

Racial and Ethnic Disparity in Pretrial Criminal Processing

Traci Schlesinger

This study uses data on the processing of felony defendants in large urban courts to analyze racial and ethnic disparities in pretrial processing. There are three major 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. These findings are consistent with the theoretical perspective offered, which suggests that stereotypes influence criminal processing when their specific content is made salient by either the concerns relevant to a particular processing decision or the crime type of a defendant's primary charge.

Keywords pretrial processing; race and ethnicity; focal concerns

Introduction

When individuals either are denied bail or fail to post bail, they are detained in local jails—institutions that house over a quarter of America's incarcerated population. On a single day, more than 600,000 individuals are incarcerated in local jails, and over 11 million admissions are made to these facilities each year. The median term of incarceration in local jails is approximately 6 months (US Department of Justice, Bureau of Justice Statistics, 2002). Startlingly, over a quarter of the individuals incarcerated in the United States are being held in local jails, and over half of these individuals are being held pending trial (US Department of Justice, Bureau of Justice System, 2001b). Even if they are later found not guilty, or given a non-custodial sentence, these individuals experience terms of incarceration that may lead to many of the deleterious effects associated with post-trial incarceration: a decreased likelihood of employment, depressed wages,

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a decreased likelihood of marriage, and an increased likelihood of recidivism (Feeley, 1979; Pager, 2003; Rankin, 1964; Western, 2002; Western, Kling, & Weiman, 2001; Western & McLanahan, 2000; Western & Pettit, 2000). Despite this, scholars tend to focus on post-trial incarceration and thus sentencing decisions.

Similar to the focus on post-trial incarceration, research on the effects of extra-legal characteristics on criminal processing has tended to view race as binary (Delgado & Stefancic, 2001; Perea, 1998) and, thus, to compare the processing of White and Black defendants—either dropping observations of Latinos, Asians, and Native Americans or classifying them as either White or Black. However, while disparity in incarceration for Latinos is considerably smaller than for Blacks, Latinos are now the largest minority in the United States (US Census Bureau, 2001) and an increasing proportion of the jail and prison populations (US Department of Justice, Bureau of Justice Statistics, 1981, 2001a). Further, studies that have included Latinos frequently find that their ethnicity affects criminal processing (Hebert, 1997; Holmes & Daudistal, 1984; LaFree, 1985; Spohn & Holleran, 2000; for negative findings, see Spohn, Gruhl, & Welch, 1981-1982). In fact, some theorists claim that Latinos receive less beneficial criminal processing decisions than Blacks (Demuth, 2003; Steffensmeier & Demuth, 2000, 2001). Additionally, when ethnicity is not considered, this not only obscures ethnic disparities in criminal processing but also acts to obscure racial disparities since Whites and Latinos are often included in the same category. Specifically, if both Latino and Black defendants receive criminal justice decisions that are less beneficial than those White defendants receive, including Latinos in the “White” category will make the White-Black gap in criminal processing appear smaller than it actually is. As such, it is imperative that scholars begin to include Latino defendants and analyze the effect of their ethnicity when examining disparities in criminal processing.

In spite of both the magnitude of the pretrial incarcerated population and the rapid growth of the Latino population, research on the effects of extra-legal characteristics on criminal processing continues to focus on the effect of race on sentencing decisions. Few studies have examined either the effect of any extra-legal characteristics on pretrial incarceration decisions or the effect of ethnicity on any criminal processing decision. This study adds to research on the effects of extra-legal characteristics on criminal processing by: analyzing pretrial processing; distinguishing between legal decisions that affect pretrial incarceration and pretrial outcomes; including White, Black, and Latino defendants; and examining Black/Latino differences. The three legal decisions examined in the study are denial of bail, non-financial release, and bail amount; the two pretrial outcomes examined are made bail and pretrial incarceration.

A Theory of Court Decision-Making

The focal concerns perspective on court decision-making argues that judges rarely have complete information about cases or defendants. As a result, they

often try to reduce uncertainty by relying not only on the defendant's present offense and prior criminal conduct but also on attributions linked to the defendant's gender, race, social class, or other social positions (Albonetti, 1991; Bridges & Steen, 1998; Davis, 1995; Farrell & Swigert, 1978; Knapp, 1993; Spohn & Holleran, 2000; Steffensmeier, 1980; Steffensmeier, Kramer, & Streifel, 1993; Ulmer, 1997). On the basis of these attributions, judges may project behavioral expectations about the likelihood of a defendant's rehabilitation, the potential danger to the community a defendant represents, the blameworthiness of the defendant, or the likelihood that the defendant will either re-offend or fail to appear at trial and thus adversely affect the judges' career advancement (Demuth, 2003; Steffensmeier, 1980; Steffensmeier & Demuth, 2000). If judges attach negative attributions to particular groups, there will be an increased likelihood that they will categorize defendants who are members of these groups in disadvantageous ways and that, as a result, these defendants will receive detrimental criminal justice decisions (Liska, Logan & Bellair, 1998; Peterson & Hagan, 1984; Swigert & Farrell, 1976).

The racial formation perspective argues that attributions of different racial and ethnic groups are distinct and thus suggests that it is necessary to specify the content of attributions of particular groups (Anderson, 1995; Chiricos, 1996; Delgado & Stefancic, 2001; Healey, 1995; Omi & Winant, 1986; Quinney, 1999). Research finds that Black men are seen as aggressive, criminal, dangerous, irresponsible, and intimately connected to drug use and trade (Gibbs, 1998; Swigert & Farrell, 1976; Tittle & Curran, 1988). Drug use and violence are often portrayed as "ghetto pathologies" that are beginning to invade "White space" (Beckett, 1997; Chiricos, 1996). As such, Blacks are portrayed not only as intimately involved with illicit drugs, but also as preeminently dangerous. While less research examines criminal attributions to Latinos, evidence indicates that Latinos also face negative stereotyping (Anderson, 1995; Delgado & Stefancic, 2001; Hagan & Palloni, 1999; Healey, 1995). However, while stereotypes of Blacks and Latinos sometimes overlap, they are nevertheless distinct. Latinos are portrayed primarily as lazy and irresponsible, and the rendering of the Latino "bandito" most often centers on narratives of drug trade and use—rather than violence (Berg, 2002; De Leon, 1998; Delgado & Stefancic, 1998).

