

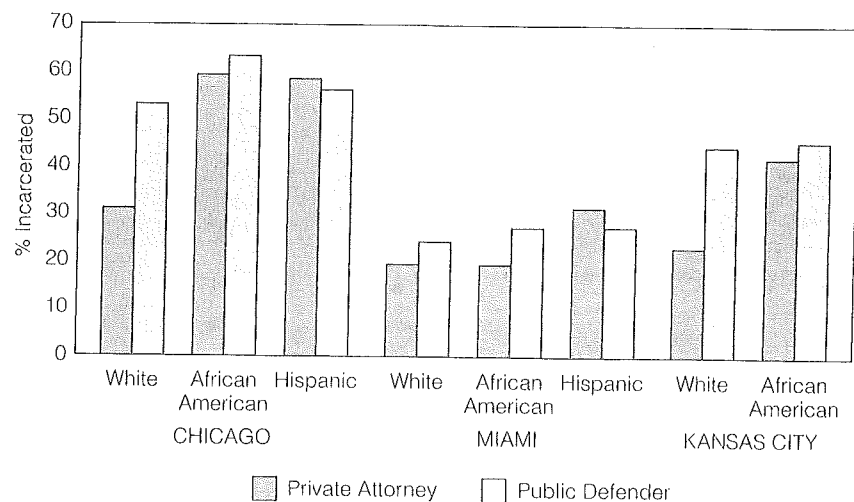


FIGURE 5.1 Race/Ethnicity, Type of Attorney, and Incarceration Rates in Chicago, Miami, and Kansas City

sentenced to prison at a slightly *higher* rate than Hispanics represented by the public defender.

The incarceration rates displayed in Figure 5.1 do not take into account differences in the types of cases handled by private attorneys and public defenders. It is certainly possible that the incarceration rates for defendants represented by private attorneys generally are lower than the rates for defendants represented by public defenders, not because private attorneys are more experienced, more competent, and more zealous but because the types of cases they handle are less serious or because the defendants they represent have less serious prior criminal records. If private attorneys, in other words, usually represent first offenders charged with relatively minor crimes and public defenders represent recidivists as well as first offenders and violent offenders as well as nonviolent offenders, we would expect the sentences imposed on defendants with private attorneys to be less severe than those imposed on defendants with public defenders, irrespective of the quality of representation provided by the attorney.

To test this possibility, Spohn and DeLone analyzed the relationship between race/ethnicity, type of attorney, and the likelihood of incarceration, controlling for several indicators of the seriousness of the crime and for the offender's prior criminal record, age, gender, and employment status. They found that, with one exception, the type of attorney had no effect on the odds of incarceration for any racial/ethnic group in any jurisdiction. The only exception was in Miami, where African Americans represented by private attorneys faced significantly lower odds of incarceration than African Americans represented by public defenders.

These results cast doubt on assertions that racial minorities are disadvantaged by their lack of access to private counsel. At least in these three jurisdictions,

public defenders do not appear to “provide a lower caliber defense than what private attorneys offer.”⁴⁸

In summary, although it would be premature to conclude on the basis of research conducted to date either that decisions concerning the provision of counsel are racially neutral or that the consequences of these decisions for racial minorities are unimportant, significant changes have occurred since the 1930s. (See the “Focus on an Issue: Racial Minorities and the Legal Profession” box for a discussion of racial minorities and the legal profession.) It is clear that scenes from the infamous Scottsboro case will not be replayed in the twenty-first century. The Supreme Court has consistently affirmed the importance of the right to counsel and has insisted that states provide attorneys to indigent criminal defendants at all critical stages in the criminal justice process. Although some critics have questioned the quality of legal services afforded indigent defendants, particularly in capital cases where the stakes are obviously very high, the findings of a number of methodologically sophisticated studies suggest that “indigent defenders get the job done and done well.”⁴⁹ In short, it is no longer true that racial minorities “are without a voice”⁵⁰ in courts throughout the United States.

