</td>
<td></td>
<td></td>
</tr>
</tbody>
</table>

**Age**

<table>
<thead>
<tr>
<th>Age</th>
<th></th>
<th></th>
<th></th>
<th></th>
<th></th>
<th></th>
</tr>
</thead>
<tbody>
<tr>
<td>20-24</td>
<td>-1.08%**</td>
<td>-1.62%***</td>
<td>-1.03%**</td>
<td>-1.52%***</td>
<td>-3.50%***</td>
<td>-1.67%***</td>
</tr>
<tr>
<td>25-29</td>
<td>-1.09%**</td>
<td>-2.14%***</td>
<td>-1.02%*</td>
<td>-2.00%***</td>
<td>-5.06%***</td>
<td>-2.67%***</td>
</tr>
<tr>
<td>30-39</td>
<td>-0.64%</td>
<td>-2.73%***</td>
<td>-0.56%</td>
<td>-2.54%***</td>
<td>-5.16%***</td>
<td>-2.68%***</td>
</tr>
<tr>
<td>40-49</td>
<td>-0.93%**</td>
<td>-3.20%***</td>
<td>-0.85%**</td>
<td>-3.02%***</td>
<td>-6.61%***</td>
<td>-3.11%***</td>
</tr>
<tr>
<td>50 or more</td>
<td>-2.26%***</td>
<td>-3.52%***</td>
<td>-2.20%***</td>
<td>-3.34%***</td>
<td>-8.58%***</td>
<td>-3.99%***</td>
</tr>
</tbody>
</table>

Note: Throughout these tables, * indicates a confidence level of .1, ** a confidence level of .05, and *** a confidence level of .01.
### Table 4: Probit Model of Defendants’ Probability of Being Held

<table>
<thead>
<tr>
<th></th>
<th>No Race Covariates</th>
<th>Race a Covariate just in Hold Probability</th>
<th>Race also a Covariate in Flight/Danger Probability Prediction</th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td>(1)</td>
<td>(2)</td>
<td>(3)</td>
</tr>
<tr>
<td>Black Defendant</td>
<td></td>
<td></td>
<td>12.25***</td>
</tr>
<tr>
<td></td>
<td></td>
<td></td>
<td><strong>33.38</strong>*</td>
</tr>
<tr>
<td>Flight Probability</td>
<td>1.54**</td>
<td></td>
<td>2.86***</td>
</tr>
<tr>
<td>Danger Probability</td>
<td>14.46***</td>
<td><strong>3.14</strong>*</td>
<td>3.15***</td>
</tr>
<tr>
<td></td>
<td></td>
<td></td>
<td>2.73***</td>
</tr>
<tr>
<td></td>
<td></td>
<td><strong>14.87</strong>*</td>
<td>14.60***</td>
</tr>
<tr>
<td></td>
<td></td>
<td></td>
<td><strong>13.80</strong>*</td>
</tr>
</tbody>
</table>

**Panel A: Coefficients**

<table>
<thead>
<tr>
<th></th>
<th>Panel B: Average Effect</th>
</tr>
</thead>
<tbody>
<tr>
<td>Black Defendant</td>
<td>11.49%***</td>
</tr>
<tr>
<td></td>
<td>9.16%***</td>
</tr>
<tr>
<td></td>
<td>4.12%***</td>
</tr>
<tr>
<td>Flight Probability</td>
<td>0.54%</td>
</tr>
<tr>
<td></td>
<td>1.06%**</td>
</tr>
<tr>
<td></td>
<td>0.96%*</td>
</tr>
<tr>
<td></td>
<td>1.06%</td>
</tr>
<tr>
<td></td>
<td>0.92%</td>
</tr>
<tr>
<td>Danger Probability</td>
<td>4.89%***</td>
</tr>
<tr>
<td></td>
<td>5.02%***</td>
</tr>
<tr>
<td></td>
<td>4.80%***</td>
</tr>
<tr>
<td></td>
<td>4.92%***</td>
</tr>
<tr>
<td></td>
<td>4.64%***</td>
</tr>
<tr>
<td>Observations</td>
<td>56,375</td>
</tr>
<tr>
<td></td>
<td>55,818</td>
</tr>
<tr>
<td></td>
<td>55,564</td>
</tr>
<tr>
<td></td>
<td>56,675</td>
</tr>
<tr>
<td></td>
<td>55,564</td>
</tr>
<tr>
<td></td>
<td>55,564</td>
</tr>
<tr>
<td></td>
<td>55,564</td>
</tr>
</tbody>
</table>

