

# Racial Disparities in Pretrial Diversion: An Analysis of Outcomes Among Men Charged With Felonies and Processed in State Courts

Race and Justice

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**Traci Schlesinger<sup>1</sup>****Abstract**

Living with a felony conviction exposes people to a host of negative life experiences, including unemployment, low income, and family instability. Pretrial diversions offer defendants a rare chance to escape this fate. Using data from the State Court Processing Statistics, this study examines racial disparities in pretrial diversion among men charged with felony crimes in metropolitan counties in the even years from 1990 to 2006. The study finds that prosecutors are more likely to grant pretrial diversions to White defendants than they are to grant these diversions to Black or Latino defendants with similar legal characteristics. Moreover, while disparities disadvantaging Latinos are only present among defendants whose most serious arrest charge is for a drug crime and who have no prior convictions, those disparities disadvantaging Blacks occur both among defendants whose most serious arrest charge is for a drug crime regardless of prior convictions and among defendants charged with violent crimes who have no prior convictions.

**Keywords**

attributions, diversion, pretrial, prosecutors, racial disparities

More than 8 million people living in the United States have been convicted of felonies (Bureau of Justice Statistics, 2003, 2010).<sup>1</sup> These convictions may function as legitimate stigmas that exclude people from employment (Pager, 2007), lower formerly

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<sup>1</sup> Department of Sociology, DePaul University, Chicago, IL, USA

**Corresponding Author:**

Traci Schlesinger, Department of Sociology, 990 West Fullerton Ave, Suite 1100, DePaul University, Chicago, IL 60614, USA.

Email: tschlesi@depaul.edu

convicted people's incomes, when they do find work, throughout their lifetimes (Western, 2002; Western & Pettit, 2005), and decrease the quality of their family lives (Lopoo & Western, 2005; Western & McLanahan, 2000). People who have been convicted of felonies are locked out of a plethora of welfare programs: denied access to public housing, barred from receiving educational grants, and, in some states, even denied food stamps (Mele & Miller, 2005; Wacquant, 2001). In many states, individuals who have been convicted of felonies are stripped of the most basic right of citizenship, the right to vote (Manza & Uggen, 2004, 2006; Uggen & Manza, 2002). Considering this evidence, Alexander (2010) argues that felony convictions operate to create a permanent underclass of people, people who are disproportionately black and brown. Moving our focus from the market to the state, Gilmore (2007) argues that felony convictions in the contemporary United States produce civil deaths, the loss of all or nearly all civil rights.

In this context, pretrial diversions, "the practice by criminal justice officials . . . of channeling *out* of the criminal process classes of offenders who, as a consequence of their probable and assumed guilt, could theoretically be handled by the criminal process," take on particular importance (Brakel, 1971, p. 213).<sup>2</sup> Further, although the proportion of felony defendants who receive pretrial diversions is small, it is not negligible. Police arrest nearly 14 million people each year, over 1 million of whom prosecutors charge with felonies (Bureau of Justice Statistics, 2010; Snyder, 2011). Roughly 60% of these defendants are convicted, almost exclusively through guilty pleas. Through these convictions, defendants either join the ranks of or reaffirm their membership among this permanent underclass. However, nearly 8% of the people who police arrest and charge with felonies are singled out by prosecutors for pretrial diversions (Bureau of Justice Statistics, 2010).<sup>3</sup> Because defendants' charges are dropped so long as they complete the diversion program, pretrial diversions channel defendants *out* of the criminal legal system.<sup>4</sup> This allows defendants a chance to avoid both the stigma and the concomitant material consequences of a criminal record. As such, racial disparities in defendants' odds of receiving pretrial diversion are likely to breed racial disparities in the broad array of social and economic outcomes associated with felony convictions, including employment, income, family stability, and mental health (Freudenberg, 2002; Lopoo & Western, 2005; Pager, 2007; Western, 2002).

### *Prosecutorial Decision Making and Racial Disparities*

Most studies of racial disparities in criminal processing examine judicial decision making, especially sentencing decisions (Chiricos & Bales, 1991; Kramer & Steffensmeier, 1993; Nobiling, Spohn, & DeLone, 1998; Petersilia, 1984; Peterson & Hagan, 1984; Steffensmeier, Ulmer, & Kramer, 1998). This focus can obscure earlier criminal legal decisions, which is striking, given the emerging consensus that prosecutorially controlled decisions have become increasingly important shapers of defendants' punishment outcomes, perhaps particularly in jurisdictions where judicial discretion has been limited through the implementation of sentencing guidelines

(Albonetti, 1987; Krug, 2002; McKenzie, Stemen, & Coursen, 2009; Spohn, Beichner, & Davis-Frenzel, 2001; Wooldredge & Griffin, 2005).

Studies that do examine decisions controlled by prosecutors are almost all examinations of the charging decisions. For example, several scholars have investigated prosecutorial discretion in the application of mandatory terms and sentencing enhancements. They found two things. First, prosecutors only apply mandatory terms and sentencing enhancements to between 15 and 65 of eligible cases (Bynum, 1982; Caravelis, Chiricos, & Bales, 2011; Farrell, 2003; Ulmer, Kurlychek, & Kramer, 2007). Second, particularly among people convicted of drug crimes and also among people convicted of property crimes, studies have found that prosecutors are more likely to apply mandatory terms and sentencing enhancements to Black and Latino men than to anyone else (Caravelis et al., 2011; Crawford, Chiricos, & Kleck, 1998; Crow & Johnson, 2008; Farrell, 2003; Ulmer et al., 2007).

Other studies have investigated the role that charge reductions play in producing racial disparities in criminal processing outcomes. These studies found that prosecutors were more likely to engage in charge bargaining with White defendants than with Black or Latino defendants with similar legal characteristics both at the state (Bjerk, 2005; Bushway & Piehl, 2007) and at the federal level (Shermer & Johnson, 2010) and that racial disparities in charge bargaining work to produce racial disparities in sentencing outcomes (Bushway & Piehl, 2007).

Finally, Bontrager and her colleagues examined the withholding of adjudication among men who have either pled guilty or been found guilty of a felony and sentenced to probation in Florida and found that prosecutors are less likely to withhold adjudication for Black and Latino men than they are for White men with similar legal characteristics (Bontrager, Bales, & Chiricos, 2005).

The findings of these studies offer support to the long held suspicion that increased determinacy in sentencing does not decrease racial disparities in criminal processing; rather, it shifts the production of racial disparities from judicial to prosecutorial decision making (see, e.g., Alschuler, 1978). The current study continues this practice of turning our gaze toward prosecutorial decision making and examines racial disparities in a decision, pretrial diversion, which is not only understudied but perhaps unparalleled in its power to channel criminal defendants *out* of the criminal legal net.