Attribution theory suggests that negative racial and ethnic attributions are more likely to be made when legal factors relevant to the case increase their salience. For instance, the type of crime that a defendant is charged with may affect the likelihood of judges using particular attributions; attributions are more likely to become salient when they are relevant to the crime charged. Racialized attributions portray Blacks as being both involved with illicit drugs and dangerous; these attributions may be more salient when defendants are charged with either drug or violent crimes. Attributions of Latinos as being involved in the drug trade may be more salient among defendants charged with drug crimes.

Similarly, because judges use different criteria during each stage of criminal processing, particular stereotypes are more likely to be salient during some

criminal processing decisions than others. Bail reform legislation passed throughout the country during the 1960s, 1970s, and 1980s generally mandates that judges base the denial of bail on the need to protect the community from the defendant; thus, attributions concerning dangerousness—and the capacity for violence—are most likely to affect this decision.¹ These reforms further mandate that the decision to grant non-financial release should be based on the perceived flight risk of the defendant. Thus, immigration and citizenship status as well as perceived irresponsibility are most likely to influence this decision. Finally, bail reform legislation instructs judges to base bail amount on the current offense (Goldkamp & Gottfredson, 1979; Nagel, 1983). Perceived blameworthiness is most likely to affect this decision. While attributions may affect this perception, this decision is presumably strongly grounded in the legal characteristics of the defendant.

Prior Research

Despite the obvious need for research on the effects of race and ethnicity on pretrial incarceration, most studies that examine this stage in criminal processing generally either use pretrial incarceration as an independent rather than dependent variable² or analyze only pretrial incarceration outcomes and not decisions. Studies that examine whether an offender was released or detained pretrial rather than the legal decisions that affect pretrial incarceration (Chiricos & Bales, 1991; Spohn et al., 1981-1982) do not disaggregate the effects of discrimination from the effects of socio-economic status. While the justice system may obligate defendants to meet comparable financial requirements in order to be granted release, the economic resources and networks of the alleged offenders will determine if they are able to meet those requirements. Thus, identical treatment by the justice system does not guarantee identical pretrial incarceration outcomes. Spohn and her colleagues (1981-1982) acknowledge this by viewing pretrial incarceration as “a surrogate for social status” rather than as a result of legal and processing decisions.

Some scholars have looked beyond the released/detained outcome and examined the legal decisions that affect pretrial incarceration. However, while several studies examine the impact of legal and community-tie factors on these

1. Some states also mandate that bail be denied to defendants whose criminal justice status was active at the time of arrest. Since criminal justice status is correlated to race and ethnicity, not including this variable will inflate the estimate of racial and ethnic disparity in denial of bail. In response, the variable “criminal justice status” is included in all analyses to control for the effects of these laws.

2. Studies that use pretrial incarceration as an independent variable analyze the effects of pretrial incarceration on sentencing decisions and find that this detention affects both the decision to incarcerate and sentence length (Albonetti, 1989; Clark & Henry, 1997; Nobling, Spohn & Delone, 1998; Rankin, 1964; Spohn & Cederblom, 1991; Wald, 1972; Unnever, 1980).

legal decisions (Albonetti, 1989; Barnes, Kingsnorth, & Hodgins, 1989; Petee, 1994), only three studies have examined the effect of race and ethnicity (Demuth, 2003; Katz & Spohn, 1995; Nagel, 1983).

Nagel (1983) analyzes data on state defendants in one New York City borough from 1974 and 1975 to examine the impact of legal and extralegal characteristics on non-financial release, bail amount, and the offering of cash alternatives to surety bonds. She finds that White defendants receive lower bail amounts and are more likely to be offered cash alternatives to surety bonds but are not more likely to be granted non-financial release. Further, defendants whose primary language is Spanish are given higher surety bonds, but there is no evidence that these defendants are less likely to be offered non-financial release or that they are less likely to be offered cash alternatives to surety bonds.

Katz and Spohn (1995) analyze data on defendants charged with violent felonies in Detroit between 1976 and 1978 to investigate the effects of race and gender on bail amount and pretrial incarceration. They find evidence of gendered, but not racial, disparity in bail amount. In contrast, they find that both race and gender affected the likelihood of pretrial incarceration.

Both studies are limited to analyses of data from one jurisdiction in the 1970s. Since both systemic bail restructuring and large-scale Latino immigration post-date these studies, the findings of these studies may not reflect current patterns in criminal processing. Demuth's (2003) study provides the only contemporary analysis of the effects of race and ethnicity on the legal decisions that affect pretrial incarceration of which I am aware.

Demuth's study analyzes data on state-level felony defendants from large urban counties and finds evidence of both racial and ethnic disparity in pretrial criminal processing. He also compares the processing of Black and Latino defendants and finds that Latinos face especially harsh treatment. Although the most thorough analysis of the effects of race and ethnicity on pretrial incarceration to date, this study suffers from several shortcomings. First, although the study notes the importance of examining pretrial incarceration decisions rather than outcomes, these decisions are only analyzed with the aggregate sample. When the study runs models on offense-type subsamples, it only examines the release/detained dichotomy. Thus, the analysis does not test whether the increased salience of racialized attributions of violence and drug involvement increase the likelihood of disparate treatment. Second, while the analysis employs two-tailed z-tests to examine Black/Latino differences in criminal processing, this is—once again—done only for the pretrial incarceration outcome and not for the legal decisions that affect this outcome. Thus, the Black/Latino differences the study finds may be completely attributable to the lack of economic resources and networks that Latino defendants face relative to Black defendants. As a result of the above two limitations, the study is unable to test if disparity is greatest when the specific criteria used by judges increase the salience of negative stereotypes about Blacks or Latinos.

