

Race and Adjudication

*Paul Butler**

Racial discrimination in criminal adjudication is unlawful, destructive, and ubiquitous. At virtually every step of adjudication—charging, setting bail, plea-bargaining, jury selection, trial, and sentencing—law enforcement officials exercise discretion in ways that disproportionately harm people of color. Studies have shown that African American and Latino defendants are, for example, significantly more likely than white defendants to be arrested on charges that are not prosecutable, to be detained pretrial, and to be wrongly convicted. The Supreme Court has made it very difficult to challenge racial discrimination in the criminal process, effectively silencing a defendant’s claim to equal protection of the law unless she can produce “smoking gun” evidence of racist intent. Given inadequate legal recourse, efforts to reduce racial discrimination in criminal adjudication should focus on limiting contact between people of color and law enforcement officials and constraining those officials’ discretion. Specifically, policymakers should work to end money bail, decriminalize misdemeanors, require racial-impact analyses for new criminal justice policies, and collect data on prosecutors’ offices. Legislation implementing these recommendations would go a long way toward improving policy in an area where courts and law enforcement officials have been largely ineffectual.

INTRODUCTION

Race matters at every stage of the criminal process, from the prosecutor’s initial charging decision to the sentence handed down by the judge. White defendants tend to have more favorable outcomes than similarly situated African-Americans and Latinos. People of color are more likely to be charged with serious offenses, jailed prior to trial, convicted, and to receive a harsher sentence. These disparities exist even when factors like the severity of the crime and the criminal history of the accused person are the same.

* Albert Brick Professor in Law, Georgetown University.

The United States Constitution makes it unlawful for government actors, including legislators, prosecutors, juries and judges, to discriminate on the basis of race. But the Supreme Court has set high standards for how discrimination in the criminal process can be proved. Because there are many factors relevant to the disposition of a criminal case, the Supreme Court has been reluctant to single out race, despite substantial evidence that it plays a major role. When there is evidence of race disparities, most courts have been unwilling to infer discrimination.

When a person is accused of a crime, it is fundamentally unfair and un-American for her race to influence whether she is found guilty or not guilty and how much time she gets. The United States criminal process is a long way from the ideal that people should be judged by the content of their character and not the color of their skin. To reduce the prejudice that African-Americans and Latinos face, this chapter recommends reducing prosecutorial discretion and limiting contact between law enforcement and communities of color.

Part I describes the process of adjudication. Part II analyzes the role race plays in adjudication. Part III identifies and discusses the major Supreme Court cases on race and adjudication. Part IV proposes several recommendations to curtail racial bias in this stage of the criminal justice process.

I. THE BASICS OF ADJUDICATION

Criminal adjudication describes the practices and procedures after an individual has been arrested. After an individual is arrested, prosecutors decide how (or whether) to charge her. The individual might be charged with just one criminal offense, or multiple offenses. Because there are many overlapping criminal laws on the books, prosecutors often have considerable discretion over charging decisions.¹

The next step is the bail determination. Bail is the money² an arrested person has to pay in order to secure her release from jail. The purported purpose of bail is to ensure that the defendant will attend all court proceedings if she is released from custody. A judge sets bail at a hearing based on a number of factors, including the severity of the defendant's crime, the defendant's criminal history, and the risk that the defendant will flee or hide to avoid appearing in court. The practices for setting bail vary across different jurisdictions—some states have detailed guidelines, while others leave more discretion to judges and magistrates. The amount set for bail is important. An individual is more likely

1. See generally Ronald F. Wright, "Prosecutor Institutions and Incentives," in the present Volume; John F. Pfaff, "Prosecutorial Guidelines," in the present Volume.

2. Bail can also be paid in the form of property or a bond.

to be convicted if she is held prior to trial.³ The higher the bail amount, the more likely an accused person is to remain in pretrial detention—especially if she is economically disadvantaged.

After bail is set, the case looks to be on its way to trial—but criminal cases rarely go to trial. According to recent estimates, less than 5% of criminal cases go to trial.⁴ Instead, most criminal prosecutions are resolved out of court through plea bargaining. The prosecutor and the defendant negotiate over, for example, whether the defendant will plead guilty to a lesser charge in exchange for the prosecutor dropping a more serious charge, or whether the defendant will plead guilty in exchange for the prosecutor recommending a more lenient sentence. The two sides can reach a plea agreement any time before the jury reaches a verdict, so negotiations may be ongoing during the trial.

If the case goes to trial, a jury must be selected. Jurors are chosen from the “jury pool” for the relevant jurisdiction—a list of names usually derived from voter-registration lists or driver’s license lists. Through a process called *voir dire*, the lawyers question potential jurors to determine whether they are biased. If a lawyer thinks that a juror cannot decide a case fairly—because, for example, the juror is related to the defendant—then she can ask the judge to strike that juror for cause. Lawyers also have the ability to make “peremptory challenges,” which permit them to dismiss jurors without providing a reason. Peremptory challenges cannot be racially discriminatory, but, as we will see, it can be difficult to prove that peremptories were made on the basis of race.

