

Short of the Mountaintop: Race Neutrality, Criminal Law, and the Jericho Road Ahead

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I. INTRODUCTION

Fifty years ago, in Memphis, Dr. Martin Luther King, Jr. finished his final speech with a two-level prophesy:

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And then I got into Memphis. And some began to say the threats, or talk about the threats that were out. What would happen to me from some of our sick white brothers?

Well, I don't know what will happen now. We've got some difficult days ahead. But it doesn't matter with me now. Because I've been to the mountaintop. And I don't mind. Like anybody, I would like to live a long life. Longevity has its place. But I'm not concerned about that now. I just want to do God's will. And He's allowed me to go up to the mountain. And I've looked over. And I've seen the promised land. I may not get there with you. But I want you to know tonight, that we, as a people, will get to the promised land. And I'm happy, tonight. I'm not worried about anything. I'm not fearing any man. Mine eyes have seen the glory of the coming of the Lord.¹

The first level of that prophesy is easy to understand and oft-noted: one of those “sick white brothers” murdered Dr. King the next day. This Essay addresses the second level of that prophesy, as it pertains to criminal law in the United States fifty years later. That system is plagued with racial inequality at every level, despite the race-neutrality of the laws themselves. At its core, the problem is that many of those in power believe or pretend that the promised land of racial equality has been reached. In truth, we are not yet even at the mountaintop from which the promised land of true equality can be glimpsed. This Essay will discuss the dynamic of imagining that racism is purged from criminal law, rue our failures thus far, and suggest a path at least to that high point from which the promised land can be seen.

Section Two of this Essay describes a dynamic abetted by the existence of facially race-neutral laws: an urge to pretend that racial-ly fair outcomes exist and that racial equality has been achieved. This self-satisfaction has become more prominent—and more dangerous—in the Trump era as some political leaders have promoted a false nar-

1. MARTIN LUTHER KING, JR., *I See the Promise Land*, in *A TESTAMENT OF HOPE: THE ESSENTIAL WRITINGS AND SPEECHES OF MARTIN LUTHER KING, JR.* 279, 286 (James Melvin Washington ed., 1968).

rative that inhibits further discussion.² According to that narrative, there are essentially three stages to modern racial history: there was overt racism, then Dr. King addressed and fixed the problem (with the help of the Department of Justice), and now we live in a post-racial age where the discussion of race by groups like Black Lives Matter is simply unnecessary.

Section Three first establishes the untruth of that false narrative, which imagines that racial equality exists now in criminal law. That dream has not been achieved, as revealed by studies of every level of the criminal justice process. Once that is (fairly easily) established, this Essay examines the swamp where inequality breeds: the hidden world of discretion. In this secret world, racial bias moves freely and unobserved, abetted by the operation of mandatory minimums and sentencing guidelines triggered by prosecutors' choices. Because the exercise of discretion by police and prosecutors is largely untracked or unavailable to the public, implicit (or even explicit) racial bias in this context currently goes unobserved at the individual level and does not challenge the "mission accomplished" view of racial equality in criminal law.

Section Four sets out a path forward in a political space defined by those who want the project to be done and statistics that show a clear and continuing problem. Certainly, the only true cure for racial inequality in criminal law is to eliminate bias in the greater society. That is an important, long-term goal that realistically is far from being achieved. While we wait for that broad and necessary societal change, this Essay offers two ways to address racial disparities in criminal justice in the shorter term. The first acknowledges the reality of racial bias within the system and seeks to mitigate it by shifting the approach to drug interdiction away from incarceration and towards a market-reality model. Because a prison-centric model of addressing narcotics has disproportionately disadvantaged and imprisoned black Americans, turning away from that model will push the other way.

The second idea is rooted in transparency. On that last night in Memphis, Dr. King described the mountaintop not as the goal but as the place from which lines of sight allow the goal to be glimpsed. Transparency, using modern analytical tools accessible to the public,

2. See *infra* text accompanying notes 3–9.

can reveal racially disparate outcomes and connect them with specific actors—investigators, prosecutors, and judges—within the criminal justice system. Shame can achieve what the law cannot. Only there, from the mountaintop, where all can be seen, can we address a problem that resides in our hearts rather than within the statutes we cite.

II. THE ILLUSION OF SUCCESS

The effort to remedy racial disparities in criminal law faces a large obstacle: the desire of many of those in power to declare that racial equality has already been achieved because the basest badges of servitude and its effects have been outlawed. This false narrative often references Dr. King himself, as part of a fictional historical arc in which racism existed, Dr. King intervened, and the problem of explicit racism was then resolved. In the eyes of those who embrace this view, Dr. King's success forecloses the need for greater inspection and introspection about our criminal justice system now and allows those with power to avoid the unpleasant task of even approaching the topic of racial equity within the realm of criminal law.

This false narrative was exemplified in an address at the Department of Justice's commemoration of Martin Luther King, Jr. Day this past January.³ In his speech leading up to an introduction of former Deputy Attorney General Larry Thompson, then Attorney General Jeff Sessions illustrated the "mission accomplished" view of race and criminal law.⁴

First, and inarguably, Sessions recounted the racial horrors of his Alabama youth, citing segregated schools, wage discrimination, denial of the right to vote, and the absence of African Americans within law enforcement at that time.⁵ Next, he noted the emergence of Dr. King as a truth-teller, saying, "Dr. King exposed that system for what it was—to the country and to the world—and helped end it by putting it to shame."⁶ But from that point forward there was noth-

3. Jeff Sessions, U.S. Att'y Gen., Dep't of Justice, Remarks at the 2018 Department of Justice Dr. Martin Luther King, Jr. Commemorative Program (Jan. 16, 2018) (transcript available at <https://www.justice.gov/opa/speech/attorney-general-jeff-sessions-delivers-remarks-2018-department-justice-dr-martin-luther>).

4. *Id.*

5. *Id.*

6. *Id.*

ing: no recognition of enduring problems, no mention of lingering racial disparities, and no acknowledgment of the challenge ahead. The story ended with an abrupt victory.

