

## Who gets a second chance?

### Conviction diversion programs and their consequences for inequality

#### **Abstract**

*A growing literature is expanding criminal justice research beyond incarceration and felony conviction by mapping the expansion and consequences of lower-level criminal justice contact, including misdemeanors, arrest records, and community supervision. Within this recent body of work, there is little research on the distribution and consequences of alternative criminal case dispositions, and how they contribute to racial disparities in the U.S. criminal justice system. This paper addresses the gap in the literature by analyzing whether and how criminal case dispositions vary by race and ethnicity. To investigate this question, I use a unique data set from a large urban jurisdiction in Texas that includes all felony and jailable misdemeanor cases (N=663,796) filed against adults aged 17-99 (N=280,342) from 2000-2015. Preliminary results indicate that Whites are more likely to have their cases result in a non-conviction compared with Black and Latinx defendants.*

#### **Background and Introduction:**

After forty years of unprecedented growth, the American criminal justice system is measured in millions. Over 18 million adults have a felony conviction, nearly 2 million are confined in prison or jail, and over 5 million are under supervision through probation or parole (Kaeble and Glaze 2015; Shannon et al. 2017). These staggering figures have captured the attention of social scientists and the public alike, prompting inquiry into the causes and consequences of what is now known as mass incarceration. Extensive research in recent decades has established that conviction and imprisonment are associated with diminished employment prospects and earnings (Western 2002; Pager 2003; Uggen et al. 2009; Harding et al. 2018), political participation (Uggen and Manza 2002; Weaver and Lerman 2010), lifetime physical health (Massoglia 2008), and family and child wellbeing (Comfort 2008; Wakefield and Wildeman 2011, 2013). Less well understood, however, are the consequences of far more frequent low-level criminal justice contact including misdemeanors, arrests without conviction, and non-custodial sentences.

Of the more than 10 million arrests made in the United States each year, fewer than 20% will result in a felony conviction (Rosenmerkel et al. 2009; Puzzanchera and Kang 2017). The overwhelming majority of criminal cases in the U.S. will result in a dismissal or misdemeanor

conviction. Until recently, data on these lower-level charges and dispositions have been limited. The Bureau of Justice Statistics, whose reports are widely used for incarceration research, does not routinely collect data on state-level case dispositions, misdemeanors, or diversion programs (Phelps 2015). Longitudinal surveys include information about low-level contact, but often suffer from high dropout amount populations who are disproportionately likely to experience criminal justice involvement (Western et al. 2016). Despite the drawbacks of available data, emerging work has begun to uncover the consequences of low-level criminal justice contact, including misdemeanors (Natapoff 2012; Kohler-Hausmann 2013), probation (Phelps 2013, 2017), arrest records (Uggen et. al 2014; Lageson 2016) and surveillance (Goffman 2009; Brayne 2014, 2016). Not yet explored in this literature are the conviction diversion programs which provide defendants a “second chance” at a clean record.

Criminal cases in state courts are typically closed in one of two ways: dismissal or conviction. Cases can be dismissed prior to plea or trial at the discretion of the judge, often with the recommendation of the prosecutor. Reasons for dismissal range from due process concerns, such a speedy trial violations, to a dismissal “in the interest of justice.” A charge may also be dismissed if the prosecutor has pursued a different case against the defendant and has secured a conviction, a process sometimes known as charge bargaining. Cases result in conviction through either a guilty plea by the defendant or a finding of guilt in a trial. In between these two outcomes lies an intermediary disposition that provides a “second chance” for a defendant to secure a dismissal rather than a conviction. Referred to in this paper as diversion, this disposition occurs when a court decides to temporarily delay a finding of guilt while the defendant completes a set of court-ordered conditions. Upon the successful completion of diversion, defendants may have the charges dismissed and become eligible for the record to be expunged. Failure to complete the ordered conditions prompts the prosecutor to resume the pursuit of conviction. At present, forty-eight states and the District of Columbia have laws which permit courts to implement diversion programs for at least some misdemeanor and felony offenses (Love, et. al 2018). Although they go by a variety of names, including deferred adjudication, pre-trial diversion, probation before trial, and adjournment in contemplation of dismissal, they share the stated goal of moving certain cases toward dismissal rather than conviction.

Like many aspects of the criminal justice process, prosecutorial and judicial discretion has significant influence over when and if diversion is offered, and which cases will ultimately

end in a dismissal rather than conviction. It is well established that Latinx and African Americans, particularly men, are disproportionately represented in felony convictions and incarceration. There is comparatively less research on how divertive court programs may contribute to the overrepresentation of minority defendants at later stages in the criminal justice process. I address this gap in the literature by analyzing whether and how criminal case outcomes and consequences vary by race and ethnicity.

