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CLASS MATTERS

ERICA J. HASHIMOTO*

Poor people constitute one of the most overrepresented categories of people in the criminal justice system. Why is that so? Unfortunately, we simply do not know, in large part because we have virtually no information that could provide an answer. As a result of that informational vacuum, policymakers either have ignored issues related to economic class, instead focusing on issues like drug addiction and mental illness as to which there are more data, or have developed fragmented policies that touch on economic status issues only tangentially. The bottom line is that without better data on the profile of poor defendants, coherent policy to address issues related to economic status simply will not be enacted. Because we lack data on economic status, we also cannot ascertain whether the system enforces criminal laws equally or whether it targets poor people. The inability to prove (or disprove) class discrimination prevents policymakers from enacting any solutions and leads to mistrust in the system.

This Article highlights the potential beneficial uses of general data on criminal defendants and data on economic status of criminal defendants in particular. It goes on to document the data we currently have on income levels of criminal defendants, and the shortcomings both in our analysis of that data and in our data collection. Finally, the Article provides a roadmap for how states and the federal government should collect and analyze data on the economic status of criminal defendants.

I. INTRODUCTION

The United States spends nearly two hundred billion dollars each year to combat crime.¹ Both because of the amount of money involved and

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¹ See KRISTEN A. HUGHES, BUREAU OF JUSTICE STATISTICS BULLETIN: JUSTICE EXPENDITURE AND EMPLOYMENT IN THE UNITED STATES, 2003, at 1 (2006), available at <http://bjs.ojp.usdoj.gov/content/pub/pdf/jeeus03.pdf> (noting that in 2003, the United States spent \$185 billion on police protection, corrections, and judicial and legal activities, an increase of 418% from the amount spent in 1982).

because of the importance of this issue, policymakers should rest their decisions on accurate data so that there is some assurance that the vast criminal justice budget is being effectively spent. In too many instances, however, legislators develop policy and laws with little or no information. Part of the reason that policymakers do not consider data may be that data are unavailable. In particular, demographic information on defendants in the system (with the possible exception of information regarding race and gender) is almost nonexistent. Indeed, one of the most potentially significant factors—the economic status of the defendant—has been almost completely ignored.

The data we do have show that poor people become defendants in criminal cases at a much higher rate than do non-poor people. Without collecting more data on those defendants—their criminal histories, the crimes with which they are charged, the outcomes of their cases, their sentences, and the extent of their overrepresentation in the system—we can neither generate interest from policymakers in the problems presented by the sheer volume of poor people in the system nor begin to identify causes and solutions for this overrepresentation.

Some might argue that collecting more data is not necessary because everyone knows that the criminal justice system prosecutes more indigent than non-indigent persons. Without data, however, we do not, and cannot, know the extent of this disparity and the issue lacks resonance. In this context, data represent the most powerful, descriptive tool. In addition, without data, we cannot determine the causes of overrepresentation, so we cannot develop effective solutions. A very simple (and admittedly oversimplified) example makes the point. If, for instance, the data reveal that poor defendants commit all types of offenses at a uniformly higher rate than non-poor defendants, that information may suggest that poor defendants commit crimes for reasons other than economic need. If that is the case, any programs targeted at reducing offense rates of poor people need to recognize that the motivation for the criminal behavior may not be economic need and may need to incorporate a model of promoting not only job placement but also community investment and engagement.² On the other hand, if the differential in offense rates between poor and non-poor defendants does vary depending on the economic nature of the crime, the message may be that job programs constitute the best tool for countering criminal activity.

