Eliminating Racial Disparities in Prosecutorial Discretion

In the United States, "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] They have broad discretion and authority to decide everything from what and who to investigate, what charges to bring, whether to offer a plea bargain, and what sentence to recommend.[2] The most urgent concern for prosecutors in making discretionary decisions should not be whether a case can be won or whether an accused person has committed a crime, but whether prosecuting the offense serves the public interest.[3]

Racial bias pervades prosecutorial discretionary decision-making. The law requires prosecutors to exercise their broad powers in good faith and in a non-discriminatory manner. Unfortunately, when it comes to Black and Latinx defendants, prosecutors routinely exercise their discretion in a racially discriminatory manner. Recent studies demonstrate that prosecutors are more likely to engage in charge bargaining[4] with White defendants than with Black or Latinx defendants with similar legal charges.[5] 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."[6] 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."[7] "[W]hite 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."[8] Because more than ninety-five percent of criminal convictions in the United States come from closed-door plea-bargaining rather than a jury trial,[9] prosecutors' charging power enhances their control of plea-bargaining outcomes.[10] Sixty percent of all convicted defendants plead guilty to non-violent offenses related to immigration, drugs, or property – crimes overrepresented by low socioeconomic and minority groups.[11] Among people convicted of drug or property crimes, prosecutors are more likely to apply mandatory terms and sentencing enhancements to Black and Latinx men.[12]

Measures to Reduce Racial Disparities Resulting from Discrimination in Prosecutorial Discretion

I. UNIFORM DECISION-MAKING

Inconsistency among office-wide and individual prosecutorial decision-making contributes to disparities in the treatment of individuals in the criminal legal system.[13] One study found that "prosecutors displayed widely divergent views about the goals of the criminal justice system, charging philosophies, and plea bargaining strategies."[14] These differences account for some of the variation in screening, charging, and plea offer decisions.[15] District attorneys can establish and maintain consistency in decision-making by developing manuals with specific rules for screening cases, charging cases, dismissing cases, and plea offers for uniform outcomes across cases and prosecutors.[16] Robust training programs for

new prosecutors and periodic refresher courses for veterans should cover these rules and practices. Most importantly, supervising prosecutors should review the decisions of all prosecutors to ensure consistency within the office. Studies have found that when the most experienced prosecutor in a unit screens all its cases, there is a noticeable increase in consistency in screening decisions.[17]

II. CHARGING

MANDATE RACIAL IMPACT STUDIES

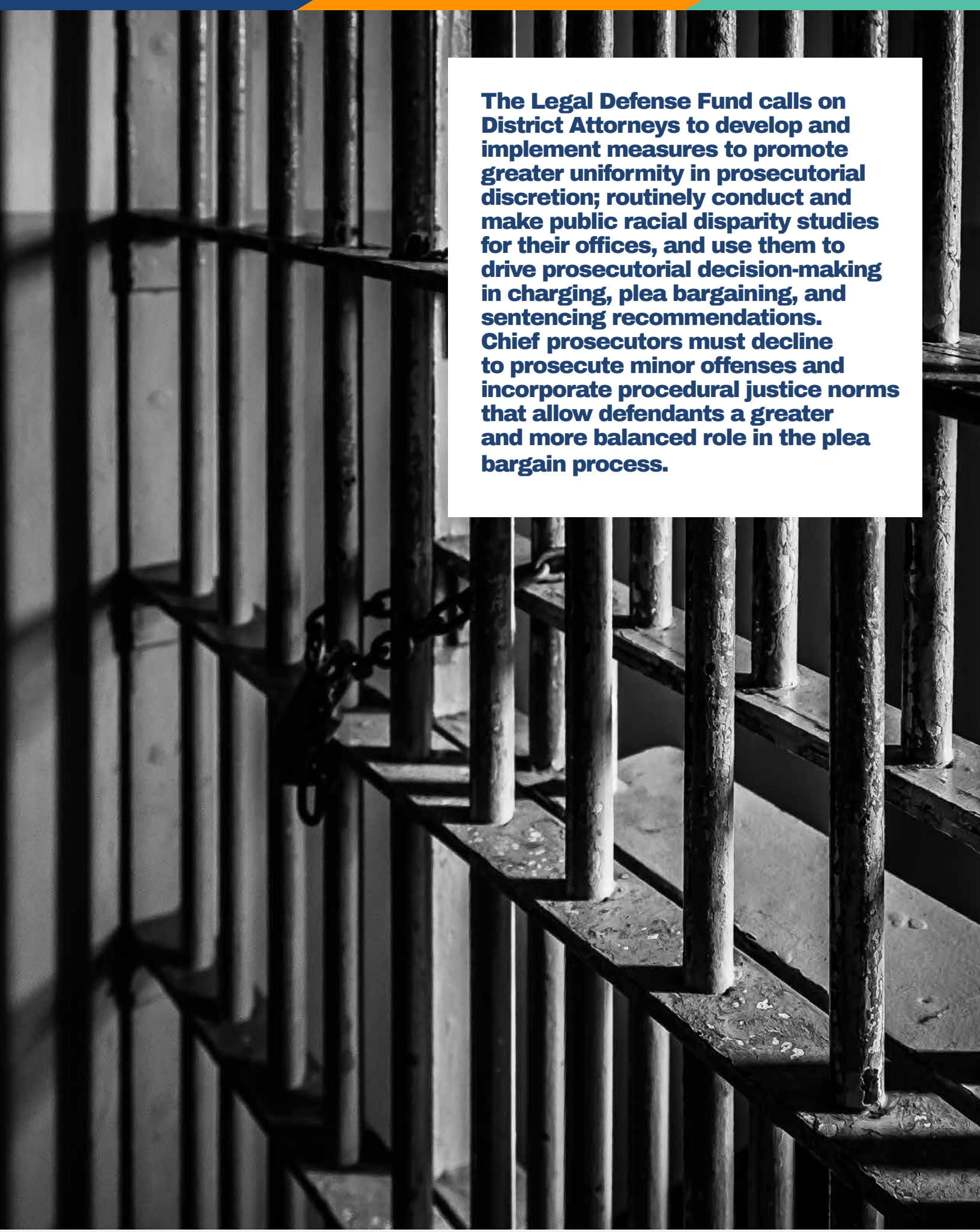
Racial impact studies are "the collection and publication of data on the race of the defendant and the victim in each case for each category of offense, and the prosecutorial action taken at each step of the criminal process."[18] This data is analyzed to determine if race had a statistically significant correlation with prosecutorial decisions.[19] Such studies can reveal disparate treatment of African American defendants or victims or the discriminatory impact of race-neutral discretionary decisions and policies. They help prosecutors make informed decisions about policies formulated to guide discretion in specific cases. Racial impact studies also inform criminal defendants, crime victims, and the public about the exercise of prosecutorial discretion, which could force prosecutors to be accountable for their decisions.[20]

