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## PROSECUTORIAL ROLES IN REDUCING RACIAL DISPARITIES IN THE JUSTICE SYSTEM

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### EXECUTIVE SUMMARY

The most pressing problems facing criminal justice policymakers and practitioners are racial disparities within the criminal justice system. In many instances, the data on outcomes at each stage of the criminal justice process are stark, with Black individuals disproportionately bearing the brunt of system involvement and severe sentences. While nearly every actor and policymaker associated with the criminal justice system can play a part in addressing this issue, prosecutors remain some of the most powerful. With a hand in decisions ranging from charging to plea bargaining, the policies and practices of prosecutors inevitably influence the existence and extent of any racial disparities. This paper examines the sources of racial disparities in the criminal justice system, the ways in which prosecutors may contribute to them and finally, actions that prosecutors can take to help reduce these disparities. These recommendations include better understanding of disparities, decreasing reliance on cash bail and pretrial detention, prioritizing diversion programs and implementing algorithmic color-blind charging.

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### INTRODUCTION

Persistent racial disparities have long been a reality in our criminal justice system. Black individuals are incarcerated in state prisons at approximately five times the rate of white offenders.<sup>1</sup> Black men face disproportionately harsh incarceration experiences, including being more likely to be wrongfully convicted and to face the death penalty.<sup>2</sup> These disparities stem from many sources in the criminal justice system, but prosecutorial decision-making is a key factor. Prosecutors hold enormous power in the system, from charging decisions to plea bargaining. These decision points can be used to make disparities worse or to respond proactively.

Recently, a number of prosecutorial policy changes have reduced disparities, which demonstrates that such changes are possible. The disparity between white and Black individuals sentenced for federal drug crimes reduced from 47 months in 2009 to zero in 2018, in large part due to instructions not to seek the maximum penalty for drug trafficking given by then Attorney General Eric Holder.<sup>3</sup> At the state level, the ratio of Black to white individuals under some kind of supervision (incarcerated, on probation or parole) declined from around 8.3-to-1 to 5.1-to-1.<sup>4</sup> The causes for the reduction at the state level are complicated and include the rising imprisonment of white men, but prosecutorial discretion, particularly in drug cases, has played a part.

There is hope: prosecutors can make a difference and already have made positive changes in some jurisdictions. This paper begins by discussing the problem of racial disparities in the

1. Bruce Western and Jessica Simes, "Criminal Justice, Pathways: The Poverty and Inequality Report," in *The State of the Union Report*, Stanford Center on Poverty & Equality, 2019. [https://inequality.stanford.edu/sites/default/files/Pathways\\_SOTU\\_2019\\_CriminalJustice.pdf](https://inequality.stanford.edu/sites/default/files/Pathways_SOTU_2019_CriminalJustice.pdf).

2. "Criminal Justice Fact Sheet," NAACP, last accessed June 10, 2021. <https://www.naacp.org/criminal-justice-fact-sheet>.

3. Michael T. Light, "The Declining Significance of Race in Criminal Sentencing: Evidence from US Federal Courts," *Social Forces* (March 15, 2021). <https://academic.oup.com/sf/advance-article-abstract/doi/10.1093/sf/soab018/6170993>.

4. William J. Sabol, et al., "Trends in Correctional Control by Race and Sex," Council on Criminal Justice, December 2019. <https://www.ncsl.org/Portals/1/Documents/cj/advancing-justice/Council%20on%20Criminal%20Justice%20Trends.pdf>.

system and potential causes. The second part discusses a prosecutor's role in the criminal justice system and how they might contribute to this issue. The final part looks to innovative strategies that prosecutors can utilize to reduce disparities.

## RACIAL DISPARITIES IN THE CRIMINAL JUSTICE SYSTEM

The overrepresentation of Black and Brown individuals in the criminal justice system is well documented. One in three Black men and one in six Latino men (compared to one in 17 white men) is incarcerated at some point in their lifetime.<sup>5</sup> There are a number of possible factors that contribute to this disparity, including disproportionate offending, policies like the War on Drugs and discriminatory practices.