### **Data and Methods:**

In order to investigate this, I use a unique compilation of data from a large urban jurisdiction in Texas, a state with a history of punitiveness and a contemporary reputation for criminal justice reform. I created a pooled cross-section of all felony and misdemeanor cases filed from 2000 – 2015 using local and state level records.<sup>1</sup> The data contain initial case outcome descriptions, which include dismissals, diversion, convictions, and plea information, and as well as secondary case outcomes, which measures the conversion of diverted cases to either conviction or dismissal. Texas law permits courts to offer pre-trial diversion and deferred adjudication in a number of both felony and misdemeanor cases at the discretion of the judge and prosecutor. For preliminary inquiry I construct a discrete outcome variable as my dependent variable. I sorted all initial dispositions into dismissal, diversion, or conviction. The sample data contain a mutually exclusive race variable, which I use as my key independent variable. Controls used in initial inquiry are coded from original court record data and include sex, estimated age at the time of the offense, and severity of charge. Sex is coded as a binary male/female based on reported defendant sex. Age is estimated by dividing the number of days between the defendant's date of birth and the recorded offense date by 365. The severity of the charge is classified by Texas Code of Criminal Procedure definitions, and sorted into discrete categories which range from most severe (capital felony) to least severe (Class B misdemeanor). Cases have recorded divertive outcomes at all crime levels, except at the capital felony level.

The sample consists of 663,796 cases filed against 280,345 unique individuals aged 17 – 99 at the first recorded offense in the period. Less than one percent of observations are dropped

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<sup>1</sup> The sample was drawn from all recorded cases 1975 – 2018, and limited in order to increase validity. Records prior to 2000 are incomplete in both state and local electronic systems, and cases entered after 2015 may still be pending a final decision, particularly in cases of diversion. The data excludes Class C Misdemeanors, which are fine-only offenses adjudicated in municipal and justice of the peace courts.

due to missing or erroneous data, or having juvenile status at the time of the recorded offense.<sup>2</sup> 279 capital felony cases are included in the summary statistics but excluded from preliminary analysis because diversion is not permitted in death penalty cases. Table 1 displays descriptive statistics of the sample, both by individuals and by cases. Race is coded into four mutually-exclusive categories based on the original data. Less than 2 percent of the sample has a recorded race other than White, Black or Latino. There is no ethnicity variable in the local data, so in later models I test the sensitivity of results with ethnicity data from state-level convictions as well as a Hispanic-ethnicity variable constructed based on Spanish-language surnames in the sample. Table 1 shows that Black and Latinx defendants have the most cases filed against them, with nearly three times the number of cases as unique individuals in the sample, whereas Whites have less than twice as many cases as unique defendants. Over forty percent of individual defendants were under the age of 26 at the time of their first period charge, and males make up over 70 percent of the sample in terms of both individuals and cases. These figures are consistent with national aggregate estimates of people incarcerated in prison and jail (Kaeble and Glaze 2015).

Table 2 shows summary statistics of initial case outcomes by race, sex, and offense level. Approximately two-percent of cases in the sample ended in an outcome other than dismissal, diversion or conviction. These outcomes include transfers to other jurisdictions; cases ending in a mistrial, hung jury, or not guilty verdict; and cases where a defendant was found insane or mentally unfit to stand trial. Without controlling for other variables, the distribution of case outcomes indicates that Black and Latinx defendants have fewer cases diverted and more cases convicted than White defendants. Furthermore, it appears that only Latinx defendants have fewer of their cases dismissed than Whites. There also appear to be differences in diversion and conviction by sex. More cases brought against female defendants result in diversion and dismissal than conviction, whereas the majority of cases against male defendants result in conviction.

Table 3 displays the results of a preliminary regression model used to demonstrate proof of concept prior to building more sensitive models. I use multinomial logistic regression to estimate the logged odds of case outcomes for all defendants, excluding those charged with

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<sup>2</sup> Erroneous data was identified as those observations in which the defendant's recorded date of birth was later than the filed offense date or the disposition record read "CREATED IN ERROR". Texas defines juvenile status as those aged 16 and younger.

capital offenses. Results show that case outcomes may vary by race, when controlling for sex, age, and offense level. The model predicts that Latinx and Black defendants have significantly higher odds of their case ending in either conviction or dismissal than diversion, compared to Whites. Unexpectedly, female defendants are less likely to have their case dismissed rather than diverted, compared to male defendants. This preliminary estimate prompts further inquiry into the relationship between gender and criminal justice contact. The coefficient estimate for age indicates that older defendants, compared with younger defendants, have a greater likelihood of either a conviction or dismissal. This estimate may reveal that older defendants are those more likely to have a criminal history, and thus are ineligible for diversion. Alternatively, it may reflect that courts are more willing to offer diversion to younger defendants whom they believe have more to lose from a criminal conviction. Finally, the coefficient estimates for crime type indicate that more severe crimes are less likely to be dismissed and more likely to end in conviction, when compared with the lowest level offense in the sample (Class B misdemeanors). These estimates support the validity of the crime severity rankings in the sample, which show that more severe offenses have a greater likelihood of conviction. This is consistent with conviction rate trends in aggregate criminal case statistics (Rosenmerkle et al. 2009).

