Prosecutorial Discretion And Racial Profiling

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Introduction

Prosecutorial discretion and racial profiling are distinct issues, but they can interact across the criminal justice process. Racial profiling generally refers to using race, ethnicity, national origin, religion, or another identity marker as a basis for suspicion or enforcement rather than relying on individualized evidence. Prosecutorial discretion refers to the authority prosecutors exercise when deciding whether to file charges, which charges to pursue, whether to offer diversion, what plea terms to propose, and what sentencing position to take. Profiling most visibly occurs during surveillance, stops, searches, arrests, and immigration or security enforcement, while prosecutorial discretion usually begins after law enforcement refers a case. The distinction matters because unequal outcomes may accumulate across multiple stages. A prosecutor may receive a case that was already shaped by unequal policing, then make additional discretionary decisions that affect detention, plea bargaining, diversion, and punishment. Recent research shows that racial disparities can appear at several decision points even after legally relevant factors are considered, although the size and direction of disparities differ by jurisdiction and stage (United States Sentencing Commission, 2023; Grommon et al., 2025). A serious analysis therefore requires attention to both individual decisions and the institutional systems that produce the cases prosecutors see.

Racial Profiling

Racial profiling becomes problematic when group identity substitutes for specific evidence about conduct. Police may lawfully consider race as one element of a detailed suspect description when officers are looking for a particular person, but broad assumptions that members of one racial group are more likely to be involved in crime do not provide individualized suspicion. Research on police stops has repeatedly found that Black people are disproportionately subjected to traffic stops, pedestrian stops, searches, or force in many jurisdictions, although patterns vary by place and enforcement strategy. A systematic review of empirical research on police stops found persistent evidence of racial selectivity, especially involving Black men, and linked such encounters with reduced trust in police (Ribeiro et al., 2022). The Department of Justice’s 2023 investigation of the Minneapolis Police Department similarly found racial disparities in searches and force after stops, concluding that Black and Native American people were unlawfully discriminated against in enforcement activities (U.S. Department of Justice, 2023).

These disparities matter to prosecutors because policing determines which incidents enter the court system. If one neighborhood is policed more intensively, more low-level offenses may be detected there even when similar behavior occurs elsewhere. If searches are more frequent for one group, that group may generate more possession cases regardless of underlying behavior. Prosecutors therefore should not assume that a police referral represents a neutral sample of criminal activity. This does not mean that every case involving a racial disparity is invalid or that prosecutors should ignore evidence. It means they should understand how enforcement practices can influence the composition of cases and should be willing to decline, dismiss, or correct cases when the underlying stop, search, arrest, or evidence collection is legally or factually deficient.

Prosecutorial Discretion

Prosecutors have substantial discretion because criminal codes often permit multiple charging options and because not every legally supportable charge must be pursued. Decisions may include whether to accept a police referral, whether to file a felony or misdemeanor, whether to add enhancements, whether to request detention or bail conditions, whether to offer diversion, whether to reduce charges, and what plea offer to extend. Each decision can have consequences beyond the final sentence. A felony charge may affect employment and housing even before conviction, while pretrial detention can make it harder for defendants to maintain work, care for children, or assist in their defense. Plea bargaining is especially important because most criminal cases are resolved without trial.

Recent empirical work shows why these discretionary stages deserve scrutiny. Research using data from a large prosecutor's office found racial and ethnic differences at multiple stages, including bail requests and indictment, and demonstrated that an early prosecutorial decision can influence later outcomes indirectly (Kutateladze et al., 2022). A 2025 study examining four decision points in a Midwestern prosecutor's office similarly found that racial disparities may emerge differently at initial charging, diversion, case resolution, and sentencing rather than following one uniform pattern (Grommon et al., 2025). These findings make it difficult to identify one simple source of inequality. They instead suggest that offices need detailed data capable of showing where disparities begin, whether they persist after accounting for case characteristics, and whether policies or practices can explain them.

Bias and Unequal Outcomes

Disparities do not require openly racist intent. Prosecutors, like other decision-makers, work under time pressure and may rely on heuristics when evaluating risk, credibility, dangerousness, or the seriousness of a case. Implicit stereotypes can influence these judgments, but organizational rules and local context can also generate inequality even when individual prosecutors believe they are being neutral. A 2024 study of prosecutorial decision-making found that racial and ethnic disparities in indictment decisions were shaped by the social context of offenses and by how prosecutors interpreted focal concerns such as blameworthiness, risk, and practical constraints (Avni, Guetzkow, &

Hasisi, 2024). Research on capital charging in California likewise found that defendant and victim race were associated with decisions at important stages of death-penalty processing, showing that demographic effects can appear in prosecutorial charging as well as sentencing (Grosso et al., 2024).