At trial, the jury hears opening statements, the evidence for and against the defendant, and closing statements. The lawyers might make objections to admitting certain pieces of evidence or hearing testimony on a particular subject. After hearing the evidence, the jury goes into deliberations to reach a verdict. In a criminal case, the possible verdicts are “guilty” or “not guilty.” The standard for convicting a criminal defendant is “beyond a reasonable doubt.”

3. Pretrial detention weakens a defendant’s bargaining position and increases the likelihood of a guilty plea. See WILL DOBBIE, JACOB GOLDIN & CRYSTAL YANG, THE EFFECTS OF PRETRIAL DETENTION ON CONVICTION, FUTURE CRIME, AND EMPLOYMENT: EVIDENCE FROM RANDOMLY ASSIGNED JUDGES (Nat’l Bureau of Econ. Research, Working Paper No. 22511, 2016). See generally Megan Stevenson & Sandra G. Mayson, “Pretrial Detention and Bail,” in the present Volume.

4. LINDSEY DEVERS, BUREAU OF JUSTICE ASSISTANCE, U.S. DEP’T OF JUSTICE, PLEA AND CHARGE BARGAINING (2011), <https://www.bja.gov/Publications/PleaBargainingResearchSummary.pdf>; see also Jed S. Rakoff, *Why Innocent People Plead Guilty*, N.Y. REV. OF BOOKS (Nov. 20, 2014), <http://www.nybooks.com/articles/2014/11/20/why-innocent-people-plead-guilty/>.

If the defendant is convicted, the next step in the adjudicatory process is sentencing. In most jurisdictions, a judge decides on the appropriate sentence. However, in most death-penalty cases, a jury decides on whether the defendant should be executed.⁵ In a non-death-penalty case, the judge makes the sentencing determination based on various factors, including the nature of the offense and any prior criminal history. Federal judges typically make decisions based on the U.S. Sentencing Guidelines, which prescribe factors to consider and suggested ranges; however, the Guidelines are advisory rather than mandatory.⁶

The defendant can appeal to challenge the verdict based on some legal error that occurred at trial.⁷ For example, the defendant might argue on appeal that the judge's instruction to the jury was incorrect, or that a piece of harmful evidence was unfairly admitted. A criminal defendant convicted in *state* court can also file a writ of habeas corpus in *federal* court to argue that she was deprived of her constitutional rights. However, laws passed by Congress in the 1990s make it very difficult for prisoners to challenge their convictions or their living conditions in prison.⁸

II. THE ROLE OF RACE IN ADJUDICATION

Many studies demonstrate that African-Americans and Latinos are treated differently at every stage of the criminal process. Race plays a role in charging decisions, bail determinations, plea bargaining, convictions, and sentencing.

5. There is some debate over whether only a jury can impose the death penalty under the Eighth Amendment, which prohibits "cruel and unusual punishment." The Supreme Court recently invalidated a capital sentencing scheme in which a jury rendered an "advisory sentence" but a judge independently weighed aggravating and mitigating factors to determine whether the death penalty was appropriate. *Hurst v. Florida*, 136 S. Ct. 616 (2016); *see also* *Ring v. Arizona*, 536 U.S. 584 (2002). For a discussion of the death penalty, see Carol S. Steiker & Jordan M. Steiker, "Capital Punishment," in Volume 4 of the present Report.

6. *See* *United States v. Booker*, 543 U.S. 220 (2005); *see, e.g.*, Douglas A. Berman, "Sentencing Guidelines," in Volume 4 of the present Report.

7. *See generally* Nancy J. King, "Criminal Appeals," in the present Volume.

8. *See* John Pfaff, *Bill Clinton Is Wrong About His Crime Bill—So Are the Protesters He Lectured*, N.Y. TIMES (Apr. 12, 2016), <https://www.nytimes.com/2016/04/12/magazine/bill-clinton-is-wrong-about-his-crime-bill-so-are-the-protesters-he-lectured.html> (discussing the Anti-Terrorism and Effective Death Penalty Act and the Prison Litigation Reform Act).

A. CHARGING DECISIONS

Prosecutors have wide discretion about what crime to charge someone with. African-American men are almost twice as likely as white men to be charged with a federal crime that carries a minimum mandatory sentence.⁹ A study of the Manhattan District Attorney's Office by the Vera Institute of Justice found that African-Americans and Latinos were more likely to have charges dismissed than whites and Asian-Americans.¹⁰ The study's authors didn't have enough information to conclude whether this reflected leniency on the part of the DA's office, or that African-Americans and Latinos were more frequently arrested for cases that were not prosecutable. Other findings in the study, including that blacks and Latinos are more likely to be held for misdemeanors and receive less favorable plea offers, would seem to refute the leniency explanation.

