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# THE UNWARRANTED DISPARITY STATEMENT: A NEW TOOL TO REDUCE DISPARITIES IN POSTARREST OUTCOMES

**Aaron Gottlieb***

***Abstract***

This Article proposes a new data-driven approach that can be employed to help reduce postarrest disparities in criminal case outcomes in the United States: the unwarranted disparity statement. In Part I, the Article documents the existence of unwarranted disparities in postarrest criminal case outcomes, highlights structural reforms that have been implemented to address these disparities, and argues that a data-driven approach that helps to reduce these disparities in the short term is needed. Part II describes three data-driven approaches that have been proposed or employed to address postarrest case outcome disparities and identifies key limitations of each of these approaches that are not present with the unwarranted disparity statement. In Part III, the Article provides a basic framework for the unwarranted disparity statement approach and describes the content of unwarranted disparity statements. Part IV provides an empirical illustration of how the unwarranted disparity statement approach would work in practice using data from the 2009 State Court Processing Statistics. Part V assesses the strengths and limitations of the unwarranted disparity statement approach. Last, in Part VI, the Article concludes by making the case that the unwarranted disparity statement should be employed as a complement to, not a substitute for, structural change efforts to the criminal legal system.

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## I. Introduction

The United States' criminal legal system is more reliant on incarceration than any other criminal legal system in the world, currently incarcerating people at a rate of 655 per 100,000 population.[1] In addition to the scope of confinement, the United States' criminal legal system is rife with disparities.[2] Perhaps most well-known are the significant racial/ethnic disparities in incarceration.[3] Specifically, data indicates that Black individuals are imprisoned at greater than 5 times the rate of White individuals, while Latinx individuals are imprisoned at approximately 1.3 times the rate of White individuals.[4] While these disparities are driven

1. Roy Walmsley, *World Prison Population*, Int'l Ctr. For Prison Studies, King's Coll. London, 6 (12th ed. 2018), available at http://www.prisonstudies.org/sites/default/files/resources/downloads/wppl_12.pdf.
2. *See* Matt W. Epperson & Carrie Pettus-Davis, Smart Decarceration: Achieving Criminal Justice Transformation in the 21st Century 3, 3–19 (Matt W. Epperson & Carrie Pettus-Davis eds., 2017); Nat'l Res. Council, The Growth of Incarceration in the United States 1 (Jeremy Travis et al. eds., 2014); Becky Pettit & Bruce Western, *Mass Imprisonment and the Life Course: Race and Class Inequality in U.S. Incarceration*, 69 Amer. Soc. Rev. 151 (2004).
3. *See* Michelle Alexander, The New Jim Crow: Mass Incarceration in the Age of Colorblindness (2010); 13th (Kandoo Films 2016).
4. Ashley Nellis, The Sentencing Project, The Color of Justice: Racial and Ethnic Disparity in State Prisons 1 (2016), available at https://www.

at least in part by differences in criminal offending patterns and policing practices,[5] they are also the result of differences in how people are treated once they have been arrested.[6] Studies have found that prosecutors,[7] public defenders,[8] judges,[9] and juries[10] all have racial biases that contribute to racial/ethnic disparities in case outcomes.

Although racial and ethnic disparities may receive most of the attention, there are other types of disparities in postarrest case outcomes as well. In some instances, these disparities may not be driven by bias or unfair treatment.[11] For instance, people convicted of violent offenses, on average, receive particularly negative case dispositions because these offenses are often viewed as especially serious.[12] However, in other instances, as is the case with race and ethnicity, there are clearly problematic post-arrest case outcome disparities that exist.[13] Some clear examples of this include, but are not limited to, the following: (1) individuals who are detained pretrial have worse case outcomes than individuals who are

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sentencingproject.org/publications/color-of-justice-racial-and-ethnic-disparity-in-state-prisons/.

5. *See* Alfred Blumstein, *On the Racial Disproportionality of United States' Prison Populations*, 73 J. Crim. L. & Criminology 1259, 1267 (1982); Nat'l Rsch. Council, *supra* note 2.
6. *See, e.g.,* Nazgol Ghandnoosh, The Sentencing Project, Black Lives Matter: Eliminating Racial Inequity in the Criminal Justice System 2015), available at https://www.njjn.org/uploads/digital-library/Black_Lives_Matter_Sentencing-Project_Feb-2015.pdf; Marc Mauer, *Addressing Racial Disparities in Incarceration*, 91 The Pris. J. 87S (2011); Ojmarrh Mitchell, *A Meta-Analysis of Race and Sentencing Research: Explaining the Inconsistencies*, 21 J. Quant. Criminology 439 (2005); M. Marit Rehavi & Sonja B. Starr, *Racial Disparity in Federal Criminal Sentences*, 122 J. Pol. Econ. 1320 (2014).
7. *See* Carlos Berdejó, *Criminalizing Race: Racial Disparities in Plea-Bargaining*, 59 B.C. L. Rev. 1187, 1196-1200 (2018); Christi C Metcalfe & Ted Chiricos, *Race, Plea, and Charge Reduction: An Assessment of Racial Disparities in the Plea Process*, 35 Just. Q. 223, 232 (2018).
8. *See* L. Song Richardson & Phillip Atiba Goff, *Implicit Racial Bias in Public Defender Triage*, 122 Yale L. J. 2626, 2634-2640 2013).
9. *See* David Arnold et al., *Racial Bias in Bail Decisions*, 133 Q. J. Econ. 1885 (2018); Jeffrey J. Rachlinski et al., *Does Unconscious Racial Bias Affect Trial Judges?*, 84 Notre Dame L. Rev. 1195, 1197 (2009).
10. *See* Samuel R. Sommers & Phoebe C. Ellsworth, *How Much Do We Really Know about Race and Juries? A Review of Social Science Theory and Research*, 78 Chi.-Kent L. Rev. 997, 1029-31 (2003); Mikah K. Thompson, *Bias on Trial: Toward an Open Discussion of Racial Stereotypes in the Courtroom*, 2019 Mich. St. L. Rev. 1243, 1244-45 (forthcoming 2019).
11. *See* Angela J. Davis, *Prosecution and Race: The Power and Privilege of Discretion*, 67 Fordham L. Rev. 13, 54 (1998); Angela J. Davis, *In Search of Racial Justice: The Role of the Prosecutor*, 16 N.Y.U. J. Legis. & Pub. Pol'y 821, 833 (2013).
12. *See, e.g.,* Aaron Gottlieb, *Making Gideon Count? Public Defender Resources and Felony Case Outcomes for Black, White, and Latinx Individuals*, XX Race & Just. 1, 9-16 (2021).
13. *See* Berdejó, *supra* note 7; Richardson & Goff, *supra* note 8; Arnold, *supra* note 9; Rachlinski, *supra* note 9; Sommers & Ellsworth, *supra* note 10; Thompson, *supra* note 10.

not detained pretrial,[14] (2) individuals represented by assigned counsel tend to experience worse case outcomes than individuals who hire a private attorney or are represented by a public defender,[15] and (3) men, on average, tend to experience more negative case outcomes than women, even after accounting for differences in offending patterns.[16]

In recent years, there has been a growing emphasis on eliminating unwarranted disparities in the criminal legal system.[17] Most efforts to address these disparities have attempted to significantly change faulty systems. For instance, a number of states, such as New Jersey and Illinois, have attempted to eliminate cash bail as a way to ensure that individuals are not detained pretrial because they lack economic resources.[18] Relatedly, indigent defense systems are often extremely underfunded,[19] and indigent defense attorneys and their support staff often have excessive caseloads.[20] Therefore, efforts to improve the quality of indigent defense

14. Will Dobbie et al., *The Effects of Pretrial Detention on Conviction, Future Crime, and Employment: Evidence from Randomly Assigned Judges,* 108 Amer. Econ. Rev. 201, 204 (2018); Cassia Spohn, *Race, Sex, and Pretrial Detention in Federal Court: Indirect Effects and Cumulative Disadvantage*, 57 U. Kan. L. Rev. 879, 880 (2009).
15. *See* Amanda Agan et al., *Is Your Lawyer a Lemon? Incentives and Selection in the Public Provision of Criminal Defense*, 103 Rev. Econ. & Stats. 294, 301 (2021); James M. Anderson & Paul Heaton, *How Much Difference Does the Lawyer Make: The Effect of Defense Counsel on Murder Case Outcomes*, 122 Yale L. J. 154 (2012–2013); Thomas H. Cohen, *Who is Better at Defending Criminals? Does Type of Defense Attorney Matter in Terms of Producing Favorable Case Outcomes*, 25 Crim. Just. Pol'y Rev. 29 (2014).
16. *See* Jill K. Doerner & Stephen Demuth, *Gender and Sentencing in the Federal Courts: Are Women Treated More Leniently?*, 25 Crim. Just. Pol'y Rev. 242 (2014); S. Fernando Rodriguez et al, *Gender Differences in Criminal Sentencing: Do Effects Vary Across Violent, Property, and Drug Offenses?*, 87 Soc. Sci. Q. 318 (2006).
17. *See generally* Michelle Alexander, *supra* note 3; Aaron Gottlieb, *The Effect of Message Frames on Public Attitudes Toward Criminal Justice Reform for Nonviolent Offenses*, 63 Crime & Delinq. 636 (2017); Leah Sakala & Nicole D. Porter, *Criminal Justice Reform Doesn't End System's Racial Bias*, USA Today (Dec. 12, 2018), https://www.usatoday.com/story/opinion/policing/politics-policing/2018/12/12/racial-injustice-criminal-justice-reform-racism-prison/2094674002/ [https://perma.cc/5KE9-ABX3].
18. In New Jersey, the Criminal Justice Reform Act essentially eliminated monetary bail on January 1, 2017. *See* ACLU New Jersey, Pretrial Justice Reform, https://www.aclu-nj.org/theissues/criminaljustice/pretrial-justice-reform [https://perma.cc/2D4S-BZJA]. In Illinois, in early 2021, a new law was passed that will end monetary bail by 2023. *See* Emanuella Evans and Rita Oceguera, *Illinois Criminal Justice Reform Ends Cash Bail, Changes Felony Murder Rule*, InjusticeWatch (Feb. 23, 2021), https://www.injusticewatch.org/news/2021/illinois-criminal-justice-reform-cash-bail-felony-murder/ [https://perma.cc/JU96-YEKJ].
19. *See* Norman Lefstein & Robert L. Spangenberg, The Constitution Project, Justice Denied: America's Continuing Neglect of Our Constitutional Right to Counsel, (2009); John F. Pfaff, Locked In: The True Causes of Mass Incarceration and How to Achieve Real Reform (2017).
20. *See* Aaron Gottlieb & Kelsey Arnold, *The Effect of Public Defender and Support*