This sense of finality was repeated later in Sessions's speech, when he again turned to Dr. King's role and claimed, "Indeed, while he led the movement, the Department of Justice became the engine for making the dream a reality."⁷ Consider that for a moment: to the top law enforcement officer in the United States, Dr. King's dream is now "a reality." And, in his mind, it is the Department of Justice that accomplished it.

The closest Sessions came to defining a directive to "act" was vaguely urging: "Whatever you do here at this Department, let us all renew our dedication to promoting justice—whether that's by protecting law-abiding people from crime or defending their rights in court."⁸ Sessions made no mention of current discrimination or racial bias.⁹ Also interesting is the thought that promoting racial justice is achieved by "protecting people" from crime—the stated purpose for many of the policies that created egregious racial disparities¹⁰ and is too often propelled by the conceit that crime is primarily something that black people do to white people.¹¹

Many, understandably, saw hypocrisy in Sessions's invocation of King's legacy. For example, former DOJ official Vanita Gupta stated, "It is ironic for Jeff Sessions to celebrate the architecture of civil rights protections inspired by Dr. King and other leaders as he works to tear down these very protections."¹² At base, though, it may

7. *See id.*

8. *Id.*

9. *Id.*

10. LaJuana Davis, *Rock, Powder, Sentencing—Making Disparate Impact Evidence Relevant in Crack Cocaine Sentencing*, 14 J. GENDER, RACE & JUST. 375, 381–88 (2011).

11. Indicative of this racialized conception of crime was a tweet sent out by President Trump in 2015, claiming that 81% of whites who were murdered were killed by black assailants. The correct figure is 15%. Jon Greenberg, *Trump's Pants on Fire Tweet that Blacks Killed 81% of White Homicide Victims*, POLITIFACT (Nov. 23, 2015, 3:35 PM), <http://www.politifact.com/truth-ometer/statements/2015/nov/23/donald-trump/trump-tweet-blacks-white-homicide-victims/>.

12. Dan Thomasson, *Sessions Has a Long Way to Go to Win Over African-Americans*, EVANSVILLE COURIER & PRESS (Jan. 22, 2018, 9:28 AM),

be something subtler and more insidious than hypocrisy at work here. By declaring that the dream of racial equality has been achieved, Sessions doesn't make racial justice today a controversial goal or one in which we might disagree as to tactics. Instead, he attempts to render it irrelevant by defining the world in such a way that substantive discussion of bias is unnecessary now that racism has been addressed. "Move along," the policeman said, "nothing to see here."

This "dream-achieved" narrative is even embraced by the President himself. In January, shortly before Sessions's speech, President Trump reportedly defined African nations and Haiti as "shithole countries."¹³ When criticized for his statements, the President told reporters that he was the "least racist person you have ever interviewed."¹⁴ Even given Trump's penchant for hyperbole, it is hard to believe the President could hold these two thoughts together. Yet, it is possible—if "racism" is limited to the atrocities of the Jim Crow era. From that perspective, a bright line divides people who are racists because they still believe in overt discrimination and segregated schools and those who do not—and Trump sees himself as being on the right side of that line since he is against legally segregated schools and similar institutions.¹⁵ A staff editorial in the Pittsburgh Post-Gazette printed on that same Martin Luther King, Jr. Day supported

<https://www.courierpress.com/story/opinion/columnists/2018/01/22/thomasson-sessions-has-long-way-go-win-over-african-americans/1053520001/>.

13. Julie Hirschfield Davis, Sheryl Gay Stolberg & Thomas Kaplan, *Trump Alarms Lawmakers with Disparaging Words for Haiti and Africa*, N.Y. TIMES (Jan. 11, 2018), <https://www.nytimes.com/2018/01/11/us/politics/trump-shithole-countries.html>.

14. Brent D. Griffiths, *Trump: 'I Am the Least Racist Person You Have Ever Interviewed'*, POLITICO (Jan. 14, 2018, 8:16 PM), <https://www.politico.com/story/2018/01/14/trump-least-racist-person-340602>. Of course, this is not the only, or even the most significant, statement leading to charges of racism by Trump. See Michael D. Shear & Maggie Haberman, *Trump Defends Initial Remarks on Charlottesville; Again Blames 'Both Sides'*, N.Y. TIMES (Aug. 15, 2017), <https://www.nytimes.com/2017/08/15/us/politics/trump-press-conference-charlottesville.html>.

15. *But see* Davis, Stolberg & Kaplan, *supra* note 13 (discussing racially insensitive statements made by President Trump).

Trump's view, concluding: "We need to confine the word 'racist' to people like Bull Connor and Dylann Roof."¹⁶

The "dream-achieved" narrative is understandably attractive to those in power. If racism is a thing of the past, then those in power are freed from the responsibility of addressing questions of race and personally absolved of the stain of racism. Instead, it is only those who insist on *talking* about race who are labeled by the "dream-achieved" believer as the real racists—allowing for the bizarre condemnation of both white supremacists and Black Lives Matter.¹⁷ The common bond between those groups, from that "dream-achieved" perspective, is that they both openly discuss race and thus deny the completion of the race equality project.

While members of the Trump administration may be the current public figures most easy to ridicule for pretending that the project of racial equality is completed, the truth is that many of us suffer from the same underlying urge to be vindicated and absolved—an urge that compels a belief in the "mission accomplished" mentality described above. I see that same desire for absolution in myself. Fortunately, someone with moral authority called me on it.

Beginning in 2012, I worked with a remarkable leader and activist from the Open Society Foundations, Nkechi Taifa.¹⁸ We collaborated for several years on an important project: seeking to expand President Obama's use of executive clemency.¹⁹ Specifically, we wanted President Obama to shorten the sentences of those who had received overly harsh punishment under crack laws and sentencing guidelines that were in place until the Fair Sentencing Act of 2010. Those previous laws and rules created striking racial disparities

16. The Editorial Board, *Reason as Racism: An Immigration Debate Gets Derailed*, PITTSBURGH POST-GAZETTE (Jan. 14, 2018, 11:00 PM), <http://www.post-gazette.com/opinion/editorials/2018/01/15/Reason-as-racism-An-immigration-debate-gets-derailed/stories/201801150024>.

