

IN SEARCH OF RACIAL JUSTICE: THE ROLE OF THE PROSECUTOR

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This article examines the role of prosecutors in establishing and maintaining racial disparities in the criminal justice system, and examines efforts of the Prosecution and Racial Justice Program of the Vera Institute of Justice to enact reform within prosecutors' offices. After providing an overview of the debate on causes of such racial disparities generally, the article examines how seemingly race neutral charging and plea-bargaining decisions by prosecutors can actually cause and perpetuate racial disparities. As a model for reforming such practices, the article evaluates and critiques the Prosecution and Racial Justice Program and makes recommendations for how this program can be replicated across the country.

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INTRODUCTION

The racial disparities in our criminal justice system are extraordinary and well-documented. In 1995, nearly one in three African American men between the ages of twenty and twenty-nine were under the supervision of the criminal justice system—either in jail, prison, on probation, or on parole.¹ Today, one in every ten black males in his thirties is in prison or jail on any given day.² Over 60% of all prisoners in 2010 were Black or Latino.³ The disparities exist at every step of the criminal process, from arrest through sentencing.

Much has been written about why the American criminal justice system is so fraught with racial disparity.⁴ Some point to discrimina-

1. MARC MAUER & TRACY HULING, *THE SENTENCING PROJECT, YOUNG BLACK AMERICANS AND THE CRIMINAL JUSTICE SYSTEM: FIVE YEARS LATER 1* (1995), available at http://www.sentencingproject.org/doc/publications/rd_youngblack_5yrslater.pdf.

2. *Racial Disparity*, THE SENTENCING PROJECT, <http://www.sentencingproject.org/template/page.cfm?id=122> (last visited Aug. 26, 2013).

3. PAUL GUERINO ET AL., BUREAU OF JUSTICE STATISTICS, *PRISONERS IN 2010*, at 26 (2011). Compare E. ANN CARSON ET AL., BUREAU OF JUSTICE STATISTICS, *PRISONERS IN 2011*, at 9 (2012), available at <http://www.bjs.gov/content/pub/pdf/p11.pdf> (stating that in 2010, 468,528 state inmates were white, while 518,763 were black), with U.S. CENSUS BUREAU, *THE WHITE POPULATION: 2010 3* (2011) (stating that in 2010, whites alone comprised 72.4% of the U.S. population), available at <http://www.census.gov/prod/cen2010/briefs/c2010br-05.pdf>.

4. See generally MARC MAUER, *RACE TO INCARCERATE* (2d ed. 2006) (discussing the alarming rate that our prison population has grown in the last few decades and the racial disproportionalities reflected in the increase); Alfred Blumstein, *On the Racial Disproportionality of United States' Prison Populations*, 73 J. CRIM. L. & CRIMINOLOGY 1259 (1993) (exploring various explanations for the racial disproportionality including “racial discrimination in the criminal justice system” and “disproportionate involvement in criminal activity”); David C. Baldus & George Woodworth, *Race Discrimination and the Legitimacy of Capital Punishment: Reflections on the Interaction of Fact and Perception* 53 DEPAUL L. REV. 1411 (2004) (extending a previous study by Baldus that found gross racial inequities in the administration of the death penalty

tory decision-making by criminal justice officials at each step of the process while others suggest that disproportionate offending is the cause. In fact, there are many complex reasons for this unfortunate phenomenon. Criminal justice officials—including police officers, prosecutors, judges, and corrections officials—make discretionary decisions that often have a racial impact. In addition, the socioeconomic causes of crime disproportionately affect people of color.⁵ The impact of the War on Drugs cannot be overstated, and there are undoubtedly many other factors that have contributed to the startling statistics and overwhelming evidence of racial disparity. Not surprisingly, as the causes of the racial disparities in our criminal justice system stem from many sources, so must the solutions.

In this article, I focus on prosecutors. As the most powerful officials in the criminal justice system, their discretionary decisions—especially their charging and plea-bargaining decisions—play a very significant role in creating and maintaining the racial disparities in the criminal justice system. The good news is that prosecutors can, if they wish, use that same power and discretion to help reduce these disparities.

The Prosecution and Racial Justice Program of the Vera Institute of Justice provides a model for reform that could help to eliminate unwarranted racial disparities in the criminal justice system. In this program, Vera Institute staff members work with prosecutors in selected offices to help them analyze the racial impact of their decisions at various points of the process. According to the Program's website, it "works collaboratively with its partners to analyze data about the exercise and impacts of prosecutorial discretion; assists in developing routine policies and practices that promote fairness, efficiency, and professionalism in prosecution; and provides technical assistance to help prosecutors implement those measures."⁶ Researchers from the Vera Institute collect data at various decision points in prosecution offices and use a methodology that seeks to determine whether and how race neutral discretionary decisions have produced racial dispari-

in Georgia); Dan Weikel, *War on Crack Targets Minorities Over Whites: Cocaine Records Show Federal Officials Almost Solely Prosecute Nonwhites*, L.A. TIMES, May 21, 1995, at A1.

5. See generally Deborah C. Malamud, *Assessing Class-Based Affirmative Action*, 47 J. LEGAL EDUC. 452, 453 (1997) (describing how low socioeconomic status and associated factors relating to poverty and social disadvantages to economic opportunity and attainment disproportionately affect people of color).

6. *Prosecution and Racial Justice Program*, VERA INST. OF JUSTICE, <http://www.vera.org/centers/prosecution-and-racial-justice-program> (last visited June 3, 2013).

ties. If racial disparities are identified, the chief prosecutor may then take corrective action to eliminate them.

This article will discuss and evaluate the Prosecution and Racial Justice Program. Might it serve as a model that could be duplicated in prosecution offices across the country? To what extent might it effectively reduce racial disparities? How might the model be improved? Part I will briefly discuss the racial disparity problem and some of its causes. Part II will focus on the role of prosecutors and explain how their seemingly race neutral charging and plea-bargaining decisions can cause and perpetuate racial disparities. Part III will discuss the Prosecution and Racial Justice Program, including its history and current projects. Part IV will analyze and critique the program by examining its successes and challenges. Finally, Part V will provide recommendations for successful duplication of the program in additional prosecution offices.

I.

RACIAL DISPARITY IN THE CRIMINAL JUSTICE SYSTEM

The statistics are startling. In 1954, there were about 100,000 African Americans in America's prisons and jails.⁷ Today, there are almost 900,000.⁸ Current research suggests that one of every three African American males born today can expect to go to prison at some point in his lifetime, as can one of every six Latino males.⁹ One of every eighteen African American females and one of every forty-five Hispanic females face a similar fate.¹⁰ This data appears even starker when compared to the statistics for their white counterparts: One in seventeen White males and one in 111 White females can expect to spend time in prison.¹¹

Scholars debate the reasons for the disparity, although most agree that it is caused by a combination of factors, including disproportionate offending in certain categories of crime, discriminatory decision-making by criminal justice officials, certain criminal justice policies and practices, and the War on Drugs. Most of the disagreement centers around which of these factors plays the most significant role in causing and perpetuating racial disparities.¹² In fact, it would be very diffi-

7. Marc Mauer, *Addressing Racial Disparities in Incarceration*, 91 PRISON J. 87S, 88S (2011).

8. *Id.*

9. *Id.*

10. *Id.*

11. *Id.*

12. See generally RANDALL KENNEDY, *RACE, CRIME, AND THE LAW* (1998); MAUER, *supra* note 4; *Prosecution and Racial Justice Program*, *supra* note 6.

cult, if not impossible, to determine the precise extent to which each of these factors contributes to the racial disparities in our criminal justice system; they all play a role. Although this article focuses on the role of the prosecutor,¹³ disproportionate offending, racial profiling, and the War on Drugs all contribute to the disparities.

A. *Disproportionate Offending*

The proponents of the disproportionate offending theory claim that African Americans and Latinos are disproportionately represented in the criminal justice system because they commit a disproportionate number of crimes.¹⁴ One of the problems with relying on this theory is that there is no accurate mechanism for measuring the rate of offending. Although it would seem natural to rely on arrest statistics, they are not a reliable measure of how many crimes are committed because of the discretionary nature of the police function. A police officer may arrest an individual if there is probable cause to believe that the individual committed a crime.¹⁵ But even if there is probable cause, with very few exceptions, a police officer is not *required* to make an arrest.¹⁶ In one neighborhood, a police officer may break up a neighborhood fight and negotiate a truce between the parties without making an arrest. That same police officer might decide to arrest everyone involved in a similar fight in another neighborhood, creating a record of criminality. In addition, not all crimes are reported to the police.

