

American University Washington College of Law

Digital Commons @ American University Washington College of Law

Articles in Law Reviews & Other Academic Journals

Scholarship & Research

2007

Racial Fairness in the Criminal Justice System: The Role of the Prosecutor

Angela J. Davis

American University Washington College of Law, angelad@wcl.american.edu

Follow this and additional works at: https://digitalcommons.wcl.american.edu/facsch_lawrev



Part of the [Criminal Law Commons](#), [Law and Race Commons](#), [Law Enforcement and Corrections Commons](#), and the [Legal Profession Commons](#)

Recommended Citation

Davis, Angela J., "Racial Fairness in the Criminal Justice System: The Role of the Prosecutor" (2007). *Articles in Law Reviews & Other Academic Journals*. 1398.
https://digitalcommons.wcl.american.edu/facsch_lawrev/1398

This Article is brought to you for free and open access by the Scholarship & Research at Digital Commons @ American University Washington College of Law. It has been accepted for inclusion in Articles in Law Reviews & Other Academic Journals by an authorized administrator of Digital Commons @ American University Washington College of Law. For more information, please contact kclay@wcl.american.edu.

RACIAL FAIRNESS IN THE CRIMINAL JUSTICE SYSTEM: THE ROLE OF THE PROSECUTOR

Angela J. Davis*

I. INTRODUCTION

There are many complex reasons for the unwarranted racial disparities that plague the American criminal justice system,¹ but

* Professor of Law, American University, Washington College of Law. B.A. Howard University; J.D., Harvard Law School; former Director of the Public Defender Service for the District of Columbia. The author thanks Molly Hostetler and Elizabeth Janelle for their research assistance. The ideas in this article were presented at the symposium entitled "Pursuing Racial Fairness in the Administration of Justice: Twenty Years After *McCleskey v. Kemp*," held by the NAACP Legal Defense and Educational Fund and Columbia Law School on March 2-3, 2007.

1. See, e.g., David Cole, *No Equal Justice: Race and Class in the American Criminal Justice System* (1999) (exploring how race and class-based double standards in the criminal justice system allow a privileged few to enjoy constitutional protections at low cost); Milton Heumann & Lance Cassak, *Good Cop, Bad Cop: Racial Profiling and Competing Views of Justice* (2003) (discussing the impact of the practice of profiling on racial and ethnic minorities); Marc Mauer, *Race to Incarcerate* (2d ed. 2006) (exploring the impact of mass incarceration on the "underclass"); *Racial Issues in Criminal Justice: The Case of African Americans* (Marvin D. Free, Jr., ed., 2003) (discussing the enormous racial disparities in the criminal justice system from academic research on crime and media portrayals to the application of capital punishment); Kathryn K. Russell, *The Color of Crime: Racial Hoaxes, White Fear, Black Protectionism, Police Harassment, and Other Macroaggressions* (1998) (focusing on the criminal image projected onto blacks by the media, the criminal justice system, racial hoaxes, and misrepresented research); Rebecca Marcus, *Racism in Our Courts: The Underfunding of Public Defenders and Its Disproportionate Impact upon Racial Minorities*, 22 *Hastings Const. L.Q.* 219 (1994) (discussing the disadvantages that racial minorities face in criminal justice due to inadequate resources of public defender services); Mark D. Rosenbaum & Daniel P. Tokaji,

one of the most significant contributing factors is the exercise of prosecutorial discretion, especially at the charging and plea bargaining stages of the process. Few prosecutors consciously favor criminal defendants or victims based on race or class.² Most prosecutors are motivated by a desire to enforce the law in ways that will produce justice for everyone in the communities they serve. However, all too often, prosecutors' well-intentioned charging and plea bargaining decisions result in dissimilar treatment of similarly situated victims and defendants, sometimes along race and class lines.³

Unwarranted racial disparities cannot be eliminated without the active participation of prosecutors. Prosecutors, along with other criminal justice officials, must be willing to acknowledge the role

Healing the Blind Goddess: Race and Criminal Justice, 98 Mich. L. Rev. 1941 (2000) (reviewing David Cole, *No Equal Justice: Race and Class in the Criminal Justice System* (1999)) (discussing the "massive and flagrant abuses" of law enforcement officers and their disparate effect on racial minorities); *Developments in the Law—Race and the Criminal Process*, 101 Harv. L. Rev. 1472 (1988) (examining the problem of race discrimination within the criminal justice system due to police misconduct, prosecutorial discretion, jury selection and misconduct, and sentencing).

2. This Article focuses on racial disparities, but class and socio-economic status are both relevant to the treatment of criminal defendants and victims of crime. From the police, prosecutors, lawyers, judges, and other officials who run the system to the defendants and victims who are drawn into it unwillingly, the behavior and treatment of almost everyone involved in the criminal justice process reflect the complexities of race and class. For a discussion of the relevance of both race and socio-economic status to discriminatory behavior by criminal justice officials, see Derrick Bell, *And We Are Not Saved: The Elusive Quest for Racial Justice* 5 (1987) (noting that "race-related disadvantages" are "now as likely to be a result as much of social class as of color"); Michael Tonry, *The Functions of Sentencing and Sentencing Reform*, 58 Stan. L. Rev. 37, 62–63 (2005) (discussing the racial disparities resulting from the use of sentencing policy to achieve personal, ideological, or partisan goals); Angela J. Davis, *It's Class and Race*, Wash. Post, Nov. 25, 1995, at A19 (arguing that both race and class discrimination exist in the criminal justice system). It is often difficult to discern whether discrimination is based on race, class, or both. First, the number of Americans living in poverty are disproportionately African-American, and African Americans are disproportionately poor. See Sheldon Danziger & Peter Gottschalk, *America Unequal* 73–74 (1995) (discussing data showing the disproportionate rate of African-American poverty). Second, because discrimination is often unintentional or unconscious, and thus unacknowledged, its origin is sometimes difficult to discern. See *infra* Part I.

3. Angela J. Davis, *Prosecution and Race: The Power and Privilege of Discretion*, 67 Fordham L. Rev. 13, 34–35 (1998).

they play in contributing to these disparities and agree to institute reform measures. Yet actually securing the cooperation of prosecutors in such an effort will, for a variety of reasons, be a challenging undertaking. Prosecutors traditionally have resisted even modest efforts to reform the way that they perform their duties and responsibilities.⁴ Because most prosecutors are elected officials, their constituents must view the issue as a high priority and insist upon prosecutorial action. The public, inundated by one-sided images of prosecutors in the news and popular media, and bereft of information about some of the most important functions that prosecutors perform, does not view prosecutorial reform as a priority. Thus, education and advocacy are needed to secure the support of prosecutors and their constituents. Even if this support is secured, legislation may be necessary to ensure that needed reforms are implemented.

Any proposal for reform that is based on allegations of racial bias will be met with particular resistance. It is doubtful that many prosecutors will take responsibility for contributing to racial disparities in the criminal justice system, even as an unintended consequence of their race-neutral charging and plea bargaining decisions. In addition, the ability of prosecutors to resist reform will be enabled by Supreme Court decisions that have shielded prosecutorial decisions from scrutiny in a variety of contexts, including in cases where there has been a claim of discrimination based on race.⁵

Almost ten years ago, in an article entitled *Prosecution and Race: The Power and Privilege of Discretion*,⁶ I proposed the use of racial impact studies in prosecutors' offices as a way to advance the nondiscriminatory exercise of discretion and to reduce racial disparities in the criminal justice system. Since that time, there has been increased awareness of the role that prosecutors play in perpetuating these disparities. Criminal justice organizations and

4. See Angela J. Davis, *Arbitrary Justice: The Power of the American Prosecutor* 155–57 (Oxford Univ. Press 2007) (discussing how the Citizens Protection Act, 28 U.S.C. § 530(b) (Supp. IV 1998), was widely opposed by federal prosecutors); Allan Van Fleet, *Full Contact v. No Contact: How Government Lawyers Tilt the Ethical Playing Field*, *Antitrust*, Fall 1998, at 13, 16 (noting the dissatisfaction of the Justice Department and federal prosecutors with the Citizens Protection Act).