17. See, e.g., William Douglas & Brian Murphy, *Pittenger Asks: Why Aren't Liberals Condemning Black Lives Matter and Others?*, CHARLOTTE OBSERVER (Aug. 23, 2017, 3:35 PM), <http://www.charlotteobserver.com/news/politics-government/article168766842.html>.

18. For more information on this organization, see *About Us: Mission & Values*, OPEN SOCIETY FOUNDS., <https://www.opensocietyfoundations.org/about/mission-values> (last visited Oct. 7, 2018).

19. Nkechi Taifa, *Clemency: An Inside Story from a Progressive Advocate*, 29 FED. SENT'G REP. 234, 234–35 (2017).

as they were primarily applied to black defendants.²⁰ Lawmakers, however, did not make that legislation retroactive, meaning that thousands of prisoners—primarily black men who would have been affected by the change—were denied its benefit.²¹ To Ms. Taifa and me, it seemed that clemency would be one way to right that wrong—and a path that would appeal to President Barack Obama.

As part of our push, we appeared together on a six-hour “radiothon” hosted by activist (and Ford-era clemency recipient) Rhozier “Roach” Brown on station WPFW-FM in Washington D.C.²² During the course of the program, someone from the station popped in and announced that D.C. Delegate to the United States House of Representatives, Eleanor Holmes Norton, was going to stop by to talk about the need for D.C. to have its own clemency process.²³ I was thrilled and a little overwhelmed. Norton, of course, is a historical figure, and it was an honor to meet her. When she entered, Ms. Taifa graciously introduced me saying that I was a former federal prosecutor who was now working for clemency. In that moment, I dearly hoped that Eleanor Holmes Norton would praise me and tell me that I was “good.” That is not what happened.

She instead turned her gaze to me and said, without warmth, “So, this is penance.” I was taken aback; I had hoped for congratulations. Upon reflection, though, her response made sense. How many white constituents had come to her hoping for vindication, for some kind of acknowledgment that things were taken care of? She was right, both about my penance and in her refusal to declare some kind

20. The Fair Sentencing Act of 2010 altered the ratio previously embedded in both statute and sentencing guidelines, which required or advised that the same sentence be given for 100 grams of powder cocaine as for a single gram of crack. To his credit, then-Senator Jeff Sessions played a role in creating that legislation. Editorial, *The Fair Sentencing Act Corrects a Long-Time Wrong in Cocaine Cases*, WASH. POST (Aug. 3, 2010), <http://www.washingtonpost.com/wp-dyn/content/article/2010/08/02/AR2010080204360.html>.

21. Linda Greenhouse, *Crack Cocaine Limbo*, N.Y. TIMES (Jan. 5, 2014), <https://www.nytimes.com/2014/01/06/opinion/greenhouse-crack-cocaine-limbo.html>.

22. *JusticeRadiothon Audio Archive Live National Radio Broadcast from June 17, 2016*, JUSTICE ROUNDTABLE, <https://justiceroundtable.org/resource/justiceradiothon-audio-archive-june-17-2016-live-national-radio-broadcast/> (last visited Oct. 7, 2018).

23. Taifa, *supra* note 19, at 239.

of victory. Although I critique Trump and Sessions for seeking to absolve themselves of America's legacy of racism, I recognize that same impulse within myself as well.

More complicated, of course, is the legacy of President Obama. Importantly, he explicitly recognized the need to proactively address the problems of race in the criminal justice system, an imperative rooted in personal experience. As he described it, "As a community organizer, I saw firsthand how our criminal justice system exacerbates inequality. It takes young people who made mistakes no worse than my own and traps them in an endless cycle of marginalization and punishment."²⁴ As President, he took concrete steps aimed at the continuing problems of racial disparities. During his presidency, Congress passed the Fair Sentencing Act, reducing mandatory minimum sentences for narcotics offenses involving crack cocaine.²⁵ His administration pressed the states to reform their own systems.²⁶ Further, he used his pardon power to free more than 1,000 federal inmates who had been over-sentenced, many of them the black men convicted of selling crack for which Nkechi Taifa and I had advocated.²⁷ In addition, in 2013 Attorney General Eric Holder announced new charging guidelines for federal prosecutors that limited the risk of over-sentencing low-level offenders.²⁸

Yet even these efforts were hindered by those less committed to the idea that racial issues in criminal justice constituted a continuing problem. This was particularly prevalent within the Department of Justice, which, as an institution and collection of individuals, resisted reform at several turns. For example, after the passage of the Fair Sentencing Act, the United States Sentencing Commission considered whether to make the resulting change in the federal sentencing guidelines retroactive. The Department of Justice urged for major re-

24. Barack Obama, *The President's Role in Advancing Criminal Justice Reform*, 130 HARV. L. REV. 811, 812 (2017).

25. *Id.* at 826.

26. *Id.* at 845–46.

27. *Id.* at 837.

28. Memorandum from Eric Holder, Attorney Gen., to the U.S. Attorneys & Assistant Attorney Gen. for the Criminal Div. (Aug. 12, 2013), <https://www.justice.gov/sites/default/files/oip/legacy/2014/07/23/ag-memo-department-policy-on-charging-mandatory-minimum-sentences-recidivist-enhancements-in-certain-drugcases.pdf>.

strictions on such a move, and the National Association of Assistant United States Attorneys argued outright that there should be no retroactivity at all.²⁹ While the clemency initiative was impressive and important, it could have done far more if the Department of Justice had been fully invested in the effort from its inception until President Obama left office. That was not the case.³⁰ In fact, in 2016 the Pardon Attorney resigned, citing resistance within the Department.³¹

It is not surprising that the first black president, among his recent contemporaries, best avoided the trap of declaring success; he did not buy into the false narrative of a complete victory over racial bias. Yet it is telling that even his authority struggled to overcome resistance within the ranks of the Department of Justice, leaving much of the work of reform still on the table as he left office.

