1.2. Review of Relevant Literature

Politicians, policymakers, journalists, legal scholars, and social scientists have long debated the relationship between prosecutorial decision making and racial and ethnic justice. Despite the acknowledged importance of this subject, however, relatively little is known about the criteria that prosecutors take into account in making discretionary decisions; more to the point, there is relatively little research on the degree to which disparities can be attributed to prosecutorial decision making, particularly in the area of plea bargaining.

Overall, research on racial disparities has primarily focused on sentencing outcomes, with comparatively little empirical attention focused on earlier stages of case processing involving prosecutorial discretion (Free, 2001). The Vera Institute of Justice's 2012 review of empirical research on race, ethnicity, and prosecution yielded 34 empirical studies published between 1990 and 2011 in peer-reviewed journals (Kutateladze, Lynn & Liang, 2012). The studies reviewed looked into the decision to prosecute and file charges (Albonetti, 1987; Baumer et al. 2000; Beichner & Spohn, 2005; Frazier & Haney, 1996; Frederick & Stemen, 2012; Spears & Spohn, 1997; Spohn, Beichner, & Davis-Frenzel, 2001; Spohn & Holleran, 2001); the decision to reduce charges (Albonetti, 1992; Bishop & Frazier, 1984; Holmes, Daudistel, & Farrell, 1987; Shermer & Johnson 2009); the decision to pursue a mandatory minimum sentence (Ulmer, Kurlycheck, & Kramer, 2007); and the decision to dismiss charges once filed (Adams & Cutshall, 1987; Albonetti, 1987; Barnes & Kingsnorth, 1996; Baumer, Messner, & Felson, 2000; Myers, 1982; Wooldredge & Thistlethwaite 2004). However, the review showed that most studies (18 out of 34) examined the initial screening decision and only a handful of studies looked into other discretionary points, including case dismissals, charge reductions, or plea offers. There was not a single study that reviewed all discretionary points. Given that earlier case processing decisions

greatly influence final criminal dispositions (Piehl & Bushway, 2007), examining a single discretion point in a complex process may not account for disparities introduced at other discretionary stages. The present study addressed this shortcoming by looking into every discretionary point from initial screening to sentencing.

There is mixed evidence that race plays a role in discretionary prosecutorial outcomes. The Vera Institute review (Kutateladze et al., 2012) concluded:

> Overall, research finds that the effect of race and ethnicity on prosecutorial decision making is inconsistent, and it is not always blacks or Latinos/as who are treated more punitively. Some of this inconsistency stems from the fact that prosecutors' offices have varied practices that may influence the impact of race on case outcomes. Yet even within the same office, specific types of cases (for example, homicide versus possession of marijuana) are likely to be handled very differently, which in turn would increase or decrease the impact of race. Furthermore, researchers suggest that minorities receive both more severe and more lenient outcomes, depending at different stages of the case-processing continuum. (p. 7)

Some studies show that race matters (e.g., Frederick & Stemen, 2012; Free, 2002; Sorensen & Wallace, 1999; Ulmer et al., 2007); others find no direct effect of race or offender's other characteristics in the charging process (e.g., Albonetti, 1992; Franklin, 2010; Shermer & Johnson, 2009); and still others show charge reductions in favor of minority offenders (e.g., Holmes et al., 1987; Wooldredge & Thistlethwaite, 2004). The inconsistency of these findings suggests that further investigation of the direct and indirect effects of race and ethnicity, while controlling for legally relevant case characteristics (e.g., strength of the evidence, type and seriousness of the offense, and defendant's culpability) and legally irrelevant factors (e.g., defendant-victim relationship, defendant gender, defendant social status, and victim race, ethnicity, and gender) is necessary to determine the circumstances under which race and ethnicity influence discretionary prosecutorial outcomes.

As noted above, a number of studies found that race and ethnicity affect prosecutorial decision making. Free (2002) reviewed studies on presentence discretionary decisions including the decision to prosecute a case and the decision to seek the death penalty in capital-eligible cases. In reviewing 19 studies on the decision to seek the death penalty, Free (2002) found that race clearly affected prosecutors' decisions to seek the death penalty. Bernstein, Kick, Leung, and Schulz (1977) examined charge reductions for a small sample of robbery offenses in a metropolitan jurisdiction in New York State and found that minorities who pleaded guilty at later stages of trial received less significant charge reductions. More recently, Ulmer et al. (2007) found that prosecutors were almost twice as likely to seek mandatory sentences against Hispanic defendants as white defendants. Chen (2008) found that black defendants were more likely to be charged with and receive third-strike sentences than white defendants, particularly for offenses that can be prosecuted either as a felony or a misdemeanor.