often prioritize increasing the resources that indigent defense systems have at their disposal and/or reducing public defender caseloads.[21] Moreover, a growing movement has reframed the narrative of the change that prosecutors can make on case outcomes and has mobilized the election of progressive prosecutors.[22] From this perspective, by electing someone progressive to run a prosecutor's office, the culture of the office can potentially be transformed, leading to a change in charging decisions and a reduction in excessive punishment and unwarranted disparities in criminal legal outcomes.[23]

In other instances, states have often engaged in sentencing reform efforts that have been facially race neutral and targeted reducing punitiveness around nonviolent offenses.[24] These efforts, such as California's AB 109, often referred to as California's Public Safety Realignment,[25] do

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*Staff Caseloads on Incarceration Outcomes for Felony Defendants*, 10 J. Soc. SW. & Res. 1, 5 (2021); Norman Leftstein, ABA, Securing Reasonable Caseloads: Ethics and Law in Public Defense (2011); Tina Peng, *I'm a Public Defender. It's Impossible for Me to Do a Good Job Representing My Clients*, Wash. Post (Sep. 3, 2015), https://www.washingtonpost.com/opinions/our-public-defender-system-isnt-just-broken—its-unconstitutional/2015/09/03/aadf2b6c-519b-11e5–9812–92d5948a40f8_story.html [https://perma.cc/YY26-8AF5].

21. Perhaps most notably, at the Federal level, then Senator Harris introduced the Ensuring Quality Access to Legal Defense (EQUAL) Act in 2019. Ensuring Quality Access to Legal Defense (EQUAL) Act of 2019, S. 1377, 116th Cong. (2019).This bill, if passed into law, would incentivize states to establish workload limits for full-time public defenders, ensure public defenders and prosecutors are paid equally within five years, produce annual data on the workloads of public defenders, and provide support and training. In addition, the Bill would also provide student loan relief for public defenders. At the local level, New Orleans passed legislation in 2020 that ensures that the city's public defense office will receive no less than 85 percent of the funds allocated to the prosecutor's office. *See* Jonathan Rapping, *Reforming Public Defense Is Crucial for Criminal Justice*, Law360 (Sep. 20, 2020), https://www.law360.com/articles/1307528/reforming-public-defense-is-crucial-for-criminal-justice [https://perma.cc/T488-DYGZ].

22. George Soros is perhaps the most notable individual who has taken on this cause. Organizations who have worked towards electing progressive prosecutors and ensuring that they are successful once in office include: Color of Change; Center for American Progress; Real Justice PAC; and Fair and Just Prosecution.

23. For a discussion on progressive prosecution, see generally Emily Bazelon, Charged: The New Movement to Transform American Prosecution and End Mass Incarceration (2019); Angela J. Davis, *Reimagining Prosecution: A Growing Progressive Movement*, 3 UCLA Crim. Just. L. Rev. 1 (2019); David Allan Sklansky, *The Progressive Prosecutor's Handbook*, 50 UC Davis L. Rev. Online 25 (2017).

24. *See* Katherine Beckett, Anna Reosti, & Emily Knaphus, *The End of an Era? Understanding the Contradictions of Criminal Justice Reform*, 664 ANNALS Amer. Acad. Pol. & Soc. Sci. 238 (2016); Nazgol Ghandnoosh, *Can We Wait 60 Years to Cut the Prison Population in Half?* Sentencing Project (Jan. 22, 2021), https://www.sentencingproject.org/publications/can-we-wait-60-years-to-cut-the-prison-population-in-half [https://perma.cc/4UKC-4RE3]; Samantha Harvell et al., Urban Institute, Reforming Sentencing and Corrections Policy: The Experience of Justice Reinvestment Initiative States (2016).

25. For background on what AB 109 entails, see Magnus Lofstrom, Mia Bird, &

not directly tackle disparities; instead these reforms cast a wide net in order to reduce punitiveness in the criminal legal system overall, which may in turn benefit groups that are disproportionately harmed by the system.[26] Last, some approaches have aimed to change the behavior of individual actors within the criminal legal system, such as judges, prosecutors, and defense attorneys. Perhaps most common among these efforts to reduce racial and ethnic disparities is providing implicit bias training to criminal legal system actors.[27]

In this Article, I do not take a position on which of these reforms are likely to be most effective. Instead, I argue that because these reforms are trying to change systems and/or core attitudes of individual actors, these reforms are often challenging to pass,[28] difficult to implement once passed,[29] and met with resistance.[30] As a result, even if these reforms can eliminate or substantially reduce unwarranted disparities in the criminal legal system, it will likely take a long a time to achieve that aim. In this Article, I propose a data-driven approach that should be employed in concert with larger systemic change efforts. Until unwarranted disparities in postarrest case outcomes are eliminated, it is my contention that courts should collect data and use statistical analysis to track the extent to which defendants with specific characteristics experience unwarranted disadvantages in that jurisdiction because of their attributes or characteristics that should not influence case outcomes.[31] Based on this data collection

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Brandon Martin, Pub. Pol'y Inst. of Cal., California's Historic Corrections Reforms (2016).

26. *See* Aaron Gottlieb et al., *Were California's Decarceration Efforts Smart? A Quasi-Experimental Examination of Racial, Ethnic, and Gender Disparities*, 48 Crim. Just. & Behav. 116, 131 (2021).

27. For instance, in the middle of 2016, the United States Department of Justice announced that all its prosecutors and law enforcement officers would receive implicit bias training. *See Department of Justice Announces New Department-Wide Implicit Bias Training for Personnel*, U.S. Dep't of Just. (Jun. 27, 2016), https://www.justice.gov/opa/pr/department-justice-announces-new-department-wide-implicit-bias-training-personnel [https://perma.cc/NQ9N-8Y9D]. The emphasis on implicit bias training is not limited to the Federal level. For example, California passed AB-242, which requires all its lawyers, judges, and judicial staff to take counter-bias training. For more information on state legislation regarding implicit bias training, see ABA Resol. 116G (Aug. 4, 2020).

28. The EQUAL Act, *supra* note 21, was introduced in 2019 and would significantly increase Federal investment in public defense. It has yet to pass.

29. NY State amended its law that eliminated monetary bail after only three months and now allows bail for certain offenses. *See* Taryn A. Merkl, *New York's Latest Bail Law Changes Explained*, Brennan Ctr. for Just. (Apr. 16, 2020), https://www.brennancenter.org/our-work/analysis-opinion/new-yorks-latest-bail-law-changes-explained [https://perma.cc/LU9B-SZBX].

30. For information on resistance that progressive prosecutors experience, see Andrew Cohen, *Reformist Prosecutors Face Unprecedented Resistance from Within*, Brennan Ctr. for Just. (Jun. 19, 2019), https://www.brennancenter.org/our-work/analysis-opinion/reformist-prosecutors-face-unprecedented-resistance-within [https://perma.cc/62D2-QDFM].

31. For instance, if a defendant is a thirty-year-old Black man who was detained

effort and statistical analysis, the court would produce an unwarranted disparity statement for each case in which a defendant is predicted to experience an unwarranted disadvantage. The unwarranted disparity statement would document the extent of this expected disadvantage with respect to conviction, being sentenced to incarceration, and incarceration sentence length. This unwarranted disparity statement would be made available to the prosecutor, defense counsel, judge, and jury, so that each can weigh this information, along with the other case evidence, as they make important case-related decisions.

In the pages that follow, I begin by describing other data-driven proposals that seek to address disparities in postarrest case outcomes using statistical analysis. I then describe my proposal in detail by describing how it builds on other data-driven proposals and the type of information that would be included in the unwarranted disparity statement. Next, I use data from the 2009 State Court Processing Statistics (SCPS)[32] to provide an empirical illustration of how the approach would work in practice and the kind of useful information that it would provide key courtroom actors. I then highlight the strengths and limitations of the unwarranted disparity statement approach. Finally, I conclude by summing up the key points from the Article.

