Eliminating Racial Disparities in the Exercise of Prosecutorial Discretion

In the United States there are many laws criminalizing various conduct from actions like jaywalking or driving 5 mph over the speed limit to very serious acts like murder. Prosecutors, the most powerful officials in the criminal legal system, are the ones interpreting these laws. "Prosecutors must exercise judgment about which of the many cases that are technically covered by the criminal law are really worthy of criminal punishment."[1] Prosecutors have broad discretion and authority to decide everything from what and who to investigate, what charges to bring and when, whether to offer a plea bargain, and what sentence to recommend.[2] These decisions are affected by a wide range of factors ranging from things like changing public attitudes to the viewpoint of victims.[3][4] As officers of the court, bound to carry out provisions of the Constitution and state laws, prosecutors are by law required to exercise their broad powers in good faith and in a non-discriminatory manner. But, when it comes to Black (and Latinx) defendants, prosecutors routinely exercise their discretion in a racially discriminatory manner, resulting in a grossly disparate application of the harsh penalties extant in the U.S. criminal justice system.[5]

Prosecutorial discretion is one of the most elusive problems in the administration of justice in our system.[6] And yet, is one of the most discernible causes of racial inequality in the criminal justice system.[7]

Racial bias pervades prosecutorial discretionary decision-making. Recent studies have found that "prosecutors were more likely to engage in charge bargaining[8] with White defendants than with Black or Latinx defendants with similar legal characteristics.[9] White defendants are "twenty-five percent more likely than Black defendants to have their most serious initial charge dropped or reduced to a less severe charge (i.e. Black defendants are more likely than White defendants to be convicted of their highest initial charge)."[10] As a result, White defendants who face initial felony charges "are approximately fifteen percent more likely than Black defendants to end up being convicted of a misdemeanor instead."[11] White defendants initially charged with misdemeanors are approximately seventy-five percent more likely than Black defendants to be convicted for crimes carrying no possible incarceration, or not to be convicted at all.[12] Since more than ninety-five percent of criminal convictions in the United States are the product of closed-door plea-bargaining rather than a jury trial,[13] prosecutors' charging power enhances their control of plea-bargaining outcomes.[14] Sixty percent of all convicted defendants pleaded guilty to non-violent offenses related to immigration, drug, and property – crimes overrepresented by those in low socioeconomic and minority groups.[15] Among people convicted of drug crimes and property crimes, prosecutors are more likely to apply mandatory terms and sentencing enhancements to Black and Latinx men than to anyone else.[16]

Since the prosecutor's duty is to do justice, not to obtain convictions, prosecutors must apply their discretion to address the lack of justice and racial disparities pervading our criminal justice system.[17]

Potential Measures to Reduce Racial Disparities Resulting from Discrimination in Prosecutorial Discretion

I. UNIFORM DECISION-MAKING

A continuing challenge faced by prosecutors is inconsistency among office-wide and individual decision-making.[18] One study found that "prosecutors displayed widely divergent views about the goals of the criminal justice system, charging philosophies, and plea bargaining strategies."[19] The study ultimately found that these differences in views accounted for some of the variation in screening, charging and plea offer decisions.[20] Because of the skepticism about the capacity of courts to police prosecutorial discretion, recruitment, training and supervision are common themes for internal reform.[21] District attorneys can maintain consistency in decision-making by having new prosecutors "shadow" more senior prosecutors, by having supervisors review the decisions of new prosecutors and by creating training and orientation periods for new prosecutors, followed by adequate re-training.[22] Additionally developing specific rules for screening cases, charging cases, dismissing cases and plea offers can ensure uniform outcomes across cases and prosecutors.[23] Given the complexity of some cases which require a certain level of flexibility, "round-tabling" could serve as a mechanism to ensure consistency.[24] Roundtable discussions ensure that decisions in cases are made by the entire unit, rather than one individual.[25] In the alternative, the office could rely on the most experienced prosecutor within any unit to do all screening.[26] Studies find that in offices using this approach, prosecutors perceived a noticeable increase in consistency in screening decisions.[27]

Prosecutorial offices should develop specific policies of discretion and mandate training, consultation, supervision and review of discretionary choices and provide that the failure to consult with peers or supervisors, or to seek review of discretionary decisions provides an identifiable basis for disciplinary sanction – one more enforceable than judicial review.[28]

