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Criminalizing Race: Racial Disparities in Plea-Bargaining

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CRIMINALIZING RACE: RACIAL DISPARITIES IN PLEA-BARGAINING

CARLOS BERDEJÓ

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CRIMINALIZING RACE: RACIAL DISPARITIES IN PLEA-BARGAINING

CARLOS BERDEJÓ*

Abstract: Most of the empirical research examining racial disparities in the criminal justice process has focused on its two endpoints—the arrest and initial charging of defendants and judges’ sentencing decisions. Few studies have assessed disparities in the steps leading up to a defendant’s conviction, where various actors make choices that often constrain judges’ ultimate sentencing discretion. This Article addresses this gap by examining racial disparities in the plea-bargaining process, focusing on the period between the initial filing of charges and the defendant’s conviction. The results presented in this Article reveal significant racial disparities in this stage of the criminal justice process. White defendants are twenty-five percent more likely than black defendants to have their principal initial charge dropped or reduced to a lesser crime. As a result, white defendants who face initial felony charges are less likely than black defendants to be convicted of a felony. Similarly, white defendants initially charged with misdemeanors are more likely than black defendants either to be convicted for crimes carrying no possible incarceration, or not to be convicted at all. Racial disparities in plea-bargaining outcomes are greater in cases involving misdemeanors and low-level felonies. In cases involving severe felonies, black and white defendants achieve similar outcomes. Defendants’ criminal histories also play a key role in mediating racial disparities. Although white defendants with no prior convictions receive charge reductions more often than black defendants with no prior convictions, white and black defendants with prior convictions are afforded similar treatment. These patterns in racial disparities suggest that in these “low information” cases, race perhaps is being used as a proxy for a defendant’s latent criminality and likelihood to recidivate.

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INTRODUCTION

The treatment of African Americans in the criminal justice process has been the subject of intense scrutiny in both academic literature and the popular press. Many have argued that policing practices disproportionately target black individuals,¹ who are also more likely to be arrested and become defendants in criminal cases.² These black defendants are incarcerated more often and sentenced to longer terms in prison relative to white defendants.³

¹ See, e.g., Andrew Gelman et al., *An Analysis of the New York City Police Department's "Stop-and-Frisk" Policy in the Context of Claims of Racial Bias*, 102 J. AM. STAT. ASS'N 813, 813–14 (2012) (finding that black individuals were stopped more frequently than white individuals even after controlling for a variety of factors); N.Y. CIVIL LIBERTIES UNION, STOP AND FRISK REPORT 2011, at 7 (May 2012), https://www.nyclu.org/sites/default/files/publications/NYCLU_2011_Stop-and-Frisk_Report.pdf [<http://perma.cc/77W4-UERP>] (finding that young minority males accounted for 41.6% of stops even though they comprise 4.7% of the population); GREG RIDGEWAY, RAND CORP., ANALYSIS OF RACIAL DISPARITIES IN THE NEW YORK POLICE DEPARTMENT'S STOP, QUESTION, AND FRISK PRACTICES 31 (2007), https://www.rand.org/pubs/technical_reports/TR534.html [<http://perma.cc/D4LJ-4NH8>] (finding that black suspects are more likely to be frisked than similarly situated white suspects and that police arrested and used force against nonwhite suspects more than similarly situated white suspects). In 2013, a federal district court held that the New York City Police Department's stop-and-frisk policy violated the Fourteenth Amendment of the U.S. Constitution. See *Floyd v. City of New York*, 959 F. Supp. 2d 540, 661 (S.D.N.Y. 2013).

² See, e.g., KAREN E. FIELDS & BARBARA J. FIELDS, RACECRAFT: THE SOUL OF INEQUALITY IN AMERICAN LIFE 265 (2012) ("While Afro-Americans accounted for 14 percent of drug users in the United States in 2006, they accounted for 35 percent of those arrested for drug offenses, 53 percent of those convicted, and 45 percent of those in prison for drug offenses as of 2004."); Shima Baradaran, *Race, Prediction, and Discretion*, 81 GEO. WASH. L. REV. 157, 187–90 (2013) (finding that police arrest black individuals more often for drug crimes than white individuals); Katherine Beckett et al., *Drug Use, Drug Possession Arrests, and the Question of Race: Lessons from Seattle*, 52 SOC. PROBS. 419, 426–29 (2005) (comparing drug use data with arrest statistics and finding disparities between the racial composition of arrestees and users); Christopher J. Lyons & Becky Pettit, *Compounded Disadvantage: Race, Incarceration, and Wage Growth*, 58 SOC. PROBS. 257, 257–58 (2011) (noting that black drivers are about three times more likely to be searched during a traffic stop than white drivers and that black individuals are twice as likely to be arrested than white individuals); Brad Heath, *Racial Gap in U.S. Arrest Rates: 'Staggering Disparity'*, USA TODAY (Nov. 18, 2014, 5:13 PM), <https://www.usatoday.com/story/news/nation/2014/11/18/ferguson-black-arrest-rates/19043207> [<http://perma.cc/3CCZ-HXPJ>] (examining data filed by police departments with the FBI and concluding that blacks are more likely than others to be arrested in almost every city regardless of the type of crime).

³ For a review of the existing literature on racial disparities in criminal sentencing see *infra* notes 35–45 and accompanying text. Racial disparities in the imposition of capital punishment are also well-documented. See, e.g., SAMUEL WALKER ET AL., THE COLOR OF JUSTICE: RACE, ETHNICITY AND CRIME IN AMERICA 231–45 (2000); David C. Baldus & George Woodworth, *Race Discrimination and the Death Penalty: An Empirical and Legal Overview*, in AMERICA'S EXPERIMENT WITH CAPITAL PUNISHMENT: REFLECTIONS ON THE PAST, PRESENT, AND FUTURE OF THE ULTIMATE PENAL SANCTION 501, 513–14 (James R. Acker et al. eds., 2d ed. 2003). For a recent study, see KATHERINE BECKETT & HEATHER EVANS, THE ROLE OF RACE IN WASHINGTON STATE CAPITAL SENTENCES, 1981–2012, at 2 (Jan. 2014), <https://deathpenaltyinfo.org/documents/WashRaceStudy2014.pdf> [<http://perma.cc/K4C6-5WMM>] (finding juries were three times more

The end result of these disparities is a pair of dispiriting statistics that are well-known to many—black males are incarcerated at a rate that is five times that of white males,⁴ and one third of black males can expect to be imprisoned at some point in their lives.⁵

Much of the recent empirical work on racial disparities in the criminal justice process has centered on its two endpoints—the arrest and initial charging of individuals and sentencing decisions by judges. These studies generally find that black individuals are more likely to be arrested and charged than white individuals⁶ and that black defendants receive harsher sentences than white defendants.⁷ The reasons for these observed disparities are the subject of vigorous academic debate.⁸

Setting that debate aside, merely focusing on these endpoints ignores critical steps in the criminal justice process that follow an individual's detention but precede the sentencing hearing. Critically, judges make their sentencing decisions conditional on the crime (or crimes) for which the defendant was convicted, which, together with other factors, determines a sentencing range.⁹ The crime of ultimate conviction is the result of a process controlled by a different set of actors in the system.¹⁰ Surprisingly, few studies have examined the role of race in determining defendants' outcomes in these pre-sentencing stages of the criminal justice process.¹¹

This Article fills this gap in the literature by examining disparities in the plea-bargaining process that precede judges' sentencing decisions and constrain their sentencing discretion. Using data obtained from the Wiscon-

likely to impose the death penalty when the defendant was black than in cases involving similarly situated white defendants).

⁴ See ASHLEY NELLIS, THE SENTENCING PROJECT, THE COLOR OF JUSTICE: RACIAL AND ETHNIC DISPARITY IN STATE PRISONS 3 (June 2016), <http://www.sentencingproject.org/publications/color-of-justice-racial-and-ethnic-disparity-in-state-prisons> [<http://perma.cc/SLW2-2CL7>] (explaining "African Americans are incarcerated in state prisons at a rate that is 5.1 times the imprisonment of whites"); Keith Humphreys, *There's Been a Big Decline in the Black Incarceration Rate, and Almost Nobody's Paying Attention*, WASH. POST (Feb. 10, 2016), <https://www.washingtonpost.com/news/work/2016/02/10/almost-nobody-is-paying-attention-to-this-massive-change-in-criminal-justice> [<http://perma.cc/J33Z-A65X>] (reporting that in 2014, 2,725 of every 100,000 black males were imprisoned, while for white males the corresponding figure was 465).

⁵ Lyons & Pettit, *supra* note 2, at 257–58 (citing data from the Bureau of Justice Statistics that suggest that "one in three black men can expect to go to prison in their lifetime").

⁶ See *supra* notes 1–2; *infra* note 60 and accompanying text. Additionally, black defendants are less likely to be released on bail and more likely to be held in remand prior to trial. See *infra* notes 289–290 and accompanying text.

⁷ See *infra* notes 35–36 and accompanying text.

⁸ See *infra* notes 33–64 and accompanying text.

⁹ See *infra* notes 46, 82–90 and accompanying text.

¹⁰ See *infra* notes 48–51, 77–79 and accompanying text.

¹¹ See *infra* notes 58–64 and accompanying text.

sin Circuit Courts, this Article documents striking racial disparities in these earlier stages.¹² White defendants are twenty-five percent more likely than black defendants to have their most serious initial charge dropped or reduced to a less severe charge (i.e., black defendants are more likely than white defendants to be convicted of their highest initial charge).¹³ As a result, white defendants who face initial felony charges are approximately fifteen percent more likely than black defendants to end up being convicted of a misdemeanor instead.¹⁴ In addition, white defendants initially charged with misdemeanors are approximately seventy-five percent more likely than black defendants to be convicted for crimes carrying no possible incarceration, or not to be convicted at all.¹⁵

More in-depth analyses reveal two patterns that may shed light as to the underlying dynamics behind these racial disparities. First, disparities in plea-bargaining outcomes appear to be driven by cases in which defendants have no prior convictions.¹⁶ In cases involving defendants with prior convictions there are no significant racial disparities in plea-bargaining outcomes.¹⁷ This pattern suggests that in the absence of evidence of a defendant's recidivism risk (for example, when there is no criminal history), prosecutors may be using race as a proxy for the defendant's likelihood to recidivate.¹⁸ Second, racial disparities in plea-bargaining outcomes are greater in cases involving misdemeanors and low-level felonies relative to cases involving more severe offenses.¹⁹ This second pattern suggests that prosecutors may be using race as a proxy for a defendant's latent criminality (for

¹² Not only do black defendants receive less favorable treatment in the plea-bargaining process but, consistent with the existing literature in the field, this Article also finds that black defendants encounter significant disparities at the sentencing stage as well. Black defendants are 50% more likely than white defendants to be incarcerated and receive sentences that are on average two months longer than white defendants. *See infra* note 143 and accompanying text.

¹³ *See infra* notes 168–169 and accompanying text.

¹⁴ *See infra* notes 187–190 and accompanying text.

¹⁵ *See infra* notes 173–175 and accompanying text. Notably, sentencing disparities are also greater in the subset of misdemeanor cases. *See infra* notes 145–146 and accompanying text.

¹⁶ *See infra* note 198 and accompanying text. Although existing studies have controlled for the prior criminal history of defendants when examining racial disparities in criminal case outcomes, these have not explored the interaction of this variable with the defendant's race. *See infra* notes 70–101 and accompanying text.

¹⁷ *See infra* note 199 and accompanying text.

¹⁸ *See* Dawinder S. Sidhu, *Moneyball Sentencing*, 56 B.C. L. REV. 671, 675 (2015) (criticizing predictors of recidivism that use various defendant characteristics, including race, as illegal discrimination under the Fourteenth Amendment's equal protection clause and incorrectly severing the causal connection between an individual's conduct and the punishment they receive); *infra* notes 260–267 and accompanying text.

¹⁹ *See infra* notes 260–267 and accompanying text.

example, propensity to commit a severe offense in the future) in cases involving low-level offenses.²⁰

In addition to uncovering racial disparities in the plea-bargaining process, this Article contributes to a pair of current policy debates in the criminal law arena. First, the evidence presented in this Article sheds light on the question surrounding the role that the disparate impact theory should play in equal protection claims under the Fourteenth Amendment. Historically, courts have been reluctant to accept statistical evidence showing patterns of racial discrimination to establish an equal protection claim, instead requiring plaintiffs to show a racially discriminatory intent or purpose.²¹ Several scholars have been critical of the high burden placed on plaintiffs as a result of this requirement, which often renders the equal protection clause an ineffectual tool for combating racial discrimination in the criminal justice process.²² Critics of this evidentiary standard argue that its focus on discriminatory purpose and intent ignores the growing evidence on the impact of implicit racial biases on an individual's actions, which often contradict an individual's conscious or express intentions.²³ If subconscious racial biases do contribute to racial dis-

²⁰ See *infra* notes 262–267 and accompanying text.

²¹ See, e.g., *McCleskey v. Kemp*, 481 U.S. 279, 292 (1987) (holding that evidence of the unjustified racially disparate impact was insufficient to support an equal protection claim against a state's capital punishment regime unless a defendant can prove disparate treatment was based on race in their individual case); *Washington v. Davis*, 426 U.S. 228, 242 (1976) (holding that statistical evidence of the unjustified racially disparate impact of an employment policy was insufficient to mount an equal protection challenge to the policy); *Farrakhan v. Gregoire*, 623 F.3d 990, 993 (9th Cir. 2010) (holding that plaintiffs challenging a felon disenfranchisement law under the Voting Rights Act must “at least” show that a state’s criminal justice system is “infected by intentional discrimination or that the felon disenfranchisement law was enacted with such intent”); see also Naomi Murakawa & Katherine Beckett, *The Penology of Racial Innocence: The Erasure of Racism in the Study and Practice of Punishment*, 44 L. & SOC’Y REV. 695, 701–08 (2010).

²² See, e.g., MICHELLE ALEXANDER, *THE NEW JIM CROW: MASS INCARCERATION IN THE AGE OF COLORBLINDNESS* 135 (2010) (discussing Supreme Court precedent preventing challenges to racial bias in the criminal justice system and arguing that “[t]he Supreme Court has now closed the courthouse doors to claims of racial bias at every stage of the criminal justice process, from stops and searches to plea bargaining and sentencing”); Baradaran, *supra* note 2, at 174 (“The standard of racial intent proves difficult to establish and allows relatively unchecked police discretion. . . . As a whole, at all steps in the process—stops, searches, plea bargaining, charging, and sentencing—the Court has made it much more difficult to bring claims of racial bias, resulting in unchecked discretion by criminal justice actors.”); Sheri Lynn Johnson, *Unconscious Racism and the Criminal Law*, 73 CORNELL L. REV. 1016, 1031 (1988) (“The dissatisfaction with the discriminatory purpose doctrine has several facets, but a recurring theme in the literature is the difficulty of proving discriminatory purpose.”); David Rudovsky, *Litigating Civil Rights Cases to Reform Racially Biased Criminal Justice Practices*, 39 COLUM. HUM. RTS. L. REV. 97, 106 (2007) (arguing “the Equal Protection Clause requires a showing of intentional racial discrimination before a court may consider legal remedies”).

²³ See John Tyler Clemons, *Blind Injustice: The Supreme Court, Implicit Racial Bias, and the Racial Disparity in the Criminal Justice System*, 51 AM. CRIM. L. REV. 689, 692–94 (2014) (summarizing existing research on implicit racial bias and the perception of criminality based on

parities (for example, by the use of race as a proxy for a defendant's latent criminality),²⁴ there would be no constitutional means to address these under the evidentiary requirements articulated by the courts.²⁵ The nature of the biases documented in this Article affirms the need to re-examine the role of evidence showing disparate impact in equal protection claims.

The evidence presented in this Article also touches upon a second current policy debate—the treatment of misdemeanors in the criminal justice process and their role in perpetuating racial disparities. Unlike other studies that have focused on more serious felony crimes, this Article stresses the importance of racial disparities in misdemeanor cases, both in plea-bargaining and sentencing.²⁶ Although misdemeanors have traditionally been overlooked due to the low-level nature of the offenses, sheer volume of cases, and the shorter sentences involved, recent work has highlighted their significant role in the criminalization of black males.²⁷ The fact that the racial disparities in plea-bargaining and sentencing documented in this Article are greater in cases involving misdemeanors adds further urgency to the debate surrounding their regulation and decriminalization.²⁸

The Article proceeds as follows. Part I summarizes the existing evidence on racial disparities in criminal case outcomes, highlighting the limited attention that has been devoted to the plea-bargaining process.²⁹ Part II provides background information on the criminal justice process in Wisconsin and describes the dataset and the construction of the variables used in the analyses.³⁰ The results of these analyses are then presented in Part III.³¹

an individual's race); Johnson, *supra* note 22, at 1027–28 (explaining “[a] burgeoning literature documents the rise of the ‘aversive’ racist, a person whose ambivalent racial attitudes leads him or her to deny his or her prejudice and express it indirectly, covertly, and often unconsciously”); Timothy D. Wilson et al., *A Model of Dual Attitudes*, 107 PSYCHOL. REV. 101, 102 (2000) (explaining how individuals can harbor implicit biases distinct from their explicit attitudes); *see also infra* notes 43–44 and accompanying text.

²⁴ *See infra* notes 44–45, 54–57 and accompanying text.

²⁵ *See* Arthur H. Garrison, *Disproportionate Incarceration of African Americans: What History and the First Decade of Twenty-First Century Have Brought*, 11 J. INST. JUST. & INT’L STUD. 87, 104 (2011) (“Each decision point of the criminal justice system: arrest by law enforcement; arraignment, release, and pre-adjudicatory hearings; pre-trial jail and prison custody; adjudication and sentencing; probation and community supervision; and parole decisions are all exercised with various levels of discretion and subject to covert, overt, and unconscious biases.”); Johnson, *supra* note 22, at 1019 (“The phenomenon of unconscious racism challenges both Powell’s fourteenth and his eighth amendment analyses. The concept of purposeful discrimination, or at least its terminology, does not mesh well with unconscious race discrimination.”).

²⁶ *See infra* notes 145–146 and accompanying text.

²⁷ *See infra* notes 177–186, 262–267 and accompanying text.

²⁸ *See infra* notes 183–186 and accompanying text.

²⁹ *See infra* notes 33–64 and accompanying text.

³⁰ *See infra* notes 65–116 and accompanying text.

³¹ *See infra* notes 117–276 and accompanying text.

The policy implications of these results and avenues for future research are discussed in the Conclusion.³²

I. RACIAL DISPARITIES IN CRIMINAL CASE OUTCOMES

This Part discusses the existing empirical and theoretical work examining racial disparities in the criminal justice process. Section A begins with an overview of the empirical literature that has identified significant racial disparities in the imprisonment of white and black defendants, followed by a review of the theoretical work that has attempted to explain these disparities.³³ Section B describes the critical role of prosecutorial discretion and the plea-bargaining process in determining criminal case outcomes, highlighting the limited attention that has been devoted in the empirical literature to this particular area.³⁴

A. Racial Disparities in Sentencing

Studies examining criminal case outcomes in federal courts have identified substantial racial disparities in judges' sentencing decisions—black defendants are incarcerated more frequently and receive longer sentences than white defendants.³⁵ Although fewer studies have analyzed sentencing disparities at the state level, the evidence suggests that racial disparities in sentencing outcomes also exist at the state level.³⁶

Various factors can explain these racial disparities. For example, the severity of the conviction offense and the defendant's criminal history are

³² See *infra* notes 277–303 and accompanying text.

³³ See *infra* notes 35–45 and accompanying text.

³⁴ See *infra* notes 46–64 and accompanying text.

³⁵ See, e.g., David B. Mustard, *Racial, Ethnic, and Gender Disparities in Sentencing: Evidence from the U.S. Federal Courts*, 44 J.L. & ECON. 285, 306 (2001) (finding that black and Hispanic defendants receive substantially longer sentences than white defendants and are also more likely to be incarcerated); Max Schanzenbach, *Racial and Sex Disparities in Prison Sentences: The Effect of District-Level Judicial Demographics*, 34 J. LEGAL STUD. 57, 72–73 (2005) (finding that black defendants in federal criminal cases receive sentences that are 2.9 months higher than white defendants, a difference that represents 6% of the average sentence of 48.2 months); Darrel Steffensmeier & Stephen Demuth, *Ethnicity and Sentencing Outcomes in U.S. Federal Courts: Who Is Punished More Harshly?*, 65 AM. SOC. REV. 705, 716 (2000) [hereinafter Steffensmeier & Demuth, *Outcomes*] (documenting similar sentencing disparities).

