

## ABSTRACT

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Directed By: Professor Shawn Bushway, Criminology and  
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Previous research has suggested that racial disparity originates from judicial decisions at sentencing; however I argue that racial disparity may originate at the pretrial stage. First, research has consistently demonstrated a potential discriminatory link between race/ethnicity and incarceration. Second, other research has demonstrated that minorities are likely to be assigned a high bail, less likely to afford that bail, and more likely to be detained pretrial. Finally, recent research has also suggested that pretrial detention can lead directly to more guilty pleas and a higher likelihood of incarceration. I predict that accounting for pretrial outcome will decrease the impact of race on the probability of incarceration at the conviction stage. I argue that utilizing a sample of indicted individuals (opposed to convicted offenders) is appropriate approach in type of study. I find that the impact of race on sentencing outcome is reduced when pretrial outcomes are included in the model.

RACE, SENTENCING, AND THE PRETRIAL PROCESS

By

Michelle Elizabeth Hart

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Advisory Committee:  
Professor Shawn Bushway, Chair  
Professor Brian Johnson  
Professor Jean McGloin

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## **Introduction**

It is well known that minorities are over-represented in the criminal justice system in the United States (Free, 2002). For example, while African Americans make up only about 13% of the U.S. population, they account for approximately 46% of all inmates in state or federal systems that receive sentences of more than one year (Beck, 2000). Researchers have long been trying to uncover the source of this racial disparity. There are two main sources: differential activity of black and white defendants, and discrimination on the basis of race/ethnicity by actors in the criminal justice system. Typically, information on crime severity and criminal history are used to control for the first possibility, and any remaining race effect is thought to represent racial discrimination.

While the results of early sentencing literature on racial discrimination are mixed, more recent research clearly suggests that there is racial discrimination for in/out sentence decisions both at the state level (Kramer & Steffensmeier, 1993; Spohn & Holleran, 2000; Steffensmeier, Ulmer, & Kramer, 1998; Demuth & Steffensmeier, 2004), and at the federal level (Steffensmeier & Demuth, 2000). This suggests that judges may be more likely to sentence minority defendants to incarceration rather than probation. Most researchers use focal concerns theory to explain this occurrence, claiming that due to limited time, information, and resources, judges rely on bounded rationality often influenced by racially biased stereotypes in order to make their decisions.

I argue that this disparity thought to be occurring at the sentencing stage may actually be originating earlier in the system. Racially biased decisions in the pretrial

process may influence whether or not an offender is even convicted, and in turn whether or not he is incarcerated. Should this be true, previous studies using conviction data are likely to result in misleading conclusions about the source of the bias. My analysis therefore looks at a sample of indicted offenders rather than simply those who are eventually convicted.

A substantial body of previous research supports my claim that focal concerns may come into play earlier in the system. Studies have suggested that minorities are more likely to be held in jail prior to adjudication (Bynum, 1982; Chiricos & Bales, 1991; Crew, 1991). Research has also shown that non-Whites are assigned a higher bail amount than Whites (Ayres & Waldfogel, 1994; Farnworth & Horan, 1980; Kruttschnitt, 1984; Nagel, 1983; Patterson & Lynch, 1991). Further, when considering bail options, studies suggest that non-Whites are more likely than Whites to receive more severe bail options (e.g. : cash or surety bonds vs. supervised release) (Albonetti et al., 1989; Feeley, 1979; Nagel, 1983; Petee, 1994). In recent studies, racial disparities still exist at the pretrial stage even when relevant characteristics (prior record, offense type, etc.) are controlled (Demuth, 2003; Schlesinger, 2005).

The key insight in this thesis is that each step in the court process is not independent of the previous ones (Klepper, Nagin, and Tierney, 1983). Discrimination at any one stage in the process may affect later stages, and potentially skew the results of research. Several studies have suggested that being held prior to adjudication is associated with an increased probability of receiving a sentence of incarceration (Farrell & Swigert, 1978; Nobling, Spohn, & Delone, 1998; Rankin, 1964). Also, failure to make bail increases the likelihood of a guilty verdict, usually

through a guilty plea with time served, as opposed to the likely case of dismissal if the person had been on bail (Foote, 1959; Patterson & Lynch, 1991). Thus, in this thesis, I consider whether the racial disparity observed at the pretrial stage might help account for the racial/ethnic differences in incarceration. In doing so, I consider not only pretrial outcome (whether a defendant is held prior to trial or not), but also pretrial options. For example, because a high bail amount makes it more difficult for a defendant to post bail, and, as mentioned above, failure to make bail increases the likelihood of a guilty verdict, the bail decision can impact the eventual sentencing decision (Free, 2002). The logic follows that if minorities are less likely to post bail and therefore be incarcerated prior to trial, then they are also more likely to plead guilty, receive a guilty verdict/conviction, and receive a sentence of incarceration. As a result, models of observed racial disparity at the conviction stage which do not take pretrial release into account, may in fact be capturing the actions of the pre-release actors and not the sentencing judges.

I explore this possibility using the State Court Processing Statistics, a dataset that has been used in prior research to examine both the impact of race on pretrial release (Demuth, 2003; Schlesinger, 2005) and sentencing decisions (Demuth & Steffensmeier, 2004). Specifically, I find that taking pretrial decisions into account in the incarceration model substantially changes the estimate of the impact of race on the probability of incarceration.

To recap, my argument has three key points. First, research has consistently demonstrated a potential discriminatory link between race/ethnicity and incarceration. Second, other research has demonstrated that minorities are more likely to be

assigned a higher bail, and less likely to be able to afford that bail. Thus minorities are more likely to be detained prior to trial. Finally, recent research has also suggested that pretrial detention can lead directly to more guilty pleas and a higher likelihood of incarceration, all else constant. Based on these three observations, I predict that accounting for pretrial outcome will decrease the impact of race on the probability of incarceration at the conviction stage. My research builds directly on three previous studies (Demuth, 2003; Demuth & Steffensmeier, 2004; Schlesinger, 2005) that use a nationally representative data set to make points 1 and 2. Using the same data set and a similar sample, I explore whether what happens at the pretrial stage has any ability to account for the well known finding with respect to minorities and incarceration. Because pretrial status affects both conviction and incarceration, I extend previous research by conducting my analysis on a sample of indicted offenders to account for selection bias and the fact that pretrial outcome may in fact be dictating whether or not offenders even get convicted. A finding that the impact of race is substantially reduced by accounting for pretrial release will present an alternative interpretation for the current finding that judges are engaging in racial discrimination with regard to the incarceration decision. It should also focus attention on the pretrial release decision as a potential source of racial disparity.

## **Previous Research**

### ***Racial Disparity in Incarceration***

While African Americans make up only about 13% of the U.S. population, they account for approximately 46% of all inmates in state or federal systems that receive

sentences of more than one year (Beck, 2000). Not only does this racial disparity in incarceration exist, it appears to be increasing. According to research conducted by The Sentencing Project (1997), “From 1988 to 1994, 38 states and the District of Columbia experienced an increase in the racial disparity in their rates of incarceration. Nationally, the Black rate of incarceration in state prisons during this period increased from 6.88 times that of Whites to 7.66. [Further,] twelve states and the District of Columbia incarcerate African Americans at a rate more than ten times that of Whites” (Mauer, 1997b). Specifically, young African American men are the most likely to be incarcerated. Approximately one in three African American men between the ages 20-29 are under some form of criminal justice supervision (Mauer & Huling, 1995). Staggering statistics, such as these, call into question the equity of the criminal justice system and prompt the need for research on this topic.

### ***Ethnicity is Essential***

While researchers have long been interested in the overrepresentation of Black versus White individuals in the criminal justice system, they are beginning to recognize the necessity of considering not only the impact of race (Black vs. White), but also ethnic membership (e.g. : Hispanic) on one’s involvement in the criminal justice system (Zatz, 1984; Albonetti, 1997; Crawford, Chiricos, & Kleck, 1998; Hebert, 1997; Steffensmeier & Demuth, 2000, 2001; Spohn & Holleran, 2000; Demuth, 2004; Demuth & Steffensmeier, 2004). It is increasingly important not only to differentiate between races, but to also consider Hispanics as a separate ethnic group (Zatz, 1984; Demuth & Steffensmeier, 2004). Statistically speaking, in studies where Hispanics are lumped into the “White” category, the results may underestimate

the difference between Whites and Blacks, thus it is essential to look at each ethnic group separately (Demuth & Steffensmeier, 2004; Steffensmeier & Demuth, 2000, 2001; Schlesinger, 2005).

Further, according to the United States Census Bureau, the Hispanic population in the United States is rapidly growing. The current United States population is comprised of 72 percent White non-Hispanics; 12 percent Black non-Hispanics; 11 percent Hispanics; and 5 percent Asian and other ethnicities. Also, “Since 1980, the number of Hispanics in the U.S. has grown five times faster than the rest of the population, making the United States the third largest Spanish-speaking country in the world... [and] between 2005 and 2015, Hispanics are expected to pass African-Americans as the country’s largest minority group” (Schmidt, 2000). Hispanic representation in the criminal justice system is on the rise as well. For example, while Hispanics made up only about 8% of the state and federal prison population in 1980, they represented about 17% in 2000 (Bureau of Justice Statistics 2001). Thus with their increasing representation in the criminal justice system and the United States population as a whole, it is particularly important that this ethnic group be considered when studying the effects of extra-legal characteristics, such as race and ethnicity, on the criminal justice process.

Several recent sentencing studies have done just that. Zatz (1984), who examined Black, White, and Hispanic defendants, claims that different control variables (e.g. : prior record, offense seriousness, etc.) “play differing roles in explaining variation in sentencing within each racial/ethnic group, and their effects on sentence length differ significantly between groups” (p. 164). Demuth and

Steffensmeier (2004) found that Hispanic defendants are sentenced more similarly to Black defendants than White defendants. They argue that due to their low social status, similar to that of Blacks, paired with language and citizenship issues, as well as prejudice and drug-related stereotypes, Hispanic males are likely to receive harsher sentences than Whites. Other studies that have included Hispanics as a racial/ethnic category have found that this characteristic affects the decisions made in their criminal processing (Zatz, 1984; Hebert, 1997; Holmes & Daudistal, 1984; LaFree, 1985; Spohn & Holleran, 2000). The SCPS dataset used in my analysis however, provides good measures of race and ethnicity, thus allowing for a more detailed analysis. Therefore, my research will be able to examine three ethnic categories (White non-Hispanic, Black non-Hispanic, and Hispanic) instead of simply Black and White.