5. See discussion of ineffective legal remedies *infra* Part III.A.

6. Davis, *supra* note 3.

institutions also have urged prosecutors to take responsibility for how their decisions contribute to racial disparities, and have taken a leadership role in helping to eliminate them.⁷

In this Article, I discuss developing efforts to involve prosecutors in the elimination of racial disparities in the criminal justice system. In Part II, I discuss how prosecutors unintentionally contribute to disparities through the arbitrary, unsystematic exercise of discretion. In Part III, I argue that the U.S. Supreme Court has failed to provide an effective legal remedy for victims of race-based selective prosecution. Finally, in Part IV, I endorse the use of racial impact studies and task forces and discuss a model reform effort spearheaded by the Vera Institute of Justice.

II. THE RACIAL IMPACT OF RACE-NEUTRAL DECISION-MAKING

Prosecutors exercise a tremendous amount of discretion in charging and plea bargaining processes with no external oversight and very little accountability to the constituents they serve. Charging and plea bargaining decisions frequently predetermine the outcome of criminal cases, especially in cases involving mandatory minimum sentences.⁸ Since over ninety-five percent of criminal cases are resolved with guilty pleas,⁹ the impact of prosecutorial discretion cannot be understated.

Police officers also exercise a great amount of discretion when making arrests.¹⁰ As such, the police contribute to unwarranted racial disparities. Consequently, scholars have rightly focused much

7. See discussion of American Bar Association Commission on Effective Criminal Sanctions and Vera Institute of Justice Prosecution and Racial Justice Project *infra* Parts III.B, III.D.

8. See Charles W. Thomas & W. Anthony Fitch, *Prosecutorial Decision Making*, 13 Am. Crim. L. Rev. 507, 510–11 (1976) (evaluating the powerful impact of prosecutorial discretion at the charging and plea bargaining stages).

9. U.S. Dep't of Justice Bureau of Statistics, *Felony Defendants in Large Urban Counties, 2000 iv* (2003), available at <http://www.ojp.usdoj.gov/bjs/pub/pdf/fdluc00.pdf>.

10. See Rosenbaum & Tokaji, *supra* note 1, at 1942 (discussing the "massive and flagrant abuses" of law enforcement officers and their disparate effects on racial minorities); David A. Harris, *The Reality of Racial Disparity in Criminal Justice: The Significance of Data Collection*, 66 Law & Contemp. Probs. 71, 74–78 (2003) (detailing the role of data collection and police participation in the problem of racial discrimination).

attention on the problem of racial profiling.¹¹ However, although police officers bring individuals into the system with the arrest power, only prosecutors have the power to formally charge them with crimes—a power that often predetermines their fate.

Prosecutors can, and frequently do, decide not to charge individuals who have been arrested, even if there is probable cause to believe they have committed a crime. This decision is completely within their discretion. If they do decide to charge, prosecutors have complete discretion in deciding what crime or crimes to charge and are restrained only by the criminal codes of their jurisdictions. The proliferation of criminal statutes, both state and local, only expands their discretion. Legislators pass laws that criminalize a vast array of behaviors, and frequently these laws are duplicative. However, prosecutors are not required to exercise their charging discretion in any particular manner. There is no requirement, for example, that prosecutors charge similarly situated¹² individuals with the same offenses.

Most prosecutors would vehemently deny that they take race into account in any way in the exercise of their prosecutorial duties, and most probably do not consciously consider race. Nonetheless, prosecutors rely on legitimate, race-neutral factors that sometimes have racial effects. The American Bar Association (ABA) Standards for the Prosecution Function have endorsed several such factors.¹³ A report to the ABA noted that legitimate factors include: the seriousness of the offense, the defendant's prior criminal record, the

11. See David A. Harris, *Profiles in Injustice: Why Racial Profiling Cannot Work* (2002) (discussing the harmful effects of racial profiling on minority individuals and communities and its ineffectiveness as a policing tool); Andrew J. Taslitz, *Stories of Fourth Amendment Disrespect: From Elian to the Internment*, 70 *Fordham L. Rev.* 2257, 2270 n.81 (2002) (stating that racial profiling violates the principles of a "jurisprudence of respect"); Tracy Maclin, *Race and the Fourth Amendment*, 51 *Vand. L. Rev.* 333, 354–362 (1998) (arguing that pretextual traffic stops on the basis of race should constitute a violation of the Fourth Amendment); Jeremiah Wagner, *Racial (De)Profiling: Modeling a Remedy for Racial Profiling After the School Desegregation Cases*, 22 *Law & Ineq.* 73, 95 (2004) (proclaiming that racial profiling is a form of segregation).

12. A "similarly situated" defendant would have a similar criminal record and the facts and circumstances of his case and alleged involvement in the crime would be of a similar magnitude.

13. See ABA, *Criminal Justice Section Standards: Prosecution Function*, Standard 3-3.9(b), available at http://www.abanet.org/crimjust/standards/pfunc_blk.html#3.9 (last visited Oct. 26, 2007).

victim's interest in prosecution, the strength of the evidence, the likelihood of conviction, and the availability of alternative dispositions.¹⁴

The factor that many prosecutors consider most important is the seriousness of the offense: the more serious the offense, the more likely the prosecutor will charge the accused. For example, a prosecutor may decide to dismiss a simple assault while zealously pursuing the prosecution of an aggravated assault involving serious injury. Few would question this decision, regardless of the race of the defendant or victim. The more difficult issue arises when two defendants are charged differently in cases involving similar facts, except with defendants or victims of different races. At this point, the issue of unconscious racism becomes relevant. If, for example, a defendant in a case involving a white victim is charged with capital murder while a similarly situated defendant in a case involving a black victim is charged with second-degree murder, questions arise about the value the prosecutors placed on the lives of the respective victims. A prosecutor may unconsciously consider a case involving a white victim as more serious than a case involving a black victim,¹⁵ and this may influence the charging, plea bargaining, and other related decisions.¹⁶

If a prosecutor initially deems a particular case to be more serious than others, she will invest more time and resources investigating the case and preparing for trial. This will yield more evidence, making it less likely that the prosecutor will offer a plea bargain and more likely that she will succeed in obtaining a conviction at trial. The likelihood of conviction is another consideration endorsed by the ABA.¹⁷ Thus, although the strength of

14. ABA, Justice Kennedy Commission, Reports with Recommendations to the ABA House of Delegates 58 (2004), available at <http://www.abanet.org/crimjust/kennedy/JusticeKennedyCommissionReportsFinal.pdf>.

15. See Martha A. Myers and John Hagan, *Private and Public Trouble: Prosecutors and the Allocation of Court Resources*, 26 Soc. Probs. 439, 447 (1979) (stating that "regardless of the race of the defendant, prosecutors may consider white victims more credible than black victims or their troubles more worthy of full prosecution").

16. Charles R. Lawrence, *The Id, The Ego, and Equal Protection: Reckoning with Unconscious Racism*, 39 Stan. L. Rev. 317, 327 (1987) (analyzing unconscious racism and defining it, at its core, as "unconscious beliefs and attitudes about race").

17. See American Bar Ass'n, *supra* note 14, at 58.

the evidence and the likelihood of conviction are facially race-neutral factors, they may be influenced by initial, unconscious racial valuations.¹⁸

The victim's interest in prosecution is another factor that prosecutors legitimately consider in making charging and plea bargaining decisions.¹⁹ If the victim of a crime has no interest in the prosecution of his case and no desire to see the defendant punished, the prosecutor may dismiss the case based on these views, especially if the prosecutor believes that the defendant does not pose a danger to society and that there are no other legitimate reasons for pursuing the prosecution.²⁰ Few would question this decision, especially if the victim of the crime considered the prosecution process too onerous and difficult.²¹

On the other hand, should a prosecutor pursue a prosecution in a case that she would otherwise dismiss for legitimate reasons simply because the victim demonstrates an interest in prosecution?²² Or should a prosecutor assume that a victim is not interested in prosecution when the victim does not appear for witness conferences or respond to a subpoena?²³ Prosecutors are more likely to pursue prosecutions in cases involving crime victims who are comfortable navigating the criminal process and who have time to attend grand jury hearings, witness conferences, and status hearings. The poor, who are disproportionately people of color, are less able to take time off from work to attend these hearings. They may also feel less comfortable participating in the process, especially since they are more likely to have family or friends involved in the system as criminal defendants. Thus, race and class may have an unintended effect on this factor as well.