Disproportionate offending, which is the concept that Black individuals are overly represented because they actually commit more crime, is a simplistic and inaccurate rendering of a complicated issue. Arrest records (which are higher for minorities) are not a reliable measure of actual criminal behavior because Black individuals are more likely to be policed and stopped.<sup>6</sup> Even setting aside arrests, the racial breakdown does not mirror the racial breakdown in imprisonment. Differences in decision-making at other points in the system must account for this.<sup>7</sup> Furthermore, a number of studies have noted that the rates of criminal behavior are fairly consistent across racial groups for drug and property crimes.<sup>8</sup> Thus, actual differences in criminal behavior cannot fully explain the racial disparities in our criminal justice system. The differences that remain are disturbing and necessitate our attention.

Policies and laws can also have a disproportionate impact on Black individuals—perhaps most famously, the War on Drugs. President Richard Nixon established the Drug Enforcement Administration (DEA) in 1973, which precipitated the rollout of severe prison terms and long mandatory minimums for drugs. Congress also passed cocaine sentencing laws that deeply affected the Black population by differentiating between a crack and powdered version of the drug with a 100:1 disparity in sentencing. Other seemingly

race-neutral policies also had an impact. For example, the establishment of additional punishments for drug offenses in school zones does not consider that Black communities tend to manifest in urban areas in which a three-mile radius around schools may overtly and disproportionately penalize Black youth, without protecting children.<sup>9</sup>

Implicit bias and explicit racial profiling also cause the disproportional penalization of Black individuals. While racially biased practices are illegal under the Fourteenth Amendment, they do continue. Racial profiling is the practice of implicitly or explicitly considering race and ethnicity a factor when deciding how and whether to charge an individual, when determining the nature of the plea offered, when deciding which cases necessitate dismissals and when issuing sentencing recommendations after trial. Overall, racial bias has evolved from explicit Jim Crow era laws into implicit bias, which is far more difficult to detect. Implicit bias occurs when race becomes a factor because of automatic associations that operate at an unconscious level, including stereotypes and social or cultural attitudes toward a particular group.<sup>10</sup> All court actors, and indeed all individuals, can be subject to implicit bias, including public defenders, judges and probation agents.<sup>11</sup> Thus far, insufficient attention has been paid to prosecutorial decision making that might be influenced by implicit bias.<sup>12</sup>

Too often racial bias in the system has become a partisan issue. But it should be a concern for us all because it affects the fairness and procedural due process of the system. An ineffective and unfair system lacks credibility.

## PROSECUTORS IN THE CRIMINAL JUSTICE SYSTEM

As representatives of the people, prosecutors must balance multiple roles in the justice system with a unique set of ethical responsibilities. They must seek justice for all, including the defendant, which requires them to operate with intention. Prosecutors have enormous discretion to influence the course of a case. Some scholars have argued they are the most powerful actors in the criminal justice system.<sup>13</sup> Through

5. Elizabeth Hinton, et al., "An Unjust Burden: The Disparate Treatment of Black Americans in the Criminal Justice System," Vera Institute of Justice, May 2018. <https://www.vera.org/downloads/publications/for-the-record-unjust-burden-racial-disparities.pdf>.

6. David Weisburd and Malay K. Majumdar, *Proactive Policing: Effects on Crime and Communities*, (National Academies Press, 2018). <https://www.nap.edu/read/24928/chapter/9>.

7. Ashley Nellis, "The Color of Justice: Racial and Ethnic Disparity in State Prisons," The Sentencing Project, June 14, 2016. <https://www.sentencingproject.org/publications/color-of-justice-racial-and-ethnic-disparity-in-state-prisons>.

8. Lauren Gase, et. al., "Understanding Racial and Ethnic Disparities in Arrest: The Role of Individual, Home, School, and Community Characteristics," *Race and Social Problems* 8:4 (Nov. 3, 2016). <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC5509345>.

9. Judith Greene, et al., "Disparity by Design: How drug-free zone laws impact racial disparity – and fail to protect youth," Justice Policy Institute, March 2006. <https://drugpolicy.org/sites/default/files/SchoolZonesReport06.pdf>.

10. Rachel Godsil and HaoYang (Carol) Jiang, "Prosecuting Fairly: Addressing the Challenges of Implicit Bias, Racial Anxiety, and Stereotype Threat," *CDAA Prosecutor's Brief* 40:2 (Winter 2018). <https://perception.org/wp-content/uploads/2018/07/Prosecuting-Fairly.pdf>.

11. Irene Oritseweyimi Joe, "Regulating Implicit Bias in the Federal Criminal Process," *California Law Review* 108:3 (June 2020). <https://www.californialawreview.org/print/implicit-bias-federal-criminal-process>.