³⁶ See, e.g., David S. Abrams et al., *Do Judges Vary in Their Treatment of Race?*, 41 J. LEGAL STUD. 347, 356 (2012) (finding that black defendants in Chicago, Illinois receive longer sentences and are 30% more likely to be incarcerated than white defendants); Darrel Steffensmeier & Stephen Demuth, *Ethnicity and Judges' Sentencing Decisions: Hispanic-Black-White Comparisons*, 39 CRIMINOLOGY 145, 160 (2001) [hereinafter Steffensmeier & Demuth, *Decisions*] (finding that white defendants in Pennsylvania are less likely to be incarcerated than black and Hispanic defendants, and also receive shorter sentences).

associated with higher rates of incarceration and longer prison sentences.³⁷ Thus, if black defendants have lengthier prior records and are convicted of offenses that are more severe than white defendants, then one would expect the former to receive, on average, longer sentences.³⁸ Other defendant characteristics, such as age³⁹ and gender,⁴⁰ which impact sentencing determinations could also be correlated with a defendant's race. Nevertheless, even after controlling for these defendant and crime characteristics, a significant black-white sentencing gap remains.⁴¹

Another explanation for the observed racial disparities in sentencing is that judges, due to time and information constraints, may be using a defendant's race (an observable attribute) as a proxy for the defendant's inherent criminality (an unobservable attribute).⁴² Judges must make their sentencing

³⁷ See Mustard, *supra* note 35, at 306; Steffensmeier & Demuth, *Decisions*, *supra* note 36, at 161.

³⁸ See Steffensmeier & Demuth, *Outcomes*, *supra* note 35, at 716 (finding that black defendants are convicted of more severe offenses and have lengthier prior records than white defendants).

³⁹ Existing work suggests that younger defendants receive harsher punishment than older defendants. See, e.g., Mustard, *supra* note 35, at 309 (finding that younger defendants receive on average higher sentences); Steffensmeier & Demuth, *Decisions*, *supra* note 36, at 161 (finding that older defendants are less likely to be incarcerated and receive longer sentences than younger defendants).

⁴⁰ Prior studies have found that female defendants receive on average shorter sentences than their male counterparts. See, e.g., Mustard, *supra* note 35, at 306 (finding that female defendants are more likely to be assigned no prison term than male defendants); Schanzenbach, *supra* note 35, at 84 (finding that female defendants on average receive sentences that are 5.4 months lower than those received by males in federal criminal cases); Darrel Steffensmeier et al., *Gender and Imprisonment Decisions*, 31 CRIMINOLOGY 411, 423 (1993) (finding that male defendants are more likely to be incarcerated and receive lengthier sentences than female defendants in criminal cases in Pennsylvania).

⁴¹ See *supra* notes 35–36 and accompanying text. Unobservable crime characteristics may also be driving these sentencing disparities. The heinousness and other aspects of a crime, which may be observed by a judge but not a researcher, may affect sentencing decisions. See Schanzenbach, *supra* note 35, at 63. However, for this to explain racial disparities in sentencing, one would need the heinousness of a crime to correlate with the race of the criminal (i.e., black criminals would need to be more likely to commit a given crime in a more heinous manner than white criminals).

⁴² See Celesta A. Albonetti, *An Integration of Theories to Explain Judicial Discretion*, 38 SOC. PROBS. 247, 250 (1991) [hereinafter Albonetti, *Integration*] (“Using defendant characteristics, circumstances of the crime, and case processing outcomes, judges assess the defendant’s disposition toward future criminal activity. . . . Discrimination and disparity in sentencing decisions . . . may be the product of judicial attempts to achieve a ‘bounded rationality’ in sentencing by relying on stereotypical images of which defendant is most likely to recidivate.”); Celesta A. Albonetti, *The Joint Conditioning Effect of Defendant’s Gender and Ethnicity on Length of Imprisonment Under the Federal Sentencing Guidelines for Drug Trafficking/Manufacturing Offenders*, 6 J. GENDER, RACE & JUST. 39, 42 (2002) (“From the uncertainty avoidance/causal attribution perspective, the defendant’s gender and ethnicity are salient to attributions of an enduring predisposition to criminal activity and dangerousness. As such, these defendant characteristics

decision without full knowledge of the defendant's likelihood of recidivating and the danger that the defendant represents to the community, factors that arguably help determine the optimal sentence in a criminal case.⁴³ In this setting, implicit biases can lead judges to make decisions that systematically discriminate against defendants of a given race if they ascribe certain characteristics to members of that group.⁴⁴ If judges perceive black defendants as being more dangerous and more likely to recidivate than white defendants, then judges may (consciously or subconsciously) punish black defendants more severely than similar white defendants.⁴⁵

B. The Critical Role of Prosecutors

Judges' sentencing discretion is constrained in a number of ways. Criminal statutes often prescribe a minimum and maximum sentence for a particular crime, which are set by the legislature when enacting the law that

influence judicial sentencing decisions.”); Ian Ayres & Peter Siegelman, *Race and Gender Discrimination in Bargaining for a New Car*, 85 AM. ECON. REV. 304, 317 (1995) (explaining “[s]tatistical discrimination” is based not on a psychological distaste for associating with blacks or women, but rather on sellers’ use of observable variables (such as race or gender) to make inferences about a relevant but unobservable variable”); Sara Steen et al., *Images of Danger and Culpability: Racial Stereotyping, Case Processing, and Criminal Sentencing*, 43 CRIMINOLOGY 435, 463 (2005) (arguing “because they lack complete information about individual cases, decision makers form causal attributions for offending and assess dangerousness and culpability by referencing stereotypes”). Theoretically, this model is closely related to the concept of statistical discrimination. See Kenneth J. Arrow, *What Has Economics to Say About Racial Discrimination?*, J. ECON. PERSP., Spring 1998, at 91, 96–97 (describing the statistical discrimination model).

⁴³ See Albonetti, *Integration*, *supra* note 42, at 250 (explaining “uncertainty surrounding the sentencing decision arises from an inability to predict accurately future criminal behavior”).

⁴⁴ See, e.g., *id.* at 249–50 (“[J]udges would attempt to manage uncertainty in the sentencing decision by developing ‘patterned responses’ that are themselves the product of an attribution process influenced by causal judgments . . . These attributions provide a basis for arriving at rational decision in a domain of responsibility characterized by uncertainty.”); Jeffrey J. Rachlinski et al., *Does Unconscious Racial Bias Affect Trial Judges?*, 84 NOTRE DAME L. REV. 1195, 1197 (2009) (arguing that judges “hold implicit racial biases” and that such biases “can influence their judgment”). For an overview of the possible sources of implicit biases, see Jerry Kang et al., *Implicit Bias in the Courtroom*, 59 UCLA L. REV. 1124, 1128–35 (2012); Anthony G. Greenwald & Linda Hamilton Krieger, *Implicit Bias: Scientific Foundations*, 94 CALIF. L. REV. 945, 952–957 (2006); see also Christine Jolls & Cass R. Sunstein, *The Law of Implicit Bias*, 94 CALIF. L. REV. 969, 969–70 (2006) (providing examples of both explicit and implicit bias).

⁴⁵ Judges may impose higher sentences on the defendants they perceive as being riskier to incapacitate them (i.e., prevent them from committing additional crimes) and to enhance the deterrent effect of criminal sentencing. See Albonetti, *Integration*, *supra* note 42, at 258 (explaining “[i]ncreases in sentence severity produced by the race variable support the causal attribution and uncertainty avoidance hypothesis linking black defendants with attributions of a high risk of future criminal behavior and judicial use of discretion as a means to deal with administrative concerns for reducing such risk”); Baradaran, *supra* note 2, at 176–77 (explaining that criminal justice actors often use group-based factors, rather than individual ones, to make bail, sentencing and parole decisions, which may lead to the inappropriate consideration of race in those decisions).

criminalizes a given activity. Additionally, various states and the federal government have sought to control the exercise of judicial discretion by adopting sentencing guidelines, which generally provide a set of recommended sentencing ranges which are determined by an offense score (a function of the conviction crime) and the defendant's criminal history.⁴⁶

The applicable sentencing guidelines range and statutory minimum and maximum sentences are ultimately determined by the conviction crime. Except in cases adjudicated in bench trial, the judge has no direct control over the ultimate crime of conviction, which itself is, in the great majority of cases, a result of the plea-bargaining agreement between the defendant's counsel and the prosecuting attorney.⁴⁷ Not surprisingly, prosecutors are considered to be the most influential players in the criminal justice process.⁴⁸

Prosecutorial discretion in the plea-bargaining process plays an important role in determining the conviction crime. Serious charges that were initially filed against a defendant may be reduced to less serious ones and concurrent charges involving less serious crimes may be dropped altogether.⁴⁹ As a result of this process, charges involving felony crimes may be reduced to misdemeanors, or all charges carrying a possible incarceration term may be dropped or reduced to charges that carry no possible jail or prison time.⁵⁰ Furthermore, prosecutors also enjoy ample discretion in deciding which

⁴⁶ See, e.g., U.S. SENTENCING COMM'N, FEDERAL SENTENCING: THE BASICS 1–7 (Aug. 2015), https://www.ussc.gov/sites/default/files/pdf/research-and-publications/research-projects-and-surveys/miscellaneous/201510_fed-sentencing-basics.pdf [<https://perma.cc/HZA3-HKH3>]. Initially, the federal sentencing guidelines were mandatory in the sense that judges wishing to depart from the guidelines (i.e., impose a sentence above or below the guidelines range) had to justify their decision orally or in writing. See Schanzenbach, *supra* note 35, at 60 (describing federal sentencing guidelines). After the Supreme Court held that the federal sentencing guidelines were unconstitutional, the sentencing guidelines began serving an advisory role, as one of the factors judges consider in determining a sentence. See *United States v. Booker*, 543 U.S. 220, 245 (2005); Joshua B. Fischman & Max M. Schanzenbach, *Racial Disparities Under the Federal Sentencing Guidelines: The Role of Judicial Discretion and Mandatory Minimums*, 9 J. EMPIRICAL LEGAL STUD. 729, 733–34 (2012).

⁴⁷ See U.S. SENTENCING COMM'N, *supra* note 46, at 5 (“Over 95 percent of federal defendants convicted of a felony or Class A misdemeanor . . . are adjudicated guilty based on a guilty plea rather than a verdict at a trial.”).

⁴⁸ See ANGELA J. DAVIS, *ARBITRARY JUSTICE: THE POWER OF THE AMERICAN PROSECUTOR* 5 (2007); M. Marit Rehavi & Sonja B. Starr, *Racial Disparity in Federal Criminal Sentences*, 122 J. POL. ECON. 1320, 1326 (2014) (explaining “[l]egal scholars, judges and practitioners broadly agree that prosecutorial decisions play a dominant role in determining sentences”); Lauren O’Neill Shermer & Brian D. Johnson, *Criminal Prosecutions: Examining Prosecutorial Discretion and Charge Reductions in U.S. Federal District Courts*, 27 JUST. Q. 394, 398 (2010).

⁴⁹ See Shermer & Johnson, *supra* note 48, at 395; Ronald F. Wright & Rodney L. Engen, *Charge Movement and Theories of Prosecutors*, 91 MARQ. L. REV. 9, 9–10 (2007).

⁵⁰ See Shermer & Johnson, *supra* note 48, at 395.

initial charges to file, a choice that defines the starting point of any plea-bargaining negotiations.⁵¹

In exercising their discretion, prosecutors may, like judges when imposing a sentence, be subject to implicit biases that adversely impact certain types of defendants.⁵² For example, prosecutors may consciously or subconsciously perceive race as a proxy for recidivism or latent criminality.⁵³ With limited information available and facing time and resource constraints, prosecutors may have to rely on such heuristics in their decision making.⁵⁴ And if that is the case, we would expect prosecutors to be on average more lenient on white defendants relative to black defendants, for example by agreeing to reduce the top charges faced by white defendants more often.⁵⁵

Under this model of prosecutorial decision-making, race should play a smaller role when prosecutors have access to other salient and easily available proxies about a defendant's dangerousness. That is, one would expect the gap in charge reduction rates between white and black defendants to be smaller when the defendants share a characteristic that is associated with recidivism, such as a prior criminal record.⁵⁶ Black defendants thus receive less "personalized" or "individualized" treatment—i.e., the differences in charge reductions between black defendants with and without criminal records will be smaller than the difference in charge reductions between white defendants with and without criminal records.⁵⁷

⁵¹ See *id.*

⁵² See *id.* at 402 ("Prosecutors, like other organizational actors, are faced with uncertainty that may lead them to develop decision-making schema that incorporate past practices and reflect the subtle influences of social and cultural stereotypes in society.")

⁵³ See *id.* at 403 ("[P]rosecutors are likely to develop 'perceptual shorthands' that tie attributions of dangerousness to the ascriptive characteristics of offenders and their victims."); *supra* note 44–46 and accompanying text.

⁵⁴ See Faigman et al., *supra* note 44, at 1141–42 (arguing that that prosecutors are likely to be subject to implicit biases in the discharge of their duties given the fact that they have "wide discretion" and have to make "quick decisions with little accountability"); Robert J. Smith & Justin D. Levinson, *The Impact of Implicit Racial Bias on the Exercise of Prosecutorial Discretion*, 35 SEATTLE U. L. REV. 795, 796–98 (2012) (noting that prosecutors use determinations about the danger posed by an individual to society when exercising their discretion).

⁵⁵ See *infra* notes 260–267 and accompanying text.

⁵⁶ See Steen et al., *supra* note 42, at 460–61 (finding that "the likelihood of incarceration is virtually certain for both black and white offenders who fit the stereotype of a dangerous drug offender, but in the less-serious categories . . . judges are less likely to incarcerate white offenders than their black counterparts" and interpreting these findings "to mean that decision-makers are more likely to define low-level black offenders as a threat to public safety, and therefore deserving of incarceration, than similarly situated white offenders").

⁵⁷ See *id.* at 461 (explaining "decision makers do not appear to make sharp distinctions between the most 'dangerous' black offenders and most other black offenders. . . . Thus, a principal effect of minority status may be to produce less individualized, more homogenous decision making").

Surprisingly, empirical work analyzing the link between prosecutorial discretion and racial disparities is limited, at least compared to work analyzing judicial behavior and racial disparities in sentencing.⁵⁸ Moreover, the conclusions reached by these studies have often been inconsistent.⁵⁹ Recent studies have focused on prosecutors' initial charging decisions and the importance of charges involving mandatory minimum sentences in ultimately generating racial disparities in sentencing outcomes.⁶⁰ Studies that have examined disparities in charge reductions and dismissals have mostly focused on a specific subset of crimes and have relied on a relatively low number of observations.⁶¹ Although some of these studies find that the race of the defendant has no effect on the exercise of prosecutorial discretion in reducing

⁵⁸ See BESIKI KUTATELADZE ET AL., VERA INST. JUST., DO RACE AND ETHNICITY MATTER IN PROSECUTION? A REVIEW OF EMPIRICAL STUDIES 1 (June 2012), <https://www.vera.org/publications/do-race-and-ethnicity-matter-in-prosecution-a-review-of-empirical-studies> (follow the "PDF" hyperlink) [<https://perma.cc/NXZ7-S9K4>] (explaining that "[r]elative to the attention that police and the courts have received from researchers analyzing disproportionate minority contact with the criminal justice system, there has been little study of prosecution"); Shermer & Johnson, *supra* note 48, at 395 (noting the scant literature in the area); Rehavi & Starr, *supra* note 48, at 1326 (noting that "prior empirical studies of racial and other demographic disparities in sentencing have considered judicial sentencing decision only in isolation from the prosecutorial choices that preceded them"); Wayne S. McKenzie, Dir., Prosecution & Racial Justice Program, Vera Inst. Justice, Racial Disparities in the Criminal Justice System, Testimony Before the House Judiciary Committee on Crime, Terrorism and Homeland Security 6 (Oct. 29, 2009) (transcript available on the House of Representatives Judiciary Committee website) (explaining the Prosecution & Racial Justice Program's mission to collect and analyze data for prosecutors similar to already well-established analysis of other actors in the justice system).

⁵⁹ See KUTATELADZE ET AL., *supra* note 58, at 7 ("While a review of the 34 studies discussed here suggests that defendants' and victims' race affect prosecutorial decisions, the findings are complex and somewhat difficult to interpret. Overall, research finds that the effect of race and ethnicity on prosecutorial decision making is inconsistent, and it is not always blacks or Latinos and Latinas who are treated more punitively.").

⁶⁰ See, e.g., Fischman & Schanzenbach, *supra* note 46, at 757 (finding that racial disparities may be exacerbated by the existence of statutory minimum sentences); Rehavi & Starr, *supra* note 48, at 1335–36, 1344 (finding that 12.4% of black arrestees face an initial charge with a mandatory minimum while 7.5% of the white arrestees do and that prosecutors' decision to bring a charge carrying a mandatory minimum sentence explains more than half of the black-white sentence disparities not explained by other case or defendant characteristics). Some earlier studies did not find these racial disparities in initial charging decisions by prosecutors. See KUTATELADZE ET AL., *supra* note 58, at 7–11 (summarizing existing studies examining racial disparities in prosecutors' initial charging decisions); Jeffrey T. Ulmer et al., *Prosecutorial Discretion and the Imposition of Mandatory Minimum Sentences*, 44 J. RES. CRIME & DELINQ. 427, 440–46 (2007) (finding no differences in prosecutors' decision to bring charges with a mandatory minimum sentence against black and white drug offenders in Pennsylvania).

⁶¹ See KUTATELADZE ET AL., *supra* note 58, at 12–14 (summarizing existing studies examining racial disparities in dismissals and charge reductions); Shermer & Johnson, *supra* note 48, at 400 (describing the methodological limitations of existing studies examining racial disparities in dismissals and charge reductions).

or dismissing charges⁶² or that prosecutorial discretion may be used in a manner favorable to black offenders,⁶³ others conclude that there are racial disparities in the plea-bargaining process disfavoring black defendants.⁶⁴

II. SENTENCING IN WISCONSIN AND DESCRIPTION OF THE DATA

Section A of this Part presents an overview of the legal framework governing the criminal justice process in Wisconsin, focusing on the discretion afforded to district attorneys and judges, followed by a brief description of recent incarceration trends in the state and its prison population.⁶⁵ Sec-

⁶² See, e.g., Celesta A. Albonetti, *Charge Reduction: An Analysis of Prosecutorial Discretion in Burglary and Robbery Cases*, 8 J. QUANTITATIVE CRIMINOLOGY 317, 323, 328 (1992) (analyzing 400 burglary and robbery cases in Jacksonville, Florida, and finding no evidence of racial or gender disparities in prosecutors' decision to reduce initial charges); Rodney Kingsnorth et al., *Adult Sexual Assault: The Role of Racial/Ethnic Composition in Prosecution and Sentencing*, 26 J. CRIM. JUST. 359, 362–365 (1998) (finding no racial disparities in the prosecution and sentencing of cases in a sample of 365 sexual assaults in Sacramento County, California); Shermer & Johnson, *supra* note 48, at 420–21 (finding race of defendant does not affect likelihood of receiving a reduction in charges); EMILY OWENS ET AL., EXAMINING RACIAL DISPARITIES IN CRIMINAL CASE OUTCOMES AMONG INDIGENT DEFENDANTS IN SAN FRANCISCO 9 (2017), <http://sfpublicdefender.org/wp-content/uploads/sites/2/2017/06/quattronefullreport.pdf> [<http://perma.cc/PY5W-2GDM>] (finding that felony charges filed against white defendants represented by the San Francisco Public Defender's Office were more likely to be downgraded (31%) than felony charges filed against black defendants represented by that same office, but that such disparities are not statistically significant after controlling for criminal history and booking charges).

⁶³ See, e.g., Malcolm D. Holmes et al., *Determinants of Charge Reductions and Final Dispositions in Cases of Burglary and Robbery*, 24 J. RES. CRIME & DELINQ. 233, 242–45 (1987) (finding that black defendants accused of burglary and robbery offenses in Delaware County, Pennsylvania are more likely to receive a charge reduction); Cassia Spohn et al., *The Impact of Ethnicity and Gender of Defendants on the Decision to Reject or Dismiss Felony Charges*, 25 CRIMINOLOGY 175, 183–86 (1987) (finding that black-on-white sexual assaults were more likely to be dismissed by prosecutors than white-on-black assaults in a sample of 321 sexual assaults in a Michigan county); John Wooldredge & Amy Thistlethwaite, *Bilevel Disparities in Court Dispositions for Intimate Assault*, 42 CRIMINOLOGY 417, 437–39 (2004) (finding that black offenders are less likely to be charged and fully prosecuted relative to white offenders in a study of 2,948 male arrests for misdemeanor intimate assaults in Cincinnati, Ohio).

⁶⁴ See, e.g., BESIKI KUTATELADZE ET AL., VERA INST. JUSTICE, RACE AND PROSECUTION IN MANHATTAN 6 (July 2014), <https://www.vera.org/publications/race-and-prosecution-in-manhattan> (follow Research Summary “PDF” hyperlink) [<https://perma.cc/8NX7-UVTE>] (analyzing a sample of misdemeanor and felony drug cases in New York City and finding that “[a]lthough some evidence emerged that black defendants were less likely to receive an offer of a lower charge than were similarly situated white defendants, this difference was not statistically significant due to a relatively small sample size”); Besiki Luka Kutateladze et al., *Opening Pandora's Box: How Does Defendant Race Influence Plea Bargaining?*, 33 JUST. Q. 398, 414 (2016) (finding in a sample of misdemeanor marijuana cases in New York County that black defendants are less likely than white defendants to be offered a charge reduction); Spohn et al., *supra* note 63, at 183–86 (finding that Hispanic and black males are more likely to be fully prosecuted in a sample of cases from Los Angeles county).