Scholars have studied and evaluated arrest records and imprisonment rates to try to determine the extent to which bias may play a role in the criminal justice process. Alfred Blumstein's 1982 study compared African American arrest rates with African American imprison-

13. See *infra* Part III.

14. See generally WILLIAM WILBANKS, *THE MYTH OF A RACIST CRIMINAL JUSTICE SYSTEM* (1986); Heather McDonald, *Is the Criminal Justice System Racist?*, CITY J., Spring 2008, http://www.city-journal.org/2008/18_2_criminal_justice_system.html; Jason Riley, Opinion, *Race, Politics and the Zimmerman Trial*, WALL ST. J., July 15, 2013, <http://online.wsj.com/article/SB10001424127887323394504578608182550247030.html>.

15. See generally *U.S. v. Watson*, 423 U.S. 411 (1976) (upholding the constitutionality of warrantless arrests as long as they are based on probable cause); 5 AM. JUR. 2D *Arrest* § 14 (2013) (illustrating that probable cause, as it has been incorporated into the Federal Rules of Criminal Procedure, is a common sense determination based on the reasonably cautious suspicion that an offense has been committed and that the suspect committed it).

16. *But see* ALASKA STAT. § 18.65.530(a)(1) (2012) (“[A] peace officer, with or without a warrant, shall arrest a person if the officer has probable cause to believe . . . the person has committed domestic violence” (emphasis added)); COLO. REV. STAT. 18-6-803.6(1) (2012); D.C. CODE § 16-1031(a) (2012); VA. CODE ANN. § 19.2-81.3 (2013) N.J. STAT. ANN. § 2C:25-12 (West 2005).

ment rates in eleven categories of crime.¹⁷ Blumstein concluded “that in a nonbiased system, racial proportions in arrests would be mirrored in racial proportions imprisoned.”¹⁸ He determined the percentage of unexplained disproportionality for each category. Not surprisingly, this percentage was low for homicide and aggravated assault (2.8% and 5.2% respectively);¹⁹ one would assume that for these serious offenses, police officers would more likely make an arrest, regardless of the race of the defendant or victim. However for the other categories of offenses, the percentage of unexplained disproportionality was relatively high—from 26% to 46%.²⁰ The highest percentage—48.9%—was for drug offenses.²¹

Assuming the accuracy and reliability of Blumstein’s study, it reveals a significant amount of unexplained disproportionality. This unexplained disproportionality suggests that the incarceration of a very large number of African Americans may be based, at least in part, on racial bias at some point in the criminal justice process.²² For drug offenses, it would appear that almost half of African Americans may have been incarcerated as a result of such bias. However, because the study relies on arrest records, which do not accurately reflect rates of offending, it cannot accurately reflect the extent to which racial bias permeates the criminal justice system.

In sum, disproportionate offending among African Americans and Latinos accounts for some of the racial disparities in the criminal justice system, but it is difficult to quantify. For some offenses—like drug offenses, for example—disproportionate offending does not appear to be a significant factor. Since drug arrests and convictions account for such a high percentage of individuals in prisons and jails,²³

17. Alfred A. Blumstein, *On the Racial Disproportionality of United States’ Prison Populations*, 73 J. CRIM. L. & CRIMINOLOGY 1259, 1275 (1982).

18. *Id.* at 1264.

19. *Id.* at 1274.

20. *Id.*

21. *Id.*

22. Alfred Blumstein, *Racial Disproportionality of U.S. Prison Populations Revisited*, 64 U. COLO. L. REV. 743, 749 (1993) (“Racial discrimination is part of the residual not accounted for. Such discrimination could account for a part, or all, of the twenty percent not accounted for by the differential involvement in arrest—or perhaps for even more than twenty percent). Examination of 1991 data shows that “. . . the racial disproportionality situation for the crimes other than drugs is roughly comparable in 1991 to what it was in 1979.” *Id.* at 754.

23. *Drug Policy*, THE SENTENCING PROJECT, <http://www.sentencingproject.org/template/page.cfm?id=128> (last visited Oct. 3, 2013) (“At the Federal level, prisoners incarcerated on a drug charge comprise half of the prison population, while the number of drug offenders in state prisons has increased thirteen-fold since 1980.”).

the role of disproportionate offending in the overall calculus of the racial disparity problem is, at best, uncertain.

B. Racial Profiling

Many scholars have written about the discriminatory effect of discretionary decision-making by criminal justice officials, especially at the arrest and prosecution stages of the process.²⁴ Police and prosecutors exercise vast discretion in the performance of their duties and responsibilities, and sometimes that discretion is exercised in ways that result in different treatment of defendants and victims. Even if police and prosecutors do not intend to discriminate against defendants because of their race, their race neutral decision-making sometimes has a racial effect. Judicial decisions and certain criminal justice policies also play a role.

Police officers engage in racial profiling when they suspect an individual is engaging in criminal behavior because of that person's race or ethnicity. The practice is based on racial stereotypes and manifests itself in many different ways. The term "Driving While Black" or "DWB" is used to describe the phenomenon of pretextual traffic stops in which police officers stop African American drivers on the pretext of giving them a traffic ticket so that they may question them, ask for consent to search, and otherwise investigate them for crimes for which they have no basis to suspect them.²⁵ With all forms of racial profiling, police officers stop and question and/or search individuals solely because of their race or ethnicity when they have

24. See generally PAUL BUTLER, *LET'S GET FREE: A HIP-HOP THEORY OF JUSTICE* (2009) (presenting various proposals to combat discriminatory practices and mass incarceration in the criminal justice system); MILTON HEUMANN & LANCE CASSAK, *GOOD COP, BAD COP: RACIAL PROFILING AND COMPETING VIEWS OF JUSTICE IN AMERICA* (3d ed. 2007) (exploring the impact of racial profiling on racial and ethnic minorities); DAVID A. HARRIS, *PROFILES IN INJUSTICE: WHY RACIAL PROFILING CANNOT WORK* (2003) (discussing how racial profiling is unjust and ineffective in preventing crime or apprehending criminals); Mark D. Rosenbaum & Daniel P. Tojaki, *Healing the Blind Goddess: Race and Criminal Justice*, 98 MICH. L. REV. 1941 (2000) (discussing some of the many overt abuses of power by law enforcement officials that have affected racial minorities); Charles W. Thomas & W. Anthony Fitch, *Prosecutorial Decision Making*, 13 AM. CRIM. L. REV. 507 (1976) (focusing on the powerful role that the prosecutor plays in the enforcement of laws); *Developments in the Law: Race and the Criminal Process*, 101 HARV. L. REV. 1472 (1988) (reviewing the impact that criminal justice officials can have at all stages of the criminal charging and sentencing process).

25. See generally David A. Harris, *The Stories, The Statistics, and The Law: Why "Driving While Black" Matters*, 84 MINN. L. REV. 265 (1999) (discussing the many instances where African Americans who have been subjected to pretextual traffic stops and the deleterious effects that "DWB" stops have on African American communities).

neither reasonable suspicion²⁶ nor probable cause²⁷ to believe they are engaged in criminal activity.

Racial profiling was so rampant in New York City that a class action lawsuit was brought against the city. In *Floyd v. New York City*, the plaintiffs challenged the police department's stop and frisk policy as being in violation of the Fourth Amendment's prohibition against unreasonable searches and seizures.²⁸ During the trial, the plaintiffs presented overwhelming evidence that police officers were stopping individuals based on their race or ethnicity with neither probable cause nor reasonable suspicion.²⁹ In an extraordinary opinion issued on August 12, 2013, Judge Shira A. Scheindlin ruled for the plaintiffs, finding that New York City's stop and frisk policy violated the plaintiffs' Fourth and Fourteenth Amendment rights.³⁰ Judge Scheindlin found that senior officials in the City and New York Police Department were "deliberately indifferent" to unconstitutional stop and frisks and that these practices were sufficiently widespread to have the "force of law."³¹ She further found that the police department had a *policy* of indirect racial profiling based on criminal suspect data and that senior officials in the City and police department were *deliberately indifferent* to the intentionally discriminatory practices at the officer and managerial levels.³² The city of New York has appealed the decision.³³

Although racial profiling has been formally condemned by legislators,³⁴ police chiefs,³⁵ and even the President of the United States,³⁶

26. See 5 AM. JUR. 2D. § 14, *supra* note 15.

27. See generally Margaret Raymond, *Down on the Corner, Out in the Street: Considering the Character of the Neighborhood in Evaluating Reasonable Suspicion*, 60 OHIO ST. L.J. 99 (1999) (arguing against the "broken-windows" theory, where the appearance of a neighborhood is said to justifiably arouse "reasonable suspicion" in the minds of law enforcement officers).

28. 739 F. Supp. 2d 376, 378 (S.D.N.Y. 2010).