To address the problem of inconsistency on a larger scale,

II. CHARGING MANDATE USE OF RACIAL IMPACT STUDIES

Professor Angela J. Davis defines racial impact studies "as 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 action taken at each step of the criminal process."[29] This data is analyzed to determine if race had a statistically significant correlation with various prosecutorial decisions.[30] According to Davis, the studies would serve a number of purposes:

First, they would reveal whether there is a disparate treatment of African American defendants or victims. Second, they may reveal the discriminatory impact of race-neutral discretionary decisions and policies. Third, they would help prosecutors make informed decisions about the formulation of policies and establish standards to guide the exercise of discretion in specific cases. Finally, the publication of these studies would inform criminal defendants, crime victims and the general public about the exercise of prosecutorial discretion and force prosecutors to be accountable for their decisions.[31]

Most importantly, publication of these studies would help inform the public about prosecutorial practices so they may more effectively hold prosecutors accountable through the electoral process.[32]

DECLINE TO PROSECUTE MINOR OFFENSES In addition to compiling and disclosing racial impact studies, scholars have called on chief prosecutors to exercise their discretion to decline to prosecute minor offenses where arrests patterns show a disparate impact on racial minorities.[33] This will reduce the substantial burden that zero tolerance policing places have had on historically disadvantaged communities.[34] Even in the plea-bargaining stage, studies show racial disparities in plea-bargaining outcomes are greater in cases involving misdemeanors and low-level felonies relative to cases involving more severe offenses.[35] The zero-tolerance policing approach to minor offenses has increased the number of individual subjected to lower criminal courts to over thirteen million per year, where police focus is disproportionately on poor communities of color.[36]

A prosecutor can reduce the harms caused by unequal enforcement of the law and by overburdened lower criminal courts by simply declining to prosecute all arrests under certain statutes.[37] The benefits of declining to prosecute minor offenses where racial disparities in enforcement exist, include: reducing the racial disparities in the criminal justice system, freeing resources to improve the quality of justice in lower criminal courts, removing the burden of

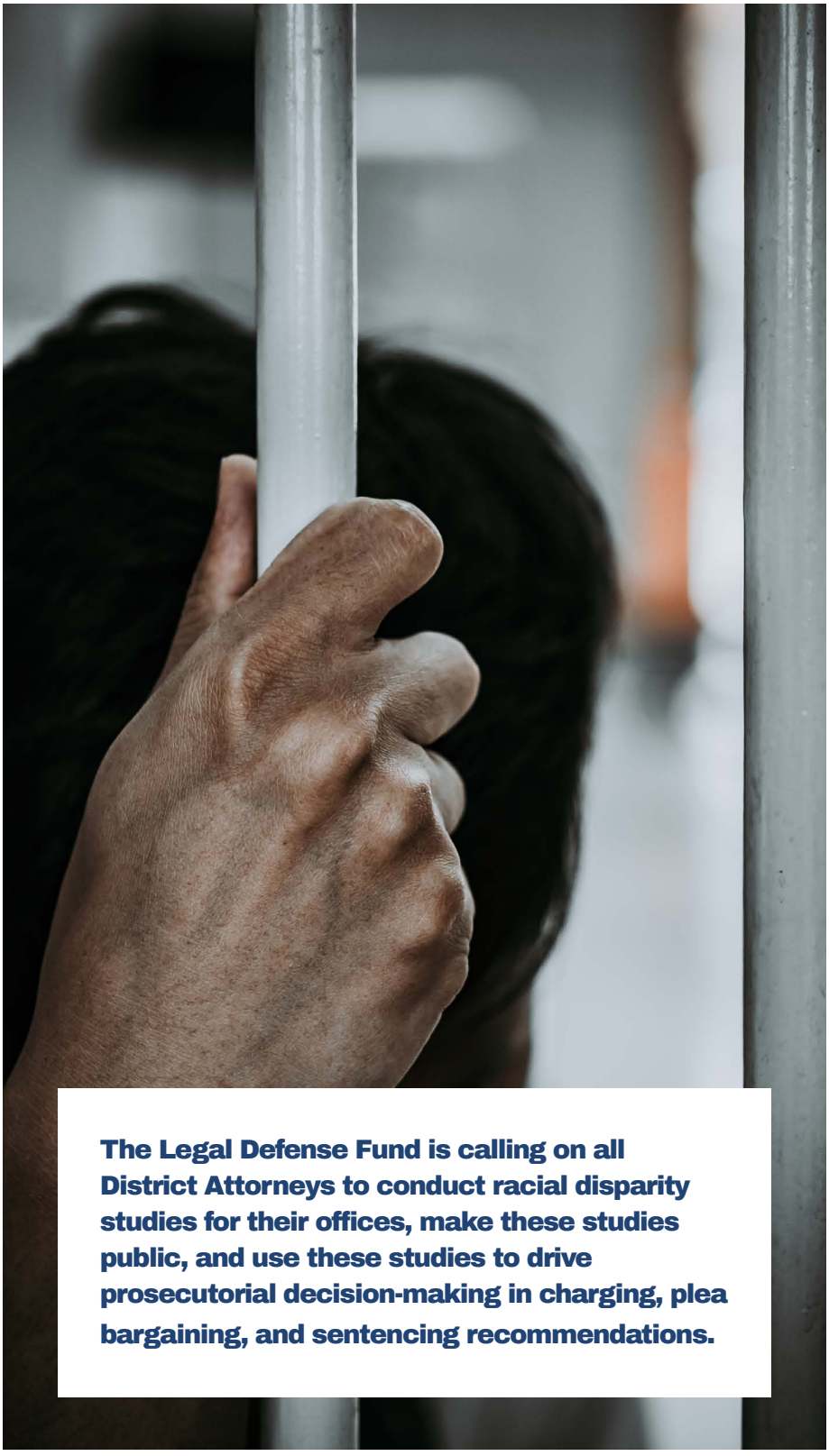
unintended collateral consequences and costs associated with prosecution, and ultimately affecting policing strategies, leading to equal enforcement of the laws on the streets as well as in the courts.[38]