III. THE CONTINUING PROBLEM OF DISPARATE RACIAL IMPACTS AND HIDDEN DISCRETION

A. *The Truth of Racial Inequality in Criminal Law*

The Trump-Sessions racial justice narrative that concludes with an already-achieved victory over racism is false. It appears, too, that things have gotten worse instead of better over the past fifty years. The presence of continuing disparities in criminal justice outcomes demonstrate how far short we have fallen. According to a Bureau of Justice Statistics analysis of data from 2016, eighteen- and nineteen-year-old black men were 11.8 times more likely to be imprisoned than their white counterparts, and the overall imprisonment rate for black women was twice that of white women.³² The Economic Policy Institute recently reported that while African Americans

29. Rachel E. Barkow & Mark Osler, *Designed to Fail: The President's Defiance to the Department of Justice in Advancing Criminal Justice Reform*, 59 WM. & MARY L. REV. 387, 414–15 (2017).

30. *Id.*

31. *Id.* at 432–34.

32. BUREAU OF JUSTICE STATISTICS, U.S. DEP'T OF JUSTICE, PRISONERS IN 2016 (2018), https://www.bjs.gov/content/pub/pdf/p16_sum.pdf.

were “5.4 times as likely as whites to be in prison or jail” in 1968; in 2018 that disparity has risen to a factor of 6.4 times.³³

Controlling for important variables and looking beyond broad incarceration rates, a series of studies has revealed troubling disproportionalities at each level of the criminal process. In a remarkable analysis of federal data, M. Marit Rehavi and Sonja B. Starr controlled the data for criminal history and the arrest offense and concluded that there was a remaining black-white sentencing disparity of nearly 13% in a broad sample that included drug cases.³⁴ Rehavi and Starr calculated the costs associated with this disparity and concluded that eliminating the “black premium” that they identified “would reduce the steady-state level of black men in federal prison by 8,000–11,000 men and save \$230–\$320 million per year in direct costs.”³⁵

Sentencing data, however, only measure the end result and that can reflect bias at a number of points during the process as different actors exercise discretion without identifying where the bias occurs. If we break down that process into its component parts, we can see these disparities at each level.³⁶

Let us start at the entry point between a citizen and the criminal justice system: contact with the police. Research by Harvard Economist Roland G. Fryer, Jr. has revealed that “Blacks and Hispanics are fifty percent more likely to experience some form of force in interactions with police.”³⁷ Even controlling for context and civilian

33. Janelle Jones et al., *50 years After the Kerner Commission: African Americans Are Better Off in Many Ways but Are Still Disadvantaged by Racial Inequality*, ECON. POLICY INST. (Feb. 26, 2018), <https://www.epi.org/publication/50-years-after-the-kerne-commission/>.

34. M. Marit Rehavi & Sonja B. Starr, *Racial Disparity in Federal Criminal Sentences*, 122 J. POL. ECON. 1320, 1323 (2014), <https://www.journals.uchicago.edu/doi/full/10.1086/677255>.

35. *Id.*

36. Andrew Kahn & Chris Kirk, *What It's Like to Be Black in the Criminal Justice System*, SLATE (Aug. 9, 2015, 12:11 PM), http://www.slate.com/articles/news_and_politics/crime/2015/08/racial_disparities_in_the_criminal_justice_system_eight_charts_illustrating.html.

37. Roland G. Fryer, Jr., *An Empirical Analysis of Racial Differences in Police Use of Force* (Nat'l Bureau of Econ. Research, Working Paper No. 22399, 2018), <http://www.nber.org/papers/w22399.pdf>.

behavior (which narrows the gap), the disparity is unexplained by neutral factors.³⁸

Once within the criminal justice system after arrest, racial disparities persist when determining bail. Professor Cynthia Jones reviewed fifty years of research and concluded that “nearly every study on the impact of race in bail determinations has concluded that African Americans are subjected to pretrial detention at a higher rate and are subjected to higher bail amounts than are white arrestees with similar charges and similar criminal histories.”³⁹ One recent study, focused on Philadelphia and Miami-Dade County, found that in those two areas there was “evidence that there is substantial bias against black defendants” and intriguingly suggested that this bias was probably implicit rather than explicit.⁴⁰ The study concluded: “We find several pieces of evidence consistent with our results being driven by racially biased prediction errors in risk, as opposed to racial animus among bail judges.”⁴¹

Charging and enhancement by prosecutors are crucial drivers of racial disparities. Rehavi and Starr’s comprehensive federal study found that prosecutors seek mandatory sentences 1.75 times more against black men compared to white men, and that “[t]he initial mandatory minimum charging decision alone is capable of explaining more than half of the black-white sentence disparities not otherwise explained by precharge characteristics.”⁴²

Finally, sentencing judges may sometimes create their own disparities, on top of all of those included in the system up to that

38. *Id.* Fryer’s working paper was criticized by other economists for its conclusion that the force disparity does not extend to officer-involved shootings. Samantha Nelson, *Paper Finding No Racial Bias in Shootings by Police Criticized*, USA TODAY (July 21, 2016, 10:31 AM), <https://www.usatoday.com/story/news/nation-now/2016/07/21/paper-finding-no-racial-bias-shootings-police-criticized/87301632/>.

39. Cynthia E. Jones, “*Give Us Free*”: *Addressing Racial Disparities in Bail Determinations*, 16 N.Y.U. J. LEGIS. & PUB. POL’Y 919, 938 (2013).

40. David Arnold, Will Dobbie & Crystal S. Yang, *Racial Bias in Bail Decisions* 26, 30 (Nat’l Bureau of Econ. Research, Working Paper No. 23421, 2017), <https://www.princeton.edu/~wdobbie/files/racialbias.pdf>.

41. *Id.* at 30.