Racial Minorities and Bail Decision Making

Critics of the traditional money bail system, in which defendants either pay the amount set by the judge or pay a bail bondsman to post bond for them, argue that the system discriminates against poor defendants. They also charge that the system discriminates, either directly or indirectly, against racial minorities. Critics contend that historically African-American and Hispanic defendants were more likely than white defendants to be detained prior to trial, either because the judge refused to set bail or because the judge set bail at an unaffordable level.⁵¹ “As a result,” according to one commentator, “the country’s jails are packed to overflowing with the nation’s poor—with red, brown, black, and yellow men and women showing up in disproportionate numbers.”⁵²

Bail Reform Concerns about the rights of poor defendants and about the consequences of detention prior to trial led to the first bail reform movement, which emerged in the 1960s and emphasized reducing pretrial detention. Those who lobbied for reform argued that the purpose of bail was to ensure the defendant’s appearance in court and that bail therefore should not exceed the amount necessary to guarantee that the defendant would show up for all court proceedings. Proponents of this view asserted that whether a defendant was released or detained prior to trial should not depend on his or her economic status or race. They also cited research demonstrating that the type and amount of bail imposed on the defendant and the time spent by the defendant in pretrial detention affected the likelihood of a guilty plea, the likelihood of conviction at trial, and the severity of the sentence.⁵³

Arguments such as these prompted state and federal reforms designed to reduce pretrial detention. Encouraged by the results of the Manhattan Bail Project, which found that the majority of defendants released on their own recognizance

FOCUS ON AN ISSUE

Racial Minorities and the Legal Profession

In the early 1930s, one of the defendants in the Scottsboro case described the courtroom where he was convicted and sentenced to death as "one big smiling white face." With the exception of the defendants themselves, no racial minorities were present in the courtroom.

Although the situation obviously has changed since then, racial minorities still represent a very small proportion of the lawyers and judges in the United States. Among those enrolled in law schools in 2013–2014, only 28.5 percent were African American, Hispanic, Asian, or Native American.⁵⁴ In fact, a report on the Columbia Law School's website noted that although the number of first-year law students grew by nearly 3,000 from 1993 to 2008, the proportion of students who were African American declined by 7.5 percent and who were Hispanic declined by 11.7 percent.⁵⁵ There is even less racial diversity among practicing attorneys. In 2010, 88 percent of all licensed lawyers were white and only 12 percent were racial minorities: 4.8 percent were African American, 3.4 percent were Asian, and 3.7 percent were Hispanic.⁵⁶ A 2015 report by the Stanford Criminal Justice Center found that whites were overrepresented and Hispanics were underrepresented among prosecutors in California. Although whites comprised only 38 percent of the population in that state, they made up 70 percent of prosecutors; by contrast, Latinos made up 39 percent of the California population, but only 9 percent of prosecutors.⁵⁷

Racial minorities also comprise a very small proportion of the judiciary. A 2004 report by the American Bar Association revealed that only 10.1 percent of all state court judges were racial

minorities. Of these judges, 5.9 percent were African American, 2.8 percent were Hispanic, 1.1 percent were Asian, and only 13 (0.1 percent) were Native American.⁵⁸ The situation is somewhat more positive at the federal level, where 12.5 percent of all district court judges and 13 percent of all court of appeal judges on the bench in 2014 were African American. Hispanics comprised 10.1 percent of the district court bench and 8 percent of the appellate court bench. There were, however, very few Asian Americans or Native Americans on the federal bench.⁵⁹ Moreover, most of the racial minorities on the federal bench were men. Among court of appeal judges, 16.7 percent were non-white men and only 6.8 percent were nonwhite women; the figures for district court judges were similar—15.4 percent were nonwhite men and 9.8 percent were nonwhite women.⁶⁰ And only three nonwhites have served on the U.S. Supreme Court: Thurgood Marshall (African American) was appointed in 1967, Clarence Thomas (African American) in 1991, and Sonia Sotomayor (Hispanic) in 2009.

The American Bar Association's 2000 report on the progress of minorities in the legal profession concluded that minority entry into the profession had stalled and that the obstacles to minority entry into the profession had grown more formidable. The report noted that the campaign to end affirmative action in law school admissions, which had spread rapidly throughout the United States, threatened "to stifle minority entry and advancement in the profession for years to come." According to the American Bar Association, "The legal profession—already one of the least integrated professions in the

(Continued)

country—threatens to become even less representative of the citizens and society it serves.”⁶²

ARE AFRICAN-AMERICAN LAW STUDENTS HURT OR HELPED BY AFFIRMATIVE ACTION?