Implications for Present Research

The theoretical approach outlined above makes three related arguments. First, since judges rarely have complete information about cases or defendants, they often try to reduce uncertainty by relying not only on the defendant's present offense and prior criminal conduct but also on attributions linked to the defendant's social positions. Second, the attributions linked to different disadvantaged groups are distinct. Finally, attributions are more likely to be salient and thus have adverse effects in particular legal contexts.

In light of this, I expect stereotypes to influence criminal processing when their specific content is made salient by either the concerns relevant to a particular processing decision or the crime type of a defendant's primary charge. More specifically, I expect racial disparity to be greatest during the decision to deny bail and for defendants charged with drug or violent crimes and ethnic disparity to be greatest during the decision to grant a non-financial release and for defendants charged with drug crimes. Additionally, due to both racial and ethnic disparity in the legal decisions that affect pretrial incarceration and the correlation between race, ethnicity, and economic resources and networks, I expect both Black and Latino defendants to be less likely than White defendants to make bail and more likely than White defendants to be incarcerated pretrial. Finally, I expect Blacks to receive less beneficial decisions than Latinos during the decision to deny bail and when they are arrested for violent crimes, and Latinos to receive less beneficial decisions than Blacks during the granting of non-financial release.

Research Strategy

In order to test whether attributions influence criminal processing when particular legal contexts increase their salience, this study analyzes data from the *State Court Processing Statistics (SCPS), 1990-2000: Felony Defendants in Large Urban Counties* (US Department of Justice, Bureau of Justice Statistics, 2004) using both logistic and linear fixed effects models for the following five response variables: denial of bail, non-financial release, bail amount, made bail, and pretrial incarceration. The analyses are disaggregated by both decision and crime type.

Data

The SCPS tracks a sample of felony cases filed in 40 of the nation's 75 most populous counties until their final disposition or until 1 year has elapsed from the date of filing. This dataset contains a representative sample of state felony cases in large metropolitan counties in the years 1990, 1992, 1994, 1996, 1998, and 2000, and provides detailed information on prior record and offense

severity, a comprehensive list of common offenses, several measures of demographic characteristics, and a nationally representative sample of adequate size.

There are three substantial limitations to this data. The first stems from the data being clustered by county. Differences in the way in which defendants are processed through the criminal justice system in the sample sites are reflected in the data. For example, sites vary in their ratio of judges, prosecutors, defenders, etc. to defendants, their filing and review procedures, their court structure, and the extent of pretrial release options available. Similarly, since many processing laws vary by state, differences in processing may be attributable to differences in state laws.³ Thankfully, this limitation is easily addressed by the use of fixed effects models. These models control for all county-level variation by only using within-county information to estimate the regression parameters. Thus, county- and state-level characteristics do not affect the regression parameters.

The second limitation of the SCPS data concerns the lack of representation of rural courts. If the effects of race and ethnicity on processing in rural courts are different from the effects of race and ethnicity on processing in metropolitan courts, then it is possible that the results of this study cannot be generalized to rural settings. However, since more than a third of the US population lives in the counties from which the SCPS is drawn, and approximately half of 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.

The third limitation of the data is that they do not include information on the "community ties" of defendants (i.e., employment status, marriage status, responsibility for dependent children, living arrangements, and residential stability). Since these variables correlate with race and ethnicity, and are legally admissible in the pretrial incarceration decisions, they may account for some of what appears as race and ethnicity effects. However, research has shown that the importance of community ties on pretrial incarceration has been minimal since the passage of bail reform legislation (Barnes et al., 1989; Hirsch & Sheely, 1993). Further, the data used for this study are exceptionally inclusive with regard to controls for case characteristics and other relevant factors that might influence sentencing practices. The controls included in the analysis—which include information on offense charge, prior record, and prior failure to appear—have been found to be the best predictors of pretrial incarceration decisions (Nagel, 1983). Finally, the fixed effects models employed in the analysis will control for some of the effects of community tie variables by accounting for county-level averages of these variables.

3. For example, many states now mandate that defendants who are arrested with active criminal justice statuses be denied bail. Including the fixed effects addresses any bias that results from a correlation between race, ethnicity, and state / county. Including a control for criminal justice status addresses any bias that results from a correlation between race, ethnicity, and criminal justice status within a given state or county.

This study is limited to an analysis of Black, White, and Latino male defendants.⁴ After dropping observations for all female defendants, "other race" male defendants, and defendants for whom information on legal variables was missing, the sample includes 36,709 defendants.

There are five dependent variables for this study. The first three are legal decisions that affect pretrial incarceration: the decision to deny bail, the decision to grant a non-financial release, and bail amount.⁵ The final two are pretrial processing outcomes: whether defendants given bail are able to post bail and pretrial incarceration. While the pretrial incarceration results for defendants who are either given non-financial releases or denied bail are completely determined by these legal decisions, most defendants are given financial requirements for release. Some of these defendants are able to post bail, while others are not. Thus, in addition to the three legal decisions that influence pretrial incarceration, the economic resources and networks of defendants also influence release. The effects of these resources and networks can be seen when examining whether defendants given financial requirements for release are able to meet those requirements and, more broadly, whether defendants are released or detained pretrial. Both of these outcomes result from the interaction of legal decisions—the denial of bail, the granting of non-financial release, and the setting of bail amount—and the economic networks and resources of the defendants.

