

5.2 Overview

A. The Scope and Consequences of Prosecutorial Discretion

The first and most consequential discretionary decision a prosecutor makes is the charging decision. Determining whether to charge a suspect, and with what charge, has been described as “the broadest discretionary power in criminal administration.” James Vorenberg, *Narrowing the Discretion of Criminal Justice Officials*, 1976 DUKE L. J. 651, 678. “[S]o long as the prosecutor has probable cause to believe that the accused committed an offense defined by statute, the decision whether or not to prosecute, and what charge to file or bring before a grand jury, generally rests entirely in his discretion.” *Bordenkircher v. Hayes*, 434 U.S. 357, 364 (1978); see also Josh Bowers, *Legal Guilt, Normative Innocence, and the Equitable Decision Not to Prosecute*, 110 COLUM. L. REV. 1655, 1659–60 (2010) (“Laws are shells, and prosecutors retain almost unfettered discretion to decide how to fill the void within.”). As laws proscribing criminal conduct and sentencing enhancements expand, so too does the prosecutor’s discretionary charging and plea bargaining power. See, e.g., William J. Stuntz, *The Pathological Politics of Criminal Law*, 100 MICH. L. REV. 505, 509 (2011) (“As criminal law expands, both lawmaking and adjudication pass into the hands of police and prosecutors . . . [resulting in] criminal codes that . . . delegate power to district attorneys’ offices and police departments”); Jeff Welty, [Growth of Chapter 14](#), N.C. CRIM. L., UNC SCH. OF GOV’T BLOG (Oct. 30, 2013) (discussing growth of criminal code in North Carolina).

The prosecutor’s choice of charges affects defendants in obvious ways and also in ways that may not be immediately apparent. Of course, the charges prescribe the range of available criminal penalties. Additionally, criminal charges may result in innumerable collateral consequences for those ultimately convicted, including include loss of professional licenses; ineligibility for government benefits, public housing, or student loans; loss of voting rights and ineligibility for jury duty; and deportation for immigrants. Charges also can influence pretrial release determinations. See G.S. 15A-534(c) (judicial official must take into account nature and circumstances of the offense charged, among other factors, in setting conditions of pretrial release). This determination in turn may influence case outcomes, as defendants released pretrial generally achieve better case outcomes. See *supra* § 4.2D, Defendants Detained Pretrial Achieve Worse Outcomes. The charging decision also bears on plea negotiations. For example, by offering not to pursue a habitual felon charge if the defendant pleads guilty, a prosecutor provides a strong incentive to a defendant to accept a plea of guilty to the underlying felony offense rather than proceed to trial. H. Mitchell Caldwell, *Coercive Plea Bargaining: The Unrecognized Scourge of the Justice System*, 61 CATHOLIC U. L. REV. 63, 84 (2013). Reflecting on prosecutorial discretion, Professor Angela Davis concluded that, “[i]n conjunction with the plea bargaining process, the charging decision almost predetermines the outcome of a criminal case, because the vast majority of criminal cases result in guilty pleas or guilty verdicts.” Angela J. Davis, *Prosecution and Race: The Power and Privilege of Discretion*, 67 FORDHAM L. REV. 13, 23 (1998).

B. Studies of Prosecutorial Decision-Making and Racial Disparities

As mentioned elsewhere in this manual, studies have concluded that, where discretion is greatest, implicit and explicit biases exert the greatest influence. *See supra* § 1.3E, Discretionary Decision-Making and the Cumulative Nature of Disparities. The broad discretionary power afforded to prosecutors—in bringing criminal charges, enabling access to diversion programs, dismissing charges, reducing charges, approving deferred prosecutions, negotiating guilty pleas, evaluating defendants’ cooperation with the government, and recommending sentences—creates the potential for bias to enter in and generate disparate outcomes for defendants of different races.