To achieve widespread consistency, states could adopt charging and plea-bargaining guidelines that are legally binding on local prosecutors.[1] These guidelines would help ensure that prosecutors charge based on evidence and public safety (not gut instinct), rely on race and other problematic factors less frequently, allow the public have more say in how prosecutor offices balance error costs of being too harsh or aggressive, and states are better able to address the moral hazard problem.[2] Regulating prosecutorial discretion with guidelines could also help level the playing field between prosecutors and public defenders and implement transparency into the criminal justice system.[3]

III. PLEA BARGAINING

Prosecutors acknowledge that the likelihood of innocent individuals pleading guilty is substantial.[39] Scholarship suggests that prosecutors need to ensure procedural justice in the practice of plea-bargaining, since bargaining power lies disproportionately in the hands of the government. Prosecutors must give defendants the "opportunity to tell their sides of the story before making or responding to an offer; explain their bargaining positions by reference to objective, uniformly applied criteria; demonstrate consideration of arguments made by defendants; and avoid the use of charging threats and other high-pressure tactics to induce guilty pleas."[40] These practices and procedures do not currently occur in uniformity or on a systematic basis.[41]

Research indicates that "implementing procedural justice norms not only may increase defendant satisfaction with plea-bargained outcomes (even if the outcomes themselves remain substantively unchanged), but also may contribute to the perceived legitimacy of the criminal justice system and ultimately enhance defendants' levels of voluntary compliance with legal rules and authorities."[42] Ultimately, prosecutors need to consider specific changes in office policies and practice that would bring plea bargaining into greater conformity with this procedural justice model.[43]



The Legal Defense Fund is calling on all District Attorneys to conduct racial disparity studies for their offices, make these studies public, and use these studies to drive prosecutorial decision-making in charging, plea bargaining, and sentencing recommendations.

Notes

1. Leslie C. Griffin, The Prudent Prosecutor, 14 Georgetown Journal of Legal Ethics 259, 263 (2001) (citing Gerard E. Lynch, Our Administrative System of Criminal Justice, 66 Fordham L. Rev. 2117, 2136-37 (1998) (emphasis removed).

2. *Id.*; see also Angela J. Davis, In Search of Racial Justice: The Role of the Prosecutor, 16 HARV. J.L. & PUB. POL'Y 821 (2013).

3. *Id.* at 263-64.