⁶⁵ See *infra* notes 72–101 and accompanying text.

tion B describes the dataset and the construction of the variables used in the empirical analyses presented later in the Article.⁶⁶

Before proceeding further, it is worth explaining the choice of Wisconsin as the jurisdiction in which to conduct this study. The most important reason is the nature of the available data. Wisconsin courts maintain records that include a comprehensive set of information for each criminal action, allowing us to follow a case from the initial filing of charges, through the dismissal or reduction of charges, and up to adjudication and sentencing.⁶⁷ Similar databases maintained by other states or the federal government are more limited in their scope, often including only cases which resulted in a conviction and containing only sentencing information.⁶⁸ Another important consideration for choosing Wisconsin is its geographical location. Existing evidence suggests that racial disparities in dismissals are greater in southern states.⁶⁹

A. Criminal Justice in Wisconsin

This section provides a brief overview of the criminal justice process in Wisconsin, which informs the construction of the variables and design of the analyses described later. The first subsection describes the criminal justice process in Wisconsin—from the time charges are initially filed in a case by the prosecutor to the point where the judge imposes a sentence.⁷⁰ The second subsection provides general information on Wisconsin's prison population and existing racial disparities in incarceration rates.⁷¹

1. The Criminal Justice Process

Circuit courts have jurisdiction to hear and determine all criminal actions and proceedings in Wisconsin.⁷² With a few exceptions, each county in the state has its own circuit court, with the number of branches (or judges)⁷³ varying from circuit to circuit.⁷⁴ Circuit court judges are elected at the

⁶⁶ See *infra* notes 102–116 and accompanying text.

⁶⁷ For an overview of the data see *infra* notes 112–116 and accompanying text.

⁶⁸ See Shermer & Johnson, *supra* note 48, at 396 (summarizing existing literature on the topic); *id.* at 420 (“The limited empirical attention devoted to prosecutorial discretion is largely the result of data limitations. Whereas data on judicial sentencing decisions are now readily available, records on prosecutorial charging behavior remain elusive.”).

⁶⁹ See Travis W. Franklin, *Community Influence on Prosecutorial Dismissals: A Multilevel Analysis of Case- and County-Level Factors*, 38 J. CRIM. JUST. 693, 699–700 (2010).

⁷⁰ See *infra* notes 72–90 and accompanying text.

⁷¹ See *infra* notes 91–101 and accompanying text.

⁷² See WIS. STAT. § 753.03 (2018).

⁷³ See *id.* § 753.061(1).

⁷⁴ See *id.* § 753.06. Dane County, which has its own circuit court, has seventeen branches (or judges). See *id.* § 753.06(5)(a).

circuit court level for a term of six years.⁷⁵ Similarly, with a few exceptions, each county in the state also encompasses a prosecutorial unit and elects a district attorney who serves a term of four years.⁷⁶

Charging and plea-bargaining decisions are made by the local district attorney's office.⁷⁷ Prosecutorial discretion in this respect is quite broad so long as the charges are supported by probable cause.⁷⁸ Although judges do review plea bargains, in practice few agreements are rejected.⁷⁹ As in other jurisdictions, the minority of cases which are not resolved via a plea agreement are adjudicated at a bench or jury trial.⁸⁰ Once a defendant has been convicted of a particular crime, Wisconsin law provides the presiding judge ample discretion in choosing the appropriate sentence.⁸¹

Wisconsin does not have a set of sentencing guidelines providing a mandatory or advisory sentencing range based on the crime committed by the defendant and the defendant's criminal history.⁸² Also, few crimes carry a mandatory minimum sentence.⁸³ Most crimes are classified into classes of felonies or misdemeanors, with each class carrying its own maximum penalty.⁸⁴ Currently, there are nine classes of felony crimes⁸⁵ and three classes of misdemeanors.⁸⁶ Certain statutory provisions allow for sentencing enhancements which increase the possible maximum sentence a judge may impose,

⁷⁵ See *id.* § 753.01.

⁷⁶ See *id.* § 978.01.

⁷⁷ See Michael M. O'Hear, *Sentencing Policies and Practices in Wisconsin*, OXFORD HANDBOOKS ONLINE 7 (Mar. 2016) (on file with author).

⁷⁸ See *id.*

⁷⁹ See *id.*

⁸⁰ See WIS. STAT. § 972.02 (2018).

⁸¹ See *infra* notes 82–89 and accompanying text.

⁸² See O'Hear, *supra* note 77, at 1; *supra* note 46 and accompanying text.

⁸³ See O'Hear, *supra* note 77, at 8 (noting that few crimes carry a mandatory minimum and that the most important of these are Class A felonies which carry a mandatory life sentence).

⁸⁴ See *id.*; *infra* notes 85–86 and accompanying text.

⁸⁵ The classes of felony crimes are as follows, with maximum sentences in parenthesis: A (Life), B (60 years), C (40 years), D (25 years), E (15 years), F (12.5 years), G (10 years), H (6 years), and I (3.5 years). WIS. STAT. § 939.50. Prior to 2002, there were six classes of felonies: A (Life), B (60 years), BC (30 years), C (15 years), D (10 years), and E (5 years). WIS. STAT. § 939.50 (1999). Three new classes of felony crimes were added as part of a broader reform to the criminal system in 2002. See 2001 WIS. ACT 109 §§ 545–559 (July 26, 2002) (amending WIS. STAT. § 939.50). Prior to this reform, a number of drug offenses, among others, had maximum sentences that were set by statute and not keyed to a class. See, e.g., WIS. STAT. § 961.41 (setting sentence lengths for certain controlled substance offenses).

⁸⁶ The three classes of misdemeanor crimes are the following, with maximum prison sentences in parenthesis: A (9 months), B (90 days), and C (30 days). See WIS. STAT. § 939.51 (2018). More generally, misdemeanors are defined as crimes that are not punishable by imprisonment in a state prison. See *id.* § 939.60.

but these are advisory in nature and not ultimately binding.⁸⁷ If a defendant is convicted of more than one count that carries a potential sentence, the judge may impose sentences for each count to be served concurrently or consecutively.⁸⁸ Except for crimes involving a Class A felony, the sentencing judge also has the discretion to impose probation instead of a sentence carrying an incarceration term.⁸⁹ Sentences imposed by judges in Wisconsin are definitive, as defendants are required to serve the full term of their sentences without the possibility of parole or early release due to good behavior.⁹⁰

2. Prison Population and Incarceration Rates

Historically, Wisconsin had imprisonment rates that were lower on average than those of other states.⁹¹ Nevertheless, starting in the late 1970s, Wisconsin's imprisonment rate began to converge to the national average, a trend that has been linked to increases in the state's violent crimes rates and the associated increase in incarceration rates and length of sentences.⁹² This increase in the prison population has been accompanied by a shift in the composition of inmates from property offenders to violent and sexual offenders.⁹³ These high imprisonment rates go hand in hand with significant racial disparities, as African Americans have consistently been overrepresented in Wisconsin's prison population.⁹⁴ As of 2010, African Americans represented for-

⁸⁷ See O'Hear, *supra* note 77, at 7–8. For example, if a violent felony was committed in a designated school zone, the applicable maximum sentence is increased by five years. See WIS. STAT. § 939.632(2).

⁸⁸ See O'Hear, *supra* note 77, at 7.

⁸⁹ See WIS. STAT. § 939.50(3). A judge choosing to impose probation has wide discretion in structuring a probationary scheme. See O'Hear, *supra* note 77, at 8. The judge may withhold sentencing altogether, or impose a sentence of incarceration and stay it for the duration of probation. See WIS. STAT. § 973.09(1)(a). In cases where sentencing is withheld, a defendant that violates probation requirements has to return to court to be sentenced by a judge. See *Community Corrections—General Information*, WIS. DEP'T CORRS., <https://doc.wi.gov/Pages/AboutDOC/CommunityCorrections/GeneralInformation.aspx#ppes> [<http://perma.cc/HAB4-DJ8V>]. If a sentence was imposed but stayed, a defendant that violates a condition in its probation is automatically incarcerated for the term of the original sentence. *Id.*

⁹⁰ See Michael O'Hear, *Good Conduct Time for Prisoners: Why (and How) Wisconsin Should Provide Credits Toward Early Release*, 98 MARQ. L. REV. 487, 496 (2014); O'Hear, *supra* note 77, at 8. This applies to all felony offenses committed on or after December 31, 1999. See O'Hear, *supra* note 77, at 16. Additionally, although appellate courts review judges' sentencing decisions, the process is not very rigorous and seldom leads to the overturning of a sentence. See Michael O'Hear, *Appellate Review of Sentence Explanations: Learning from the Wisconsin and Federal Experiences*, 93 MARQ. L. REV. 751, 762 (2009); O'Hear, *supra* note 77, at 9–11.

⁹¹ See O'Hear, *supra* note 77, at 2.

⁹² See Michael M. O'Hear, *Mass Incarceration in Three Midwestern States: Origins and Trends*, 47 VAL. U. L. REV. 709, 741 (2013); O'Hear, *supra* note 77, at 2–3.

⁹³ See O'Hear, *supra* note 77, at 6.

⁹⁴ See *id.* at 7.

ty-three percent of the prison population, a figure that dwarfs the group's seven percent share of the total population.⁹⁵ In fact, Wisconsin has one of the country's highest incarceration rates for African American males,⁹⁶ as well as one of the highest race-based differentials in incarceration rates.⁹⁷

These striking racial disparities in imprisonment rates are mostly driven by Milwaukee County, which has a higher imprisonment rate than the other counties in the state, as well as the highest proportion of African Americans.⁹⁸ According to a 2015 report, Milwaukee was home to one-sixth of the state population but accounted for about a quarter of prison admissions.⁹⁹ Such rates coupled with the fact that seventy percent of Wisconsin's African American population lives in Milwaukee County explains a good share of the state's racial disparities in imprisonment rates.¹⁰⁰ Notably, over fifty percent of Milwaukee's black males between thirty and fifty years old are serving, or have at some point served, time in a state prison.¹⁰¹

B. Description of the Data

The first subsection provides an overview of the dataset used to conduct the analyses presented later in the Article.¹⁰² The second subsection describes how the different variables were constructed.¹⁰³

1. Overview of the Database

The data comes from the public records of the Wisconsin Circuit Courts, which are available electronically at the Wisconsin Circuit Court Access website.¹⁰⁴ This site provides the case information entered into the Consolidated Court Automation Programs ("CCAP") case management system by court staff in the Wisconsin Circuit Courts where the files are locat-

⁹⁵ See NELLIS, *supra* note 4, at 16; CHRISTINA D. CARMICHAEL, WIS. LEGISLATIVE FISCAL BUREAU, ADULT CORRECTIONS PROGRAM 12 (2011), http://docs.legis.wisconsin.gov/misc/lfb/informational_papers/january_2011/0057_adult_corrections_program_informational_paper_57.pdf [<https://perma.cc/ADZ5-Y996>].

⁹⁶ See JOHN PAWASARAT & LOIS M. QUINN, UNIV. WIS. MILWAUKEE, WISCONSIN'S MASS INCARCERATION OF AFRICAN AMERICAN MALES: WORKFORCE CHALLENGES FOR 2013, at 8 (2013), <http://www4.uwm.edu/eti/2013/BlackImprisonment.pdf> [<http://perma.cc/BE2N-79BH>].

⁹⁷ See NELLIS, *supra* note 4, at 8.

⁹⁸ See O'Hear, *supra* note 77, at 6.

⁹⁹ See *id.*

¹⁰⁰ See *id.*

¹⁰¹ See Pawasarat & Quinn, *supra* note 96, at 12.

¹⁰² See *infra* notes 104–111 and accompanying text.

¹⁰³ See *infra* notes 112–116 and accompanying text.

¹⁰⁴ WIS. COURT SYS. CIRCUIT COURT ACCESS, <https://wcca.wicourts.gov/index.xsl>.

ed.¹⁰⁵ The focus of this study is those cases labeled as criminal misdemeanors or criminal felonies,¹⁰⁶ which involve offenses committed after December 31, 1999¹⁰⁷ and adjudicated before December 31, 2006.¹⁰⁸

The analyses presented later in the Article restrict the sample to cases filed and adjudicated in Dane County. Focusing on a single county is advantageous to the extent that it helps maintain a number of factors relating to law enforcement and the criminal justice process (such as district attorney office and judges) constant. A natural choice would be Milwaukee County, the largest county of the state by population. Nevertheless, its high incarceration rates and demographical make-up does not make it an ideal candidate as it is not representative of the state.¹⁰⁹ Dane County, which includes the capital city of Madison, is the second most populous county in the state after Milwaukee County¹¹⁰ and has a demographic make-up that reflects that of the state as a whole.¹¹¹ In addition, the coding of different variables in the datasets appeared to be more consistent in Dane County relative to Milwaukee County.

Cases which were transferred to another county or jurisdiction before adjudication or that deal with the extradition of a defendant to another state

¹⁰⁵ *Case Search*, WIS. COURT SYS., <https://www.wicourts.gov/casesearch.htm> [http://perma.cc/L7NE-GGWV]. Some counties started using CCAP during 1991, but Dane county began using the system in January 1995. See *When Wisconsin Counties Began Using CCAP*, WIS. COURT SYS. CIRCUIT COURT ACCESS, <https://wcca.wicourts.gov/countyOnCCAP.xsl> [http://perma.cc/9L9D-T6RC]. Several counties, including Dane, have loaded their historical cases to the system, making them available on the Wisconsin Circuit Court Access system. See *Help*, WIS. COURT SYS. CIRCUIT COURT ACCESS, <https://wcca.wicourts.gov/help.xsl> [http://perma.cc/B3NF-ADRB].

¹⁰⁶ *Frequently Asked Questions*, WIS. COURT SYS. CIRCUIT COURT ACCESS, <https://wcca.wicourts.gov/faq.xsl#Faq15> [http://perma.cc/3BSE-PUJ4] (Frequently Asked Question #15: “Could You Describe What the Different Case Types Mean?”).

¹⁰⁷ This restriction is imposed so that only cases adjudicated under the Truth in Sentencing Law are included. See *supra* note 90 and accompanying text.

¹⁰⁸ The Wisconsin Circuit Court provided all available information in the CCAP system for all cases resolved on or before December 31, 2006.

¹⁰⁹ See *supra* notes 98–101 and accompanying text.

¹¹⁰ As of 2010, Dane county had a population of 488,073 and Milwaukee county had a population of 947,735. See David Egan-Robertson, *Population and Race Data, Wisconsin County Subdivisions (Minor Civil Divisions), Census 2000 and 2010 Comparisons*, WIS. DEP’T ADMIN. (Mar. 2011), https://doa.wi.gov/DIR/Pop_Race_MCD_2000_2010.pdf [http://perma.cc/SM62-Y4TD]. Dane County also has the second largest number of cases in the dataset. Of the 704,190 cases in the dataset involving commissions—on or after January 1, 2000—of felony or misdemeanor offenses, 116,541 were filed in Milwaukee County, while 51,028 were filed in Dane County.

¹¹¹ According to the 2010 census, 86.2% of the Wisconsin population was white. That number is considerably lower in Milwaukee, where only 60.6% of the population was white according to census data. See Egan-Robertson, *supra* note 110. In Dane county, on the other hand, 84.7% of the population was white. See *id.* The other major racial groups in Dane county are Hispanics (5.9% of the population), African Americans (5.2% of the population), and Asians (4.7% of the population). See *id.*

are excluded from the final dataset. Also excluded are cases that involve defendants which are legal persons (such as businesses) or defendants who were found not to be mentally competent. The final dataset contains 48,368 cases. Of these, 17,561 included at least a felony crime as part of the initial charges, while the remaining 30,807 involved misdemeanor and lesser charges.

2. Construction of the Variables

The data made available by the CCAP is quite detailed. One file of the dataset provides demographical information on the defendant—including the defendant's name, gender, race, and date of birth. I used this information to create variables for the defendant's gender,¹¹² age,¹¹³ and race.¹¹⁴ One key variable not directly contained in the dataset is the criminal history of the defendant. Nevertheless, the fact that the data contain the full name and date of birth of the defendant allows us to generate a variable to measure a defendant's criminal history. Using the defendant information dataset together with the judgment disposition dataset¹¹⁵ I was able to calculate the number of times a defendant had been convicted prior to the adjudication of a given case.¹¹⁶

The database also contained detailed information for each individual charge in a case, including the initial crime a defendant was charged with, as well as the crime with which the defendant was ultimately charged. For

¹¹² The variable *Female* is an indicator variable equal to 1 if a defendant's gender is coded in CCAP as female and 0 if the defendant's gender is coded as male.

¹¹³ The variable *Age* is constructed by subtracting the defendant's year of birth from the year in which the case was originally filed. For cases missing a defendant's age, the average age in the sample is imputed.

¹¹⁴ Defendants were divided into three groups based on the race description provided in the CCAP data: (1) white, (2) black, and (3) other. This last group includes Hispanic, Asian and Native American defendants, as well as defendants for whom race information was not available.

¹¹⁵ That dataset contains sentencing information for those cases in which a defendant was convicted of at least one of the charges filed against him or her. Records relating to offenses committed before the year 2000 were also employed to measure the prior criminal record of defendants.

¹¹⁶ Defendants were matched based on first name, last name, and month and year of birth to create a unique identifier. For each case in the dataset, the following two variables were generated: (i) *Prior1*, an indicator variable equal to 1 if the defendant had one prior conviction, and (ii) *Prior2+*, an indicator variable equal to 1 if the defendant had two or more prior convictions. Defendants with no prior convictions are coded with a 0 in both of these indicator variables. This method of calculating this variable is certainly not precise. One concern is that of false positives—if two individuals have the same name and date of birth, then the number of priors for these individuals will be artificially inflated. It is worth noting that the nature of the sample (i.e., just individuals charged with a crime) reduces the likelihood of such false positives occurring. Additionally, for these false positives to bias the results, one would need such false positives to be systematically correlated with the race of the defendant.

each final charge the dataset contained information on the final adjudication of the charge—whether it was dismissed, whether the defendant pled guilty or no contest, or whether the defendant was found guilty or innocent at trial. Another dataset contained the sentencing information for those charges for which defendants were convicted, i.e., whether the defendant was given a jail or prison sentence (and the number of months), whether the defendant was put on probation, or whether the defendant was assessed a monetary penalty.

For each case, I collected information on the initial set of charges: the highest crime class (i.e., the highest possible sentence for all charges), as well as a general count of the number of felony and misdemeanor offenses the defendant was initially charged with. The same information was recorded for the final set of charges for which the defendant was convicted—i.e., the highest crime class, the number of charges by crime class group, as well as a general count of the number of felony and misdemeanor convictions. Finally, I recorded the highest sentence received by the defendant for all charges. I then constructed different outcome and control variables based on these variables. These outcome and control variables are described in more detail in the discussion of the results presented in the next section.

III. RESULTS

Section A of this Part explores racial differences at the sentencing stage, where a judge chooses which penalty to impose given the crimes of which a defendant has been convicted.¹¹⁷ The results are similar to those in the existing literature and confirm the presence of significant disparities in incarceration rates and sentence lengths of black and white defendants. Section B of this Part examines racial disparities during the plea-bargaining process, i.e., the period between the filing of initial charges and a defendant's conviction by guilty plea.¹¹⁸ The results reveal that white defendants are more likely than black defendants to see their initial charges reduced and dropped during this process. Section C sheds further light on the disparities discussed in Section B by discussing racial disparities in the filing of initial charges.¹¹⁹

A. Racial Disparities in Sentencing

I start by analyzing racial disparities at the sentencing stage, that is, at the point where the defendant has been convicted of a given crime and the

¹¹⁷ See *infra* notes 120–151 and accompanying text.

¹¹⁸ See *infra* notes 152–267 and accompanying text.

¹¹⁹ See *infra* notes 268–276 and accompanying text.

judge imposes a sentence according to any applicable statutory guidelines. This stage has been the focus of most previous empirical work analyzing racial disparities in criminal case outcomes.¹²⁰ Table 1 presents summary statistics of sentencing outcomes for those cases in which the defendant was convicted of a crime that carries a possible jail or prison sentence.¹²¹

Table 1. Sentencing Outcomes by Race¹²²

<i>Panel A – All Cases</i>			
		(1)	(2)
	Obs.	Incarceration	Sentence
White	18,282	34.88%	2.84
Black	14,867	51.99%	4.85
<i>Panel B – All Cases with Felony Convictions</i>			
		(1)	(2)
	Obs.	Incarceration	Sentence
White	5,262	36.94%	8.09
Black	4,620	48.74%	12.68
<i>Panel C – All Cases with Misdemeanor Convictions</i>			
		(1)	(2)
	Obs.	Incarceration	Sentence
White	13,020	34.04%	0.72
Black	10,247	53.42%	1.32

As documented in the existing literature, black defendants are significantly more likely to receive a prison sentence than white defendants. The

¹²⁰ See *supra* notes 65–116 and accompanying text.