29. *Id.* at 378–79, 383–85. See also *Floyd v. City of New York*, 283 F.R.D. 153, 170, 174 (S.D.N.Y. 2012) ("[T]he frequency of alleged injuries . . . here creates a likelihood of future injury sufficient to address any standing concerns . . . As [plaintiffs] argue, these claims raise 'central questions of fact and law that, when answered, will resolve all class members' *Monell* claims against the City.'").

30. *Floyd v. City of New York*, No. 08 Civ. 1034(SAS), 2013 WL 4046209, at *75 (S.D.N.Y. Aug. 12, 2013).

31. *Id.* at *70.

32. *Id.* at *72.

33. See Benjamin Weiser, *City Asks Court to Vacate Rulings on Policing Tactic*, N.Y. TIMES, Nov. 10, 2013, at A31.

34. See Racial Profiling Prevention Act, H.R. 838, 113th Cong. (2013); see also *Ending Racial Profiling in America Before the Subcomm. on the Constitution, Civil Rights, and Human Rights of the S. Judiciary Comm.*, 112th Cong. (2012) (recounting the instances of racial profiling in immigration and terrorism policy in the 21st Century).

police officers continue to engage in the practice.³⁷ The Supreme Court has held that police officers may stop a driver as long as he has probable cause to believe the individual has committed a traffic offense, even if it is a pretextual traffic stop.³⁸ The Court made it clear that any claim of racial discrimination must be based on the Equal Protection Clause and requires a showing that the officer engaged in intentional discrimination.³⁹ Proving intentional race-based discrimination is difficult, and often police officers do *not* discriminate intentionally. Racial profiling may be based on unconscious racism⁴⁰ or implicit bias, for which there is no legal remedy.⁴¹

In addition to the practice of racial profiling, police officers contribute to racial disparities when they engage in more heavy-handed police practices in neighborhoods of color than in white neighborhoods.⁴² When police maintain a presence in neighborhoods of color and are absent from white neighborhoods, it is no surprise that they will arrest African Americans and Latinos while declining to arrest their similarly situated white counterparts. The failure to arrest whites who engage in criminal behavior contributes to racial disparity as much as the blatant practice of racial profiling.

35. See PORTLAND POLICE BUREAU, PLAN TO ADDRESS RACIAL PROFILING 3 (2009) (discussing Chief Roseanne M. Sizer's plan to research and curtail racial profiling in Portland, Oregon); cf. Matthew Kauffman, *Police Chief Pleads for Clarity in Racial-Profiling Law*, HARTFORD COURANT, Mar. 12, 2012, <http://courantblogs.com/investigative-reporting/police-chief-pleads-for-clarity-in-racial-profiling-law/> (showing that local Hartford, CT, police chiefs support the collecting of data for profiling statistics).

36. See Katherine Q. Seelye, *Obama Wades into a Volatile Racial Issue*, N.Y. TIMES, July 23, 2009, http://www.nytimes.com/2009/07/23/us/23race.html?_r=0 (drawing on the unfounded arrest of Prof. Henry Louis Gates to highlight President Obama's opposition to racial profiling during his time as an Illinois Senator).

37. See Fernanda Santos, *Judge Finds Violation of Rights by Sheriff*, N.Y. TIMES, May 24, 2013, at A14 (discussing the ruling by an Arizona federal district judge that Sheriff Joe Arpaio and his deputies violated the rights of Latinos by targeting them during raids and traffic stops in Maricopa County, AZ).

38. See *Whren v. United States*, 517 U.S. 806, 812–13 (1996).

39. See *id.* at 813.

40. See Charles R. Lawrence III, *The Id, The Ego, and Equal Protection: Reckoning with Unconscious Racism*, 39 STAN. L. REV. 317, 322 (1987) (explaining that subconscious biases, while not overt, nonetheless inform racially disproportionate criminal justice practices).

41. See Angela J. Davis, *Racial Fairness in the Criminal Justice System: The Role of the Prosecutor*, 39 COLUM. HUM. RTS. L. REV. 202, 205–07 (2007).

42. See generally *Stop-and-Frisk Data*, N.Y. CIVIL LIBERTIES UNION, <http://www.nyclu.org/content/stop-and-frisk-data> (last visited Oct. 30, 2013); George L. Kelling & James Q. Wilson, *Broken Windows: The Police and Neighborhood Safety*, ATLANTIC, Mar. 1, 1982, <http://www.theatlantic.com/magazine/archive/1982/03/broken-windows/304465/>.

C. *The War on Drugs*

The term “War on Drugs” was first used widely in 1973 when President Nixon created the Drug Enforcement Administration (“DEA”) to announce “an all-out global war on the drug menace.”⁴³ During the 1980s, it escalated drastically with the passage of numerous draconian drug laws carrying long prison terms and mandatory minimum sentences on both the federal and state levels.⁴⁴ States received federal funding to increase arrests and prosecutions,⁴⁵ and not surprisingly, a disproportionate number of the arrestees were African American and Latino. In the mid-1980s, drug arrests went from 581,000 in 1980 to 1,663,000 in 2009.⁴⁶ The number of incarcerated drug offenders rose from about 41,000 persons in 1980 to nearly 500,000 by 2003.⁴⁷ The racial disparities steadily increased as well. African Americans constituted 21% of drug arrests in 1980 and that number rose to 36% in 1992.⁴⁸ African Americans only constitute about 13% of the population.⁴⁹

Although the laws appeared to be race neutral, they were enforced in ways that produced racial disparities. Data on regular drug users collected by the Department of Health and Human Services has consistently shown over the years that African Americans use drugs at the same rate as whites.⁵⁰ In light of that fact, one would not expect racial disparities in drug arrests, prosecutions or convictions. Data collected in 1993 revealed that although African Americans only comprised 13% of all monthly drug users, they were 35% of arrests for drug possession and 55% of all drug convictions.⁵¹ Although statistics on drug distribution are not as readily available, the existing research suggests that individuals who purchase drugs are much more likely to

43. Claire Suddath, *The War on Drugs*, TIME, Mar. 25, 2009, <http://www.time.com/time/world/article/0,8599,1887488,00.html> (exploring the history of the War on Drugs as it reflects our relations with Mexico and South America).

44. See generally Clarence Lusane, *In Perpetual Motion: The Continuing Significance of Race and America's Drug Crisis*, 1994 U. CHI. LEGAL F. 83, 95–99, 101–02 (1994) (discussing the implementation of mandatory minimums in the context of the war on drugs).

45. See *id.* at 99–100 (discussing the war on drugs' disparate impact on minority arrests and criminal prosecution).

46. Mauer, *supra* note 7, at 94S.

47. *Id.*

48. *Id.*

49. USA: *People Quick Facts*, U.S. CENSUS BUREAU (June 25, 2013, 1:52 PM), <http://quickfacts.census.gov/qfd/states/00000.html>.

50. See MARC MAUER, THE SENTENCING PROJECT, THE CHANGING RACIAL DYNAMICS OF THE WAR ON DRUGS 7 (2009), available at http://www.sentencingproject.org/doc/dp_raceanddrugs.pdf.

51. MAUER & HULING, *supra* note 1, at 12.

purchase them from someone of their own race,⁵² suggesting that there must be a significant number of whites involved in drug distribution.

Congress passed cocaine laws that particularly exacerbated the racial disparities in the criminal justice system.⁵³ The penalties for possession and distribution of cocaine were vastly different, depending on whether it was in powder or crack form. Crack cocaine offenses were penalized at 100 times the rate of powder cocaine offenses. The penalty for distribution of 500 grams of powder cocaine was 5 mandatory minimum years in prison while distribution of only 5 grams of crack cocaine carried the same penalty.⁵⁴ Since African Americans were much more likely to be arrested and prosecuted for crack cocaine offenses, this 100:1 disparity greatly contributed to the racial disparities in the prosecution of drug offenses. In 2010, Congress reduced the disparity to 18:1.⁵⁵

Other laws that contribute to racial disparity include laws that enhanced the penalty for drug offenses committed near schools—usually 500 to 1,000 feet.⁵⁶ These laws appear to be race neutral and seem to promote the goal of protecting children from drug dealers. However, because a disproportionate number of people of color live in urban areas and near schools, the laws have a racially disparate effect.⁵⁷

Disproportionate offending in certain categories of crimes (despite the difficulty predicting its impact), racial profiling, the War on Drugs, and certain sentencing laws and policies all contribute to racial disparity in the criminal justice system. The role that prosecutors play in the equation is unique because of their extraordinary power and discretion. The impact of their discretion, power, and decision-making cannot be overstated.