In 1997, Barbara Grutter, a white resident of Michigan with a 3.8 undergraduate GPA and a 161 LSAT score, was denied admission to the University of Michigan Law School. (See “In the Courts: *Grutter v. Bollinger*” for a more detailed discussion of this case.) She sued, claiming that she was rejected because the law school used race as a “predominant factor” and gave preference to applicants from certain minority groups. She argued that doing so violated the Equal Protection Clause of the Fourteenth Amendment and Title VI of the Civil Rights Act of 1964. In 2003, the U.S. Supreme Court ruled that “the law school’s narrowly tailored use of race in admissions decisions to further a compelling interest in obtaining the educational benefits that flow from a diverse student body is not prohibited by the Equal Protection Clause or Title VI” (*Grutter v. Bollinger*, 288 F.3d 732 [2003]).

One year later, Richard Sander, a law professor at the University of California Los Angeles, argued in the *Stanford Law Review* that affirmative action policies hurt, not help, African-American law students.⁶³ Sander contended that the African-American students who get preferential treatment as a result of affirmative action enter law school with weaker grades and lower LSAT scores—the two best predictors of law school success—than white students. Noting that 43 percent

of the African-American students who entered law school in the fall of 1991 either did not graduate or did not pass the bar exam, Sander asserted that affirmative action sets up African-American students for failure by placing them in schools where they cannot compete academically. He also predicted that “the number of black lawyers produced by American law schools each year and subsequently passing the bar would probably increase if those schools collectively stopped using racial preferences.”⁶⁴

Sander’s methods and conclusions were called into question by social scientists and legal scholars. The harshest criticism came from David L. Chambers, Timothy T. Clydesdale, William C. Kidder, and Richard O. Lempert, who argued in the *Stanford Law Review* that Sander’s conclusions were “simple, neat, and wrong.”⁶⁵ They asserted that ending affirmative action would lead not to an increase in the number of African-American lawyers, as Sander had predicted, but to a 30–40 percent decline in the number of African Americans entering the legal profession.⁶⁶ Other critics stated that even if Sander’s findings were correct, his study failed to take into consideration the academic benefits of diversity, for which “there is universal celebration” on college campuses.⁶⁷

THE PERCEPTIONS OF AFRICAN-AMERICAN AND WHITE LAWYERS: DIVIDED JUSTICE?

A 1998 survey of African-American and white lawyers commissioned by the *ABA Journal* and the *National Bar Association Magazine* revealed stark racial differences in perceptions of the justice system.⁶⁸ When asked about the amount of racial bias that

currently exists in the justice system, more than half of the African-American lawyers, but only 6.5 percent of the white lawyers, answered "very much." In fact, 29.6 percent of the white lawyers stated that they believed there was "very little" racial bias in the justice system.

Responses to other questions also varied by race:

- How does the amount of racial bias in the justice system compare with other segments of society?

	African Americans %	Whites %
More	22.7	5.7
Same	69.6	40.5
Less	5.9	45.8

- Have you witnessed an example of racial bias in the justice system in the past three years?

	African Americans %	Whites %
Yes	66.9	15.1
No	31.1	82.4

- What is your assessment of the ability of the justice system to eliminate racial bias in the future?

	African Americans %	Whites %
Hopeful	59.1	80.7
Pessimistic	38.2	15.1

- Should police be allowed to create profiles of likely drug dealers or other criminals as a way to combat crime?

	African Americans %	Whites %
Yes	17.8	48.6
No	74.6	36.9

- Should race be a factor in creating the profiles?

	African Americans %	Whites %
Race OK	5.5	19.5
Race Not OK	91.2	67.9

- Have you seen an attempt to skew a jury racially because of the race of the defendant?

	African Americans %	Whites %
Yes	51.7	22.4
No	45.8	73.6

- Are minority women lawyers treated less fairly than white women lawyers in hiring and promotion?

	African Americans %	Whites %
Yes	66.5	10.9
No	14.3	60.4

As these results clearly suggest, African-American lawyers are substantially more likely than white lawyers to believe that the justice system is racially biased. As the author of the study noted, "Though they have made the justice system their life's work, many black lawyers believe the word 'justice' has a white spin that says 'just us'."⁶⁹

In the Courts: *Grutter v. Bollinger*

In 1997, Barbara Grutter, a white resident of Michigan with a 3.8 undergraduate GPA and a 161 LSAT score, was denied admission to the University of Michigan Law School. She filed suit, arguing the law school's admission policies discriminated against her on the basis of race in violation of the Fourteenth Amendment and Title VI of the Civil Rights Acts of 1974.