### ***Racial Disparity at Sentencing: Early Studies Found Mixed Results***

Racial disparity in sentencing has been studied for many years (since about the 1920's). Research prior to 1985 tended to find little consistent support for racial discrimination. For example, in his review of 20 studies of judicial sentencing published between 1928 and 1969, Hagan (1974) concluded, "While there may be evidence of differential sentencing, knowledge of extra-legal offender characteristics contributes relatively little to our ability to predict judicial dispositions" (p. 379). Hagan (1974) argued that the results of significance tests have been misinterpreted in the past to suggest racial discrimination, but that when substantive significance is taken into consideration (how strong the relationship is), race is not really a factor. Further, he cited the lack of control variables and spurious relationships as a reason for the finding of a race effect at sentencing. Similarly, Kleck (1981) reviewed 40

studies published up until 1979 and found that in non-capital cases, “The evidence is largely contrary to a hypothesis of general or widespread overt discrimination against black defendants, although there is evidence of discrimination for a minority of specific jurisdictions, judges, crime types, etc.” (p. 799).

Hagan and Bumiller (1983) conducted another major review of race and sentencing literature (31 studies). They found that on the whole, the relationship between race and sentencing is weak. However, they noted that studies published after 1969 were more likely to control for either crime type, crime seriousness, or prior record, and were thereby more likely to conclude that there is a significant (and non-spurious) relationship between race and sentencing (Hagan & Bumiller, 1983). And Zatz (1984) argued that for “some offenses, in some jurisdictions, controlling for some legal and extralegal factors, at some historical points, and using some methodologies, some groups are differentially treated” (p. 149).

### ***Recent Research: Supporting Claim of Racial Disparity at Sentencing***

In more recent years, the majority of sentencing studies have found support for the claim that there is racial disparity at sentencing. Because there is such a vast amount of sentencing literature that is difficult to concisely synthesize, I have created a table of race and sentencing studies from the past 10 years<sup>1</sup>. (See Figure 1.) The majority of these studies concur that racial disparity exists at sentencing. Following the table, I will review the research most relevant to my study, including pieces from the table and several slightly older pieces that warrant inclusion.

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<sup>1</sup> In order to create this table to summarize race and sentencing literature over the past 10 years, I used Criminal Justice Abstracts Database and searched using keywords “race & sentencing”. While the results are by no means exhaustive, they provide a good overview of recent research.

<b>Figure 1.</b>							
<b>Author</b>	<b>Year</b>	<b>Title</b>	<b>Journal</b>	<b>Dependant Var.</b>	<b>Ethnicity Considered</b>	<b>Basic Finding</b>	<b>Race effect</b>
Demuth & Steffensmeier	2004	Ethnicity effects on sentencing outcomes in large urban courts: Comparisons among White, Black, and Hispanic defendants	Social Science Quarterly	In/out decisions and sentence length	Yes	Hispanic sentences are more similar to Blacks than Whites. Black and Hispanics are sentenced more harshly than Whites	+
Ulmer & Johnson	2004	Sentencing in context: A multilevel analysis	Criminology	In/out decisions and sentence length	Yes	Racial and ethnic composition-affect sentencing outcomes	+
Farrell	2003	Mandatory minimum firearm penalties: A source of sentencing disparity	Justice Research and Policy	Guideline departures	No	Black offenders are more likely to receive the mandatory penalty than Whites	+
Johnson	2003	Racial and ethnic disparities in sentencing departures across modes of conviction	Criminology	Guideline departures	Yes	Extra-legal effects vary considerable across modes of different courtroom actors in contributing to racial and ethnic disparities under sentencing guidelines	+/-
Free	2002	Race and pre-sentencing decisions in the United States: A summary and critique of the research	Criminal Justice Review	Meta-analysis of sentencing decisions	Vary by study	Race was neither the sole nor the strongest predictor of pre-sentencing outcome	+/-
Everett & Wojtkiewicz	2002	Difference, disparity, and race/ethnic bias in federal sentencing	Journal of Quantitative Criminology	Sentence length	Yes	African Americans, Hispanics, and Native Americans received relatively harsher sentences than whites. The first two groups are more likely to plead guilty or accept responsibility than others, and this contributes to their longer sentences.	+
Steffensmeier & Demuth	2001	Ethnicity and judges' sentencing decisions: Hispanic-Black-White comparisons	Criminology	In/out decisions and sentence length	Yes	Hispanic defendants are the subgroup most at risk to receive the harshest penalty for both in/out and sentence length	+
Steffensmeier &	2000	Ethnicity and sentencing	American	In/out and	Yes	Ethnicity had a small to moderate effect	+

Demuth		outcomes in U.S. federal courts: Who is punished more harshly	Sociological Review	sentence length		on sentencing outcomes favoring White and penalizing Hispanics, with Blacks in an intermediate position	
Spohn & Holleran	2000	The imprisonment penalty paid by young, unemployed Black and Hispanic male offenders	Criminology	In/out and sentence length	Yes	Race did not affect sentence length, but had a significant and direct effect on in/out decisions	+/-
Steffensmeier, Ulmer, & Kramer	1998	The interaction of race, gender, and age in criminal sentencing: The punishment cost of being young, black, and male	Criminology	Sentence length	No	Race was most influential in the sentencing of younger rather than older males.	+
Albonetti	1997	Sentencing under the federal guidelines: effects of defendant characteristics, guilty pleas, and departures on sentence outcomes for drug offenses	Law and Society Review	Sentence length, and guideline departures	Yes	More severe sentences were imposed on nonwhite defendants	+

Beginning with an important paper by Wheeler et al. (1982), researchers changed strategies and began looking at sentencing as two stages –the decision to incarcerate (in/out) and the sentence length decision for those who were incarcerated. Once the data was split in this way, researchers began to find more consistent results. Chiricos and Crawford (1995) concluded that there is consistent, and frequently significant, racial disparity with regard to in/out decisions at sentencing, but not sentence length<sup>2</sup>. In other words, Blacks are more likely than Whites to receive a sentence of incarceration versus no incarceration. The finding of a race effect for in/out sentencing decisions is consistent both at the state level (Kramer & Steffensmeier, 1993; Spohn & Holleran, 2000; Steffensmeier, Ulmer, & Kramer, 1998; Demuth & Steffensmeier, 2004) and at the federal level (Steffensmeier & Demuth, 2000). It is important to note that while all of these more recent studies find a race (and in some cases, ethnicity) effect, the variables found to have the most significant impact on in/out sentence decisions are offense severity and prior record.

Mitchell (2005) conducted the most recent meta-analysis of race and sentencing literature in which he utilized 71 published and unpublished studies (yielding 116 independent contrasts). Ultimately, he found that African Americans are generally sentenced more harshly than whites. Using non-federal data he found that African Americans are 1.28 times more likely than Whites to be incarcerated. He takes the analysis further and runs a multivariate model to “estimate the average effect size in contrasts that utilized more precise measures of criminal history and offense seriousness, and included controls for both type of defense counsel and

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<sup>2</sup> These effects are even stronger in the South and in places with a high proportion of Blacks in the population (Chiricos & Crawford 1995).

method of disposition, while holding all other variables at their respective means” (p. 462). This analysis produces an odds ratio of 1.13, which while less than the initial odd ratio measure of 1.28, still suggests racial disadvantage for African Americans.

As previously mentioned the results of more recent sentencing studies support the claim that there is racial disparity at sentencing. For example, using Pennsylvania sentencing guidelines data from 1985 to 1987 (n=61,294), Kramer and Steffensmeier (1993) studied the effect of race (binary; White vs. Black) on both in/out sentence decisions and sentence length<sup>3</sup>. They controlled for a variety of legal characteristics, such as offense severity and criminal history. They also controlled for offender characteristics (race, sex, age, type of disposition), and contextual factors (percent of population Black, percent of population urban, etc.). Results suggest that while race only adds .5% to the explained variation across most offenses, Blacks are on average 8% more likely to be incarcerated than White defendants (net of all other variables). Further, “the odds ratio indicates that the odds of Blacks being incarcerated (versus not being incarcerated) is 1.54 times higher than the odds of Whites being incarcerated” (p. 368).

Steffensmeier, Ulmer, and Kramer (1998) also utilized data from Pennsylvania, ranging from 1989-1992 (n≈139,000)<sup>4</sup>. Primarily they focused on the interaction between race, age, and gender; however, they also separately analyzed the effect of each characteristic on both in/out sentence decisions and sentence length.

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<sup>3</sup> In/Out sentence decisions are measured in 3 ways: Prison/Jail vs. Probation; Prison vs. Jail/Probation; and Prison vs. Jail. Prison/Jail vs. Probation is the traditional in/out sentence decision measure therefore my review of this study will focus on that outcome.

<sup>4</sup> Steffensmeier, Ulmer, and Kramer (1998) used the Pennsylvania Commission on Sentencing Data (PCS). “By law, each sentence given for a felony or misdemeanor conviction must be reported to PCS” (p. 771).

Steffensmeier, et. al. (1998) included controls very similar to those used by Kramer and Steffensmeier (1993). Results suggest that with regard to in/out sentence decisions, Blacks are 1.5 times more likely to receive incarceration (versus no incarceration) when compared to Whites (Log odds =1.5). Further, “these odds yield a difference in the probability of incarceration between Blacks and Whites of 10%” (p. 776)<sup>5</sup>.

Spohn and Holleran (2000) extended Steffensmeier, Ulmer, and Kramer’s (1998) work by including Hispanics as an ethnic category in their analysis (n=6,638). Instead of simply using data from Pennsylvania, Spohn and Holleran (2000) analyzed data from three separate jurisdictions: Cook County (Chicago), Illinois; Dade County (Miami), Florida; and Jackson County (Kansas City), Missouri<sup>6</sup>. Their results were similar to those found by Steffensmeier et. al. (1998). Based on odds ratios, Spohn and Holleran (2000) found that “in Chicago, Blacks are 12.1% more likely, and Hispanics are 15.3% more likely than whites to be sentenced to prison. In Miami, the difference in the probabilities of incarceration for Hispanic offenders and White offenders is 10.3% [Blacks and Whites were not significantly different]” (p. 293).

Using nationally representative state level data, Demuth and Steffensmeier (2004) also found a race/ethnicity effect at sentencing. Demuth and Steffensmeier (2004) used the State Court Processing Statistics (SCPS) dataset and examined felony cases in even years from 1990-1996. After running a logit analysis (with controls that are less extensive than the controls available in datasets with guideline data), Demuth

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<sup>5</sup> The formula used to convert odds ratios to probabilities is  $[(\text{odds}/(\text{odds}+1))-.50]$ . (Steffensmeier, Ulmer, & Kramer, 1998; Spohn & Holleran, 2000; Hanushek & Jackson, 1977).

<sup>6</sup> Jackson County (Kansas City) Missouri only had 47 Hispanics in the dataset and were therefore not analyzed separately. Instead dummy variables for white and black offenders were used (Spohn & Holleran, 2000).

and Steffensmeier (2004) reported that “the odds of incarceration for Black defendants are 57% greater than the odds of incarceration for White defendants; the odds of incarceration for Hispanic defendants are 45% greater than the odds of incarceration for white defendants” (p. 1004-1005).