42. Rehavi & Starr, *supra* note 34.

point.⁴³ After a year of studying millions of data points, investigators from the Sarasota Herald-Tribune found that in Florida's Manatee County, black defendants got on average more than a year in prison for felony drug possession, while white defendants received five months.⁴⁴ The investigation also found that in Flagler County black defendants got triple the prison time for armed robbery that white defendants received, among a lengthy string of similar comparisons.⁴⁵ The series was titled "Bias on the Bench."⁴⁶

"But," some might say, "things are getting better, right? People are less racist than they used to be?" That's a hard—perhaps impossible—thing to measure. But imagine that, hypothetically, explicit and implicit racism went down fifty percent among decision-makers in the criminal justice system from 1980 to 2015. That would be great! Yet, we would *still* have more imprisonments poisoned by racism than ever because there are many more people imprisoned over all. For example, if a given system has 100 prosecutors and each handle fifty cases leading to imprisonment in a year, then let's suppose that in 1980 ten of those prosecutors exhibited explicit or implicit racism in their decision-making, potentially poisoning 500 of those cases. In 2015 though, there are more cases leading to imprisonment, since incarceration rates in state and federal prisons went from under 400,000 to over 1,400,000 in that period⁴⁷—a factor of well over three

43. While it can be easily said that some judges are biased sometimes (as is true with nearly any set of decision-makers in a society that suffers from a racist history), broader conclusions are harder to draw at this level for judicial decision-making. For example, one study of Louisiana outcomes showed that black and white judges alike tended to be more lenient on defendants of a race other than their own. Jeff Guo, *Researchers Have Discovered a New and Surprising Racial Bias in the Criminal Justice System*, WASH. POST (Feb. 24, 2016), https://www.washingtonpost.com/news/wonk/wp/2016/02/24/researchers-have-discovered-a-surprising-racial-bias-in-the-criminal-justice-system/?utm_term=.cd59e5ecf473.

44. Josh Salman, Emily Le Coz & Elizabeth Johnson, *Florida's Broken Sentencing System*, SARASOTA HERALD TRIBUNE (Dec. 12, 2016), <http://projects.heraldtribune.com/bias/sentencing/>.

45. *Id.*

46. *Id.*

47. *Fact Sheet: Trends in US Corrections*, SENTENCINGPROJECT.ORG, <https://sentencingproject.org/wp-content/uploads/2016/01/Trends-in-US-Corrections.pdf> (last updated June 2018).

times. Thus, if our hypothetical jurisdiction is even close to typical, now there are more than 15,000 rather than 5,000 cases leading to imprisonment a year. Even if racist impulses were cut in half, there are more racially poisoned *outcomes*. And in the world we inhabit, that's real, not hypothetical: more actual black men and women are cut out of freedom and all that comes with it *because* of race as we grow any system that contains racist impulses, even if those impulses are lessened over time (so long as the growth of the system outpaces that reduction).

B. The Problem of Hidden Discretion

Police, prosecutors, and judges make their decisions in different ways. There is important discretion at each level, but only judges exercise their discretion out in the open. Police and prosecutors make their choices largely unobserved, and that matters when we consider the interplay of bias and racial outcomes in criminal law.

To understand the way that discretion plays out, consider a typical case. A police officer stops a car for failing to signal a turn. When he approaches the car, he notices a box in the back seat. He asks the driver if he can look in the box, and the driver consents. Inside the box are a few ounces of marijuana. The driver claims that it is for his personal use, and that he is going to a party to share it with his friends.

The first realm of discretion is in the hands of the police officer. The law does not require that he arrest someone who is in possession of marijuana, and officers often dispose of these cases in informal ways (in one instance making the person do push-ups instead of arresting them).⁴⁸ Thus, the officer is able to end the case there, without public notice or a record being made. If there is bias intrud-

48. Kyle Jaeger, *This Officer's Response to a Teen's Marijuana Offense Is Going Viral*, ATTN: (Dec. 29, 2016), <https://www.attn.com/stories/13902/officer-gives-choice-of-marijuana-charge-or-pushups>. In my nearly two decades of teaching, I have had many students with a law enforcement background. To demonstrate this kind of informal discretion, I ask them in class how they dealt with small-time marijuana cases. Nearly all of them had an informal method they employed, such as "yelling at the kid and throwing the joint in a sewer" (New York) or "tossing the marijuana into a cornfield" (Wisconsin).

ing on the decision of who is let go and who is not, it may exist in darkness.⁴⁹

If the officer does make an arrest and sends the case up for prosecution, the next decision point is made by an intake official or the line prosecutor. Prosecutors don't have to take every case that the police bring them; they can "decline" a case for a wide variety of reasons.⁵⁰ The Department of Justice's directive to prosecutors in the field makes this explicit: "The United States Attorney is authorized to decline prosecution in any case referred directly to him/her by an agency unless a statute provides otherwise."⁵¹ And they often use that discretion, too: Michael O'Neill's analysis of data from 1994 to 2000 revealed that in those years federal prosecutors declined between 26% and 36% of the cases that were referred to them by investigative agencies.⁵²

Accepting or declining a case is only the first exercise of discretion by the prosecutor, though. As the case progresses, she will also have to consider what charge to employ and whether to enhance the sentence. Those decisions, too, can drive results. In the hypothetical case above, the prosecutor could choose to charge simple possession or possession with intent to distribute (based on the target's professed plan of sharing the pot with his friends). The latter is a trafficking offense, and it will bring a much higher sentence.

And, of course, the judge has discretion. In most American justice systems, the judge has the ability to peg a sentence, at least within a range of possible outcomes, providing only minimal explanations of why he or she chose that point.⁵³ While judges make their

49. In the absence of systemic tracking, one of the few ways we learn about bias is when officers themselves break ranks. *E.g.*, Dana DiFilippo, *Black Cops Sue, Claiming Racism in Philly Narcotics Unit*, WHYY (Dec. 15, 2017), <https://whyy.org/articles/black-cops-sue-claiming-racism-philly-narcotics-unit/>.

50. The federal guidelines for declining cases are publicly available and offer prosecutors wide latitude. JUSTICE MANUAL § 9-27.200-50 (2018), <https://www.justice.gov/usam/usam-9-27000-principles-federal-prosecution#9-27.220>.

51. *Id.* § 9-2.020.