12. Ibid.

13. Angela J. Davis, "The Power and Discretion of the American Prosecutor," *Egalite et Discrimination*, 45:1 (2005), pp. 55-66. <https://journals.openedition.org/droitcultures/1580>.

their decisions, they can determine the outcome of a case and subsequently of an individual's life-path and future opportunities. They can also influence other actors such as law enforcement. Prosecutors and law enforcement function in a mutually interdependent manner: while the influence of law enforcement includes who to police and what laws to enforce, the influence of prosecutors includes whether to proceed with charges after an arrest and how to do so. Through this mechanism, prosecutors create a feedback loop with law enforcement that indicates what sorts of cases they are likely to proceed with and what investigatory techniques they condone.<sup>14</sup>

Historically, prosecutors have been subject to little accountability, which allowed them to make charging and plea-bargaining decisions that were “virtually unreviewable.”<sup>15</sup> In each decision, prosecutors had the power to increase racial disparities or strive for racial equity. Yet, research demonstrates that bias has affected prosecutorial decision making. The Vera Institute of Justice reviewed 34 empirical studies in 2012 and found that most of the studies suggested a defendants’ or victims’ race directly or indirectly influenced case outcomes, even in consideration with other factors.<sup>16</sup>

## SPECIFIC POINTS OF DECISION-MAKING AND POTENTIAL RACIAL BIAS

### Charging Decisions

Charging decisions are moments in which prosecutors decide whether to charge a defendant and what specific charge should be applied to a case. These moments of broad discretion are important because they affect whether downstream policies, such as sentencing guidelines, have much effect.<sup>17</sup> After police arrest an individual, prosecutors are often the next point of contact and are given the option of whether to charge a defendant with a crime. Prosecutors file charges only if the prosecutor reasonably believes that the charges are supported by probable cause, that admissible evidence will be sufficient to support conviction beyond a reasonable doubt and that the decision to charge is in the

interest of justice.<sup>18</sup> But prosecutors can also choose not to file charges even if evidence exists to support such a charge.<sup>19</sup> Few individuals would be aware of such a decision because it typically occurs privately and cannot be reviewed by a judge.<sup>20</sup> The decision to charge an individual can also significantly influence whether they are held in custody pretrial, released on their own recognizance or receive a cash bail in practicing jurisdictions.

If a prosecutor decides to charge an individual, a wide range of possible next steps may apply to each person. If an individual is found with drugs, charges can include possession, possession with intent to distribute and distribution. An individual in an empty dwelling can be charged with trespass or burglary. A fight between two individuals might be a first, second or third-degree assault. Charging decisions have significant consequences in terms of classification as a felony or misdemeanor and potential sentencing terms. The facts of the case are part of the decision-making calculus, but state statutes typically leave much room for discretion. After charging, prosecutors can also decide whether to maintain charges, refer a case for early resolution or offer diversion alternatives.

At the severe end of the criminal justice spectrum, researchers have found prosecutors are more likely to charge capital murder and seek the death penalty in cases with Black defendants and/or with white victims.<sup>21</sup> A study found that Black defendants were more likely to be detained, more likely to be offered a plea that included incarceration and more likely to be incarcerated. Yet, it also found that Black and Latino individuals charged with a misdemeanor were more likely to have their cases dismissed.<sup>22</sup>

### Plea Bargaining

The overwhelming majority of cases end in a plea bargain rather than a trial, which cements the prosecutor's processual power.<sup>23</sup> A prosecutor might offer a particular charge and recommended sentence, which a defendant can accept to mitigate the risks of a trial, to be released from pretrial incarceration sooner or to save the expense of a trial. With charge bargaining, prosecutors control the defendants' sentencing

14. Eric L. Nelson, “The Relationship Between Individual Police Officer Work Habits and the Stated Reasons Prosecutors Reject Their Domestic Violence Investigations,” *Government Agencies* 3:4, (Nov. 25, 2013). <https://journals.sagepub.com/doi/10.1177/2158244013511826>.

15. Davis. <https://journals.openedition.org/droitcultures/1580>.

16. See, e.g., Eric Nelson, “The Relationship Between Individual Police Officer Work Habits and the Stated Reasons Prosecutors Reject Their Domestic Violence Investigations,” *SAGE Open* (January 2013). <https://journals.sagepub.com/doi/10.1177/2158244013511826>; Besiki Kutateladze, “Do Race and Ethnicity Matter in Prosecution? A Review of Empirical Studies,” Vera Institute of Justice, May 2012. <https://www.vera.org/publications/do-race-and-ethnicity-matter-in-prosecution-a-review-of-empirical-studies>.