Some studies find no effect of offender race or ethnicity in the charging process.[5] In reviewing 24 studies of the initial decision to prosecute, Free (2002) found that the role of race was less clear; 15 of the 24 studies found no racial disparities. The Vera Institute's review (Kutateladze et al., 2012) found reported racial differences in 11 out of 18 studies focusing on *initial case screening*,[6] 4 out of 5 studies on *pretrial release and bail procedure*,[7] 2 out of 3 studies on *dismissal*,[8] and 3 out of 5 studies on *charge reduction*.[9] The review found only one study, by Albonetti (1990), which explicitly examined the impact of defendants' race on their

[5] It is also possible that studies that found differences by race were more likely to be published, and thus are overrepresented in the peer-reviewed outlets.
[6] When a reviewing prosecutor decides whether to accept a case for prosecution and, in some cases, how to charge the offense.
[7] Whether a defendant is held in detention while the case is pending and whether a defendant is offered and/or awarded bail.
[8] Whether a case or charge is dismissed at any point after initial screening by a prosecutor or a judge.
[9] Whether the seriousness and/or the number of charges are reduced at any point after initial screening.

likelihood to plead guilty and found only limited evidence that blacks were less likely to plead guilty. In another study, Albonetti (1992) examined the decision to reduce initial charges in 400 burglary and robbery cases in Jacksonville, Florida, and found no evidence of racial or gender disparity. Kingsnorth, Lopez, and Wentworth (1998) found no effect at any decision point in a sample of sexual assault cases in Sacramento, California. Albonetti and Hepburn (1996) examined diversion of felony drug cases in Maricopa County, Arizona and observed no direct effect of race but found male offenders were less likely to be diverted.

However, findings of no difference by race do not necessarily imply the absence of discrimination. For example, if police arrests involve racial selectivity, a finding of no differences in dismissal rates could imply a failure to correct the bias introduced by the police. Spohn and Spears (1996) found that sexual assault cases involving black defendants and white victims were more likely to be dismissed, but noted that their result could suggest prosecutors may be more willing to pursue weaker cases at initial screening.

Some studies report minority defendants were more likely than white defendants to receive charge reductions or dismissals. In a sample of burglary and robbery cases resolved by guilty pleas in Delaware County, Pennsylvania, and Pima County, Arizona, Holmes et al. (1987) found that being black increased the likelihood of a charge reduction in Delaware County and that Mexican–origin defendants in Pima County received more favorable charge reductions. Wooldredge and Thistlethwaite's (2004) study of misdemeanor assaults in Cincinnati, Ohio, reported African American offenders were less likely to be charged and fully prosecuted than similarly situated white offenders. Most researchers interpret these counterintuitive results as suggesting that blacks and Latinos are more likely than whites to be arrested on weak evidence

and that this, in turn, leads to a greater likelihood of charge reduction during the plea-bargaining process (see, e.g., Petersilia, 1983).

Previous research also suggests that charge-processing outcomes vary by offense type (Albonetti, 1997; Mustard, 2001; Steffensmeier, Ulmer, & Kramer, 1998; Wright & Engen, 2006). Most recently, Shermer and Johnson (2009) examined charging and sentencing outcomes in all federal cases terminated in 2001 and found that property crimes were more than twice as likely as violent crimes to receive charge reductions. Race and ethnicity emerged as strong predictors for *weapons* offenses, where blacks and Latinos were less likely to have their initial charges reduced. Latinos, however, were 20 percent more likely to have their charges reduced for *drug* offenses. In general, charge reductions were more likely to occur in cases involving more serious crimes, cases with more filing charges, and cases involving acceptance of responsibility and pretrial release.

A report commissioned by the Wisconsin Sentencing Commission concluded that racial disparities, when present, were typically found in *sentence types* (prison versus probation), with racial disparity increasing as offense severity decreased—thus highlighting the importance of analyzing less serious offenses where criminal justice actors have discretion (Mayrack, 2007).

Victim characteristics also appear to matter. LaFree (1980) found that black men who assaulted white women received more serious charges, were more likely to have their cases filed as felonies, and received longer sentences in state penitentiaries. Spohn and Holleran (2001) also report that when the perpetrator was a stranger, sexual assault cases involving white victims were more likely to elicit charges. In an empirical study of Detroit prosecutors' decisions to file charges in sexual assault cases, Spohn and Spears (1996) found that victim characteristics such as age (child, or adolescent/adult), moral character, and behavior at the time of the incident were

the *only* significant predictors of initial charging decisions. The Vera Institute of Justice's unpublished report (Kutateladze & Turner, 2011) also found that in a large mid-Western jurisdiction, domestic violence cases involving black defendants and white victims were more likely to be prosecuted compared to cases involving white defendants and white victims, black defendants and black victims, and white defendants and black victims. While victim's race appears to influence case outcomes, most DA's offices do not systematically capture this information, which makes victims' race-based analyses particularly difficult to conduct (this limitation also applies to this study).