Steffensmeier and Demuth (2000) used federal data (U.S. Sentencing Commission 1993-1996) and obtained results that align with the four state level studies discussed above. Breaking down ethnicity into four categories (Black, White, Black-Hispanic, and White-Hispanic), examining both drug and non-drug cases, and utilizing similar controls as in previous studies, Steffensmeier and Demuth (2000) found the following results based on their probit analysis: “Compared with White defendants in non-drug cases, Blacks are 5% more likely, White-Hispanics are 7% more likely, and Black-Hispanics are 6% more likely to be incarcerated. Relative to White drug defendants, White-Hispanic drug defendants are 16% more likely to be imprisoned...Black-Hispanic drug defendants are 20% more likely to be imprisoned...and Black drug defendants are 11% more likely to be imprisoned” (p. 718). The fact that Demuth and Steffensmeier’s (2000) results are substantively smaller than Steffensmeier and Demuth’s (2004) could be a question of jurisdiction, or it could be the result of a less fully specified model when using the SCPS data.

In sum, most recent sentencing research supports the claim that there is a race/ethnicity effect for in/out sentence decisions controlling for relevant factors such as criminal history and offense severity. In other words, minorities are more likely than their White counterparts to receive a sentence of incarceration. Several

researchers have proposed a theory to explain this phenomenon, which will be summarized below.

### ***Theoretical Perspective: Focal Concerns***

The majority of recent research dealing with race/ethnicity and sentencing has used the focal concerns perspective on court decision making as a theoretical base (Albonetti, 1991; Steffensmeier, Ulmer, & Kramer, 1998; Steffensmeier & Demuth, 2000; Demuth, 2003; Johnson, 2003; Demuth & Steffensmeier, 2004; Schlesinger, 2005; Spohn & Holleran, 2000). This theory posits that judges are charged with making rational decisions with regard to an offender's sentence. These decisions are typically based on three factors: 1) offender's blameworthiness, 2) protection of the community from potentially dangerous offenders, and 3) practical constraints and consequences (Steffensmeier, Ulmer, & Kramer, 1998).

Blameworthiness typically involves offense severity (positive relationship with blameworthiness), criminal history (positive relationship with blameworthiness) and prior victimizations (negative relationship with blameworthiness), and is associated with the just deserts or retribution philosophies of punishment (Steffensmeier, Ulmer, & Kramer, 1998). Protection of the community, on the other hand, is associated with the incapacitation and general deterrence philosophies of punishment. Judgments about this focal concern usually revolve around risk of future violence or crime; specifically information regarding the seriousness of the offense and offender characteristics that increase the likelihood that one will re-offend (Steffensmeier, Ulmer, & Kramer, 1998). Finally, practical constraints and consequences refer to both organizational concerns (e.g. judicial and correctional

resources) and individual concerns (e.g. an offender's ability to serve time behind bars) (Steffensmeier, Ulmer, & Kramer, 1998).

While in a perfect world judges would be provided with all the necessary information and time to make rational and unbiased decisions, this does not occur in reality. Judges are constrained by "bounded rationality" and forced to make decisions without all the relevant information to predict an offender's future behavior (Albonetti, 1991). Thus, judges develop "perceptual shorthands" to assist in making decisions when information and time are limited and uncertainty is high (Steffensmeier, Ulmer, & Kramer, 1998). This shorthand relies not only on legally relevant characteristics such as offense severity and criminal history, but also on stereotypes linked to extralegal characteristics such as race/ethnicity, gender, age, or social class (Demuth, 2003; Steffensmeier, Ulmer, & Kramer, 1998; Albonetti, 1991). Once these patterns of thought are set in place they are difficult to change and frequently result in racial/ethnic bias in court decisions (Demuth, 2003).

Minorities are more likely than Whites to have negative stereotypes associated with them. In fact these negative stereotypes are often closely related to the three focal concerns outlined above. After reviewing previous literature, Demuth (2003) states, "Blacks are viewed by others as being aggressive and irresponsible (Tittle & Curran, 1988), disrespectful of authority (Bridges & Steen, 1998), and more criminal in their lifestyles (Swigert & Farrell, 1976)" (p. 883). Other research has demonstrated that Hispanics are associated with similar stereotypes (Anderson, 1995; Carnevale & Stone, 1995; Mata, 1998). It is argued that these negative stereotypes paired with language and citizenship issues make Hispanics even more likely to

receive both harsher sentences (Demuth & Steffensmeier, 2004) and harsher pretrial decisions (Demuth, 2003) than Whites.

Most researchers that have utilized the focal concerns perspective have done so with reference to sentencing decisions. However, Demuth (2003) and Schlesinger (2005) suggest that the focal concerns perspective can be applied to other courtroom actors as well, specifically during the pretrial stage. In fact, at the pretrial stage, when relevant legal factors may be unavailable, focal concerns are even more likely to come into play; thus highly subjective decisions may occur at this stage (Demuth, 2003). These subjective decisions frequently rely on stereotypes which can be racially/ethnically biased. Johnson (2003) states, “When the exercise of discretion is greatest, so too should be the reliance on stereotypical patterned responses, resulting in greater effects for extralegal variables like race and ethnicity” (p. 456). Along these lines, because there is a large amount of discretion employed in the pretrial process (Demuth, 2003) it is essential to examine racial/ethnic bias at that stage and how that manifests itself in the sentencing process. Following this logic, this thesis applies focal concerns theory to the pretrial process and asks how actions at the pretrial stage might affect inference about the role of race/ethnicity on the decision to incarcerate.

### ***“Convicted Sample” May Obscure Part of the Story***

The main argument here is that the actions at the pretrial stage can impact the decision to incarcerate. For example, imagine the following situation:

*Two individuals, one White and one minority, are indicted for similar minor crimes and both are offered bail. The White individual is able to post bail and*

*is therefore released, whereas the minority defendant is unable to afford it and is therefore held in jail prior to trial.*

Now suppose the prosecutor makes the decision that these cases are not serious enough to warrant further adjudication. Focal concerns theory suggests that organizational efficiency is one goal of the system. What is the easiest way to dispose of these cases while still pursuing justice? For an individual held on bail, a guilty plea and a sentence of time served results in a case being closed without additional court resources. For an individual who has made bail, a case dismissal also closes the case without more time or resources. In each case, the resources used are about the same from the perspective of the prosecutor and the immediate future is the same for the individual, although the future implications are different. The prosecutor has simply used the leverage of the current incarceration to maximize convictions, and the individual in jail has made a rational decision with respect to sunk costs.

The plausibility of the above scenario or another like it is supported by a couple dated pieces of literature. For example, it has been shown that individuals who are unable to make bail and are therefore held in jail prior to trial are more likely to plead guilty (Foote, 1959; Patterson & Lynch, 1991) and receive a sentence of time served. In fact, Foote (1959) found specifically that “a grand jury dismissed 24 percent of bail cases and [only] 10 percent of jail cases, while jail defendants were more likely to plead guilty and less likely to be acquitted at a trial than bail defendants” (p. 47).

While the aforementioned studies support my theory, they are limited in number and are extremely dated. Thus, I use my own data to support my claim.

Using a probit analysis and standard relevant control variables (used in the rest of my analyses and which will be explained later), I model the effect of making bail on the probability of having one's case dismissed versus pleading guilty<sup>7</sup>. The results suggest that individuals who make bail are significantly more likely than those who do not make bail to have their cases dismissed; in fact, 10.4 percentage points more likely. Since the average probability of case dismissal is .257, those who make bail are 40.62% more likely to have their cases dismissed than those who do not make bail<sup>8</sup>. (See Table 1.)

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<sup>7</sup> This analysis looks at cases in which individuals were arrested and offered bail. The outcome variable of interest is dichotomous: 1=case dismissed; 0=guilty plea

<sup>8</sup> In order to standardize the base rate, magnitude of effect is calculated by dividing the dprobit coefficient of the variable of interest by the average probability of making bail.

**Table 1: Effects of Making Bail on Probability of Case Dismissal vs. Guilty Plea  
Probit Analysis (1990-2000)**

Note: This sample consists of individuals arrested and offered bail  
Outcome is Dichotomous: 1=Case Dismissal & 2=Guilty Plea

<b>Measures</b>	<b>df/dx (SE)</b>	<b>P</b>
Made Bail	.1044*** (.0144)	.000
(White)		
Black	.0332** (.0158)	.034
Hispanic	-.0031 (.0108)	.777
Age <sup>2</sup>	-.0000 (.0000)	.359
Age	.0029 (.0031)	.353
(Rape)		
Robbery	-.0500 (.0386)	.225
Assault	-.0188 (.0339)	.585
Other Violent	-.0350 (.0314)	.288
Burglary	-.1350*** (.0284)	.000
Theft	-.1280*** (.0278)	.000
Other	-.1230*** (.0288)	.001
Property	-.1805*** (.0261)	.000
Trafficking	-.1359*** (.0405)	.005
Other Drug	-.0975*** (.0122)	.000
Multiple	-.0050 (.0049)	.311
Crimes	-.0003 (.0089)	.976
Index Crim.	.0089 (.0089)	.319
Hist.		
Prior FTA		
CJ Status		
N	15560	
Pseudo R <sup>2</sup>	.1436	
<hr/>		
P<.01***		
P<.05**		
P<.1*		

In other words, those who make bail (disproportionately White), are more likely to have their cases dismissed; and therefore, do not show up in a sample of

convicted offenders, the sample typically used in previous sentencing research. Similarly, those who do not make bail (disproportionately minority), are more likely to plead guilty and be convicted and will therefore be included in a sample of convicted offenders. Thus, the convicted sample is likely made up of minorities accused of less serious crimes matched up against whites accused of more serious crimes (serious enough that they would be held on bail). The less serious whites are not even in the convicted sample; therefore, if one were to only use a sample of convicted offenders one would be comparing unlike groups. In other words, the race effect seen at the sentencing stage may only be a product of a selection bias into the sample.

If the above is true, the pretrial process is likely dictating the very means by which someone is convicted. As a result, the pretrial process is partially determining who makes it into the sample of convicted offenders. Thus, the estimate of any coefficients that are correlated with factors that are driving selection (e.g. race/ethnicity) will be biased.

There are two potential ways to deal with this. The first would be to model the process by which someone gets convicted using a model like the Heckman selection model. This entails identifying a variable related to conviction that is unrelated to both the pretrial process and to sentencing outcomes. Obviously, this would be extremely difficult to isolate, and is beyond the scope of this thesis. Thus, I take the other route, and do not attempt to model the conviction process. Instead, I take a step back, extend my sample to include all indicted individuals, and simply look at the effect of race on incarceration; rather than attempting to speak to causality

or attempting to identify which courtroom actors play a role. When I extend the sample to include all indicted individuals (rather than only those eventually convicted of crimes) the “less serious Whites” are included, allowing me to compare like cases. While using the indicted sample does not solve the problem of sample selection bias, it does allow me to make inference on the question.