Some scholars have concluded that the exercise of prosecutorial discretion is a key point at which racial disparities may be introduced into the criminal proceeding. “Understanding the impact of [prosecutors’] decisions on the higher incarceration rates of blacks and Latinos is crucial to determining whether, or how, race and ethnicity influence outcomes in the criminal justice system.” BESIKI KUTATELADZE ET AL., VERA INSTITUTE OF JUSTICE, [DO RACE AND ETHNICITY MATTER IN PROSECUTION? A REVIEW OF EMPIRICAL STUDIES](#) 1 (2012). In considering the possible influence of implicit biases on prosecutorial discretion, it is worth noting that 95% of North Carolina prosecutors are White. DR. MATTHEW ROBINSON, [THE DEATH PENALTY IN NORTH CAROLINA: A SUMMARY OF THE DATA AND SCIENTIFIC STUDIES](#) 40 (2011). This figure, on its own, does not compel any particular conclusion concerning the influence of race on prosecutorial decision-making. However, since “the social category you belong to can influence what sorts of biases you are likely to have,” the figure is not without relevance. *See* JERRY KANG, [IMPLICIT BIAS: A PRIMER FOR COURTS](#) 3–5 (National Center for State Courts 2009) (noting that “most Whites (and Asians, Latinos, and American Indians) show an implicit attitude in favor of Whites over Blacks”).

Researchers have found that the plea bargaining process can result in racially disparate outcomes for similarly situated individuals. An examination of the pretrial negotiations in nearly 700,000 criminal cases in California concluded that “[a]t virtually every stage of pretrial negotiation, whites are more successful than non-whites.” Of 71,000 adults charged with felonies and with no prior record in [a study conducted by the *San Jose Mercury News*], one third of whites had charges reduced to misdemeanors or infractions, while only one quarter of blacks and Hispanics received these outcomes.” Marc Mauer, [Racial Impact Statements as a Means of Reducing Unwarranted Sentencing Disparities](#), 5 OHIO ST. J. CRIM. L. 19, 26 (2007) (quoting Christopher H. Schmitt, *Plea Bargaining Favors Whites as Blacks, Hispanics Pay Price*, SAN JOSE MERCURY NEWS, Dec. 8, 1991, at 1A). In one example highlighted in this report, two defendants, one black and one white, both began serving prison terms for similar crimes the same year:

Both offenders initially were charged with four counts: three burglary charges and one charge of receiving stolen property. Both had one, non-violent prior offense. Neither had been to prison before. Both had been on probation previously. Neither had used a weapon in the offense. Drugs were not involved. Both plea-bargained their outcomes.

The black man was convicted on the four original charges and drew an eight-year prison term. The white man got three charges dismissed, was convicted on a single burglary charge and got 16 months.

Christopher H. Schmitt, *Plea Bargaining Favors Whites as Blacks, Hispanics Pay Price*, SAN JOSE MERCURY NEWS, Dec. 8, 1991, at 1A. The impact of prosecutorial discretion in plea bargaining is magnified by the fact that the vast majority of criminal cases are resolved by plea agreements, which are rarely reviewed on appeal.

Researchers have found that prosecutorial discretion is one possible factor contributing to racial disparities in criminal justice outcomes. See [A Conversation with Cassie Spohn](#), VERA INSTITUTE OF JUSTICE BLOG (June 4, 2012) (professor and director of the School of Criminology and Criminal Justice, Arizona State University). Nevertheless, “[r]elative to the attention that police and the courts have received from researchers analyzing disproportionate minority contact with the criminal justice system, there has been little study of prosecution.” BESIKI KUTATELADZE ET AL., VERA INSTITUTE OF JUSTICE, [DO RACE AND ETHNICITY MATTER IN PROSECUTION? A REVIEW OF EMPIRICAL STUDIES](#) 1 (2012). One group examining race and prosecutorial decision-making concluded that “[p]rosecutors’ exercise of discretion operates with minimal external oversight, yet has more impact on case outcomes than the decisions made by any other actor in the criminal justice process.” ASHLEY NELLIS ET AL., [THE SENTENCING PROJECT, REDUCING RACIAL DISPARITY IN THE CRIMINAL JUSTICE SYSTEM: A MANUAL FOR PRACTITIONERS AND POLICYMAKERS](#) 35 (2d ed. 2008) (describing work of Vera Institute of Justice).