### ***Pretrial Diversions***

Pretrial diversions occur when prosecutors defer or dismiss a criminal charge conditional on the successful completion of a generally community-based diversion program (Bellassai, 2010).<sup>5</sup> While pretrial diversion programs had existed in a few jurisdictions before 1967, they spread voraciously following the widely publicized President's Commission on Law Enforcement & Administration of Justice's final report, *The Challenge of Crime in a Free Society* (Bellassai, 2010). In early diversion programs, eligibility was informal, decisions were discretionary, and programs consisted almost exclusively of job training and placement for defendants without prior convictions (Bellassai 2010; Brakel 1971). In the present era, standardized eligibility

criteria, including prior criminal history and current charge, have become customary (National Association of Pretrial Services Agencies, 2009). If defendants are deemed eligible by these criteria, prosecutors can divert defendants to inpatient or outpatient drug rehabilitation programs, community service, job training programs, victim restitution programs, or other community programs that maintain ties with the prosecutor's or pretrial service agency's office (National District Attorneys' Association, 2010). Additionally, in some jurisdictions, probation offices use risk assessment scales and pretrial services to make referrals to the prosecutor. Taken together, these criteria and practices create a pool of defendants who are eligible for diversions; nonetheless, prosecutors use their discretion when deciding to whom, among the eligible, they will grant diversions.

Most evaluations of pretrial diversions examine recidivism rates among those who are diverted (for a review, see Lange, Rehm, & Popova, 2011), rather than examining who, among eligible defendants, will receive pretrial diversions. In fact, searches of academic databases returned only one study that examined racial disparities in the granting of pretrial diversions. Albonetti and Hepburn (1996) estimated the interactive effects of achieved (current offense and prior arrests) and ascribed (race and age) status on felony drug possession defendants' odds of receiving pretrial diversion in Phoenix, Arizona, in 1989. They found that the effect of minority status was conditional on age and prior record. Among those who were most likely to receive these diversions, defendants who were young and who had no prior arrests, being Black or Latino was associated with a decrease in the odds of receiving pretrial diversion. Among those who had prior arrests, being Black or Latino was, perhaps counter-intuitively, associated with an increase in the odds of receiving pretrial diversion.

Albonetti and Hepburn's (1996) study was innovative and important but, as any single study must, left some points uncovered. First, their data contained individuals from only one jurisdiction and one year, a time now 24 years past. As such, it is important that new studies explore these same questions using the most recently available data and examining these outcomes in multiple jurisdictions. Second, the study collapsed Blacks and Latinos together and excluded Asian and Native Americans. Albonetti and Hepburn were not, therefore, able to examine whether or how patterns of racial disparities disadvantaging Blacks, Latinos, Asians, and Native Americans differ. Third, because Albonetti and Hepburn only analyzed diversion decisions among drug defendants, they were unable to examine whether and how the presence of racial disparities varies by charge type. Fourth, the only information on prior record contained in their data was whether the defendant had a prior arrest. Since criminal legal officials have developed eligibility criteria for pretrial diversion that are based on prior conviction—sometimes on prior felony conviction in particular—and rarely on prior arrest, prior arrests is an imperfect predictor of eligibility for pretrial diversion (National Association of Pretrial Services Agencies, 2009). Because race and prior conviction are correlated, with Black defendants having longer and more serious prior records than do White or Latino defendants, the omission of a control for prior conviction could have led Albonetti and Hepburn to overestimate the association between minority status and defendants' likelihood of receiving pretrial diversion.

Although directed by Albonetti and Hepburn's (1996) groundbreaking work, this analysis moves beyond that study in a number of important ways. The current study examines a large, multijurisdiction sample with data from all even years from 1990 to 2006, a sample that includes defendants charged with violent, property, drug, and public order offenses. The data include a wide variety of prior record variables: prior arrest, prior misdemeanor conviction, prior felony conviction, prior prison, and criminal legal status at the time of arrest. This large, representative, and rich data source allows the analysis to examine patterns of racial disparities in pretrial diversion outcomes, across Black, Latino, and "other race" defendants, charge type, and prior record severity. As such, this study moves beyond Albonetti and Hepburn's investigation by examining not only *whether* racial disparities exist but also *patterns* within racial disparities.

### *A Theory of Criminal Legal Decision Making*

Sociologists of race argue that the dominant form of racism shifted during the 1960s and 1970s in response, at least in part, to gains made by the civil rights movement (Bobo, Kluegel, & Smith, 1997; Bonilla-Silva, 2006; McConahay & Hough, 1976; McVeigh, 2004; Mendelberg, 2001; Sears & Kinder, 1971; Wilson, 1978). Overt public discrimination and explicit racist views characterize the period that scholars refer to as "old fashion" or "Jim Crow" racism. In contrast, in the post-civil rights period, a system in which racial inequality is produced and maintained through formally race-neutral policies, practices, and ideologies. Theorists variously name this system "modern" (Mendelberg, 2001), "implicit" (McConahay & Hough, 1976), "symbolic" (Sears & Kinder, 1971), "laissez faire" (Bobo et al., 1997), or "colorblind" (Bonilla-Silva, 2006) racism. According to these theories, racialized notions of merit and, in the case of criminal legal policies, of criminality and threat currently produce disparate impact (Delgado, 1994; Schlesinger, 2011).

The uncertainty reduction perspective, formulated by Albonetti, can help us to understand how these "racialized notions of criminality and threat" shape criminal legal outcomes, absent explicitly racialized policies or practices. The uncertainty reduction perspective postulates that rarely having complete information about defendants or cases, officials work to reduce their uncertainty by unconsciously attributing an underlying disposition of criminality to defendants based on stereotypes that associate typical offenders with their typical crimes (Albonetti, 1987, 1991). When uncertainty is low—when both the charge and the evidence point to an obvious case outcome, for example—criminal legal officials, including but not limited to prosecutors and judges, make decisions based on the legal factors of the case. When uncertainty is high, however, criminal legal officials work to reduce uncertainty by relying on stereotypes connected to the defendant's race, sex, age, and other extralegal characteristics. When the legal and extralegal characteristics of a defendant converge to mirror a racialized criminal stereotype, this convergence suggests a stable, underlying disposition of criminality to the criminal legal official. Once this attribution of criminality has been made, the criminal legal official gives the defendant

less beneficial criminal processing decisions than she gives to other defendants with similar legal characteristics (Albonetti, 1987, 1991).

The uncertainty reduction perspective leads to a prediction that minority defendants receive less beneficial criminal legal decisions than do White defendants with similar legal characteristics; studies of criminal processing have generally found support for hypotheses derived from this perspective (Albonetti, 1987, 1991, 2002; Albonetti & Hepburn, 1996; Johnson, 2005; Kramer & Steffensmeier, 1993; Steffensmeier & Demuth, 2006; Steffensmeier et al., 1998).

Moreover, prosecutors' attributions regarding defendants' ability to be rehabilitated rest on already existing racializations of criminality. Social psychologists have used a number of experimental designs to probe hypotheses that Americans imagine criminals as Black men and Black men as criminals. These studies find that people are more likely to shoot an image of someone holding a weapon, and to do so more quickly, if the person in the image is Black (Correll, Park, Judd, & Wittenbrink, 2002). Relatedly, people are more likely to perceive an object as a weapon if the person holding the object is Black (Eberhardt, Goff, Purdie, & Davies, 2004; Payne, 2001). Moreover, when asked to match photos of criminals to the crimes they committed, people match photos of Black men to violent crimes (Sunnafrank & Fontes, 1983). These findings suggest that Americans associate Black men not only with criminality generally but also with violence in particular.