DECLINE TO PROSECUTE MINOR OFFENSES

Chief prosecutors must decline to prosecute minor offenses where arrest patterns show a disparate impact on racial minorities.[21] This reduces the harmful effect that zero tolerance policing practices have on historically disadvantaged communities.[22] Studies show that racial disparities in plea-bargaining outcomes are greater in cases involving misdemeanors and low-level felonies than in cases involving more severe offenses.[23] And a zero-tolerance policing approach to minor offenses has increased the number of individuals subjected to criminal courts to over thirteen million per year, with police focused disproportionately on poor communities of color.[24] In addition to reducing racial disparities in the criminal justice system, declining to prosecute minor offenses could ultimately affect policing strategies, reallocate resources to the most serious crimes (including helping victims of those crimes), and lead to equal enforcement of the laws on the streets.[25]

III. PLEA BARGAINING

"[P]rosecutors acknowledge that the likelihood of innocent individuals pleading guilty is substantial."[26] Scholars suggest that prosecutors need to incorporate procedural justice in the practice of plea-bargaining, since bargaining power lies disproportionately in the hands of the government. Prosecutors must give defendants the "opportunit[y] 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."[27] These practices and procedures do not occur uniformly or on a systematic basis.[28] 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."[29] Prosecutors must consider specific changes in office policies and practice that would conform plea bargaining with this procedural justice model.[30]



The Legal Defense Fund calls on District Attorneys to develop and implement measures to promote greater uniformity in prosecutorial discretion; routinely conduct and make public racial disparity studies for their offices, and use them to drive prosecutorial decision-making in charging, plea bargaining, and sentencing recommendations. Chief prosecutors must decline to prosecute minor offenses and incorporate procedural justice norms that allow defendants a greater and more balanced role in the plea bargain process.

Notes

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

2 *Id.*; *see also* Angela J. Davis, *In Search of Racial Justice: The Role of the Prosecutor*, 16 N.Y.U.J. Legis. & Pub. Pol'y 821, 823 (2013).

3 K. Babe Howell, *Prosecutorial Discretion: The Duty to Seek Justice in an Overburdened Criminal Justice System*, 27 Geo. J. Legal Ethics 285, 313 (2014).

4 *See* Ronald Wright & Marc Miller, *Honesty and Opacity in Charge Bargains,* 55 Stan. L. Rev. 1409 (2003); *see e.g.,* Lindsey Devers, *Plea and Charge Bargaining*, Bureau of Justice Assistance, U.S. Dep't of Just. (Jan. 24, 2011), https://bja.ojp.gov/sites/g/files/xyckuh186/files/media/document/PleaBargainingResearchSummary.pdf; *see also* Ronald Wright & Rodney L. Engen, *Charge Movement and Theories of Prosecutors,* 91 Marq. L. Rev. 9 (2007).

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

6 Carlos Berdejo, *Criminalizing Race: Racial Disparities in Plea-Bargaining*, 59 B.C. L. Rev. 1188, 1191 (2018).

7 *Id.* (footnote omitted.)

8 *Id.*

9 *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* (July 10, 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).

10 Davis, *supra* note 2, at 832-33.

11 Brady Heiner, *The Procedural Entrapment Of Mass Incarceration: Prosecution, Race, and The Unfinished Project of American Abolition*, 42 Phil. & Soc. Criticism 594, 616 (2015).

12 Schlesinger, *supra* note 5, at 212.

13 Howell, *supra* note 3.

14 Bruce Frederick & Don Stemen, *The Anatomy of Discretion: An Analysis of Prosecutorial Decision Making – Technical Report* (Doc. No. 240334, Grant No: 2009-IJ-CX-0040) Nat'l Inst. Of Justice, U.S. Dep't of Just. 280 (Dec. 2012).

15 *See id.*

16 *See id.* at 283.

17 *See id.* at 282–83.

18 Davis, *supra* note 2, at 836.

19 *See id.*

20 *See id.*

21 *See* Howell, *supra* note 3, at 287, 326–34.

22 *See id.* at 287.

23 Berdejo, *supra* note 6, at 1213-20

24 Howell, *supra* note 3, at 290 (footnote omitted).

25 *Id*. at 327.

26 *Id.* at 291 (footnote omitted).

27 Michael M. O'Hear, *Plea Bargaining and Procedural Justice*, 42 Ga. L. Rev. 407, 411 (2008).

28 *Id.*

29 *Id.* at 412

30 *Id.* at 413.