### ***Demonstrated Link Between Pretrial and Sentencing***

While I have demonstrated that pretrial outcome may be linked to the probability of conviction (thereby creating a selection bias for the convicted sample), there is also reason to believe that the pretrial process may have an effect on final dispositions. Previous research has suggested that pretrial decisions and outcomes have some effect on sentencing decisions later down the line. Most of the research in this area is older and lacks sophisticated statistical techniques; however, the results clearly suggest that pretrial detention is related to sentencing decisions.

In a very early study on the bail system, Foote (1959) reported two studies conducted in Philadelphia in 1953 (n=958) and in New York in 1957 (n=3223). Results suggested that individuals held in jail prior to trial were more likely to be convicted and then incarcerated than individuals accused of similar crimes who were free on bail. To sum up his results:

“Forty-eight percent of bailed defendants [in Philadelphia] were not convicted compared with 18 percent of jailed defendants. In the New York sample, the grand jury dismissed 24 percent of the bail cases and 10 percent of the jail cases, while jail defendants were more likely to plead guilty and less likely to be acquitted at a trial than bail defendants. [In guilty cases] in Philadelphia 59 percent of the jail cases but only 22 percent of the bail cases were sentenced to imprisonment, while in New York 84 percent of the jail and only 45 percent of the bail cases were sentenced to a penal institution” (p. 47).

In 1978, Farrell and Swigert examined the correlation of various characteristics with final disposition. While this analysis lacks control variables, it suggests that making bail is correlated (-.219) with final disposition (incarceration). Similarly, Humphrey and Fogarty (1987) examined 3,149 felony burglary cases in six U.S. cities in 1978.<sup>9</sup> Using logistic regression, and only controlling for race (non-White vs. White; odds ratio=1.20), pretrial release status (odds ratio=1.66), and prior felony convictions (odds ratio=1.66), they found that all three variables had an effect on in/out sentence decisions<sup>10</sup>.

Several studies that analyze sentence decisions using pretrial incarceration as an independent variable find that pretrial incarceration affects both in/out sentence decisions and sentence length (Nobling, Spohn, & Delone, 1998; Rankin, 1964). This type of analysis is similar to the one conducted in this thesis therefore I will review these two studies in more detail below.

Using data from Chicago (n=2,983) and Kansas City (n=1,576) in the year 1993, Nobling, Spohn, & Delone (1998) studied the relationship between an offender's employment status and the severity of sentence. Pretrial release was one of many control variables they included in their multivariate analysis (logit). They noted that "in each city, offenders that were released before trial were less likely to be sentenced to prison than those who were in custody" (p. 473)<sup>11</sup>.

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<sup>9</sup> Cities include: Norfolk, Seattle, Tucson, El Paso, New Orleans, and Delaware County.

<sup>10</sup> These variables were all dichotomous. Race: 1=non-white, 2=White  
Pretrial Release: 1=detained, 2=not detained  
Prior Conviction: 1=one or more, 2=none

<sup>11</sup> Chicago odds ratio=.10 and significant at the .05 level.  
Kansas City odds ratio=.32 and significant at the .05 level.

Rankin (1964) used data from Manhattan's Magistrate's Felony Court between October of 1961 and September of 1962. She found five characteristics of individuals that were related to both pretrial detention and final disposition: 1) previous record, 2) bail amount, 3) counsel (private vs. court assigned attorney), 4) family integration, and 5) employment stability. She found that "each of [the] five characteristics [delineated above], when considered separately do not account for the statistical relationship between detention before adjudication and unfavorable disposition [incarceration]. When the characteristics are considered in combination, they account for only a small part of the relationship" (p. 655). In other words, because these characteristics that are related to both pretrial detention and final disposition only explain a small part of the relationship between the two, it is likely that there is a causal relationship between detention and incarceration. Thus, she argues that pretrial detention increases a defendant's probability of receiving a sentence of incarceration.

Patterson & Lynch (1991) ascertain that failure to make bail increases the likelihood of a guilty verdict. For example, because a high bail amount makes it more difficult for a defendant to post bail, and, as mentioned above, failure to make bail increases the likelihood of a guilty verdict, the bail decision can impact the eventual sentencing decision (Free, 2002).

In sum, studies have suggested that being held prior to adjudication is associated with an increased probability of receiving a sentence of incarceration (Farrell & Swigert 1978; Nobling, Spohn, & Delone, 1998; Rankin, 1964). Also, failure to make bail increases the likelihood of a guilty verdict (Foote, 1959; Patterson

& Lynch, 1991). The logic follows that if minorities are less likely to post bail and therefore be incarcerated prior to trial, that they are also more likely to plead guilty, receive a guilty verdict/conviction, and receive a sentence of incarceration. As a result, models of observed racial disparity at the conviction stage, which do not take pretrial release into account, may in fact be capturing the actions of the pre-release actors and not the sentencing judges. Therefore, I will now review previous pretrial literature to determine if research suggests that there is racial/ethnic discrimination in the pretrial stage, rather than simply at sentencing.

### ***Focal Concerns Earlier in Process: Disparity Exists at Pretrial***

As mentioned above, it is argued that focal concerns theory may apply to other courtroom actors, aside from judges. In fact, research supports the claim that racial/ethnic disparity exists in the pretrial process, suggesting that pretrial actors may actually be utilizing bounded rationality and relying on racially/ethnically biased stereotypes when making decisions.

While there is a large amount of research on racial disparity at sentencing, there is more limited information about the effect of race on the pretrial process. There are even fewer pretrial studies that differentiate between ethnicities (White non-Hispanic, Black non-Hispanic, vs. Hispanic). Demuth (2003) cites three reasons for the prevalence of research focusing on sentencing instead of pretrial: 1) sentencing is more proximate to potential incarceration, 2) sentencing is more visible and regulated than pretrial, and 3) there is typically better data collection with regard to sentencing information. He further argues that researchers need to look earlier in

the court process due to the large amount of discretion present throughout the earlier stages, thus allowing for more potential bias to enter the system (Demuth, 2003).

Free (2002) conducted a review of 25 studies examining the effect of race on pretrial decisions. The majority of the studies he reviewed demonstrated racial disparity apparent in the pretrial process in some shape or form. Several studies showed that non-Whites are more likely than Whites to be held prior to trial (Bynum, 1982; Chiricos & Bales, 1991; Crew, 1991). For example, when examining the effect of unemployment on pretrial incarceration, Chiricos & Bales (1991) found that young black males were 3.9 times more likely than others to be incarcerated prior to trial, suggesting that race is an aggravating factor. Bynum (1982), who examined the effect of various factors (legal and extralegal) on the probability of release on recognizance in a western city (n=360), found that nonwhites are 13% less likely to be released on recognizance than white defendants with the same characteristics.

While this is an interesting point, simply looking at whether or not a defendant is released prior to trial is superficial. Other researchers have argued that one must not only consider if a defendant is offered pretrial release, but also the bail amount and whether or not the defendant was able to make bail (Schlesinger, 2005).

In that respect, studies reviewed by Free (2002) show that non-Whites are assigned a higher bail amount than Whites (Ayres & Waldfogel, 1994; Farnworth & Horan, 1980; Kruttschnitt, 1984; Nagel, 1983; Patterson & Lynch, 1991) and tend to receive more severe bail options (Albonetti et al., 1989; Feeley, 1979; Nagel, 1983; Petee, 1994). More specifically, Ayres & Waldfogel (1994) found that on average, bail amounts for Black and Hispanic men are 35% ( $p < .1$ ) and 19% ( $p < .05$ ) higher

than white men, respectively<sup>12</sup>. When examining the effect of legal and extralegal characteristics on bail decisions based on cases in New York (between December 1974 and March 1975; n=5594), Nagel (1983) found that there is a small race effect on bail amount (bail is lower for whites;  $\beta = -.04$  &  $p < .1$ ) and on the decision to offer cash alternatives (Whites are more likely to be offered cash alternatives;  $\beta = .04$  &  $p < .1$ ). Petee (1994) found that being non-White reduced the log-odds ratio of being released on recognizance by .759 ( $p < .05$ ) based on data from felony cases in Lucas County, Ohio between 1981 and 1989.

While the studies reviewed by Free (2002) all make important contributions to the field, the vast majority of them only examined regional data (Bynum, 1982; Chiricos & Bales, 1991; Crew, 1991; Nagel, 1982; Ayres & Waldfogel, 1994; Farnworth & Horan, 1980; Kruttschnitt, 1984; Nagel, 1983; Patterson & Lynch, 1991; Feeley, 1979; Nagel, 1983; Petee, 1994), rather than national data. Another weakness of these previous studies is that they all used relatively old data and many failed to control for relevant characteristics (such as prior record, offense type, etc.). The SPCS data used in this thesis is a multi-jurisdictional dataset covering even years from 1990-2000, thus it is more current and more representative of the entire United States.

In several more recent studies where relevant characteristics (prior record, offense type, etc.) were controlled for, racial disparities still exist (Demuth, 2003; Schlesinger, 2005). Two very similar recent studies examined the effect of race and

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<sup>12</sup> Study based on data from the Court of Common Pleas in New Haven, Connecticut from 1990. To be a part of the data, individuals had to be arrested, processed, and secure release using the services of bond dealers. Thus, it is difficult to generalize from this sample.

ethnicity on the pretrial process using the SCPS dataset (Demuth, 2003; Schlesinger, 2005). Demuth (2003) found:

“The odds of detention are 66% greater for Black defendants than White defendants, and the odds of detention are 91% greater for Hispanic defendants than White defendants. Furthermore the odds of detention for Hispanic defendants are significantly higher than the odds of detention for Black defendants” (p. 895).

When compared to White defendants, Blacks and Hispanics are 1.21 and 1.23 times more likely to be denied bail, respectively. Hispanics are 39% more likely to have financial restrictions attached to their release, compared to Blacks and Whites who are more likely to have non-financial options (e.g. ROR or supervised release).

Finally, the bail amount assigned to Hispanics is about 8% higher than that for White defendants (Demuth, 2003). Similarly Schlesinger (2005) reports three main findings:

“First, racial disparity is most notable during the decision to deny bail and for defendants charged with violent crimes. Second, ethnic disparity is most notable during the decision to grant a non-financial release and for defendants charged with drug crimes. Third, when there is disparity in the treatment of Black and Latino defendants with similar legal characteristics, Latinos always receive the less beneficial decisions” (p. 170).