52. See MARC MAUER & RYAN S. KING, *THE SENTENCING PROJECT, A 25-YEAR QUAGMIRE: THE WAR ON DRUGS AND ITS IMPACT ON AMERICAN SOCIETY* 21–22 (2007), available at http://www.sentencingproject.org/doc/publications/dp_25year_quagmire.pdf (citing K. JACK RILEY, NAT'L INST. OF JUSTICE, *CRACK, POWDER COCAINE, AND HEROIN: DRUG PURCHASE AND USE PATTERNS IN SIX CITIES I* (1997)).

53. See Anti-Drug Abuse Act of 1986, Pub. L. No. 99-570, § 1002, 100 Stat. 3207 (1986) (prior to 2010 amendment).

54. Mauer, *Addressing Racial Disparities*, *supra* note 7, at 94S.

55. See *id.* at 95S; see also Fair Sentencing Act of 2010, Pub. L. No. 110-220, § 2, 124 Stat. 2372 (2010).

56. See Fair Sentencing Act of 2010 § 2.

57. See *id.*

II.

THE ROLE OF THE PROSECUTOR

Prosecutors are the most powerful officials in the criminal justice system. They make the decisions that control the system, and they exercise almost boundless discretion in making those decisions.⁵⁸ Many argue that police officers are the most important officials in their role as the gatekeepers who bring individuals into the system.⁵⁹ There is no doubt that police officers exercise broad discretion in deciding whether to stop and/or arrest individuals for criminal behavior. However, police officers only have the power to bring individuals to the courthouse door. It is the prosecutors whose decisions keep them there and firmly entrench them in the system—decisions that have life-changing consequences.

The most important prosecutorial decisions are the charging and plea bargaining decisions.⁶⁰ Prosecutors control and almost predetermine the outcome of criminal cases through these two critical decisions. They decide whether to charge an individual with a crime and what the charge or charges should be, and they enjoy vast discretion in making this decision. Even if a prosecutor believes she can prove a defendant's guilt beyond a reasonable doubt, she is not required to charge that individual.⁶¹ If she does decide to charge, she often has discretion to charge either a misdemeanor or felony. For example, if an individual is arrested with a large quantity of cocaine, the police officer might recommend that the person be charged with Possession with Intent to Distribute Cocaine—a felony that carries a mandatory minimum sentence. The prosecutor has a number of choices. She may decide to charge the person with the felony, but she also has the discretion to charge him with simple possession—a misdemeanor that may result in a probationary sentence with fewer collateral consequences. The prosecutor may also choose not to charge the person at

58. See ANGELA J. DAVIS, *ARBITRARY JUSTICE: THE POWER OF THE AMERICAN PROSECUTOR* 5 (2007); Kenneth J. Melilli, *Prosecutorial Discretion in an Adversary System*, 1992 BYU L. REV. 669, 671–72 (1992) (acknowledging the immense power that a prosecutor wields in the criminal justice process); Thomas & Fitch, *supra* note 24, at 509 (focusing on the powerful role that the prosecutor plays in the enforcement of laws).

59. See, e.g., Larry J. Siegel, *Police and Law Enforcement*, in *CRIMINOLOGY* 498–533 (7th ed. 2000) (“Police are the gatekeepers to the criminal justice process and they use their power of arrest to initiate the criminal justice process.”).

60. See DAVIS, *supra* note 58, at 22, 43.

61. See Melilli, *supra* note 58, at 673 (“A decision not to prosecute, or to dismiss a pending prosecution, may be made even in the face of sufficient evidence for conviction.”).

all. The charging decision is totally within the discretion of the prosecutor.

Prosecutors enjoy the same discretion in the plea-bargaining process. They are not required to offer the defendant a plea to a lesser offense, but if they do, they decide what that offer will be.⁶² Certainly a defendant may agree to plead guilty to a lesser offense if the prosecutor dismisses all other offenses, but the decision is up to the prosecutor. And with the existence of so many offenses that carry mandatory minimum sentences, the plea bargaining power has become even more important. Since going to trial always carries the risk of conviction, the only way a defendant can be assured that he will not be convicted of an offense carrying a mandatory minimum sentence is to plead guilty to a lesser offense. Ninety-five percent of all criminal cases are resolved by way of a plea.⁶³ Prosecutors' control of the charging and plea-bargaining decisions almost permits them to predetermine the outcome of most criminal cases.

Charging and plea-bargaining decisions have a tremendous impact on racial disparities in the criminal justice system.⁶⁴ If a prosecutor charges an African American with a crime but chooses not to charge his similarly situated white counterpart,⁶⁵ or chooses to charge the white counterpart with a less serious offense, she will create an unwarranted disparity. But the problem is a complex one. A prosecutor is rarely presented with two cases—one white defendant, one black—with exactly the same circumstances (same prior record, same facts, etc.) where she consciously chooses to treat the black defendant more harshly. She may unconsciously empathize with a white defendant and give him preferable treatment, or she may offer a white defendant better treatment for legitimate reasons that produce a racial impact.

Consider the case of a white defendant who is arrested for selling cocaine in his dorm room. The arresting officer recommends that he

62. See LINDSEY DEVERS, BUREAU OF JUSTICE ASSISTANCE, PLEA AND CHARGE BARGAINING: RESEARCH SUMMARY 1–2 (2011).

63. See *Missouri v. Frye*, 132 S. Ct. 1399, 1407 (2012) (citing *Padilla v. Kentucky*, 130 S. Ct. 1473, 1485–86 (2010)).

64. See BESIKI KUTATELADZE ET AL., VERA INST. OF JUSTICE, DO RACE AND ETHNICITY MATTER IN PROSECUTION? A REVIEW OF EMPIRICAL STUDIES 13–14 (2012), available at <http://www.vera.org/sites/default/files/resources/downloads/race-and-ethnicity-in-prosecution-first-edition.pdf>; Andrew E. Taslitz, *Judging Jena's D.A.: The Prosecutor and Racial Esteem*, 44 HARV. C.R.-C.L. L. REV. 393 (2009) (discussing the role of the prosecutor in the Jena Six cases in Jena, Louisiana in 2007).

65. A “similarly situated” white counterpart would be someone who has committed the same crime, with the same prior record and who has other similar characteristics relevant to the charging decision.

be charged with distribution of cocaine—a felony offense with a five year mandatory minimum sentence. The defendant’s parents hire an attorney who tells the prosecutor that the defendant is suffering from a debilitating drug addiction and was selling drugs only to support his own addiction. The attorney indicates that the defendant has been accepted to a six-month program at a residential drug treatment facility. He also informs the prosecutor that the defendant is an honor student who planned to apply to law school, that he has never been arrested in his life, and that a felony conviction would ruin his career and his life. A prosecutor might legitimately offer such a defendant a plea to a misdemeanor offense, or even dismiss the case all together. One could see how a prosecutor might empathize with such a defendant, subconsciously seeing himself and perhaps remembering his own “youthful indiscretions.”

That same prosecutor might handle the case of a similarly situated black defendant quite differently. Consider the black defendant arrested for selling cocaine on the street corner in his neighborhood. The arresting office recommends the same charge—distribution of cocaine. This defendant is poor and represented by an overworked public defender. The public defender discovers that his client is addicted to cocaine and was selling the drug only to support his habit. The family cannot afford to pay for residential treatment and there are no free programs available. The defendant does not have a prior criminal record but is a high school dropout with no employment prospects. The public defender asks the prosecutor to consider dismissing the case, and the prosecutor declines.

The prosecutor’s decisions in these cases would produce a racial disparity, but were her decisions unfair or unjustified? Shouldn’t a prosecutor pursue an outcome that results in an alternative to incarceration, thereby saving scarce government resources, especially if she does not believe that the defendant poses a danger to the community? Is it the prosecutor’s fault that the black defendant could not afford to pay for a drug program and was neither employed nor in school? Yet the black defendant did not appear to be any more deserving of a prison term than the white defendant. The prosecutor may have had an unconscious bias towards the white defendant and against the black defendant, but how could that be proven? And even if it were true, would it matter, considering all the other factors?