B. BAIL

A Justice Department study examined bail determinations in 45 counties. Controlling for a number of other factors, "the study found that African Americans were sixty-six percent more likely to be in jail pretrial than were white defendants, and that Latino defendants were ninety-one percent more likely to be detained pretrial. Overall, the odds of similarly-situated African American and Latino defendants being held on bail because they were unable to pay the bond amounts imposed were twice that of white defendants."¹¹ Race affects the amount of bail as well. In a study examining bail practices in Connecticut, scholars found that "bail amounts set for black male defendants were thirty-five percent higher than those set for their white male counterparts," even after "controlling for eleven variables relating to the severity of the alleged offense."¹²

The Vera Institute study of the Manhattan DA's Office found that blacks and Latinos are more likely to be held in jail prior to trial, because either no bail is set or if a bail is set, it requires more financial resources than the defendants have.¹³

9. Sonja B. Starr & M. Marit Rehavi, *Racial Disparity in Federal Criminal Sentences*, 122 J. POL. ECON. 1320, 1323 (2014) (noting that black men "have 1.75 times the odds of facing" charges carrying mandatory minimum sentences). For a discussion of mandatory minimums, see Erik Luna, "Mandatory Minimums," in Volume 4 of the present Report.

10. BESIKI KUTATELADZE, WHITNEY TYMAS & MARY CROWLEY, VERA INST. OF JUST., RACE AND PROSECUTION IN MANHATTAN (2014), <https://www.vera.org/publications/race-and-prosecution-in-manhattan>.

11. Cynthia E. Jones, "Give Us Free": Addressing Racial Disparities in Bail Determinations, 16 N.Y.U. J. LEGIS. & PUB. POL'Y 919, 941 (2013).

12. Ian Ayres & Joel Waldfogel, *A Market Test for Race Discrimination in Bail Setting*, 46 STAN. L. REV. 987, 992 (1994).

13. KUTATELADZE ET AL., *supra* note 10.

C. PLEA BARGAINING

Most criminal cases never go to trial. More than 95% of criminal cases are resolved by plea bargains.¹⁴ African-American defendants are more likely to be offered plea deals that include prison time than white or other minority defendants.¹⁵

D. CONVICTIONS

The problem of racial disparities affects convictions as well. For example, wrongly convicted defendants are disproportionately likely to be African-American or Latino.¹⁶ A recent study of almost 2,000 exonerations over the last three decades showed that African-Americans convicted of murder or sexual assault “are significantly more likely than their white counterparts to be later found innocent of the crimes.”¹⁷

What is the source of these disparities? One possible explanation is jury composition. A study of felony trials in Florida between 2000 and 2010 showed that all-white juries convicted black defendants 16% more often than white defendants, a gap that was “entirely eliminated when the jury pool includes at least one black member.”¹⁸ These findings show how devastating discriminatory peremptory strikes can be on the fairness of our criminal justice system. Another possible explanation for disparities in convictions is bias on the part of trial judges. Studies have shown that judges harbor implicit racial biases that can influence their decisions during trials.¹⁹

14. DEVERS, *supra* note 4; *see also* Rakoff, *supra* note 4. For a discussion of plea bargaining, see Jenia I. Turner, “Plea Bargaining,” in the present Volume.

15. KUTATELADZE ET AL., *supra* note 10.

16. Karen F. Parker, Mari A. Dewees & Michael L. Radelet, *Racial Bias and the Conviction of the Innocent*, in *WRONGLY CONVICTED: PERSPECTIVES ON FAILED JUSTICE* 114, 127–28 (Saundra D. Westervelt & John A. Humphrey eds., 2001). For a discussion of wrongful convictions, see Brandon L. Garrett, “Actual Innocence and Wrongful Convictions,” in the present Volume.

17. Niraj Chokshi, *Black People More Likely to Be Wrongly Convicted of Murder, Study Shows*, N.Y. TIMES (Mar. 7, 2017), <https://www.nytimes.com/2017/03/07/us/wrongful-convictions-race-exoneration.html>.

18. Shamena Anwar, Patrick Bayer & Randi Hjalmarsson, *The Impact of Jury Race in Criminal Trials*, 127 Q. J. ECON. 1017 (2012).

19. Jeffrey J. Rachlinski et al., *Does Unconscious Racial Bias Affect Trial Judges?*, 84 NOTRE DAME L. REV. 1195, 1197 (2008).