More specifically, Schlesinger (2005) found that Blacks and Hispanics are 25% and 24% more likely to be detained prior to trial, respectively. When compared to Whites, Hispanics are 25% less likely, and Blacks are 12% less likely to be granted non-financial release. Finally, Hispanics are assigned a bail amount that is about 12% higher than that of Whites.

Based on the studies reviewed above, it is clear that there is racial/ethnic disparity at sentencing and at pretrial. Therefore, it is plausible to ask, “Could the actions of individuals at pretrial result in misleading conclusions about the actions of

judges?” I argue that the answer to this question is yes. My research extends these previous studies (and specifically builds on the work of Demuth, 2003, Demuth & Steffensmeier, 2004, and Schlesinger, 2005) by raising the possibility that the racial disparity apparent at the pretrial stage “leaks” into and partially accounts for the racial disparity observed in this data with the incarceration decision.

### ***Putting it all Together: Race/Ethnicity, Sentencing, and the Pretrial Process***

Scholars have acknowledged that sentencing outcomes are the result of decisions and interactions of various actors operating in a complex system (Bushway & Peihl, 2001; Johnson, 2003; Klepper, Nagin, & Tierney, 1983). Nevertheless, very few empirical studies examine the influence of different courtroom actors at sentencing (Johnson, 2003). Along these lines, Klepper, Nagin, and Tierney (1983) argue that there is a need for broader based sentencing research.

In an attempt to extend prior research, the present study investigates the degree to which the effect of race/ethnicity at sentencing (in/out) is moderated by pretrial decisions. In other words, is race being taken into account earlier in the court process? So much previous research has suggested that racial disparity originates from judicial decisions at sentencing; however this may not be the case. Racial disparity can creep into the system earlier, specifically at the pretrial stage. The focal concerns and bounded rationality that researches suggest judges utilize, may be utilized by other courtroom players. For example, prosecutors play a large role in pretrial outcomes; they may be utilizing bounded rationality based on racial stereotypes, which later affects sentencing outcome. My research improves on these

previous studies by asking the broader question about the impact of pretrial sentencing on incarceration with the same data set used to ask the narrower question about the impact of race on incarceration. I then extend previous literature by conducting my analysis on what I argue to be the more appropriate sample; indicted offenders rather than only convicted offenders. The SCPS data is unique in its ability to not only answer this question, but to also do so with the more appropriate sample as it is not limited to conviction data. Further, SCPS contains variables to examine race/ethnicity more thoroughly as it is possible to distinguish between White non-Hispanic, Black non-Hispanic, and Hispanic. Therefore in this thesis, I use the SCPS dataset to determine the extent to which racial/ethnic discrimination at sentencing is mediated by pretrial decisions.

Extending the logic of other studies that suggest that the pretrial process may affect sentencing outcomes, my research examines if the race/ethnicity effect on in/out sentencing outcome is moderated by pretrial decisions. First, I attempt to replicate the results of Demuth and Steffensmeier (2004), Demuth (2003), and Schlesinger (2005) using a nearly identical sample<sup>13</sup>. Then, I extend their work by controlling for pretrial decisions when examining the effect of race/ethnicity. I propose that the race/ethnicity effect at sentencing will be reduced when pretrial outcomes are used as controls.

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<sup>13</sup> All efforts were made to identically replicate the samples used by Demuth (2003), Demuth and Steffensmeier (2004) and Schlesinger (2005); however, it was not possible to do so. Therefore, I utilized most of the same limiting characteristics as Demuth (2003) and Demuth and Steffensmeier (2004) in order to make my sample as similar as possible. Schlesinger modeled her study after these two studies and I do the same.

## Data

In order to examine discretion and racial/ethnic discrimination in the sentencing process, this study uses data collected by the United States Department of Justice, Bureau of Justice Statistics. The data set, known as “State Court Processing Statistics, 1999-2000: Felony Defendants in Large Urban Counties (SCPS),” contains information about felony cases (excluding federal cases) filed in May of even numbered years from 1990 to 2000. The cases are tracked until the final disposition, or until one year has past. The data are collected from 40 of the 75 most populous counties in the United States, providing basic demographics, arrest charges, criminal history, pretrial, adjudication, and sentencing information. Data are collected using a two-stage stratified sampling method, and are weighted accordingly.<sup>14</sup>

The SCPS dataset is particularly useful for this particular question for several reasons. First and most importantly, it has been used by other researchers (Demuth, 2003; Demuth & Steffensmeier, 2004; & Schlesinger, 2005) to study directly related issues; thus the credibility of using this dataset to examine racial/ethnic disparity, sentencing, and pretrial decisions has already been established. Secondly, it contains extensive information about the pretrial process that is lacking in many other sentencing datasets, thus providing me with quality controls for pretrial decisions, rather than simply pretrial outcome, when examining race and sentencing. Thirdly, the SCPS dataset contains a large number of cases (87,437) from many jurisdictions all over the nation, better allowing the results to be generalized to the entire United

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<sup>14</sup> Stage one was a stratified sample to select 40 of the 75 most populous counties. Stage two was a systematic sample of felony filings within each selected county (ICPSR). The weight of each case is equal to the inverse probability of selection into the sample (ICPSR).

States. Further, the dataset contains large numbers of cases from each racial/ethnic category, unlike other data sets that simply code cases as White and non-White. It also provides cases of indicted offenders, as well as convicted offenders allowing me to extend my sample. Finally, the SCPS dataset contains good demographic controls to be included in my analysis.

As with all datasets, SCPS also has some limitations. Because all the cases come from large urban counties it may not be practical to generalize to smaller rural counties. However, Schlesinger (2005) points out: “Since more than a third of the U.S. population lives in the counties from which the SCPS is drawn, and approximately half of the reported crimes occur in these counties, understanding the effects of race and ethnicity in these courts will add to our understanding of criminal processing and disparity in invaluable ways” (p. 176).

Another limitation of the SCPS dataset involves the fact that the data is clustered by county, which could pose a problem as counties may differ from one another (e.g. different court procedures, pretrial release options, review and filing procedures, etc.); however, adding dummy variables for each year and county should correct for this potential limitation (Schlesinger, 2005). Unfortunately SCPS lacks quality information for other important characteristics that might affect outcomes such as community ties, severity of offense, if individuals are sentenced to time served, the impact of sentencing guidelines, etc. This limitation cannot be rectified; however, I followed Demuth (2003) and Schlesinger (2005) by including as many relevant controls as possible.

## Sample

The analysis only focuses on male defendants as there are not enough females in each racial category for stable statistical analysis (Demuth, 2003; Demuth & Steffensmeier, 2004; Schlesinger, 2005). Similarly, the “other” racial category is excluded because of its small size and uneven distribution. The analysis is further limited to three general offense types: property, violent, and drug (Demuth, 2003; Demuth & Steffensmeier, 2004; Schlesinger, 2005). Finally, murder cases are excluded because it can be reasonably inferred that an individual convicted of a murder offense would receive a sentence of incarceration regardless of his race (Demuth & Steffensmeier, 2004).

### *Convicted Sample*

The first sample is made up of individuals **convicted** of offenses (hereafter known as the “convicted sample”).<sup>15</sup> This sample is used as it replicates other sentencing studies that have come before it (Demuth & Steffensmeier, 2004). While conducting analyses on this sample is informative, it is not very methodologically sound as previously explained. As cases move through the criminal justice system they are weeded out. For example, of the crimes committed, only some are reported. Of those crimes reported, only some criminals are caught and arrested. Of those criminals arrested, only a very small proportion is ever seen in court. According to Klepper, Nagin, and Tierney (1983):

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<sup>15</sup> All counties are included in this analysis except for Westchester, New York; Duval, Florida; and Washington D.C. These three counties are excluded because after the sample was restricted by the other limiting factors, these counties had less than 20 cases. Because of the small number of cases within these counties and the uneven distribution, they are excluded from the analysis.

“Cases that reach the sentencing stage are a very select group that typically represents only a small proportion of the population of ‘similar’ cases (e.g., same arrest charges) that originally entered the system. Moreover, even those cases entering the system via an arrest are themselves a selected sample of crimes...Since the selection process is by no means random, it may induce serious biases in parameter estimates of included variables. Such biases, may for example, result in an inappropriate conclusion that racial considerations influence sentencing decisions when in fact they do not” (p. 57).

While police discretion is beyond the scope of this paper, it is important to address selection bias as carefully as possible<sup>16</sup>. Thus, rather than simply running my analysis on individuals convicted of crimes, I extend my analysis to include all indicted individuals. Further and more importantly, as explained in more detail above, simply examining a sample of convicted offenders ignores the fact that pretrial outcome, which has been demonstrated to be linked to race/ethnicity, may dictate whether or not an individual is convicted, and therefore if they even make it into the sample.

### ***Indicted Sample***

The second sample is more inclusive than the convicted sample. It is comprised of individuals **indicted** of offenses (hereafter known as the “indicted sample”)<sup>17</sup>. I utilize this larger sample to help account for the aforementioned selection bias that may occur by simply looking at convicted individuals. Further, if I were to only look at individuals that were convicted of their crimes, I would be assuming that the process by which one moves from being indicted to being convicted is random; or to put it more clearly, that the process of moving from being indicted to convicted is unrelated to the legal and extralegal characteristics controlled for on the right hand side of the model. Considering that the variables on the right

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<sup>16</sup> For a more extensive discussion on selection bias see Klepper, Nagin, & Tierney (1983) specifically p. 63-65

<sup>17</sup> The indicted sample also excludes the three counties mentioned in footnote 15.

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hand side include offense severity, prior record, etc. which have been shown to be linked to both pretrial and sentencing outcome, it is extremely unlikely that they are unrelated to the probability of being convicted. But I expect the model to change when I look at the indicted sample, because we know that pretrial process predicts whether or not someone is likely to plead guilty (See Table 1). Therefore, conducting my analysis on the conviction sample alone would be incomplete. By examining the indicted sample, I am allowing for the fact that the pretrial process may be related to how a defendant pleads which may in turn affect conviction, and eventual sentencing outcome. Rather than attempt to model that process (which would be extremely difficult and beyond the scope of this thesis) I extend my sample and look at all indicted offenders.<sup>18</sup>

## Variables

In order to keep consistent with the three key previous studies, I model the coding of my variables after Demuth (2003). The primary dependent variable in this study is *incarceration*. It is coded as a dichotomous variable; an in/out decision.