¹²¹ Cases in which the defendant was acquitted, in which the charges were dropped, or in which the defendant was only convicted of a crime that does not carry a possible sentence, such as forfeitures, are not included in the analyses in this section.

¹²² This Table is permanently available at <http://www.bc.edu/content/dam/bc1/schools/law/pdf/law-review-content/BCLR/59-4/berdejo-graphics.pdf> [<https://perma.cc/ECS5-GP79>]. Note: Panel A includes all cases in which the defendant was convicted of a crime which carries a possible sentence in jail or prison. Panel B includes only those cases in which the defendant was convicted of at least one felony. Panel C includes those cases in which the defendant was convicted of at least one misdemeanor, but of no felonies. Column (1) in each panel reports the average incarceration rate for each race group, while column (2) reports the average highest sentence received by a defendant (in months).

incarceration rate for black defendants is 51.99%, substantially higher than that of white defendants, 34.88%.¹²³ In other words, black defendants are about fifty percent more likely than white defendants to be incarcerated.¹²⁴ Additionally, black defendants receive sentences that are on average two months longer than those received by white defendants (4.85 months versus 2.84 months).¹²⁵ This difference is substantial in relative terms—the sentences received by black defendants are over seventy percent longer than those received by white defendants.¹²⁶

In Panel B and Panel C of Table 1, cases are divided into two groups—those cases in which there was at least one felony conviction (Panel B) and those cases in which defendants were only convicted of misdemeanor crimes (Panel C). Black defendants convicted of at least one felony are 11.8% more likely than white defendants to be incarcerated (48.74% versus 36.94%)¹²⁷ and receive sentences that are on average 4.59 months longer than those received by white defendants (12.68 months versus 8.09 months).¹²⁸ Looking at sentencing in misdemeanor cases reveals relatively greater disparities. In these cases, black defendants are 19.38% more likely than white defendants to be incarcerated (53.42% versus 34.04%)¹²⁹ and receive sentences that are on average 0.60 months longer than those received by white defendants (1.32 months versus 0.72 months).¹³⁰

As discussed earlier, there are several factors that affect judges' sentencing decisions. For example, the type and severity of the crime, the number of concurrent convictions, and the criminal history of the defendant all play a role on sentencing determinations.¹³¹ Other demographic characteristics of defendants—such as age and gender—also appear to play a role in sentencing outcomes.¹³² One concern is that black defendants are more likely than white defendants to exhibit those characteristics and commit

¹²³ See *supra* note 122 and accompanying text (Table 1, panel A, column (1)).

¹²⁴ This is equal to the difference in incarceration rates (17.11% points) divided by the incarceration rate of white defendants (34.88%).

¹²⁵ See *supra* note 122 and accompanying text (Table 1, panel A, column (2)).

¹²⁶ These figures include those cases in which a sentence of zero months was imposed.

¹²⁷ This difference represents 31.94% of the incarceration rate of white defendants.

¹²⁸ That is, black defendants convicted of a felony offense receive sentences that are 56.56% longer than those received by white defendants.

¹²⁹ This difference represents 56.93% of the incarceration rate of white defendants convicted of a misdemeanor offense.

¹³⁰ Although small in magnitude, this difference represents over 80% of the average sentence for white defendants in misdemeanor cases.

¹³¹ See *supra* notes 37–38 and accompanying text. This is a reason why comparing raw sentencing data can be misleading—if black defendants are convicted of more serious crimes than white defendants, for example, then it should not be surprising to find that black defendants are incarcerated more often and receive on average longer sentences.

¹³² See *supra* notes 39–40 and accompanying text.

those types of crimes that correlate with longer sentences.¹³³ To provide a more rigorous analysis of the role of race in sentencing decisions we can estimate the following specification:

$$Sent_i = \beta_1 Black_i + \beta_2 Other_i + \beta_3 X_i + \beta_4 Z_i + \varepsilon_i \quad (1)$$

The outcome of interest, $Sent_i$, is the length of the sentence (in months) associated with case i .¹³⁴ $Black_i$ is an indicator variable equal to 1 if the defendant's race was coded as African-American, while $Other_i$ is an indicator variable equal to 1 if the defendant was coded as a race other than African-American or Caucasian.¹³⁵ The vector \mathbf{X} contains an additional set of defendant controls, including (i) the age of the defendant,¹³⁶ (ii) the defendant's gender,¹³⁷ and (iii) the defendant's prior criminal history.¹³⁸ The vector \mathbf{Z} contains a set of crime and case characteristics, including (i) $Concurrent_i$, which is equal to 1 if the defendant was convicted of an additional crime; (ii) $Trial_i$, a variable equal to 1 if the case was adjudicated by a bench or jury trial,¹³⁹ (iii) $CrimeDesc_{ji}$, a set of indicator variables controlling for the type of crime involved in the defendant's principal conviction charge;¹⁴⁰ (iv) $MaxSent_{ji}$, a set of indicator variables controlling for the maximum statutory sentence for the most severe crime of which the defendant was convicted;¹⁴¹ and (v) $Year_{ji}$, a set of fixed effects for the year in which a case was initially filed. Finally, ε_i is a mean-zero stochastic error term.¹⁴²

¹³³ For example, if black defendants are more likely to be male than white defendants or are on average younger than white defendants, then some of the difference captured in the earlier analyses may be attributed to those "hidden" characteristics.

¹³⁴ Life sentences are coded as 721 months, which is one month longer than the maximum statutory sentence for Class B felonies. WIS. STAT. § 939.50 (2018).

¹³⁵ Thus, in these regressions, white defendants (i.e., Caucasian) are the omitted race group.

¹³⁶ See *supra* notes 39, 113 and accompanying text.

¹³⁷ See *supra* notes 40, 112 and accompanying text.

¹³⁸ See *supra* notes 37, 116 and accompanying text.

¹³⁹ Cases adjudicated via trial tend to be characterized by more severe punishment. See Stefensmeier & Demuth, *Outcomes*, *supra* note 35, at 716 (noting that trials are associated with higher probability of incarceration and longer sentence length compared to guilty pleas).

¹⁴⁰ These are based on the corresponding chapter of the Wisconsin criminal code that covers the principal conviction offense. Crime categories with less than fifty observations are grouped together. There are fifty-one different crime category groups used in the analyses involving sentencing.

¹⁴¹ All results presented in this Article are qualitatively similar if one uses the applicable maximum statutory sentence as a linear control instead of as a fixed effect.

¹⁴² Unless otherwise noted, heteroskedasticity-robust standard errors are used in calculating the statistical significance of coefficients of all regressions estimated in this Article. These adjusted standard errors account for the possibility that the variance of unobservable variables differs across segments of the sample. See JEFFREY M. WOOLDRIDGE, *INTRODUCTORY ECONOMETRICS: A MODERN APPROACH* 264–71 (4th ed. 2006).

The results for this baseline specification is presented in column (1) of Table 2. The coefficient on the indicator variable *Black* measures the difference in the length of sentences received by black and white defendants after controlling for the other variables included in the regression. Black defendants receive on average sentences that are 1.23 months longer than white defendants, a difference that is statistically significant and represents 32.6% of the average sentence in this sample of cases (3.77 months).¹⁴³

Table 2. Explaining Sentencing Outcomes¹⁴⁴

	(1)	(2)	(3)	(4)	(5)	(6)
	<i>All</i>		<i>Felonies</i>		<i>Misdemeanors</i>	
	<i>Sent.</i>	<i>Incarc.</i>	<i>Sent.</i>	<i>Incarc.</i>	<i>Sent.</i>	<i>Incarc.</i>
Black	1.232***	0.151***	3.186***	0.102**	0.443***	0.171***
	[0.178]	[0.006]	[0.601]	[0.011]	[0.031]	[0.007]
Other	0.577	0.085***	1.808	0.109***	0.095*	0.078***
	[0.512]	[0.013]	[1.921]	[0.025]	[0.057]	[0.015]
Female	-1.014***	0.126***	-2.795***	0.184***	0.379***	0.110***
	[0.171]	[0.008]	[0.613]	[0.015]	[0.034]	[0.009]
Age	0.053***	0.003***	0.199***	0.004***	0.009***	0.003***
	[0.010]	[0.000]	[0.034]	[0.001]	[0.001]	[0.000]
Prior (1)	0.880***	0.092***	3.037***	0.085***	0.174***	0.093***
	[0.283]	[0.009]	[1.053]	[0.018]	[0.025]	[0.010]
Prior (2+)	2.563***	0.254***	6.623***	0.251***	1.020***	0.257***
	[0.247]	[0.006]	[0.897]	[0.013]	[0.030]	[0.007]
ConcCov	1.700***	0.012*	11.130***	0.185***	-0.497	-0.097
	[0.244]	[0.007]	[1.193]	[0.015]	[1.081]	[0.318]

¹⁴³ See *infra* note 144 and accompanying text (Table 2, column (1)).

¹⁴⁴ This Table is permanently available at <http://www.bc.edu/content/dam/bc1/schools/law/pdf/law-review-content/BCLR/59-4/berdejo-graphics.pdf> [<https://perma.cc/ECS5-GP79>]. Note: Robust standard errors in brackets (* significant at 10%; ** significant at 5%; *** significant at 1%). The outcome variable in columns (1), (3) and (5) is the length (in months) of the highest sentence (capped at 720 months) received by the defendant. The outcome variable in columns (2), (4) and (6) is an indicator variable equal to 1 if the defendant received a prison or jail sentence. Columns (1), (3) and (5) present the results of ordinary least squares specifications, while columns (2), (4) and (6) present the marginal effects from a probit model. For a description of the explanatory variables of interest see *infra* note 304 and accompanying text (Appendix 1: Table 1). All regressions include a set of crime class fixed effects (i.e., maximum statutory sentence), a set of crime type fixed effects and a set of year fixed effects.

Trial	41.480*** [5.938]	0.219*** [0.033]	57.440*** [8.538]	0.287*** [0.039]	1.573*** [0.475]	0.067 [0.060]
Mean Outcomes	3.774	0.424	10.302	0.419	0.975	0.426
Obs.	35,362	35,150	10,615	10,601	24,747	24,536
R-squared	0.438		0.453		0.092	

Columns (3) and (5) of Table 2 presents the same analyses for those cases involving a felony conviction and those cases involving misdemeanor convictions only, respectively. For both type of cases, the coefficient on the black indicator variable is relatively large and statistically significant at the 1% level. Black defendants convicted of at least one felony offense receive prison sentences that are 3.19 months higher than those received by white defendants, a difference that represents 30.9% of the average felony sentence in the sample.¹⁴⁵ Although the difference in sentences received by black and white defendants in cases involving misdemeanor convictions, 0.44 months, is small in magnitude, it represents 45.4% of the average sentence in the misdemeanors sample.¹⁴⁶

The rate of incarceration, or, the percentage of cases in which a defendant is sentenced to prison or jail, is another informative outcome variable. Because this outcome is a binary variable (i.e., equal to 1 if the defendant was incarcerated and 0 if the defendant was not), we can estimate a probit model using the same explanatory variables included in specification (1) above.¹⁴⁷ Columns (2), (4), and (6) of Table 2 present the estimates of the marginal effects for the explanatory variables in these probit models.¹⁴⁸ Black defendants are generally 15.1% more likely than white defendants to be incarcerated, a difference that represents 35.6% of the average incarceration rate in the data.¹⁴⁹ Looking separately at felony and misdemeanor cases

¹⁴⁵ See *supra* note 144 and accompanying text (Table 2, column (3)).

¹⁴⁶ See *supra* note 144 and accompanying text (Table 2, column (5)).

¹⁴⁷ For a discussion of the probit model and other models for binary outcome variables see ROBERT M. LAWLESS ET AL., *EMPIRICAL METHODS IN THE LAW* 298–304 (2d ed. 2016); WOOLDRIDGE, *supra* note 142, at 580–87.

¹⁴⁸ These marginal effects indicate how the probability of the outcome variable (i.e., likelihood of incarceration) varies when the value of a given explanatory variable changes, holding all other variables constant. See WOOLDRIDGE, *supra* note 142 at, 585. For example, the marginal effects of the indicator variable *Black* in this probit model tells us how the probability of the defendant being incarcerated changes if we were to switch the race of the defendant from white to black. Estimating these models as linear probability models using ordinary least squares regressions with heteroskedasticity-robust standard errors yields similar results.

¹⁴⁹ See *supra* note 144 and accompanying text (Table 2, column (2)).

reveals similar disparities in incarceration rates, although the differences are greater in the latter. In cases involving felony convictions, black defendants are 10.2% more likely than white defendants to be incarcerated, a difference that represents 24.3% of the average incarceration rate for felonies.¹⁵⁰ In misdemeanor cases, the rate of incarceration for black defendants is 17.1% higher than that of white defendants, a difference representing 40.1% of the average incarceration rate for misdemeanor convictions.¹⁵¹

B. Racial Disparities in Plea-Bargaining

The results presented above show that black defendants are incarcerated at higher rates than white defendants and that the former also receive longer prison and jail sentences.¹⁵² The decision whether to impose a prison or jail sentence, as well as the length of a given sentence, is largely at the discretion of the judge.¹⁵³ It is not surprising then that most of the literature exploring racial disparities in sentencing have focused on judges' decision making.¹⁵⁴ Nevertheless, the sentencing hearing is the last stage of a process in which many other actors in the criminal justice process make decisions that have a substantial impact on a defendant's ultimate sentencing outcome. For example, police officers choose whether or not to arrest a suspect.¹⁵⁵ Prosecutors decide which charges (if any) to initially file against a defendant and whether to subsequently drop or amend a charge, often as part of a plea-bargaining agreement negotiated with the defendant's counsel.¹⁵⁶ The judge sitting at the end of this process takes the choices made by these actors—for example, the crime of conviction agreed upon in a plea bargain—as a given when determining the appropriate sentence.¹⁵⁷

Understanding the role played by a defendant's race in these earlier phases is critical if we wish to identify the various factors driving racial disparities in the criminal justice process and design effective reforms to reduce these disparities. Sentencing guidelines, which restrict the discretion of the judge in imposing a sentence, are an example of such a policy proposal that was adopted by a number of states as well as by the federal government.¹⁵⁸ More recent efforts have focused on eliminating mandatory minimum sen-

¹⁵⁰ See *supra* note 144 and accompanying text (Table 2, column (4)).

¹⁵¹ See *supra* note 144 and accompanying text (Table 2, column (6)).

¹⁵² See *supra* notes 123–126 and accompanying text.

¹⁵³ See *supra* notes 82–89 and accompanying text.

¹⁵⁴ See *supra* note 58 and accompanying text.

¹⁵⁵ See *supra* notes 1–2 and accompanying text.

¹⁵⁶ See *supra* notes 48–51, 77–79 and accompanying text.

¹⁵⁷ See *supra* notes 46, 82–89 and accompanying text.

¹⁵⁸ See *supra* notes 46 and accompanying text.

tences.¹⁵⁹ Having a better understanding of the sources of racial disparities throughout the criminal justice process provides a more complete framework to assess existing reforms and try to think of different ways to address this problem more effectively. Subsection one explores racial disparities in charge reduction and the severity of the crime to which defendants plead guilty.¹⁶⁰ Subsection two analyzes racial disparities in the in charge reduction, while taking into account the defendants' criminal histories.¹⁶¹ Subsection three discusses racial disparities in charge reduction, taking into account various defendant characteristics and crime characteristics.¹⁶² Subsection four examines the effect of prosecutor and defense counsel on plea-bargaining outcomes.¹⁶³ Subsection five explores the possibility that prosecutors use race as a proxy for criminality when making decisions in plea-bargaining.¹⁶⁴

1. Charge Reductions and Crime Severity

One way to measure disparities in the process leading to the sentencing stage is to compare the rates at which different defendants plead guilty to the initial principal charge, or conversely, the rates at which different defendants end up pleading guilty to a reduced charge.¹⁶⁵ Such charge reduction is one of the most important outcomes in plea-bargaining, as sentence length is often determined by the severity of the crime of which the defendant is ultimately convicted.¹⁶⁶ The analyses in this section focuses on those cases in which a defendant was initially charged with a crime that carries a potential jail or prison sentence (regardless of whether the defendant was convicted of the crime or eventually received a jail or prison sentence). To better capture the effect of plea-bargaining, the analyses in this part also exclude cases which were adjudicated in a trial, cases in which all charges were dismissed before the defendant's initial appearance, and cases

¹⁵⁹ See Rehavi & Starr, *supra* note 48, at 1349–51; Douglas A. Berman & Harlan Protass, *A Saner Approach to Sentencing*, WALL ST. J. (May 7, 2013, 8:20 PM), <https://www.wsj.com/articles/SB10001424127887324266904578462770395465286> [<https://perma.cc/EK8K-CGF2>]. Existing evidence suggests that the existence of statutory minimum sentences contributes to racial disparities. See *supra* note 60 and accompanying text.

¹⁶⁰ See *infra* notes 165–195 and accompanying text.

¹⁶¹ See *infra* notes 197–209 and accompanying text.

¹⁶² See *infra* notes 210–230 and accompanying text.

¹⁶³ See *infra* notes 232–259 and accompanying text.

¹⁶⁴ See *infra* notes 260–267 and accompanying text.

¹⁶⁵ This follows Shermer and Johnson who define their charge reduction outcome as a reduction in the statutory maximum between the filing offense and the offense of conviction. See Shermer & Johnson, *supra* note 48, at 15. Following Shermer and Johnson, for cases involving multiple charges and concurrent sentences, the statutory maximum for the most serious charge (i.e., that with the highest statutory maximum) is used. *Id.*

¹⁶⁶ See Wright & Engen, *supra* note 49, at 9.

in which the highest charge was dismissed by the court by the defendant's motion or on its own.¹⁶⁷

Generally, white defendants see their top charge dropped or reduced in 45.4% of the cases, while the charge reduction rate for black defendants is considerably lower, 35.98%.¹⁶⁸ That is, white defendants are over twenty-five percent more likely than black defendants to see their top charge dropped or reduced than black defendants.¹⁶⁹ The analyses that follow explore racial disparities in charge reduction separately for different crimes based on their severity.¹⁷⁰ Subsection (a) discusses cases in which the initial charges are misdemeanors.¹⁷¹ Subsection (b) discusses cases in which the initial charges were felonies.¹⁷²

a. Misdemeanor Offenses

The racial disparities in charge reduction rates identified above were mainly driven by cases in which a misdemeanor crime was the top charge. In this set of cases, white defendants were 45.1% more likely than black defendants to see their top charge dropped or reduced.¹⁷³ Such charge reductions at the misdemeanor level can be especially valuable to a defendant to the extent that these may eliminate the possibility of a misdemeanor conviction (thus precluding the possibility of incarceration) either by the dismissal of all charges or their reduction to a lesser offense that does not carry a prison sentence (such as a forfeiture).¹⁷⁴ To analyze differences in this particular outcome, we can construct a variable that measures whether the charges that carry a potential prison or jail sentence are dismissed, dropped or reduced to a charge that does not car-

¹⁶⁷ A total of 725 cases fall into one of these categories.

¹⁶⁸ In these analyses, there are 26,246 cases involving white defendants and 18,167 cases involving black defendants. Of the remaining 3,188 cases, 2,086 involve Hispanic defendants and 1,102 involve defendants of other races or for which race information was unavailable. The charge reduction rates for these two groups are 45.11% and 44.19%, respectively.

¹⁶⁹ This relative difference is calculated by dividing the difference in charge reduction rates between white and black defendants (9.42% points) by the charge reduction rates of black defendants (35.98% points), which yields 26.18%.

¹⁷⁰ As in the discussion of sentencing disparities, these initial analyses explore differences in raw averages. Similar analyses controlling for a variety of factors are discussed later. *See infra* notes 210–230 and accompanying text.

¹⁷¹ *See infra* notes 173–186 and accompanying text.

¹⁷² *See infra* notes 187–195 and accompanying text.

¹⁷³ *See infra* note 176 and accompanying text (Table 3, panel A, column (1)). The corresponding charge reduction rates are 44.82% for white defendants and 30.89% for black defendants, which yields a difference of 13.93%.