Explanatory variables include both extra-legal and legal variables. The extra-legal variables are race, ethnicity, and age. Of defendants in the sample, only 28 percent are White, 44 percent are Black, and 27 percent are Latino. This could be the result of race-based criminal laws, differential offending, differential policing, differential arrest, or a combination of the four. Defendants in all three racial and ethnic groups average approximately 30 years old: White defendants have a mean age of 31, Blacks of 29, and Latinos of 28. The legal variables include several measures of offense seriousness, offense type, and criminal justice history. The SCPS includes over a dozen measures of severity and prior record; I include those measures that best predict each of the dependent variables. Descriptive statistics of both dependent and explanatory variables are given in Table 1.

As Table 2 shows, nearly 9 percent of Blacks are denied bail, compared to approximately 7 percent of Whites and Latinos; Whites are 6 percentage points more likely to be granted a non-financial release than either Blacks or Latinos. Finally, mean bail amounts are highest for Latinos, who have bail set approxi-

4. The effect of the defendant's race on criminal processing varies by sex (Curran, 1983; Daly, 1989; Spohn & Holleran, 2000; Steffensmeier & Demuth, 2000); further, previous research finds that women are treated more leniently than men by the criminal justice system (Gruhl, Welch, and Spohn, 1984; Kruttschnitt and McCarthy, 1985; Spohn and Spears, 1997; Steffensmeier et al., 1993; Steury & Frank, 1990). For these reasons, it would be imprudent to combine both groups in the same sample; an analysis that includes both men and women would need to explain the differences found between the two groups, as well as explore the interactions between race and gender. This is beyond the scope of the current paper.

5. Bail amount is logged to correct for skewness.

Table 1 Variable descriptions (*N* = 36,709)

Name	Coding	<i>M</i>	Range	<i>SD</i>
Denied bail	1 = denied bail 0 = offered financial or non-financial release	.08	0-1	.27
Non-financial Release	1 = non-financial release 0 = other released or detained	.30	0-1	.46
Log bail Amount	The log of the amount of money (in dollars) a Defendant must post in order to gain release	9.35	0-21	2.29
Made bail	1 = offered financial release and was released 0 = offered financial release and was detained	.46	0-1	.50
Pretrial Incarceration	1 = in jail until trial 0 = released before trial	.42	0-1	.49
White	1 = White 0 = Black or Latino	.28	0-1	.45
Black	1 = Black 0 = White or Latino	.44	0-1	.50
Latino	1 = Latino 0 = Black or White	.27	0-1	.45
Age	In years; age squared is also included	29.43	13-87	9.93
Prior prison	Number of prison terms defendant has served, with 10 being used for 10 or more	.43	0-10	1.10
Prior jail	Number of jail terms defendant has served, with 10 being used for 10 or more	1.24	0-10	2.24
Prior felony conviction	Number of prior felony convictions, with 10 being used for 10 or more	1.06	0-10	1.91
Prior violent conviction	1 = prior conviction(s) for violent offense 0 = no prior convictions for violent offense	.11	0-1	.31
Criminal justice status	1 = on probation, parole, awaiting trial, a fugitive, or in custody at the time of arrest 0 = no active status	.36	0-1	.48
Prior failure to appear	1 = previously failed to appear for court 0 = never failed to appear for court	.31	0-1	.46
Was the crime an attempt?	1 = offense attempted 0 = offense committed	.03	0-1	.17

Table 1 (Continued)

Name	Coding	M	Range	SD
Number of charges	Number of arrest charges	2.32	1-8	1.61
Most serious charge	Dummies are used for 16 offense charges	Drug trafficking is the modal offense		
Year	Dummies are used for years			

Note. The offense dummies are for murder, rape, robbery, assault, other violent, burglary, theft, motor vehicle theft, forgery, fraud, other property, drug trafficking, other drug, weapons, driving-related, and other public order. Age squared is included to account for the curvilinear effects of age.

mately \$25,000 higher than either Black or White defendants. Each of these legal decisions affects whether the alleged offender is incarcerated while awaiting trial. Of Whites who are given bail, 58 percent are able to post and be released. In contrast, only 47 percent of Blacks and 33 percent of Latinos are able to meet these financial requirements. When we look at the pretrial incarceration outcomes of all defendants—rather than just the defendants who are given bail—we find that 51 percent of Latinos are incarcerated pretrial, compared to 42 percent of Blacks, and only 32 percent of Whites.

As Table 2 reveals, Blacks score highest on each measure of prior record: prior prison, prior jail, prior felony conviction, prior violent conviction, criminal justice status, and prior failure to appear at trial. Whites and Latinos have similar prior records, and each group scores lowest on half the prior record measures. Blacks and Latinos are most likely to be arrested for drug crimes, while Whites are most likely to be arrested for property crimes. In addition, Blacks are more likely to be arrested for violent crimes—arguably the most serious crimes—than either Whites or Latinos. However, Blacks have the least arrest charges. The only measures of offense seriousness where Whites score the highest are the number of arrest charges and the measure for attempt: Whites have the highest number of arrest charges and are the least likely to be arrested for crimes that were only attempts. Nonetheless, overall Blacks are arrested for more serious crimes and have more considerable prior records; as such, racial disparity in criminal processing will seem greater without these controls.