While media analyses find that Latinos also face negative stereotyping (Berg, 2002; Chavez, 2008; Entman & Gross, 2008), repeated searches revealed no experimental studies that test criminal attributions to Latinos. Focusing on the media analyses, then, research finds that news media, film, and TV sitcoms alternate between portraying Latinos as "hardworking illegals" and as lazy, pleasure-seeking, irresponsible "banditos." Moreover, renderings of Latino banditos most often center on narratives about drug trade and use, rather than on narratives about violence (Bender, 2003; Berg, 2002; Chang & Kleiner, 2003; Chavez, 2008; Fox, 2004; Huddy & Sears, 1995; Jackson, 1995; also see Portillos, 1998 for a critique of this distinction).

There are few empirical studies of criminal attributions to Native Americans or Asians. However, Yen (2000) argues that the "model minority" stereotype exists in constant tension with "yellow peril" stereotypes, which portray Asians as essentially alien (see also Ngai, 2004). Moreover, the recent spread of Asian gangs reinforces the historical images of Asian Americans as morally deviant (Joe, 1994). Similarly, Muñoz and McMorris (2002) argue that the image of the peaceful, helpful, and spiritual Native American exists in tension with stereotypes of Native Americans as backward, as alcoholics, and—particularly in the context of casinos—as compulsive, violent, and exploitative. Yen (2000) and Muñoz and McMorris (2002) argue that when Asian and Native Americans confront the criminal legal system, the very fact of their arrest serves to prime the negative, criminal side of these dichotomies.

During the granting of pretrial diversion, prosecutors' focal concerns center on the capacity for rehabilitation (National Association of Pretrial Services Agencies, 2009).<sup>6</sup> As such, prosecutors are less likely to offer diversion to defendants whom they perceive as having stable underlying dispositions of criminality and thus as unlikely to

be rehabilitated by a diversion program. Case characteristics (such as the charge) interact with defendant characteristics (such as prior record), priming racialized stereotypes when they key into the content of those stereotypes (Blacks are violent, Asians are unscrupulous, Native Americans are compulsive, and all racialized minorities have propensities toward involvement in the drug trade). Attribution theory argues that the extent to which legal characteristics key into already existing racial stereotypes determines the strength of the prime and thus the extent to which attributions influence prosecutors' decisions (Albonetti, 1991).

Finally, most diversion programs serve either people charged with drug crimes or people without prior convictions. Because there are not enough spots in these programs to divert all eligible defendants, uncertainty is high when prosecutors are handling the cases of defendants who are eligible for these programs (the case characteristics do not determine the outcome). Prosecutors must exercise their discretion when deciding whom, among the eligible, to divert. In contrast, uncertainty regarding diversion decisions is low when prosecutors process people charged with crimes other than drug crimes and people with serious prior records, as these case characteristics will definitively shape prosecutors' decisions (most likely, not to divert).

No data on the specific eligibility criteria of each county are included in this study. The study knows which defendants are *likely* to be eligible for diversion (based on information from the National Pretrial Service Agency) but not which defendants *are* eligible for diversion. With this limitation in mind, the study considers uncertainty highest when prosecutors are making pretrial diversion decisions for defendants who prosecutors charged with drug crimes and who have no prior convictions, as these defendants are most likely eligible for diversion. Nearly all counties with diversion programs, and thus nearly all counties in the study, have diversion programs for drug defendants. Moreover, according to the National Association of Pretrial Service Agencies, the majority of these programs prioritize diverting defendants either with no prior convictions or with no prior felony convictions (2009).

Considering the above, the study tests the following hypotheses. (1) To the extent that racialized stereotypes influence criminal legal decision making, Black, Latino, and Asian and Native American defendants are less likely to receive pretrial diversions than are White defendants with similar legal characteristics. (2) Because racialized stereotypes are broader for Blacks than for Latinos, prosecutorial decision making disadvantages Blacks charged with either drug or violent crimes but only those Latinos charged with drug crimes. The thin literature on criminal attributions to Asians and Native Americans suggests that these attributions are broad (including violence, prostitution, and drugs, for example) but exist in conflict with positive attributions. As such, the study hypothesizes that prosecutorial decision making disadvantages "other race" defendants charged with either drug or violent crimes, but that this disadvantage is less substantial than anti-Black disadvantage. (3) Finally, the study hypothesizes that racial disparities in pretrial diversion are largest when uncertainty is high: among defendants whose most serious arrest charge was for drug crimes and who have no prior convictions.

## Research Design

The current study estimates two sets of logistic models to examine data from the *State Court Processing Statistics* (SCPS). The first set of models, estimated on the full sample, examines whether a defendant's race is associated with his odds of receiving a pretrial diversion. There are three models in this set. The first estimates the association between a defendant's race and his pretrial diversion outcome; the study estimates this model to provide a baseline measure of this association. The second model in this set examines the extent to which racial differences in the characteristics of the current offense produce racial disparities in pretrial diversion. The final model in this set examines the extent to which racial differences in all legal characteristics, both current offense and prior record, produce racial disparities in pretrial diversion. Next, the study divides the sample by prior record and charge type and estimates a second set of models. These models seek to answer whether racial disparities, if they exist, are largest among defendants who are most eligible for pretrial diversion: drug defendants who have no prior convictions. They also examine whether disparities disadvantaging Blacks, Latinos, and Asians and Native Americans occur among different groups of defendants. In short, the second set of models examines whether and how the association between race and pretrial diversion outcomes is mediated by legal characteristics such as prior record and current charge, priming criminal legal officials to respond in ways that are shaped by the specific stereotypes and by the social realities of those embodied identities. Through this analysis of racial disparities in prosecutors' decisions to grant pretrial diversions, the study works not only to address gaps in the empirical literature on criminal processing but also to "flesh out" theories of institutional decision making and post-civil rights racism.

## Data

The SCPS tracks a sample of felony cases filed in urban counties until their final disposition or until one year has elapsed from the date of filing. The data include cases filed on a single day in May during each even year from 1990 to 2006 in 40 urban counties, which are weighted to represent all felony filings during the month of May in the 75 most populous U.S. counties.<sup>7</sup> As such, the data set contains a representative sample of state felony cases in large metropolitan counties. It also provides detailed information on prior record and offense severity, a comprehensive list of common offenses, several measures of demographic characteristics, and a large sample size.

However, the SCPS has three noteworthy limitations relevant to the current study. First, because the SCPS excludes rural counties, if the relationship between defendants' race and the granting of pretrial diversion is different in rural counties than in urban counties, the results of this study are not generalizable to the processing of defendants in rural counties. Most felony defendants are processed, however, in urban counties; consequently, the results from this study will be applicable to most cases.

Second, the SCPS data do not include a number of characteristics of the current charge. Most importantly, the SCPS does not record the class of felony with which the



defendants were charged or, when the charge is a drug charge, the type or amount of drug involved or the role of the defendant in the alleged crime. The SCPS does include a number of other current offense variables, including the offense category of the most serious arrest charge (assault, motor vehicle theft, drug trafficking, etc), the number of current charges, whether the most serious current charge is for an attempted crime rather than a completed one, and the number of additional felony charges. Nonetheless, having even more complete information about the current charge would help ensure that researchers disentangled the effects of racialized attributions from the effects of racial differences in offense severity.