The prior record of the defendant is another seemingly race-neutral factor considered by prosecutors in the charging and plea bargaining process.²⁴ Prosecutors understandably are more likely to charge and less likely to offer a favorable plea bargain to defendants with prior arrest and conviction records; defendants who are

18. *Id.*

19. Davis, *supra* note 3, at 36.

20. See Davis, *supra* note 4, at 70; Davis, *supra* note 3, at 36.

21. Davis, *supra* note 3, at 36.

22. *Id.*

23. *Id.*

24. *Id.*

recidivists are arguably more deserving of prosecution.²⁵ Race, however, may affect the existence of a prior criminal record even in the absence of recidivist tendencies on the part of the suspect because of racial profiling at the arrest stage of the process.²⁶

Race often plays a role in the decision to detain and/or arrest a suspect.²⁷ In addition, policy decisions about where police officers should be deployed and what offenses they should investigate have racial ramifications.²⁸ A white defendant with no criminal arrest or conviction record may have engaged in criminal behavior. If he lives in a community that resolves certain criminal offenses (drug use, assault, etc.) without police intervention, he may be a recidivist without a record. Likewise, a black defendant who lives in a designated "high crime" area may have been detained and arrested on numerous occasions even if he has not engaged in criminal behavior.²⁹ Thus, the existence or nonexistence of an arrest or conviction record may not reflect criminality. A prosecutor without knowledge of or sensitivity to this issue may give prior arrests undue consideration in making charging and plea bargaining decisions.³⁰

The ABA standards also suggest that prosecutors consider the availability of alternative dispositions before bringing criminal charges.³¹ Many prosecutors' offices have diversion programs or other

25. *Id.*

26. *Id.* at 36–37.

27. *See* *United States v. Leviner*, 31 F. Supp. 2d 23, 33–34 (D. Mass. 1998) (acknowledging the relevance of race in traffic stops and arrests); Sean Hecker, *Race and Pretextual Traffic Stops: An Expanded Role for Civilian Review Boards*, 28 Colum. Hum. Rts. L. Rev. 551, 562 n.59 (1997) (referring to an ACLU survey that found that while minorities make up only 21.8% of violators, they constitute 80.3% of those stopped and searched on Maryland portions of route I-95); David Cole, *Enemy Aliens*, 54 Stan. L. Rev. 953, 976–77 (2002) (critiquing ethnic profiling for its overbreadth and ineffectiveness).

28. *See, e.g.*, Lawrence Rosenthal, *Policing and Equal Protection*, 21 Yale L. & Pol'y Rev. 53, 56 (2003) (arguing that reactive law enforcement strategies leave poor, disproportionately minority communities more vulnerable to crime than wealthy ones).

29. *See* David A. Harris, *Particularized Suspicion, Categorical Judgments: Supreme Court Rhetoric Versus Lower Court Reality Under Terry v. Ohio*, 72 St. John's L. Rev. 975, 1000 (1998) (addressing the problem of police detentions based on the person's proximity to a high crime area).

30. *See Leviner*, 31 F. Supp. 2d 23, 33–34 (holding that, on account of racial bias, the defendant's prior record would not be considered when determining his sentence).

31. *See* ABA, *supra* note 13, at Standard 3–3.8.

alternatives that allow for the dismissal of a case combined with alternative resolutions such as restitution, rehabilitative treatment or community service.³² Most of these alternatives are available for first offenders only and benefit not only the defendant but all parties. The victim may be compensated if restitution is involved, and the alternatives have the added benefit of eliminating the time and expense of trying another case for the prosecutor, the defense attorney, and the court. As with other seemingly legitimate considerations, however, this factor may have class and race ramifications. Wealthier defendants have a greater ability to make restitution or pay for drug, alcohol, or psychiatric treatment. Since people of color are disproportionately poor,³³ this seemingly race neutral factor can have racial effects.

Arbitrary, unsystematic decision-making, exacerbated by unconscious race and class predilections, sometimes results in disparate treatment of similarly situated victims and defendants. That prosecutors do not intend to cause racial disparities does not excuse them from responsibility for the harmful effects of their decisions. The U.S. Supreme Court, however, has repeatedly blocked efforts to hold prosecutors accountable for unintentional discrimination.

III. INEFFECTIVE LEGAL REMEDIES

A. Selective Prosecution

When a prosecutor singles out an individual for prosecution based on his race, religion, or some other inappropriate classification, she engages in selective prosecution. In *Oyler v. Boles*, the Supreme Court held that selective prosecution based on race, religion, or any other arbitrary classification is unconstitutional only if it is purposeful or intentional.³⁴ The requirement of an independent showing of discriminatory purpose was solidified by the Supreme Court's decision in *Washington v. Davis*.³⁵ There, the Court required evidence of discriminatory purpose independent of disproportionate

32. See Thomas & Fitch, *supra* note 8, at 530.

33. See Davis, *supra* note 2.

34. *Oyler v. Boles*, 368 U.S. 448, 456 (1962).

35. *Washington v. Davis*, 426 U.S. 229, 230 (1976).

impact to prove that a facially neutral law violates the Equal Protection Clause.³⁶

In 1985, the Supreme Court applied the strict intent standard to a selective prosecution case in *Wayte v. United States*.³⁷ In *Wayte*, the defendant was charged with knowingly and willfully failing to register for the draft.³⁸ Wayte claimed that he had been selectively prosecuted because of his protests against the draft.³⁹ The Court rejected his claim, holding that, even if there were evidence of discriminatory impact, Mr. Wayte had to prove that the government intended to discriminate against him *because* of his protests.⁴⁰ The Court made it clear that a showing of discriminatory impact alone was not sufficient to prove discriminatory motive.⁴¹ Thus, since *Wayte*, defendants must make a *prima facie* showing of discriminatory effect and *purpose* to prove selective prosecution.

The Court has even imposed onerous requirements on defendants seeking the necessary evidence to make a *prima facie* case of selective prosecution. In *United States v. Armstrong*,⁴² the defendants filed a discovery motion to obtain evidence from a prosecutor about his office's prosecution practices.⁴³ The case involved African-American defendants in Los Angeles who were charged in federal court with crack cocaine and firearms offenses.⁴⁴ The defendants filed a motion to dismiss the indictment for selective prosecution based on evidence that the U.S. Attorney prosecuted virtually all African Americans charged with crack offenses in federal court, but left all white crack defendants to be prosecuted in state court.⁴⁵ Since the federal law penalized crack distribution much more

36. *Id.* at 241–42.

37. *Wayte v. United States*, 470 U.S. 598, 608–09 (1985).

38. *Id.* at 603.

39. *Id.* at 604.

40. *Id.* at 608–10.

41. *Id.* at 608–09.

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

43. *Id.* at 459.

44. *Id.* at 458–59.

45. See Dan Weikel, *U.S. Defends Handling Of Crack Cases*, L.A. Times, May 26, 1995, at A3 (noting that “[v]irtually all whites arrested for crack offenses have been prosecuted in state court, where the penalties are less severe.”); Gary Webb, *War On Drugs’ Unequal Impact On U.S. Blacks*, San Jose Mercury News, Aug. 20, 1996, at A1; Gary Webb, *Flawed Sentencing Blamed For Disparity*, San Jose Mercury News, Aug. 20, 1996, at A11.

harshly than California state law,⁴⁶ this decision by the federal prosecutor resulted in African Americans receiving harsher punishment than their white counterparts charged with the same criminal conduct.

The defendants' discovery motion requested the U.S. Attorney's criteria for deciding whether to bring charges in federal court, as well as the number and racial identity of all defendants charged with crack offenses in both federal court and state court. The prosecutor opposed the discovery motion, noting that the facts of the case met the office's criteria for prosecution and denying the allegation of selective prosecution based on race.⁴⁷ However, the prosecution neither admitted nor denied the claim that there were no federal prosecutions of white defendants charged with these offenses.⁴⁸

The district court granted the defendants' motion, ordering the government to provide very general information: (1) a list of all cases from the last three years in which the government charged both cocaine and firearms offenses, (2) the race of the defendants in those cases, (3) the levels of law enforcement involved in the investigations of those cases, and (4) the criteria for deciding to prosecute those defendants for federal cocaine offenses.⁴⁹ The U.S. Attorney went to remarkable lengths to avoid turning over the requested information, yet offered no explanation of why providing the discovery would prejudice the government's case.⁵⁰ The defendants did not request specific information about cases, and so confidentiality and other privacy concerns were not at issue. The U.S. Attorney first appealed to the Court of Appeals for the Ninth Circuit. When the Ninth Circuit affirmed the district court,⁵¹ the prosecutors appealed the decision to the U.S. Supreme Court.