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<sup>18</sup> One drawback of the SCPS data is the large number of missing cases. I followed Schlesinger in my analysis using listwise deletion. Demuth (2003) however, used imputation to deal with missing cases. I made a number of attempts to replicate his multiple imputation approach. Eventually, personal communication with Demuth revealed that he had in fact not done multiple imputations, but rather had conducted single imputation. There are numerous concerns about this approach, in particular that the standard errors are too small. In results not reported here, I replicated the results from Table 5 with an imputed sample, which roughly doubles the size of the sample. As in Table 5, the Hispanic results remain significant and the magnitude is cut roughly in half. The coefficient on Black was never significant, even in the main model without pretrial outcomes. This result is not consistent with the vast amount of research in this area, and leads me to doubt the imputation procedure. Absent further research, I have concluded that the imputation approach raises more questions than it answers, and I have chosen not to report the full results here.

Those sentenced to jail or prison are considered “incarcerated”, and all other cases are considered “not incarcerated”.

The demographic characteristic *race/ethnicity* is my main independent variable of interest. It is coded as three separate dummy variables: 1) White non-Hispanic, 2) Black non-Hispanic, and 3) Hispanic. On average, the samples are made up of approximately 45% Black non-Hispanic defendants, 26% White non-Hispanics, and 26% Hispanics. (See Table 2.)

**Table 2: Racial/Ethnic Makeup of Samples**

<b>Race/Ethnicity</b>	<b><i>Convicted Sample Percent (Frequency)</i></b>	<b><i>Indicted Sample Percent (Frequency)</i></b>
<b>White Non-Hispanic</b>	28% (4356)	28% (9067)
<b>Black Non-Hispanic</b>	42% (6472)	45% (14427)
<b>Hispanic</b>	30% (4688)	27% (8727)
<b>Total N</b>	15516	32221

In order to control for legal characteristics, my analysis includes the following legal variables: offense severity, criminal history, and mode of conviction. *Offense severity* is represented by nine dummy variables for the most serious conviction charge in the “convicted” sample, and most serious arrest charge in the “indicted” sample. Each dummy variable represents a specific offense from one of three crime types: violent, property, and drug.<sup>19</sup> Murder is excluded, as the majority of individuals convicted of murder will receive a sentence of incarceration, regardless of

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<sup>19</sup> The dummy variables for violent offenses are: rape, robbery, assault, and other. The dummy variables for property offenses are: burglary, theft, and other. Finally, the dummy variables for drug offenses are: trafficking and other.

their race (Demuth & Steffensmeier, 2004). I also include a dummy variable in the analysis in order to account for individuals with multiple arrest charges, as this would likely increase the perception that they are highly dangerous and likely to re-offend (Demuth, 2003, Demuth & Steffensmeier, 2004).

In order to account for *criminal history* Demuth (2003) and Demuth and Steffensmeier (2004) used three different measures. Similarly, I use an index of prior contact with the criminal justice system<sup>20</sup>, a dummy variable indicating if an individual has ever failed to appear in court, and a dummy variable indicating a defendant's criminal justice status at the time of the arrest in question (active vs. inactive).

The *mode of conviction* is measured with two more dummy variables: one denoting a bench trial, with the other one denoting a jury trial.<sup>21</sup> Research has suggested that the mode of conviction (e.g. bench trial, jury trial, guilty plea) is linked to sentence severity. Specifically, those individuals who go to trial are more likely to receive a harsher sentence than those who plead guilty (Spohn & Holleran, 2000; Steffensmeier & Demuth, 2001; Ulmer & Kramer, 1996; Johnson, 2003). Johnson (2003) suggests that the amount of discretion exercised by various courtroom actors varies by mode of conviction. (For a more thorough examination of discretion utilized by different courtroom actors across various modes of conviction see Johnson, 2003.)

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<sup>20</sup> The index measuring prior contact with the criminal justice system is made up of four dummy variables: 1) ever been arrested for a felony, 2) ever been convicted of a felony, 3) ever been in jail, 4) ever been in prison.

<sup>21</sup> Reference category is "guilty plea".

Other extralegal variables controlled for are *age*, *county*, and *filing year*. In addition to age, I include an age squared term, accounting for its previously established non-linear relationship with incarceration (Demuth, 2003, Demuth, 2004, Steffensmeier, Kramer, and Ulmer, 1995). Adding dummy variables for county and filing year controls for differences across each.

Finally, I include a control for pretrial release outcome. This control is made up of a dummy variable where 1 is equal to “released prior to trial” and 0 is equal to all other options. Therefore, I control for pretrial outcome to determine if the race effect shown in the standard incarceration model is mitigated by the pretrial process.

## **Methods**

In essence, Demuth & Steffensmeier (2004) looked at race/ethnicity effects (including Hispanics) in a basic incarceration model. Demuth (2003) and Schlesinger (2005) both examined race/ethnicity effects on pretrial outcomes and decisions, respectively. My work combines the above studies to examine race/ethnicity effects on the decision to incarcerate, while controlling for pretrial decisions using a sample nearly identical to that used in these three studies. My thesis then goes one step further in using a more appropriate sample of indicted offenders rather than simply those convicted. I propose that the extralegal characteristic of race/ethnicity is considered earlier in the process, resulting in potentially biased decisions by court officials in the early stages, rather than simply at sentencing.

First, basic descriptive statistics are run on both samples. Next I model the effect of race/ethnicity on pretrial release (controlling for legal and extra-legal

characteristics) in order to determine if results from my sample suggest that there is a race/ethnicity effect at this earlier stage in the court process (essentially replicating Schlesinger (2005) and Demuth (2003)). Due to the dichotomous nature of my dependent variable, many of the assumptions of the classic regression model are no longer tenable; thus in my models I use a probit analysis, where “F(z) is set to equal the cumulative standard normal distribution function” (Klepper, Nagin & Tierney, 1983, p. 61).

Next, I run a classic incarceration model controlling for legal and extralegal characteristics (discussed above in the variable section) to establish if there is a race/ethnicity effect at sentencing (essentially replicating Demuth and Steffensmeier (2004)). Finally, I rerun the incarceration model, but also include my pretrial controls. As with the pretrial release model, both of these two models use a probit analysis due to the dichotomous nature of the dependent variable (in/out sentence decision). I run all of the models discussed above on both samples. The results are then analyzed to determine if the effect of race/ethnicity on incarceration is mediated by pretrial decisions<sup>22</sup>.

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<sup>22</sup> While a probit model was used to model the effects of race/ethnicity on incarceration, controlling for pretrial options, the results reported are marginal effects. In other words, I used Stata 9's `dprobit` function and report those results. According to the Stata9 manual: “Rather than reporting the coefficients, **dprobit** reports the marginal effect, that is the change in the probability for an infinitesimal change in each independent, continuous variable and, by default, reports the discrete change in the probability for dummy variables.”

## **Results**

### ***Convicted Sample***

When examining the convicted sample (n=15,516), results suggest that without controlling for other variables, the probability of a convicted Hispanic receiving a sentence of incarceration is 85%, whereas the probability is 75% for Blacks and 68% for Whites. Descriptive statistics suggest that Whites have a higher probability (25%) than both Hispanics (20%) and Blacks (16%) to be granted non-financial release options, whereas Hispanics have a higher probability (58%) than Whites (35%) and Blacks (43%) of being held on bail. (See Table 3.)

Table 3: Variable Descriptions for the Convicted Sample

<b>Variable</b>	<b>White</b>	<b>Black</b>	<b>Hispanic</b>	<b>Total</b>
	Mean (SD)	Mean (SD)	Mean (SD)	Mean (SD)
Incarcerate	.68 (.47)	.75 (.44)	.85 (.36)	.76 (.43)
Financial Release	.29 (.45)	.23 (.42)	.15 (.36)	.22 (.42)
Emergency Release	.00 (.07)	.01 (.11)	.00 (.04)	.01 (.08)
Held on Bail	.35 (.48)	.43 (.49)	.58 (.49)	.45 (.50)
Denied Bail	.08 (.28)	.11 (.32)	.08 (.26)	.09 (.29)
Release Conditions Unknown	.01 (.11)	.01 (.12)	.02 (.13)	.01 (.12)
Held Conditions Unknown	.01 (.10)	.01 (.07)	.01 (.10)	.01 (.09)
Non-Financial Release	.25 (.43)	.20 (.40)	.16 (.37)	.20 (.40)
Case Closed	.00 (.05)	.00 (.04)	.00 (.04)	.00 (.04)
Pre-released	.55 (.50)	.45 (.50)	.33 (.47)	.44 (.50)
Age	30.70 (9.94)	29.52 (9.77)	28.33 (9.10)	29.5 (9.66)
Rape	.02 (.14)	.01 (.10)	.01 (.10)	.01 (.11)
Robbery	.03 (.18)	.08 (.27)	.06 (.24)	.06 (.24)
Assault	.08 (.28)	.08 (.27)	.10 (.30)	.09 (.28)
Other Violent	.06 (.24)	.03 (.17)	.06 (.24)	.05 (.21)
Burglary	.14 (.34)	.10 (.30)	.11 (.31)	.11 (.32)
Theft	.17 (.37)	.13 (.33)	.12 (.33)	.14 (.35)
Other Property	.14 (.35)	.09 (.29)	.07 (.25)	.10 (.30)
Trafficking	.13 (.34)	.24 (.42)	.26 (.44)	.21 (.41)
Other Drug	.23 (.42)	.25 (.43)	.20 (.40)	.23 (.42)
Multiple Charges	.61 (.49)	.56 (.50)	.60 (.49)	.58 (.49)
Criminal History Index	1.59 (1.53)	2.04 (1.56)	1.65 (1.53)	1.80 (1.56)
Prior FTA	.31 (.46)	.40 (.49)	.35 (.48)	.36 (.48)
Active Criminal Justice Status	.38 (.48)	.42 (.49)	.41 (.49)	.41 (.49)
Bench	.03 (.18)	.05 (.22)	.02 (.12)	.03 (.18)
Jury	.02 (.14)	.03 (.18)	.02 (.15)	.03 (.16)
Guilty Plea	.95 (.22)	.92 (.27)	.96 (.19)	.94 (.24)
N	4356	6472	4688	15516

Race/Ethnicity has a significant effect on the probability of being released prior to adjudication. Blacks are about 11 percentage points less likely than Whites to be released prior to trial ( $p < .01$ ). Hispanics are even more disadvantaged, being about 18 percentage points less likely than whites to be released prior to adjudication ( $p < .01$ ). (See Table 4)