E. SENTENCING

Racial bias also enters into sentencing decisions. African-American offenders receive sentences that are 10% longer than the sentences for similarly situated white defendants.²⁰ African-Americans “are 21 percent more likely to receive mandatory-minimum sentences than white defendants and are 20 percent more like[ly] to be sentenced to prison.”²¹ A rigorous statistical study of judges in Cook County, Illinois, found that “at least some judges treat defendants differently on the basis of their race” and that the “magnitude of this effect is substantial.”²²

As discussed below, the so-called “Baldus study” (at issue in *McCleskey v. Kemp*) demonstrated that racial factors affect the likelihood of a death sentence. More recent research has shown that “the probability of receiving the death penalty is significantly influenced by the degree to which the defendant is perceived to have a stereotypical Black appearance (e.g., broad nose, thick lips, dark skin).”²³

III. MAJOR SUPREME COURT CASES ON RACE AND ADJUDICATION

There is surprisingly little case law on racial bias in the criminal process. As discussed below, the Supreme Court has decided important “race” cases on jury composition, sentencing, and selective prosecution, but given the vast race disparities in arrests and incarceration, and the considerable scholarship devoted to these issues, one might expect there to be more decisions from the Court addressing the problems.

This relative dearth of case law may be a circumstance that the Court has helped to create. As discussed below, its case law makes it difficult for accused persons to even obtain data from prosecutors that would make it possible to compare their treatment of various racial groups. It is also possible that racial-justice advocates have been reluctant to take their claims to a conservative Court that has been seen, for the last three decades, as unsympathetic to civil-rights claims. Indeed, in the three major cases discussed below, the African-American

20. U.S. SENTENCING COMM’N, DEMOGRAPHIC DIFFERENCES IN FEDERAL SENTENCING PRACTICES: AN UPDATE OF THE BOOKER REPORT’S MULTIVARIATE REGRESSION ANALYSIS (2010). See generally Cassia Spohn, “Race and Sentencing Disparity,” in Volume 4 of the present Report.

21. Sophia Kerby, *The Top 10 Most Startling Facts About People of Color and Criminal Justice in the United States*, CENTER FOR AM. PROGRESS (Mar. 13, 2012), <https://www.americanprogress.org/issues/race/news/2012/03/13/11351/the-top-10-most-startling-facts-about-people-of-color-and-criminal-justice-in-the-united-states/>.

22. David Abrams, Marianne Bertrand & Sendhil Mullainathan, *Do Judges Vary in Their Treatment of Race?*, 41 J. LEGAL STUD. 347, 350 (2012).

23. Jennifer L. Eberhardt et al., *Looking Deathworthy: Perceived Stereotypicality of Black Defendants Predicts Capital-Sentencing Outcomes*, 17 PSYCHOL. SCI. 383 (2006).

litigants lost two of them. In the other case, *Batson v. United States*, the civil-rights claim prevailed, but the opinion has been widely regarded as ineffectual. A third explanation might be that defendants have the most incentive to raise Fourth Amendment claims, because the remedy for a violation is exclusion of the evidence. There is no exclusionary rule for equal protection violations.²⁴

Racial discrimination in criminal adjudication is unconstitutional. However, racial *disparities* in criminal justice are not necessarily proof of discrimination. In a number of decisions over the years, the Supreme Court has made racial discrimination difficult to prove.

A. RIGHT TO “EQUAL PROTECTION OF LAW” IN JURY COMPOSITION

In criminal cases, the prosecutor and the defendant both play a role in selecting the jury. If there is a reason to think a potential juror cannot be fair, either side can ask the judge to dismiss the juror “for cause.” The prosecutor and defendant also have a limited number of “peremptory challenges,” which allow them to strike jurors without any explanation to the judge. In *Batson v. Kentucky*, the Supreme Court held that a prosecutor may not use these challenges to exclude potential jurors based on race.²⁵ The Court ruled that when a prosecutor exercises a peremptory challenge based on race, the defendant’s constitutional right to “equal protection under law” has been denied. At the same time, the Court was careful to note that a defendant has no right to have a jury that includes members of his or her own race. The Constitution requires only that the process of selecting the jury pool be free of racial bias.

Justice Thurgood Marshall, the first African-American to sit on the Supreme Court, agreed with the majority opinion but wrote separately to make the point that the goal of eliminating racial discrimination in jury selection “can be accomplished only by eliminating peremptory challenges entirely.”²⁶

In *Georgia v. McCollum*, the Court extended its holding in *Batson* to defense attorneys, prohibiting them from using their peremptory challenges to exclude jurors based on race.²⁷ In spite of *Batson* and *McCollum*, evidence suggests that race discrimination in jury selection remains a problem, but it is difficult to prove because lawyers can usually identify “race neutral” reasons explaining why they have struck a potential juror. For example, the Supreme Court rejected a *Batson* challenge brought by a Hispanic defendant because it

24. Pamela Karlan, *Race, Rights, and Remedies in Criminal Adjudication*, 96 MICH. L. REV. 2001 (1998).

25. *Batson v. Kentucky*, 476 U.S. 79 (1986).

26. *Id.* at 103 (Marshall, J., concurring).