Third, the SCPS data do not contain information about whether defendants were eligible for pretrial diversion. If likelihood of eligibility correlates with race, including noneligible defendants in the sample could bias the results of the study. An analysis could make up for this by including data on all of the characteristics that jurisdictions use to determine eligibility. Unfortunately, while the SCPS does have detailed information on prior records and current charges, the two most common criteria for eligibility across jurisdictions (National Association of Pretrial Services Agencies, 2009), it does not include other individual characteristics that jurisdictions sometimes use to determine eligibility for diversion. For example, the SCPS does not include measures of mental illness. Since pretrial diversion programs for defendants with mental health histories are common, being unable to control for mental health histories will bias the results of the study. However, since such histories are *more* prevalent among Black and Latino defendants than among White defendants (Phillips, Wolf, & Coons, 1988), one would expect prosecutors to be *more* likely to recommend Black and Latino defendants for pretrial diversion. Accordingly, omitting controls for mental health histories will produce a conservative estimate of the impact of a defendant's race on his likelihood of receiving a pretrial diversion. However, the SCPS also does not contain data on substance abuse history, victim approval, provisions for restitution, or recommendations of the relevant law enforcement agency, all characteristics that prosecutors sometimes consider when making pretrial diversion decisions (National Association of Pretrial Services Agencies, 2009; National District Attorneys' Association, 2010).

While this is a real limitation of the current study, prior record and current charge characteristics are likely to correlate strongly with each of the above variables. Moreover, prior record and current charge are the eligibility requirements prosecutors use *most often* (National Association of Pretrial Services Agencies, 2009). Thus, controlling for a wide variety of prior record and current charge variables, as this study does, minimizes the bias caused by omitting measures of the above eligibility criteria. This limitation is notable and future research should examine this decision using the data that allow the researcher to select only eligible defendants. However, given the use of prior record and current charge variables to control for diversion eligibility and the paucity of research on racial disparities in pretrial diversion, this study makes a substantive contribution to our understanding both of prosecutorial decision making and of a criminal processing decision with weighty consequences for defendants—despite the noted limitations.

Eleven counties in the SCPS, eight of them in New York, do not have pretrial diversion programs.<sup>8</sup> Moreover, 20 more of the SCPS counties did not divert any defendants during one or more of the SCPS years. The data analyzed in this study omit all observations from these county-years. Similarly, none of the defendants whose most serious arrest charge was for murder were offered a pretrial diversion; thus, the study excludes all defendants with this arrest charge.

The analysis also excludes defendants whose assigned sex is female.<sup>9</sup> Racial disparities in pretrial diversion among women are smaller, inconsistent, and follow different patterns than do racial disparities among men. As such, including men and women in the same study without careful attention to intersectionality would lead to an underestimation of the effects of racial bias on pretrial diversions among men (Steffensmeier and Demuth 2006; Steffensmeier et al., 1998).

After dropping observations for defendants charged in counties without pretrial diversion programs, whose most serious arrest charge was for murder, whose assigned sex is female, whose charges were dismissed, or whose case was still pending 1 year after the initial filing, the sample includes 37,987 defendants. The study uses the following racial categories: White, Black, Latino, and "other race." Of the "other race" defendants, 15% are Native American and the remaining 85% are Asian.

The study divides the sample by prior record and charge type during the second stage of the analysis. When splitting the sample, the study uses a constructed prior record variable that has five values: defendants with no prior arrests, those with arrests but no convictions, those whose most serious conviction is for a misdemeanor, those who have been convicted of a felony but have never been to prison, and those who have served time in prison. Charge type divides defendants according to whether their most serious arrest charge is for a violent, property, or drug crime. Defendants whose most serious arrest charge is for a public order offense are excluded from this part of the analysis. The only charges included in this category are weapons, driving, and "other public order"; because it is unlikely that either uncertainty or racialized stereotypes are comparable for defendants charged with weapons and driving offenses, this category fails to cohere for the purposes of this analysis.

### *Pretrial Diversion*

In 40 of the nation's 75 largest counties, an estimated 58,100 people were charged with a felony in 2006. While 67% of these defendants were convicted, almost exclusively through plea bargains, approximately 8% were offered pretrial diversions.<sup>10</sup> Pretrial diversion rates vary by race. While prosecutors granted pretrial diversions to 9% of White and Latino defendants, they granted these diversions to only 7% of "other race" defendants and 6% of Black defendants.

### *Legal Characteristics*

To control for the effects of defendants' current charge, all models include variables that designate the most serious arrest charge, whether the charge is marked as an

attempt, the total number of crimes a defendant is charged with, and whether any of these additional charges are for felonies. Most serious arrest charge is operationalized as a set of binary variables. For example, a variable “rape” is coded 1 if the defendant’s most serious charge is for rape and 0 if it is not. The other most serious charge variables are robbery, assault, other violent, burglary, theft, motor vehicle theft, forgery, fraud, other property, drug trafficking, other drug, weapons, driving, and other public. Current charge varies less by race than one might expect; however, there is one conspicuous exception. While 19% and 17% of Black and Latino defendants, respectively, have a drug trafficking charge as their most serious charge, this is true for only 12% and 11% of White and “other race” defendants, respectively.

To control for prior record, all models include a variable that designates whether defendants had an active criminal legal status—were on probation, parole, or pretrial release—at the time of arrest, and variables that designate the number of prior arrests, prior misdemeanor convictions, prior felony convictions, and prior prison terms (all capped at 10) each defendant had. In contrast to measures of the current charge, most measures of prior record vary considerably by race. Black, Latino, and Asian and Native American defendants are more likely than White defendants to have had an active criminal legal status at the time of arrest, and Black defendants have more prior arrests, prior misdemeanor convictions, prior felony convictions, and prior prison terms than anyone else.

Racial disparities in prior record may be due to a convergence of race and gender salient criminal laws (Farrell, 2003; Schlesinger, 2008, 2011; Vincent & Hofer, 1994), differential offending (Hindelang, 1981; Sampson & Lauritsen, 1997), differential policing and arrest (Beckett, Nyrop, & Pfingst, 2006; Beckett, Nyrop, Pfingst, & Bowen, 2005), and differential criminal processing (Spohn, 2000; Zatz, 1987). To the extent that this is the case, prior records may contain within them the effects of previously experienced racial bias. Because prior records may be as much a measure of racial bias as they are of past criminal behavior, Carodine (2009) argues elegantly that prior record should not be usable in jury impeachments. Other scholars have correspondingly argued against the use of prior records in criminal processing decisions (Alexander, 2010; Delgado, 1994; Frase, 2009; Reiman, 2004; Tonry, 2011, p. 23).

However, prior records are “legal variables” that prosecutors expressly consider during the decision to grant pretrial diversions. In fact, prior records are likely to signify “stable, enduring, criminality” and thus convince prosecutors that defendants are not likely to be rehabilitated by diversion programs and thus not good candidates for pretrial diversion. Given these racial disparities in prior records, one possibility is that the consideration of prior records produces, at least in part, the racial disparities in pretrial diversion outcomes observed. Failing to control adequately for prior records, then, will lead scholars to exaggerate the direct effect of racial bias on diversion decisions.