Here, they finally found support. The Supreme Court reversed the Ninth Circuit decision, holding that to be entitled to

46. See 21 U.S.C. § 841(b)(1)(A)(iii) (2006) (requiring a sentence of 10 years under federal law); Cal. Health & Safety Code §§ 11351–11351.5 (West 1991) (establishing a penalty of two to five years for distribution of cocaine under state law).

47. *Armstrong*, 517 U.S. 456, 459.

48. *Id.*

49. *Id.*

50. *Id.* at 460–61.

51. *United States v. Armstrong*, 48 F.3d 1508, 1510 (9th Cir. 1995), *rev'd en banc*, 517 U.S. 456 (1996).

discovery in selective prosecution cases based on race, a defendant must produce credible evidence that similarly situated defendants of other races could have been prosecuted but were not.⁵² The Court held that Armstrong and his co-defendants did not meet this threshold requirement.⁵³ The Court noted that in selective prosecution cases, the claimant must show discriminatory effect and purpose. To establish discriminatory effect, the claimant must show that “similarly situated individuals of a different race were not prosecuted.”⁵⁴ In other words, the Court placed the burden of demonstrating selective prosecution on the defendants, making that burden extremely heavy.

The *Armstrong* Court, in seemingly defensive language, took great pains to explain why a defendant’s burden in a selective prosecution case is not impossible to meet. In explaining the requirements for making out a prima facie case, the Court noted:

The similarly situated requirement does not make a selective-prosecution claim impossible to prove. Twenty years before *Ah Sin*, we invalidated an ordinance, also adopted by San Francisco, that prohibited the operation of laundries in wooden buildings. The plaintiff in error successfully demonstrated that the ordinance was applied against Chinese nationals but not against other laundry-shop operators. The authorities had denied the applications of 200 Chinese subjects for permits to operate shops in wooden buildings, but granted the applications of 80 individuals who were not Chinese subjects to operate laundries in wooden buildings “under similar conditions.”⁵⁵

The Court’s reliance upon *Yick Wo v. Hopkins*,⁵⁶ a case decided in 1886, as evidence that the selective prosecution standard is not impossible to meet, speaks volumes. After addressing the requirements for the prima facie selective prosecution case, the Court went on to discuss the rigorous showing for obtaining discovery in such cases, expressing concern that providing discovery would be burdensome for prosecutors:

52. United States v. Armstrong, 517 U.S. 456, 469–70 (1996).

53. *Id.* at 465.

54. *Id.*

55. *Id.* at 465–66 (quoting *Yick Wo v. Hopkins*, 118 U.S. 356, 374 (1886)) (internal citations omitted).

56. *Yick Wo v. Hopkins*, 118 U.S. 356 (1886).

Discovery thus imposes many of the costs present when the Government must respond to a prima facie case of selective prosecution. It will divert prosecutors' resources and may disclose the Government's prosecutorial strategy. The justifications for a rigorous standard for the elements of a selective-prosecution claim thus require a correspondingly rigorous standard for discovery in aid of such a claim. The parties, and the Courts of Appeals which have considered the requisite showing to establish entitlement to discovery, describe this showing with a variety of phrases The Courts of Appeals "require some evidence tending to show the existence of the essential elements of the defense," discriminatory effect and discriminatory intent.⁵⁷

The Court provided no guidance on what would be sufficient to meet the vague "some evidence" requirement,⁵⁸ other than to note that the evidence presented by the defendants in *Armstrong* was not enough.

Even if there were a way to produce "some evidence" that similarly situated defendants could have been prosecuted—private investigators looking for white drug dealers perhaps—how many criminal defendants could afford such an undertaking? The Court ignored the fact that the vast majority of criminal defendants are indigent.⁵⁹ The efforts made by public defenders in the *Armstrong* case were extraordinary considering the resource constraints of most public defender offices. Most criminal defendants simply cannot afford to produce the additional evidence required in *Armstrong*, assuming it could be found—a fact the Court left unaddressed.

B. *McCleskey v. Kemp* – Statistics Are Not Enough

The *Armstrong* decision was soundly criticized by lawyers and scholars.⁶⁰ Despite the Court's proclamation that selective

57. *United States v. Armstrong*, 517 U.S. 456, 468–69 (1996) (quoting *United States v. Berrios*, 501 F. 2d 1207, 1211 (CA2 1974)) (internal citations omitted).

58. *Id.*

59. *Id.*

60. See generally Richard H. McAdams, *Race and Selective Prosecution: Discovering the Pitfalls of Armstrong*, 73 Chi. Kent L. Rev. 605 (1998) (arguing that the *Armstrong* rule's evidentiary standard ensures that meritorious claims will never be proven); Randall Kennedy, *Race, Crime, and the Law* 357-59 (1997) (noting that *Armstrong* illustrates the judicial system's hostility to challenges to

prosecution is not impossible to prove, after *Armstrong*, obtaining discovery for such claims seemed as difficult as prevailing on the merits. And the case shed no light on how a defendant might go about meeting the onerous standard. Nine years before *Armstrong* was decided, the Court addressed prosecutorial discretion and racial disparity in another context: the implementation of the death penalty. *McCleskey v. Kemp*,⁶¹ one of the Court's most controversial decisions, similarly left lawyers and scholars in a fog about how one might ever prove racial discrimination by prosecutors.⁶²

Warren McCleskey was a black man convicted of armed robbery and murder of a white police officer in the state of Georgia in 1978. The prosecutor sought the death penalty, and the jury sentenced McCleskey to death. During one of his post-conviction appeals in federal district court, McCleskey claimed that the administration of the Georgia capital punishment system violated the Equal Protection Clause because African-American defendants and defendants charged with killing whites were more likely to receive the death penalty than other defendants.

McCleskey's claim was based on a statistical analysis conducted by Professor David Baldus of the University of Iowa Law School. The study examined the implementation of the death penalty in the state of Georgia during the 1970s in over 2,000 murder cases. Professor Baldus found that defendants charged with killing white persons received the death penalty in eleven percent of these cases, but defendants charged with killing blacks received the death

prosecutorial discretion); Marc Price Wolf, *Proving Race Discrimination in Criminal Cases Using Statistical Evidence*, 4 *Hastings Race & Poverty L.J.* 395, 416 (2007) (arguing that *Armstrong* sets up a "Catch-22" scenario for defendants in proving selective prosecution because "in order to first obtain the necessary evidence which would allow them to establish a claim of selective prosecution, they must first present the court with some evidence tending to show the existence of a selective prosecution claim").

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

62. See Randall L. Kennedy, *McCleskey v. Kemp: Race, Capital Punishment, and the Supreme Court*, 101 *Harv. L. Rev.* 1388, 1401 (1988) (explaining how the Court recognized that statistical disparities such as those found in the Baldus study may create a prima facie case that shifts onto the state the burden of rebutting allegations of racial discrimination, but still required exceptionally clear proof in capital cases before inferring that discretion was abused).

penalty in only one percent of the cases.⁶³ Baldus also divided the cases according to the race of the defendant and the race of the victim. He found that the defendants received the death penalty in twenty-two percent of the cases involving black defendants and white victims, eight percent of the cases involving white defendants and white victims, one percent of the cases involving black defendants and black victims, and three percent of the cases involving white defendants and black victims.⁶⁴

Because prosecutors are in charge of the administration of the death penalty, the study necessarily implied that prosecutors were at least partially responsible for the racial disparities in Georgia's capital punishment system. Baldus found that prosecutors sought the death penalty in seventy percent of the cases involving black defendants and white victims, thirty-two percent of the cases involving white defendants and white victims, fifteen percent of the cases involving black defendants and black victims, and nineteen percent of the cases involving white defendants and black victims.⁶⁵

The district court rejected McCleskey's claim, as did the U.S. Court of Appeals and the Supreme Court. The Supreme Court accepted the validity of the Baldus study but held that there was no constitutional violation.⁶⁶ According to the Court, McCleskey was not entitled to relief because the Baldus study did not prove that the decision-makers in his case intended to discriminate against him because of his race.⁶⁷

Since the Court did not question the accuracy of the Baldus study, it was clear that the Court was unwilling to accept statistical studies as proof of intentional discrimination by prosecutors. The *McCleskey* Court described *Yick Wo v. Hopkins* as one of the "rare cases in which a statistical pattern of discriminatory impact demonstrated a constitutional violation,"⁶⁸ presumably because the statistics in *Yick Wo* were so stark. But the Court's primary reason for rejecting McCleskey's claim seemed to focus, not on the need for

63. David C. Baldus et al., *Comparative Review of Death Sentences: An Empirical Study of the Georgia Experience*, 74 J. Crim. L. & Criminology 661 (1983).