### Table 5: Probit Model of Defendants’ Probability of Being Held with Nonlinear Functional Forms

<table>
<thead>
<tr>
<th></th>
<th>Average Marginal Effect on Hold Rates</th>
</tr>
</thead>
<tbody>
<tr>
<td>Black Defendant</td>
<td>-1.52%</td>
</tr>
<tr>
<td>Danger Probability</td>
<td>-1.52%</td>
</tr>
<tr>
<td>at 1%</td>
<td>13.22%***</td>
</tr>
<tr>
<td>at 3%</td>
<td>7.19%***</td>
</tr>
<tr>
<td>at 5%</td>
<td>2.65%***</td>
</tr>
<tr>
<td>at 7%</td>
<td>0.95%*</td>
</tr>
<tr>
<td>Flight Probability</td>
<td>-1.52%</td>
</tr>
<tr>
<td>at 1%</td>
<td>0.46%</td>
</tr>
<tr>
<td>at 3%</td>
<td>0.29%</td>
</tr>
<tr>
<td>at 5%</td>
<td>0.14%</td>
</tr>
<tr>
<td>at 7%</td>
<td>-0.01%</td>
</tr>
</tbody>
</table>
### Table 6: Additional Misbehavior Probabilities

<table>
<thead>
<tr>
<th></th>
<th>Linear</th>
<th>Nonparametric</th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td>(1)</td>
<td>(2)</td>
</tr>
<tr>
<td>Black Defendant</td>
<td>2.43%*</td>
<td>3.20%***</td>
</tr>
<tr>
<td>Danger Probability</td>
<td>4.75%***</td>
<td>3.52%***</td>
</tr>
<tr>
<td>Flight Probability</td>
<td>0.36%</td>
<td>-1.41%***</td>
</tr>
<tr>
<td>Drug Crime Probability</td>
<td>0.71%***</td>
<td>1.22%**</td>
</tr>
<tr>
<td>Nonviolent Felony Probability</td>
<td></td>
<td>1.53%***</td>
</tr>
</tbody>
</table>

### Table 7: Nonparametric Results By Race

<table>
<thead>
<tr>
<th></th>
<th>White</th>
<th>Black</th>
<th>Ratio of Coefficients</th>
</tr>
</thead>
<tbody>
<tr>
<td>Danger Probability</td>
<td>11.21%***</td>
<td>7.31%***</td>
<td>1.53</td>
</tr>
<tr>
<td>Flight Probability</td>
<td>-1.19%</td>
<td>1.05%</td>
<td></td>
</tr>
<tr>
<td>Drug Crime Probability</td>
<td>3.71%***</td>
<td>0.50%</td>
<td>7.42</td>
</tr>
</tbody>
</table>

### Table 9: Statistics for Cook County, IL

<table>
<thead>
<tr>
<th></th>
<th>(1)</th>
<th>(2)</th>
</tr>
</thead>
<tbody>
<tr>
<td>Black Defendant</td>
<td>1.53%</td>
<td>-0.84%</td>
</tr>
<tr>
<td>Danger Probability</td>
<td>45.59%***</td>
<td>52.36%***</td>
</tr>
<tr>
<td>Flight Probability</td>
<td>1.07%</td>
<td>-0.33%</td>
</tr>
<tr>
<td>Drug Crime Probability</td>
<td>-0.60%</td>
<td></td>
</tr>
</tbody>
</table>