If prosecutors charge African American and Latino defendants with crimes while neglecting to charge their similarly situated white counterparts, they may be engaging in race-based selective prosecu-

tion. Race-based selective prosecution violates the Constitution,⁶⁶ but proving it is difficult. As with racial profiling, the victim of selective prosecution must prove that the prosecutor intended to discriminate against him because of his race.⁶⁷ The Court practically closed the door on all claims of race-based selective prosecution when it decided *United States v. Armstrong*.⁶⁸ In *Armstrong*, the Court held that in order to get discovery to prove selective prosecution, the defendant must show that similarly situated whites could have been charged, but were not⁶⁹—an impossible showing for almost anyone.⁷⁰

The Supreme Court has consistently required proof of intentional discrimination in criminal cases, and the amount and type of proof necessary have made successful challenges extremely difficult, if not impossible. In *McCleskey v. Kemp*,⁷¹ Mr. McCleskey presented a sophisticated study of how the death penalty was implemented in the state of Georgia. The study, conducted by Professors David Baldus, Charles Pulaski, and George Woodworth (known as “the Baldus Study”) produced startling racial disparities in the implementation of the death penalty and concluded that black defendants who kill whites were more likely to receive a death sentence.⁷² The Court accepted the validity of the study and its findings, but nonetheless declined to reverse Mr. McCleskey’s death sentence.⁷³ Because the study did not prove that the prosecutors in Mr. McCleskey’s case intended to discriminate against him because of his race, the Court rejected his claim.

The difficulty of proving intentional discrimination does not pose the most difficult challenge, since intentional discrimination is rarely the cause of racial disparity in today’s criminal justice system. Most racial disparities are caused and/or exacerbated by prosecutors’ race-neutral decisions which may be influenced by unconscious racism.

66. See *Oyler v. Boles*, 368 U.S. 448, 456 (1962) (“[I]t was not stated that the [selective prosecution claim] was deliberately based upon an unjustifiable standard such as race, religion, or other arbitrary classification.”).

67. See *Ah Sin v. Whitman*, 198 U.S. 500, 507–08 (1905) (ruling that in order to establish a discriminatory effect, the plaintiff must show that similarly situated individuals of a different race were not prosecuted).

68. 517 U.S. 456, 465–66 (1996) (citing *Ah Sin*, 198 U.S. at 507–08).

69. See *id.*

70. See Angela J. Davis, *The Legal Profession’s Failure to Discipline Unethical Prosecutors*, 36 HOFSTRA L. REV. 275, 276, 307 (2007) (discussing the lack of enforcement of prosecutorial misconduct policies and the insurmountable burden that citizens face in showing selective prosecution).

71. 481 U.S. 279, 286 (1987).

72. See *id.*

73. See *id.* at 297 (“Accordingly, we hold that the Baldus study is clearly insufficient to support an inference that any of the decisionmakers in McCleskey’s case acted with discriminatory purpose.”).

These race neutral decisions, even though unintentional, may have a racial impact.

Whether or not prosecutors intentionally or unconsciously discriminate against defendants of color in the charging and plea-bargaining processes, their decisions—even the race-neutral ones—may cause or exacerbate racial disparities. Their tremendous power and discretion is often exercised in ways that produce unintended and undesirable consequences. However, that same power and discretion can be used to remedy the problem. The next section will examine one possible solution.

III.

THE PROSECUTION AND RACIAL JUSTICE PROGRAM

In 1998 in an article entitled “Prosecution and Race: The Power and Privilege of Discretion,” I proposed “the use of racial impact studies in prosecution offices to advance the responsible, nondiscriminatory exercise of prosecutorial discretion.”⁷⁴ The racial impact studies would involve the collection and publication of data on the race of the defendant and the victim in each case for each category of offense and the prosecutorial action taken at each stage of the criminal process. The data would be analyzed to determine if race appeared to be related to the prosecutorial decisions. These studies would possibly reveal the racially discriminatory impact of race-neutral discretionary decisions and policies and help prosecutors formulate policies and guidelines to reduce racial disparities. Finally, I recommended the publication of the studies to inform the general public about prosecutorial practices and enable them to hold elected prosecutors accountable.

The Prosecution and Racial Justice Program of the Vera Institute of Justice is an innovative program that involves the collection and analysis of data in prosecution offices to determine the impact of discretionary decisions. According to the Program’s website:

Vera’s Prosecution and Racial Justice Program (PRJ) enhances prosecutorial accountability and performance through partnerships with prosecutors’ offices nationwide. PRJ works collaboratively with its partners to analyze data about the exercise and impacts of prosecutorial discretion; assists in developing routine policies and practices that promote fairness, efficiency and professionalism in prosecution; and provides technical assistance to help prosecutors implement those measures. By collaborating with prosecutors, analyzing data, and devising solutions, PRJ works alongside prosecu-

74. Angela J. Davis, *Prosecution and Race: The Power and Privilege of Discretion*, 67 *FORDHAM L. REV.* 13, 18 (1998).

tors to improve their performance and related criminal justice outcomes.⁷⁵

The PRJ staff developed a series of performance indicators that focus on four significant points in the prosecutorial process that involve the exercise of discretion: initial case screening, charging, plea offers, and final disposition.⁷⁶ The program's methodology allowed them to discover whether similarly situated defendants were being treated differently at each of these steps in the process.

A. History

The Prosecution and Racial Justice Program ("PRJ") was established in 2005 with the goal of helping prosecutors "manage the exercise of discretion within their offices in a manner that reduces the risk of racial disparity in the decision-making process."⁷⁷ To be effective, the program required chief prosecutors to grant Vera Institute staff broad access to their offices in order to track decision-making at key discretion points with the goal of identifying patterns of disparity. PRJ's first director was Wayne McKenzie, a prosecutor in the Kings County District Attorney's Office in Brooklyn, New York. Mr. McKenzie took a leave of absence from his office to direct the program. His status as a prosecutor gave the program credibility with the participating prosecutors and staff and helped to secure their cooperation.

The first chief prosecutors to volunteer for the Program were Peter Gilchrist of Charlotte, North Carolina, Paul Morrison of Johnson County, Kansas,⁷⁸ and Michael McCann of Milwaukee, Wisconsin. The Vera Institute staff reached out to these prosecutors because they enjoyed an excellent reputation in the prosecution community and in their jurisdictions. Other factors that made these prosecutors suitable for the project included the location of their offices and the demographics of their communities.⁷⁹

75. *Prosecution and Racial Justice Program*, *supra* note 6.

76. WAYNE MCKENZIE ET AL., VERA INST. OF JUSTICE, PROSECUTION AND RACIAL JUSTICE: USING DATA TO ADVANCE FAIRNESS IN CRIMINAL PROSECUTION 2 (2009), available at https://files.nyu.edu/dac229/public/2009_03_06_PRJ_8page_FINAL.pdf.

77. Wayne McKenzie, Briefing Memorandum for Advisory Board Meeting in Charlotte (Dec. 1, 2005), in DAVIS, *supra* note 59, at 192.

78. Paul Morrison withdrew before beginning the project because he left the chief prosecutor position to run for Attorney General of the state. See *infra* note 129 and accompanying text.

79. See *Charlotte, North Carolina, State & County Quick Facts*, U.S. CENSUS BUREAU (June 27, 2013, 2:10 PM), <http://quickfacts.census.gov/qfd/states/37/3712000.html> (providing the following figures: White alone, percent 2010: 50.0%, Black or African American alone, percent 2010: 35.0%, Hispanic or Latino, percent 2010: 13.1%); *Johnson County, Kansas, State & County Quick Facts*, U.S. CENSUS BUREAU

B. Findings in Mecklenburg County and Milwaukee

1. Mecklenburg County District Attorney's Office, Charlotte, North Carolina

The Vera Institute staff began their work in the Mecklenburg County prosecutor's office in Charlotte, North Carolina. The PRJ staff worked hard to establish a good working relationship with the prosecutors and support staff. They had to convince the Charlotte staff that they were not there to place blame or label them as "racists" but to help them enforce the law effectively and fairly. Key to the program's success in Charlotte was the fact that PRJ was directed by a former prosecutor. Another factor that helped secure buy-in was the fact that the data collection and management system that Vera implemented not only helped discover possible bias, but it also helped them manage their caseloads.

The findings in Charlotte were quite revealing. The supervising prosecutors were surprised to discover that the office was prosecuting almost 97% of all drug cases—a very high percentage considering the fact that the office was prosecuting only 70% of all cases combined.⁸⁰ Another surprising finding was that African American women were treated more harshly than members of any other group—100% of the drug cases involving African American women were prosecuted.⁸¹ The Assistant District Attorneys had been adopting the police officer's charging recommendations in 98.9% of the cases, and 70% of the defendants charged were people of color.⁸²

PJR's findings prompted the District Attorney, Peter Gilchrist, to take action. He appointed different people to the supervisory positions and implemented policies that required the Assistant District Attorneys to screen the cases more carefully. These changes resulted in a reduction of the percentage of drug cases charged to 88% and a de-

(June 27, 2013, 2:24 PM), <http://quickfacts.census.gov/qfd/states/20/20091.html> (providing the following figures: White alone, percent 2012: 87.9, Black or African American alone, percent 2012: 4.8%, Hispanic or Latino, percent 2012: 7.4%); *Milwaukee, Wisconsin, State & County Quick Facts*, U.S. CENSUS BUREAU (June 27, 2013, 2:19 PM), <http://quickfacts.census.gov/qfd/states/55/5553000.html> (providing the following figures: White alone, percent 2010: 44.8%, Black or African American alone, percent 2010: 40.0%, Hispanic or Latino, percent 2010: 17.3%).