64. *Id.*; see also *McCleskey v. Kemp*, 481 U.S. 279, 286 (1987).

65. *McCleskey*, 481 U.S. at 287.

66. *Id.* at 292 n.7.

67. *Id.* at 292-93.

68. *Id.* at 293 n.12.

additional proof, but on its aversion to challenging the exercise of prosecutorial discretion. According to the Court, “the policy considerations behind a prosecutor’s traditionally ‘wide discretion’ suggest the impropriety of our requiring prosecutors to defend their decisions to seek death penalties, ‘often years after they were made.’”⁶⁹ The Court further noted:

“[I]f the prosecutor could be made to answer in court each time . . . a person charged him with wrongdoing, his energy and attention would be diverted from the pressing duty of enforcing the criminal law.” Our refusal to require that the prosecutor provide an explanation for his decisions in this case is completely consistent with this Court’s longstanding precedents that hold that a prosecutor need not explain his decisions unless the criminal defendant presents a *prima facie* case of unconstitutional conduct with respect to his case.⁷⁰

While the majority opinion roundly endorsed a “hands off” approach to prosecutorial discretion, the dissenting opinions provided powerful critiques of this approach. Justice Brennan’s dissent argued that the absence of guidelines governing the prosecutor’s decision to seek the death penalty provided substantial opportunity for racial considerations, even if subtle or unconscious, to influence the charging decision.⁷¹ As for the majority’s exhortations about the importance of prosecutorial discretion, Justice Brennan stated that “[w]hen confronted with evidence that race more likely than not plays such a role in a capital sentencing system, it is plainly insufficient to say that the importance of discretion demands that the risk be higher before we will act—for in such a case the very end that discretion is designed to serve is being undermined.”⁷²

Justice Blackmun wrote a separate dissent that focused on the prosecutor’s role in the process to an even greater degree than Justice Brennan’s dissent.⁷³ Blackmun noted that the prosecutor is the primary decision-maker at each stage of the death penalty process and analyzed the evidence of abuse of discretion by the

69. *Id.* at 296.

70. *Id.* at 296 n.18 (internal citation omitted) (quoting *Imbler v. Pachtman*, 424 U.S. 409, 425–26 (1976)).

71. *Id.* at 333–34 (Brennan, J., dissenting).

72. *Id.* at 336.

73. *Id.* at 345 (Blackmun, J., dissenting).

District Attorney in *McCleskey*.⁷⁴ Justice Blackmun cited the prosecutor's deposition, during which the prosecutor had acknowledged that there were no guidelines for when to seek the death penalty and that "the only guidance given was on-the-job training."⁷⁵ According to the Fulton County District Attorney, individual prosecutors made the death penalty decisions regarding their cases and were not even required to report these decisions to him.⁷⁶ Justice Blackmun noted the significance of the race of the victim at various stages of prosecutorial decision-making and urged the establishment of guidelines that might provide some procedural safeguards at these early stages of the criminal process.⁷⁷

Wayte, *McCleskey*, and *Armstrong* share a common resounding theme: the Supreme Court is strongly inclined to defer to prosecutors in the exercise of their discretion. Although the Court purports to provide a remedy for race discrimination in the exercise of prosecutorial duties, it provides little to no guidance on what proof might be sufficient to obtain relief. The proof was sufficient in *Yick Wo* but insufficient in *Armstrong* and *McCleskey*. Continued litigation of this issue is a crapshoot with very bad odds, and remedies must be pursued elsewhere.⁷⁸

IV. REFORM MEASURES

Given the inadequacy of current legal remedies and the Court's affirmation of broad prosecutorial discretion, advocates for racial justice must consider other solutions. As noted earlier, prosecutors frequently make race neutral charging and plea bargaining decisions that produce racial disparities.⁷⁹ At the same

74. *Id.* at 350.

75. *Id.* at 357.

76. *Id.* at 357-58.

77. *Id.* at 356, 365.

78. The *McCleskey* court itself suggested that legislatures should attempt to resolve the issue of racial disparity in the implementation of the death penalty. *Id.* at 319 (majority opinion) ("[l]egislatures also are better qualified to weigh and 'evaluate the results of statistical studies'" (quoting *Gregg v. Georgia*, 428 U.S. 153, 186 (1976))). Since *McCleskey*, the U.S. Congress and several states have sought to enact Racial Justice Acts to permit capital defendants to use statistical evidence to show that race influenced the decision to seek the death penalty in their cases. So far, only the state of Kentucky has enacted such a law. *See Ky. Rev. Stat. Ann.* § 532.300 (1996).

79. *See supra* Part II.

time, because of their immense power and discretion, prosecutors are uniquely positioned and empowered to remedy these injustices.

Not every disparity is evidence of discrimination. Since many legitimate factors affect prosecutorial decisions, it may be appropriate to treat victims and defendants differently, even in similar cases. A prerequisite to eliminating race discrimination in the criminal process is the determination of whether the dissimilar treatment of similarly situated persons is based on race rather than some legitimate reason. Whether the treatment is unintentional or purposeful is immaterial—the goal should be elimination of unwarranted disparities.

Prosecutors currently have the ability to make significant progress towards the elimination of unwarranted racial disparity in the criminal justice system without litigation or legislation. Racial impact studies along with racial and ethnic task forces could produce some success with the cooperation and leadership of prosecutors.

A. Racial Impact Studies⁸⁰

Racial impact studies should be conducted in prosecutors' offices to discover and eliminate any racially discriminatory treatment of defendants and victims. These studies would involve the collection of data on the race of the defendant and victim for each category of offense and the status of the case at each step of the prosecutorial process.⁸¹ For example, in each case, the prosecutor would document the race of the defendant, the defendant's criminal history, the initial charging decision, each plea offer made, accepted, or rejected, and the sentence advocated by the prosecutor.⁸² If relevant, the prosecutor would also document whether and how a decision was made to charge in federal versus state court.⁸³ The statistics would be collected for each type of offense so that an appropriate statistical analysis comparing the disposition of the

80. I originally proposed the ideas in this section in Angela J. Davis, *Prosecution and Race: The Power and Privilege of Discretion*, 67 *Fordham L. Rev.* 13, 54–56 (1998).

81. *Id.* at 54.

82. Davis, *supra* note 4, at 187.

83. *Id.* at 188.

cases of white defendants and victims with those of similarly situated defendants and victims of color could be performed.⁸⁴

These studies should be published and widely disseminated to the general public for the purpose of forcing prosecutors to acknowledge that their decisions contribute to racial disparities in the system.⁸⁵ The studies would assure that the issue is addressed by prosecutors in the electoral process and would provide additional information to the public about the extent to which the elimination of racial disparity is a prosecutorial priority.⁸⁶

Racial impact studies would not only be helpful in determining whether defendants of color receive harsher treatment for the same criminal behavior, but would also demonstrate whether cases involving white victims were prosecuted more vigorously than cases involving victims of color.⁸⁷ The data also would indicate whether similarly situated defendants and victims of different races are treated the same at each step of the process.⁸⁸ Are defendants in cases involving white victims initially charged with the same offense as similarly situated defendants in cases involving black victims? Do they receive comparable plea offers? Do prosecutors advocate for the same dispositions at the sentencing hearings? The collection of this data would provide answers to these questions.⁸⁹

The data may help to reveal the extent to which people of color are being arrested with disproportionate frequency.⁹⁰ If the majority of the cases in any particular category of offense involve defendants of color, the prosecutor should investigate further to determine whether people of color comprise a majority of the

84. *Id.*

85. *Id.* at 187; Davis, *supra* note 3, at 54.

86. Davis, *supra* note 4, at 188.

87. *Id.*; Davis, *supra* note 3, at 54.