The limitations of existing research make findings difficult to generalize. Meaningful comparisons between studies are problematic because of the lack of uniformity in the operationalization of variables measuring race and ethnicity; whereas some researchers simply differentiate between whites and non-whites, with all racial minorities lumped into the non-white category (e.g., Patterson and Lynch, 1991; Pyrooz, Wolfe & Spohn, 2011), others include separate variables for blacks, Latinos, and whites. Studies limited to one stage of processing may also mask disparities originating at other stages, which makes it particularly important to examine multiple discretion points. Also, as a number of the studies reviewed above show, aggregating data from a variety of offenses may mask racial differences in criminal processing. Failure to control for victim race and/or evidentiary strength may also produce misleading results. For example, Myers and Hagan (1979) found that defendant and victim race were only significant predictors in the decision to prosecute *after* controlling for measures of evidence.

Also, the existing research mainly focuses on the treatment of blacks, and to a lesser extent of Latinos, and provides very little insight into the treatment of other racial and ethnic groups, particularly Asians. Only two known studies focused on Asians, the first one examining

sentencing outcomes for Asian defendants (Johnson & Betsinger, 2009),[10] and the second one assessing the likelihood of Asian victims to support prosecution (Kingsnorth & MacIntosh, 2004). Therefore, the existing research tells us very little about the treatment of Asians, and more specifically whether they are more or less likely, compared to other racial groups, to be prosecuted, to have their case dismissed, to be detained, to be released on bail, or to receive punitive plea offers.

With a few exceptions (e.g., Frederick & Stemen, 2012; Spohn & Fornango, 2009), existing studies also do not take into account the effect of prosecutor characteristics and organizational constraints such as prosecutor caseload (Free, 2001) and rarely consider the impact of the type of criminal defense used (e.g., institutional provider, court-appointed or private) when testing hypotheses of racial disparity.

Furthermore, none of the studies focuses explicitly on plea offers to a lesser charge and custodial sentence offers (versus non-custodial alternatives), although a handful of studies described above looked into both charge reductions (e.g., Farnworth, Teske & Thurman, 1991; O'Neill-Shermer & Johnson, 2010) and sentencing outcomes (e.g., Hartley, Maddan & Spohn, 2007). Given that most cases are disposed through plea bargaining, the importance of examining the impact of race on plea offers cannot be overstated. It is not a lack of interest in plea bargaining, however, but perhaps the absence of systematic and recent data, that makes the current state of research inadequate to reliably suggest whether, and to what extent, defendants' race matters in the plea-bargaining process.

[10] These authors analyzed 165,632 cases from 88 federal districts eligible for discounts and examined whether Asian Americans were more likely to receive substantial assistance departures (SAD) (as well as be incarcerated and get a longer prison sentence) compared to white, black, Hispanic, and "other" offenders. The study concluded that Asian offenders were much more likely to receive a substantial assistance departure than white, black, and Hispanic offenders, even across offense categories such as violent crimes, drug crimes, and fraud cases. This finding is important, because SAD reduces the likelihood of incarceration as well as the final sentence length.

Finally, existing studies do not typically provide crucial information about the structure and case-processing specifics of individual jurisdictions from which data have been taken, nor do they suggest that practitioners' input have been gathered when designing studies and interpreting findings, which raises questions about their applicability. Given that criminal case processing in general, and in prosecutor's offices in particular, is extremely nuanced yet insufficiently and inconsistently documented, eliciting advice from practitioners ensures not only more accurate data and analyses but findings that are meaningful to policy and practice. Close collaborations with specific jurisdictions provide researchers with a more complete understanding of the discretionary decision-making process and the range of factors that may influence outcomes. Findings will therefore be more meaningful because they will have accurately considered actual office practice.

The present research overcomes some of these shortcomings by: (a) looking into a wide range of offenses, including minor offenses; (b) focusing on a large urban jurisdiction with sufficient sample size; (c) using recent data; (d) comparing the treatment of blacks and Latinos, but also Asians, with that of white defendants; (e) gathering data on evidence (particularly in drug offenses); (f) examining the impact of prosecutor (caseload, gender and race), defense counsel (institutional provider versus court-appointed versus private counsel), and arresting police officer (specialization) characteristics on case outcomes; (g) analyzing multiple discretionary points, from screening through sentencing, and principally focusing on plea offers; and (h) eliciting practitioners' feedback on data collection, analyses, and the contextualization of findings.