80. MCKENZIE ET AL., *supra* note 77, at 7.

81. *Id.*

82. *Racial Disparities in the Criminal Justice System: Hearing Before the Subcomm. on Crime, Terrorism, and Homeland Security of the H. Comm. on the Judiciary*, 111th Cong. 6 (2009) (testimony of Wayne S. McKenzie, Director of the Prosecution & Racial Justice Program, Vera Institute of Justice), available at <http://judiciary.house.gov/hearings/pdf/McKenzie091029.pdf>.

crease in the decision to prosecute cases involving African American females.⁸³ Mr. Gilchrist met with community members and informed them of his office's participation in PRJ and their findings and received positive feedback.⁸⁴ Peter Gilchrist retired effective December 31, 2010. His successor, R. Andrew Murray, did not continue the relationship with PRJ, so the program is no longer in effect at that office.

2. *Milwaukee, County District Attorney's Office, Milwaukee, Wisconsin*

Michael McCann had been the District Attorney in Milwaukee for 37 years when he decided that his office would partner with PRJ. Following his retirement in 2006, his successor, John Chisholm, continued with the program. His office has implemented the most successful and long-standing model of the program to date. Mr. Chisholm continues to work with the program and its current director, Whitney Tymas, who is also a former prosecutor. PRJ has completed statistical studies in the Milwaukee office in four categories of crimes: Possession of Drug Paraphernalia, Prostitution, Resisting or Obstructing an Officer, and Domestic Violence.

a. *Possession of Drug Paraphernalia*

When PRJ staff members first began their work in Milwaukee in 2006, they examined the initial case screening decisions for the nine most frequently occurring crime categories. In six of those nine categories, they found that prosecutions against people of color were declined at a slightly higher percentage than whites.⁸⁵ However, the results were reversed when it came to public order and drug offenses. Specifically, they found that in 41% of the arrests of whites for Possession of Drug Paraphernalia, the prosecutors declined to prosecute compared to only 27% of people of color arrested for the same offense.⁸⁶ The supervising prosecutors met to discuss the possible reasons for this disparity. They discovered that inexperienced misdemeanor prosecutors were making most of these decisions.⁸⁷ They also discovered that a significant number of the drug paraphernalia cases in the city of Milwaukee, where the majority of African Americans in the greater community reside, involved possession of crack pipes, while the paraphernalia in the suburban parts of the

83. *Id.*

84. *Id.* at 7–8.

85. *Id.* at 7.

86. *Id.*

87. MCKENZIE ET AL., *supra* note 77, at 7.

county involved other types of paraphernalia.⁸⁸ One suggestion was that the junior prosecutors viewed crack cocaine as a more serious drug and therefore prosecuted the possession of crack pipes more aggressively.⁸⁹

John Chisholm responded to these findings by implementing new charging policies. He first explained to his staff that possession of crack cocaine paraphernalia was probably an indication of a drug addiction. He then directed his staff to decline prosecution in these cases and refer the arrestees to drug treatment. Any prosecutor who wanted to charge an individual with this offense was required to justify the decision and get approval from a supervisor.⁹⁰ The new policy remedied the racial disparity and resulted in an overall reduction in the prosecution of these cases.⁹¹ Mr. Chisholm hosted a number of community meetings about his office's engagement with PRJ, the results of the findings, and his new policies, and the community response was very positive.⁹²

b. Prostitution

The PRJ staff examined prostitution cases referred to the Milwaukee County District Attorney's Office between January 2009 and June 2010. Their initial examination of these cases showed that black defendants were much more likely to be charged than white defendants.⁹³ They decided to examine the cases more closely by collecting information about the defendants' prior record and probation status and by examining the initial screening decision and whether the defendants were offered deferred prosecution.⁹⁴ Their findings demonstrated that black defendants were more likely to be charged, but were also more likely to be offered deferred prosecution.⁹⁵ An analysis of cases involving female defendants revealed that black female defendants were more likely to be charged than white female defendants.⁹⁶

88. *Id.*

89. *Id.*

90. *Id.*

91. *Racial Disparities in the Criminal Justice System*, *supra* note 83, at 8.

92. *Id.*

93. VERA INST. OF JUSTICE, STATISTICAL TABLES FOR CASE PROCESSING ANALYSIS – PROSTITUTION 1 (2011) (on file with author).

94. "Deferred Prosecution" is a diversion program in which the defendant is required to fulfill certain conditions over a period of time (such as a two-year alcohol treatment program for a DUI). If the conditions are met, the case is dismissed. If the conditions are not met, the District Attorney's office proceeds with the prosecution.

95. VERA INST. OF JUSTICE, *supra* note 94, at 1, 7.

96. *Id.* at 1.

191 cases with a top charge of prostitution were referred to the District Attorney's Office.⁹⁷ The majority of defendants were black (61%), female (65%), in custody (75%), referred by the Milwaukee Police Department (94%), and had a prior record (64%).⁹⁸ The PRJ staff examined the race and gender of the defendants and found that black defendants had the highest charge rate (89%) compared to a charge rate of 86% for white defendants.⁹⁹ Most of the defendants were black females (42%), followed by white females (20%), black males (19%), and white males (14%).¹⁰⁰ The charge issuance rate for black females was 91%, 87% for white females, 83% for black males, and 85% for white males.¹⁰¹

The PRJ staff also examined the gender and level of experience of the prosecutors making the charging decisions. There were 34 prosecutors reviewing prostitution cases during this time period.¹⁰² The average number of years of experience was eight years, and the median was four years.¹⁰³ 47% of the cases were reviewed by men and 43% were reviewed by women. Women were more likely to bring prostitution charges than men – 99% of the cases vs. 81%.¹⁰⁴

When examining the existence of charging differences by race, the PRJ staff took into account a number of factors, including the defendant's gender and age, the number of charges, the defendant's custody status, the prosecutor's gender, the referral agency (Milwaukee Police Department or other agency), the defendant's prior overall record and prior prostitution record, and the defendant's probation status.¹⁰⁵ Taking all of these factors into account, the charging rate was only 2% higher for black defendants, a difference that might be explained by factors not considered.¹⁰⁶ The PRJ staff did a separate, similar analysis focusing on female defendants only. This analysis

97. *Id.* "Top charge" refers to the most serious offense charged.

98. *Id.*

99. *Id.*

100. *Id.*

101. *Id.*

102. *Id.* at 3.

103. *Id.*

104. *Id.*

105. *Id.* at 5.

106. *Id.* The odds of case issuance were initially 9% higher for black defendants but decreased to 2% when prior record and probation status were taken into account, suggesting that much of the 9% difference was attributable to those two factors. *Id.* It should be noted, however, that these findings are not statistically significant and therefore cannot be generalized to other jurisdictions.

revealed that black female defendants were more likely to be charged than white defendants.¹⁰⁷

The examination of whether a defendant was offered deferred prosecution revealed opposite results. The PRJ staff members controlled for the same factors considered for the analysis of the charging decision. They found that the odds of receiving deferred prosecution were 10% higher for black defendants.¹⁰⁸

c. Resisting or Obstructing an Officer

A total of 1,283 cases with a top charge of Resisting or Obstructing an Officer (hereinafter “RO”) were referred to the Milwaukee County District Attorney’s Office between January 2009 and June 2010. 56% of all the cases were charged with no difference between black and white defendants (55% of each racial group was charged).¹⁰⁹ Most of the defendants charged were black (70%), male (79%), and in custody (80% of blacks and 66% of whites).¹¹⁰

The PRJ staff members decided to sample 200 cases (100 white defendants and 100 black defendants) and include information about the defendants’ prior record and probation status.¹¹¹ Sixty-two percent of the cases in the sample were charged with RO.¹¹² Most of them were male (72% of whites, 81% of blacks), in custody (68% of whites, 73% of blacks), and had a prior record (57% of whites, 64% of blacks).¹¹³ Among defendants with a prior record, a similar percentage of white and black defendants were charged.¹¹⁴

d. Domestic Violence

The findings from the Domestic Violence study were notable in that they included statistics on the race of the victim and the race of the defendant. Possession of Drug Paraphernalia and Prostitution might be characterized as victimless crimes, and because the victims in Resisting or Obstructing an Officer charges are all police officers, the impact of the race of the victim on the charging decision in those cases would likely be insignificant. However, domestic violence cases

107. *Id.* at 6.