### *Extralegal Characteristics*

Only 33% of the defendants in the sample are White, while 39% are Black, 26% are Latino, and 2% are Asian or Native American. In contrast, among people living in the

metro areas from which the SCPS sample is drawn, 62 % are White, 14% are Black, 18% are Latino, 5% are Asian, and 1% is Native American (U.S. Census Bureau, 2011). Like racial disparities in prior records, race salient criminal laws, racially biased policing goals and practices, differential offending, and racial biases in criminal processing likely combine to produce disparities between the metro population and the SCPS sample. Approximately equal numbers of defendants fall into the following three age groups: between 18 and 24 years old, between 25 and 34 years old, and 35 years of age or older. However, Latino and “other race” defendants are less likely to be young, between 18 and 24 years old, than are either White or Black defendants (Table 1).

## Methods

In order to evaluate the intersectional effects of uncertainty and primed racialized stereotypes on decision making, the study examines data on felony defendants arrested in urban counties in all even years from 1990 to 2006, using StataMP 12. The analysis estimates all models on pooled data, which include all 9 years in the SCPS.

To address the fact that the SCPS data are clustered by county and year, all models include county- and year-level fixed effects. Many county-level variables may both be correlated with race and impact prosecutors’ decisions to grant pretrial diversion (Bridges & Crutchfield, 1988; Crawford, 2000; Crawford et al., 1998; Helms & Jacobs, 2002; Jacobs & Helms, 1996). For example, because some jurisdictions have more or larger pretrial diversion programs than do others (National Association of Pretrial Services Agencies, 2009), the percentage of defendants whom prosecutors recommend for pretrial diversion varies substantially across the county. Examining the counties in the SCPS shows that in the third of the counties with the lowest rates of diversion, prosecutors grant pretrial diversions to only 2% of defendants. In contrast, in the third of the counties with the highest rates of diversion, prosecutors grant pretrial diversions to almost 19% of the defendants. If the variation in the size of a jurisdiction’s pretrial diversion program is associated with the proportion of defendants from that jurisdiction who are Black, for example, this could bias the results of the study. While fixed-effects models do not help to discover which county-level variables affect criminal processing (diversion program size or something else entirely), they do adequately control for these variables. Similarly, diversion policies may have changed in any given county from one year to the next. Year-level fixed effects, while not allowing for an analysis of how these changes impact racial disparities in diversions, do adequately control for the effects of changes over time—whether coming from changes in policy, demographic shifts, changes in the structure of the economy, or any other temporally based change.

## Results

### *Does Race Matter?*

First, the study estimates a series of three nested models, each of which predicts pretrial diversion. The first model includes only the demographic characteristics of the

**Table 1.** Means of All Variables, by Race.

	Black	White	Latino	Other Race
Dependent variable				
Pretrial diversion	.06	.09	.09	.07
Demographics				
Race	.39	.33	.26	.02
Aged 25 to 34	.33	.28	.38	.41
Aged 35 and older	.31	.32	.35	.32
Offense severity				
Rape	.02	.02	.02	.02
Robbery	.09	.04	.06	.06
Assault	.13	.12	.13	.14
Other violent	.03	.05	.05	.06
Burglary	.10	.12	.10	.13
Theft	.08	.10	.06	.07
Motor vehicle theft	.04	.04	.05	.06
Forgery	.02	.03	.01	.02
Fraud	.02	.03	.01	.05
Other property	.03	.05	.03	.04
Drug trafficking	.19	.12	.17	.11
Other drug	.17	.19	.21	.16
Weapons	.04	.02	.03	.02
Driving	.01	.04	.04	.03
Other public	.04	.03	.03	.03
Was charge an attempt?	.03	.02	.03	.02
Number of charges	2.28	2.44	2.35	2.84
Additional felony?	.37	.39	.41	.47
Prior record				
Criminal legal status	.36	.34	.37	.36
# of Prior arrests	5.34	4.56	4.34	3.66
# of Prior misdemeanor convictions	4.88	1.80	1.73	1.19
# of Prior felony convictions	1.68	1.17	1.02	.67
# of Prior prison terms	.68	.40	.34	.18
N	22,335	17,961	16,173	1,123

Note. The *t* test reveals that the Blacks' prior records are significantly more serious than are those of the Whites or Latinos for all measures except criminal legal status. Prior arrest, prior misdemeanor conviction, prior felony, and prior prison terms are all capped at 10 by the Bureau of Justice Statistics.

defendants and thus informs us of the simple association between race, age, and defendants' odds of being granted pretrial diversions. Pseudo- $R^2$ s are low for this model, signaling that these null models fail to explain much of the variance in pretrial diversion. This makes sense as Model 1 provides a baseline measure of the association between a defendant's race and pretrial diversion outcomes rather than an explanation of the association. The second model includes both measures of defendants' race and age and controls for all 17 measures of the severity of the current charge, 14 of which are dummies coding the most serious current charge with "other drug" as the reference category. Pseudo- $R^2$ s for these models are a bit higher, but still low, showing that

demographics and current charge, taken together, only explain about 14% of the variance in pretrial diversion in the SCPS counties and years. The final model includes measures of defendants' race and age, 17 measures of the severity of the current charge, and 5 measures of defendants' prior record. All three models include year and county fixed effects. Pseudo- $R^2$ s for these models are considerably higher but show that demographics, current charge, and prior record, taken together, still only explain about a quarter of the variance in pretrial diversion.

The results from Model 1 demonstrate that demographic characteristics are significantly associated with defendants' odds of receiving pretrial diversion. Among defendants charged with felony offenses in counties and years with operating pretrial diversion programs, Black and "other race" defendants have odds of receiving pretrial diversion that are 42% and 30% lower than those of White defendants, respectively. There are no statistical differences between White and Latino defendants' odds of receiving pretrial diversion. However, since this model controls neither for offense severity nor for prior record, associations between race and these legal measures may produce these disparities.

Surprisingly, adding controls for offense severity in Model 2 not only fails to reduce anti-Black racial disparities in pretrial diversions but actually shows that racial disparities in defendants' odds of receiving pretrial diversions are slightly larger among people who are charged with similar offenses than among the full sample. Black defendants have odds of receiving pretrial diversion that are 44% lower than those of White defendants charged with similar offenses. Defendants who are between 25 and 34 years of age and those who are 35 years or older have odds of receiving pretrial diversion that are 41% and 48% lower, respectively, than defendants charged with similar offenses who are 24 years or younger. There are no statistical differences between White and either Latino or Asian and Native American defendants' odds of receiving pretrial diversion. Controlling for offense severity is clearly important when predicting pretrial diversions; while the Pseudo- $R^2$  from Model 1 was only .07, the Pseudo- $R^2$  from Model 2 is double of that (.14). Moreover, almost every measure of offense severity is significantly associated with defendants' odds of being granted pretrial diversion. Defendants charged with possession are more likely to be diverted than are defendants charged with any other offense, each additional charge decreases defendants' odds of being granted pretrial diversion by 8% and being charged with more than one felony decreases defendants' odds of being granted pretrial diversion by 35%.

