

# Racial Bias and Prosecutorial Discretion

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*This is the second in a weekly series of blog posts by the ACS Racial Bias and Criminal Justice policy team. This week, Emily Graham outlines the issue of racial bias in prosecutorial discretion.*

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By Emily Graham

Racial disparities in the criminal justice system have long been a subject of empirical research. Despite the fact that state and federal prosecutors have enormous control over the criminal justice system through expansive and largely unreviewable discretion, little of this research has focused on racial disparities in prosecutorial decision-making.<sup>[1]</sup> The fundamental aspects of prosecutorial discretion, including decisions of whether to prosecute, what to initially charge, bail recommendations, and terms and conditions of plea bargains, including charge levels and sentencing, are vulnerable to conscious and subconscious racial bias. Little empirical research has been done, however, to study the role of race in these decisions and to investigate whether these decisions contribute to the racial disparities existing throughout the criminal justice system.

A review of existing research reveals inconsistent findings: while there are disparate racial outcomes in almost every stage of prosecutorial discretion,<sup>[2]</sup> other factors such as prior arrest record appeared to remain more important in charging decisions.<sup>[3]</sup> Some of the key findings include the importance of the victim's race, with cases more likely to be prosecuted if the victim were white.<sup>[4]</sup> Whites are also more likely to receive low bail and more likely to receive a charge reduction as part of a plea bargain, often correlated with a shorter sentence.<sup>[5]</sup>

A recent study of the New York County District Attorney's office conducted by the Vera Institute indicates race plays a significant role in prosecutorial decision-making, even when controlling for prior arrest record.<sup>[6]</sup> Examining prosecutorial discretion at every level: case screening, bail recommendations, charging, and sentences in pleas found more severe outcomes for minority defendants compared to similarly situated whites. Black defendants were recommended to be denied bail more often, which contributed to worse case outcomes, and to have an eventual plea deal contain more time incarcerated than a similarly situated white defendant.

It is important that further research address this issue. If racial bias, whether explicit or implicit, enters into prosecutorial decision-making, it must be addressed in district attorney offices around the country and in law schools themselves, the institutions that train these prosecutors.

<sup>[1]</sup> Angela Davis, *In Search Of Racial Justice: The Role Of The Prosecutor*, 16 N.Y.U. J. Legis. & Pub. Pol'y 821 (2014).

<sup>[2]</sup> Besiki Kutateladze et al., *Do Race and Ethnicity Matter in Prosecution?* (2012), <http://www.vera.org/sites/default/files/resources/downloads/race-and-ethnicity-in-prosecution-first-edition.pdf>

[3] *Id.*

[4] Jon Sorenson & Donald H. Wallace, *Prosecutorial Discretion in Seeking Death: An Analysis of Racial Disparity in the Pretrial Stages of Case Processing in a Midwestern County*, 16 *Justice Quarterly* 3 (1999).

[5] E. Britt Patterson & Michael J. Lynch, *Bias In Formalized Bail Procedures, in Race and Criminal Justice*, (Michael J. Lynch & E. Britt Patterson eds., 1991).

[6] Besiki Kutateladze & Nancy Andiloro, *Race and Prosecution in Manhattan* (2014), <http://www.vera.org/sites/default/files/resources/downloads/race-and-prosecution-manhattan-technical.pdf>