88. For purposes of the report, "similarly situated" defendants would have committed the same criminal act and have similar criminal histories. "Similarly situated" victims would have the same level of interest in prosecution and similar criminal histories. Other characteristics of either the defendant or the victim (wealth, education, jury appeal, etc.) should not be relevant to the prosecutor's calculus, as they would involve discriminatory treatment based on criteria inapplicable to a study focusing simply on the racial impact of prosecutorial decisions. Whether those criteria are present or not in prosecutorial decisions is immaterial to the empirical question of the extent of racially disparate outcomes resulting from prosecutorial decision-making.

89. Davis, *supra* note 4, at 187; Davis, *supra* note 3, at 55.

90. Davis, *supra* note 4, at 188; Davis, *supra* note 3, at 55.

population in that jurisdiction.⁹¹ If people of color are involved in the offenses at a rate disproportionate to their representation in the jurisdiction, further investigation would certainly be warranted to determine whether people of color actually commit the crime in question at greater rates than whites.⁹² The absence of credible evidence of disproportionate criminality should create a rebuttable presumption of racial bias in the arrest process.⁹³

A sophisticated statistical analysis, of the sort provided by the Baldus study, is also needed.⁹⁴ Similar studies in prosecutors' offices would determine whether racial disparities exist in the prosecution of all types of cases and whether the disparities are statistically significant such that they create a necessary inference of discriminatory treatment on the basis of race.⁹⁵ A scientific study would be essential to the credibility of the evaluation because there are so many legitimate, nonracial factors that may be considered in prosecutorial decisions.⁹⁶ This type of evaluation would shed light on whether, and to what extent, disparate treatment of similarly situated victims and defendants is based on race.⁹⁷

In order to influence prosecutorial behavior, racial impact studies must be published and widely disseminated.⁹⁸ These studies would inform the public about the possible discriminatory effects of prosecution policies and practices.⁹⁹ They would force a public debate about racial disparities and compel prosecutors to be truly accountable to their constituents.¹⁰⁰ Prosecutors could do this by either establishing policies and practices to help eliminate the disparities or by explaining that there are legitimate, race-neutral

91. Davis, *supra* note 3, at 55.

92. *Id.*

93. The prosecutor should not use conviction and sentencing rates as evidence of criminality, as the Supreme Court did in *Armstrong*. As Justice Stevens noted in his dissent in *Armstrong*, conviction and sentencing rates only reflect the number of individuals prosecuted and sentenced for certain crimes, not necessarily the number of individuals who committed these crimes. *Armstrong*, 517 U.S. 456, 482 (1996) (Stevens, J., dissenting).

94. Davis, *supra* note 4, at 188; Davis, *supra* note 3, at 55.

95. Davis, *supra* note 3, at 55-56.

96. *Id.*

97. Davis, *supra* note 4, at 188.

98. *Id.*; Davis, *supra* note 3, at 56.

99. Davis, *supra* note 4, at 188.

100. *Id.*; Davis, *supra* note 3, at 59.

reasons for such disparities.¹⁰¹ If the public were not satisfied with efforts to eliminate the disparities or the prosecutor's explanation for disparities, it could remove the prosecutor from office through the electoral process.¹⁰² The public debate would also enable willing prosecutors to establish workable remedial policies and practices.¹⁰³ Thus, public access to the studies would motivate prosecutors to correct inequities and help to make the electoral process a more meaningful check on unacceptable prosecutorial practices.¹⁰⁴

B. Criminal Justice Racial and Ethnic Task Forces

Discretionary decisions that contribute to racial disparity are made at every step of the criminal justice process and are cumulative at each of these steps. Effective solutions should involve officials and stakeholders at every stage of the process as well as policymakers, legislators, and interested members of the community. Task forces comprised of the chief decision-makers at each stage would be situated to identify and eliminate many of the discriminatory effects of race-neutral decision-making.

In August 2004, the ABA Justice Kennedy Commission¹⁰⁵ issued a report to the ABA House of Delegates that recommended the formation of Criminal Justice Racial and Ethnic Task Forces.¹⁰⁶ Specifically, the Commission recommended that task forces:

- 1) design and conduct studies to determine the extent of racial and ethnic disparity in the various stages of criminal investigation, prosecution, disposition and sentencing;
- 2) make periodic public reports on the results of their studies; and
- 3) make specific recommendations intended to eliminate racial and ethnic discrimination and unjustified racial and ethnic disparities.¹⁰⁷

101. Davis, *supra* note 4, at 188–89; Davis, *supra* note 3, at 59.

102. Davis, *supra* note 4, at 189; Davis, *supra* note 3, at 59–60.

103. Davis, *supra* note 4, at 189. Davis, *supra* note 3, at 60.

104. Davis, *supra* note 3, at 60.

105. Now called the ABA Commission on Effective Criminal Sanctions. See ABA Commission on Effective Criminal Sanctions, <http://www.abanet.org/dch/committee.cfm?com=CR209800> (last visited Oct. 9, 2007).

106. ABA, Justice Kennedy Commission, Reports with Recommendations to the ABA House of Delegates *supra* note 14, at 63 (2004), available at <http://www.abanet.org/crimjust/kennedy/JusticeKennedyCommissionReportsFinal.pdf>.

107. *Id.*

The ABA adopted this recommendation and it is now ABA policy.

Prosecutors should take a leadership role in establishing such task forces in their communities. These task forces should conduct comprehensive studies of criminal justice systems to determine whether there are racial disparities at each stage, to establish the cause of these disparities, and to recommend and implement concrete strategies to eliminate them. Although these studies require the participation of key high-level officials, the most significant determinant of their effectiveness will be the chief prosecutor's willingness to provide access to internal prosecution data, enabling the task force to determine whether there are racial differences in charging and plea bargaining decisions.

The Monroe County Racial Justice Task Force provides an example of how the criminal justice officials in one community addressed racial disparity in their criminal justice system.¹⁰⁸ The Monroe County NAACP and the Unitarian Universalist Church in Bloomington, Indiana, spearheaded the effort.¹⁰⁹ They first issued a preliminary report that documented the racial disparity in the county's criminal justice system before organizing a task force to address the problem.¹¹⁰ Participants in the task force included officials from the District Attorney's Office, the Police Department, the Deputy Sheriff's Office, the Monroe County Circuit Court, the local NAACP, and the Unitarian Universalist Church. Graduate students from the Criminal Justice Department of Indiana University agreed to provide research assistance and data collection.¹¹¹

The Monroe County Racial Justice Task Force sought technical assistance from The Sentencing Project, a nationally recognized non-profit organization that promotes alternatives to incarceration and more effective and humane criminal justice policies.¹¹² The Executive Director of the Sentencing Project, Marc

108. Monroe County Racial Justice Task Force Study Committee, Monroe County, Indiana, *Race and Criminal Justice in Monroe County, Indiana: 2003 Report from the Monroe County Racial Justice Task Force (2003)*, available at http://www.bloomington.in.us/~mcbnaacp/assets/2003_Racial_Justice_Task_Force_Report.pdf.

109. *Id.* at i.

110. *Id.*

111. *Id.* at 54.

112. *Id.* at 11. See The Sentencing Project, <http://www.sentencingproject.org> (last visited Oct. 9, 2007).

Mauer, along with Dennis Schrantz, provided technical assistance to the Monroe County Task Force.¹¹³ The Monroe County Task Force sought guidance from a manual co-authored by Mauer and Schrantz entitled *Reducing Racial Disparity in the Criminal Justice System—A Manual for Practitioners and Policymakers*.¹¹⁴ This manual provides a step-by-step research design to assist communities in identifying and addressing racial disparity and served as a guide for the Monroe County Task Force.¹¹⁵ The Task Force completed its work and published the completed report in October 2003.

The participation and commitment of the chief prosecutor for Monroe County was critical to the success of the Task Force. Although he was not legally required to do so, he provided the necessary access to files and records in his office and participated fully in the process.¹¹⁶ The Task Force included the key decision-makers at every step of the process with the power and discretion to change practices and policies that were perpetuating unwarranted racial disparities. However, because the charging and plea bargaining decisions guide the process and often pre-determine the outcome of criminal cases, the Task Force could not have succeeded without the chief prosecutor's full cooperation.