4. Id. at 264-65.

5. See generally Emily Owens et al., Examining Racial Disparities in Criminal Case Outcomes Among Indigent Defendants in San Francisco (2017), https://www.law.upenn.edu/live/files/6791-examining-racial-disparities-may-2017combinedpdf; see e.g. Angela J. Davis et al. Race and Prosecution (2019), https://static1.squarespace.com/static/5c4fbee5697a9849dae88a23/t/5c53598e1905f463fdfd471e/1548966286995/Executive+Session+-+Race+and+Prosecutors+FINAL+.pdf (discussing how "every action that a prosecutor's office takes is colored by this country's historical record of oppressing racial minorities" and addresses why prosecutors must understand and appreciate this history to address systemic disproportionality and disparity); Angela J. Davis, Prosecution and Race: The Power and Privilege of Discretion, 67 Fordham L.R. 13, n.10 (1998); see also Traci Schlesinger, Racial and Ethnic Disparity in Pretrial Criminal Processing, 22 JUST. Q. 170 (2005) (discussing the significance and relevance of race and ethnicity to bail officials' decisions on pretrial release, and how Black and Latino defendants in the data set were more likely to be denied bail and less likely to be given non-financial release than White defendants); see also James C. McKinley Jr., Study Finds Racial Disparity in Criminal Prosecutions, N.Y. TIMES (Jul. 8, 2014), https://www.nytimes.com/2014/07/09/nyregion/09race.html.

6. Bennett L. Gersham, A Moral Standard for the Prosecutor's Exercise of the Charging Discretion, 20 Fordham Urban L. J. 513 (1993).

7. Davis, supra note 1, at 17.

8. See Ronald Wright and Marc Miller, Honesty and Opacity in Charge Bargains, 55 Stan. L. Rev. 1409 (2003); see e.g. BUREAU OF JUSTICE ASSISTANCE, U.S. DEP'T OF JUSTICE, Plea and Charge Bargaining (Jan. 24, 2011), https://bja.ojp.gov/sites/g/files/xyckuh186/files/media/document/PleaBargainingResearchSummary.pdf; see also Ronald Wright, Charge Movement and Theories of Prosecutors, 91 Marq. L. Rev. 102 (2007).

9. Traci Schlesinger, Racial Disparities in Pretrial Diversion: An Analysis of Outcomes Among Men Charged with Felonies and Processed in State Courts, 3 Race and Justice 210, 212 (2013).

10. Carlos Berdejo, Criminalizing Race: Racial Disparities in Plea-Bargaining, 59 Boston College Law Review 1188, 1191 (2018).

11. *Id.*

12. *Id.*

13. See generally Nat'l Assoc. of Crim. Defense Lawyers, The Trial Penalty: The Sixth Amendment Right to Trial on the Verge of Extinction and How to Save It (2018), https://www.nacdl.org/getattachment/95b7f0f5-90df-4f9f-9115-520b3f58036a/the-trial-penalty-the-sixth-amendment-right-to-trial-on-the-verge-of-extinction-and-how-to-save-it.pdf; see also Marc Galanter, The Vanishing Trial: An Examination of Trials and Related Matters in Federal and State Courts, 1 J. Empirical Legal Stud. 459 (2004).

14. Davis, supra note 6, at 23.

15. Brady Heiner, The Procedural Entrapment Of Mass Incarceration: Prosecution, Race, and The Unfinished Project of American Abolition, 42 Philosophy and Social Criticism 594, 616 (2015).

16. Schlesinger, supra note 12.

17. K. Babe Howell, Prosecutorial Discretion: The Duty to seek Justice in an Overburdened Criminal Justice System, 27 Georgetown Journal of Legal Ethics 285, 310 (2014).

18. *Id.*

Notes

19. *Id.* at 280.

20. *Id.*

21. Griffin, supra note 1, at 293.

22. Bruce Frederick & Don Stemen, The Anatomy of Discretion: An Analysis of Prosecutorial Decision Making – Technical Report at 282 (Dec. 2012) (unpublished report) (on file with the National Institute of Justice).

23. *Id.* at 283.

24. *Id.*

25. *Id.*

26. *Id.*

27. *Id.*

28. Griffin, supra note 1, at 305.

29. Davis, supra note 1, at 19.

30. *Id.*

31. *Id.*

32. *Id.*

33. See Howell, supra note 13, at 326-334.

34. *Id.* at 287.

35. Berdejo, supra note 5, at

36. Howell, supra note 13, at 287.

37. *Id.* at 298.

38. *Id.* at 327.

39. *Id.* at 291.

40. Michael M. O'Hear, Plea Bargaining and Procedural Justice, 42 Georgia Law Review 407, 419 (2008).

41. Id. at 412

42. *Id.* at 412.

43. *Id.* at 413.