The law school's admission policy, which was designed to achieve a diverse student body, required officials to evaluate the candidate's undergraduate GPA and LSAT score along with the quality of the undergraduate institution; the difficulty of the courses taken as an undergraduate; and the candidate's personal statement, letters of recommendation, and essay describing how he or she "would contribute to law school life and diversity." Although the policy did not define diversity solely in terms of race and ethnicity or restrict the types of diversity that would be given substantial weight in admissions decisions, it did state that the goal was to accept "a mix of students with varying backgrounds and experiences who will respect and learn from each other."⁷⁰ The policy stated explicitly that the law school was committed to "racial and ethnic diversity with special reference to the inclusion of students from groups which have been historically discriminated against, like African Americans, Hispanics, and Native Americans, who without this commitment might not be represented in our student body in meaningful numbers."⁷¹

Grutter claimed that she was not admitted to the University of Michigan Law School in large part because the school took the race/ethnicity of the applicant into account and, in doing so, gave African-American and Hispanic applicants a significantly greater chance of admission than white students with similar credentials. She argued that the school did not have a "compelling interest" to justify the use of race as an admissions factor.

The U.S. Supreme Court did not agree with Grutter's arguments. The court ruled that "the Law School's narrowly tailored use of race in admissions decisions to further a compelling interest in obtaining the educational benefits that flow from a diverse student body is not prohibited by the Equal Protection Clause" or Title VI of the Civil Rights Act of 1964.⁷² The Supreme Court stated that student body diversity was, in fact, a compelling state interest "that can justify using race in university admissions." The court acknowledged that it would be "patently unconstitutional" to enroll a certain number of minority students "simply to assure some specified percentage of a particular group," but stated that this was not the case with respect to the law school's admission policy. Rather, "the Law School defines its critical mass concept by reference to the substantial, important, and laudable educational benefits that diversity is designed to produce, including cross-racial understanding and the breaking down of racial stereotypes."⁷³

The Supreme Court also noted that the admissions plan was "narrowly tailored," in that it considered each applicant's race/ethnicity as only one factor among many. The court reiterated that although "universities cannot establish quotas for members of certain racial or ethnic groups or put them on separate admission tracks," they can structure their admission policies to give serious consideration to all of the ways an applicant might contribute to a diverse educational environment.

Three years after the Supreme Court handed down its decision, Michigan voters enacted the Michigan Civil Rights Initiative (MCRI), which added the following language to the Michigan Constitution:

The University of Michigan, Michigan State University, Wayne State University, and any other public college or university, community college, or school district

shall not discriminate against, or grant preferential treatment to, any individual or group on the basis of race, sex, color, ethnicity, or national origin in the operation of public employment, public education, or public contracting.

In 2008, a federal district court judge ruled that the initiative did not violate the U.S. Constitution.⁷⁴ Four years later, the U.S. Court of Appeals for the Sixth Circuit overturned MCRI, but in 2014 the U.S. Supreme Court voted 6-2 to uphold the constitutionality of the ballot initiative (*Schuette v. Coalition to Defend Affirmative Action*, 134 S. Ct. 1623, 2014). The plurality opinion, which was authored by Justice Anthony M. Kennedy, held that voters of a state may choose, via a ballot initiative, to prohibit the use of race-based preferences in decisions by government bodies, including universities.

The issues raised in the *Grutter* case have generated additional litigation. In December 2015, the Supreme Court heard oral arguments *Fisher v. University of Texas*, a case involving a challenge to the use of race in undergraduate admission decisions at the University of Texas. Similar challenges were filed against Harvard University and the University of North Carolina at Chapel Hill in November 2014. In June 2016, the Supreme Court decided 4-3 that the admission process used by the University of Texas did not violate the Constitution's guarantee of equal protection of the law (*Fisher v. University of Texas*, 579 U.S. ____ 2016). According to Justice Anthony Kennedy, who wrote the majority opinion, "A university is in large part defined by those intangible qualities which are incapable of objective measurement but which make for greatness." "Considerable deference is owed to a university in defining those intangible characteristics, like student body diversity, that are central to its identity and educational mission." Legal experts indicated that the *Fisher* decision made it unlikely that the Court would strike down the affirmative action policies at Harvard, University of North Carolina, and other universities.

did appear for trial,⁷⁵ local jurisdictions moved quickly to reduce reliance on money bail and to institute programs modeled after the Manhattan Bail Project. Many states revised their bail laws, and in 1966 Congress passed the Bail Reform Act, which proclaimed release on recognizance the presumptive bail decision in federal cases.

Then, as Samuel Walker noted, "the political winds shifted."⁷⁶ The rising crime rate of the 1970s generated a concern for crime control and led to a reassessment of bail policies. Critics challenged the traditional view that the only function of bail was to assure the defendant's appearance in court. They argued that guaranteeing public safety was also a valid function of bail and that pretrial detention should be used to protect the community from "dangerous" offenders.