## II. Data-Driven Approaches as Tools to Address Criminal Legal System Disparities

The approach that I outline in this Article is not the first to make use of data and statistical analysis to try to address criminal legal challenges. In fact, legal scholars have increasingly recognized both the incredibly rich amount of data that courts have at their disposal,[33] as well as the fact that this data can be used to improve criminal legal processes.[34] In the Subpart below, I describe other social science data-driven approaches that have been proposed or employed in an effort to address postarrest case processing disparities, and I identify the limitations of these approaches that the unwarranted disparity statement approach seeks to address.

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pretrial and represented by assigned counsel, to what extent does that person's combination of race, gender, pretrial detention status, attorney type, and age influence his case outcomes?

32. I will describe this dataset in more detail later in this Article. However, for more detail on the data, see Brian A. Reaves, U.S. Dep't of Just, Felony Defendants in Large Urban Counties, 2009 - Statistical TABLES, (2013).

33. For instance, Andrew Manuel Crespo argues that courts have a ton of data at their disposal that is severely underutilized. *See* Andrew Manuel Crespo, *Systemic Facts: Toward Institutional Awareness in Criminal Courts*, 129 Harv. L. Rev. 2049, 2052-53 (2016).

34. *See id. See also* Tracey L. Meares, *Three Objections to the Use of Empiricism in Criminal Law and Procedure - And Three Answers*, 2002 U. Ill. L. Rev. 851, 866, 873 (2002); Laurens Walker & John Monahan, *Social Frameworks: A New Use of Social Science in Law*, 73 VA.L. Rev. 559, 582-83 (1987).

### A. *Racial Impact Statements for State Legislation*

Some state legislatures have created mechanisms to consider racial impact statements when evaluating proposed criminal legal system legislation as one data-driven approach to address disparities in postarrest case outcomes.[35] Unlike the two other approaches that I will discuss, this type of racial impact statement legislation targets the legislative branch, rather than courtroom actors.[36] Not all racial impact statement legislation is the same, with significant variation in which authority is responsible for preparing the statements, the content of statements, and the mechanisms through which statements are produced and considered.[37] Despite these differences, all racial impact statement legislation has been based on the following core ideas: (1) data and quantitative social science forecasting methods can be used to predict how proposed legislation will impact racial/ethnic disparities in criminal legal outcomes,[38] (2) legislators should be made aware of how proposed legislation is predicted to impact racial and ethnic disparities in criminal legal outcomes prior to casting votes,[39] and (3) if legislators are made aware of the impact that legislation will have on racial and ethnic disparities in criminal legal outcomes, they will be more likely to support criminal legal legislation that is predicted to reduce disparities and less likely to support legislation that is anticipated to exacerbate disparities.[40]

Thus far, nine states (Colorado, Connecticut, Florida, Iowa, Maine, Maryland, New Jersey, Oregon, and Virginia) have passed legislation that creates mechanisms for racial impact statements to be developed and considered.[41] Although racial impact legislation has not been passed in Minnesota, the Minnesota Sentencing Guidelines Commission produces racial impact statements for all significant criminal legal system legislation, so Minnesota is, in practice, a racial impact statement state.[42] Eight additional states (Arkansas, Illinois, Kentucky, Mississippi, Nebraska, New York, Oklahoma, and Wisconsin) have proposed legislation but have yet to establish mechanisms to develop and consider racial impact

35. *See* Nicole D. Porter, *Racial Impact Statements*, The Sentencing Project (June 16, 2021), https://www.sentencingproject.org/publications/racial-impact-statements/ [https://perma.cc/GV43-MBK9].

36. *See* Catherine London, *Racial Impact Statements: A Proactive Approach to Addressing Racial Disparities in Prison Populations*, 29 Law & Ineq. 211, 226-28 (2011); Marc Mauer, *Racial Impact Statements as a Means of Reducing Unwarranted Sentencing Disparities*, 5 Ohio St. J. Crim. L. 19, 33-34 (2007).

37. For instance, in Iowa, racial impact statements are required for all criminal justice legislation, while in Oregon legislators must request that a racial impact statement be produced. *See* Porter, *supra* note 35; London, *supra* note 36, at 228-33.

38. *See* Porter, *supra* note 35; London, *supra* note 36, at 227-28, 247.

39. *See* Porter, *supra* note 35; London, *supra* note 36, at 227-28, 247.

40. *See* Porter, *supra* note 35; London, *supra* note 36, at 227-28, 247.

41. *See* Porter, *supra* note 35.

42. *See* Porter, *supra* note 35; London, *supra* note 36, at 228, 230, 241, 248.

statements.[43] How well these laws work in practice once enacted has yet to be tested empirically, and to my knowledge only one study has tracked how legislators vote after being provided with impact statements.[44] Specifically, in Iowa, 23 percent of bills projected to increase disparities have become law compared to 40 percent of those that have been projected to reduce or have no impact on disparities.[45]

Although potentially effective at reducing racial and ethnic disparities in criminal legal outcomes, racial impact statement legislation is limited in a number of ways that the unwarranted disparity statement approach tries to address. First, within a state, there is variation across local jurisdictions in criminal legal disparities across race/ethnic groups because criminal legal actors in different jurisdictions apply laws in different ways.[46] Because these racial impact statements focus on state legislation, they capture how a specific bill is likely to impact racial/ethnic disparities in the aggregate.[47] However, given that laws are implemented differently across jurisdictions, a proposed law may lead to a reduction in disparities in one jurisdiction but not in another.[48] Therefore, this type of legislation has the potential to reduce racial and ethnic disparities in the aggregate, while increasing differences in racial and ethnic disparities between counties within a state.[49] Second, although making predictions

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43. *See* Porter, *supra* note 35.
44. *See* Ryan J. Foley, *Racial-Impact Law Has Modest Effect in Iowa*, Des Moines Register (Jan. 21, 2015, 7:47 PM), https://www.desmoinesregister.com/story/news/politics/2015/01/21/racial-impact-law-effect-iowa-legislature/22138465/ [https://perma.cc/V5L7-HWRW].
45. *See id.* It is important to note that this investigation provides suggestive evidence that the legislation may be working, but it is not conclusive because we do not know the extent to which legislators were voting in favor of legislation that was likely to exacerbate/reduce disparities prior to the passage of racial impact statement legislation. Moreover, we also do not know whether racial impact legislation changed the type of legislation that was proposed (for instance legislators may be less inclined to propose legislation that would exacerbate disparities if they know that a racial impact statement is going to be produced). Ideally, to assess the efficacy of this legislation, statistical tools, like difference in difference, would be employed to see whether racial disparities changed in racial impact states after racial impact statement legislation was implemented to a greater extent than in states that did not pass racial impact legislation. For more information on the difference in difference methodology, see Coady Wing et al., *Designing Difference in Difference Studies: Best Practices for Public Health Policy Research*, 39 Ann. Rev. Pub. Health 453 (2018).
46. For a review of literature documenting how racial disparities in sentencing vary across social contexts, *see* Jeffery T. Ulmer, *Recent Developments and New Directions in Sentencing Research*, 29 Just. Q. 1, 13-16 (2012). For data that documents county differences in racial disparities in incarceration within states, *see* Jacob Kang-Brown, *Incarceration Trends*, Vera Inst. Just., https://www.vera.org/projects/incarceration-trends [https://perma.cc/3AVL-MEEH] (last visited Feb. 11, 2022).
47. London, *supra* note 36, at 227-28, 231-33.
48. Ulmer, *supra* note 46, at 13-14.
49. *Id.* at 30.

about how legislation will impact disparities may help close racial disparities, it is very difficult to predict how courtroom actors will respond to changes in law, which makes it very difficult to make accurate predictions about the impact of laws. For instance, eliminating monetary bail may reduce racial disparities in pretrial detention because Black individuals are less likely than White individuals to be able to afford bail amounts.[50] However, it will not reduce disparities significantly if judges respond to the legislation by disproportionately remanding Black individuals because they view them as more likely to miss court or to commit another offense.[51] Therefore, in this instance, it would be very difficult to predict the impact of eliminating monetary bail on racial and ethnic disparities. Third, as described earlier, the race and ethnicity of the defendant is a very important source of disparity in the criminal legal system,[52] but there are many other sources of disparity, such as whether a defendant is detained pretrial,[53] the type of attorney obtained by the defendant,[54] and the gender of the defendant.[55] Racial impact statement legislation does not tackle these other problematic unwarranted disparities.[56]

### B. *Racial Impact Studies in Prosecutor Offices*

A second data-driven approach, proposed by Angela J. Davis, is for chief prosecutors to implement racial impact studies to determine the extent of unwarranted racially disparate treatment that is occurring in their office.[57] These studies would use data and quantitative social science re-

50. Cynthia E. Jones, *Give Us Free: Addressing Racial Disparities in Bail Determinations*, 16 Legis. & Pub. Pol'y 919, 938–941 (2013); *see* Meghan Sacks et al., *Sentenced to Pretrial Detention: A Study of Bail Decisions and Outcomes*, 40 Am. J. Crim. Just. 661, 665–666, 675–678 (2015).