27. *Georgia v. McCollum*, 505 U.S. 42 (1992).

found that the ability to speak Spanish—the prosecutor’s professed reason for striking the juror—was race-neutral.²⁸

In addition, some studies suggest that race might play a role in how jurors evaluate criminal cases; for example, an African-American juror, based on her life experiences, might be more suspicious of the police than a white juror. If that’s true, then *Batson* and *McCullum* require lawyers to ignore race when they might perceive it to be in the best interests of their client to pay attention to it.²⁹

Foster v. Chatman is one of the few recent cases in which the Supreme Court has found discrimination in the criminal process.³⁰ In the death-penalty trial of Timothy Foster, an African-American man, Georgia prosecutors established a code to designate potential jurors who were African-American and then used their peremptory strikes to exclude them. Among other things, the prosecutors took notes that marked potential black jurors as “B1,” “B2,” and “B3,” and put “n” for “no” next to the names of all those jurors. Another note referred to a potential juror’s affiliation with the Church of Christ and was annotated “NO. No Black church.”³¹ A draft affidavit from an investigator compared black prospective jurors and concluded, “[i]f it comes down to having to pick one of the black jurors, [this one] might be okay.”³²

In addition to this smoking-gun evidence of discrimination, the Court noted that the prosecutors’ “proffered reason[s] for striking” black jurors “applie[d] just as well” to similarly situated white jurors.³³ The Court also found relevant the prosecution’s “shifting explanations” and “misrepresentations of the record,” as well as the “persistent focus on race in the prosecution’s file.”³⁴ Considering this mountain of damning evidence, the Court held that the standard of purposeful discrimination had been met and ordered a new trial. While this decision was a good outcome for Mr. Foster, it nonetheless underscores the difficulty of proving discrimination in jury selection. In most cases, there will be no smoking gun, and clever prosecutors will be able to point to plausible race-neutral reasons for striking black jurors.

B. DISCRETION VERSUS EQUAL JUSTICE

28. *Hernandez v. New York*, 500 U.S. 352 (1991).

29. See Darryl K. Brown, *The Role of Race in Jury Impartiality and Venue Transfer*, 53 MD. L. REV. 107 (1994); Nancy J. King, *Post-Conviction Review of Jury Discrimination: Measuring the Effects of Juror Race on Jury Decisions*, 92 MICH. L. REV. 63, 88 n.92 (1993).

30. *Foster v. Chatman*, 136 S. Ct. 1737 (2016).

31. *Id.* at 1744.

32. *Id.*

33. *Id.* at 1754.

34. *Id.*

Racial disparities do not necessarily prove racial discrimination. The mere fact that, for example, African-Americans receive harsher sentences than similarly situated whites does not show that those sentences are the product of discrimination. The Supreme Court's decision in *McCleskey v. Kemp* illustrates the insufficiency of showing disparities in sentencing.

Warren McCleskey was an African-American man who had been convicted of killing a white police officer during an armed robbery in Georgia. He was sentenced to death and he appealed, arguing that the state's capital-punishment regime violated the constitutional right to equal protection of law and the Eighth Amendment prohibition against "cruel and unusual" punishment. McCleskey's claims were based on empirical evidence that suggested that African-Americans who killed white persons were more likely to be executed than whites who killed blacks, or blacks who killed other blacks. An elaborate statistical study (the Baldus study) indicated that, in Georgia, the death penalty was assessed in 22% of the cases involving black defendants and white victims, 8% of cases involving white defendants and white victims, 1% of cases involving black defendants and black victims, and 3% of cases involving white defendants and black victims.

The Baldus study controlled for hundreds of variables, including the race of the defendant and the victim, in capital trials. It found that race did not matter much in those cases in which juries rarely imposed the death penalty (for example, a man who kills his wife) or almost always imposed the death penalty (for example, mass murderers). In a mid-range of cases (including cases in which law enforcement officials were victims), however, juries sometimes imposed death and sometimes did not. In those cases, race made a significant difference, with the killers of white victims being most likely to be punished with death.

The Supreme Court, for the purposes of its analysis, assumed that the empirical evidence was correct. Nonetheless, the Court found that the death penalty in Georgia was constitutional, for several reasons.³⁵ First, the Supreme Court's equal protection doctrine requires intentional discrimination and McCleskey failed to prove that the Georgia Legislature intended to discriminate against blacks when it established the death penalty. Second, the Baldus study did not include McCleskey's own case and thus, even if the study proved discrimination in the abstract, it did not prove that McCleskey himself had been a victim of discrimination. Finally, the Court held that there are so many variables in a jury's decision to impose death that the Baldus study did not demonstrate that race was a significant factor.