¹⁷⁴ For instance, of the 12,997 cases in the database in which a defendant was convicted of a crime that carries no sentence or in which the defendant was acquitted, 64.27% involve white defendants, while only 27.77% involved black defendants.

ry a potential prison or jail sentence. Using this outcome variable reveals a slightly greater disparity—white defendants are 74.72% more likely than black defendants to see all misdemeanor charges carrying a potential imprisonment sentence dropped, dismissed or amended to lesser charges.¹⁷⁵

Table 3. Pre-Sentencing Outcomes & Crime Severity¹⁷⁶

<i>Panel A – All Cases</i>				
	(1)	(2)	(3)	(4)
	<i>Misdemeanors</i>		<i>Felonies</i>	
	Top Charge Dropped or Amended	Charges with Sentences Dropped or Dismissed	Top Charge Dropped or Amended	Felony Charges Dropped or Dismissed
White	44.82%	36.97%	46.53%	41.71%
Black	30.89%	21.16%	43.9%	36.41%

<i>Panel B – Felony Cases by Severity</i>				
	(1)	(2)	(3)	(4)
	<i>Top Charge 5 Years or Less</i>		<i>Top Charge More Than 5 Years</i>	
	Top Charge Dropped or Amended	Felony Charges Dropped or Dismissed	Top Charge Dropped or Amended	Felony Charges Dropped or Dismissed

¹⁷⁵ See *infra* note 176 and accompanying text (Table 3, panel A, column (2)). The corresponding outcomes are 36.97% for white defendants and 21.16% for black defendants, a difference of 15.81%.

¹⁷⁶ This Table is permanently available at <http://www.bc.edu/content/dam/bc1/schools/law/pdf/law-review-content/BCLR/59-4/berdejo-graphics.pdf> [<https://perma.cc/ECS5-GP79>]. **Note:** Columns (1) and (3) of both panels present the percentage of cases in which the initial top charge was dropped, amended to a lower charge or dismissed. Column (2) in Panel A presents the percentage of cases in which all charges carrying a potential sentence were dropped, amended to a charge carrying no sentence, or dismissed. Column (2) of Panel B and column (4) in both panels presents the percentage of cases in which all initial felony charges were dropped, amended to misdemeanor charges or dismissed. Columns (1) and (2) of Panel A include all cases in which the top initial charge was a misdemeanor. Columns (3) and (4) of Panel A include all the cases in which the top initial charge was a felony. Columns (1) and (2) of Panel B include felony cases in which the top charge carried a potential sentence of 5 years or less, while columns (3) and (4) include felony cases in which the top charge carried a potential sentence longer than 5 years.

White	49.83%	49.63%	45.35%	38.9%
Black	39.87%	39.55%	44.99%	35.57%

The impact of a misdemeanor conviction on a defendant's life should not be understated. Although certainly less severe than felony convictions, misdemeanor convictions can carry major consequences for individuals. For one, a defendant can be incarcerated, even if it is not for a long period of time.¹⁷⁷ Recall that not only are black defendants originally charged with misdemeanors more likely to be convicted of a misdemeanor than white defendants,¹⁷⁸ but black defendants convicted of a misdemeanor are more likely to be punished by incarceration than white defendants convicted of a misdemeanor.¹⁷⁹ Even defendants receiving a fine or probation as punishment for their misdemeanor convictions are likely to be eventually imprisoned if they are unable to pay their fines or if they violate a condition of their probation.¹⁸⁰ Misdemeanor convictions can also affect a person's future interaction with the criminal justice process and other public institutions. A misdemeanor conviction becomes part of the defendant's criminal history and can be considered by a judge in a future case when determining bail and sentencing.¹⁸¹ Additionally, there can also be collateral conse-

¹⁷⁷ In this dataset those incarcerated following a misdemeanor conviction receive sentences that are on average 2.31 months long. This average is 2.47 months for black defendants and 2.13 for white defendants. If we include cases with zero sentences, the average incarceration period for the entire sample is 0.97 months. For black defendants, the average incarceration length in cases involving misdemeanor convictions (including zero sentences) is 1.32 months, while for white defendants it is 0.72 months. See *supra* note 122 and accompanying text (Table 1, panel C, column (2)).

¹⁷⁸ See *supra* notes 173–174 and accompanying text.

¹⁷⁹ See *supra* notes 129–130 and accompanying text. Additionally, black defendants convicted of misdemeanors receive longer sentences than white defendants. See *supra* note 177.

¹⁸⁰ See Alexandra Natapoff, *Misdemeanor Decriminalization*, 68 VAND. L. REV. 1055, 1081–82 (2015) [hereinafter Natapoff, *Decriminalization*]; see also KAREN DOLAN & JODI L. CARR, INST. POL'Y STUD., THE POOR GET PRISON: THE ALARMING SPREAD OF THE CRIMINALIZATION OF POVERTY 11 (Mar. 2015), <https://www.ips-dc.org/wp-content/uploads/2015/03/IPS-The-Poor-Get-Prison-Final.pdf> [<http://perma.cc/UGY8-4M7G>] (noting that in many jurisdictions, low-income individuals are “facing harsher outcomes linked to their inability to pay fines,” including incarceration); Lisa Riordan Seville & Hannah Rappleye, *Sentenced to Debt: Some Tossed in Prison over Unpaid Fines*, NBC NEWS (May 27, 2013, 3:43 AM), <https://www.nbcnews.com/feature/in-plain-sight/sentenced-debt-some-tossed-prison-over-unpaid-fines-v18380470> [<http://perma.cc/5QXJ-UDVP>] (discussing a rising trend involving local governments imprisoning individuals for failure to pay fines); Joseph Shapiro, *Jail Time for Unpaid Court Fines and Fees Can Create Cycle of Poverty*, NAT'L PUB. RADIO (Feb. 9, 2015, 5:38 PM), <https://www.npr.org/sections/codeswitch/2015/02/09/384968360/jail-time-for-unpaid-court-fines-and-fees-can-create-cycle-of-poverty> [<http://perma.cc/3DRM-T22S>] (providing an example of an individual that was incarcerated for being unable to pay a fine).

¹⁸¹ Irene Oritseweyinmi Joe, *Rethinking Misdemeanor Neglect*, 64 UCLA L. REV. 738, 758 (2017).

quences for a defendant convicted of a misdemeanor offense, such as loss of eligibility for student loan assistance or public housing.¹⁸²

Even if the penalties (and the associated disparities) are small in magnitude on a case-by-case basis, in the aggregate they can be quite substantial. Misdemeanors comprise the vast majority of criminal cases and for most individuals represent the first point of contact with the criminal justice process.¹⁸³ Despite (and perhaps due to) their sheer volume, the criminal justice system provides fewer protections for defendants in misdemeanor cases than felony cases.¹⁸⁴ This creates a system with lower evidentiary standards, prone to higher rates of wrongful convictions and where appellate review and scrutiny is limited.¹⁸⁵ One commentator argues it is in these misdemeanor cases where black individuals begin to be labeled as criminals.¹⁸⁶

b. Felony Offenses

In cases in which the defendant received at least one initial felony charge, white defendants received charge reductions 5.99% more often than black defendants.¹⁸⁷ Charge reductions at the felony level can be valuable to defendants not just because of the corresponding reduction in the maximum possible sentence they may receive later in the process, but also because of the possibility of having felony charges reduced to misdemeanor charges.¹⁸⁸ To capture differences in this specific outcome, we can calculate the rate at

¹⁸² See *id.* at 763–66.

¹⁸³ See Natapoff, *Decriminalization*, *supra* note 180, at 1063 (noting that misdemeanors comprise “around eighty percent of most state dockets” and that the “misdemeanor process is the gateway to the criminal system”).

¹⁸⁴ See Alexandra Natapoff, *Misdemeanors*, 85 S. CAL. L. REV. 1313, 1315 (2012) [hereinafter Natapoff, *Misdemeanors*] (explaining that processes used for misdemeanor cases, likely due to their routine and ubiquitous nature, typically function with fewer due process protections than felony cases).

¹⁸⁵ See *id.* at 1317 (“[T]he lack of procedural integrity in petty offense processing generates wrongful convictions.”); Natapoff, *Decriminalization*, *supra* note 180, at 1063–64 (“Unlike its felony counterpart, the misdemeanor arena is severely underregulated, informal, and sloppy.”); Joe, *supra* note 181, at 761 (“Misdemeanor convictions also receive less rigorous appellate review than felony convictions . . .”).

¹⁸⁶ See Natapoff, *Misdemeanors*, *supra* note 184, at 1368 (arguing misdemeanors generate “high-volume convictions of questionable evidentiary validity,” primarily against young black men, which then label those convicted as criminals in any future interaction with the criminal justice process).

¹⁸⁷ See *supra* note 176 and accompanying text (Table 3, panel A, column (3)). White defendants in felony cases receive a charge reduction in 46.53% of the cases, which is 2.63% higher than the charge reduction rate for black defendants, 43.9%.

¹⁸⁸ See Wright & Engen, *supra* note 49, at 9 (noting that the reduction of felony charges to misdemeanors is especially consequential because it reduces punishment and offender’s criminal history).

which defendants see all their felony charges dropped, dismissed or amended to a misdemeanor charge.¹⁸⁹ Examining this outcome variable yields similar results, though the disparities are a bit greater—white defendants see their felony charges dropped or reduced into a misdemeanor charge 14.56% more often than black defendants.¹⁹⁰

Felony crimes as a class include a very diverse group of offenses. Some felonies are associated with penalties of just over a year in prison, whereas others carry potential sentences of up to sixty years or even life imprisonment. It is possible that racial disparities in charge reductions in felony cases may differ depending on the severity of the crime. The fact that racial disparities in overall reduction rates are lower than racial disparities in the rate at which defendants see their felony charges reduced to misdemeanor charges suggests that there might be such difference in charge reduction rates within classes of felonies—i.e., that white defendants are more likely to be treated more favorably than black defendants in cases that involve low-level felonies, those “nearer” to the misdemeanor level. To explore these differences more closely, we can divide felony cases into two groups according to the severity of the crime involved—whether the maximum statutory sentence corresponding to the principal charge is (i) greater than 5 years or (ii) 5 years or lower.¹⁹¹

In cases where defendants were initially charged with a less severe felony offense, white defendants received a charge reduction 49.83% of the time whereas black defendants received a charge reduction 39.87% of the time.¹⁹² The difference in charge reduction rates between white and black defendants, 9.96%, represents 24.98% of the charge reduction for black defendants.¹⁹³ On the other hand, there are no differences in charge reduction rates between white and black defendants in cases involving more serious initial felony charges. In this subset of cases, white defendants received a charge reduction 45.35% of the time, whereas black defendants did so

¹⁸⁹ This metric only takes into account cases in which at least one of the original charges involved a felony crime.

¹⁹⁰ See *supra* note 176 and accompanying text (Table 3, panel A, column (4)). The corresponding outcomes are 41.71% for white defendants and 36.41% for black defendants, a difference of 5.3%.

¹⁹¹ This threshold is based on the maximum statutory sentence for the lowest felony class in effect during the earlier years of the dataset. See *supra* note 85 and accompanying text.

¹⁹² See *supra* note 176 and accompanying text (Table 3, panel B, column (1)).

¹⁹³ As a result, white defendants are 25.49% more likely than black defendants to see their initial felony charges dropped to misdemeanor (or even lesser) charges. See *supra* note 176 and accompanying text (Table 3, panel B, column (2)). White defendants see their felony charges dropped to a misdemeanor, or entirely dropped, 49.63% of the time. For black defendants, this happened 39.55% of the time, a difference of 10.08%.

44.99% of the time, a negligible and statistically insignificant difference.¹⁹⁴ Figure 1 presents a graphical illustration of the relationship between racial disparities in charge reduction rates and the severity of the top initial charge. The role of the severity of the offense in mediating plea-bargaining disparities is examined later in the Article.¹⁹⁵

Figure 1. Relative Disparities in Charge Reduction by Severity of Crime¹⁹⁶

2. Charge Reductions and Defendant's Criminal History

Along similar lines, we can divide cases according to the other factor that, together with the severity of the crime, is often determinative of the sentence received by a defendant—the defendant's criminal history. In the analyses that follow we measure the defendant's criminal history by the number of prior convictions, or more specifically, whether or not a defendant had a prior conviction.¹⁹⁷ Dividing the sample along this dimension reveals striking differences in plea-bargaining outcomes between black and white defendants in cases involving both misdemeanor and felony charges.

¹⁹⁴ See *supra* note 176 and accompanying text (Table 3, panel B, column (3)). The *p*-value from a two-tailed test that the charge reduction for black and white defendants is equal is 0.6613. White defendants see their felony charges dropped to a misdemeanor, or entirely dropped, 38.9% of the time. For black defendants, this happened 35.57% of the time, a difference of 3.33%. See *supra* note 176 and accompanying text (Table 3, panel B, column (4)).

¹⁹⁵ See *infra* notes 260–267 and accompanying text.

¹⁹⁶ This Figure is permanently available at <http://www.bc.edu/content/dam/bc1/schools/law/pdf/law-review-content/BCLR/59-4/berdejo-graphics.pdf> [<https://perma.cc/ECS5-GP79>].

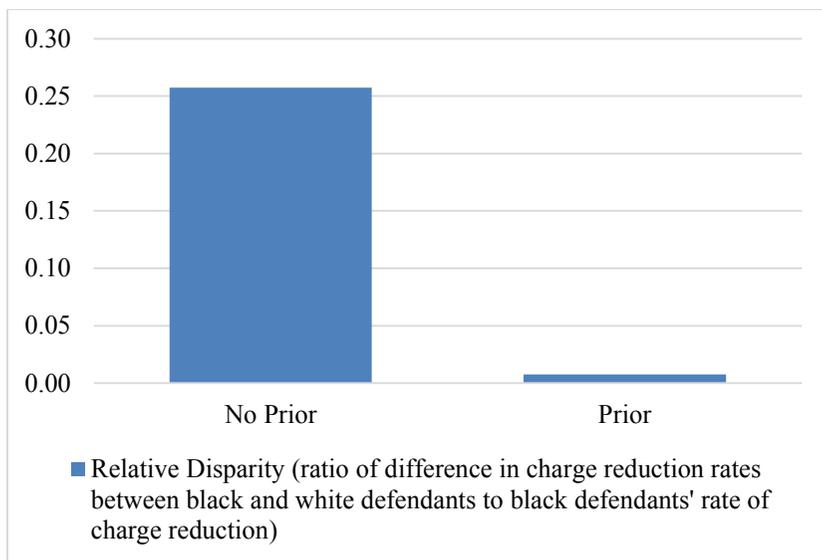
¹⁹⁷ See *supra* note 116 and accompanying text.

White defendants with no prior convictions receive charge reductions in 63.91% of the cases, 13.25% higher than the rate of charge reductions for black defendants with no prior convictions, 50.66%.¹⁹⁸ In other words, white defendants with no prior convictions are over twenty-five percent more likely than black defendants to receive a charge reduction. On the other hand, the charge reduction rates for white and black defendants with at least one prior conviction are nearly identical—30.3% and 30%, respectively.¹⁹⁹ Figure 2 presents a graphical illustration of this relationship between racial disparities in charge reduction rates and defendants' criminal histories.

¹⁹⁸ This difference in charge reduction rates between white and black defendants with no prior convictions is statistically significant at the 1% level.

¹⁹⁹ This difference in charge reduction rates between white and black defendants with prior convictions is not statistically significant at conventional levels (the *p*-value from a two-tailed test that the charge reduction for black and white defendants with prior conviction is equal is 0.6740).

Figure 2. Relative Racial Disparities in Charge Reduction by Defendant's Criminal History²⁰⁰



As shown in Table 4, this pattern is consistent across both felonies and misdemeanors. White defendants charged with misdemeanors who have no prior criminal history are 33.06% more likely than similarly situated black defendant to see their top charges dropped or reduced.²⁰¹ As a result, these white defendants are 46.27% more likely than black defendants to have all misdemeanor charges carrying a potential sentence dropped or reduced to charges that carry no potential imprisonment.²⁰² Differences in charge reduction rates between white and black defendants in misdemeanor cases are substantially smaller when we only consider defendants who have at least one prior conviction. In these cases, 26.51% of white defendants receive a charge reduction, whereas black defendants do only 23.15% of the time.²⁰³

²⁰⁰ This Figure is permanently available at <http://www.bc.edu/content/dam/bc1/schools/law/pdf/law-review-content/BCLR/59-4/berdejo-graphics.pdf> [<https://perma.cc/ECS5-GP79>].

²⁰¹ See *infra* note 204 and accompanying text (Table 4, panel A, column (1)). In this subset of cases white defendants see their top charges reduced 63.99% of the time, while black defendants see their top charges dropped 48.09% of the time. The difference between the two groups—15.9%—is statistically significant at the 1% level.

²⁰² See *infra* note 204 and accompanying text (Table 4, panel A, column (2)). White defendants achieve this plea-bargaining outcome 57.6% of the time, while black defendants do so 39.38% of the time. The difference between the two groups—18.22%—is statistically significant at the 1% level.

²⁰³ See *infra* note 204 and accompanying text (Table 4, panel A, column (3)). Additionally, black and white defendants see their misdemeanor charges dropped or reduced to charges carrying

Table 4. Pre-Sentencing Outcomes & Criminal History²⁰⁴

<i>Panel A – Misdemeanor Cases</i>				
	(1)	(2)	(3)	(4)
	<i>No Prior Convictions</i>		<i>Prior Convictions</i>	
	Top Charge Dropped or Amended	Charges with Sentences Dropped or Dismissed	Top Charge Dropped or Amended	Charges with Sentences Dropped or Dismissed
White	63.99%	57.60%	26.51%	16.51%
Black	48.09%	39.38%	23.15%	12.96%

<i>Panel B – Felony Cases</i>				
	(1)	(2)	(3)	(4)
	<i>No Prior Convictions</i>		<i>Prior Convictions</i>	
	Top Charge Dropped or Amended	Felony Charges Dropped or Dismissed	Top Charge Dropped or Amended	Felony Charges Dropped or Dismissed
White	63.67%	58.96%	36.36%	31.47%
Black	55.47%	48.33%	39.89%	31.29%

White defendants with no prior convictions see their top felony charges reduced 63.67% of the time, whereas black defendants do so 55.47% of time.²⁰⁵ Similarly, white defendants see all their felony charges dropped to a misdemeanor or lesser charge (or dropped entirely) in 59.96% of the cases, whereas for black defendants with no prior criminal history this favorable

no potential imprisonment at similar rates, 12.96% and 16.51%, respectively. See *infra* note 204 and accompanying text (Table 4, panel A, column (4)).

²⁰⁴ This Table is permanently available at <http://www.bc.edu/content/dam/bc1/schools/law/pdf/law-review-content/BCLR/59-4/berdejo-graphics.pdf> [https://perma.cc/ECS5-GP79]. Note: Columns (1) and (3) of all panels present the percentage of cases in which the initial top charge was dropped, amended to a lower charge or dismissed. Columns (2) and (4) in Panel A present the percentage of cases in which all charges carrying a potential sentence were dropped, amended to charges carrying no sentence, or dismissed. Columns (2) and (4) in Panel B present the percentage of cases in which all initial felony charges were dropped, amended to misdemeanor charges or dismissed. Panel A includes all cases in which the top charge was a misdemeanor, while Panel B includes all cases in which the top charge was a felony. Columns (1) and (2) in each panel restrict the sample to cases in which the defendant had no prior convictions, while columns (3) and (4) restrict the sample to cases in which the defendant had at least a prior conviction.

²⁰⁵ See *supra* note 204 and accompanying text (Table 4, panel B, column (1)). This difference of 8.2% represents 14.78% of the charge reduction rate for black defendants and is statistically significant at the 1% level.

outcome occurs 48.33% of the time.²⁰⁶ The results are entirely different if we consider those defendants with a prior criminal history. In this subset of cases, black defendants are marginally more likely than white defendants to see their top felony charges reduced²⁰⁷ and see their felony charges dropped to a misdemeanor charge (or dropped entirely).²⁰⁸ The role of defendants' criminal histories in mediating plea-bargaining disparities is examined later in the Article.²⁰⁹

3. Controlling for Defendant and Crime Characteristics

The analyses of plea-bargaining outcomes presented thus far have centered on the comparison of raw averages across black and white defendants without controlling for various case and defendant characteristics that may play a role in determining plea-bargaining outcomes and that may, at the same time, also correlate with race. One concern is that the racial disparities documented earlier are driven by systematic differences in these other variables, an issue explored earlier as part of the discussion of sentencing disparities.²¹⁰

To assess racial disparities in the plea-bargaining process more rigorously, we can estimate a series of probit models in which the outcome variable is a binary indicator variable equal to 1 if the top charge in a case was reduced and 0 if the top charge was not reduced.²¹¹ The explanatory variables in these models are similar to those described for specification (1) above,²¹² including certain defendant characteristics (such as defendant's age, gender and criminal history) and case characteristics (such as the existence of additional initial charges, a set of fixed effects for the statutory max-

²⁰⁶ See *supra* note 204 and accompanying text (Table 4, panel B, column (2)). This difference of 10.63% represents 21.99% of the charge reduction rate for black defendants and is statistically significant at the 1% level.