Model 3 tests the possibility that the racial disparities found in Model 1 and Model 2 are produced through associations between race and prior record. While this is partially true, Black/White racial disparities decrease notably from Model 2 to Model 3, the results of Model 3 nevertheless present strong evidence that the defendants' race affects prosecutors' decisions about to whom they grant a pretrial diversion. The results of Model 3 show that Black, Latino, and Asian and Native American defendants have odds of receiving pretrial diversion that are 28%, 13%, and 31% lower, respectively, than those of White defendants with similar legal characteristics. Moreover, defendants who are between 25 and 34 years of age and those who are 35

years or older have odds of receiving pretrial diversion that are 19% and 17% lower, respectively, than those who are 24 years or younger. This corroborates Albonetti and Hepburn findings (1996) that young defendants are more likely to be granted diversions than are legally similar older defendants.

Defendants charged with possession are more likely to be diverted than are defendants charged with any other offense. In general, prosecutors are less likely to grant defendants with more serious current charges diversions. For example, each additional charge decreases defendants' odds of being granted pretrial diversion by 8% and being charged with more than one felony decreases a defendant's odds of being granted pretrial diversion by 37%. Counterintuitively, however, being charged with an attempt is associated with a 31% decrease in a defendant's odds of being granted pretrial diversion.

Finally, controlling for prior record, in addition to offense severity, increases our ability to predict pretrial diversions. While the Psuedo- $R^2$  from Model 2 was only .14, the Pseudo- $R^2$  from Model 2 is more than 50% higher (.22). Moreover, every measure of prior record is significantly associated with defendants' odds of being granted a pretrial diversion. Each prior arrest, prior misdemeanor conviction, prior felony conviction, or prior prison term decreases defendants' odds of being granted pretrial diversion by 6%, 4%, 33%, and 28%, respectively. Having an active criminal legal status at the time of arrest decreases defendants' odds of being granted pretrial diversion by 34% (Table 2).

### *Intersectionality*

Next, the study examines the conditional effects of uncertainty and primed racialized stereotypes. The study considers uncertainty high among drug defendants with no prior convictions, medium among defendants who either are drug defendants or have no prior convictions, and low among defendants with prior convictions whose most serious charge is for a property or violent offense. Moreover, the study, following the insights garnered from both social psychological and cultural studies research, assumes that drug and violent charges prime racialized stereotypes concerning Blacks, while only drug charges prime racialized stereotypes concerning Latinos. Supporting the theoretical perspective outlined above, the analysis finds that racial disparities disadvantaging both Blacks and Latinos are most substantial and consistent where uncertainty is high and racialized stereotypes are primed. The analysis, however, also finds evidence of racial disparities disadvantaging Blacks in situations where either of these variables is high. There is no evidence of racial disparities that disadvantage Asian or Native American defendants during this analysis; this should not be taken as evidence *against* this possible reality as the cell sizes for Asian and Native American defendants in each of these subsamples are quite low, ranging from 15 to 195.

As Table 3 shows, the study finds that racial disparities in defendants' likelihoods of receiving pretrial diversions are more substantial and consistent among defendants charged with drug crimes than among those charged with either property or violent

**Table 2.** Predicting Pretrial Diversion for Men Charged With Felonies, From 1990 to 2006.

	Model 1		Model 2		Model 3	
	Odds Ratio	Beta & SE	Odds Ratio	Beta & SE	Odds Ratio	Beta & SE
<b>Demographics</b>						
Black	.58***	-.54*** .05	.56***	-.59*** .05	.72***	-.32*** .05
Latino	.91	-.09 .05	.96	-.04 .05	.87***	-.14*** .05
Other race	.70*	-.36* .15	.81	-.21 .15	.69***	-.37*** .15
Aged 25 to 34	.67***	-.41*** .05	.59***	-.53*** .05	.81***	-.21*** .05
Aged 35 or over	.64***	-.45*** .04	.52***	-.66*** .05	.83***	-.19*** .05
<b>Offense severity</b>						
Rape			.14***	-1.99*** .20	.09***	-2.38*** .20
Robbery			.14***	-1.96*** .12	.13***	-2.01*** .12
Assault			.23***	-1.45*** .07	.19***	-1.66*** .07
Other violent			.20***	-1.60*** .12	.14***	-1.95*** .12
Burglary			.21***	-1.54*** .08	.22***	-1.52*** .08
Theft			.26***	-1.35*** .08	.25***	-1.40*** .08
Motor vehicle theft			.18***	-1.73*** .12	.18***	-1.72*** .12
Forgery			.36***	-1.02*** .13	.33***	-1.12*** .14
Fraud			.42***	-.87*** .13	.33***	-1.12*** .13
Other property			.25***	-1.37*** .13	.22***	-1.51 .13
Drug trafficking			.26***	-1.34*** .07	.23***	-1.46*** .07
Weapons			.18***	-1.72*** .15	.17***	-1.80*** .15
Driving			.13***	-2.04*** .16	.12***	-2.12*** .16
Other public			.26***	-1.35*** .12	.23***	-1.46*** .12
Number of charges			.92***	-.09*** .02	.92***	-.08*** .02
Attempt			.77	.26 .14	.69**	-.37** .14

(continued)



**Table 2.** (continued)

	Model 1		Model 2		Model 3	
	Odds Ratio	Beta & SE	Odds Ratio	Beta & SE	Odds Ratio	Beta & SE
Additional felony			.65***	-.45***	.63***	-.46***
Prior record				.05		.05
Prior arrest					.94***	-.06***
Prior misdemeanor conviction					.96**	-.04**
Prior felony conviction					.67***	-.39***
Prior prison terms					.72***	-.33***
Criminal justice status					.66***	-.41***
Constant	.07***	-2.71***	.18***	-1.70***	.19***	-1.66***
		.21		.23		.23
Pseudo-R <sup>2</sup>	.07		.14		.22	

Note. Each model includes county and year fixed effects. The reference category for most serious arrest charge is other drug.

\* $p \leq .05$ . \*\* $p \leq .01$ . \*\*\* $p \leq .001$ .

crimes and among those with no prior convictions than among those with prior convictions. Looking at the intersections of uncertainty and primed racialized stereotypes, the study finds that racial disparities in defendants' likelihoods of receiving a pretrial diversion are most substantial and consistent where these two factors intersect—that is, among drug defendants with no prior convictions.

Among drug defendants with no prior record, Black and Latino defendants have odds of receiving a pretrial diversion that are 43% and 34% lower, respectively, than the odds of White defendants with similar legal characteristics. Among drug defendants with a prior arrest but no prior convictions, Black and Latino defendants have odds of receiving a pretrial diversion that are 34% and 39% lower, respectively, than the odds of White defendants with similar legal characteristics. Even among drug defendants with more serious prior records, however, racial disparities in defendants' likelihoods of receiving a pretrial diversion, at least those disadvantaging Black defendants, remain. Among drug defendants who have served time in prison, Black defendants have odds of receiving a pretrial diversion that are 55% lower than the odds of White defendants with similar legal characteristics. The only other significant finding of racial disparities in defendants' odds of receiving pretrial diversion occurs among defendants with a prior arrest but no prior conviction who have been charged with a violent crime. Among these defendants, Black defendants have odds of receiving a pretrial diversion that are 50% lower than the odds of White

**Table 3.** Odds Ratios for 15 Models Predicting Pretrial Diversion Among Men Charged With Felonies, From 1990 to 2006 by Charge Type or Record.