The Court also suggested that even if race discrimination existed in the

35. *McCleskey v. Kemp*, 481 U.S. 279 (1987).

administration of criminal justice, McCleskey's proposed remedy of abolishing the Georgia death-penalty law was impractical. Justice Lewis Powell wrote that, "taken to its logical conclusion, [McCleskey's proposal to eliminate capital punishment in Georgia because it is administered in a discriminatory manner] throws into serious question the principles that underlie our entire criminal justice system." Justice Powell was concerned that if the Court eliminated the death penalty because of discriminatory enforcement, it would create precedent that would require the elimination of other kinds of punishment also found to be administered in a discriminatory manner. The Court concluded its analysis by suggesting that arguments about, and proposed remedies for, any racial consequences of capital punishment are "best presented to the legislative bodies."³⁶

A study by the U.S. Department of Justice found large race disparities in imposition of the death penalty in federal courts.³⁷ Between 1995 and 2000, 72% of the federal cases approved for the death penalty involved minority defendants. White defendants were nearly twice as likely to receive plea bargains that waived the death penalty as African-American and Latino defendants.³⁸ The study noted that minority defendants make up a disproportionate percentage of federal death-penalty cases. According to the Justice Department, "the cause of this disproportion is not racial or ethnic bias, but the representation of minorities in the pool of potential federal capital cases. A factor of particular importance is the focus of federal enforcement efforts on drug trafficking enterprises and related criminal violence."³⁹

Therefore, under existing case law, disparities do not conclusively demonstrate unlawful discrimination. On the one hand, it is true that some of these disparities are attributable to differences in crime rates. According to one study, about 60% of the black incarceration rate can be explained by higher rates of criminal behavior among African-Americans.⁴⁰ Of course, that leaves another 40% that likely result from "the foreseeable effects on blacks and whites of police tactics in the war on drugs and sentencing policies for violent

36. *Id.*

37. U.S. DEP'T OF JUSTICE, THE FEDERAL DEATH PENALTY SYSTEM: SUPPLEMENTARY DATA, ANALYSIS, AND REVISED PROTOCOLS FOR CAPITAL CASE REVIEW (2001), <https://www.justice.gov/archive/dag/pubdoc/deathpenaltystudy.htm>.

38. *See id.* (noting that "a plea agreement to a non-capital charge ... has occurred for 48% of White defendants, 25% of Black defendants, and 28% of the Hispanic defendants in cases where the Attorney General approved the death penalty.")

39. *Id.*

40. Michael Tonry & Matthew Melewski, *The Malign Effects of Drug and Crime Control Policies on Black Americans*, 37 CRIME & JUST. 1 (2008).

and drug offenses.”⁴¹ The problem with explaining sentencing disparities by pointing to offending rates is that this argument ignores selective enforcement and government policies that incentivize illegal behavior. African-Americans do not use or sell drugs at significantly higher rates than whites, but they are more heavily prosecuted for those crimes.⁴² While African-Americans are more likely to be involved in violent crime, this violence is largely a result of an illegal market for drugs and a lack of economic opportunity.⁴³ Understanding the problems in the criminal justice system requires a broad conception of discrimination, but the Supreme Court has insisted on a narrow definition.

C. DIFFICULTY OF PROVING DISCRIMINATION

Proving discrimination in the workings of the criminal justice system can be quite difficult. *United States v. Armstrong* shows that black defendants claiming discrimination are fighting an uphill battle.

Christopher Lee Armstrong alleged that he was selectively prosecuted for offenses involving crack cocaine because he is African-American.⁴⁴ At his trial, Armstrong presented evidence that in each of the 22 crack distribution and conspiracy cases brought in Los Angeles in 1991, the defendant was African-American. He filed a motion for “discovery,” which is the process by which lawyers acquire information about the other side’s case prior to trial. Armstrong requested records about the race of people who had been prosecuted for crack offenses in the last three years. The prosecution refused to provide the evidence.

The Supreme Court ruled that Armstrong did not have a right to the evidence. In an 8-1 decision, the Court held that, in order to obtain discovery, a defendant who claims selective prosecution must make a threshold showing that “the Government declined to prosecute similarly situated suspects of other races.” Chief Justice William Rehnquist stated, “If the claim . . . were well founded, it should not have been an insuperable task to prove that persons of a different race were not prosecuted.”⁴⁵

41. *Id.*

42. NAT’L RESEARCH COUNCIL OF THE NAT’L ACADS., GROWTH OF INCARCERATION IN THE UNITED STATES: EXPLORING CAUSES AND CONSEQUENCES 60–61 (2014) (“[T]he prevalence of drug use is only slightly higher among blacks than whites for some illicit drugs and slightly lower for others; the difference is not substantial. There is also little evidence, when all drug types are considered, that blacks sell drugs more often than whites.”).

43. *Id.* See generally Jeffrey A. Miron, “Drug Prohibition and Violence,” in Volume 1 of the present Report.

44. *United States v. Armstrong*, 517 U.S. 456 (1996).