²⁰⁷ See *supra* note 204 and accompanying text (Table 4, panel B, column (3)). The rate of charge reduction for white defendants with prior convictions is 36.36%, which is 3.53% lower than the charge reduction rate for black defendants, 39.89%. This difference represents 9.7% of the charge reduction rate for white defendants and is statistically significant at the 1% level.

²⁰⁸ See *supra* note 204 and accompanying text (Table 4, panel B, column (4)). The difference here is even smaller—black defendants are 0.57% less likely to see their felony charges converted to misdemeanor charges or dropped entirely. For white defendants, this outcome takes place 31.47% of the time, while for black defendants it does 31.29% of the time. The difference between these two groups is not statistically significant.

²⁰⁹ See *infra* notes 260–267 and accompanying text.

²¹⁰ See *supra* notes 131–133 and accompanying text.

²¹¹ For a description of the probit model and the interpretation of its results, see *supra* notes 147–148. Estimating the model as a linear probability model using an ordinary least squares regression with heteroskedasticity-robust standard errors yields similar results.

²¹² See *supra* notes 135–142 and accompanying text.

imum sentence corresponding to the principal initial charge (i.e., the charge carrying the highest possible sentence), the type of crime corresponding to the principal initial charge,²¹³ and the year the case was filed). Estimating these models allows us to focus on the effect of race on the plea-bargaining process after controlling for these additional factors. The results of these models are presented in Table 5 below.²¹⁴

²¹³ This set of crime categories is based on the corresponding chapter of the Wisconsin criminal code. For a list of these categories see *supra* note 144 and accompanying text (Table 2). One concern is that these categories are too broad, raising the possibility that the race of the defendant may be correlated with the severity of the crime within each category (e.g., black defendants may be more likely to be charged with first degree robberies, while white defendants are more likely to be charged with lesser degrees of that crime). Although the empirical model also controls for crime class and severity (i.e., with fixed effects based on the statutory maximum sentence), these might not fully address this problem. As a robustness check, one can create alternative crime controls based on the interaction of the type of crime (e.g., robbery) and the class of the offense (e.g., 720, 480, and 180 months). This measure, for example, would yield three different groups for robbery crimes, each associated with a different class (or statutory maximum). Including these alternative crime controls instead of the two complementary sets of controls described above does not affect the results described below. See *infra* notes 216 and 223; Tables 3 and 4.

²¹⁴ To facilitate the interpretation of these results, Table 5 shows the marginal effects of the explanatory variables. See *infra* note 215 and accompanying text; see also *supra* notes 147–148 and accompanying text. The results are nearly identical if we use the more granular crime fixed effects described in note 213, *supra*. See *supra* note 176 and accompanying text (Table 3).

Table 5. Charge Reduction Rates & Crime Severity²¹⁵

	(1)	(2)	(3)		
	<i>All Cases</i>	<i>Misd. Cas- es</i>	<i>Felony Cases</i>		
			<i>All</i>	<i>Low</i>	<i>High</i>
Black	-0.066*** [0.005]	-0.082*** [0.006]	-0.039*** [0.009]	-0.109*** [0.018]	-0.018* [0.010]
Other	-0.036*** [0.010]	-0.045*** [0.012]	-0.002 [0.019]	-0.039 [0.039]	0.011 [0.022]
Female	0.060*** [0.006]	0.076*** [0.008]	0.018 [0.011]	0.016 [0.025]	0.019 [0.013]
Age	0.001*** [0.000]	0.002*** [0.000]	0.000 [0.000]	0.002* [0.001]	0.000 [0.001]
Prior (1)	-0.242*** [0.006]	-0.267*** [0.006]	-0.163*** [0.012]	-0.174*** [0.023]	-0.160*** [0.014]
Prior (2+)	-0.326*** [0.005]	-0.352*** [0.006]	-0.249*** [0.010]	-0.291*** [0.018]	-0.233*** [0.011]
ConcChrg	-0.049 [0.048]	-0.015** [0.007]	-0.109*** [0.000]	-0.203*** [0.025]	-0.096*** [0.010]
Obs.	47,507	30,441	17,052	4,251	12,793
Mean	0.418	0.397	0.454	0.450	0.455

Once again, the coefficient of interest is the indicator variable *Black*. The results are consistent with those described above, evidencing substantial racial disparities in charge reduction rates, with such disparities being

²¹⁵ This Table is permanently available at <http://www.bc.edu/content/dam/bc1/schools/law/pdf/law-review-content/BCLR/59-4/berdejo-graphics.pdf> [<https://perma.cc/ECS5-GP79>]. *Note:* Robust standard errors in brackets (* significant at 10%; ** significant at 5%; *** significant at 1%). This table presents the marginal effects from probit models in which the outcome variable is an indicator variable equal to 1 if the initial top charge in a case was dropped, amended to a lesser charge or dismissed. Column (1) includes all cases, column (2) includes all misdemeanor cases and column (3) include all felony cases. Columns (4) and (5) divide felony cases based on whether the principal charge carried a potential sentence of (i) 5 years or less or (ii) more than 5 years, respectively. For a description of the explanatory variables of interest see *infra* note 304 and accompanying text (Appendix 1: Table 1). All regressions include a set of crime class fixed effects, a set of crime type fixed effects and a set of year fixed effects.

significantly lower in cases involving more severe felonies. For example, the coefficient on *Black* for misdemeanor cases is -0.082 .²¹⁶ This means that black defendants are 8.2% less likely than white defendants to see their top charge reduced, a difference that represents 20.65% of the average rate of top charge reduction in misdemeanor cases.²¹⁷ Similarly, for cases involving less serious felonies,²¹⁸ the coefficient on *Black* is -0.109 , which represents 22.22% of the charge reduction rate in these felony cases.²¹⁹ On the other hand, for cases involving serious felonies,²²⁰ the coefficient on *Black* is -0.018 , which represents just 3.96% of the corresponding average outcome.²²¹

Table 6 presents the results of similar probit models estimated on separate subsets of the data based on defendants' criminal histories.²²² The results are consistent with those described earlier—there are substantial disparities in the rate of charge reductions received by white and black defendants who have no prior criminal records, but the disparities between these two groups decrease significantly when we focus solely on defendants with at least one prior conviction. This is true for cases in which the top charge was a misdemeanor²²³ and in cases in which the top charge was a felony, as seen below.²²⁴

²¹⁶ See *supra* note 215 and accompanying text (Table 5, column (2)).

²¹⁷ See *supra* note 215 and accompanying text (Table 5, column (2)).

²¹⁸ These are felonies that carry a maximum statutory sentence of five years or less. See *supra* note 192.

²¹⁹ See *supra* note 215 and accompanying text (Table 5, column (4)).

²²⁰ These are felonies that carry a maximum statutory sentence of more than five years. See *supra* note 192.

²²¹ See *supra* note 215 and accompanying text (Table 5, column (5)).

²²² The results are nearly identical if we use the more granular crime fixed effects described in note 213, *supra*. See *infra* note 307 and accompanying text (Appendix 4: Table 4).

²²³ Black defendants with no prior convictions who are initially charged with misdemeanors are 16.2% less likely than white defendants to receive a charge reduction. See *infra* note 225 and accompanying text (Table 6, column (3)). The coefficient on *Black* represents 27.22% of the average reduction rate in this sample of cases. See *infra* note 225 and accompanying text (Table 6, column (3)). On the other hand, when we look at misdemeanor cases in which the defendant had prior convictions, the coefficient on *Black* is smaller (-0.019) and represents 6.3% of the mean outcome. See *infra* note 225 and accompanying text (Table 6, column (4)).

²²⁴ In felony cases, black defendants with no prior convictions are 10.1% less likely than white defendants to obtain a charge reduction. The coefficient on *Black* represents 16.69% of the average rate in the sample. See *infra* note 225 and accompanying text (Table 6, column (5)). However, there is no statistically significant difference between the rates of charge reduction for black and white defendants with prior criminal history. The coefficient on *Black* is small (0.012) and represents 3.16% of the mean outcome. See *infra* note 225 and accompanying text (Table 6, column (6)).

Table 6. Charge Reduction Rates & Criminal History²²⁵

	(1)	(2)	(3)	(4)	(5)	(6)
	<i>All Cases</i>		<i>Misdemeanor Cases</i>		<i>Felony Cases</i>	
	<i>No Prior</i>	<i>Prior</i>	<i>No Prior</i>	<i>Prior</i>	<i>No Prior</i>	<i>Prior</i>
Black	-0.143*** [0.009]	-0.019*** [0.006]	-0.162*** [0.010]	-0.023*** [0.007]	-0.101*** [0.016]	-0.012 [0.010]
Other	-0.029** [0.013]	-0.059*** [0.013]	-0.033** [0.016]	-0.075*** [0.014]	0.015 [0.026]	-0.021 [0.025]
Female	0.093*** [0.008]	0.014* [0.008]	0.107*** [0.010]	0.025*** [0.009]	0.043*** [0.017]	-0.005 [0.014]
Age	0.000 [0.000]	0.002*** [0.000]	0.001* [0.000]	0.002*** [0.000]	-0.001 [0.001]	0.001 [0.001]
Prior (2+)		-0.073*** [0.007]		-0.063*** [0.008]		-0.086*** [0.012]
ConcChrg	-0.009 [0.088]	-0.059 [0.051]	-0.058*** [0.011]	0.023*** [0.008]	-0.146*** [0.016]	-0.085*** [0.011]
Obs.	18,831	28,676	13,169	17,270	5,655	11,397
Mean	0.598	0.300	0.595	0.247	0.605	0.380

Finally, Table 7 presents the estimates of similar probit models using our two alternative outcome variables that measure the rates at which (i) defendants charged with misdemeanors are ultimately convicted of crimes that carry no possible incarceration and (ii) defendants charged with felo-

²²⁵ This Table is permanently available at <http://www.bc.edu/content/dam/bc1/schools/law/pdf/law-review-content/BCLR/59-4/berdejo-graphics.pdf> [<https://perma.cc/ECS5-GP79>]. *Note:* Robust standard errors in brackets (* significant at 10%; ** significant at 5%; *** significant at 1%). This table presents the marginal effects from the series of probit models described next. The outcome variable in columns (1)–(6) is an indicator variable equal to 1 if the initial top charge in a case was dropped, amended to a lesser charge or dismissed. Columns (1)–(2) includes all cases, while columns (3)–(4) and (5)–(6) include all misdemeanor and felony cases, respectively. Columns (1), (3) and (5) restrict the sample to cases in which the defendant had no prior convictions. Columns (2), (4) and (6) restrict the sample to cases in which the defendant had at least one prior conviction. For a description of the explanatory variables of interest see *infra* note 304 and accompanying text (Appendix 1: Table 1). All regressions include a set of crime class fixed effects, a set of crime type fixed effects and a set of year fixed effects.

nies are ultimately convicted of a misdemeanor (or a lesser crime).²²⁶ The results confirm that the significant racial disparities in these alternative outcomes discussed earlier are present even after controlling for various defendant and crime characteristics.²²⁷ White defendants charged with misdemeanors are more likely than black defendants to be ultimately convicted of crimes carrying no potential incarceration or have their charges dismissed.²²⁸ Similarly, white defendants charged with felonies are more likely than black defendants to be convicted of a misdemeanor or lesser charge.²²⁹ As noted earlier, these disparities are mainly driven by cases involving defendants with no prior convictions—if we focus on cases involving defendants with prior convictions, racial disparities are substantially lower.²³⁰

²²⁶ These outcome variables are constructed as follows: (a) an indicator variable equal to 1 if all charges carrying a potential jail or prison sentence were dropped or reduced to charges carrying no potential incarceration (misdemeanors cases) and (b) an indicator variable equal to 1 if all felony charges were dropped or reduced to misdemeanor (or lesser) charges (felony cases).

²²⁷ See *supra* notes 205–208 and accompanying text.

²²⁸ See *infra* note 231 and accompanying text (Table 7, column (1)).

²²⁹ These disparities are substantially greater in cases where a defendant is charged with less severe felonies (i.e., those carrying potential sentences of five years or less). See *infra* note 231 and accompanying text (Table 7, columns (6)–(7)).

²³⁰ See *infra* note 231 and accompanying text (Table 7, columns (2)–(3) (misdemeanors) and Table 7, columns (4)–(5) (felonies)).

Table 7. Alternative Pre-Sentencing Outcomes²³¹

	(1)	(2)	(3)	(4)	(5)	(6)	(7)
	<i>Misdemeanor Cases</i>			<i>Felony Cases</i>			
	<i>All</i>	<i>No Pri- or</i>	<i>Prior</i>	<i>No Pri- or</i>	<i>Prior</i>	<i>High</i>	<i>Low</i>
Black	-0.085*** [0.006]	-0.178*** [0.010]	-0.019*** [0.005]	-0.118*** [0.016]	-0.019** [0.009]	-0.031*** [0.010]	-0.105*** [0.018]
Other	-0.020* [0.010]	-0.016 [0.016]	-0.041*** [0.011]	0.008 [0.027]	-0.032 [0.023]	-0.004 [0.021]	-0.035 [0.037]
Female	0.057*** [0.007]	0.113*** [0.010]	-0.004 [0.007]	0.035** [0.018]	-0.000 [0.013]	0.015 [0.012]	0.013 [0.024]
Age	0.001*** [0.000]	-0.000 [0.000]	0.002*** [0.000]	-0.000 [0.001]	0.001 [0.001]	-0.000 [0.001]	0.002* [0.001]
Prior (1)	-0.244*** [0.005]		0.052*** [0.007]			-0.169*** [0.012]	-0.188*** [0.022]
Prior (2+)	-0.348*** [0.005]				-0.087*** [0.012]	-0.257*** [0.011]	-0.311*** [0.018]
ConcChrg	-0.107*** [0.007]	-0.116*** [0.011]	-0.074** [0.006]	-0.254** [0.016]	-0.196*** [0.010]	-0.220*** [0.009]	-0.231*** [0.025]
Obs.	30,433	13,164	17,231	5,651	11,375	12,779	4,235
Mean	0.311	0.526	0.147	0.546	0.316	0.376	0.440

²³¹ This Table is permanently available at <http://www.bc.edu/content/dam/bc1/schools/law/pdf/law-review-content/BCLR/59-4/berdejo-graphics.pdf> [<https://perma.cc/ECS5-GP79>]. **Note:** Robust standard errors in brackets (* significant at 10%; ** significant at 5%; *** significant at 1%). This table presents the marginal effects from the series of probit models described next. The outcome variable in columns (1)–(3) is an indicator variable equal to 1 if all charges carrying a potential sentence were dropped, amended to a charge carrying no sentence, or dismissed. The outcome variable in columns (4)–(7) is an indicator variable equal to 1 if all initial felony charges were dropped, amended to misdemeanor charges, or dismissed. Column (1) includes all misdemeanor cases, while columns (2) and (3) include misdemeanor cases in which the defendant had no prior conviction and in which the defendant had at least one prior conviction, respectively. Columns (4) and (5) include all felony cases in which the defendant had no prior conviction and in which the defendant had a prior conviction, respectively. Columns (6) and (7) divide felony cases based on whether the principal charge carried a potential sentence of 5 years or less or more than 5 years. For a description of the explanatory variables of interest see *infra* note 304 and accompanying text (Appendix 1: Table 1). All regressions include a set of crime class fixed effects, a set of crime type fixed effects and a set of year fixed effects.

4. The Role of Prosecuting and Defense Attorneys

The results presented thus far indicate that white defendants are more likely than black defendants to see their initial charges reduced as part of the plea-bargaining process.²³² This allows white defendants initially charged with a felony to avoid a felony conviction more often than black defendants.²³³ It also allows white defendants originally charged with a misdemeanor to avoid being convicted of a crime that carries a potential imprisonment sentence at a rate higher than black defendants.²³⁴ These results are robust to the inclusion of variables controlling for various defendant and crime characteristics.²³⁵

a. Differences in Prosecuting Attorneys

One possible explanation relates to the identity of the prosecuting attorney making the decision whether or not to reduce the principal charge in a given case. If prosecutors differ in their willingness to agree to a charge reduction and cases are not allocated randomly across prosecutors, one may be concerned that the racial disparities documented earlier are the result of the assignment of cases involving black defendants to prosecutors that are less likely to agree to reduce charges. If this is true, then the coefficient on the black indicator variable would be capturing some of these systematic differences across prosecutors, thus artificially inflating the magnitude of the observed racial disparities.²³⁶

To address these concerns, we can use the identity of the prosecuting attorney, which the CCAP database provides for all but 211 of the 47,601 cases considered in the analyses presented earlier in this section. Thirty-three prosecutors appear in at least one hundred cases (and in a total of 47,012 cases). Using this information, we can construct thirty-five indicator variables: (i) one indicator variable for each of the thirty-three prosecutors that appear in at least one hundred cases; (ii) one indicator variable for cases involving prosecutors that appeared less than 100 times in the dataset; and (iii) one indicator variable for cases in which the identity of the prosecutor was not available. To verify whether systematic differences in the identity of the prosecutor are driving the racial disparities in plea-bargaining

²³² See *supra* notes 165–172 and accompanying text.

²³³ See *supra* notes 187–195 and accompanying text.

²³⁴ See *supra* notes 173–186 and accompanying text.

²³⁵ See *supra* notes 210–230 and accompanying text.

²³⁶ In addition, cases assigned to the same prosecutor are not necessarily independent of one another, which can result in artificially deflated standard errors that make results appear statistically significant when they might not be.

outcomes documented earlier, the specifications presented in Table 5 (which divided cases along charge severity)²³⁷ and Table 6 (which divided cases along defendant criminal history)²³⁸ can be re-estimated including this set of thirty-five prosecuting attorney fixed-effects. The results for these specifications are presented in Table 8.²³⁹

Table 8. Analyses Including Prosecuting Attorney Fixed Effects²⁴⁰

	(1)	(2)	(3)	(4)	(5)
	<i>Misdemeanors</i>	<i>Low Level Felonies</i>	<i>High Level Felonies</i>	<i>No Prior Convictions</i>	<i>Prior Convictions</i>
Black	-0.083*** [0.006]	-0.108*** [0.020]	-0.021* [0.012]	-0.143*** [0.009]	-0.019*** [0.007]
Other	-0.045*** [0.009]	-0.041 [0.032]	0.018 [0.023]	-0.029* [0.0170]	-0.054*** [0.014]
Female	0.077*** [0.009]	0.018 [0.022]	0.031* [0.017]	0.096*** [0.013]	0.019** [0.009]
Age	0.002*** [0.000]	0.001 [0.001]	-0.000 [0.001]	0.000 [0.001]	0.002*** [0.000]
Prior (1)	-0.267*** [0.011]	-0.183*** [0.024]	-0.160*** [0.017]		0.073*** [0.009]

²³⁷ See *supra* note 215 and accompanying text (Table 5); see also *supra* notes 210–221 and accompanying text.

²³⁸ See *supra* note 225 and accompanying text (Table 6); see also *supra* notes 222–224 and accompanying text.

²³⁹ To correct for the fact that cases managed by the same prosecutor are not independent from one another, standard errors are clustered at the prosecutor level.

²⁴⁰ This Table is permanently available at <http://www.bc.edu/content/dam/bc1/schools/law/pdf/law-review-content/BCLR/59-4/berdejo-graphics.pdf> [<https://perma.cc/ECS5-GP79>]. Note: Robust standard errors clustered at the prosecuting attorney level in brackets (* significant at 10%; ** significant at 5%; *** significant at 1%). This table presents the marginal effects from probit models in which the outcome variable is an indicator variable equal to 1 if the initial top charge in a case was dropped, amended to a lesser charge or dismissed. Column (1) includes all misdemeanor cases. Column (2) includes felony cases in which the principal charge carried a potential sentence of 5 years or less, while column (3) includes felony cases in which the principal charge carried a potential sentence of more than 5 years. Columns (4) and (5) include all cases in which the defendant had no prior convictions and in which the defendant had at least one prior conviction, respectively. For a description of the explanatory variables of interest see *infra* note 304 and accompanying text (Appendix 1: Table 1). All regressions include a set of crime class fixed effects, a set of crime type fixed effects, a set of year fixed effects and a set of prosecuting attorney fixed effects (see *supra* notes 237–239 and accompanying text).

Prior (2+)	-0.351*** [0.008]	-0.296*** [0.030]	-0.232*** [0.015]		
ConcChrg	-0.018** [0.009]	-0.213*** [0.024]	-0.094*** [0.017]	0.006 [0.086]	-0.056 [0.035]
Obs.	30,441	4,251	12,793	18,831	28,676
Mean	0.397	0.450	0.455	0.598	0.300

In misdemeanor cases, black defendants are 8.3% less likely than white defendants to receive a charge reduction, which is virtually identical to the difference documented in the specifications excluding the indicator variables (8.2%).²⁴¹ In cases involving low-level felonies, black defendants are 10.8% less likely than white defendants to receive a charge reduction, nearly identical to the difference documented earlier in earlier analyses (10.9%).²⁴² In cases involving high level felonies, black defendants are 2.1% less likely than white defendants to receive a charge reduction, a rate differential similar to that documented earlier (1.8%).²⁴³ Results are also consistent when dividing cases based on the criminal history of the defendant. Black defendants with no prior convictions are 14.3% less likely than white defendants to receive a charge reduction, which is identical to the earlier estimate.²⁴⁴ Finally, including these prosecutor fixed effects confirms that differences in charge reduction rates between white and black defendants that have at least one prior conviction are smaller (1.9%).²⁴⁵

b. Differences in Attorney Quality

Another possible explanation for the racial disparities in plea-bargaining outcomes documented earlier is that there are systematic differences in the quality of the legal representation of black and white defendants. If more qualified and experienced attorneys negotiate superior terms

²⁴¹ See *infra* note 253 and accompanying text (Table 9, column (1)); *supra* note 215 and accompanying text (Table 5, column (2)).