These arguments fueled the second bail reform movement, which emerged in the 1970s and emphasized preventive detention. Conservative legislators and policy makers lobbied for reforms allowing judges to consider "public safety" when making decisions concerning the type and amount of bail.⁷⁷ By 1984, 34 states had enacted legislation giving judges the right to deny bail to defendants deemed dangerous.⁷⁸ Also in 1984, Congress passed a law authorizing preventive detention of dangerous defendants in federal criminal cases.⁷⁹

The Effect of Race on Bail Decision Making Proponents of bail reform argued that whether a defendant was released or detained prior to trial should not depend on his or her economic status or race. They argued that bail decisions should rest either on assessments of the likelihood that the defendant would appear in court or on predictions of the defendant's dangerousness.

The problem, of course, is that there is no way to guarantee that judges will not take race into account in making these assessments and predictions. As Coramae Richey Mann asserted, even the seemingly objective criteria used in making these decisions "may still be discriminatory on the basis of economic status or skin color."⁸⁰ If judges stereotype African Americans and Hispanics as less reliable and more prone to violence than whites, they will be more inclined to detain people of color and release whites, irrespective of their more objective assessments of risk of flight or dangerousness.

Studies examining the effect of race on bail decisions have yielded contradictory findings. Some researchers conclude that judges' bail decisions are based primarily on the seriousness of the offense and the defendant's prior criminal record and ties to the community; race has no effect once these factors are taken into consideration.⁸¹ Other researchers contend that the defendant's economic status, not race, determines the likelihood of pretrial release.⁸² If this is the case, one could argue that bail decision making reflects *indirect* racial discrimination because African-American and Hispanic defendants are more likely than white defendants to be poor.

A number of studies document *direct* racial discrimination in bail decisions. A study by George S. Bridges of bail decision making in King County, Washington, for example, examined the effect of race/ethnicity on four bail outcomes: whether the defendant was released on his or her own recognizance; whether the court set monetary bail; the amount of bail required; and whether the defendant was held in custody pending trial.⁸³ As shown in Table 5.2, he found that racial minorities were less likely than whites to be released on their own recognizance and were more likely than whites to have bail set. Racial minorities also were held in pretrial detention at higher rates than whites. The detention rate was 55 percent for Native Americans, 54 percent for Hispanics, 36 percent for African Americans, and 28 percent for whites. There were, however, no differences in the median amount of bail required.

Bridges noted that although "at face value these differences may seem alarming,"⁸⁴ they might be the result of legitimate factors that criminal justice officials take into consideration when establishing the conditions of pretrial release: the defendant's ties to the community, the perceived dangerousness of the defendant, and any previous history of the defendant's failure to appear at court proceedings. When he controlled for these legally relevant variables and for the defendant's age and gender, however, he found that the race effects did not disappear. Racial minorities and men were less likely than whites and women to be released on their own recognizance and more likely than whites and women to be required to pay bail as a condition of release. For both of these decisions, the prosecutor's recommendation regarding the type and amount of bail was the strongest predictor of outcome. In contrast, race had no effect on the likelihood of pretrial detention

TABLE 5.2 Race/Ethnicity and Bail Outcomes in King County, Washington

	Whites	All Racial Minorities	African Americans	Hispanics	Native Americans	Asian Americans
Released on personal recognizance	25%	14%	14%	10%	8%	18%
Monetary bail set	34%	56%	46%	60%	60%	50%
Median bail amount	\$10,000	\$10,000	\$10,000	\$10,000	\$10,000	\$15,000
In custody prior to trial	28%	39%	36%	54%	55%	35%

SOURCE: George S. Bridges, *A Study on Racial and Ethnic Disparities in Superior Court Bail and Pre-Trial Detention Practices in Washington* (Olympia: Washington State Minority and Justice Commission, 1997), Table 1.

once the bail conditions and the amount of bail set by the judge were taken into account.