52. Michael Edmund O'Neill, *When Prosecutors Don't: Trends in Federal Prosecutorial Declinations*, 79 *Notre Dame L. Rev.* 221, 252-53 (2003).

53. Even in the highly regulated federal system (both before and after the federal guidelines became advisory rather than mandatory in 2005), judges maintained the ability to sentence without explanation within the guideline range, which

decisions in public, American judicial systems resist the reporting of sentencing data by race of defendant and sentencing judge. For example, the United States Sentencing Commission regularly reports out reams of data, including data that describes the race of defendants in particular districts or convicted of certain crimes.⁵⁴ What it does not do is link racial data to particular sentencing judges.

Compounding this tracking problem is the ability of federal judges to effectively hide their employment of discretion by disguising it as findings of fact. For example, a judge may not truly believe that a defendant has provided substantial assistance to the government but still grant a downward departure under the sentencing guidelines to get to the lower sentence he or she deems appropriate without issuing a variance.⁵⁵ Professor Daniel Freed of Yale identified and warned of this in 1992, asserting that the sentencing system “simultaneously proceeds on two different levels,” one open and the other meant to elude scrutiny.⁵⁶

The criminal justice system as a whole abounds with unobserved discretion that masks the influence of racial bias. Which means that because those working in criminal justice are to some degree representative of the larger society, so long as there is lingering racism in the United States, bias will exist in those dark places. To utterly eliminate such bias, we would have to do the same to racial bias in the larger society. That broader accomplishment is crucial, but if we want to address the contemporary problem in an immediate way

provides a 25% spread between its lower and upper bounds. 28 U.S.C. § 994(b)(2) (2012); U.S. SENTENCING GUIDELINES MANUAL § 1B1.4 (U.S. SENTENCING COMM’N 2016).

54. *E.g.*, U.S. SENTENCING COMM’N, QUARTERLY DATA REPORT (2016), https://www.ussc.gov/sites/default/files/pdf/research-and-publications/federal-sentencing-statistics/quarterly-sentencing-updates/USSC-2016_Quarterly_Report_Final.pdf.

55. *E.g.*, U.S. SENTENCING GUIDELINES MANUAL § 5K1.1 (U.S. SENTENCING COMM’N 2016).

56. Daniel J. Freed, *Federal Sentencing in the Wake of Guidelines: Unacceptable Limits on the Discretion of Sentencers*, 101 YALE L.J. 1681, 1683 (1992). At the time Professor Freed wrote the sentencing guidelines they were mandatory, but the pressures that created the dynamic he described continued after the *Booker* decision in 2005 made the guidelines advisory. *E.g.*, Mark Osler, *The Promise of Trailing-Edge Sentencing Guidelines to Resolve the Conflict Between Uniformity and Judicial Discretion*, 14 N.C. J.L. & TECH. 203, 209–10 (2012).

we will have to creatively consider short-term projects that can directly prevent the harms of bias in the system we have at this moment in a nation still redolent with racial assumptions that consistently disfavor African Americans.⁵⁷

IV. TWO SHORT-TERM SOLUTIONS TO THE ENDURING PROBLEM OF RACIAL BIAS IN CRIMINAL LAW

A. Long-Term and Short-Term Goals

Certainly, the long-term answer to the problem of bias in the criminal justice system is to eliminate bias in the larger society. There is much work to be done there, of course, and this Essay does not seek to describe that broader effort.

We can be sure of one thing about the project of eliminating racial bias within American society: it will take time. And while that project proceeds, too many black men and women will be imprisoned in the meantime because of racial bias. While the deniers of bias are confronted and the broader societal project advances slowly, we need to employ faster-acting projects to save freedom and lives now. Though many are possible, I suggest two here. One is based on economics and the other on shame. Both could help address the immediate impact of bias, while also confronting the lie that the dream of racial equality has been achieved.

First, bias could be side-stepped if we changed the way in which we address narcotics. Bias within narcotics prosecutions seems deeply rooted. One solution, which has some strong advocates, is to legalize narcotics.⁵⁸ Another option, less often explored, would be to shift the target of drug interdiction from people to money—that is, to attack cash flow rather than labor to shut down drug businesses.

57. It is difficult to measure bias in the general population with precision, but the best tools we have certainly reflect the existence of implicit bias against African Americans. See Tom Bartlett, *Can We Really Measure Implicit Bias? Maybe Not* CHRON. REV. (Jan. 5, 2017), <https://www.chronicle.com/article/Can-We-Really-Measure-Implicit/238807>.

58. E.g., Jeffrey Miron, *Could Legalizing All Drugs Solve America's Opioid Epidemic?*, FORTUNE (Sep. 19, 2017), <http://fortune.com/2017/09/19/jeff-sessions-opioid-epidemic-legalize-all-drugs/>.

A second short-term approach would be to use modern data and social media tools to attach racially disparate outcomes to specific actors within the criminal justice system with the goal of shaming them into doing better. For example, if it is known to the public that a specific judge overwhelmingly sentences black men to longer sentences for drug trafficking than white men who commit similar crimes, peer effects will correct that bias more certainly than any law or regulation could. Importantly, this form of transparency would also pierce the false narrative that race-neutral laws, on their own, have made racial inequality a thing of the past.

B. Controlling Bias by Changing the Focus of Drug Interdiction

The over-imprisonment of black Americans has been part of a broader and explosive growth in incarceration generally.⁵⁹ If we move away from our over-use of imprisonment to address crime, we will go a long way towards mitigating the effects of bias in criminal sentencing.

New tactics that de-emphasize incarceration will benefit all who are exposed to prison terms, but if African Americans are more likely to face that liability (and they are), they have more to gain from that general reduction in imprisonment. Narcotics cases are only a part of the larger growth in incarceration,⁶⁰ but it is an important part. Nearly half of federal prisoners⁶¹ and about 15% of state prisoners⁶² are serving time for drug offenses.

The War on Drugs' focus on incarceration suffers from a central defect: a total failure to account for the fact that narcotics traf-

59. *E.g.*, THE SENTENCING PROJECT, FACT SHEET: TRENDS IN U.S. CORRECTIONS 1–8 (2018), <https://sentencingproject.org/wp-content/uploads/2016/01/Trends-in-US-Corrections.pdf>.