17. Christopher Robertson, et al., “Race and Class: A Randomized Experiment with Prosecutors,” *University of Arizona James E. Rogers College of Law* 19:26 (December 2019). [https://scholarship.law.bu.edu/faculty\\_scholarship/961](https://scholarship.law.bu.edu/faculty_scholarship/961).

18. “Prosecution Function,” American Bar Association, 2017. [https://www.americanbar.org/groups/criminal\\_justice/standards/ProsecutionFunctionFourthEdition](https://www.americanbar.org/groups/criminal_justice/standards/ProsecutionFunctionFourthEdition).

19. *Ibid.*

20. Davis. <https://journals.openedition.org/droitcultures/1580>.

21. Samuel R. Sommers and Satia A. Marotta, “Racial Disparities in Legal Outcomes: On Policing, Charging Decisions, and Criminal Trial Proceedings,” *Policy Insights from the Behavioral and Brain Sciences* 1:1 (Oct. 1, 2014), pp. 103-111. <https://doi.org/10.1177/2372732214548431>.

22. Kutateladze. <https://www.vera.org/publications/do-race-and-ethnicity-matter-in-prosecution-a-review-of-empirical-studies>.

23. Legal Information Institute, “Plea Bargain,” Cornell Law School, last accessed June 22, 2021. [https://www.law.cornell.edu/wex/plea\\_bargain](https://www.law.cornell.edu/wex/plea_bargain).

exposure by selecting the charges the individual will face. Prosecutors can also recommend a particular sentence to the judge that can be part of the plea agreement. An array of factors can be considered in this determination, including an individual's previous criminal record, their personal history including age, occupation, and family status, and other factors like their willingness to serve as a prosecutor's witness in a future case. While pleas cannot be obviously coercive ("I'll shoot you if you don't plead guilty"), they can contain a "trial penalty." For example, putting aside a more severe charge only if an individual is willing to plead guilty.<sup>24</sup>

Prosecutors do not have to state on the record why they are offering a certain plea, and there can be variation in the pleas offered for similar charges. With limited information and time, prosecutors may consciously or unconsciously use race as a piece of information in fashioning a plea. For instance, using race to evaluate which individuals will commit crimes in the future, or which individuals are deserving of a second chance. One recent study found significant differences in how white and Black defendants experienced plea bargaining. The overall conclusion was that white defendants ended up with less severe charges and sentences. White defendants were 25 percent more likely to have their most serious initial charge dropped or reduced, which resulted in white individuals being 15 percent more likely to be convicted of a misdemeanor instead of a felony.<sup>25</sup> The largest differences appeared in misdemeanor cases. White individuals facing just misdemeanor charges were nearly 75 percent more likely to have all charges carrying imprisonment dropped, dismissed or reduced to a lesser charge.<sup>26</sup>

## Trials

While trials are few and far between, there are many strategic decisions that prosecutors can make, including choosing a jury, the framing of opening and closing arguments, whether and when objections should be made, which witnesses to call and which jury instructions to request. While overt race-based reasoning for striking jurors is prohibited, it is difficult to prove. It is easy for prosecutors to provide race-neutral reasons for striking jurors, and asking a judge to make a finding of intentional discrimination is extremely difficult.<sup>27</sup>

Opening and closing statements are two of the few occasions when a prosecutor can speak directly to a jury. While overt comments regarding race and racial epithets are not permissible, there are implicit ways a prosecutor might reference race, which researchers have found can affect the ways jurors evaluate evidence.<sup>28</sup> One researcher noted that prosecutors unduly might "inflame a jury's fears and stereotypes with predictions of bloodshed, terror, and violence unless the jury convicts the accused Black man."<sup>29</sup> Coded language that is not overtly racial is often used in summation arguments and can be particularly difficult to challenge.<sup>30</sup>

## METHODS OF REDUCING RACIAL DISPARITIES

As previously discussed, the prosecutorial process is one segmented by numerous decision points where prosecutors have large amounts of discretionary authority. At any of these decision points racial disparities can impact the criminal justice system. To determine if disparities are present and what their origins may be, data must be collected and analyzed. Which decisions, processes and workflows are analyzed will depend upon the local jurisdiction, but without a proper base of knowledge to work from, new policies or actions intended to reduce racial disparities may exacerbate them.