C. The Prosecutorial Response¹¹⁷

The elimination of discrimination is totally consistent with the responsibility of the prosecutor to seek justice, not simply win convictions.¹¹⁸ The duty to seek justice is not limited to the

113. Monroe County Racial Justice Task Force Study Committee, *supra* note 108, at 11. Mauer was Assistant Director of the Task Force at the time the report was issued.

114. *Id.*; The Sentencing Project, *Reducing Racial Disparity in the Criminal Justice System—A Manual for Practitioners and Policymakers* (2000), available at http://www.sentencingproject.org/Admin/Documents/publications/rd_reducingrdmanual.pdf.

115. Monroe County Racial Justice Task Force Study Committee, *supra* note 108, at 11.

116. *Id.* at 12 (“The Monroe County Prosecutor agreed to provide access to all files included in the study, thereby laying the foundation for collection of more data.”).

117. I originally proposed the ideas in this section in Angela J. Davis, *Arbitrary Justice: The Power of the American Prosecutor 189–91* (Oxford University Press 2007).

118. See *Berger v. United States*, 295 U.S. 78, 88 (1935) (arguing that the interest of the prosecutor “is not that it shall win a case, but that justice shall be

prosecutor's responsibilities in individual cases, but also applies to the administration of justice in the criminal justice system as a whole. In fact, the prosecutor's duties include the oversight function of ensuring fairness and efficiency in the criminal justice system.¹¹⁹ Those duties should include recognizing injustice in the system and initiating corrective measures.¹²⁰

Nonetheless, it is likely that a substantial number of prosecutors will oppose racial impact studies and Criminal Justice Racial and Ethnic Task Forces. Some will believe there is no need for reform.¹²¹ Others may believe that there is always room for improvement, but disagree with the suggested strategies for reform—particularly the requirement that prosecutors provide access to data.¹²² Each of these proposals requires prosecutors to disclose information they would not otherwise be required to disclose by law.¹²³ Some prosecutors will undoubtedly resist these efforts for the

done."); ABA Standard for Criminal Justice 3-1.2(c) (3d ed. 1993) ("The duty of the prosecutor is to seek justice, not merely to convict."); Model Rules of Prof'l Conduct R. 3.8 cmt. 1 (1990) (describing a prosecutor's responsibilities "to see that [a] defendant is accorded procedural justice and that guilt is decided upon the basis of sufficient evidence."); Model Code of Prof'l Responsibility EC 7-13 (1981) ("The responsibility of a public prosecutor differs from that of the usual advocate; his duty is to seek justice, not merely to convict.").

119. Fred C. Zacharias, *Structuring the Ethics of Prosecutorial Trial Practice: Can Prosecutors Do Justice?*, 44 Vand. L. Rev. 45, 57 (1991) (noting that among other responsibilities, a prosecutor has a duty to further the state's need for a criminal justice system that is efficient and that appears fair).

120. See ABA Standard for Criminal Justice 3-1.2(d) (3d ed. 1993) ("It is an important function of the prosecutor to seek to reform and improve the administration of criminal justice. When inadequacies or injustices in the substantive or procedural law come to the prosecutor's attention, he or she should stimulate efforts for remedial action."); Model Rules of Prof'l Conduct pmb. 5 (1990) ("A lawyer should be mindful of deficiencies in the administration of justice . . ."); Model Code of Prof'l Responsibility EC 8-1 (1981) ("[L]awyers are especially qualified to recognize deficiencies in the legal system and to initiate corrective measures therein. Thus they should participate in proposing and supporting legislation and programs to improve the system . . ."); see also *id.* EC 8-9 ("The advancement of our legal system is of vital importance in maintaining the rule of law and in facilitating orderly changes; therefore, lawyers should encourage, and should aid in making, needed changes and improvements.").

121. Davis, *supra* note 4, at 189.

122. *Id.*

123. *Id.*

same reasons they have resisted the discovery of their internal decisions in the past.¹²⁴

Criticisms of both strategies would undoubtedly echo the Supreme Court's reasons for deferring to prosecutorial discretion in *Wayte v. United States*.¹²⁵ For example, prosecutors may claim that the publication of this information will have a chilling effect on law enforcement efforts.¹²⁶ This argument suggests that prosecutors would be hesitant to prosecute certain cases if they believe that members of the public, criminal defendants, or victims would question their decisions.¹²⁷ Thus, according to this argument, some criminal activity will not be prosecuted.¹²⁸ However, the goal of the publication of the studies is not to chill appropriate and fair law enforcement, but to totally eliminate unfair, discriminatory law enforcement.¹²⁹ To the extent that law enforcement tactics or prosecutorial policies involve misconduct or discriminate based on race, they should not merely be chilled—they should be entirely eliminated.¹³⁰ The reports and studies, and the knowledge that they will be published, should cause prosecutors to be more careful and meticulous in making decisions. They should motivate prosecutors to follow ethical rules and assure that similarly situated victims and defendants are treated equitably.¹³¹

The Supreme Court's concern that judicial interference with prosecutorial discretion would undermine prosecutorial effectiveness should not apply to the publication of these reports or studies.¹³² The Supreme Court was concerned that if criminals were aware of how and under what circumstances cases are prosecuted, they would adjust their behavior to avoid prosecution.¹³³ For example, if it were common knowledge that a prosecution office had a policy of only prosecuting cases involving more than five grams of cocaine, dealers and users would distribute or possess quantities less than five

124. *Id.*

125. *See id.* at 189–90; Davis, *supra* note 3, at 62.

126. Davis, *supra* note 4, at 190; Davis, *supra* note 3, at 63.

127. Davis, *supra* note 4, at 190–91; Davis, *supra* note 3, at 63.

128. Davis, *supra* note 4, at 191; Davis, *supra* note 3, at 63.

129. Davis, *supra* note 4, at 191; Davis, *supra* note 3, at 64.

130. Davis, *supra* note 3, at 64.

131. Davis, *supra* note 4, at 190; Davis, *supra* note 3, at 62.

132. Davis, *supra* note 4, at 190; Davis, *supra* note 3, at 62.

133. Davis, *supra* note 3, at 62.

grams.¹³⁴ The publication of task force reports and racial impact studies would not create this problem because the studies would not reveal specific law enforcement policies.¹³⁵ The information in these studies and reports would be limited to general demographic data.¹³⁶

Prosecutors would also understandably be concerned about the time and resources necessary to implement these strategies.¹³⁷ The prosecutor's primary function is law enforcement; any undertaking which substantially interferes with that responsibility would be subject to legitimate criticism.¹³⁸ In the case of racial impact studies, for example, if the collection of data were a tedious process that substantially interfered with the performance of important prosecutorial duties, most prosecutors would object to the studies.¹³⁹ Prosecutors, however, could collect the relevant information in an efficient, non-intrusive manner. Prosecutors' offices could create forms with checklists on which the prosecutors could quickly and easily note the relevant information.¹⁴⁰ Most prosecutors routinely make written entries in case files whenever an action is taken in a particular case.¹⁴¹ These forms or checklists could be kept in the same case file and would involve no more time than the routine case file entries. The only difference would be the type of information and the format for its collection. The information also might be collected electronically in an equally efficient manner.¹⁴²

Time is not the only relevant factor. Few prosecutors' offices would have the expertise or resources to perform the necessary statistical analysis of the collected data for racial impact studies.¹⁴³ For that reason, the organized bar should help to secure these

134. *Id.*

135. *Id.*

136. *Id.* at 64; Davis, *supra* note 4, at 191. See also *Wayte v. United States*, 470 U.S. 598, 607 (1985) (expressing concern that inquiry into prosecutorial decision-making would reveal enforcement policies and permit criminals to modify their behavior to avoid prosecution).

137. Davis, *supra* note 4, at 190; see Davis, *supra* note 3, at 62.

138. Davis, *supra* note 3, at 62.

139. *Id.*

140. See Thomas & Fitch, *supra* note 8, 523-24 (advocating that prosecutors use forms and checklists to record the basis of their charging decisions).