60. German Lopez, *Why You Can't Blame Mass Incarceration on the War on Drugs*, VOX (May 30, 2017, 9:00 AM), <https://www.vox.com/policy-and-politics/2017/5/30/15591700/mass-incarceration-john-pfaff-locked-in>.

61. *Inmate Statistics: Offenses*, FED. BUREAU OF PRISONS, https://www.bop.gov/about/statistics/statistics_inmate_offenses.jsp (last updated Sept. 29, 2018).

62. E. ANN CARSON, U.S. DEP'T OF JUSTICE, PRISONERS IN 2016, at 13 (2018), <https://www.bjs.gov/content/pub/pdf/p16.pdf>.

ficking syndicates operate as businesses within a market.⁶³ By approaching the problem of narcotics as a moral crusade while ignoring the market realities,⁶⁴ we have ensured both failure of the project and enduring racial disparities. In short, the moral crusade approach—which centers on the supposed venality of anyone involved in narcotics trafficking—inexorably leads to a single-minded focus on identifying, convicting, and imprisoning individuals who sell drugs. That means that we mostly sweep up low-wage labor.

Addressing narcotics by sweeping up and incarcerating low-wage labor does not solve the problem of narcotics use.⁶⁵ Because this tactic disproportionately affects minorities,⁶⁶ the sad reality of this strategy is that racial inequality is driven by a project that is largely fruitless.

It is fruitless because low-wage labor is easily replaced. In fact, successful businesses—legitimate or not—adapt themselves easily to the loss of low-wage labor by simplifying jobs to reduce training time and heighten efficiency. You can see this if you observe (or work at) a fast-food franchise, for example. The cash register is organized for ease of use, featuring pictures of the food that is ordered. The food-prep area is arranged to simplify tasks. Even the food is altered to enable rapid turn-over in labor, as the number of ingredients used is limited so that new hires can quickly get to work.

The narcotics business was similarly able to adapt to labor disruptions, particularly among those in low-skill, low-pay jobs or entrepreneurial opportunities. We know this because even with over-

63. This is not my first time to argue that a failure to account for market effects is a core failing of the War on Drugs. See Mark Osler, *1986: AIDS, Crack, and C. Everett Koop*, 66 RUTGERS L. REV. 851, 868–70 (2014) [hereinafter Osler, *1986: AIDS*]; Mark Osler, *Asset Forfeiture in a New Market-Reality Narcotics Policy*, 52 HARV. J. LEGIS. 221, 224–26 (2015) [hereinafter Osler, *Asset Forfeiture*]; Mark Osler, *What Would It Look Like If We Cared About Narcotics Trafficking? An Argument to Attack Narcotics Capital Rather Than Labor*, 15 UDC/DCSL L. REV. 113, 115–17 (2011); Mark Osler & Thea Johnson, *Why Not Treat Drug Crimes As White-Collar Crimes?*, 61 WAYNE L. REV. 1, 1–2 (2015).

64. See Osler, *1986: AIDS*, *supra* note 63, at 864–67.

65. E.g., Nicholas Kristof, Opinion, *Drugs Won the War*, N.Y. TIMES (June 13, 2009), <http://www.nytimes.com/2009/06/14/opinion/14kristof.html>.

66. E.g., Nekima Levy-Pounds, *From the Frying Pan into the Fire: How Poor Women of Color and Children are Affected by Sentencing Guidelines and Mandatory Minimums*, 47 SANTA CLARA L. REV. 285, 305–06 (2007).

incarceration, drug use in the United States didn't decrease. Drugs won the drug war.⁶⁷ If one crack dealer was arrested, another would take his place in the marketplace; that's the nature of markets.⁶⁸ And make no mistake: low-level drug dealers do not make much money. The economists Steven D. Levitt and Stephen J. Dubner analyzed the question and concluded that "a crack gang works pretty much like the standard capitalist enterprise: you have to be near the top of the pyramid to make a big wage."⁶⁹

If sweeping up the low-wage labor in a narcotics market through mass incarceration doesn't work, what might? One idea, rooted in an understanding of markets, would be to attack the cash flow that sustains narcotics trafficking at the highest levels. In other words, ignore the people and take the money as it flows back to the original source of the narcotics. It would be a much more efficient way to disrupt drug markets, and it would be revenue-positive since the government would get to keep the money. Such a plan would rely on forfeitures of that money, and forfeitures have been criticized by many in the criminal justice communities.⁷⁰ Much of that criticism, however, has been attached to the forfeiture of drug profits or related properties (cars and homes) rather than cash flow.⁷¹

Not incidentally, a shift from labor to cash flow in the interdiction of narcotics trafficking would not only make our efforts more successful but also would provide two important additional benefits: fewer people would be incarcerated, and those who were incarcerated would be the most culpable since the money would lead to them. This tactic would simply take away the pools of discretion leading to prison that have been poisoned by implicit bias and replace them with discretion relating to a more objective economic analysis.

67. Kristof, *supra* note 65.

68. See Osler, *1986: AIDS*, *supra* note 63, at 861.

69. STEVEN D. LEVITT & STEPHEN J. DUBNER, *FREAKONOMICS* 103 (2005).

70. Noah Smith, *Government Calls It Forfeiture, But It's Theft*, BLOOMBERG NEWS (June 21, 2018, 7:00 AM), <https://www.bloomberg.com/view/articles/2018-06-21/government-needs-a-good-reason-for-civil-asset-forfeiture>.

71. Osler, *Asset Forfeiture*, *supra* note 63, at 224–26.

C. Controlling Discretion Through Transparency and Shame

1. The Importance of Seeing

In that last speech in Memphis, Dr. King relied on a key metaphor, that of vision, in saying, “He’s allowed me to go up to the mountain. And I’ve looked over. And I’ve seen the promised land.”⁷² It’s about getting to a place where the lay of the land can be seen. Doing exactly that within criminal law would go a long way towards addressing, in both the short and the long term, the problem of bias. My suggestion is specific: I want to track and make public the racial outcomes of the choices made by police officers, prosecutors, and judges.