It is important that policy solutions are pragmatic—that is, that they are solutions that prosecutors' offices will actually embrace and want to adopt. No one wishes to be labeled a racist, and when bias is implicit and operating at an unconscious level, the individual may not even be aware it is occurring. Solutions that eliminate the need to cast blame and assume good intent—that all individuals want to work towards equitable outcomes—are more likely to succeed. As such, implicit bias training programs are not recommended because there is simply not enough research to support that they decrease bias.<sup>31</sup>

While there is no one-size-fits-all solution for addressing racial disparities in any context, the following are several policy tools that might be considered to improve equity and justice for all.

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24. Dylan Walsh, "Why U.S. Criminal Courts Are So Dependent on Plea Bargaining," *The Atlantic*, May 2, 2017. <https://www.theatlantic.com/politics/archive/2017/05/plea-bargaining-courts-prosecutors/524112>.

25. Carlos Berdejó, "Criminalizing Race: Racial Disparities in Plea-Bargaining," *Loyola Law School* 59:4 (2018), p. 1187. <http://lawdigitalcommons.bc.edu/bclr/vol59/iss4/2>.

26. *Ibid.*

27. "Panelists call Batson a failure, offer solutions," American Bar Association, May 2017. <https://www.americanbar.org/news/abanews/publications/youraba/2017/march-2017/panelists-call-i-batson-i-a-failure-offer-solutions>.

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28. Praatika Prasad, "Implicit Racial Biases in Prosecutorial Summations: Proposing an Integrated Response," *Fordham University School of Law* 86:6 (2018), pp. 3101. <https://ir.lawnet.fordham.edu/flr/vol86/iss6/24>.

29. *Ibid.*

30. *Ibid.*

31. Betsy Mason, "Making people aware of their implicit biases doesn't usually change minds. But here's what does work," *Knowable Magazine*, Jun. 10, 2020. <https://www.pbs.org/newshour/nation/making-people-aware-of-their-implicit-biases-doesnt-usually-change-minds-but-heres-what-does-work>.

## UNDERSTANDING RACIAL DISPARITIES TO REDUCE THEM

By collecting data and understanding where racial disparities exist, the prosecutor's office can make small changes to create large impacts. For example, the Prosecution and Racial Justice Program ("PRJ") was established by the Vera Institute for Justice 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."

Deploying the PRJ program results in some significantly positive outcomes for prosecutors and defendants alike. For example, when prosecutors in Charlotte, North Carolina realized that the office was over prosecuting drug cases compared to other charges and was treating African American women more harshly than any other group, the District Attorney was able to make meaningful reductions by appointing different individuals to supervisory positions and by screening cases more carefully.<sup>32</sup> Similarly, the Milwaukee district attorney's office noticed a disparity in the prosecution of possession of drug paraphernalia where prosecutors more often declined to prosecute in cases with White individuals than Black. Once noted, they were able to analyze why it was occurring and discovered that inexperienced misdemeanor prosecutors were making most of the decisions to proceed, and that a large number of cases included the possession of crack pipes, which were being viewed as more serious than other types of drug paraphernalia cases.<sup>33</sup>

The PRJ model has many positive attributes—it is evidence-based, and can be adapted to examine various points in the process from charging to plea bargaining. Simply by learning about a disparity a prosecutor can often take steps to locate its source and reduce it.

## Decrease Reliance on Cash Bail and Pretrial Detention

Cash bail and pretrial detention are also significant contributors to racial disparities in downstream criminal justice outcomes such as likelihood of conviction, chance of pleading guilty and length of incarceration.<sup>34</sup> This is largely due to the fact that minority groups have less wealth than their white peers on average, and when cash bail is required across the board for defendants the end result is a disparity along racial lines between those who can afford to post bail and those

who cannot.<sup>35</sup> This initial disparity in pretrial detention rates can result in cumulative disadvantages, meaning that various noticed and unnoticed racial disparities further downstream in the criminal justice system could have a common root in pretrial release determinations.<sup>36</sup>

To address this potential source of disparity, prosecutors should work with affiliated government agencies and community organizations to reduce the use of cash bail and pretrial detention. To achieve this goal, some jurisdictions have implemented pretrial release screening for certain offenses, expansion of pretrial services and increased use of validated pretrial assessment programs.<sup>37</sup>