108. *Id.* at 9.

109. VERA INST. OF JUSTICE, STATISTICAL TABLES FOR CASE PROCESSING ANALYSIS – RESISTING OR OBSTRUCTING AN OFFICER 1 (Sept. 13, 2011) (on file with author).

110. *Id.*

111. *Id.* at 2 (oversampling white defendants because a smaller proportion of the RO defendant population was white).

112. *Id.*

113. *Id.*

114. *Id.* at 3.

provided an opportunity to examine whether interracial cases were treated differently from intraracial cases, and if so, how.

There were 10,455 domestic violence cases referred to the District Attorney's Office between January 2009 and June 2010.¹¹⁵ Most of these defendants were black (74%), male (84%), and were referred by the Milwaukee Police Department (81%).¹¹⁶ The majority of victims were black (69%) and female (83%).¹¹⁷ Ninety-one percent of the cases were intraracial (the defendant and victim were of the same race).¹¹⁸ Most cases involved a black defendant and victim (67%), followed by a white defendant and victim (24%), a black defendant and a white victim (7%) and a white defendant and a black victim (1%).¹¹⁹

The PRJ staff considered a number of factors in determining charging outcomes by the defendant's race, the victim's race, and the defendant's race and victim's race combined. These factors included: the defendant's gender, the victim's gender, the number of charges, the seriousness of the charge, the defendant's custody status, offense enhancers, and the referral agency (police department or other agency).¹²⁰ When controlling for these factors, they found almost no difference in the charging decision based on the defendant's race.¹²¹ However, they found that the odds of charging in cases involving black victims were 16% lower than in cases involving white victims.¹²² There was an even more significant disparity in cases involving black defendants and white victims – the odds were 34% higher that charges would be brought in these cases than in cases with a white defendant and white victim.¹²³

To address the disparities in the prosecution of domestic violence cases evident from PRJ's findings, Mr. Chisholm invited PRJ staff members to participate in a series of meetings between members of his office, the law enforcement community, the domestic violence advocacy community, the probation department, and others. After the meetings were concluded, the PRJ staff recommended additional training of prosecutors, investigators and representatives of the domestic violence advocacy community. The training took place in October

115. VERA INST. OF JUSTICE, STATISTICAL TABLES FOR CASE PROCESSING ANALYSIS – DOMESTIC VIOLENCE 2 (2011) (on file with author).

116. *Id.*

117. *Id.*

118. *Id.* at 4.

119. *Id.*

120. *Id.* at 5.

121. *Id.*

122. *Id.* at 6.

123. *Id.*

2012 and focused on providing effective strategies for working with victims from diverse races and cultures and on how to approach cases in which victims remain with their assailants – an occurrence that had been identified as associated with race, ethnicity, and socio-economic status in some instances.¹²⁴ Sarah M. Buel, a well-known domestic violence activist, facilitated the training.¹²⁵

The training received positive feedback, so Mr. Chisholm asked PRJ to assist in arranging additional training with the goal of increasing cultural competency when handling the cases in which the research identified disparity—domestic violence and prostitution cases.¹²⁶ Mr. Chisholm is planning community brainstorming meetings to promote community engagement and accountability.¹²⁷ The PRJ staff will share the findings from the research and inform community stakeholders about the work. The PRJ staff also provided Mr. Chisholm's office with recommendations about how to improve the PROTECT system, (the acronym for the statewide data management system). These recommendations focused on changes that would facilitate future social science research.¹²⁸

B. *New Partners*

Cyrus Vance, Jr., the District Attorney for the New York County District Attorney's Office, agreed to participate in the Prosecution and Racial Justice Program, and the PRJ staff began working in this office in January 2012. The funding for the work at this site (in the borough of Manhattan) was secured through a grant with the National Institute of Justice. The findings will be published when completed. PRJ will also begin studies at the Lancaster County Attorney's Office in Lincoln, Nebraska (headed by County Attorney Joe Kelly) and the San Francisco District Attorney's Office (under the leadership of District Attorney George Gascon) in early 2014.

124. Email from Whitney Tymas, Director, Prosecution and Racial Justice Program, to Angela Davis (July 7, 2013, 3:45 PM) (on file with author).

125. *Id.*

126. Email from Whitney Tymas, Director, Prosecution and Racial Justice Program, to Angela Davis (June 10, 2013, 1:09 PM) (on file with author).

127. *Id.*

128. *Id.*

IV.

PRJ AS A MODEL FOR REFORM

A. *Advantages*

PRJ has great potential as a model for prosecutors who want to improve the quality of justice by working to eliminate the unwarranted racial disparities in our criminal justice system. As the most powerful officials in the criminal justice system, prosecutors have the discretion and power to implement policies in their offices that can have a significant and positive impact on this problem. The same lack of transparency that makes it difficult for their constituents to hold them accountable for the decisions they make can also provide the political cover to allow them to make significant changes—particularly at the charging stage of the process—that can help to reduce unwarranted racial disparities. PRJ provides a model for how this can be done.

The PRJ model has many advantages over other approaches. First, it is evidence-based. The collection of data at key decision points in the process allows prosecutors to know whether their race neutral decisions have a racial effect. PRJ's methodology is based on regression analysis, which permits prosecutors to consider numerous relevant variables and the possible effect that each may have on outcomes. For example, the case analyses done in the Milwaukee District Attorney's Office demonstrated that the consideration of defendants' prior criminal record was a key factor in the charging decision that had a significant impact on racial disparities for certain offenses.¹²⁹ A prosecutor armed with this knowledge is in a much better position to make a decision about whether the disparities are unfair and unwarranted and what policies she might implement to reduce the disparities.

A second benefit of the PRJ model is that it eliminates the need for blame. One of the biggest challenges to eliminating the racial disparity caused by criminal justice decision-makers is what to do when it appears that it is caused by racial bias—implicit or otherwise. No one wants to be called a racist, and when the bias is unconscious, "racist" may not be a fair label. At any rate, blaming individuals for unconscious bias is neither necessary nor advisable, as such blaming does nothing to solve the problem. Certainly, appropriate education and training about implicit bias would benefit any prosecution office.¹³⁰ But the PRJ model allows a prosecutor to implement policies

129. See MCKENZIE ET AL., *supra* note 77, at 6.

130. See generally Jerry Kang et al., *Implicit Bias in the Courtroom*, 59 UCLA L. REV. 1124, 1169–77 (2012) (examining how intervention strategies using training and

and change practices that may be causing disparities without pointing fingers or punishing. A chief prosecutor who decides to implement the model in her office could achieve buy-in and support from staff by making it clear from the outset that the purpose of the study is not to place blame, but to discover whether there are unwarranted biases that may be corrected by a change in practices or policies. The chief prosecutor establishes the practices and policies of the office, so if any assistant prosecutor's implementation of those policies causes unwarranted racial disparity, it is ultimately the responsibility of the chief prosecutor. District Attorneys Gilchrist and Chisholm were able to successfully implement changes in policies without blaming or punishing anyone on their staffs.

A third advantage of the PRJ model is that it can be implemented without legislation or rule making. The legislative process is not only time-consuming, but prosecutors and legislators are almost always concerned about being seen as "soft on crime." A law that would mandate that prosecutors implement the PRJ model may be difficult to pass, as it may be seen as diverting resources from law enforcement. A chief prosecutor with the will and resources may proceed with the PRJ model without legislation or even without asking or informing anyone. Of course, the better practice would be for the chief prosecutor to inform and engage her constituents. District Attorneys Gilchrist and Chisholm informed criminal justice officials and community members about PRJ and were successful in getting buy-in and support for the project.

B. Challenges

The model, in its current form, does have its challenges. One of its advantages—the fact that it can be implemented without legislation—may also be seen as a disadvantage. Without some enforcement mechanism, the program is dependent on the will, interest, and priorities of individual prosecutors. Few prosecutors view the elimination of racial disparities in the criminal justice system as their responsibility. Even those interested and concerned about the problem may be too occupied with what they view as their primary obligation—enforcing the laws and keeping their communities safe. Most prosecutors are extremely busy with the day-to-day work of bringing charges (including grand jury proceedings), litigating motions, interviewing and preparing witnesses, trying cases, and handling all of their other

education can counter implicit biases in the courtroom by focusing on the judge and jury).

responsibilities. The idea of adding a major project to an already overburdened office probably would not be attractive to most prosecutors.