Analysis

The analysis uses fixed-effects logistic and linear models to examine the effects of race and ethnicity on each pretrial incarceration decision and outcome. First, I estimate the effects of race and ethnicity by decision or outcome type for the full sample. Next, in order to test whether Blacks receive harsh treatment for violent crimes and Latinos for drug crimes, I run models on sub-samples of the data that only include defendants arrested for specific crime types—violent,

Table 2 Variable descriptions: Means by race ($N = 36,709$)

Name	White $N = 10,413$	Black $N = 16,283$	Latino $N = 10,013$
Denied bail	.07 (.25)	.09 (.29)	.07 (.26)
Non-financial release	.34 (.47)	.28 (.45)	.28 (.45)
Bail amount	28,340 (98,460)	30,031 (127,491)	54,031 (195,314)
Made bail	.58 (.49)	.47 (.50)	.33 (.47)
Pretrial incarceration	.32 (.46)	.42 (.49)	.51 (.50)
Age	30.86 (10.28)	29.28 (9.99)	28.28 (9.29)
Prior prison	.31 (.95)	.57 (.46)	.33 (.49)
Prior jail	1.05 (2.08)	1.39 (2.35)	1.24 (2.23)
Prior felony conviction	.87 (1.80)	1.38 (2.14)	.79 (1.56)
Prior violent conviction	.08 (.27)	.15 (.35)	.09 (.28)
Criminal justice status	.30 (.46)	.39 (.49)	.37 (.48)
Prior FTA	.26 (.44)	.36 (.48)	.31 (.46)
Attempt?	.02 (.15)	.03 (.18)	.03 (.18)
Number of charges	2.24 (1.64)	2.23 (1.62)	2.20 (1.54)
Modal offense type	Property	Drug	Drug

Notes. Means with standard deviations in parentheses are reported for all variables except for race and offense type. Dummy variables are used for these variables in the analysis. Numbers reported for race in this table are the percent of defendants in the sample from each racial category; the modal offense category is presented for each racial group. "Real" values for bail amount are presented in this table; however, as the standard deviations for this variable show, bail amount is skewed. As such, logged values of this variable are included in the models estimated for Tables 3-5.

property, drug, or public order. In both of these analyses, White is the reference category, and coefficients or odds ratios of the Black and Latino dummy variables are reported. Finally, I formally test for differences in the criminal processing of Blacks and Latinos by examining a sub-sample that includes only Black and Latino defendants. In this last analysis, Black is the reference

category, and the coefficients or odds ratios of the Latino dummy variable are reported.

The SCPS data are clustered by county; thus, the analysis employs fixed effects models to control for county-level omitted variables that may be correlated with race or ethnicity and may affect criminal processing. Research finds that a variety of community-level characteristics affect sentencing decisions, including percent Black in a county or Black-White income inequality (Bridges & Crutchfield, 1988; Crawford, 2000; Crawford, Chiricos, & Kleck, 1998), and while fixed effects models cannot be used to discover what community-level characteristics affect criminal processing, they do adequately control for these variables. They do this by assuming that the county-level conditions that affect criminal processing are invariant across individuals and adding a constant to each individual in that county. As such, these models use only within-county variation to estimate the effects of legal and extra-legal characteristics on processing decisions and outcomes. For estimation, the analysis employs conditional fixed-effects logits for the dichotomous dependent variables of denied bail, non-financial release, made bail, and pretrial incarceration and linear fixed-effects models for the continuous dependent variable of bail amount. These models are run on pooled data, which include all 6 years in the SCPS.⁶

Results⁷

Aggregate Analysis

The analysis finds evidence of racial disparity during two of the three legal decisions that affect pretrial incarceration and evidence of ethnic disparity during all three of these decisions. Additionally, the analysis finds evidence of both racial and ethnic disparity during both pretrial incarceration outcomes.

As Table 3 shows, being Black increases a defendant's odds of being denied bail by 25 percent, and being Latino increases a defendant's odds of being denied bail by 24 percent. Additionally, Latinos have odds of being granted a non-financial release that are 25 percent lower than Whites, while Blacks have odds of being granted a non-financial release that are 12 percent lower than Whites. Looking at the last legal decision that affects pretrial incarceration, the analysis shows that Latinos receive bails that are 12 percent higher than

6. For individual i in county j , the log odds of being granted a non-financial release, being denied bail, making bail or being incarcerated pretrial can be written as $\text{logit}(p_{ij}) = x'_{ij}\beta + \theta_j$ and bail amount can be estimated as $\log(Y_{ij}) = x'_{ij}\beta + \theta_j$, where θ_j is a county level fixed-effect and x'_{ij} is a vector of covariates of legal and extra-legal characteristics of defendants. The analysis is run on logged values for bail amount in order to correct for skewness in this variable.

7. All race and ethnicity affects reported are from models which control for the legal characteristics of offenders.

Table 3 Effects of race and ethnicity on pretrial incarceration decisions and outcomes from fixed effects logistic and OLS regressions, 1990-2000 (*N* = 36,709)

	Denied bail	Non-financial release	Bail amount (logged)	Made bail	Pretrial incarceration
Black	1.25*** (3.83)	.88*** (3.60)	.01 (.03)	.53*** (14.87)	1.87*** (14.87)
Latino	1.24*** (3.32)	.75*** (7.67)	.12** (.04)	.50*** (15.14)	2.01*** (15.14)
Age	1.01 (0.96)	.97*** (4.82)	.00 (.01)	.97*** (4.11)	1.04*** (4.11)
Age squared	1.00 (1.39)	1.00*** (5.66)	.00 (.00)	1.00*** (3.77)	1.00*** (3.77)
Prior prison	1.11*** (4.73)	.89*** (5.13)	.10*** (.02)	.92*** (4.07)	1.09*** (4.07)
Prior jail	.97 (2.15)	.95*** (5.36)	.01 (.01)	.88*** (13.23)	1.14*** (13.23)
Prior felony Conviction	1.07*** (3.93)	.88*** (10.18)	-.01 (.01)	.98 (1.65)	1.02 (1.65)
Prior violent Conviction	1.15 (2.29)	.92 (1.56)	.17*** (.05)	.84** (3.08)	1.19** (3.08)
Criminal justice	5.77*** (33.06)	.48*** (21.42)	.04 (.03)	.56*** (15.29)	1.78*** (15.29)
Status	1.14* (2.47)	.89*** (3.40)	.02 (.03)	.83*** (4.53)	1.21*** (4.53)
Prior FTA	1.44*** (3.41)	.80** (2.78)	.48*** (.08)	.76** (2.87)	1.31** (2.87)
Attempt?	1.09*** (6.15)	.87*** (14.30)	.15*** (.01)	.95*** (4.61)	1.05*** (4.61)
Number of charges					
Charge dummies					
Year dummies					