Interviews with King County criminal justice officials revealed that most of them believed the racial differences in bail outcomes could be attributed to three factors: racial minorities' lack of resources and consequent inability to retain a private attorney; the tendency of judges to follow the recommendations of prosecutors; and cultural differences and language barriers that made it difficult to contact the defendant's references or verify information provided by the defendant. Because racial minorities were more likely than whites to be poor, they were more likely to be represented by public defenders with large caseloads and limited time to prepare for bail hearings. Resource constraints similarly limited the amount of time that judges and pretrial investigators were able to devote to bail decisions, which led to reliance on the recommendations proffered by the prosecutor. Although Bridges stressed that his study produced no evidence "that disparities are the product of overt, prejudicial acts by court officials," he nonetheless concluded that "race and ethnicity matter in the disposition of criminal cases."⁸⁵ He added that this "is a serious concern for the courts in Washington" because it "implies that, despite the efforts of judges and others dedicated to fairness in the administration of justice, justice is not administered fairly."⁸⁶

Other evidence of direct racial discrimination is found in an analysis of pretrial release outcomes for felony defendants in the nation's 75 largest counties during the 1990s.⁸⁷ As shown in Figure 5.2, Stephen Demuth and Darrell Steffensmeier found that African Americans and Hispanics were more likely than whites to be detained in jail prior to trial. Among female defendants, the detention rates were 23.5 percent (whites), 28.4 percent (African Americans), and 34.7 percent (Hispanics). Among males, the rates were 33.1 percent (whites), 44.8 percent (African Americans), and 50.5 percent (Hispanics). The pretrial detention rate for Hispanic males, in other words, was more than twice the rate for white females.

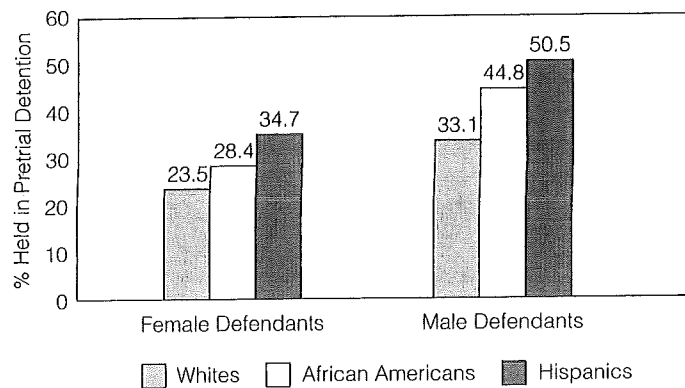


FIGURE 5.2 Race/Ethnicity, Gender, and Pretrial Detention in 75 U.S. Counties

SOURCE: Stephen Demuth and Darrell Steffensmeier, "The Impact of Gender and Race-Ethnicity in the Pretrial Release Process," *Social Problems* 51 (2004), pp. 222–242.

As was the case with the Washington State study, these differences did not disappear when the authors controlled for the seriousness of the charges against the defendant, the number of charges the defendant was facing, whether the defendant previously had failed to appear for a court proceeding, and the defendant's prior record and age. Demuth and Steffensmeier found that males were more likely than females and that African Americans and Hispanics were more likely than whites to be detained in jail prior to trial. They also found that white females faced a significantly smaller likelihood of pretrial detention than any of the other groups, particularly Hispanic and African-American males.⁸⁸

Findings from this study also provided some clues as to the reasons why defendants were held in jail prior to trial. For African Americans, the increased likelihood of detention was because they were almost two times more likely than whites to be held on bail; African Americans, in other words, were less likely than whites to be able to pay bail and secure their release. For Hispanics, however, the increased likelihood of detention reflected not only their inability to pay bail but also the fact that they were more likely than whites to have to pay bail for release and the amount they were required to pay was higher than the amount that similarly situated whites were required to pay.⁸⁹ The authors also found that both female and male white defendants were more likely than their racial/ethnic counterparts to be released prior to trial and that this was largely because of their greater ability to make bail. As they noted, "White defendants of both sexes apparently have greater financial capital or resources either in terms of their personal bankroll/resources, their access to family or social networks willing to post bail, or their greater access to bail bondsmen for purposes of making bail."⁹⁰

A recent study using data on those arrested for misdemeanors and felonies in New York City provided additional evidence that race and ethnicity influence pretrial detention decisions.⁹¹ Kutateladze and his colleagues found that the seriousness of the charges, the offender's criminal justice status and criminal history, the offender's gender, and whether the offender had a private attorney all

affected the likelihood that the defendant would be detained prior to trial. When they controlled for these (and other) factors, they found that the pretrial detention rate for African Americans was 10 percent higher than the rate for whites, and the rate for Hispanics was 3 percent higher than the rate for whites; by contrast, the rate for Asian Americans was 21 percent less than the rate for whites. Among those arrested for misdemeanor person offenses, the rate for African Americans exceeded the rate for white by 20 percent.⁹²