	Drug Offenses	Property Offenses	Violent Offenses
No prior record	Model 1	Model 6	Model 11
Black	.57***	.86	.94
Latino	.66***	.83	1.11
Other Race	.88	.89	.81
N	2916	1982	1523
Psuedo-R <sup>2</sup>	.24	.17	.10
% Diverted	.21	.12	.07
Prior arrest only	Model 2	Model 7	Model 12
Black	.66*	.69	.50*
Latino	.61**	.75	1
Other Race	1.22	1.54	2.11
N	1788	1031	774
Psuedo-R <sup>2</sup>	.19	.17	.13
% Diverted	.17	.09	.06
Prior misdemeanor	Model 3	Model 8	Model 13
Black	.98	.89	.99
Latino	1.07	.74	1.01
Other Race	1.12	.40	1
N	2483	1557	1301
Psuedo-R <sup>2</sup>	.14	.23	.21
% Diverted	.20	.06	.05
Prior felony	Model 4	Model 9	Model 14
Black	.72	.79	.60
Latino	.85	1.16	1.17
Other Race	.26	1.84	1
N	2969	1730	1002
Psuedo-R <sup>2</sup>	.10	.17	.19
% Diverted	.05	.03	.03
Prior prison	Model 5	Model 10	Model 15
Black	.45*	.91	1.50
Latino	.76	3.58	1.53
Other Race	1	1	1
N	2528	977	482
Psuedo-R <sup>2</sup>	.14	.27	.23
% Diverted	.04	.02	.02

Note. While this table only reports the odds ratios for the measures of race (Black, Latino, and "other race"), all models include all variables in Table 1. The reference category for most serious arrest charge is other drug, theft, and assault, in models estimated on defendants charged with drug crimes, property crimes, and violent crimes, respectively. Each model includes year and county fixed effects.

\* $p \leq .05$ . \*\* $p \leq .01$ . \*\*\* $p \leq .001$ .

defendants with similar legal characteristics. There is no evidence of racial disparities in pretrial diversion among defendants charged with property or violent offenses who also have a prior conviction, whether misdemeanor or felony, or who have served time in prison.

## Discussion

Using data from the SCPS, this study examines racial disparities in pretrial diversion among men charged with felony crimes in metropolitan counties in the even years from 1990 to 2006. The study asks not only whether there is evidence of racial disparities in pretrial diversion but also what are the patterns of racial disparities in pretrial diversion and what do these patterns tell us about contemporary institutional decision making. The study has three main findings.

First, the findings support Hypothesis 1. Overall, prosecutors are more likely to grant pretrial diversions to White defendants than they are to grant these diversions to Black, Latino, or Asian and Native American defendants with similar legal characteristics. While measures of the current charge and prior record are strong predictors of pretrial diversion outcomes, a defendant's race is associated with his likelihood of receiving a pretrial diversion even when controlling for a core set of current charge and prior record variables.

Evidence for Hypothesis 2 is mixed. Among defendants charged with drug crimes, both Black and Latino defendants are disadvantaged relative to Whites. However, while Hypothesis 2 predicted that Blacks would be disadvantaged relative to Whites with similar legal characteristics among defendants charged with violent crimes, this is only true among those with prior arrests only. Prosecutors divert very few defendants who are charged with violent crimes and who have prior convictions. As such, it is not surprising that there is no significant evidence of racial disparities among defendants in these groups. However, the models also found no evidence of anti-Black disparities among defendants charged with violent crimes who had no prior arrests—and prosecutors offered 9% of defendants in this group pretrial diversion. While the finding that racial disparities are most consistent and substantial among defendants charged with drug crimes is nothing new, given the robust evidence that Americans associate Blacks with violence (Eberhardt et al., 2004; Payne, 2001; Sunnafrank & Fontes, 1983), attribution theory predicts large racial disparities among this group. Future studies should examine the processing of defendants charged with violent crimes to explore whether and when anti-Black racial disparities emerge. If anti-Black disparities in criminal processing decisions are not present among those charged with violent crimes, this offers a serious challenge to attribution theory.

Supporting Hypothesis 3, racial disparities in pretrial diversions are most substantial and consistent among defendants who are most eligible for pretrial diversion: drug defendants with no prior felony convictions. This suggests that racial disparities are most likely to be generated when uncertainty is high and when racialized stereotypes are primed. Nonetheless, while the study finds evidence of anti-Latino disparities only among the most eligible defendants, it finds evidence of anti-Black disparities both among the most eligible and among mid-eligible defendants. Albonetti and Hepburn (1996) found that, among defendants who were “less serious,” prosecutors were less likely to grant pretrial diversions to defendants with minority status than to White defendants with similar legal characteristics. In contrast, this analysis finds evidence of racial disparities disadvantaging Black defendants both among

those charged with violent crimes and among those who have previously served time in prison, hardly those who we would call “less serious.” One interpretation of these findings is that primed racialized stereotypes, if strong enough, can produce racial disparities in criminal processing outcomes even when officials’ uncertainty is low.

The findings of patterned racial disparities vis-à-vis prior record, wherein racial disparities disadvantaging Latinos only exist among the most eligible defendants but those disadvantaging Blacks exist both among the most eligible and among the mid-eligible, may suggest the following. Prosecutors, when choosing among the most eligible defendants, choose to divert White defendants more often than they do Black or Latino defendants with similar legal characteristics, while treating Black and Latino defendants comparably. In contrast, when choosing among less eligible defendants, prosecutors choose *not* to divert Black defendants, while treating White and Latino defendants comparably. That is, prosecutors exhibit a positive preference for diverting White defendants and a negative avoidance of diverting Black defendants. Treatment of Latino defendants depends upon whether they are being compared to White defendants—a comparison wherein they lose—or black defendants—a comparison wherein they win. In light of a growing body of scholarship suggesting that Latinos receive less beneficial criminal processing decisions than do Black defendants with similar legal characteristics (Demuth, 2003; Schlesinger, 2005; Steffensmeier & Demuth, 2000, 2001), the findings of this study, wherein anti-Black disparities are more consistent and substantial than are anti-Latino disparities, offer a cautionary tale. Research examining racial disparities in criminal processing decisions has found anti-Black and anti-Latino disparities at different stages of criminal processing and among different classes of offenders (Demuth, 2003; Hebert, 1997; Steffensmeier & Demuth, 2000). As such, it may be more helpful to examine *the conditions under which* anti-Latino disparities are more substantial or consistent than are anti-Black disparities, and vice versa, rather than creating a scale of discrimination suffered upon which defendants from different racial groups can be placed.

Finally, because the decision to grant a pretrial diversion is made using either a set risk assessment scale or, in its absence, criteria grounded in the ideal of risk assessment, racial disparities in this outcome may point to both flaws in this purportedly race-neutral method (Harcourt, 2007) and to the indefatigability of discretion in criminal legal decision making (Zimring, Hawkins, & Kamin, 2001). Future studies should examine this more closely, using data that include substance abuse history, mental health history, victim recommendation, recommendation of relevant law enforcement agency, and provisions for restitution. Only analyses that include these variables will be able to demonstrate whether racial disparities are produced through risk assessment measures, as Harcourt (2007) suggests, or in spite of them, as Alschuler (1978) suggests. The racial disparities uncovered by this study are important in either case, but the production mechanisms, prosecutorial discretion versus putatively race-neutral risk assessment criteria, matter.