Research into the intersection of race and prosecutorial decision-making faces inherent challenges; for example, many aspects of the plea bargaining process are “not documented in any formal way.” See [A Conversation with Cassie Spohn](#), VERA INSTITUTE OF JUSTICE BLOG (June 4, 2012). It is difficult to find records of plea bargains offered to and rejected by defendants, which would be needed to study the role of race in discretionary determinations regarding plea bargains. Additionally, factors including “the strength of [a] case, the prosecution’s general deterrence value, the Government’s enforcement priorities, and the case’s relationship to the Government’s overall enforcement plan” are difficult to quantify in empirical analyses; the presence of such race-neutral factors makes it difficult for researchers to isolate the influence of race. *Wayte v. United States*, 470 U.S. 598, 607–08 (1985). Without access to the internal policies regarding plea bargains or habitual felon determinations of a given district attorney’s office, it is hard to assess whether a racially disparate prosecution record reflects the improper influence of racial factors or legitimate policy choices. See, e.g., *State v. Parks*, 146 N.C. App. 568 (2001), discussed *infra* “Illustrative cases: insufficient evidence of discriminatory effect” in § 5.3E, First Prong of a Selective Prosecution Claim: Discriminatory Effect.

Recently, however, studies have emerged that analyze the possible impact of prosecutorial decision-making on racial disparities in the criminal justice system. Researchers studying North Carolina capital charging decisions concluded that, between 1990 and 2009, prosecutors brought 17.21% of death eligible cases to capital trial where

the case included at least one white victim, and 8.86% of such cases to capital trial where the case did not include at least one white victim. *Affidavit of Catherine Grosso and Barbara O'Brien* (exhibit to motion to prohibit death penalty under the Racial Justice Act) at 5 in the Race Materials Bank at www.ncids.org (select “Training and Resources”). Controlling for non-racial statutory aggravating and mitigating factors, cases including at least one white victim were 1.53 times more likely to advance to a capital trial. *Id.* In the federal context, researchers have concluded that Black and Latino people, men, older defendants, noncitizens, and high school dropouts receive fewer and smaller substantial-assistance sentencing discounts than White people, women, young people, citizens, and high school graduates. LINDA DRAZGA MAXFIELD & JOHN H. KRAMER, [U.S. SENTENCING COMM’N, SUBSTANTIAL ASSISTANCE: AN EMPIRICAL YARDSTICK GAUGING EQUITY IN CURRENT FEDERAL POLICY AND PRACTICE](#) 31, 34 (1998). Researchers who conducted a two year study of cases handled by the District Attorney of New York City concluded that, “compared to similarly situated white defendants, black and Latino defendants were more likely to be detained at arraignment (remanded or have bail set, but not met), to receive a custodial sentence offer as a result of the plea bargaining process, and to be incarcerated, but they were also more likely to have their cases dismissed.” See BESIKI KUTATELADZE ET AL., VERA INSTITUTE OF JUSTICE, [RACE AND PROSECUTION IN MANHATTAN](#) 3 (2014). A 2012 review of 34 empirical studies considering prosecutorial decision-making and race reported that, while the influence of race and ethnicity on prosecutorial decision-making was inconsistent across the studies, they generally demonstrated overall that race and/or ethnicity do influence “case outcomes, even when a host of other legal and extra-legal factors are taken into account.” BESIKI KUTATELADZE ET AL., VERA INSTITUTE OF JUSTICE, [DO RACE AND ETHNICITY MATTER IN PROSECUTION? A REVIEW OF EMPIRICAL STUDIES](#) 17 (2012).