51. The focal concerns perspective argues that courtroom actors do not make decisions based solely on the facts of cases. Instead, they also consider three additional factors: the blameworthiness of the defendant, the implications of any action for the safety of the community, and practical constraints. The focal concerns perspective has often been used to explain sentencing disparities, with scholars arguing that groups who receive more punitive outcomes tend to be viewed by courtroom actors as either more blameworthy or as a greater threat to the community because of biases held by key actors. In this context, because of bias, judges may view Black defendants as more blameworthy or as a greater safety risk to the community. Thus, when bail is no longer an option, instead of disproportionately assigning unreasonable bail, judges are likely to disproportionately remand Black defendants. Gottlieb & Arnold, *supra* note 20, at 571; Ulmer, *supra* note 46, at 10–11;; Cf. Darrell J. Steffensmeier, *Assessing the Impact of the Women's Movement on Sex-Based Differences in the Handling of Adult Criminal Defendants*, 26 CRIME & DEL. 344, 349 (1980).

52. *See* Nellis, *supra* note 4.

53. *See* Dobbie et al., *supra* note 14; *see* Spohn, *supra* note 14.

54. *See* Agan, *supra* note 15, at 308–309; Anderson & Heaton, *supra* note 15, at 212–214; Cohen, *supra* note 15, at 54–55.

55. *See supra* note 16.

56. *See generally supra* note 36.

57. *See* Angela J. Davis, *Prosecution and Race: The Power and Privilege of Discretion*, 67 Fordham L. Rev. 13 (1998); Angela J. Davis, *Racial Fairness in the Criminal*

search methods, primarily multivariate regression, to account for factors that could potentially explain the existence of disparities in an effort to isolate disparities that exist purely due to racially disparate treatment.[58] Specifically, Davis proposes collecting data on defendant and victim race and ethnicity for each type of offense and at each stage of the prosecutorial process.[59] Then, statistical analyses would be conducted to determine whether there were racial differences in case outcomes among similarly situated defendants[60] and whether case outcomes depended on the race and ethnicity of the victim.[61] These analyses would be conducted at each stage of the process, documenting disparities in the initial charging decision, plea offers made, and sentences advocated for.[62] Importantly, this approach is focused on the impact of an office's actions and aims to alert prosecutors to disparities that they should then try to remedy moving forward.[63]

In addition to conducting racial impact studies, Davis proposes that these studies be published so the public is aware of the findings.[64] If the findings of these studies were not made available to the public, Davis argues that when chief prosecutors do not genuinely care about racial or ethnic disparities, they would be unlikely to take actions to remedy the disparities revealed by the studies.[65] By making these studies public, Davis asserts that prosecutors will be more likely to attempt to remedy disparities out of concern that the public will hold them electorally accountable if they fail to do so.[66]

In practice, the Vera Institute of Justice's Prosecution and Racial Justice Program (PRJ) has implemented racial impact studies in a number of jurisdictions, including in Mecklenburg County, North Carolina, Milwaukee County, Wisconsin, and New York County, New York.[67] In each jurisdiction, racial/ethnic disparities were observed in at least one

*Justice System: The Role of the Prosecutor*, 39 Colum. Hum. Rts. L. Rev. 202 (2007).

58. Davis, *Prosecution and Race, supra* note 57, at 19; Davis, *Racial Fairness in the Criminal Justice System, supra* note 57, at 219–220.
59. *See supra* note 58.
60. Similarly situated defendants are defendants who committed the same offense and had similar criminal histories. Davis, *Prosecution and Race, supra* note 57, at n. 217.
61. *Id.* at 54–55; Davis, *Racial Fairness in the Criminal Justice System, supra* note 57, at 219–220.
62. *See supra* note 61.
63. Davis, *Prosecution and Race, supra* note 57, at 25–26; Davis, *Racial Fairness in the Criminal Justice System, supra* note 57, at 219–220.
64. *See supra* note 57.
65. Davis, *Prosecution and Race, supra* note 57, at 18–19; Davis, *Racial Fairness in the Criminal Justice System: The Role of the Prosecutor*, *supra* note 57 at 225.
66. Davis, *Prosecution and Race, supra* note 57, at 18–19; Davis, *Racial Fairness in the Criminal Justice System: The Role of the Prosecutor*, *supra* note 57 at 222.
67. *See* Angela J. Davis, *In Search of Racial Justice: The Role of the Prosecutor*, 16 N.Y.U. J. Legis. & Pub. Pol'y 821, 838–44 (2013); Vera Inst. of Just., A Prosecutor's Guide for Advancing Racial Equity 14 –17 (2014).

stage of the prosecutorial process, prosecutor offices made changes to policies and/or organizational structure in an effort to address concerns raised by the studies, and the study findings were shared publicly.[68]

Although findings from these jurisdictions are promising, there are a number of limitations to this approach that the unwarranted disparity statement approach seeks to address. First, conducting racial impact studies in a prosecutor's office does not address nonracial sources of postarrest disparities, such as disparities by pretrial detention status,[69] type of attorney,[70] and gender.[71] Second, as Davis herself acknowledges, there is no mechanism compelling prosecutors to share the results of these impact studies.[72] This is a critical limitation because prosecutors are not the only actors in the criminal legal system. Even if racial impact studies result in chief prosecutors taking action to reduce disparities on their own, other courtroom actors, such as judges, juries, and defense attorneys, would benefit from the results being shared.[73] Yet, the chief prosecutor has complete discretion in deciding whether to provide these other stakeholders with the results of the studies.[74] Third, although Davis's approach has the potential to lead to substantial reforms within prosecutor offices that will affect future defendants, the approach does not provide a clear way towards relief for Black and Latinx defendants who are currently being charged with a crime. For example, the approach does not require information about disparities to be turned over to the defense or introduced as evidence for the judge and jury to consider.[75]

### C. *Social Adversity Defense*

A third data-driven approach to address disparities, proposed initially by David Bazelon, is for defense attorneys to be permitted to present a social adversity defense.[76] The general premise behind the social adversity defense is that people who have more difficult lives and face social disadvantage are less culpable or are not responsible for criminal

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68. *See supra* note 67.
69. Dobbie et. al., *supra* note 14, at 236–238*;* Spohn, *supra* note 14, at 899–900.
70. *See supra* note 54.
71. *See supra* note 16.
72. Angela J. Davis, *Prosecution and Race: The Power and Privilege of Discretion*, *supra* note 57, at 20-21; Angela J. Davis, *Racial Fairness in the Criminal Justice System: The Role of the Prosecutor*, *supra* note 57, at 227.
73. Angela J. Davis, *Prosecution and Race: The Power and Privilege of Discretion*, *supra* note 57, at 18-19; Angela J. Davis, *Racial Fairness in the Criminal Justice System: The Role of the Prosecutor*, *supra* note 57, at 220-21.
74. Davis, *Prosecution and Race, supra* note 57, at 56; Davis, *Racial Fairness in the Criminal Justice System: The Role of the Prosecutor*, *supra* note 57 at 223.
75. While making the findings public may alleviate this concern somewhat, there is no guarantee that key actors will be thinking about these disparities if they are not reminded of them in each specific relevant case. Moreover, these actors may not remember correctly when these disparities are most present, such as when racial disparities may be greater for certain types of offenses than others.
76. *See* David L. Bazelon, *The Morality of the Criminal Law*, 49 S. Cal. L. Rev. 385 (1975–1976).

offenses that they commit.[77] As such, proponents of this defense argue that if the standard of social adversity is met, judges and juries should have the ability to determine that the defendant is not responsible for the offense committed, or is guilty of a reduced charged, or that social adversity is a mitigating factor at sentencing.[78]

In support of this defense, proponents often rely on data and social science research to document that social adversity is associated with criminal behavior and that these associations are driven by the social environment, not by any sort of morally bankrupt decisionmaking.[79] For instance, Michael Tonry highlighted the developmental trajectory and age crime curve literature to argue that life-course-persistent offenders who begin criminally offending at very young ages clearly did not make a choice to become involved in crime.[80] Others, like Richard Delgado, use research documenting correlations between criminal behavior and single-parent households, neighborhood social disorganization, and school quality as evidence to support their argument.[81] Although proponents of the social adversity defense do not typically rely on a specific quantitative metric of social adversity,[82] James Garbarino makes the case that adverse childhood experiences (ACEs) survey questions could be employed. Individuals who answer "yes" to a high number of ACEs questions (Garbarino recommends at least 8 out of the 10 ACEs questions) would be treated as having experienced significant social adversity.[83]

There are several limitations to the social adversity defense approach. First, it has not been applied in practice because of constitutional concerns.[84] Indeed, in *United States v. Alexander* the court ruled that, unlike with an insanity defense, a defendant's social adversity does not eliminate responsibility and accountability[85] and that it cannot be considered as a justification for an acquittal or less serious charge.[86] Second, the social adversity defense requires defense counsel to raise it.[87] In cases where social adversity is not raised by defense counsel,[88] it cannot have