²⁴² See *infra* note 253 and accompanying text (Table 9, column (2)); *supra* note 215 and accompanying text (Table 5, column (4)).

²⁴³ See *infra* note 253 and accompanying text (Table 9, column (3)); *supra* note 215 and accompanying text (Table 5, column (5)).

²⁴⁴ See *infra* note 253 and accompanying text (Table 9, column (4)); *supra* note 225 and accompanying text (Table 6, column (1)).

²⁴⁵ See *infra* note 253 and accompanying text (Table 9, column (5)); *supra* note 225 and accompanying text (Table 6, column (2)).

for their clients during the plea-bargaining process and white defendants have on average better legal representation than black defendants, then one would expect white defendants to have a higher rate of charge reductions than black defendants. In that case, the coefficient on the black indicator variable would be capturing differences in attorney quality, an omitted variable problem.²⁴⁶

The quality of legal representation for black defendants could be different from that of white defendants if the former largely have to rely on public defenders or legal defense funds and the latter generally are able to afford private defense attorneys.²⁴⁷ For this to be true, one would need to assume that privately retained attorneys outperform attorneys from the public defenders's office or local legal defense funds. Nevertheless, the existing evidence does not necessarily support this assumption. Although more experienced counsel seem to obtain better sentencing outcomes for their clients,²⁴⁸ studies that have examined how public defenders perform relative to private counsel have reached inconsistent conclusions.²⁴⁹

The dataset allows us to partially rule out the possibility that systematic differences in legal representation between white and black defendants are driving the observed disparities. The name of the defense attorney is

²⁴⁶ If a relevant factor is omitted from a multivariate regression analysis, the econometric model may compensate for this omission by giving more weight (i.e., ascribing a higher explanatory value) to a variable that is included in the analysis and correlated with the missing variable. This is known as the omitted variable bias problem. For a discussion of this issue see WOOLDRIDGE, *supra* note 142, at 96–97.

²⁴⁷ See Schanzenbach, *supra* note 35 at 63 (explaining “both income and assets are determinants of quality of legal counsel and hence will play a role in sentencing, offense level determination, and probability of a downward departure”).

²⁴⁸ See David S. Abrams & Albert H. Yoon, *The Luck of the Draw: Using Random Case Assignment to Investigate Attorney Ability*, 74 U. CHI. L. REV. 1145, 1172–73 (2007) (finding that defendants represented by more experienced public defenders are less likely to plead to the most serious charge, are less likely to be incarcerated, and are more likely to receive lower sentences).

²⁴⁹ See Nadine Frederique et al., *What Is the State of Empirical Research on Indigent Defense Nationwide? A Brief Overview and Suggestions for Future Research*, 78 ALB. L. REV. 1317, 1327 (2015) (“Several studies found that private attorneys are able to obtain better sentencing outcomes for their clients when compared to public counsel. However, a competing line of research noted that public defender systems are able to achieve very similar outcomes to private attorneys.”). Compare Morris B. Hoffman et al., *An Empirical Study of Public Defender Effectiveness: Self-Selection by the “Marginally Indigent,”* 3 OHIO ST. J. CRIM. L. 223, 230 (2005) (finding that “public defenders achieved worse sentence outcomes for their clients than private defense counsel”), with Abrams & Yoon, *supra* note 248, at 1172–73 (finding that experienced public defenders are more likely to achieve better results for their clients), Michael A. Roach, *Indigent Defense Counsel, Attorney Quality, and Defendant Outcomes*, 16 AM. L. & ECON. REV. 577, 578 (2014) (finding that “assigned counsel generate significantly less favorable defendant outcomes than public defenders”), and Radha Iyengar, *An Analysis of the Performance of Federal Indigent Defense Counsel* 28 (Nat'l Bureau of Econ. Research, Working Paper No. 13187, 2007) (finding that public defenders outperform assigned private attorneys in federal criminal cases).

available for 42,951 of the 47,601 cases considered in the analyses in this section.²⁵⁰ Ninety defense attorneys appear in at least one hundred cases in the database and in the aggregate, comprise 36,270 total observations. Using this information, one can construct a series of (i) ninety indicator variables for each of these ninety defense attorneys; (ii) one indicator variable for the 6,681 cases involving attorneys that appear less than one hundred times; and (iii) one indicator variable for the 5,417 cases for which no defense attorney information was available. To verify whether the identity of the defense attorney is driving the racial disparities in plea-bargaining outcomes documented earlier, we can re-estimate the specifications presented in Table 5 (which divided cases along charge severity)²⁵¹ and Table 6 (which divided cases along defendant criminal history),²⁵² but including the set of ninety-two defense attorney indicator variables described above. The results for these specifications are presented in Table 9 below.

²⁵⁰ For cases involving more than one defense attorney, I selected the attorney who was active (i.e., had not withdrawn) as of the date in which the case was resolved. When more than one attorney was active as of this date, I selected the attorney based on alphabetical ordering. In 2,281 of these 42,951 cases, only the attorney's organization was available (the Legal Defense Program in 1,850 cases and State Public Defender in 431 cases). I treated these organizations as the attorney of record.

²⁵¹ See *supra* note 215 and accompanying text (Table 5); see also *supra* notes 210–221 and accompanying text.

²⁵² See *supra* note 225 and accompanying text (Table 6); see also *supra* notes 222–224 and accompanying text.

Table 9. Analyses Including Defense Attorney Fixed Effects²⁵³

	(1)	(2)	(3)	(4)	(5)
	<i>Misdemeanors</i>	<i>Low Level Felonies</i>	<i>High Level Felonies</i>	<i>No Prior Convictions</i>	<i>Prior Convictions</i>
Black	-0.053*** [0.007]	-0.087*** [0.019]	0.003 [0.011]	-0.099*** [0.009]	-0.005 [0.006]
Other	-0.026** [0.012]	-0.03 [0.042]	0.033 [0.023]	-0.006 [0.014]	-0.046*** [0.013]
Female	0.089*** [0.008]	0.037 [0.026]	0.031** [0.013]	0.106*** [0.008]	0.025*** [0.008]
Age	0.001*** [0.000]	0.001 [0.001]	-0.001 [0.001]	-0.001* [0.000]	0.002*** [0.000]
Prior (1)	-0.258*** [0.007]	-0.176*** [0.024]	-0.152*** [0.014]		
Prior (2+)	-0.333*** [0.006]	-0.277*** [0.019]	-0.219*** [0.012]		-0.067*** [0.007]
ConcChrg	-0.014* [0.007]	0.218*** [0.025]	0.100*** [0.010]	-0.020 [0.089]	-0.063 [0.051]
Obs.	30,441	4,251	12,793	18,831	28,676
Mean	0.397	0.450	0.455	0.598	0.300

²⁵³ This Table is permanently available at <http://www.bc.edu/content/dam/bc1/schools/law/pdf/law-review-content/BCLR/59-4/berdejo-graphics.pdf> [<https://perma.cc/ECS5-GP79>]. Note: Robust standard errors in brackets (* significant at 10%; ** significant at 5%; *** significant at 1%). This table presents the marginal effects from probit models in which the outcome variable is an indicator variable equal to 1 if the initial top charge in a case was dropped, amended to a lesser charge or dismissed. Column (1) includes all misdemeanor cases. Column (2) includes felony cases in which the principal charge carried a potential sentence of 5 years or less, while column (3) includes felony cases in which the principal charge carried a potential sentence of more than 5 years. Columns (4) and (5) include all cases in which the defendant had no prior convictions and in which the defendant had at least one prior conviction, respectively. For a description of the explanatory variables of interest see *infra* note 304 and accompanying text (Appendix 1: Table 1). All regressions include a set of crime class fixed effects, a set of crime type fixed effects, a set of year fixed effects and a set of defense attorney fixed effects (see *supra* notes 250–252 and accompanying text).

In misdemeanor cases, black defendants are 5.3% less likely than white defendants to receive a charge reduction.²⁵⁴ Although this difference is slightly lower than the difference when excluding the indicator variables (8.3%),²⁵⁵ it is still substantial, representing 13.35% of the average charge reduction rate in the sample. In cases involving low-level felonies, black defendants are 8.7% less likely than white defendants to receive a charge reduction, a difference representing 19.33% of the average rate in the sample.²⁵⁶ Consistent with the analyses presented earlier, there are no substantial differences in charge reduction rates between black and white defendants initially charged with high level felonies.²⁵⁷

The results highlighting the mediating role of defendants' criminal history in determining disparities in plea-bargaining outcomes are also robust to the inclusion of defense attorney fixed effects. Black defendants with no prior convictions are 9.9% less likely than white defendants to receive a charge reduction, a difference representing 16.56% of the average charge reduction rate in the sample.²⁵⁸ Additionally, including these attorney fixed effects confirms our earlier conclusion that there are no substantial differences in charge reduction rates between white and black defendants that have at least one prior conviction.²⁵⁹

5. Race as a Proxy for Criminality

A theory that seeks to explain the racial disparities in plea-bargaining outcomes documented earlier needs to account not just for differences in the average charge reduction rates for black and white defendants, but also for the cross-sectional variation in racial disparities documented earlier. For example, if race appears to matter in plea-bargaining because it serves as a proxy for some omitted variable, then the inclusion of such variable would need to explain (i) why black defendants fare worse than white defendants when they have no prior convictions, but fare as well as white defendants

²⁵⁴ See *supra* note 253 and accompanying text (Table 9, column (1)).

²⁵⁵ See *supra* note 215 and accompanying text (Table 5, column (2)).

²⁵⁶ See *supra* note 253 and accompanying text (Table 9, column (2)). This difference is slightly smaller than that documented earlier when the specifications did not include attorney fixed effects (i.e., 8.4%). See *supra* note 215 and accompanying text (Table 5, column (4)).

²⁵⁷ See *supra* note 253 and accompanying text (Table 9, columns (3)); *supra* note 215 and accompanying text (Table 5, column (5)).

²⁵⁸ See *supra* note 253 and accompanying text (Table 9, column (4)). The magnitude of this coefficient is slightly lower than our earlier estimate, 15.27% which represented 28.6% of the average outcomes in the sample. See *supra* note 225 and accompanying text (Table 6, column (1)).

²⁵⁹ See *supra* note 253 and accompanying text (Table 9, column (5)); *supra* note 225 and accompanying text (Table 6, column (2)).

when they have a prior conviction,²⁶⁰ and (ii) why black defendants fare worse than white defendants when they commit less severe crimes, but are treated more equally when they commit more severe crimes.²⁶¹

An explanation consistent with these two patterns is that the race of the defendant is subconsciously used by prosecutors as a proxy for a defendant's recidivism potential and dangerousness.²⁶² Even though prosecutors may have more information than judges about the specifics of the crime, prosecutors cannot easily observe a defendant's true type (for example, likelihood to recidivate and latent criminality) and may not have the time or resources to assess this thoroughly on a case-by-case basis before making charging and plea-bargaining decision.²⁶³ The use of race as a heuristic would explain the cross-sectional differences in racial disparities identified earlier.

For example, defendants with a prior conviction have already proved their likelihood to recidivate, rendering heuristics less useful in the risk assessment of that defendant.²⁶⁴ This could explain why disparities arise in the sample of defendants with no prior convictions (where race is perhaps being used as a proxy for recidivism) but not in the sample of defendants with prior convictions (where such heuristics are less useful).²⁶⁵ Similarly, the severity of the crime can affect the value of race as a proxy for a defendant's latent criminality and dangerousness. One who commits a serious felony crime has already proved that they are dangerous. Thus, in the sample of cases involving more severe crimes, race would be less valuable as a proxy for a person's latent criminality. Nevertheless, in cases involving less severe crimes, it is harder to tell *ex-ante* how dangerous a person might ultimately be. Under these circumstances, prosecutors could be using a defendant's race as a proxy for an individual's latent criminality.²⁶⁶ Consistent with this explanation, racial disparities are higher for cases involving less severe crimes, but virtually non-existent for those cases involving the most severe crimes.²⁶⁷

²⁶⁰ See *supra* notes 197–209 and accompanying text.

²⁶¹ See *supra* notes 165–195 and accompanying text.

²⁶² This connection of race and criminality may be conscious (i.e., statistical discrimination) or subconscious (i.e., implicit bias). See *supra* notes 42–45, 52–54 and accompanying text.

²⁶³ See *supra* notes 52–54 and accompanying text.

²⁶⁴ See *supra* notes 52–57 and accompanying text.

²⁶⁵ See *supra* notes 197–209 and accompanying text.

²⁶⁶ See *supra* notes 56–57 and accompanying text.

²⁶⁷ See *supra* notes 165–195 and accompanying text.

C. Racial Disparities in Initial Charging

The analyses presented thus far have taken the prosecutors' initial charging decisions at face value, without considering possible discriminatory decisions against the defendant. As noted earlier, the decision whether to bring initial charges against an offender and which specific charges to file (given the particular characteristics of the arrest offense) is generally at the discretion of the prosecuting attorney.²⁶⁸ One concern is that there may exist racial biases at this stage, a fact that would complicate the interpretation of racial disparities in the ensuing plea-bargaining process.²⁶⁹ For example, it could be that prosecutors "over-charge" black defendants relative to white defendants—that is, for a given arrest offense, black defendants are charged with more serious crimes than white defendants.²⁷⁰ If this is the case, then the magnitude of racial disparities in plea-bargaining documented in the Article underestimates actual racial disparities.²⁷¹

More problematic is the possibility that prosecutors "over-charge" white defendants relative to black defendants. If this is the case, then the racial disparities in plea-bargaining (favoring white defendants) documented above would merely be correcting (i.e., reversing) racial disparities in the preceding initial charging process (which favored black defendants). The data lacks the variables necessary to estimate the existence and magnitude of such racial disparities in initial charging (this would require, for example, arrest data at the individual level). Nevertheless, examining general patterns in the initial charges faced by black and white defendants reassures us that it is unlikely that white defendants are being initially "overcharged" by prosecuting attorneys.²⁷²

Of the 48,357 observations in the final dataset, 25,629 (or 55.07%) involve white defendants whereas 18,471 (or 38.2%) involve black defendants. This 16.87% difference appears large but says little by itself. One way to provide context to these figures is to look at the demographic characteris-

²⁶⁸ See *supra* notes 77–79 and accompanying text.

²⁶⁹ To complicate matters further, prosecutors' initial charging decisions may be influenced by decisions made by police officers at the initial booking stage. See, e.g., OWENS ET AL., *supra* note 62, at 2, 7 (arguing that racial disparities in sentencing are explained by differences at the initial booking stage, wherein black defendants are booked for more severe charges than white defendants, and not by disparate plea-bargaining outcomes).

²⁷⁰ Existing empirical evidence suggests that this may in fact be the case. See *supra* note 60 and accompanying text.

²⁷¹ In other words, a white defendant would be more likely to receive a charge reduction than a similar black defendant who committed the same offense even though the white defendant was initially charged with a less serious crime than the black defendant.

²⁷² In addition, existing empirical evidence from other jurisdictions suggests that this is unlikely to be the case. See *supra* note 60 and accompanying text.

tics of Dane County. In the 2010 census, 84.7% of the population was categorized as white, with black individuals making up 5.2% of the population.²⁷³ Black individuals thus appear to be overrepresented in this universe of individuals charged with a crime—their share of the population in the database is over seven times their share of the general population in the county.²⁷⁴

Looking at the distribution of black and white defendants in felony and misdemeanor cases provides additional context. Of the 15,729 cases with at least an initial felony charge, 51.43% involve white defendants whereas 41.51% involve black defendants, a difference of 9.92%. Of the 32,627 misdemeanor cases, 56.82% involve white defendants whereas 36.6% involve black defendants, a difference of 20.22%.²⁷⁵ Thus, the population of individuals charged with a misdemeanor or felony crime, black individuals appear to be significantly overrepresented in the felony subset relative to white defendants.²⁷⁶

CONCLUSION

The results presented in this Article document the existence of racial disparities in the plea-bargaining stage of the criminal justice process. White defendants are more likely than black defendants to receive a reduction in their principal initial charge.²⁷⁷ As a result, white defendants who face initial felony charges are more likely than black defendants to end up being convicted of misdemeanors rather than more serious crimes.²⁷⁸ Similarly, white defendants initially charged with misdemeanors are more likely than black defendants to be convicted for crimes carrying no possible incarceration or not being convicted at all.²⁷⁹ These disparities in plea-bargaining appear to be driven by cases in which defendants have no prior convic-

²⁷³ See *Quick Facts—Dane County, Wisconsin: 2010 Demographic Profile*, U.S. CENSUS BUREAU, <https://factfinder.census.gov/> (search in Community Facts search bar for “Dane County, Wisconsin”; then follow “2010 Demographic Profile” hyperlink).

²⁷⁴ To the extent that some of the black defendants prosecuted in Dane County reside elsewhere, this metric may overestimate the relative representation of black individuals in the sample.

²⁷⁵ Another way of looking at this particular disparity is to consider the proportion of defendants who are initially charged with a felony. For white defendants this rate is 30.38%, while for black defendants the rate is 35.35%. The difference between these rates—4.97%—is statistically significant. That is, black defendants are 16.36% more likely than white defendants to be charged initially with at least one felony.

²⁷⁶ In addition, in these felony cases, the average statutory maximum sentence for the principal charge in cases involving black defendants is 147 months, 13% higher than that of cases involving white defendants, 130 months.

²⁷⁷ See *supra* notes 168–169 and accompanying text.

²⁷⁸ See *supra* notes 187–190 and accompanying text.

²⁷⁹ See *supra* notes 173–175 and accompanying text.

tions²⁸⁰ and cases which involve less serious offenses.²⁸¹ These patterns suggest that in “low information” cases, a defendant’s race may be used as a proxy for their likelihood to recidivate and latent criminality.²⁸²

These results inform the evaluation of various current policy debates. Efforts to mitigate racial disparities in sentencing and incarceration rates should consider disparities in the plea-bargaining process and initial charging decisions. Proposals aimed at restricting prosecutorial discretion by increasing judicial discretion, for example via the elimination of statutory minimum sentences, would seem to remedy these disparities.²⁸³ The results presented in this Article also highlight how racial disparities might run deeper in misdemeanor cases, adding an empirical dimension to the concerns of those scholars who have called for the decriminalization of misdemeanors and for increased scrutiny of the misdemeanor adjudication process.²⁸⁴ More generally, the possible implicit nature of the biases driving these racial disparities lends support to those who have argued that the weight afforded to evidence showing disparate impact in equal protection claims should be re-examined.²⁸⁵

The results and conclusions presented in this Article are subject to some caveats. As with most empirical work in this area, it is difficult to establish a causal link between a defendant’s race and a criminal case outcome (in this case, charge reductions). One concern is that the models estimated above may not be accounting for certain crime and defendant characteristics that play a role in determining plea-bargaining outcomes and that are also correlated with the race of the defendant.²⁸⁶ Failing to control for such unobservable variables could be skewing the results.²⁸⁷ One variable for which the earlier analyses do not control is whether a defendant was

²⁸⁰ See *supra* notes 197–208 and accompanying text.

²⁸¹ See *supra* notes 192–194 and accompanying text.

²⁸² See *supra* notes 262–267 and accompanying text.

²⁸³ See, e.g., Fischman & Schanzenbach, *supra* note 46, at 757–61; Rehavi & Starr, *supra* note 48, at 1349–51; Berman & Protass, *supra* note 159, at A17.

²⁸⁴ See *supra* notes 177–186 and accompanying text.

²⁸⁵ See *supra* notes 21–25 and accompanying text.

²⁸⁶ See, e.g., *supra* note 246 and accompanying text.