If a prosecutor decides to go forward with the project, a lack of transparency may be a challenge to its success. One of the troubling characteristics of prosecution offices is the lack of transparency. Prosecutors are not required to share information about their internal charging and plea-bargaining decisions, and the Supreme Court has protected this lack of transparency.¹³¹ Without transparency, there is no accountability. If a prosecutor implements the PRJ model and discovers unwarranted disparities, her constituents would not be able to hold her accountable for correcting them if the findings are not made public. Publication of the findings was not a condition of participation for PRJ's first partners. Peter Gilchrist and Michael McCann (and subsequently John Chisholm) chose to communicate with their constituents about the program, and John Chisholm even released the findings from the program's work in 2009–2011. However, they were not required to do so.¹³²

Even when a chief prosecutor decides to implement the model, its sustainability may be in jeopardy once that prosecutor leaves office. Shortly after agreeing to participate in PRJ in 2005, Paul Morrison announced that he was switching from the Republican to the Democratic Party and running for Attorney General of the state. With his political campaign and focus on a statewide office, Mr. Morrison did not have time to participate in PRJ. He ultimately won the election and began his tenure as Attorney General in January 2007.¹³³

Bonnie Dumanis, the District Attorney of San Diego County, agreed to participate in PRJ soon after Paul Morrison withdrew. The San Diego County office worked with PRJ for approximately eighteen months before withdrawing from the program for similar reasons. Ms. Dumanis also ran a political campaign that left little time for directing and supervising the work of the program.

131. See DAVIS, *supra* note 59; Abby L. Dennis, *Reining in the Minister of Justice: Prosecutorial Oversight and the Superseder Power*, 57 DUKE L.J. 131 (2007); Teah R. Lupton, *Prosecutorial Discretion*, 90 GEO. L.J. 1279 (2002).

132. PRJ's current Director, Whitney Tymas, implemented a Memorandum of Understanding with the New York County District Attorney's Office that included publication of the findings. Similar memoranda are expected with the Lincoln, Nebraska, and San Francisco, California, partners.

133. Monica Davey, *In Kansas, Top Official Announces his Resignation*, N.Y. TIMES, Dec. 15, 2007, at A15 (reporting that Mr. Morrison took over for former Attorney General Phil Kline in early 2007 and announced his resignation in December 2007 because of a scandal involving an extramarital affair with a former employee who filed an EEOC claim alleging sexual harassment).

When Peter Gilchrist left office, his successor chose not to continue the program. The Milwaukee District Attorney had a different experience. Michael McCann's successor, John Chisholm, carried on the work very successfully.

Another challenge to the success of the program is the availability of resources. Few prosecutors have excess funds in their budgets. The Vera Institute obviously cannot support every prosecutor interested in implementing the PRJ model. Prosecutors would have to secure funding to hire experts to conduct the studies in their offices.¹³⁴

V.

RECOMMENDATIONS

The Prosecution and Racial Justice Program has great potential for reducing racial disparities in our criminal justice system, but there are challenges that must be overcome to encourage its adoption by other prosecution offices. This section recommends possible solutions to some of these challenges.

A. Information Campaign in the Prosecution Community

There should be an information campaign in the prosecution community to inform and educate prosecutors about the PRJ model and why it is important to the prosecution function. Part of the campaign would involve providing information about the racial disparity problem and its many disparate causes, including the racial impact of race neutral decision-making by prosecutors and other criminal justice officials. The emphasis should be on the important role that prosecutors can play by making simple policy changes that would not threaten public safety.

The best ambassadors for the information campaign would be the prosecutors who have implemented the model in their offices. The three well-known, well-respected prosecutors who participated in the program would be in the best position to convince other prosecutors of the importance and validity of the program. They would have the most credibility with other prosecutors, and their experiences (the successes and challenges) would be most valuable to prosecutors, whether they are interested or skeptical. The participating prosecutors might speak at conferences and meetings of prosecution organizations such as the

134. Although it would be difficult to predict costs because so many variables are involved and they differ from location to location, the estimated cost of the research component of the eighteen-month Manhattan project was \$390,000. Email from Whitney Tymas, Director, Prosecution and Racial Justice Program, to Angela Davis (Sept. 27, 2013, 12:00 PM) (on file with author).

National District Attorneys Association, the American Prosecutors Research Institute, the National Association of Assistant United States Attorneys, the National Black Prosecutors Association, and similar organizations.

B. Partnerships with Academic Institutions

Prosecutors interested in duplicating the PRJ model in their offices will undoubtedly need funding. Although they could request funding from their state legislatures as part of their budget requests, with the budget challenges in most states, this probably would not be a reliable source of funding. Prosecutors might also seek grant funding from foundations and from the Justice Department's Bureau of Justice Assistance.¹³⁵

Interested prosecutors might also try to partner with an academic institution. PRJ is the type of project that would be of interest to academics in the criminology and statistics departments of many universities. Law professors might also be interested in participating in and supporting the project. A cross-disciplinary partnership would be ideal. Since academics routinely seek grant funding for worthwhile projects, such a partnership would relieve the prosecution office of the burden of funding and implementing the project. The academic institution would provide the funding and expertise.

C. Transparency and Accountability

Prosecution offices that decide to implement the model should inform their constituents, seek their advice, and publish the findings of the project. Prosecutors who decide to participate probably will represent communities concerned about racial disparity issues. Prosecutors should communicate with their constituents about all issues of concern, and should share any relevant information that is not confidential. This transparency is essential to holding prosecutors accountable to the people they serve. They should not be concerned about revealing findings that show racial disparity. If the disparity is unwarranted, the prosecutor should be prepared to change their practices and/or policies to eliminate it. If the disparity is justifiable, the prosecutors should explain the reasons for the disparity to her constituents. Publishing the findings and communicating about the project with

135. PRJ received funding from the National Institute of Justice for their partnership with the New York County District Attorney's Office. Besiki Kutateladze, *Prosecutorial discretion project in New York County*, VERA INST. OF JUSTICE BLOG (Apr. 18, 2012), <http://www.vera.org/blog/prosecutorial-discretion-project-new-york-county>.

community members would have the added benefit of building and improving the prosecutor's relationship with her constituents.

D. Support from the Bar

The purpose of the public information campaigns is to encourage prosecution offices to adopt and implement the PRJ model. However, prosecutors are not the only lawyers with a vested interest in fairness in the criminal justice system. All lawyers – even those who do not have a criminal practice – should be invested in assuring fairness in the criminal justice system. For that reason, local and national bar associations should also sponsor educational programs about racial disparity and the PRJ model as a possible solution. These bar associations should encourage their prosecutor members to implement the model, and they should provide support when possible.

The American Bar Association's Criminal Justice Section has sponsored a number of projects with the goal of ensuring racial fairness in the criminal justice system.¹³⁶ It might feature a program on PRJ and even seek a resolution from the ABA House of Delegates endorsing the model and encouraging prosecutors to implement it, when appropriate. Similar support from the National Bar Association, the Hispanic National Bar Association, and state and local bar associations should also be sought.

CONCLUSION

Racial disparity in the criminal justice system is a complex problem with many disparate causes. Its elimination will require change within and outside of the criminal justice system. The socio-economic causes of crime may never be totally eliminated. However, individuals in the criminal justice system can have an impact on the problem. Prosecutors are particularly suited to help eliminate racial disparities because of their power and discretion.

Prosecutors must not only be willing to replicate the Prosecution and Racial Justice Program, they must be willing to change their practices and policies in ways that will have a real impact. Sometimes these changes will involve abandoning traditional methods of decision-making to achieve fairness. For example, even though consider-

136. The most recent project is the ABA's Racial Justice Improvement Project. *See Racial Justice Improvement Project*, AM. BAR ASS'N, <http://racialjusticeproject.weebly.com/> (last visited June 5, 2013); *see also* Cynthia Jones, *Confronting Race in the Criminal Justice System: The ABA's Racial Justice Improvement Project*, 27 *CRIMINAL JUSTICE* 1 (2012), available at http://sentencingproject.org/doc/publications/confronting_race_cj_system.pdf.

ing a defendant's prior record as a factor in the decision to charge is appropriate, if the existence of prior records is the main reason why otherwise similarly situated black defendants are being charged while whites are not, prosecutors should consider abandoning that factor. Public safety must remain the priority, but there are many defendants arrested for nonviolent offenses with criminal records of nonviolent offenses. Even if prosecutors focused on nonviolent offenses alone and abandoned or reduced reliance on traditional charging considerations in those cases, they could make a difference.

The Prosecution and Racial Justice Program is not a panacea, but it is one remedy that can make a difference. However, it can only work with the participation of chief prosecutors who are willing to make racial justice a priority. The prosecutors who have worked with PRJ have demonstrated that commitment. They took a chance that produced positive results in their offices and serve as examples for other prosecutors who seek to fulfill their duty to assure a fair and effective criminal justice system.