77. *Id. Also see* Richard Delgado, *Rotten Social Background: Should the Criminal Law Recognize a Defense of Severe Environmental Deprivation*, 3 Law & Ineq. 9, 22–23 (1985); Michael Tonry, Doing Justice, Preventing Crime 73–94 (2020).
78. Delgado, *supra* note 77, at 75–79; Tonry, *supra* note 77.
79. *See* Richard Delgado, *The Wretched of the Earth,* 2 Ala. C.R. & C.L. L. Rev. 1, 4 (2011); Tonry, *supra* note 77.
80. *See* Tonry, *supra* note 77.
81. *See* Delgado, *supra* note 79, at 16.
82. *See supra* note 77.
83. *See* James Garbarino, *ACEs in the Criminal Justice System*, 17 Ac. Ped. S32 (2017).
84. *See* Tonry, *supra* note 77.
85. United States v. Alexander, 471 F.2d 923 (D.C. Cir. 1972); *See* Delgado, *supra* note 77, at 20.
86. *Id.* at 21.
87. *See* Tonry, *supra* note 77.
88. For instance, when defense counsel has limited resources, they may not be fully aware of the extent of adversity a defendant experienced because of limited time or lack of support staff (e.g., social worker or investigator).

any impact on the decisions of other actors. Third, there is no consensus yet as to how social adversity should be defined;[89] moreover, some sources of disparities might not be captured in whatever definition is used. For instance, consider a situation in which two people are charged with the same offense, have similar criminal histories, and have a similar ACEs score, but one is person is detained pretrial and the other is not. The social adversity defense would treat these two individuals the same,[90] even though research has consistently shown that there are significant unwarranted disparities in case outcomes based on whether someone is or is not detained pretrial.[91]

## III. The Unwarranted Disparity Statement Approach

### A. *The Basic Framework*

The purpose of the unwarranted disparity statement approach is to help jurisdictions reduce unwarranted postarrest disparities[92] by making these disparities transparent to court actors. Specifically, I propose that courts[93] should use data and social science methods to estimate the extent to which defendants with specific characteristics are likely to experience unwarranted disadvantages in postarrest case outcomes in their jurisdiction.[94] Then, for each specific case in which an unwarranted disadvantage

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89. *See supra* note 77; *see also* Garbarino, *supra* note 83.
90. *See supra* note 89.
91. Dobbie et al., *supra* note 14, at 236–238; Spohn, *supra* note 14, at 899–900.
92. Specifically, I focus in this Article on conviction, being sentenced to incarceration, and incarceration sentence length. However, this approach could also certainly be used for pretrial detention as well.
93. This differs from Angela J. Davis' racial impact study proposal, which argues that prosecutor offices should both collect the data and conduct racial impact statement studies. *See supra* note 57. Instead, I focus on courts for several reasons. First, as Andrew Manuel Crespo points out, courts already collect a ton of data, and this data is very underutilized. *See supra* note 33. As a result, much of the information that is required to produce unwarranted disparity statements is already collected by courts, which would help with efficiency in implementation. Second, as Davis herself points outs, because prosecutors are engaged in an adversarial process against the defense, they may be hesitant to share information from unwarranted disparity studies that do not help them make their case. *See supra* note 57. The court, on the other hand, does not have an adversary and, therefore, may be more likely to support producing and sharing unwarranted disparity statements.
94. I recommend that jurisdictions that adopt this approach use data only from their jurisdiction for both practical and substantive reasons. Practically, it will be much easier to collect, share, and analyze data in one jurisdiction than across multiple jurisdictions. Substantively, analysis from one county is preferred because contextual factors influence case outcomes. For instance, counties that relied more heavily on slavery in 1860 still punish more punitively today. *See* Aaron Gottlieb & Kalen Flynn, *The Legacy of Slavery and Mass Incarceration: Evidence from Felony Case Outcomes*, 95 Soc. Serv. Rev. 3 (2021). In addition to influencing case outcomes overall, contextual factors, such as court community racial/ethnic composition and racial/ethnic composition of the geographic area,

is predicted to occur, the court would produce an unwarranted disparity statement that would be provided to the prosecutor, defense attorney, judge, and jury, and include information on unwarranted disparities in conviction, incarceration sentence, and sentence length. Regardless of the conclusions reached in the unwarranted disparity statement, court actors would retain discretion and be able to consider it along with other evidence,[95] as they make key decisions throughout the case.

### B. *The Content of Unwarranted Disparity Statements*

Unwarranted disparity statements would include information about the unwarranted disadvantage that a defendant is likely to experience in terms of conviction, whether they are sentenced to incarceration, and sentence length. With respect to the conviction stage, the statement would include the following: (1) the likelihood that this specific defendant would be convicted given the offense they are charged with[96] and

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are associated with racial disparities in case outcomes. *See* Ulmer, *supra* note 46.

95. For a number of reasons, the proposal allows court actors to retain discretion and to use unwarranted disparity statements as one piece of information, rather than requiring them to take a specific action, for example, requiring a judge to reduce the length of a sentence by the percent that a defendant is predicted to be disadvantaged. First, mandating specific actions might lead to the same types of constitutional concerns that the social adversity defense has faced. *See* Delgado, *supra* note 7777. Second, the proposed approach uses statistical analyses to create estimates that are probabilistic. Mandating specific action would ignore the probabilistic element that underpins the approach, suggesting that the estimates are 100 percent accurate (rather than best estimates given the data that has been collected). Third, other reforms that have taken away discretion (in the name of fairness), such as mandatory minimum sentencing, have had the perverse impact of exacerbating disparities. *See* Traci Schlesinger, *The Failure of Race Neutral Policies: How Mandatory Terms and Sentencing Enhancements Contribute to Mass Racialized Incarceration*, 57 Crime & Del. 56 (2011).

96. Type of crime is consistently viewed as a warranted source of disparity, so the unwarranted disparity statement does not aim to reduce this disparity. Instead, the unwarranted disparity statement seeks to determine the extent of disparity net of the type of crime. *See* Davis, *The Role of the Prosecutor, supra* note 57, at 219. Whether criminal history is a warranted or unwarranted source of disparity is more controversial. For instance, Davis' racial impact studies in prosecutor offices approach treats criminal history as a warranted source of disparity. *See* Davis, *Prosecution and Race, supra* note 57, at 19. Moreover, in all U.S. jurisdictions with sentencing guidelines, criminal history is a major sentencing factor. *See* Richard S. Frase, Julian R. Roberts, Rhys Hester, and Kelly Lyn Mitchell, *Criminal History Enhancements Sourcebook* (2015). However, there is growing sentiment that criminal history produces racially disparate outcomes in an unwarranted way: Black and Latinx individuals are disproportionately likely to have a criminal history because of bias and this criminal history then ratchets up future sentencing outcomes. *See* id. Given the controversy around this issue, I leave the decision on whether to treat criminal history as warranted or unwarranted up to individual jurisdictions. However, for the purpose of the empirical illustration in this paper, I conduct analyses based on the assumption that criminal history is warranted, given that this is how it is viewed in U.S. jurisdictions currently. *See* id. Notably, in so doing, I produce conservative

defendant and case characteristics that could lead to unwarranted disparities,[97] (2) the likelihood that a defendant who committed the same crime as the current defendant but who has average values on unwarranted disparity characteristics[98] would be convicted, and (3) the percentage point and percent difference in the likelihood of conviction between the current defendant and a defendant with average values on unwarranted disparity characteristics.

With respect to the sentencing stage, the following would be included in the unwarranted disparity statement: (1) the likelihood that this specific defendant would be sentenced to incarceration, if convicted, given the offense they are charged with [99] and their values on unwarranted disparity characteristics, (2) the likelihood that a convicted defendant who was charged with the same crime as the current defendant but who has average values on unwarranted disparity characteristics would be sentenced to incarceration, and (3) the percentage point and percent difference in the likelihood of being sentenced to incarceration, if convicted, between the current defendant and a defendant with average values on unwarranted disparity characteristics.

With respect to incarceration sentence length, the unwarranted disparity statement would include the following: (1) the predicted sentence length expected for this specific defendant, if sentenced to incarceration, given the offense they are charged with[100] and their values on unwarranted disparity characteristics, (2) the predicted sentence length for a defendant, if sentenced to incarceration, who was charged with the same crime as the current defendant but who has average values on unwarranted disparity characteristics, and (3) the absolute difference and the percent difference in predicted sentence length, if sentenced to incarceration, between the current defendant and a defendant with average values on unwarranted disparity characteristics.

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estimates of the potential impact of the unwarranted disparity statement approach. If criminal history is viewed as an unwarranted source of disparity, unwarranted disparity statements would likely document larger unwarranted disparities.

97. Characteristics that could lead to unwarranted disparities should at the very least include defendant demographics, such as race, gender, and age; whether the defendant was detained pretrial; and type of defense counsel. Ideally, they would include a wider range of characteristics such as defendant ACEs and victim characteristics. For brevity, I will refer to these as unwarranted disparity characteristics moving forward.

98. Average refers to the average values on unwarranted disparity characteristics among people charged with the same offense, not to the average values on unwarranted disparity characteristics for all defendants in the jurisdiction.

99. *See supra* note 96.

100. *See supra* note 96.