Notes. "Bail Amount" and "Made Bail" categories only include defendants who are given financial releases; the sample size for this group is 22,885. Odds ratios with Z-scores (absolutes) in parentheses are reported for the logistic regressions and coefficients with standard errors in parentheses are reported for the linear regressions. Bail amount is logged, and exponentiated ($e^x - 1$) results are reported; these exponentiated coefficients can be interpreted as "percents." Results for charge and year dummies are available from the author upon request.

* $p \leq .01$; ** $p \leq .005$; *** $p \leq .001$.

Whites,⁸ while there are no significant differences between bail amounts for Black and White defendants.

8. Coefficients from the models run on logged bail amounts are exponentiated using the formula $e^x - 1$ in order to get these percents.

Examining pretrial incarceration outcomes, the analysis finds Latinos and Blacks have odds of making bail that are approximately half those of Whites with the same bail amounts and legal characteristics. Further, the analysis finds that Latinos have odds of pretrial incarceration that are double those of Whites, and Blacks have odds that are 87 percent higher than Whites. This suggests that Latinos and Blacks have fewer economic resources and networks than Whites with similar legal characteristics.

Although race and ethnicity do affect pretrial criminal processing, legal variables are the best predictors of each pretrial decision—criminal justice status is the best predictor of the decision to deny bail and the decision to grant a non-financial release, while whether the crime was an attempt is the best predictor of bail amount. Additionally, at least one measure of prior incarceration, one measure of prior conviction, the defendants criminal justice status at the time of arrest,⁹ whether the crime was an attempt or completed, the number of arrest charges, and the most serious offense charge¹⁰ all significantly predict whether defendants are denied bail or granted non-financial releases and, if they are granted bail, how high their bail is set. Since these legal variables correlate closely with race and ethnicity, the effects of race and ethnicity on pretrial incarceration decisions will be inflated if these controls are not included.

In contrast, race and ethnicity are the best predictors of both pretrial outcomes. This suggests that economic resources and networks are at least as determinative of pretrial incarceration outcomes as are legal processing decisions.

By Crime

Significant race differences remain among defendants arrested for violent crimes during two of the three legal decisions that affect pretrial incarceration. Of defendants arrested for violent crimes, Black defendants are 33 percent more likely to be denied bail and 21 percent less likely to be granted a non-financial release than White defendants with similar legal characteristics. There is no evidence of racial disparity among defendants arrested for violent crimes during the setting of bail. In contrast, the analysis only finds evidence of ethnic disparity among defendants arrested for violent crimes during the decision to grant a non-financial release. This suggests that Blacks are more likely than Latinos to be associated with violence.

Analyzing the effects of race and ethnicity among defendants arrested for drug crimes, the study finds evidence of racial disparity only during the decision to deny bail: Black defendants are 80 percent more likely than Whites to be

9. This is a dichotomous variable: if a defendant was on parole, probation, or any supervisory condition, then his criminal justice status was active.

10. Dummies are entered for each offense charge, with "other public order" as the reference category. In all models, the majority of dummies had p-scores of less than 0.001.

denied bail. In contrast, there is evidence of ethnic disparity during all three legal decisions: when compared to White defendants with similar legal characteristics, Latino defendants are 67 percent more likely to be denied bail, 29 percent less likely to be granted a non-financial release, and receive bails that are 26 percent higher. These findings suggest that stereotypes of Latino involvement in the drug trade may be even more entrenched than similar stereotypes of Blacks. Alternatively, Blacks may be more likely to be viewed as users and thus less culpable, while Latinos are more likely to be viewed as dealers and thus more culpable.

As predicted by the theoretical framework, there is no evidence of either racial or ethnic disparity during the processing of defendants charged with either property or public order crimes.

Finally, both Black and Latino defendants are less likely than White defendants to make bail or be released pretrial regardless of offense charge. This may be attributable to the combined effect of racial and ethnic disparity in pretrial incarceration decisions and the dearth of economic resources and networks of Black and Latino defendants relative to White defendants (Table 4).

Black/Latino Disparity

The last part of the analysis formally tests for differences in the criminal processing of Blacks and Latinos. As Table 5 shows, the analysis finds that whenever there are significant differences in the criminal processing decisions of Blacks and Latinos, Latinos receive less beneficial decisions than Blacks. This may be due to additional difficulties faced by Latinos stemming from language barriers and questions of citizenship. When individuals arrested for all crime types are aggregated, the study finds that Latinos have odds of being granted a non-financial release that are 15 percent lower than Blacks. The denial of bail is the only decision during which Latinos—regardless of crime type charge—do not receive less beneficial decisions than Blacks.

When disaggregating by crime type, the study finds that among Blacks and Latinos arrested for drug crimes, Latinos have odds of being granted a non-financial release that are 25 percent lower than Blacks and have their bail set approximately 48 percent higher than Blacks. Once again, this suggests that Latinos may be seen either as more linked to drug trade and use than Blacks or as being more likely to be involved in trade—rather than just use—and thus as being more blameworthy. The analysis finds no difference in the decisions for Black and Latino defendants charged with violent, property, or public-order crimes.

There are no significant differences in the pretrial incarceration outcomes of Black and Latino defendants. This suggests that while Latinos receive less beneficial decisions than Blacks, the dearth of economic resources and networks of both Black and Latino defendants lead defendants from both groups to fail to make bail and to be detained pretrial at equivalent rates.