45. *Id.*

In dissent, Justice Stevens chastised the Court for essentially requiring defendants to “prepare sophisticated statistical studies in order to receive mere discovery in cases like this one.” He argued that “evidence based on a drug counselor’s personal observations or on an attorney’s practice in two sets of courts, state and federal, can ‘ten[d] to show the existence’ of a selective prosecution.”

United States v. Armstrong makes it difficult for defendants claiming selective prosecution to even get their feet in the courthouse door. The large number of overlapping criminal offenses gives prosecutors a great deal of discretion on what to charge.⁴⁶ Decisions like *Armstrong* have significantly curtailed judicial oversight of that discretion.

RECOMMENDATIONS

In a memorandum written to his fellow justices as they were considering the *McCleskey* case, Justice Antonin Scalia observed that “racial antipathies” are “ineradicable.”⁴⁷ If Scalia was correct, this suggests that African-Americans and Latinos will continue to experience discrimination no matter what kinds of reforms are implemented. It seems inevitable that law enforcement officials, even when well intentioned, will exercise their vast discretion in ways that burden people of color. The most effective remedies, then, will be those that seek to reduce contact between people of color and police and prosecutors, and those that reduce the discretion that law enforcement officials have. What follows is a number of recommendations that would reduce bias in criminal adjudication.

1. **End money bail.** Money bail discriminates against low-income defendants. Studies have found that “most people who are unable to meet bail fall within the poorest third of society.”⁴⁸ Money bail has a particularly harmful effect on people of color. “[T]he typical Black man, Black woman, and Hispanic woman detained for failure to pay a bail bond were living below the poverty line before incarceration.” It is simply unfair to “punish[] defendants before they get their day in court.”⁴⁹ Moreover, none of the

46. See, e.g., Erik Luna, *The Overcriminalization Phenomenon*, 54 AM. U. L. REV. 703 (2005).

47. Memorandum from Justice Antonin Scalia to the Conference Re: No. 84-6811—*McCleskey v. Kemp* (Jan. 6, 1987), available at <http://law.wlu.edu/deptimages/powell%20archives/McCleskeyKempBasic.pdf>.

48. BERNADETTE RABUY & DANIEL KOPF, PRISON POLICY INITIATIVE, DETAINING THE POOR: HOW MONEY BAIL PERPETUATES AN ENDLESS CYCLE OF POVERTY AND JAIL TIME (2016), <https://www.prisonpolicy.org/reports/incomejails.html>.

49. Shaila Dewan, *When Bail Is Out of Defendant’s Reach, Other Costs Mount*, N.Y. TIMES (June 10, 2015), <https://www.nytimes.com/2015/06/11/us/when-bail-is-out-of-defendants-reach-other-costs-mount.html>.

purported justifications for money bail hold up to scrutiny. Most people are not arrested for serious violent crimes. Many defendants are held only because they are poor and cannot afford bail.

Finally, ending money bail would not prevent the government from holding dangerous offenders or ensuring that people show up for court proceedings. In the District of Columbia, for example, courts release about 90% of arrestees without requiring money bail; instead, individuals must “promise to return to court and meet conditions such as checking in with a pretrial officer or reporting for drug testing.”⁵⁰ Potentially dangerous individuals are not eligible for pretrial release. Studies have shown that even a short period of pretrial detention can ruin people’s lives and increase the chances of recidivism.⁵¹ Indeed, there is growing recognition among law-enforcement officials that money bail “is not a rational system.”⁵² Maryland, New Jersey, Kentucky, and New Mexico have already limited the use of money bail.⁵³ More states should join them.

2. **Decriminalize misdemeanors.** While much of the attention around criminal justice reform has focused on reducing incarceration, policymakers must also address the millions of misdemeanor cases filed each year. As Alexandra Natapoff has explained, defendants charged with misdemeanors often find themselves deprived of basic due-process protections. The results of “the slipshod quality of petty offense processing” are devastating:

[E]very year the criminal system punishes thousands of petty offenders who are not guilty. Misdemeanants routinely plead to low-level crimes for which there is little or no evidence, without assistance of counsel or any other meaningful adversarial process. In some cases, defendants are demonstrably innocent. In others, the process is so lax that we cannot say with any certainty

50. Ann E. Marimow, *When It Comes to Pretrial Release, Few Other Jurisdictions Do It D.C.’s Way*, WASH. POST (July 4, 2016), https://www.washingtonpost.com/local/public-safety/when-it-comes-to-pretrial-release-few-other-jurisdictions-do-it-dcs-way/2016/07/04/8eb52134-e7d3-11e5-b0fd-073d5930a7b7_story.html.

51. Michael Hardy, *In Fight Over Bail’s Fairness, a Sheriff Joins the Critics*, N.Y. TIMES (Mar. 9, 2017), <https://www.nytimes.com/2017/03/09/us/houston-bail-reform-sheriff-gonzalez.html>.