## Prioritize Diversion Programs

Alongside numerous studies, the federal government has acknowledged that when it comes to enforcement of drug related offenses there are significant racial disparities to address.<sup>38</sup> Those looking to apply a race-neutral approach to reducing racial disparities, curbing aggressive charging and enforcement of drug related offenses can make a significant difference. This is not to say that offenses should go unpunished. Rather, for some offences, prosecutors can expand the use of diversion programs for appropriate individuals. As it stands, minority groups are vastly overrepresented in terms of drug-related offense enforcement and general incarceration.<sup>39</sup> By expanding the footprint of diversion programs for

32. Angela J. Davis, "In Search of Racial Justice: The Role of the Prosecutor," *New York University Journal of Legislation and Public Policy* 16:4 (2013). [https://digitalcommons.wcl.american.edu/facsch\\_lawrev/1401](https://digitalcommons.wcl.american.edu/facsch_lawrev/1401).

33. *Ibid.*, p. 839.

34. Ellen A. Donnelly and John M. MacDonald, "The Downstream Effects of Bail and Pretrial Detention on Racial Disparities in Incarceration," *The Journal of Criminal Law and Criminology* 108:4 (2018), p. 775. <https://scholarlycommons.law.northwestern.edu/jclc/vol108/iss4/4>.

35. See, e.g., Neil Bhutta, et al., "Disparities in Wealth by Race and Ethnicity in the 2019 Survey of Consumer Finances," *FEDS Notes* (Sept. 28, 2020). <https://www.federalreserve.gov/econres/notes/feds-notes/disparities-in-wealth-by-race-and-ethnicity-in-the-2019-survey-of-consumer-finances-20200928.htm>; Cynthia E. Jones, "'Give Us Free': Addressing Disparities in Bail Determinations," *New York Law Journal of Legislation and Policy* 16:1 (2013), p. 919. <https://www.nyuilpp.org/wp-content/uploads/2014/01/Jones-Give-Us-Free-16nyuilpp919.pdf>.

36. Besiki L. Kutateladze, et al., "Cumulative disadvantage: Examining racial and ethnic disparity in prosecution and sentencing," *Criminology* 52:3 (2014), pp. 514-551. [https://www.researchgate.net/profile/Brian-Johnson-26/publication/265131118\\_Cumulative\\_Disadvantage\\_Examining\\_Racial\\_and\\_Ethnic\\_Disparity\\_in\\_Prosecution\\_and\\_Sentencing/links/6022b34c299bffc26b520ec/Cumulative-Disadvantage-Examining-Racial-and-Ethnic-Disparity-in-Prosecution-and-Sentencing.pdf](https://www.researchgate.net/profile/Brian-Johnson-26/publication/265131118_Cumulative_Disadvantage_Examining_Racial_and_Ethnic_Disparity_in_Prosecution_and_Sentencing/links/6022b34c299bffc26b520ec/Cumulative-Disadvantage-Examining-Racial-and-Ethnic-Disparity-in-Prosecution-and-Sentencing.pdf).

37. Sarah L. Desmarais and Evan Lowder, "Pretrial Risk Assessment Tools," MacArthur Foundation Safety and Justice Challenge, February 2019. <https://www.safetyandjusticechallenge.org/wp-content/uploads/2019/02/Pretrial-Risk-Assessment-Primer-February-2019.pdf>.

38. See, e.g., Alyssa C. Mooney, et al., "Racial/Ethnic Disparities in Arrests for Drug Possession After California Proposition 47, 2011-2016," *American Journal of Public Health* 108:8 (Aug. 1, 2018), pp. 987-993. <https://ajph.aphapublications.org/doi/abs/10.2105/AJPH.2018.304445>; Lena Lundgren, et al., "Postincarceration Policies for those with Criminal Drug Convictions: A National Policy Review," *Families in Society* 91:1 (2010), pp. 31-38. <https://journals.sagepub.com/doi/10.1606/1044-3894.3952>; U.S. Office of Applied Studies, "Results from the 2005 National Survey on Drug Use and Health: National Findings," Department of Health and Human Services, 2005. <http://www.dpft.org/resources/NSDUHresults2005.pdf>.