Table 4 Effects of race and ethnicity on pretrial incarceration decisions and outcomes by crime type from 25 fixed effects logistic and OLS regressions, 1990-2000

	Total N = 36,709	Violent N = 9,807	Property N = 10,918	Drug N = 12,907	Public order N = 3,077
<i>Denied bail</i>					
Black	1.25*** (3.83)	1.33** (2.80)	1.07 (.63)	1.80*** (4.92)	1.40 (1.62)
Latino	1.24*** (3.32)	1.26 (1.96)	1.12 (.87)	1.67*** (3.75)	1.01 (.05)
<i>Non-financial release</i>					
Black	.88** (3.60)	.79** (3.15)	.93 (1.13)	.92 (1.38)	.92 (.62)
Latino	.75*** (7.67)	.70*** (4.16)	.87 (2.21)	.71*** (5.43)	.76 (2.10)
<i>Bail amount (logged)</i>					
Black	.01 (.03)	.07 (.07)	.02 (.06)	-.08 (.07)	.09 (.12)
Latino	.12** (.04)	.04 (.07)	-.02 (.07)	.26*** (.07)	.02 (.13)
<i>Made bail</i>					
Black	.53*** (14.87)	.58*** (7.02)	.56*** (7.82)	.47*** (9.47)	.67* (2.54)
Latino	.50*** (15.14)	.59*** (5.97)	.51*** (7.52)	.43*** (10.37)	.44*** (5.09)
<i>Pretrial incarceration</i>					
Black	1.87*** (14.87)	1.73*** (7.02)	1.80*** (7.82)	2.15*** (9.47)	1.50* (2.54)
Latino	2.01*** (15.14)	1.70*** (5.97)	1.94*** (7.52)	2.33*** (10.37)	2.29*** (5.09)

Note. Regressions on "Bail amount" and "Made bail" are run on samples that are limited to defendants who are given financial requirements for release; the total for this group is 22,885, of whom 6,734 have violent crimes as their primary charge, 6,483 have property crimes as their primary charge, 7,752 have drugs crimes as their primary charge, and 1,916 have public order crimes as their primary charge. Odds ratios with Z-scores (absolute) in parentheses are reported for the logistic regressions and coefficients with standard errors in parentheses are reported for the linear regressions. Bail amount is logged and exponentiated ($e^x - 1$) results are reported; these exponentiated coefficients can be interpreted as "percents." Controls include all explanatory variables reported in Table 2. Results for all covariates are available from the author upon request. * $p \leq .01$; ** $p \leq .005$; *** $p \leq .001$.

Discussion

This study finds that while legal characteristics of defendants are the best predictors of pretrial incarceration decisions, the race and ethnicity of defendants also affect these decisions. In fact, both Blacks and Latinos receive less

Table 5 Effect of being Latino—as compared to Black—on pretrial incarceration decisions and outcomes by crime type from 25 fixed effects logistic and OLS regressions, 1990-2000

	Total N = 25,615	Violent N = 6,996	Property N = 6,856	Drug N = 9,717	Public order N = 2,046
Denied bail	.96 (.73)	.95 (.51)	1.00 (.02)	.87 (1.20)	.68 (1.55)
Non-financial Release	.85*** (4.19)	.89 (1.43)	.97 (.44)	.75*** (4.62)	.85 (1.05)
Bail amount	.12** (.04)	-.03 (.06)	-.03 (.07)	.48*** (.07)	-.09 (.15)
Made bail	.95 (1.00)	1.02 (.19)	.95 (.51)	.91 (1.10)	.73 (1.77)
Pretrial Incarceration	1.04 (1.00)	.98 (.19)	1.05 (.51)	1.09 (1.10)	1.38 (1.77)

Note. Regressions on "Bail amount" and "Made bail" are run on samples that are limited to defendants who are given financial requirements for release; the total for this group is 16,205, of whom 4,851 have violent crimes as their primary charge, 4,134 have property crimes as their primary charge, 5,912 have drugs crimes as their primary charge, and 1,308 have public-order crimes as their primary charge. Odds ratios with Z-scores in parentheses are reported for the logistic regressions, and coefficients with standard errors in parentheses are reported for the linear regressions. Bail amount is logged, and exponentiated ($e^x - 1$) results are reported; these exponentiated coefficients can be interpreted as "percents." Controls include all measures of prior record and offense severity reported in Table 2. Results for all covariates are available from the author upon request.

* $p \leq .01$; ** $p \leq .005$; *** $p \leq .001$.

beneficial pretrial release decisions and outcomes than Whites—for all three decision types and both pretrial incarceration outcomes. More specifically, this study finds that: racial disparity is most notable during the decision to deny bail and for defendants charged with violent crimes; ethnic disparity is most notable during the decision to grant a non-financial release and for defendants charged with drug crimes; and when there is a disparity in the treatment of Black and Latino defendants with similar legal characteristics, Latinos always receive the less beneficial decisions.

Further, in addition to disparity stemming from racial and ethnic stereotypes, Black and Latino defendants have fewer economic resources and networks; as such, it is not surprising that the effects of race and ethnicity on posting bail and pretrial incarceration are greater than the effects of race and ethnicity on any of the legal decisions that help to determine whether a defendant is incarcerated pretrial. Since race and ethnicity are correlated with economic resources and networks, and these resources and networks are an important determinant in pretrial incarceration, researchers interested in isolating the effects of racial or ethnic disparity in criminal processing need

not only to include relevant legal controls, but also to look at the legal decisions that affect pretrial incarceration, rather than at pretrial incarceration itself.