Office culture can either reduce or reinforce these patterns. An office that rewards conviction counts, treats maximum charges as the normal starting point, or provides little guidance for diversion may produce different outcomes from an office that uses written standards and routine supervisory review. Consistency does not require eliminating all discretion because cases differ in ways that rigid rules cannot anticipate. The goal is structured discretion: prosecutors should be able to account for individual circumstances while applying transparent principles. Written charging guidelines, review of unusually severe decisions, standardized diversion criteria, and regular analysis of outcomes by race and ethnicity can help distinguish legitimate case differences from patterns that deserve investigation.

Sentencing Disparities

Federal sentencing data show that demographic differences persist even after statistical controls, but those data also demonstrate why the final sentence cannot reveal every source of disparity. The U.S. Sentencing Commission's 2023 report examined more than 300,000 federal cases from fiscal years 2017 through 2021. It found that Black males received sentences 13.4 percent longer and Hispanic males 11.2 percent longer than White males when all sentence types were considered. Much of the difference was associated with whether a defendant received imprisonment rather than probation. Among cases in which imprisonment was imposed, the differences in sentence length were smaller (United States Sentencing Commission, 2023).

The Commission itself cautioned that its analysis lacked information about some earlier decisions made by law enforcement and prosecutors. This limitation is critical. Sentencing occurs after decisions about surveillance, arrest, charging, plea negotiation, mandatory minimums, and dismissal have already shaped the case. Statistical adjustment can account only for variables that are measured. A final disparity may therefore reflect several earlier stages, while an apparently similar sentencing outcome may conceal different charging or plea experiences. Effective reform requires data across the full process rather than focusing exclusively on judges.

Accountability Reforms

One reform is to improve data collection. Prosecutor offices should be able to examine referrals, declinations, charges, enhancements, bail recommendations, diversion decisions, plea outcomes, dismissals, and sentencing recommendations by race and ethnicity while controlling for legally relevant case factors. Public dashboards can improve transparency when they are carefully designed and protect privacy. Several prosecutor offices have begun publishing disparity analyses precisely because internal averages can hide unequal patterns at particular decision points. Data should be used diagnostically rather than as automatic proof of discrimination. A disparity is a reason to investigate process and policy, not necessarily evidence that every decision within the pattern was biased.

Second, prosecutors can use structured criteria for diversion and plea offers. Eligibility rules should focus on conduct, risk, victim safety, and evidence rather than proxies that may reproduce prior inequalities. Criminal history requires particular care because previous arrests and convictions can themselves reflect unequal exposure to enforcement. Third, offices can review cases originating from enforcement practices known to produce legal or racial concerns. Fourth, prosecutors can support remedies when stops or searches violate constitutional standards rather than treating law-enforcement referrals as presumptively valid. Finally, training on bias is most useful when combined with supervision, data, and policy changes. One-time awareness sessions cannot substitute for systems that make outcomes visible and require reasons for consequential decisions.

Public Safety and Equality

Prosecutors have obligations to protect public safety and to pursue cases supported by evidence, but their professional role is broader than maximizing punishment. Discretion exists partly because justice requires distinctions among cases that statutes cannot fully specify. A prosecutor may properly consider victim safety, seriousness, culpability, rehabilitation, restitution, and the likelihood that a particular intervention will reduce future harm. The danger arises when identity-based assumptions influence those judgments or when discretion is exercised inconsistently without meaningful review. Equal justice does not mean identical treatment of every defendant; it means that differences in treatment should be tied to legitimate case characteristics rather than race or ethnicity.

Racial profiling also undermines public safety when it weakens trust. Communities that expect unfair treatment may be less willing to report crimes, serve as witnesses, or cooperate with investigations. DOJ’s Minneapolis findings illustrate how discriminatory enforcement can become part of a broader breakdown in legitimacy (U.S. Department of Justice, 2023). Prosecutors, although institutionally separate from police, can influence that relationship through decisions about which cases they accept and what evidence they require. Their responsibility therefore includes examining not only whether a charge can technically be filed but whether the case was developed through lawful and reliable practices.

Conclusion

Prosecutorial discretion and racial profiling occur at different stages of the justice system, but they can reinforce one another. Profiling influences who is stopped, searched, arrested, and referred for prosecution, while prosecutors then make consequential decisions about charging, detention, diversion, plea bargaining, dismissal, and punishment. Recent research shows racial disparities at several of these stages, but it also shows that patterns vary by jurisdiction and cannot be explained by one universal mechanism. The appropriate response is neither to abolish all discretion nor to assume that every disparity proves intentional discrimination. Prosecutorial offices need transparent standards, high-quality data, review of outcomes, lawful evidence, and meaningful supervision so they can identify where unequal patterns arise and whether they are justified by legitimate case factors. Racial identity should never substitute for individualized evidence. When prosecutors combine discretion with accountability, they are better positioned to protect public safety while also honoring the principle that similarly situated people should receive genuinely equal treatment under the law.

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