## IV. An Empirical Illustration of the Unwarranted Disparity Statement Approach

### A. *Data*

To illustrate how a jurisdiction can produce the information needed for the unwarranted disparity statement, I draw upon data from the 2009 State Court Processing Statistics (SCPS) survey, the most recent SCPS wave of data that was collected.[101] The SCPS employs a two-stage stratified sampling approach.[102] In the first stage, 40 out of the most populous 75 counties were selected for survey inclusion.[103] In the second stage, 39 of the 40 chosen counties provided a list of all defendants charged with felonies on randomly selected days in May, whose cases were then followed until completion or May 31st the following year.[104] In sum, the 2009 SCPS consisted of 16,694 felony defendants from 39 large urban counties.[105]

From those 16,694 defendants, I restricted the sample to defendants whose most serious charge was a felony drug offense, who had no prior convictions, and who did not have an active criminal justice status at the time of the current charge.[106] I made these sample restrictions to account for differences in the nature of the criminal offense and criminal history, both of which are factors that may lead to disparities that are not

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101. *See* Reaves, *supra* note 32.
102. *See* Reaves, *supra* note 32, at 33; Thomas H. Cohen & Tracey Kyckelhahn, *Felony Defendants in Large Urban Counties, 2006*, U.S. Dep't of Just. 3 (May 2010), https://bjs.ojp.gov/content/pub/pdf/fdluc06.pdf [https://perma.cc/8FZN-TG4D].
103. *See* Reaves, *supra* note 32.
104. Clark County, Nevada was selected for inclusion in the study but did not provide the requisite data and was therefore dropped. For additional details about the data and sampling, *see* Reaves, *supra* note 32, at 33.
105. In practice, I recommend that jurisdictions who adopt the unwarranted disparity statement approach use data only from their jurisdiction for both practical and substantive reasons. *See supra* note 94. However, for the purpose of this illustration it was not possible to only use data from one county. Because cases were only included in the data if charges were brought on a few days in May, restricting to one county would lead to far too small a sample size of cases for this empirical illustration to be useful. It is important to note that using this data from multiple counties does not change the mechanics of the approach, thus this data is still quite useful for the purposes of showing how the approach works. Jurisdictions that implement this approach should collect data over a longer time horizon, such as a year, so that they will have a large enough sample size of cases to produce useful estimates that are unique to their jurisdiction.
106. For the purpose of this illustration, I focus on this combination of offense type and criminal history. *See supra* note 96 (discussing why I included criminal history as a warranted source of disparity in this illustration, as well as why I recommend that each jurisdiction should make their own determination about whether criminal history is a warranted or unwarranted source of disparity). However, jurisdictions that adopt this approach should conduct analyses separately for all other combinations of offense type and criminal history (if they choose to view criminal history as a warranted source of disparity) as well, since disparities may be more severe for some crime types and criminal histories than others.

unwarranted.[107] After the restrictions, the sample was reduced to 1,809 defendants who fit the criteria. To further preserve sample size, I used multiple imputation to fill in missing values on covariates;[108] however, analyses using listwise deletion[109] did not alter conclusions. The final analytic samples were 1,781 defendants for analyses focused on conviction, 718 for analyses focused on incarceration among those who were convicted, and 402 for analyses focused on sentenced length among defendants sentenced to incarceration.

## B. *Measures*

The outcome variables in this empirical illustration are conviction, incarceration sentence among those convicted, and length of sentence among those sentenced to incarceration. Both convictions and incarceration sentence are measured dichotomously (0 =no and 1=yes), while sentence length is measured continuously in months. The independent variables are the sources of unwarranted disparities mentioned in the introduction: pretrial detention (measured 0=no and 1=yes), type of attorney (measured categorically as public defender, private attorney, assigned attorney, pro se, and other), race (measured categorically as White, Black, Latinx, and Other), and gender (0=male and 1=female). Additionally, I include age (measured continuously). On average, age has not been found to be associated with case outcomes.[110] However, there is variation across studies; some studies show that older individuals are subject to harsher case outcomes, while other studies show that more punitive outcomes are experienced by younger individuals.[111]

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107. For more discussion on why I account for these potentially warranted sources of disparity, *see supra* note 96. Additionally, ideally, I would make the distinction around offense charge more specific and differentiate between different types of drug charges. However, it was necessary to focus on all drug charges for this empirical illustration to preserve sample size. If jurisdictions enact this approach, they should use data over a longer time horizon so that they can be more precise in how they differentiate between charges without reducing sample size too significantly.
108. Because jurisdictions implementing this approach would be collecting data on key covariates through the court system and have clarity ahead of time on what characteristics they aim to capture, jurisdictions should be able to, in practice, have minimal amounts of missing data.
109. For a discussion of the differences between multiple imputation and listwise deletion, *see* Paul D. Allison, *Missing Data* (2001).
110. For a meta-analysis of the association between age and sentence length, see Jawjeong Wu & Cassia Spohn, *Does an Offender's Age Have an Effect on Sentence Length? A Meta-Analytic Review*, 20 CRIM. J. POL'Y REV. 379, 379-99 (2009).
111. For more information about variation in the association between age and sentence length, *see id.* Additionally, I recommend that jurisdictions adopting the unwarranted disparity approach collect a wider array of information to include in the statistical analysis than is done here (e.g., employment status, income, marital status, ACEs, victim characteristics, etc.). However, the SCPS data did not capture information on those additional controls, so those and other measures were unable to be included in this illustration. The inclusion of more measures does not change the overall approach. However, by capturing

### C. *Analytic Strategy*

This approach relies on the following steps. First, for each outcome of interest, a multivariate regression model is conducted. Logistic regression is employed for conviction and incarceration sentence because those outcomes are measured dichotomously.[112] Negative binomial regression is used for sentence length because that outcome is overdispersed.[113] Second, using Stata's margins command,[114] I plug in values for each unwarranted disparity characteristic in the statistical model for each outcome separately under two scenarios: (1) A thirty-year-old Black man who is detained pretrial and is represented by assigned counsel, which is the hypothetical defendant whose penalty I am trying to assess,[115] and (2) a similarly situated defendant[116] with average values on each of the unwarranted disparity characteristics in the model, which is the basis of comparison for the hypothetical defendant. I then compute predictions for each of the scenarios for each outcome based on the coefficients associated with each variable from the multivariate regression models.[117] In the case of the conviction and incarceration sentence outcome, I compute the predicted probability that the hypothetical defendant and the similarly situated defendant with average unwarranted disparity characteristics

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more characteristics, the court will be able to more accurately determine the extent to which a defendant is likely to experience an unwarranted disadvantage in the postarrest case outcome process.

112. For more background on logistic regression, *see generally* J. Scott Long & Jeremy Freese, *Regression Models for Categorical Dependent Variables Using Stata* (2001).

113. A variable is overdispersed when its variance exceeds its mean. Negative binomial regression models are often used when an outcome variable is overdispersed. *See* Aaron Gottlieb & Naomi F. Sugie, *Marriage, Cohabitation, and Crime: Differentiating Associations by Partnership Stage*, 36 Just. Quart. 503, 513 (2019); D. Wayne Osgood, *Poisson-Based Regression Analysis of Aggregate Crime Rates*, 16 J. Quant. Crim. 21, 28-29 (2000).

114. For more information on Stata's margins command, *see* Richard Williams, *Using the Margins Command to Estimate and Interpret Adjusted Predictions and Marginal Effects*, 12 Stata J. 308 (2012).

115. For this empirical illustration, I chose categories that research has shown to be associated with disadvantage at sentencing, so that the contrast between the hypothetical defendant and the similarly situated defendant with average unwarranted disparity characteristics would be clear. For type of counsel (see *supra* note 15), race (see Nellis, *supra* note 4), gender (see *supra* note 16), and pretrial detention status (see *supra* note 14) this was straightforward. For age, since a meta-analysis found no average association (see Wu & Spohn, *supra* note 129), this was a bit more difficult. I ended up choosing age thirty because the largest share of people incarcerated in state prisons (roughly one-third) are between the ages of twenty-five and thirty-four, with thirty being roughly the midpoint of that range. For information on the age distribution of the prison population, *see* E. Ann Carson, *Aging of the State Prison Population, 1993–2013*, Bureau of Justice Statistics (May 2016), https://bjs.ojp.gov/content/pub/pdf/aspp9313.pdf.

116. As described earlier, similarly situated defendants are those who are charged with the same type of crime and who have similar criminal histories. See *supra* note 60.

117. *See* Williams, *supra* note 114.

experience the outcome of interest.[118] For the sentence length outcome, I compute the predicted sentence length experienced by the hypothetical defendant and the similarly situated defendant with average unwarranted disparity characteristics.[119] Third, based on the predictions from the previous step, I create two measures to document the extent of the penalty that the hypothesized defendant experiences: (1) Percentage Point Difference = Predicted Value For Hypothetical Defendant - Predicted Value For Similarly Situated Defendant With Average Unwarranted Disparity Characteristics and (2) Percent Difference = Percentage Point Difference / Predicted Value For Similarly Situated Defendant With Average Unwarranted Disparity Characteristics.

## D. *Findings*

I begin by presenting results showing how the unwarranted disparity statement approach could be used to highlight disparities in risk of conviction among people charged with a felony drug offense who have no prior convictions and no active criminal justice status. In Table 1, I present logistic regression coefficients for a statistical model examining the predictors of conviction.