### ***Policy Implications: Racial Impact Partnership Programs***

Once convicted of a felony, people become acceptable targets of discrimination in education—through the loss of eligibility for grants (Mauer & Chesney-Lind, 2002),

employment (Pager, 2007), housing (Mele & Miller, 2005), and voting (Manza & Uggen, 2006). Pretrial diversions present a rare opportunity for felony defendants to escape this fate and, as such, prosecutors should work to assure that Black and Latino defendants are not unfairly excluded from these programs. Moreover, given that a string of Supreme Court cases has ensured that prosecutorial discretion will remain both wide and relatively free from judicial review,<sup>11</sup> prosecutorial endorsement of and involvement in reform may be crucial for the attenuation of racial disparities in any prosecutorially controlled decision, including pretrial diversion (Davis, 2000, p. 207). Racial impact studies coupled with racial and ethnic task forces may be the best way to engage prosecutors in the project of reform (Davis, 2007a).

One such promising model is the Vera Institute of Justice's Prosecution and Racial Justice (PRJ) program that was founded in 2005 (McKenzie et al., 2009). The PRJ "piloted an internal assessment and management procedure to help supervisors identify evidence of possible racial bias in prosecutorial decisions and respond appropriately when it is found" (McKenzie et al., 2009, p. 1). The program has been working with three metropolitan counties since 2009 (Milwaukee County, WI; Mecklenburg County, NC; and San Diego County, CA). The preliminary results from that partnership are quite promising. According to an article in the *American Bar Association Journal*, when the PRJ began, "junior prosecutors in Milwaukee were filing drug paraphernalia charges against 73% of non-Whites but only 59% of Whites. . . . Within a few months [of] when the office changing its practice to stress diversion to treatment rather than filing charges, the racial disparities in filing had disappeared" (Mui 2010). Wayne McKenzie, PRJ Director at the time, noted that the program reduced disparities while also reducing the overall prosecution rate by increasing the frequency with which prosecutors diverted offenders to treatment. In January 2012, the Vera Institute of Justice expanded the PRJ to include Manhattan. "PRJ researchers are examining the relationship between discretionary prosecutorial decisions and racially disparate case outcomes and assisting [the Manhattan District Attorney's Office] to develop and implement new policies and practices to address unwarranted disparities" (Kutateladze, 2012). The PRJ seems to work because Vera Institute researchers *collaborate* with prosecutors rather than establishing an adversarial relationship with prosecutors, as many other reform programs do (Davis, 2007b). Researchers interested in implementing programs that help to address racial disparities in pretrial diversions and other criminal legal outcomes should watch these programs closely and perhaps develop programs based on the same model in the cities in which they live.

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### **Notes**

1. The Bureau of Justice Statistics (BJS) estimates that 5.6 million people living in the United States have served time in prison at some point in their life (Bureau of Justice Statistics, 2003). The State Court Processing Statistics data show that, among felony defendants, there are 45% more people who have been convicted of a felony than who have been to prison (Bureau of Justice Statistics, 2010). I have used this number, in concert with the BJS estimate of former prisoners, to estimate the number of people living in the United States, who have previously been convicted of a felony.
2. Of course, criminal legal officials can channel defendants out of criminal processing using other mechanisms. Law enforcement agencies sometimes have the option of asset seizure in lieu of criminal processing. Helms and Constanza (2009) analyzed contextual predictors of this outcome and found that law enforcement agencies were less likely to seize defendants' assets in counties with large Black populations and more likely to seize defendants' assets in counties with high-income inequality and with high levels of support for conservative politics.
3. There is no national data on pretrial diversion; thus, the number used here is the percentage of people who are charged with felonies in 1 of 75 urban counties on a single day in May.
4. Some scholars have argued that diversion leads to "net-widening," with primarily defendants who would not have been prosecuted at all receiving this sanction (Blomberg, 1977; Blomberg, Heald, & Ezell, 1986; Morris, 1974; Morris & Tonry, 1991). While recent research suggests that defendants who receive diversion would have otherwise been incarcerated (Blomberg, Bales, & Reed, 1993), the possibility of net widening is still a concern. Other scholars have noted that defendants who do not successfully complete the diversion program still face criminal processing; as such, high failure rates in diversion programs mean that diversion programs lengthen the period of time under which people are under some form of criminal legal control (Belenko, Fabrikant, & Wolff, 2011). These are both real concern. That said, for defendants who face certain incarceration without diversion programs, the option is still often an attractive one (Lewis, 2010; Shaver, Lewis, & Maticka-Tyndale, 2011).
5. Pretrial diversions do not include sentencing offenders to alternatives to incarceration but only pretrial adjudications that include the promise of a dismissal or acquittal.
6. For an alternate perspective, see Packer's argument that criminal legal officials for successful outcomes, defined as one that "throws off at an early stage those cases in which it appears unlikely that the person apprehended is an offender and then secures, as expeditiously as possible, the conviction of the rest" (1964, p. 11), if this is the case.

7. The SCPS sample is a two-stage stratified sample that includes filings from 40 of the 75 most populous counties for each even year from 1990 to 2006. Bureau of Justice Statistics statisticians stratify the 75 most populous counties into four groups based on the variance of felony court dispositions. All counties in the first strata are included in the SCPS; the BJS chooses counties in the remaining strata at random with a decreasing probability of inclusion for counties in each stratum.
8. The following SCPS counties lack a pretrial diversion program and, as such, are excluded from the analysis: DuPage, IL; St. Louis, MO; Bronx, Erie, Kings, Monroe, Nassau, New York, Queens, and Westchester, NY; Milwaukee, WI.
9. Because the criminal legal system tends to process people according to their assigned sex, criminal legal officials generally count transgendered women as "male" and transgendered men as "female." Thus, analyses on criminal legal data necessarily sample on or examine assigned sex rather than gender.
10. Of these defendants, 24% had their charges dismissed, while less than 1% were acquitted.
11. In 1962 in *Oyler v Boles*, the Court decided that selective prosecution based on race, religion, or any other arbitrary classification is unconstitutional only if it is purposeful or intentional. A decade and a half later, in *Washington v Davis* (1976) the court decided that evidence of discriminatory purpose independent of disproportionate impact is necessary to prove that a facially neutral law violates the Equal Protection Clause. The court applied the Davis criteria to a selective prosecution case in *Wayte v U.S.* (1985). The Court found that Wayte had to prove that the government was discriminating against him because of his protests against the draft. Most recently, in *U.S. v Armstrong*, decided in 1996, the Court found that defendants need evidence of discrimination before the state will grant them discovery. Taking these cases together, it is apparent that the court considers prosecutors free to use their discretion as they see fit, even when there is evidence of disproportionate impact, and that the state will not assist defendants in proving claims of discrimination.

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### Author Biography

**Traci Schlesinger** received her PhD in Sociology from Princeton University and is currently Associate Professor of Sociology at DePaul University. Her research and teaching examines the racialized impacts of criminal laws and criminal processing, theorizing the connections between the criminal legal system and white supremacy in the post-Civil Rights United States. Her articles include “The Failure of Race-Neutral Policies,” “Equality at the Price of Justice,” and “Racial and Ethnic Disparity in Pretrial Criminal Processing.”