**Table 4: Effects of Race/Ethnicity on Pretrial Release from Probit Analysis (1990-2000)**

Measures	<i>Convicted Sample</i>		<i>Indicted Sample</i>	
	df/dx (SE)	P	df/dx (SE)	P
(White)				
Black	-.1093*** (.0129)	.000	-.1055*** (.0099)	.000
Hispanic	-.1751*** (.0161)	.000	-.1445*** (.0151)	.000
Age <sup>2</sup>	.0002*** (.0000)	.000	.0001*** (.0000)	.000
Age	-.0131*** (.0033)	.000	-.0078*** (.0022)	.000
(Rape)				
Robbery	-.0756* (.0433)	.089	-.0584** (.0257)	.022
Assault	.1724*** (.0437)	.000	.1470*** (.0235)	.000
Other Violent	.2226*** (.0517)	.000	.1594*** (.0290)	.000
Burglary	.1607*** (.0476)	.001	.0994*** (.0328)	.004
Theft	.2809*** (.0459)	.000	.1956*** (.0310)	.000
Other Property	.3454*** (.0398)	.000	.2342*** (.0266)	.000
Trafficking	.2722*** (.0498)	.000	.1896*** (.0309)	.000
Other Drug	.3937*** (.0432)	.000	.3083*** (.0312)	.000
Multiple Crimes	-.0334*** (.0111)	.003	-.0475*** (.0091)	.000
Index Crim.	-.0703*** (.0089)	.000	-.0795*** (.0082)	.000
Hist.	-.0080 (.0206)	.697	-.0038 (.0133)	.776
Prior FTA	-.1700*** (.0199)	.000	-.1652*** (.0131)	.000
CJ Status	-.0437 (.0339)	.204	-.0738 (.081) ***	.000
Bench	-.0690 (.0441)	.127	-.0877** (.0352)	.012
Jury				
N	15516		32221	
Pseudo R <sup>2</sup>	.1983		.1942	

P < .01 \*\*\*

P < .05 \*\*

P < .1 \*

The classic incarceration model run on the convicted sample suggests that race/ethnicity has a significant effect on the probability of incarceration. (“White non-Hispanic” is the reference category.) Blacks are about 5.6 percentage points more likely to be incarcerated than Whites ( $p > .01$ ). Hispanics are about 7.5 percentage points more likely to be incarcerated than Whites ( $p < .01$ ). In order to standardize these percentages so that they can be compared to the results from the indicted sample that will be discussed below, it is important to talk about magnitude of effect<sup>23</sup>. Because the average probability of incarceration is .76, Blacks are about 7.3% more likely than Whites to be incarcerated, while Hispanics are about 9.9% more likely than Whites to receive a sentence of incarceration. (See Table 5.)

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<sup>23</sup> In order to standardize the base rate, magnitude of effect is calculated by dividing the dprobit coefficient of the variable of interest by the average probability of incarceration.

**Table 5: Effects of Race/Ethnicity on Sentencing Outcome (In/Out)  
Probit Analysis of Convicted Sample (1990-2000)**

Measure	Basic Model Probit df/dx (SE)	P	Pretrial Included Probit df/dx (SE)	P
(White Non-Hispanic)	Reference		Reference	
Black Non-Hispanic	<b>.0558***</b> (.0091)	<b>.000</b>	<b>.0400***</b> (.0088)	<b>.000</b>
Hispanic	<b>.0751***</b> (.0117)	<b>.000</b>	<b>.0511***</b> (.0121)	<b>.000</b>
Age	.0070*** (.0000)	.000	.0050*** (.0015)	.001
Age <sup>2</sup>	-.0001*** (.0000)	.000	-.0000*** (.0000)	.000
(Rape)	Reference		Reference	
Robbery	.0585* (.0294)	.082	.0435 (.0326)	.228
Assault	-.1307*** (.0489)	.002	-.1066*** (.0466)	.010
Other Violent	-.1619*** (.0537)	.000	-.1250*** (.0515)	.005
Burglary	-.1465*** (.0571)	.004	-.1255*** (.0539)	.008
Theft	-.1797*** (.0566)	.000	-.1312*** (.0522)	.004
Other Property	-.2710*** (.0592)	.000	-.2048*** (.0563)	.000
Trafficking	-.1212*** (.0500)	.008	-.0809* (.0470)	.064
Other Drug	-.2255*** (.0588)	.000	-.1575*** (.0549)	.001
Multiple Charges	.0275*** (.0075)	.000	.0210*** (.0070)	.003
Criminal History Index	.0588*** (.0046)	.000	.0492*** (.0045)	.000
Prior FTA	.0136 (.0097)	.167	.0108 (.0089)	.230
Active Criminal Justice Status	.0513*** (.0104)	.000	.0271*** (.0095)	.005
Bench	.0199 (.0303)	.527	.0117 (.0290)	.694
Jury	.1206*** (.0114)	.000	.1106*** (.0113)	.000
(Held Prior to Trial)				
<b>Pre-Released</b>			<b>-.1673***</b> (.0099)	<b>.000</b>
Year dummies				
County dummies				
Pseudo R2	.2708		.3032	
N=15516				
P<.01***				
P<.05**				
P<.1*				

My results are similar to that of Demuth and Steffensmeier (2004). After running a logit analysis (with controls that are less extensive than the controls available in datasets with guideline data), Demuth and Steffensmeier (2004) reported

that “the odds of incarceration for Black defendants are 57% greater than the odds of incarceration for White defendants; the odds of incarceration for Hispanic defendants are 45% greater than the odds of incarceration for white defendants” (p. 1004-1005). Using a sample of convicted offenders, I also found that minorities are more likely than Whites to receive a sentence of incarceration.

When pretrial options are added to the model (and thereby controlled for) race/ethnicity is still significant although the marginal effects on incarceration for both Blacks and Hispanics are both reduced (from .06 to .04 and from .08 to .05 respectively). (See Table 5.) With respect to magnitude, Blacks are about 5.3% more likely than Whites to be incarcerated, while Hispanics are about 6.7% more likely than Whites to receive a sentence of incarceration. Recall however, that my hypothesis states that pretrial outcomes affect incarceration **and** conviction. A conviction sample, therefore, does not allow for a direct test of my hypothesis. In the next sample, I repeat the analysis on the sample of indicted offenders.

### ***Indicted Sample***

The above analyses are also conducted on a sample of indicted offenders in order to extend previous research and the results are reviewed below. Net of controls, like the convicted sample, Hispanics in the indicted sample on average have a 51% chance of receiving a sentence of incarceration, whereas Blacks have a 40% chance and Whites have a 39% chance of incarceration. Again, Hispanics have a higher probability of being held on bail (43%) than Whites (25%) and Blacks (32%). Further, Whites have a higher probability of being granted non-financial release options (31%) than both Blacks (27%) and Hispanics (26%). (See Table 6.)

**Table 6: Descriptive Statistics for the Indicted Sample**

Variable	White	Black	Hispanic	Total
	Mean (SD)	Mean (SD)	Mean (SD)	Mean (SD)
Incarcerate	.39 (.49)	.40 (.49)	.51 (.50)	.43 (.50)
Financial Release	.33 (.47)	.28 (.45)	.20 (.40)	.27 (.44)
Emergency Release	.01 (.08)	.01 (.11)	.00 (.04)	.01 (.09)
Held on Bail	.25 (.43)	.32 (.47)	.43 (.50)	.33 (.47)
Denied Bail	.06 (.24)	.08 (.27)	.06 (.25)	.07 (.26)
Release Conditions Unknown	.02 (.14)	.02 (.15)	.03 (.17)	.02 (.15)
Held Conditions Unknown	.01 (.09)	.00 (.07)	.01 (.09)	.01 (.08)
Non-Financial Release	.31 (.46)	.27 (.44)	.26 (.44)	.28 (.45)
Case Closed	.01 (.11)	.02 (.12)	.01 (.11)	.01 (.12)
Pre-released	.67 (.47)	.58 (.49)	.48 (.50)	.58 (.49)
Age	30.65 (10.16)	29.34 (9.92)	28.18 (9.22)	29.40 (9.85)
Rape	.02 (.15)	.02 (.14)	.02 (.13)	.02 (.14)
Robbery	.04 (.19)	.10 (.30)	.07 (.26)	.08 (.26)
Assault	.14 (.35)	.13 (.34)	.14 (.34)	.14 (.34)
Other Violent	.06 (.24)	.03 (.18)	.05 (.22)	.05 (.21)
Burglary	.12 (.33)	.09 (.29)	.11 (.31)	.11 (.31)
Theft	.16 (.36)	.13 (.34)	.11 (.31)	.13 (.34)
Other Property	.13 (.34)	.08 (.27)	.07 (.25)	.09 (.29)
Trafficking	.13 (.33)	.21 (.41)	.24 (.43)	.20 (.40)
Other Drug	.20 (.40)	.20 (.40)	.20 (.40)	.20 (.40)
Multiple Charges	.58 (.49)	.57 (.50)	.59 (.49)	.58 (.49)
Criminal History Index	1.28 (1.46)	1.81 (1.56)	1.40 (1.50)	1.55 (1.54)
Prior FTA	.26 (.44)	.38 (.48)	.32 (.46)	.33 (.47)
Active Criminal Justice Status	.30 (.46)	.39 (.49)	.36 (.48)	.36 (.48)
Bench	.02 (.15)	.04 (.19)	.01 (.11)	.03 (.16)
Jury	.02 (.12)	.02 (.15)	.02 (.13)	.02 (.13)
Guilty Plea	.96 (.19)	.94 (.23)	.97 (.17)	.96 (.21)
N	9067	14427	8727	32221

As in the convicted sample, race/ethnicity has a significant effect on the probability of being released prior to adjudication in the indicted sample. Again, Blacks are on average about 11 percentage points less likely than Whites to be released prior to trial ( $p < .01$ ). Hispanics are on average about 14 percentage points less likely than Whites to be released prior to adjudication ( $p < .01$ ). (See Table 4.)

Holding all relevant legal and extralegal characteristics constant, the classic incarceration model suggests that race/ethnicity has a significant effect on the probability of incarceration. Blacks are, on average, about 2.8 percentage points more likely than Whites to receive a sentence of incarceration ( $p < .05$ ), whereas Hispanics are, on average, about 6.5 percentage points more likely to be incarcerated ( $p < .01$ ). Again, magnitude must be taken into consideration in order to standardize these percentages. The average probability of incarceration for this sample is .43. Thus, Blacks are about 6.5% more likely than Whites to be incarcerated, while Hispanics are about 15% more likely than Whites to receive a sentence of incarceration. (See Table 7.)