**Table 1: Logistic Regression Estimates of Association between Defendant Characteristics and Risk of Drug Offense Conviction among Defendants with No Prior Convictions and No Active Criminal Justice Status (N=1,781)**

| | *Coefficient* | *Robust Standard Error* |
|---|---|---|
| *Pretrial Detention* | 0.827 | 0.298** |
| *Age* | -0.005 | 0.006 |
| *Race (White=ref)* | | |
| Black | -0.085 | 0.182 |
| Latinx | -0.048 | 0.231 |
| Other | -0.038 | 0.410 |
| *Woman* | -0.370 | 0.150* |
| *Type of Attorney (Public Defender=Ref)* | | |
| Private | 0.371 | 0.218 |
| Assigned | 1.029 | 0.321** |
| Pro Se | 1.442 | 1.112 |
| Other | -5.979 | 4.104 |

Note: **p<0.01, *p<0.05. Robust standard errors are clustered by county.

118. *See id.*
119. For a similar approach (but with poverty rate as the outcome instead of sentence length), see Aaron Gottlieb, *Incarceration and Relative Poverty in Cross-National Perspective: The Moderating Roles of Female Employment and the Welfare State*, 91 Soc. Serv. Rev. 293 (2017).

These regression coefficients are then used to create the predicted probabilities that are shown in Table 2 and that form the basis of determining the conviction penalty experienced by the hypothetical defendant. The results suggest that a thirty-year-old Black man that does not have a criminal history, is charged with a felony drug offense, detained pretrial, and represented by assigned counsel is predicted to be convicted approximately 88 percent of the time. By way of comparison, the results indicate that a similarly situated defendant with average values on each unwarranted disparity characteristic is predicted to be convicted approximately 64 percent of the time. Using these two data points, I create two measures that document the conviction penalty faced by the hypothetical defendant. The first measure is simply the percentage point difference in risk of conviction between him and the similarly situated defendant with average unwarranted disparity characteristics. Using this measure, the penalty is 23.44 percentage points, meaning that the thirty-year-old Black man that does not have a criminal history, is charged with a felony drug offense, represented by assigned counsel, and detained pretrial is 23.44 percentage points more likely to be convicted than a similarly situated defendant with average unwarranted disparity characteristics. The second measure is the percent increase in the predicted probability of conviction. Using this measure, the penalty is 36.57 percent, meaning that a thirty-year-old Black man that does not have a criminal history, is charged with a felony drug offense, detained pretrial and represented by assigned counsel has a predicted probability of conviction that is 36.57 percent higher than a similarly situated defendant with average unwarranted disparity characteristics.

**Table 2: Predicted Probabilities of Drug Offense Conviction among Defendants with No Prior Convictions and No Active Criminal Justice Status**

| | *Predicted Probability* |
|---|---|
| Thirty-Year-Old Black Man Detained Pretrial with Assigned Counsel | 87.548 |
| Defendant with Average Unwarranted Disparity Characteristics | 64.104 |
| Percentage Point Difference | 23.444 |
| Percent Difference | 36.572 |

Note: Predicted Probabilities are based on Logistic Regression Estimates From Table 1. Percentage Point Difference=87.548–64.104. Percent Difference=23.444/64.104

After documenting the conviction penalty, I present results showing how the proposed approach can be used to calculate an incarceration penalty. In Table 3, I present logistic regression coefficients for a statistical model examining the predictors of being sentenced to incarceration.

**Table 3: Logistic Regression Estimates of Association between Defendant Characteristics and Risk of Incarceration for Defendants Convicted of a Drug Offense with No Prior Convictions and No Active Criminal Justice Status (N=718)**

| | *Coefficient* | *Robust Standard Error* |
|---|---|---|
| *Pretrial Detention* | 1.019 | 0.350** |
| *Age* | 0.010 | 0.008 |
| *Race (White=ref)* | | |
| Black | 0.513 | 0.235* |
| Latinx | -0.183 | 0.414 |
| Other | 0.089 | 0.671 |
| *Woman* | -0.512 | 0.175** |
| | | |
| *Type of Attorney (Public Defender=Ref)* | | |
| Private | 0.166 | 0.253 |
| Assigned | 0.263 | 0.333 |
| Pro Se | -1.110 | 1.332 |
| Other | 5.672 | 10.812 |

Note: **p<0.01, *p<0.05. Robust standard errors are clustered by county.

I then use these regression coefficients to create the predicted probabilities that are shown in Table 4 and that form the basis of determining the incarceration penalty experienced by the hypothetical defendant. The results suggest that a thirty-year-old Black man who has no prior criminal history, is charged with a felony drug offense and convicted,[120] detained pretrial, and represented by assigned counsel is predicted to be sentenced to incarceration approximately 83 percent of the time. A similarly situated convicted defendant with average unwarranted disparity characteristics, by comparison, is predicted to be sentenced to incarceration approximately 58 percent of the time. Drawing on these two data points, I create the same two measures to document the incarceration penalty as I did for the conviction penalty above. Using the first measure, the penalty is 25.41 percentage points, meaning that the thirty-year-old Black man that has no criminal history, is charged with a felony drug offense and convicted, detained pretrial, and represented by assigned counsel is 25.41 percentage points more likely to be sentenced to incarceration than a similarly situated convicted defendant with average unwarranted disparity characteristics. When the second measure is used, the incarceration penalty is 44.18 percent, meaning

120. The language "charged with a felony drug offense and convicted" is a bit awkward, but I use it for precision. It is possible that an individual charged with a felony drug offense ends up being convicted of a more minor charge, such as a misdemeanor.

that a thirty-year-old Black man that has no criminal history, is charged with a felony drug offense and convicted, detained pretrial, and represented by assigned counsel has a predicted probability of being sentenced to incarceration that is 44.18 percent higher than a similarly situated convicted defendant who has average unwarranted disparity characteristics.

**Table 4: Predicted Probabilities of Incarceration Sentence among Defendants Convicted of Drug Offense with No Prior Convictions and No Active Criminal Justice Status**

| | *Predicted Probability* |
|---|---|
| Thirty-Year-Old Black Man Detained Pretrial with Assigned Counsel | 82.915 |
| Defendant with Average Unwarranted Disparity Characteristics | 57.507 |
| Percentage Point Difference | 25.408 |
| Percent Difference | 44.183 |

Note: Predicted Probabilities are based on Logistic Regression Estimates From Table 3. Percentage Point Difference=82.915–57.507. Percent Difference=25.408/57.507

Last, I illustrate how the unwarranted disparity statement approach can be employed to calculate a sentence length penalty. In Table 5, I present negative binomial regression coefficients for a statistical model examining the predictors of incarceration sentence length.

**Table 5: Negative Binomial Regression Estimates of Association between Defendant Characteristics and Incarceration Sentence Length for Drug Offense Defendants Sentenced to Incarceration with No Prior Convictions and No Active Criminal Justice Status (N=402)**

| | *Coefficient* | *Robust Standard Error* |
|---|---|---|
| *Pretrial Detention* | 0.769 | 0.258** |
| *Age* | 0.007 | 0.010 |
| *Race (White=ref)* | | |
| Black | 0.061 | 0.272 |
| Latinx | -0.161 | 0.299 |
| Other | 0.946 | 1.284 |
| *Woman* | -0.443 | 0.210* |
| *Type of Attorney (Public Defender=Ref)* | | |
| Private | 0.609 | 0.231** |
| Assigned | 0.169 | 0.281 |
| Pro Se | -2.189 | 0.651** |
| Other | -5.379 | 13.945 |

Note: **p<0.01, *p<0.05. Robust standard errors are clustered by county.

These regression coefficients are then used to create the predicted incarceration sentence lengths that are shown in Table 6 and that form the basis of determining the incarceration sentence length penalty experienced by the hypothetical defendant. The results suggest that a thirty-year-old Black man that does not have a criminal history, is charged with a felony drug offense and convicted, detained pretrial, represented by assigned counsel, and sentenced to incarceration is predicted to be sentenced to approximately 26 months. By comparison, a similarly situated defendant that is sentenced to incarceration is predicted to be sentenced to approximately 15 months. Using these two data points, I create the same two measures to document the sentence length penalty as I did for the conviction and incarceration penalties above. With the first measure, the sentence length penalty is 10.50 months, meaning that the thirty-year-old Black man that has no criminal history, is charged with a felony drug offense and convicted, detained pretrial, represented by assigned counsel, and sentenced to incarceration is sentenced to serve approximately 10.50 months longer than a similarly situated defendant with average unwarranted disparity characteristics that is sentenced to incarceration. When the second measure is employed, the sentence length penalty is 69 percent, meaning that a thirty-year-old Black man that has no criminal record, is charged with a felony drug offense and convicted, detained pretrial, represented by assigned counsel, and sentenced to incarceration is predicted to receive an incarceration sentence that is 69 percent longer than a similarly situated defendant that is sentenced to incarceration and has average unwarranted disparity characteristics.

**Table 6: Predicted Sentence Length among Drug Offense Defendants Sentenced to Incarceration with No Prior Convictions and No Active Criminal Justice Status**

| | *Predicted Sentence Length (Months)* |
|---|---|
| Thirty-Year-Old Black Man Detained Pretrial with Assigned Counsel | 25.713 |
| Defendant with Average Unwarranted Disparity Characteristics | 15.214 |
| Difference in Length | 10.498 |
| Percent Difference | 69.002 |

Note: Predicted Probabilities are based on Logistic Regression Estimates From Table 5. Difference in Length=25.713–15.214. Percent Difference=10.498/15.214.