1.3. Research Questions

Research, policy debate, and public discourse on racial and ethnic disparity have emphasized that minority groups, particularly blacks and Latinos, are treated more harshly than whites by the criminal justice system (Spohn, 2000). Therefore, the main research question of this study is to what extent prosecutorial discretion contributes to unwarranted racial and ethnic disparities in case outcomes. More specifically, we looked into (a) case acceptance for prosecution, (b) pretrial detention and bail determination, (c) case dismissal, (d) plea bargaining, including charge and sentence offers, and (e) sentencing to test the following hypotheses:

Hypothesis 1: Blacks and Latinos are *more* likely to have their cases accepted for prosecution than similarly situated white defendants. Initial screening is the earliest discretionary decision made by prosecutors who decide whether to accept a case for prosecution or decline to prosecute, and if they choose to accept it, then how to charge an offense. Case acceptance for prosecution will be viewed as a more punitive outcome for the obvious reason that, if a case is prosecuted, defendants are more likely to be held in detention, be convicted and sentenced to custodial punishments. It must be noted, however, that blacks and Latinos may also be less likely to have their cases accepted if reviewing prosecutors are correcting for biased decisions made by arresting police officers (Petersilia, 1983). Finally, there should be no marked difference in case acceptance between white and Asian defendants.

Hypothesis 2: Blacks and Latinos are *more* likely to be held in pretrial detention. Pretrial release decisions are made by judges at Criminal court arraignment, which typically occurs within 24 hours of arrest. Judges may release defendants on their own recognizance (ROR), set bail or remand defendants into custody (for more, see section 6.2: Pretrial Detention). While it is ultimately within judges' purview to make detention decisions and set the bail amounts,

prosecutors have the opportunity to make bail recommendations based on the facts of the case, the defendant's criminal history, input from victims, employment status, and community ties. Pretrial detention is a form of punitiveness in itself—given that a defendant is held in custody before his conviction which, among others, may result in a loss of employment and the destruction of family ties—but it may also contribute to the imposition of custodial sentences because judges and prosecutors may view those in detention as more dangerous. While we hypothesize that blacks and Latinos may be more likely to be held in detention, we do not expect to observe marked difference in pretrial detention between white and Asian defendants.

Hypothesis 3: Blacks and Latinos are *less* likely to have cases dismissed. Dismissals may occur as the result of a motion to dismiss brought by the defendant, the prosecution, or by the Court's own accord. Judges may dismiss charges against a defendant throughout the course of a case. For *misdemeanors*, prosecutors may unilaterally dismiss charges throughout the life of a case, while *felonies* after indictment may only be dismissed with judicial and supervisory approval (see section 6.3: Case Dismissal). A lower rate of dismissal will be used as one of the measures of punitiveness. Consistent with a theoretical argument that blacks and Latinos are treated more harshly, they might be less likely to have their cases dismissed. We do not expect to observe a marked difference in case dismissals between white and Asian defendants.

Hypothesis 4: Blacks and Latinos are *less* likely to receive a plea offer to a lesser charge and *more* likely to receive custodial sentence offers. DANY adheres to the so- called "best-offer-first" approach, in which ADAs are encouraged to make the best possible offer first to save investigative resources and increase defendants' likelihood to accept the plea. The best offer may

include a request to plead guilty to a lesser charge.[11] If a defendant does not accept the first offer, it is possible that the next offer, if made, will include a higher charge, or include the same charge with a more punitive sentence. Offers may also include sentencing recommendations. These can include: a recommendation of jail time, time served in pretrial detention, restitution, fine, and community service, among others (for more, see section 6.4). Custodial plea offers and offers including time served will be considered as more punitive sentence offers, although they may not always be perceived as such. For example, some defendants may view a fine and community service as a less desirable outcome compared to time served. There should be no noticeable difference in plea and sentence offers between white and Asian defendants.

Hypothesis 5: Blacks and Latinos are more likely to be sentenced to custodial punishments. Previous research suggests that these minority groups are more likely to be sentenced to imprisonment and longer prison terms (Hartley et al., 2007; Mayrack, 2007; Steffensmeier & Demuth, 2000). Although sentences are imposed by courts, given that most cases result in guilty pleas, the prosecutors' role in sentencing is significant. As for Asians, we expect that they are *less* likely to receive custodial sentences and longer sentences, compared to all racial groups, including whites. Previous research suggests that relative to other minority groups, Asians benefit from more positive and less stigmatizing stereotypes in society, which may contribute to more lenient sentencing outcomes for them (Johnson & Betsinger, 2009).

1.4. New York County District Attorney's Office

This study was conducted in partnership with the New York County District Attorney's Office (DANY), a highly prestigious and nationally influential prosecutor's office which

[11] Prosecutors do not recommend a plea to the charge. They either recommend plea offers to a lesser charge or sentences upon a plea to the charge. No offer means that prosecutors are playing hard-ball. From a defendant's perspective, the absence of an offer is a punitive response.