52. *Id.* (quoting Harris County Sheriff Ed Gonzalez).

53. Ovetta Wiggins & Ann E. Marimow, *Maryland’s Highest Court Overhauls the State’s Cash-Based Bail System*, WASH. POST (Feb. 7, 2017), https://www.washingtonpost.com/local/md-politics/maryland-highest-court-overhauls-the-states-cash-based-bail-system/2017/02/07/36188114-ed78-11e6-9973-c5efb7ccfb0d_story.html.

whether defendants are guilty or not. Moreover, because many of these underprocessed convictions are for urban disorder offenses, the phenomenon disproportionately affects minority and other heavily policed groups.⁵⁴

This method of treating misdemeanor offenses is a grave injustice. It also disproportionately hurts African-Americans. As Devon Carbado has pointed out, “blacks are more likely to be arrested for low-level crimes than whites.”⁵⁵ Criminal misdemeanor offenses, which often encompass vague conduct like “disturbing the peace” or “loitering,” grant police officers a wide range of discretion. “Against the background of mass criminalization,” Carbado writes, “police officers can almost always find a justification to investigate an African-American for some crime.”⁵⁶ Misdemeanor offenses “provide[] police officers with a kind of free-floating probable cause—or free-floating reasonable suspicion—that they can use to justify their repeated interactions with African-Americans.”⁵⁷

One solution is to decriminalize misdemeanors—that is, imposing fines rather than prison sentences for offenses like marijuana possession, disorderly conduct, and loitering. Decriminalizing misdemeanors can have unintended consequences: police forces such as the Ferguson Police Department have used less serious offenses as revenue-collection devices, preying on low-income communities; individuals can still be incarcerated for their failure to pay the fines; and individuals may still face “collateral consequences” for being convicted of a misdemeanor.⁵⁸ As a result, policymakers must not only decriminalize misdemeanor but also reduce “the burdens associated with minor offenses” and reconsider “the punitive turn that fueled the carceral explosion of the late 20th century.”⁵⁹ Decriminalization should be a means of reducing the punitive aspects of the criminal justice system, not simply reintroducing those aspects in a different form.

54. Alexandra Natapoff, *Misdemeanors*, 85 S. CAL. L. REV. 1313, 1316 (2012); see also Alexandra Natapoff, “Misdemeanors,” in Volume 1 of the present Report.

55. Devon W. Carbado, *Blue-on-Black Violence: A Provisional Model of Some of the Causes*, 104 GEO. L.J. 1479, 1486 (2016).

56. *Id.* at 1490. See generally Devon W. Carbado, “Race and the Fourth Amendment,” in Volume 2 of the present Report.

57. Carbado, *Blue-on-Black Violence*, *supra* note 55, at 1490.

58. Alexandra Natapoff, *Decriminalizing Misdemeanors*, 68 VANDERBILT L. REV. 1055, 1077–1102 (2015) (discussing the “dark side of decriminalization”). See generally Beth A. Colgan, “Fines, Fees, and Forfeitures,” in Volume 4 of the present Report; Gabriel J. Chin, “Collateral Consequences,” in Volume 4 of the present Report.

59. Natapoff, *Decriminalizing Misdemeanors*, *supra* note 58, at 1116.

3. **Require racial-impact analysis for criminal justice policies.** Before government agencies approve construction projects or promulgate regulations, they are often required to produce environmental-impact statements and engage in cost-benefit analysis. The rationale for these requirements is that “policies often have unintended consequences that would be best addressed prior to adoption of new initiatives.”⁶⁰ Criminal justice policies such as mandatory-sentencing laws often have disparate impacts on communities of color. Several states have passed laws that “require policy makers to prepare racial impact statements for proposed legislation that affects sentencing, probation, or parole policies.”⁶¹ Racial-impact statements would alert lawmakers to the potential costs of criminal justice policies and would ensure that those policies do not “exacerbate any unwanted disparities.”⁶²
4. **Collect more data on prosecutors’ offices.** “What gets measured gets noticed.”⁶³ The Vera Institute’s study of the Manhattan DA’s office provided useful data on prosecutors’ charging decisions and sentencing outcomes.⁶⁴ Similar studies of other prosecutors’ offices would tell us more about racial disparities in criminal adjudication. Data by itself will not solve the problem. But more studies that document instances of disparate treatment can help policymakers pinpoint areas for improvement.

60. Marc Mauer, *Racial Impact Statements: Changing Policies to Address Disparities*, 23 CRIM. JUST. 16 (2009).

61. *Id.*

62. *Id.*

63. See, e.g., Hillary Rodham Clinton, Keynote at the Opening Session of the Fourth High-Level Forum on Aid Effectiveness (Nov. 30, 2011), available at <https://2009-2017.state.gov/secretary/20092013clinton/rm/2011/11/177892.htm>.

64. KUTATELADZE ET AL., *supra* note 10.