The findings support the integrative theoretical perspective presented. Stereotypes of Blacks as dangerous and violent increase the likelihood that criminal justice officials will see Black defendants—relative to White defendants—as a danger to their communities. These attributes are more salient when either the decision type or the defendant’s primary charge concerns “violence” or “dangerousness.” Accordingly, I find that racial disparity is most notable during the decision to deny bail and for defendants charged with violent crimes. Stereotypes of Latinos as prone to involvement in drug trade and use coupled with their immigration status increase the likelihood that judges will see Latino defendants—relative to White defendants—as both flight risks and intimately connected to drug trafficking. These attributes are more salient when either the decision type or the defendant’s primary charge concerns either drug involvement or flight risk. Corroborating this, the analysis finds that ethnic disparity is most notable during the decision to grant a non-financial release and for defendants charged with drug crimes.

The evidence for ethnic disparity in pretrial incarceration decisions is slightly more consistent than the evidence for racial disparity in these decisions: when there is a difference in the amount of disparity Blacks and Latinos face, Latinos always receive the less beneficial decisions. This may be particular to pretrial incarceration, since citizenship status may be related to perceived flight risk. However, recent studies examining sentencing decisions have similar findings (Demuth, 2003; Steffensmeier & Demuth, 2000, 2001). Studies that do not include Latinos will not only miss these effects, but may mask race effects as well. Older data often did not record ethnicity and primarily recorded Latinos as “White.” Grouping Whites and Latinos together not only blinds us to the disparate treatment of this ethnic group but also veils the more severe treatment of Black defendants in the criminal justice system. Finally, when the Black-White binary dominates, members of non-Black minority groups must compare their situation to that of Blacks in order to be visible. As a result, disparate treatment between Black and non-Black minorities is obfuscated. This study makes steps towards the elimination of the perception of race and discrimination as binary and as centering on Black/White relations.

Conclusion

The results of this study suggest that judges’ perceptions shape their decision-making processes by helping them to efficiently categorize defendants as dangerous (or not), reliable (or not), and blameworthy (or not). Judges use racialized attributions to fill in the knowledge gaps created by limited information on cases and defendants. Through this process, racial and ethnic stereotypes become pertinent “knowledge” that direct criminal justice decisions. However,

stereotypes are not always already salient. Rather, they need to be made salient by other criminal justice features. When criminal justice features—such as the type of crime a defendant is charged with—increase the salience of racialized attributions, racial and ethnic disparities in punishment outcomes are reproduced and magnified.

These results are best explained from a theoretical perspective that integrates insights from diverse approaches such as focal-concerns perspectives, attribution theories, and racial formation theory. Scholars writing from a focal-concerns perspective point out that judges have both limited time and limited information about defendants when rendering criminal processing decisions (Knapp, 1993) and argue that judges respond to these limitations by using “focal concerns” to help direct their decision-making (Steffensmeier, Ulmer, & Kramer, 1998). Further, these scholars argue that the use of these decision-making devices interacts in complex—and often deleterious—ways with the disadvantages that poor and minority offenders face. Attribution theorists argue that stereotypes mobilize and direct discrimination and that judges access and employ racial and ethnic stereotypes when making criminal justice decisions (Davis, 1995). Students of racial formation argue that each disfavored group in this country has been racialized in its own way, according to the needs of the majority group at particular times in its history, and that this has resulted in each group being viewed and treated differently and distinctly by mainstream society (Delgado & Stefancic, 2001; Lopez, 1994; Omi & Winant, 1986). Further, these scholars argue that

[p]reconceptions and myths ... shape mindset, ... allocate suspicion, place the burden of proof on one party or the other, and tell us in cases of divided evidence what probably happened: these cultural influences are probably at least as determinative of outcomes as formal laws, since they supply the background against which the latter are interpreted and applied. (Delgado & Stefancic, 2001, p. 42)

Pulling these theoretical perspectives together, I argue that since judges rarely have complete information about cases or defendants, they often try to reduce uncertainty by relying not only on the defendant’s present offense and prior criminal conduct but also on attributions linked to the defendant’s social positions, that attributions linked to different disadvantaged groups will be distinct, and that attributions are more likely to be salient and thus have adverse effects in particular legal contexts.

In addition to suggesting directions for the development of integrative theoretical approaches, the findings of this study raise some concerns about both the equal application of the law and the ability of bail reform legislation to reduce disparity in pretrial incarceration. Although the proximate causes of bail reform included opposing urges—one to reduce unnecessary pretrial incarceration and one to increase the control of potentially dangerous defendants—bail reform legislation also sought to increase determinacy in criminal processing. As determinate sentencing policies, bail reform legislation hopes to reduce the

influence of extra-legal characteristics on criminal processing. However, this study suggests that it has not achieved this goal. While some may view these racial and ethnic disparities as subsidiary to disparities in sentencing decisions, in fact pretrial incarceration represents real jail time with tangible social effects.

Finally, this study suggests many roads for future research. First, this study's finding of particularly harsh treatment of Latino defendants is not the first. In fact, there is a consensus emerging from studies conducted since the most recent large-scale immigration of Latinos into the United States that disparity in the criminal processing of Latino defendants is both real and pervasive. This finding calls for more research that breaks down the Black/White binary paradigm of race and begins to explore disparity based on myriad and complex racial categorizations. Second, research in other fields finds that Latinos from different national origins face extremely different experiences once in the US (Johnson, 1998; Portes, 1996). Thus, it is imperative that data be collected that will allow criminologists to analyze Latinos from different national origins separately. Third, future studies should examine the effects of race and ethnicity on the pretrial processing decisions of female defendants, test for interactions between race, ethnicity, and gender—being careful to control for primary childcare responsibilities, and include defendants from other racial groups—most notably Asians and Native Americans. Finally, future research should analyze data that includes information about defendants' community ties. Since these characteristics correlate with race and ethnicity, the inclusion of these variables could reduce the affect of the defendant's racial or ethnic identity.

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