**Implications:**

The preliminary results point to the importance of low-level criminal justice contact in contributing to explanations for inequality. These preliminary results invite more sensitive coding of original case data in order to better understand variance by race and ethnicity. Future models will include a number of covariates, including criminal history, presiding judge and prosecutor, and crime type, among others, to better account for endogenous explanations of case outcome variance. This paper contributes to the literature by analyzing the demographic variance in conviction risk and exposure, expanding our understanding of how lesser charges and outcomes, particularly “diversion”, have consequences for racial inequality.

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**Table 1: Summary Statistics of Individuals and Cases in Texas County A Criminal Records, 2000 - 2015**

Variable	Individuals	Percent	Cases	Percent
<b>Race</b>				
Black	32,644	11.6	90,327	13.6
Latinx	127,586	45.5	350,970	52.9
White	116,795	41.7	217,490	32.8
Other	3,320	1.2	5,009	0.8
Total	280,345	100	663,796	100
<b>Age<sup>a</sup></b>				
17 - 25	115,194	41.1	256,720	38.7
26 - 39	98,889	35.3	263,594	39.7
40 - 59	60,282	21.5	133,299	20.1
60 +	5,980	2.1	9,783	1.5
Total	280,345	100	633,796	100
<b>Sex</b>				
Female	78,018	27.8	149,621	22.5
Male	202,327	72.2	514,175	77.5
Total	280,345	100	663,796	100

*Note:* All Misdemeanor A, B and Felony cases

**Table 2: Summary Statistics, by initial case outcome in Texas County A Criminal Records, 2000-2015**

Variable	Dismiss	Diverted	Convicted	Other	Count
<b>All Cases</b>	30.8	16.2	51	2	663,796
<b>Race</b>					
Black	33.4	12.8	51.7	2	90,327
Latinx	28.3	13.5	56.2	1.9	350,970
White	33.5	21.7	42.7	2.1	217,490
Other	39.1	28.5	30.6	1.9	5,009
<b>Sex</b>					
Female	33.1	23.8	41.5	1.6	149,621
Male	30.2	14	53.7	2.1	514,175
<b>Charge Type</b>					
Cap. Felony	16.5	0	73.8	9.7	279
Felony 1	21.2	10.8	62.5	5.4	21,116
Felony 2	19.7	14.7	61.8	3.8	29,500
Felony 3	19.6	13.4	64.1	2.9	45,521
State Jail Felony	22.3	16.3	59.7	1.7	77,625
Misd. A	37.5	14.6	45.8	2.1	189,348
Misd. B	32.3	18.2	48.1	1.5	300,407

*Note:* Figures are percentage of all cases filed in the sample period, excluding expunged records.

**Table 3: Multinomial Logistic Regression for Initial Case Outcome, All Cases in Texas County A Criminal Records, 2000-2015**

Variable	Dismissed (vs. Diverted)	Convicted (vs. Diverted)	Other Outcome (vs. Diverted)
Race (vs. White)			
Black	.515*** (.013)	.633*** (.012)	.362*** (.03)
Latinx	.272*** (.008)	.670*** (.008)	.32*** (.021)
Other	-.15*** (.036)	-.602*** (.038)	-.39*** (.109)
Sex (vs. Male)			
Female	-.413*** (.008)	-.706*** (.008)	-.725*** (.024)
Age	.026*** (.0003)	.03*** (.000)	.06*** (.001)
Charge Type (vs. Misd. B)			
Misd. A	.307*** (.01)	.069*** (.009)	.467*** (.023)
State Jail Felony	-.338*** (.013)	.23*** (.011)	.129*** (.033)
Felony 3	-.378*** (.018)	.333*** (.015)	.626*** (.034)
Felony 2	-.373*** (.021)	.32*** (.018)	1.058*** (.038)
Felony 1	.004 (.026)	.627*** (.024)	1.727*** (.04)
Constant	-.241*** (.014)	-.125*** (.013)	-4.369*** (.034)
Log likelihood - 692464.72			

\* $p < .05$ , \*\* $p < .01$ , \*\*\* $p < .001$

*Note:* Results are reported as multinomial logistic regression coefficients; standard errors are in parentheses. Reference categories listed next to variable. 279 capital felonies were dropped from data for this model.