## V. Strengths and Limitations of the Unwarranted Disparity Statement Approach

The proposed unwarranted disparity statement approach was inspired by the three data-driven approaches discussed earlier: racial impact statements for state legislation, racial impact studies in prosecutor offices, and the social adversity defense. Generally, the unwarranted

disparity statement approach builds on each of the three other approaches by capturing a wider range of disparities.[121] Notably, none of the other approaches capture unwarranted disparities that are driven by legal factors, such as whether a defendant was detained pretrial or the type of counsel obtained by a defendant.[122] As such, the unwarranted disparity statement approach increases transparency in the courtroom by unmasking the wide range of disparities that exist and making this information available to key courtroom actors.

In addition to this key feature that differentiates it from all the previously discussed approaches, the unwarranted disparities approach builds on each of the other approaches individually. With respect to racial impact statements for state legislation, the unwarranted disparities approach has the advantage of being focused locally, rather than ignoring the different contexts that exist across jurisdictions.[123] Moreover, the unwarranted disparity statement approach does not rely on the assumption that courtroom actors will respond to large structural changes in the criminal legal system by behaving in similar ways.[124] Instead, unwarranted disparity statements use data to document how the court has actually functioned and do not make any assumptions about how it will function.

Unlike the racial impact study in prosecutor offices approach, the unwarranted disparity statement approach relies on courts to collect data and produce the disparity statements.[125] This is an advantage because it is likely to increase efficiency[126] and transparency[127] in implementing the proposal. Additionally, the unwarranted disparity statement approach provides a clear mechanism through which current defendants can be relieved from harsher outcomes, such as by having courtroom actors

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121. *See* Porter, *supra* note 35; see also London, *supra* note 36, at 226-28; s*ee also* Davis, *supra* note 57, at 18-19; Davis, *supra* note 57, at 204, 219; *see also* Delgado, *supra* note 77, at 22-23.

122. *See* Dobbie, *supra* note 14, at 204; Spohn, *supra* note 14, at 880; Argan, *see also supra* note 15, at 301; Anderson, *supra* note 15; *see also* Reaves, *supra* note 32.

123. For why this is important, *see* Gottlieb, *supra* note 94; *see also* Ulmer, *supra* note 46, at 13-16.

124. By contrast, the racial impact statement approach operates under the assumption that when a structural change occurs, courtroom actors will not come up with new ways to let bias seep into decision-making. For instance, if monetary bail is eliminated, judges may respond to the legislation by disproportionately remanding Black individuals because they view them as more likely to miss court or to commit another offense. *See* Gottlieb*, supra* note 51, at 10-11; Steffenmeier, *supra*, note 51, at 349.

125. *See* Davis, *supra* note 57, at 18-19; Davis, *supra* note 57, at 204, 219.

126. Courts already collect much of the necessary data, so they may not need to create an entirely new data collection system. *See* Crespo, *supra* note 33, at 2052-53.

127. This approach only works if data documenting unwarranted disparities is shared with courtroom actors. Because prosecutors have an adversarial relationship with the defense, they have more of an incentive to avoid sharing information than the court. *See supra* note 93; Crespo, *supra* note 33, at 2052-53; Davis, *supra* note 57, at 204, 219.

consider the bias experienced by the defendant when they make key decisions. By contrast, the racial impact study in prosecutor offices approach views these studies as critical for improving future behavior and outcomes in the prosecutor's office but does not provide a clear mechanism for providing relief for the current defendant.[128]

The unwarranted disparity statement approach also has a few advantages that address limitations specific to the social adversity defense. First, the unwarranted disparity statement approach likely avoids the constitutional concerns that have made it so that the social adversity defense is not used in practice.[129] Perhaps most notably, it is my view that arguments that the unwarranted disparity statement will lead to marginalized groups receiving treatment that is too favorable are unlikely to hold up for the following reasons. Unlike the social adversity defense, the unwarranted disparity statement only highlights how individuals have been treated unfairly by the system and seeks to equalize treatment; it does not seek to favor marginalized individuals to make up for past harm.[130] Moreover, the unwarranted disparity statement does not mandate that courtroom actors take specific action in response to the contents of the unwarranted disparity statement. Instead, similar to affirmative action policies that have not been overturned, the unwarranted disparity statement is one piece of information that courtroom actors can use to make important decisions, alongside other case evidence.[131] Second, the unwarranted disparity statement approach has a clear, data-driven methodology for determining the extent to which unwarranted disparities exist. By contrast, there is no agreed upon definition for capturing social adversity.[132] Last, the social adversity defense approach requires that defense counsel raise the defense.[133] Given the fact that defense counsel is often under-resourced, the defense may often not be able to gather the necessary information to make this defense adequately, or at all.[134] By contrast, the unwarranted disparity approach has a clear mechanism for ensuring that unwarranted disparity statements reach all key court actors: The court would be responsible for producing unwarranted disparity statements for each case in which an unwarranted disadvantage is predicted to occur.

Despite the notable strengths of the unwarranted disparity statement approach, it is not without limitations.[135] First, since the emphasis

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128. *See* Davis, *supra* note 57, at 18-19; Davis, *supra* note 57, at 204, 219.
129. *See* Delgado, *supra* note 77, at 22-23.
130. *Id*.
131. *See* Melvin I. Urofsky, The Affirmative Action Puzzle: A Living History from Reconstruction to Today (Pantheon Books) (2020).
132. *See* Bazelon, *supra* note 76; Delgado, *supra* note 77, at 22-23; *see also* Tonry, *supra* note 77. Garbarino, *supra* note 83.
133. *See* Tonry, *supra* note 77.
134. *See* Gottlieb, *supra* note 12, at 9-16; *see also* Gottlieb, *supra* note 20, at 5.
135. These limitations are not unique to this approach and are shared in full or in part by the racial impact statement legislation, racial impact study in prosecutor offices, and social adversity offense approaches.

is on minimizing unwarranted disparities, the approach does not focus on the punitiveness of the criminal legal system more generally. As a result, even if the approach results in a reduction in unwarranted disparities, this does not necessarily mean that it will lead to a substantial reduction in incarceration overall.[136] This is an important limitation, since the United States has a higher incarceration rate than any other country in the world.[137] This suggests that the unwarranted disparities approach needs to be complemented by other approaches that try to change the criminal legal system in ways that reduce punitiveness overall. Second, the unwarranted disparity statement approach does not address the significant disparities that occur prior to arrest.[138] As a result, this approach should be complemented by police reform that aims to reduce front-end disparities. Third, while the unwarranted disparity statement approach brings unwarranted disparities to light, there is no guarantee that courtroom actors will respond to this information by taking actions that reduce these disparities.[139] Even if courtroom actors do not always respond to unwarranted disparity statements by seeking to reduce disparities, increasing transparency and ensuring that information around disparities is available to all key courtroom actors is still a worthwhile endeavor. Last, similar to racial impact statements for state legislation and racial impact studies in prosecutor offices, the unwarranted disparity statement approach relies on data from the past to quantify disparities.[140] Importantly, however, as is the case with these other approaches, the unwarranted disparity statement approach does not have a mechanism in place to address these disparities retroactively.[141]

## VI. Conclusion

The criminal legal system in the United States is characterized by significant disparities.[142] Current efforts to address these disparities are not sufficient in the short term because they rely on significant structural and attitudinal change, which takes time and is often met by resistance.[143]

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136. Disparities can be reduced in two ways: (1) by punishing those who face unwarranted disadvantages less punitively or (2) by punishing those who face unwarranted advantages, and for which an unwarranted disparity statement is not produced, more harshly.
137. *See* Walmsley, *supra* note 1, at 2.
138. For instance, there are significant racial disparities in police stops and searches. *See* Emma Pierson et al., *A Large-Scale Analysis of Racial Disparities in Police Stops Across the United States*, 4 Nature Hum. Beh. 736 (2020).
139. For instance, in Iowa, a state that passed racial impact statement legislation, the state government still chose to enact 23% of bills that were projected to increase racial and ethnic disparities. *See* Foley, *supra* note 44.
140. *See* London, *supra* note 36, at 226-28; Mauer, *supra* note 36, at 33-34; *see also supra* note 57.
141. *See* London, *supra* note 36, at 226-28; Mauer, *supra* note 36; *see also* Davis, *supra* note 57, at 18-19; Davis, *supra* note 57, at 204, 219.
142. *See* Eperson, *supra* note 2; Petit, *supra* note 2.
143. *See supra* note 28; *see also* Merkl, *supra* note 29; *see also* Cohen, *supra* note 30.

In this Article, I develop a new data-driven approach to help address these disparities in the short term: the unwarranted disparity statement. In each criminal case where an unwarranted disadvantage is predicted to exist, an unwarranted disparity statement would be produced by the court and would document the extent to which the current defendant is predicted to experience an unwarranted disadvantage with respect to conviction, being sentenced to incarceration, and incarceration sentence length. The prosecutor, defense counsel, judge, and jury would then be given access to the unwarranted disparity statement, so that they can consider it alongside other evidence in the case. Using data from the 2009 SCPS,[144] I provide an empirical illustration of how to calculate the key data points that would be included in the unwarranted disparity statement. The unwarranted disparity statement approach is not a panacea and should be used as a complement to, not a substitute for, structural change efforts to the criminal legal system.

144. *See* Reaves, *supra* note 32.