There is also evidence that defendant race interacts with other variables related to bail severity. Margaret Farnworth and Patrick Horan,⁹³ for example, found that the amount of bail imposed on white defendants who retained private attorneys was less than the amount imposed on African-American defendants who retained private attorneys. Theodore G. Chiricos and William D. Bales similarly found that the likelihood of pretrial detention was greatest for African-American defendants who were unemployed.⁹⁴

Bail and Case Outcomes Concerns about discrimination in bail decision making focus on two facts: African-American and Hispanic defendants who are presumed to be innocent are jailed prior to trial *and* those who are detained prior to trial are more likely to be convicted and receive harsher sentences than those who are released pending trial. These concerns focus, in other words, on the possibility that discrimination in bail decision making has "spillover" effects on other case processing decisions.

An analysis of pretrial release of felony defendants by the BJS attests to the validity of these concerns.⁹⁵ Using data from 1994 to 2004, the BJS compared the conviction rates for released and detained defendants in the 75 largest counties in the United States. They found that 78 percent of those who were detained prior to trial, but only 60 percent of those who were released, were convicted. Felony defendants who were released also were less likely than those who were detained to be convicted of a felony: the rates were 46 percent for those who were released but 69 percent for those who were detained.

Although these data suggest that pretrial release does have important spillover effects on case outcomes, the higher conviction and imprisonment rates for defendants who were detained pending trial could result from the fact that defendants who are held in jail prior to trial tend to be charged with more serious crimes, have more serious prior criminal histories, and have a history of nonappearance at court proceedings. A BJS study of felony defendants processed in state courts in 2006, for example, found that defendants charged with murder had the lowest release rate and that defendants with more serious prior records or a history of nonappearance were more likely to be detained prior to trial.⁹⁶ Given these findings, it is possible that the relationship between pretrial status and case outcomes would disappear once controls for case seriousness and prior criminal record were taken into consideration.

Data collected for a study of sentencing outcomes in Chicago, Miami, and Kansas City during 1993 and 1994 were used to explore this possibility.⁹⁷ Spohn and DeLone found that the offender's pretrial status was a strong predictor of the likelihood of imprisonment, even after other relevant legal and extralegal variables were

taken into account. In all three cities, offenders who were released prior to trial faced substantially lower odds of a prison sentence than did offenders who were detained pending trial. Further analysis of sentences imposed by judges in Chicago and Kansas City revealed that pretrial detention had a similar effect on incarceration for each racial/ethnic group and for males and females.⁹⁸ As shown in Table 5.3, among both males and females, African-American, Hispanic, and white defendants who were detained prior to trial faced substantially greater odds of incarceration than African-American, Hispanic, and white defendants who were released pending trial. In Chicago, the highest incarceration rates were found for African-American (73 percent), Hispanic (72 percent), and white (63 percent) males who were detained prior to trial; the lowest rates were found for white (7 percent), African-American (11 percent), and Hispanic (11 percent) females who were released pending trial.

The results of this study suggest that defendants who were detained prior to trial received more punitive sentences than those who were released and that the highest incarceration rates were for African Americans and Hispanics who were detained prior to trial. In Chicago, this "detention penalty" is compounded by the fact that African Americans were significantly more likely than whites to be detained prior to trial. Because they were detained more often than whites in the first place, African-American defendants were more likely than whites to suffer both the pains of imprisonment prior to trial and the consequences of pretrial detention at sentencing.

A study of pretrial detention and case outcomes in three U.S. district courts found a similar pattern of results.⁹⁹ Spohn compared pretrial detention rates and sentences for African-American and white offenders who were convicted of drug trafficking offenses in the Southern District of Iowa, the District of Minnesota, and the District of Nebraska. She found that 67.7 percent of the African-American offenders, but only 43.3 percent of the white offenders, were held in custody until their sentencing hearing. These differences did not disappear when she controlled for offender characteristics, including measures of the offender's dangerousness and community ties, access to financial resources, the offender's criminal history, and the seriousness of the crime. Even after these legally relevant predictors of pretrial detention were taken into consideration, African Americans faced higher odds of pretrial detention than did whites.¹⁰⁰ Spohn also found that the likelihood of pretrial custody was substantially higher for African-American male offenders than for other offenders. The odds of pretrial detention for African-American males were twice those for white males, and the differences between African-American males and either African-American females or white females were even larger. In fact, African-American males were 3.7 times more likely than white females and 3 times more likely than African-American females to be held in custody before trial. There also were large differences between white females and white males, but the difference between white females and African-American females was not statistically significant. Thus, African-American males were treated more harshly than all other offenders, but white females were not treated any differently than African-American females.¹⁰¹