39. "Report to the United Nations on Racial Disparities in the U.S. Criminal Justice System," The Sentencing Project, April 19, 2019. <https://www.sentencingproject.org/publications/un-report-on-racial-disparities>.

drug-related offenses prosecutors stand to reduce downstream racial disparities in general incarceration.<sup>40</sup>

While diversion is a promising practice, evidence suggests that it can exacerbate racial disparities unless programs are created with a commitment to equity in design and oversight. Diversion can be differentially applied when prosecutors and law enforcement use their discretion when referring individuals of various racial and ethnic backgrounds. Policies might also unnecessarily limit diversion eligibility. For instance, some policies limit diversion to a few, minor offenses that are more likely to be committed by white individuals, such as diverting alcohol offenses but not drug offenses.<sup>41</sup> Automatically diverting certain offenses and removing discretion is one policy solution. Additionally, analyzing data regarding diversion is vital, so that racial discrepancies in diversion practices are swiftly recognized and addressed. Prosecutors should likewise pay attention to why individuals are not successful on diversion, as these failures might indicate barriers that can be addressed such as a lack of resources, lack of transportation or inhibited ability to complete diversion requirements.<sup>42</sup>

### Implement Algorithmic Color-Blind Charging

Another policy solution that has potential to eliminate racial disparities originating from the prosecutor's office is algorithmic color-blind charging. Using AI assisted technology, identifying factors such as race, ethnicity and gender can automatically be removed from documents to provide a "clean" set of facts where implicit, or explicit, bias is less likely to impact charging decisions. Scholars at Stanford University have created such a system that appears to have promise in practical application.<sup>43</sup>

## CONCLUSION

Racial disparities are one of the most persistent and pernicious challenges in our criminal justice system. As a result, racial disparities appear throughout the criminal justice system due to various factors, and implicate structural elements from poorly written laws to the implicit and explicit biases

of system actors. In addition to being manifestly unjust for individuals, these disparities undermine the legitimacy of a system intended to distribute justice fairly, and must therefore be addressed in a sustained way at all levels.

Prosecutors who hold influence over crucial decisions throughout the criminal justice process and who serve under unique ethical obligations are especially well positioned to address this issue proactively. To do so requires recognizing the extent and impact of racial disparities in their own jurisdiction, identifying as many factors that create and exacerbate them as possible, and critically examining how prosecutors' own decisions and actions can affect racial disparity rates. For many prosecutors, incorporating greater racial equity into their policies and practices will be relatively uncharted territory. Yet, with humility and an openness to new approaches, prosecutors can make significant strides toward a more ethical and just system.

### ABOUT THE AUTHORS

**Nila Bala** is the former associate director and former senior fellow of criminal justice and civil liberties policy at the R Street Institute, where she helped lead criminal justice policy areas generally, and developed policy to advance reforms in juvenile and economic justice. Prior to her time at R Street, she was a public defender in Santa Clara, California and Baltimore, Maryland. Earlier in her career, she clerked for Judge Keith P. Ellison of the U.S. District Court for the Southern District of Texas.

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40. Jessica Eaglin and Danyela Solomon, "Reducing Racial and Ethnic Disparities in Jails," Brennan Center for Justice, 2015. [https://www.brennancenter.org/sites/default/files/2019-08/Report\\_Racial%20Disparities%20Report%20062515.pdf](https://www.brennancenter.org/sites/default/files/2019-08/Report_Racial%20Disparities%20Report%20062515.pdf).

41. See, e.g., Janet L. Lauritsen, "Racial and Ethnic Differences in Juvenile Offending," in *Our Children, Their Children: Confronting Racial and Ethnic Differences in Juvenile Justice*, eds. Darnell F. Hawkins and Kimberly Kempf-Leonard (University of Chicago Press, 2005), p. 96.

42. Liz Kroboth, et al., "Advancing Racial Equity in Youth Diversion: An Evaluation Framework Informed by Los Angeles County," Human Impact Partners, June 2019, p. 17. [https://humanimpact.org/wp-content/uploads/2019/06/HIP\\_EvaluateYouthDiversion\\_2019.06.03.pdf](https://humanimpact.org/wp-content/uploads/2019/06/HIP_EvaluateYouthDiversion_2019.06.03.pdf).

43. Alex Chohlas-Wood, et al., "Blind Justice: Algorithmically Masking Race in Charging Decisions," Association for Computing Machinery, May 19-21, 2021. <https://sharad.com/papers/blind-charging.pdf>.