²⁸⁷ For example, consider two male individuals, one white and one black, of similar age and with no prior criminal history, who are separately charged with first degree assault. If the black defendant committed the assault in a more heinous manner than the white defendant (a fact observable to the prosecutor, but unobservable to the researcher), it would not be surprising to observe that the white defendant received a charge reduction while the black defendant did not. However, for such unobservable variable to account for the results presented in this Article one would need such variable (e.g., committing a given crime in a more heinous manner) to be systematically correlated with defendants’ race.

granted bail.²⁸⁸ If black defendants in the sample are less likely to be granted bail than white defendants,²⁸⁹ then some of the observed racial disparities in charge reduction rates could be attributed to the fact that defendants facing pre-trial detention are more likely to plead guilty to their initial top charge.²⁹⁰ Similarly, it could be that prosecutors are relying on defendant characteristics other than race—but that are correlated with race—to assess the risk posed by a defendant.²⁹¹ More generally, one must consider the possibility that the results are driven not by prosecutors showing more mercy for white defendants, but by defense attorneys being less zealous (whether consciously or subconsciously) in their representation of black defendants.²⁹² Finally, the dataset includes cases from 2000–2006 and the results may not necessarily be representative of Dane County’s current criminal justice process.²⁹³ In 2010, the Wisconsin governor appointed Dane County’s first African American district attorney.²⁹⁴ And starting in 2016, Dane

²⁸⁸ See Stephanos Bibas, *Plea Bargaining Outside the Shadow of Trial*, 117 HARV. L. REV. 2463, 2493 (2004) (arguing that pre-trial detention “hampers a defendant’s ability to mount a defense,” thus “plac[ing] a high premium on quick plea bargains in small cases”).

²⁸⁹ See Traci Schlesinger, *Racial and Ethnic Disparity in Pretrial Criminal Processing*, 22 JUST. Q. 170, 181–83 (2005) (finding that black defendants are 25% more likely to be denied bail than white defendants and that black defendants are 87% more likely than white defendants to be incarcerated prior to trial). Such disparities in bail determinations are not necessarily reflecting the risk posed by individual defendants. See David Arnold et al., *Racial Bias in Bail Decisions* 23 (Nat’l Bureau of Econ. Working Paper No. 23421, 2017) (finding that “marginally released white defendants are 19.8 percentage points more likely to be rearrested prior to disposition than marginally released black defendants . . . , consistent with racial bias against blacks”).

²⁹⁰ See Megan Stevenson, *Distortion of Justice: How the Inability to Pay Bail Affects Case Outcomes* 17–18 (Jan. 12, 2017) (unpublished manuscript), <https://ssrn.com/abstract=2777615> [<http://perma.cc/UV42-EW5S>] (finding that pre-trial detention is associated with a 13% increase in the likelihood of being convicted, due mostly to increased guilty pleas by defendants).

²⁹¹ A defendant’s socio-economic status (e.g., income or education) could be one such characteristic. However, the fact that we observe racial disparities even after controlling for the identity of the defense attorney (arguably a proxy for a defendant’s socio-economic status) reassures us that this particular omitted variable is not driving the results. See *supra* notes 246–259 and accompanying text.

²⁹² See L. Song Richardson & Phillip Atiba Goff, *Implicit Racial Bias in Public Defender Triage*, 122 YALE L.J. 2626, 2636 (2013) (arguing that implicit biases can affect how public defenders evaluate evidence relating to a defendant based on the defendant’s race, “potentially causing [a public defender] to unintentionally interpret information as more probative of guilt”); Molly J. Walker Wilson, *Defense Attorney Bias and the Rush to the Plea*, 65 KAN. L. REV. 271, 283 (2016) (“Differences in socio-economic background, education, and race can influence even diligent defense attorneys powerfully, and without the attorney being conscious of them.”).

²⁹³ See *supra* notes 165–195 and accompanying text.

²⁹⁴ On 2010, the Wisconsin governor appointed Ismael Ozanne as Dane County’s district attorney. Mr. Ozanne, who was subsequently elected and re-elected in 2012 and 2016, has implemented internal policies seeking to address racial discrimination. See Ed Treleven, *Ismael Ozanne Re-elected as DA over Prosecutor Bob Jambois*, WIS. ST. J. (Aug. 10, 2016), http://host.madison.com/wsj/news/local/govt-and-politics/ismael-ozanne-re-elected-as-da-over-prosecutor-bob-jambois/article_

County has provided implicit bias training for judges, prosecutors and public defenders.²⁹⁵ It will be interesting to see whether recent changes in policies and personnel training have been effective in addressing the disparities documented earlier.

Setting these caveats aside, there is no reason why the exercise of prosecutorial discretion and the plea-bargaining process should not be subject to the same rigorous empirical scrutiny that has been applied to judicial decision making and the sentencing process. It would be interesting to see whether the patterns in racial disparities documented in this Article are replicated in other jurisdictions. Empirical work should also examine more closely any disparities in plea-bargaining outcomes along gender lines and explore the intersection of gender and race in this regard.²⁹⁶ Future work can also focus more closely on the role of the prosecutor by examining, for example, which attributes and characteristics of prosecuting attorneys (if any) explain differences in plea-bargaining outcomes²⁹⁷ or documenting the ex-

7b015c97-1a1b-53e0-b0fd-b65428a8e203.html [https://perma.cc/26LN-RH6H]; Ed Treleven, *Race for Dane DA Has Experienced Underling Sniping at the Incumbent*, WIS. ST. J. (Aug. 9, 2016), http://host.madison.com/wsj/news/local/govt-and-politics/race-for-dane-da-has-experienced-underling-sniping-at-the/article_649d917e-953c-57e6-bc24-fb85c7f913d2.html [https://perma.cc/C3RP-TKJL].

²⁹⁵ Dane County recently adopted a number of recommendations made by workgroups charged with evaluating policies to improve the criminal justice system. Among these recommendations was the implementation of an ongoing “Implicit Bias, Equity and Inclusion, Diversity and Poverty training” for judges, prosecutors and public defenders, among others. See DANE CTY. BD. SUPERVISORS, INVESTIGATING SOLUTIONS TO RACIAL DISPARITIES AND MENTAL HEALTH CHALLENGES IN THE DANE COUNTY JAIL AND THROUGHOUT DANE COUNTY’S CRIMINAL JUSTICE SYSTEM: WORK GROUP RECOMMENDATIONS 9 (Sept. 2015). These implicit bias trainings are already taking place. See Chris Rochester & Tyler Brandt, *Dane County Spends \$50,000 to Send Courthouse Staff to “Implicit Bias” Training*, MACIVER INST. (Aug. 8, 2016), <https://www.maciverinstitute.com/2016/08/dane-county-spends-50000-to-send-courthouse-staff-to-implicit-bias-training/> [https://perma.cc/2MXB-SQRB].

²⁹⁶ For a summary of studies that have documented gender disparities in sentencing outcomes see *supra* note 40 and accompanying text. Recent studies have examined gender disparities in the pre-sentencing stages of federal criminal cases. See, e.g., Shermer & Johnson, *supra* note 48, at 413–15 (examining differences in charge reductions); Sonja B. Starr, *Estimating Gender Disparities in Federal Criminal Cases*, 17 AM. L. & ECON. REV. 127, 154 (2015) (stressing the “importance of pre-sentencing stages in shaping sentence disparities”). In a separate study I document gender disparities in plea bargaining using the same dataset employed in this Article. See Carlos Berdejo, *Gender Disparities in Plea Bargaining*, 94 IND. L.J. (forthcoming 2019).

²⁹⁷ Studies analyzing differences in judges’ sentencing behavior based on judges’ demographic characteristics have been inconclusive. While some of these studies have found differences between male and female judges and between minority and white judges, other studies have found that the race and gender of judges have little influence on their sentencing behavior. See Abrams et al., *supra* note 36 at 372–74 (finding that black judges are associated with longer sentences but lower incarceration rates); Claire S.H. Lim et al., *Do Judges’ Characteristics Matter? Ethnicity, Gender, and Partisanship in Texas State Trial Courts*, 18 AM. L. & ECON. REV. 302, 305 (2016) (finding that demographic characteristics of judges have little effect on sentence

istence of significant heterogeneity across individual prosecuting attorneys.²⁹⁸

Conducting this type of empirical work requires detailed data that provides information on pre-sentencing decisions made by prosecutors. One of the reasons why so much empirical work has focused on judges' sentencing decisions is the fact that public entities at the state and federal levels collect and maintain comprehensive data on sentencing.²⁹⁹ There needs to be a similar level of transparency with respect to decisions taken by actors in the pre-sentencing stages of the criminal justice process. Collecting and maintaining such data certainly presents a more complex and challenging endeavor than collecting data on sentencing decisions, both in terms of the number of observations and variables. Nevertheless, the Wisconsin Circuit Courts' CCAP shows that this can be achieved.³⁰⁰ And a number of district attorney offices across the nation have tried to collect and use data to internally identify and address instances of racial bias in the exercise of prosecutorial discretion.³⁰¹ The availability of this type of information would also allow courts and other external groups to scrutinize prosecutorial decision-making, an area that traditionally has been less open to the public than sentencing.³⁰² Decision-makers exercising discretion in a transparent criminal

length); Schanzenbach, *supra* note 35, at 73 (documenting similar findings); Darrell Steffensmeier & Chester L. Britt, *Judges' Race and Judicial Decision Making: Do Black Judges Sentence Differently?*, 82 SOC. SCI. Q. 749, 757–58 (2001) (finding that black judges are more likely to incarcerate offenders than white judges); Darrell Steffensmeier & Chris Hebert, *Women and Men Policymakers: Does the Judge's Gender Affect the Sentencing of Criminal Defendants?*, 77 SOC. FORCES 1163, 1174–75 (1999) (finding that female judges are more likely to incarcerate offenders and sentence the imprisoned to slightly longer sentences than male judges).

²⁹⁸ Recent studies on judges' sentencing behavior have focused on individual judges, finding substantial heterogeneity in average incarceration rates and sentencing length across judges. See Abrams et al., *supra* note 36, at 367–68 (finding that judges' decisions show significant heterogeneity in all sentencing measures, including incarceration, average sentence length, and average sentence length conditional on receiving a nonzero jail sentence); Lim et al., *supra* note 297, at 305 (finding substantial heterogeneity in sentencing harshness across judges).

²⁹⁹ See *supra* notes 58, 68 and accompanying text.

³⁰⁰ See *supra* notes 104–106 and accompanying text.

³⁰¹ See WAYNE MCKENZIE ET AL., VERA INST. JUST., PROSECUTION AND RACIAL JUSTICE: USING DATA TO ADVANCE FAIRNESS IN CRIMINAL PROSECUTION 7 (Mar. 2009), <https://www.vera.org/publications/prosecution-and-racial-justice-using-data-to-advance-fairness-in-criminal-prosecution> (follow "PDF" hyperlink) [<https://perma.cc/42QN-T9AV>].

³⁰² See KUTATELADZE ET AL., *supra* note 64, at 1 ("While prosecutorial discretion is often guided by internal policies, external regulation or oversight of this discretion is quite limited."); MCKENZIE ET AL., *supra* note 301, at 1 ("Unlike officials in law enforcement and the judiciary, who have come under varying degrees of oversight in recent years, prosecutors act with little outside scrutiny or governance.").

justice process can be held accountable and this accountability can help legitimize the system in the eyes of all citizens.³⁰³

³⁰³ See KUTATELADZE ET AL., *supra* note 64, at 9 (“Prosecutors, as powerful actors in the criminal justice system, are empowered to adopt measures that promise to significantly promote equity for all people throughout all stages of the criminal justice continuum. Doing so will require a commitment to accountability and transparency.”).

APPENDIX 1

Table 1—Description of Main Explanatory Variables³⁰⁴

Black	Indicator variable equal to 1 if the defendant was African American.
Other	Indicator variable equal to 1 if the defendant was not African American or Caucasian.
Female	Indicator variable equal to 1 if the defendant was a woman.
Age	Equal to the age of the defendant as of the initial filing and calculated as the year of the case filing minus the defendant's year of birth.
Prior (1)	Indicator variable equal to 1 if defendant had one prior conviction.
Prior (2+)	Indicator variable equal to 1 if defendant had two or more prior convictions.
ConcCov	Indicator variable equal to 1 if defendant was convicted of at least two charges. In specifications restricted to felonies, it is equal to 1 if there are at least two felony convictions. In specifications restricted to misdemeanors, it's equal to 1 if there are at least two misdemeanor convictions.
ConcChrg	Indicator variable equal to 1 if defendant was initially charged with at least two crimes. In specifications restricted to felonies, it is equal to 1 if there are at least two felony charges. In specifications restricted to misdemeanors, it's equal to 1 if there are at least two misdemeanor charges.
Trial	Indicator variable equal to 1 if any of the charges in a case was adjudicated in a trial.

³⁰⁴ This Table is permanently available at <http://www.bc.edu/content/dam/bc1/schools/law/pdf/law-review-content/BCLR/59-4/berdejo-graphics.pdf> [<https://perma.cc/ECS5-GP79>].

APPENDIX 2

Table 2—Crime Type Categories³⁰⁵

Bail Jumping (Wis. Stat. § 946.49)	Other Drug Offenses (Wis. Stat. §§ 961.41(4), 42-.65)
Battery - Special (Wis. Stat. §§ 940.201, 203)	Other Felony
Battery (Wis. Stat. §§ 940.19-20)	Other Misdemeanor
Burglary (Wis. Stat. § 943.10)	OWI/PAC (Wis. Stat. § 346.63)
Child Abuse (Wis. Stat. § 948.03)	OWI/PAC w/Child (Wis. Stat. § 346.63)
Child Neglect/Fail to Support (Wis. Stat. §§ 948.21-23)	Receiving Stolen Property (Wis. Stat. § 943.34)
Crimes Against Animals (Wis. Stat. § 951)	Reckless/Negligent Injuries (Wis. Stat. §§ 940.23-.24)
Criminal Damage to Property (Wis. Stat. § 943.01)	Resisting Arrest (Wis. Stat. § 946.41)
Disorderly Conduct (Wis. Stat. § 947.01)	Robbery (Wis. Stat. § 943.32)
Drug Manufacture/Deliver (Wis. Stat. § 961.41(1))	Sex Crimes (Wis. Stat. §§ 944.15-.32)
Drug Possession (Wis. Stat. § 961.41(3g))	Sex Registry Violation (Wis. Stat. § 301.45)
Drug Possession w/ Intent (Wis. Stat. §§ 961.41(1m), (2))	Sexual Assault Child - Repeated (Wis. Stat. § 948.025)
Endangering Safety (Wis. Stat. § 941.30)	Sexual Assault Child (Wis. Stat. § 948.02)
Escape (Wis. Stat. § 946.42)	Sexual Assault (Wis. Stat. § 940.225)
Fail to Report to Jail (Wis. Stat. § 946.425)	Stalking (Wis. Stat. § 940.32)
Fleeing Officer (Wis. Stat. § 346.04)	Theft - Credit Card (Wis. Stat. § 943.41)
Forgery/Fraudulent Writing (Wis. Stat. §§ 943.37-40)	Theft - Identity (Wis. Stat. §§ 943.201-.203)
Fraud on Merchants (Non-Retail) (Wis. Stat. § 943.21)	Theft - Retail (Wis. Stat. § 943.50)
Hit and Run (Wis. Stat. §§ 346.67-.69)	Theft (Wis. Stat. § 943.20)
Homicide (Wis. Stat. §§ 940.01-.10)	Threats to Injure/Accuse of Crime (Wis. Stat. § 943.30)
Injury by use of Vehicle (Wis. Stat. § 940.25)	Threats/Harassment (Wis. Stat. §§ 947.012-.013)
Intimidate Witness/Victim (Wis. Stat. §§ 940.42-.45)	Trespass (Wis. Stat. §§ 943.125-.145)
Kidnap/Hostage (Wis. Stat. §§ 940.30-.31)	Violation of TRO (Wis. Stat. §§ 813.12 - .128)
Operate Vehicle w/out Consent (Wis. Stat. § 943.23)	Weapons/Explosives (Wis. Stat. §§ 941.20-315)
Other Crimes Against Children (Wis. Stat. §§ 948.07-.13)	Worthless Checks (Wis. Stat. § 943.24)
Other Crimes Against Children (Wis. Stat. §§ 948.30-.62)	

³⁰⁵ This Table is permanently available at <http://www.bc.edu/content/dam/bc1/schools/law/pdf/law-review-content/BCLR/59-4/berdejo-graphics.pdf> [<https://perma.cc/ECS5-GP79>].

APPENDIX 3

Table 3—Charge Reduction Rates & Crime Severity
(with Alternative Crime Controls)³⁰⁶

	(1)	(2)	(3)	(4)	(5)
	<i>All Cases</i>	<i>Misd. Cases</i>	<i>Felony Cases</i>		
			<i>All</i>	<i>Low</i>	<i>High</i>
Black	-0.068*** [0.005]	-0.082*** [0.006]	-0.043*** [0.009]	-0.111*** [0.018]	-0.021** [0.010]
Other	-0.034*** [0.010]	-0.045*** [0.012]	-0.006 [0.019]	-0.037 [0.039]	0.005 [0.022]
Female	0.060*** [0.006]	0.076*** [0.008]	0.020* [0.011]	0.0128 [0.025]	0.022* [0.013]
Age	0.001*** [0.000]	0.002*** [0.000]	0.000 [0.000]	0.002* [0.001]	-0.000 [0.001]
Prior (1)	-0.242*** [0.006]	-0.267*** [0.006]	-0.164*** [0.012]	-0.174*** [0.023]	-0.160*** [0.014]
Prior (2+)	-0.328*** [0.005]	-0.352*** [0.006]	-0.251*** [0.010]	-0.297*** [0.018]	-0.235*** [0.011]
ConcChrg	-0.078 [0.054]	0.0154** [0.007]	0.116*** [0.010]	0.206*** [0.025]	0.104*** [0.010]
Obs.	47,434	30,439	16,984	4,233	12,751
Mean	0.417	0.397	0.454	0.451	0.455

³⁰⁶ This Table is permanently available at <http://www.bc.edu/content/dam/bc1/schools/law/pdf/law-review-content/BCLR/59-4/berdejo-graphics.pdf> [<https://perma.cc/ECS5-GP79>]. *Note*: Robust standard errors in brackets (* significant at 10%; ** significant at 5%; *** significant at 1%). This table presents the marginal effects from probit models in which the outcome variable is an indicator variable equal to 1 if the initial top charge in a case was dropped, amended to a lesser charge or dismissed. Column (1) includes all cases, column (2) includes all misdemeanor cases and column (3) include all felony cases. Columns (4) and (5) divide felony cases based on whether the principal charge carried a potential sentence of (i) 5 years or less or (ii) more than 5 years, respectively. For a description of the explanatory variables of interest see *infra* note 304 and accompanying text (Appendix 1: Table 1). All regressions include a set of year fixed effects and crime class-type interaction fixed effects (*see supra* note 213).

APPENDIX 4

Table 4—Charge Reduction Rates & Criminal History
(with Alternative Crime Controls)³⁰⁷

	(1)	(2)	(3)	(4)	(5)	(6)
	<i>All Cases</i>		<i>Misdemeanor Cases</i>		<i>Felony Cases</i>	
	<i>No Prior</i>	<i>Prior</i>	<i>No Prior</i>	<i>Prior</i>	<i>No Prior</i>	<i>Prior</i>
Black	-0.147*** [0.009]	-0.019*** [0.006]	-0.164*** [0.010]	-0.023*** [0.007]	-0.115*** [0.016]	-0.013 [0.010]
Other	-0.024* [0.013]	-0.061*** [0.013]	-0.034** [0.016]	-0.075*** [0.014]	0.006 [0.027]	-0.022 [0.025]
Female	0.093*** [0.008]	0.016* [0.008]	0.107*** [0.010]	0.024*** [0.009]	0.047*** [0.017]	-0.002 [0.014]
Age	0.000 [0.000]	0.002*** [0.000]	0.001* [0.000]	0.002*** [0.000]	-0.000 [0.001]	0.001 [0.001]
Prior (2+)		-0.073*** [0.007]		-0.063*** [0.008]		-0.087*** [0.012]
ConcChrg	-0.060 [0.112]	-0.071 [0.055]	-0.058*** [0.011]	-0.023*** [0.008]	-0.158*** [0.017]	-0.090*** [0.011]
Obs.	18,730	28,610	13,166	17,264	5,558	11,342
Mean	0.597	0.299	0.595	0.247	0.603	0.379

³⁰⁷ This Table is permanently available at <http://www.bc.edu/content/dam/bc1/schools/law/pdf/law-review-content/BCLR/59-4/berdejo-graphics.pdf> [<https://perma.cc/ECS5-GP79>]. Note: Robust standard errors in brackets (* significant at 10%; ** significant at 5%; *** significant at 1%). This table presents the marginal effects from the series of probit models described next. The outcome variable in columns (1)–(6) is an indicator variable equal to 1 if the initial top charge in a case was dropped, amended to a lesser charge or dismissed. Columns (1)–(2) includes all cases, while columns (3)–(4) and (5)–(6) include all misdemeanor and felony cases, respectively. Columns (1), (3) and (5) restrict the sample to cases in which the defendant had no prior convictions. Columns (2), (4) and (6) restrict the sample to cases in which the defendant had at least one prior conviction. For a description of the explanatory variables of interest see *infra* note 304 and accompanying text (Appendix 1: Table 1). All regressions include a set of year fixed effects and crime class-type interaction fixed effects (*see supra* note 213).