To determine whether the race of the offender had *indirect* and/or *cumulative* effects on sentence severity through its effect on pretrial detention, Spohn

TABLE 5.3 The Effect of Pretrial Detention on Incarceration Rates for Typical Felony Offenders in Chicago and Kansas City

	% Sentenced to Prison	
	Detained Prior to Trial	Released Prior to Trial
Chicago		
African-American male	73	23
Hispanic male	72	22
White male	63	16
African-American female	53	11
Hispanic female	55	11
White female	42	7
Kansas City		
African-American male	29	16
White male	24	13
African-American female	13	6
White female	10	5

NOTE: These probabilities were calculated for defendants who were 30 years old, were charged with one count of possession of narcotics with intent, had one prior felony conviction, were not on probation at the time of the current offenses, were represented by a public defender, and pled guilty.

estimated a model of sentence length, controlling for the offender's pretrial status and for the offender and case characteristics identified by prior research as predictors of sentences imposed under the federal sentencing guidelines. Her analysis revealed that offenders who were in custody at the time of the sentence hearing received sentences that averaged almost 8 months ($b = 7.95$) longer than those imposed on offenders who were not detained before the hearing.¹⁰²

Spohn speculated that the pattern of results she uncovered might reflect judges' interpretation of the federal bail statute, which allows them to take the offender's dangerousness into consideration when deciding between pretrial release and detention. As she noted:

If, as prior research has shown, judges stereotype black drug traffickers and male drug traffickers as more dangerous and threatening than whites or females engaged in drug trafficking, their interpretation of the legally relevant criteria may lead to higher rates of pretrial detention for black offenders and for male offenders.¹⁰³

Although the findings are somewhat contradictory, it thus appears that the reforms instituted since the 1960s have not produced racial equality in bail decision making. It is certainly true that racial minorities are no longer routinely jailed prior to trial because of judicial stereotypes of dangerousness or because they are too poor to obtain their release. Nevertheless, there is evidence that judges

in some jurisdictions continue to take race into account in deciding on the type and amount of bail. There also is evidence that race interacts with factors such as prior record or employment status to produce higher pretrial detention rates for African-American defendants than for white defendants. Given the consequences of pretrial detention, these findings are an obvious cause for concern.

CHARGING AND PLEA BARGAINING DECISIONS

Regrettably, the evidence is clear that prosecutorial discretion is systematically exercised to the disadvantage of black and Hispanic Americans. Prosecutors are not, by and large, bigoted. But as with police activity, prosecutorial judgment is shaped by a set of self-perpetuating racial assumptions.¹⁰⁴

Thus far we have examined criminal justice decisions concerning appointment of counsel and bail for evidence of racial discrimination. We have shown that, despite reforms mandated by the Supreme Court or adopted voluntarily by the states, inequities persist. African Americans and Hispanics who find themselves in the arms of the law continue to suffer discrimination in these important court processing decisions.

In this section, we examine prosecutors' charging and plea bargaining decisions for evidence of differential treatment of minority and white defendants. We argue that there is compelling evidence of racial *disparity* in charging and plea bargaining. We further contend that this disparity frequently reflects racial *discrimination*.

Prosecutors' Charging Decisions

Prosecutors exercise broad discretion in deciding whether to file formal charges against individuals suspected of crimes and in determining the number and seriousness of the charges to be filed. According to the Supreme Court, "So long as the prosecutor has probable cause to believe that the accused committed an offense defined by statute, the decision whether or not to prosecute, and what charge to file or bring before a grand jury, generally rests entirely in his discretion."¹⁰⁵ As Justice Jackson noted in 1940, "The prosecutor has more control over life, liberty, and reputation than any other person in America."¹⁰⁶

The power of the prosecutor is reflected in the fact that in most states, from one-third to one-half of all felony cases are dismissed by the prosecutor prior to a determination of guilt or innocence.¹⁰⁷ Prosecutors can reject charges at the initial screening, either because they believe the suspect is innocent or, more typically, because they believe the suspect is guilty but a conviction would be unlikely. Prosecutors also can reject charges if they feel it would not be in the "interest of justice" to continue the case—because the crime is too trivial; because of a perception that the suspect has been punished enough; or because the suspect has