**Table 7: Effects of Race/Ethnicity on Sentencing Outcome (In/Out)  
Probit Analysis of Indicted Sample (1990-2000)**

Measure	Basic Model Probit df/dx (SE)	P	Pretrial Included Probit df/dx (SE)	P
(White non-Hispanic)	Reference		Reference	
Black non-Hispanic	<b>.0284**</b> (.0142)	<b>.046</b>	<b>.0027</b> (.0131)	<b>.839</b>
Hispanic	<b>.0651***</b> (.0144)	<b>.000</b>	<b>.0280**</b> (.0142)	<b>.048</b>
Age	.0018 (.0017)	.313	-.0002 (.0017)	.906
Age <sup>2</sup>	-.0000 (.0000)	.155	-.0000 (.0000)	.795
(Rape)	Reference		Reference	
Robbery	.0577 (.0401)	.148	.0420 (.0411)	.304
Assault	-.0561 (.0379)	.144	-.0177 (.0401)	.661
Other Violent	-.0372 (.0371)	.321	.0047 (.0394)	.905
Burglary	.0785* (.0436)	.070	.1142*** (.0424)	.007
Theft	.0307 (.0451)	.495	.0951** (.0452)	.034
Other Property	-.0278 (.0458)	.547	.0508 (.0472)	.278
Trafficking	.1005** (.0550)	.025	.1597*** (.0452)	.000
Other Drug	-.0609 (.0552)	.276	.0378 (.0547)	.488
Multiple Charges	.0853*** (.0104)	.000	.0752*** (.0101)	.000
Index Measure of Criminal History	.0664*** (.0046)	.000	.0468*** (.0058)	.000
Prior FTA	.0154 (.0103)	.134	.0144* (.0101)	.154
Active Criminal Justice Status	.0702*** (.0110)	.000	.0288*** (.0096)	.003
Bench	.2224*** (.0278)	.000	.2090*** (.0268)	.000
Jury	.2243*** (.0391)	.000	.2080*** (.0391)	.000
(Held Prior to Trial)				
<b>Pre-Released</b>			<b>-.2937***</b> (.0180)	<b>.000</b>
Year dummies				
County dummies				
Pseudo R2	.1774		.2218	
N=32221				
P<.01***				
P<.05**				
P<.1*				

These results align with the results from the convicted sample. Both samples suggest that race/ethnicity has a significant effect on the probability of incarceration. (“White non-Hispanic” is the reference category.) In the convicted sample Blacks are about 7.3% more likely than Whites to be incarcerated, while Hispanics are about 9.9% more likely than Whites to receive a sentence of incarceration. (See Table 5.) Similarly, in the indicted sample, Blacks are about 6.5% more likely than Whites to be incarcerated, while Hispanics are about 15% more likely than Whites to receive a sentence of incarceration. (See Table 7.)

When pretrial options are added to the model, the race/ethnicity effect is reduced dramatically. In fact, the coefficient on Black non-Hispanic is no longer significant ( $p < .84$ ). More over, in terms of magnitude, with the controls for pretrial outcomes included Hispanics are only 2.8 percentage points more likely than Whites to receive a sentence of incarceration (compared to 6.5 percentage points more likely without pretrial controls) (See Table 7.) In percentage terms, Blacks only .63% more likely than Whites to receive a sentence of incarceration, while Hispanics are 6.5% more likely to be incarcerated than Whites.

## **Conclusion**

Previous research has suggested that racial disparity originates from judicial decisions at sentencing; however this may not be the case. Racial disparity can creep into the system earlier, specifically at the pretrial stage as discussed above. Following the logic of the focal concerns theory, researchers have suggested that judges utilize bounded rationality based on racial stereotypes when making

sentencing decisions; however, other courtroom players may utilize this same racially biased bounded rationality. For example, prosecutors, who play a large role in pretrial outcome, may be utilizing bounded rationality based on racial stereotypes, which later affects sentencing outcome.

My argument has three key points. First, research has consistently demonstrated a potential discriminatory link between race/ethnicity and incarceration. Second, other research has demonstrated that minorities are more likely to be assigned a higher bail, and less likely to be able to afford that bail. Thus minorities are more likely to be detained prior to trial. Finally, recent research has also suggested that pretrial detention can lead directly to more guilty pleas and a higher likelihood of incarceration, all else constant. Based on these three observations, I predict that accounting for pretrial outcome will decrease the impact of race on the probability of incarceration at the conviction stage. My research builds directly on three previous studies (Demuth, 2003; Demuth & Steffensmeier, 2004; Schlesinger, 2005) that use a nationally representative data set to make points 1 and 2. Using the same data set and a similar sample, I explore whether what happens at the pretrial stage has any ability to account for the well known finding with respect to minorities and incarceration.

I argue that utilizing a sample of indicted individuals rather than only convicted individuals is a more appropriate approach to this type of study. I find that the impact of race on sentencing outcome was reduced when pretrial outcomes were included in the model. This presents an alternative interpretation for the current finding that judges are introducing the racial disparity in the system with regard to the

incarceration decision. Further, it should also focus attention on the pretrial release decision as a potential source of racial disparity.

### ***Limitations and Strengths***

There are several weaknesses to my study. The first one relates to sentencing guidelines. Sentencing guidelines attempt to reduce disparities based on extralegal characteristics by restricting judicial discretion and focusing on offense severity and criminal history; however, judges have the option of departing from the guidelines. These departures may be influenced by extralegal characteristics such as race/ethnicity thus reintroducing bias that was initially meant to be eliminated (Johnson, 2003). Some researchers (Johnson, 2003; Albonetti, 1997; Everett & Nienstedt, 1999; Kramer & Steffensmeier, 1993; Kramer & Ulmer, 1996) have made this point, and conducted research supporting the idea that guideline departures are a source of disparity in sentencing. Free (2002) further argues that sentencing guidelines essentially give more power to the prosecutors earlier in the court process as prosecutors determine the specific charge that will be brought against a defendant, thus setting the mandatory minimum. Unfortunately, I am unable to control for sentencing guidelines since SCPS is a nation-wide database, thus encompassing information from different states that may or may not even have guidelines; further if they have guidelines they are not likely to be consistent across jurisdictions. Thus, future research should attempt to take sentencing guidelines into consideration when examining race/ethnicity, pretrial decisions, and sentencing.

Another weakness of my study is the fact that I do not have very good controls for varying community ties, the severity of offenses, if individuals are

sentenced to time served, etc. This flaw is inherent in my dataset. While I cannot correct for it, I use the best control variables available to me, and also ones that have been used in other published research. Future research should replicate this study on other datasets and also attempt to use other control variables to get a better measure of factors such as offense severity.

Aside from its weaknesses, my study extends the work of previous scholars with regard to race/ethnicity, sentencing, and the pretrial process. It uses a recent, nationwide database, which allows for better generalizability than many previous studies. Further, by building on the studies by Demuth (2003), Demuth & Steffensmeier (2004), and Schlesinger (2005), my study fills in a hole in previous literature by looking at the link between pretrial outcomes and sentence outcome, and how that link affects the racial/ethnic disparity that plagues the criminal justice system.

### ***Empirical Contributions***

This thesis extends previous sentencing research and fills in a large gap in logic. Recent sentencing research suggests that there is racial disparity for in/out sentence decisions both at the state level (Kramer & Steffensmeier, 1993; Spohn & Holleran, 2000; Steffensmeier, Ulmer, & Kramer, 1998; Demuth & Steffensmeier, 2004), and at the federal level (Steffensmeier & Demuth, 2000). Another body of previous research suggests that minorities are more likely than whites: 1.) to be held in jail prior to adjudication (Bynum, 1982; Chiricos & Bales, 1991; Crew, 1991), 2.) to be assigned a higher bail amount (Ayres & Waldfogel, 1994; Farnworth & Horan, 1980; Kruttschnitt, 1984; Nagel, 1983; Patterson & Lynch, 1991), and 3.) to receive

more severe bail options (e.g. cash or surety bonds vs. supervised release) (Albonetti et al., 1989; Feeley, 1979; Nagel, 1983; Petee, 1994;). Thus, research suggests that there is a race/ethnicity effect at the pretrial stage.

While these two points have been made, no one has really connected the two to see if the race/ethnicity effect at sentencing is mediated by the pretrial process. Disparity at any one stage in the process may affect later stages, and potentially skew the results of research. As several studies have suggested, there is reason to believe that the pretrial process has some effect on the sentencing process. For example, results from research support the claim that: 1.) being held prior to adjudication is associated with an increased probability of receiving a sentence of incarceration (Farrell & Swigert, 1978; Nobling, Spohn, & Delone, 1998; Rankin, 1964), and 2.) failure to make bail increases the likelihood of a guilty verdict, usually through a guilty plea with time served, as opposed to the likely case of dismissal if the person had been on bail (Patterson & Lynch, 1991). Thus, in this thesis, I take the logical next step of considering the impact of pretrial decisions on the race/ethnicity effect at sentencing. The results of my indicted sample suggest that there is some merit in considering this idea.

Aside from filling in this gap, my thesis also suggests that using a sample of indicted offenders may be more appropriate than previous studies that only look at convicted offenders. Attempting to identify bias in the system when using a convicted sample may obscure reality as it assumes that similar individuals have a like chance of being in the sample, which is not necessarily true. My results suggest that racial/ethnic bias may enter the process early, for example during the pretrial

stage, and then affect whether or not individuals are convicted and thereby make it into a convicted sample. These biases in the pretrial stage also likely play on in the sentencing phase as well.

### ***Policy Implications***

My results support the claim that pretrial decisions mediate the effect of race/ethnicity on sentencing outcome. This result presents an alternative interpretation for the current findings that judges are introducing racial disparity into the system with regard to the incarceration decision. It should also focus attention on the pretrial release decision as a potential source of racial disparity.

The Bail Reform Act of 1966 was instituted to regulate the pretrial process; however, it has not been closely followed (Clark & Henry, 1997). Legislators and court officials should be made aware that disparity in the pretrial process may have an effect on later sentencing decisions. Much attention in recent years has focused on the implementation of sentencing guidelines in order to reduce the amount of unwarranted disparity in sentencing decisions. Along these lines, pretrial guidelines should be implemented in order to regulate that process and reduce unwarranted disparity based on extralegal characteristics. Further, defendants who cannot afford an attorney should be provided with one at the bail hearing in order to ensure that these guidelines are followed, and that the judge has enough information to make a well-informed and appropriate decision with regard to bail options.

## ***Future Research***

While this thesis is informative, it leaves room for improvements through future research. First it is recommended that the analysis conducted in this study be conducted on other samples from other datasets. It is important to know if these results can be replicated and if so, if they are consistent when using state and federal level data. Other datasets may provide better control measures to be included in the model and may affect the results. However, it is important to note that I was able to replicate the basic finding from a large literature showing that race/ethnicity has an impact on the in/out decision. Further controls on this sample should only strengthen my conclusion, rather than weaken it. Second, the analysis should be broken down by offense type. Thirdly, the analysis should be conducted again, but whether or not a defendant received a sentence of “time served” should be controlled for. In other words, a sentence of “time served” should be coded as “non-incarceration” to see if this changes the results. If so, it suggests that individuals who were held prior to trial may be more likely to plead guilty in hopes of receiving a sentence of time served, or essentially probation. Unfortunately the SCPS dataset does not provide a variable to signify if an individual was sentenced to time served thus I was unable to conduct this additional analysis. Finally, as my analysis suggests, future sentencing research should utilize a sample of indicted offenders, rather than only convicted offenders, unless they can accurately model the entire court process which is extremely difficult to accomplish.

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