141. Davis, *supra* note 4, at 190; Davis, *supra* note 3, at 63.

142. Davis, *supra* note 4, at 190.

143. *Id.*

resources.¹⁴⁴ One possible solution to the resource problem may be the volunteer efforts of local colleges and universities.¹⁴⁵ Criminology and criminal justice departments may be willing to conduct such research and would provide a wealth of resources through the use of graduate students from various departments.¹⁴⁶ The studies would provide a great public service as well as a rich academic experience for professors, scholars, and students.¹⁴⁷ Use of university resources would also give the project the objectivity that would be lacking if the project were conducted by the prosecutors themselves.¹⁴⁸

In light of potential prosecutorial opposition, legislation may be necessary to enforce these reforms.¹⁴⁹ The Racial and Ethnic Task Forces may be more acceptable to some prosecutors than the racial impact studies because they involve the cooperation of key decision-makers at every stage of the process and do not place total responsibility on prosecutors. However, resistance to each proposal should be anticipated. Although state and local bar associations and other interested groups should meet with prosecutors' offices to discuss and address their concerns, these groups should be prepared to work together in support of enforcement legislation, if necessary.¹⁵⁰

D. A Model Reform Effort¹⁵¹

In 2005, the Vera Institute of Justice¹⁵² established the Prosecution and Racial Justice Project 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-

144. Davis, *supra* note 4, at 190.

145. *Id.*; Davis, *supra* note 3, at 63.

146. Davis, *supra* note 3, at 63.

147. *Id.*

148. *Id.*

149. Davis, *supra* note 4, at 191.

150. *Id.*

151. The Model Reform Effort discussed in this section was originally presented in Angela J. Davis, *Arbitrary Justice: The Power of the American Prosecutor 192-94* (Oxford University Press 2007).

152. "The Vera Institute of Justice works closely with leaders in government and civil society to improve the services people rely on for safety and justice. Vera develops innovative, affordable programs that often grow into self-sustaining organizations, studies social problems and current responses, and provides practical advice and assistance to government officials in New York and around the world." Vera Institute of Justice, *Missions and Origins*, http://www.vera.org/about/about_2.asp (last visited Oct. 20, 2007).

making process.¹⁵³ This project's methodology is similar to that of the aforementioned racial impact studies. It involves the collection of data in prosecutors' offices to determine whether similarly situated defendants are treated differently at the charging and plea bargaining stages of the process in ways that reflect unconscious racial bias.¹⁵⁴ This ground-breaking project was made possible in large part by the willingness of three chief prosecutors to grant Vera Institute staff broad access to their offices in order to track decision-making at key discretion points.¹⁵⁵

These prosecutors—Peter Gilchrist of Charlotte, North Carolina, Paul Morrison of Johnson County, Kansas, and Michael McCann of Milwaukee, Wisconsin—all enjoy excellent reputations among other prosecutors and in their local jurisdictions.¹⁵⁶ Other factors that made these prosecutors ideal candidates for the project included the location of their offices and the demographics of their communities.¹⁵⁷ Yet, each of the prosecutors easily could have declined the offer to participate in the project. It is a time-consuming and invasive effort, and there are no obvious political benefits.¹⁵⁸ Nonetheless, each prosecutor decided to accept the offer to participate because of their commitment to fairness and racial justice.¹⁵⁹

The Vera Institute staff began their work in Peter Gilchrist's office in Charlotte, North Carolina.¹⁶⁰ The first challenge was to assure staff prosecutors and support staff that the purpose of the project was not to assign blame for racial disparities, but to assist

153. Vera Institute of Justice, Prosecution and Racial Justice Project Overview, http://www.vera.org/project/project1_1.asp?section_id=8&project_id=78 (last visited Oct. 20, 2007).

154. See Davis, *supra* note 4, at 192.

155. *Id.* at 192–94.; Vera Institute of Justice, *supra* note 153.

156. Since the project's inception, Michael McCann has retired, but has committed to continue supporting the project along with his successor, John Chisholm. Paul Morrison participated in the project until he was elected Attorney General in 2006. Bonnie Dumanis, the District Attorney of San Diego, replaced Morrison.

157. Davis, *supra* note 4, at 192. Because each community has a racially diverse population, one would not expect members of any particular race or ethnic group to be prosecuted at disproportionate rates.

158. *Id.*

159. *Id.*

160. *Id.*

them in their shared goal of enforcing the law effectively and fairly.¹⁶¹ A number of key factors assisted the Vera staff in building a relationship of trust with the prosecution staff.¹⁶² One of the most important factors was the leadership of the project director, Wayne McKenzie.¹⁶³ Mr. McKenzie was an experienced prosecutor in the Kings County (Brooklyn, New York) District Attorney's Office who took a leave of absence from his office to direct the Prosecution and Racial Justice Project at Vera.¹⁶⁴ His leadership provided the project with the credibility and trust necessary to secure the support and buy-in of the prosecutors involved in the project. He also may help persuade other prosecutors to agree to similar projects in their offices.¹⁶⁵ Another important factor that helped to secure support for the project was the knowledge that the data collection and management system that Vera would implement for the purpose of discovering possible bias also would be a useful tool for prosecutors and other staff as they worked to manage their caseloads and measure general outcomes in their offices.¹⁶⁶

The most important difference between the previously proposed racial impact studies and the Vera Institute's Prosecution and Racial Justice Project is how the collected information will be used. A key component to the success of racial impact studies is the publication of the studies.¹⁶⁷ The purpose of these studies is not only to inform prosecutors of how unconscious bias may affect their decision-making, but also to inform the general public.¹⁶⁸ However, the Vera Institute prosecutors agreed to participate in the project with the understanding that they would voluntarily address any findings of unconscious bias and make their own decisions about whether, and the extent to which, the findings of the project would be made public.¹⁶⁹

161. *Id.*

162. *Id.*

163. *Id.*

164. *Id.* See also Vera Institute of Justice, Prosecution and Racial Justice Project Staff, http://www.vera.org/project/project1_4.asp?section_id=8&project_id=78&sub_section_id=50 (last visited Oct. 20, 2007) (biography of Wayne McKenzie).

165. Davis, *supra* note 4, at 192–93.

166. *Id.* at 193.

167. *Id.*

168. *Id.*

169. *Id.*

The Prosecution and Racial Justice Project will certainly, at a minimum, make some progress towards addressing unintended bias in the exercise of prosecutorial discretion in these three offices.¹⁷⁰ If the project reveals bias, the prosecutors are committed to taking steps to address it.¹⁷¹ Solutions would vary, depending on how and at what stage of the process the bias occurs. The project's findings would advance the development of policies and practices to eliminate or reduce unwarranted disparities based on unconscious bias.¹⁷²

The main limitation of the project is its dependency upon the voluntary efforts of the prosecutors themselves.¹⁷³ Although these three prosecutors are committed to eliminating bias in the decision-making process, they may or may not choose to reveal the project's findings to the general public. Nonetheless, the project has great potential for inspiring similar data collection projects in prosecutors' offices throughout the nation with the encouragement and leadership of the three prosecutors involved in the project.¹⁷⁴ Their standing in the prosecution community provides them with the credibility to persuade other prosecutors to take similar voluntary action.¹⁷⁵ They might also be instrumental in helping to establish policies and practices that the National District Attorneys Association and other national prosecution organizations may endorse and promote to their membership.¹⁷⁶

The Vera Institute's Prosecution and Racial Justice Project will be completed in 2008.¹⁷⁷ Whether or not the data collected in each office demonstrates evidence of unconscious bias, the project should inspire similar efforts in other prosecutors' offices if it proves beneficial to the offices involved.¹⁷⁸ However, without the leadership of the project's chief prosecutors and/or the publication of the project's findings, the full potential of the project may not be realized.¹⁷⁹

170. *Id.*

171. *Id.*

172. *Id.*

173. *Id.*

174. *Id.*

175. *Id.*

176. *Id.* at 193–94.

177. *Id.* at 194.

178. *Id.*

179. *Id.*

V. CONCLUSION

Efforts to eliminate racial discrimination and unwarranted racial disparities in the criminal justice system must involve prosecutors. Although the Supreme Court has not required prosecutors to reveal information about their charging and plea bargaining decisions, prosecutors must be willing to provide access to this information to discover how race neutral decision-making can produce unjustifiable racial effects. Such data are a necessary prerequisite to the formulation of strategies for the elimination of unwarranted racial disparities in the criminal justice system. The efforts of the American Bar Association and the Vera Institute are an important beginning to what will hopefully become a trend of prosecutors taking a leadership role in promoting fairness and eliminating unjustifiable racial disparities in the criminal justice system.