If we could determine, and make public, the precise connection between individual actors and the disparate outcomes that flow from the decisions they make, it would accomplish several goals at once. First, it would refute with fierce precision the idea that racial bias is gone from the system. Second, it would shame those creating disparities and either push them towards more equitable choices or drive them from the role of discretion they now hold. Finally, it would become a part of the broader project of addressing bias within the larger society.

Because discretion (and bias) is employed at multiple levels, we would have to address each of those levels in a transparency project as well.

2. Transparency and Judges

Judges make their decisions in public at sentencing. Publicly available data sets that reveal the race of defendants in sentences made in similar cases by individual judges would be transformative. In other words, we should be able to track each judge’s disparities in sentencing white and black defendants.

That simple use of data would create peer effects and shaming to achieve racial equality without restrictive guidelines or sentencing laws.⁷³ We could hold up one judge’s record to that of others in the

72. KING, *supra* note 1.

73. We shouldn’t doubt that shaming and peer effects can impact judges. One only need the use of “tough on crime” rhetoric used for and against judicial

same District and Division and evaluate their differential outcomes from a common pool of cases. Even for judges with life tenure, social pressure would emerge if a judge were found to give significantly longer sentences to unarmed, low-stakes, black bank robbers than to similar white ones. That is, in fact, one of the lessons that emerges from the modern false narrative that racism has been addressed already: few people today want to be labeled a racist. Avoiding that designation might drive judges to fairer outcomes.

The technology for doing this is certainly available. The Sentencing Commission already gathers real-time sentencing data, including the race of the defendant.⁷⁴ All that remains to be done is to compile the data so that it is sorted by sentencing judge.

The challenges to doing this are clear. Judges would hate the idea, as they will resent any system that is based on shaming them into changing their behavior. The irony of this is rich, of course, given that the sentences they issue are in part meant to shame defendants and potential defendants into better behavior. If they don't want to be shamed, we tell defendants "don't do the crime." The same could be said of transparency in sentencing: if judges want to avoid the public censure, they can just be sure to avoid disparate sentencing.

3. Transparency and Prosecutors

While the decisions of judges are both somewhat public and tracked by the Sentencing Commission, this is less true of prosecutors. Conceivably, court records could be examined to connect intake decisions, charging decisions, and the race of defendants to specific prosecutors making appearances in each case, but this would be an unwieldy process from the outside (even if those court records revealed the race of the defendant). From the inside, though, it would

candidates in systems where judges are elected to see this at work. Allyse Falce, *Are "Tough on Crime" Ads Influencing the Way Judges Rule?*, BRENNAN CTR. FOR JUST. (Oct. 31, 2014), <https://www.brennancenter.org/blog/are-tough-crime-ads-influencing-way-judges-rule>.

74. 28 U.S.C. § 994(w)(1) (2012) (mandating the collection of sentencing data). The current Sentencing Commission data sets already contain information regarding the race of defendants. U.S. SENTENCING COMM'N, QUARTERLY SENTENCING UPDATES (2018), <https://www.ussc.gov/research/data-reports/quarter/quarterly-sentencing-updates>.

be easy to track decision data as charging and enhancement decisions are made, much as we do now with judges in the federal system. Prosecutors' offices could then make that data publicly available in much the same way that the Sentencing Commission does. That data would be most useful in comparing one prosecutor to others dealing with similar cases from a common pool.

Some prosecutors have already made the accumulation and dissemination of data regarding intake and charging a priority. In Cook County, Illinois, for example, State's Attorney Kimberly M. Foxx has made great strides in transparency by not only issuing an annual report⁷⁵ but releasing case-level data to an open portal.⁷⁶

As with judges, many prosecutors would prefer not to have their decisions revealed and would argue that some data might be misinterpreted. Again, there is some irony to this complaint, given the ability of prosecutors to base decisions regarding liberty itself on data—criminal history or an amount of financial loss, for example—that could easily have been misinterpreted.

4. Transparency and the Police

Currently, many law enforcement agencies track their arrest histories by race of the arrestee.⁷⁷ This is a welcome development but short of what is needed for true accountability. Public data should include the arrest statistics, by race, for each officer, as well as information about how many police-citizen encounters do not lead to arrest. This latter data set can be crucial to set context for the arrests actually made within an area of discretion where many cases are disposed of informally. If a single officer encountered fifty black citizens and fifty white citizens in possession of marijuana and arrested

75. KIMBERLY M. FOXX, COOK COUNTY STATE'S ATTORNEY DATA REPORT 1 (2017), <https://www.cookcountystatesattorney.org/sites/default/files/files/documents/ccsao-data-report-oct-2017.pdf>.

76. *Open Data*, COOK COUNTY GOV'T, <https://datacatalog.cookcountyil.gov/> (last visited Oct. 7, 2018).

77. E.g., Tad Vezner & Sarah Horner, *St. Anthony Police Data Shows Disproportionate Arrests of Blacks*, PIONEER PRESS (July 14, 2016, 11:42 AM), <https://www.twincities.com/2016/07/13/st-anthony-police-data-shows-disproportionate-arrests-of-blacks/>.

all of the black citizens and only half of the white citizens, all we would know is that fifty black and twenty-five white targets were arrested—we would not know the crucial context of total people encountered who *could have been* arrested, which reveals the key disparity.

V. CONCLUSION

Those of us who have climbed mountains share an experience. There comes a point where it seems certain that the peak is just over the next rise—that we are almost there. We hike along, confident that we will soon be looking out over a green, verdant valley. But it isn't true. At the top of that rise is another one and then another. The climb is longer than we expected. It might be tempting to simply declare that we stand at the summit but that would be a lie, easily pierced and deflated by the plain truth of the incline ahead of us on the path. So, it is with the lie that racial equality has been achieved in the American criminal justice system. It is not enough to simply show the untruth of this false narrative. We must go on to attack the problems that persist, using whatever tools we can. In this place and time, economics and shame can be strong levers. We should now shoulder them.