In addition to its importance in developing rational criminal justice policy, information collection plays a critical role in ensuring even-handed

² As discussed below, a therapeutic jurisprudence program might be warranted in such a situation. *See infra* Part III.B.1.

administration of our laws. Again, an example illustrates the point. If the percentage of poor people who are prosecuted for a particular crime—for instance, drug possession³—is much greater than the percentage of poor people who commit the offense, this fact may lead to questions about our enforcement efforts. Do police target poor people or neighborhoods where poor people live? Are prosecutors more likely to charge poor people for drug offenses than wealthy people? The answers to these questions may well be no, but we cannot know if that is the case unless we collect data.⁴

The Article proceeds in three parts. Citing examples, Part II describes the benefits of collecting and analyzing data on defendants in the criminal justice system—namely, that data further the development of more rational criminal justice policy and provide a means of assuring equal enforcement of the laws. Part III describes the data on economic status that states and the federal government now collect and the deficiencies in the available data. It also sets forth the argument that analysis of these data is necessary both to develop effective criminal justice policy and to ensure that the law does not discriminate against poor people. Finally, Part IV proposes new methods of analysis for the existing data and advocates the collection of more detailed data, particularly at the state level.

II. THE IMPORTANCE OF KEEPING DATA ON CRIMINAL DEFENDANTS

There are two principal reasons we should collect data about defendants in the criminal justice system. First, data should (although they often do not) inform policy decisions regarding the definitions of crimes, the development of programs, and the enactment of sentencing provisions. After all, regardless of the goals policymakers have for the criminal justice system—whether crime prevention or retribution or both—they need information in order to assess whether the money is being spent in the most cost-effective way to further those goals. If we do not know who is being prosecuted for crimes, legislators and those working in the criminal justice system cannot make informed decisions. Second, we cannot have any assurance that laws are being enforced uniformly—and not on the basis of unconstitutional or arbitrary factors such as race or gender—unless we know who is being prosecuted, convicted and punished, and for what.

³ I use drug possession for this example because we have fairly detailed statistics on the demographic profile of drug users. *See infra* Part III.B.

⁴ As discussed below, I recognize that even if the data established unequal enforcement, there may not be a legal remedy for that inequality. Even without a constitutional remedy, however, those data still could lead to changes in the enforcement mechanisms. *See infra* Part III.B.2.

A. DATA AS A MEANS OF ACHIEVING RATIONAL CRIMINAL JUSTICE
POLICY

Over the last twenty or thirty years, political considerations generated by highly publicized cases have significantly affected criminal justice policy.⁵ Indeed, many pieces of legislation creating new crimes and setting sentences both for new crimes and for existing crimes have been driven by media coverage of the most high profile cases. Political considerations generated by media coverage of atypical high-profile cases, however, provide a poor basis for shaping the criminal justice system. To illustrate the importance of considering data rather than passing legislation based on media frenzy, consider Congress's enactment of legislation that created the one-hundred-to-one sentencing differential for powder cocaine and crack cocaine offenses under the federal Anti-Drug Abuse Act of 1986.⁶ The Act set mandatory minimum penalties for defendants convicted of trafficking "kingpin" quantities of drugs: one thousand grams of heroin or five thousand grams of cocaine powder would lead to a ten year mandatory minimum sentence.⁷ With respect to crack cocaine,⁸ Congress established the "kingpin" level for the mandatory minimum ten-year sentence at fifty grams, one-hundredth of the amount that would trigger the same mandatory minimum penalty for powder cocaine.⁹

⁵ See, e.g., BUREAU OF JUSTICE ASSISTANCE, U.S. DEP'T OF JUSTICE, A POLICYMAKER'S GUIDE TO HATE CRIMES 5 (1997) ("In the area of criminal justice, it is political reality that public policy sometimes is driven more by emotions and perceptions—sometimes misperceptions—than hard empirical data."); Stephanos Bibas, *Transparency and Participation in Criminal Procedure*, 81 N.Y.U. L. REV. 911, 925–26 (2006) (noting that the public's view of the criminal justice system is formed on the basis of sensational news accounts of atypical cases); Darryl K. Brown, *Cost-Benefit Analysis in Criminal Law*, 92 CALIF. L. REV. 323, 330 (2004) ("American legislators are particularly responsive to public concerns about crime The political responsiveness of American criminal justice makes the input of expertise from social scientists, Sentencing Commission staff, and other academics or policy analysts less influential."); Steven L. Chanenson, *Sentencing and Data: The Not-So-Odd Couple*, 16 FED. SENT'G REP. 1, 1 (2003) ("On the legislative level, Congress is infamous for taking dramatic actions concerning sentencing on the spur of the moment based more on incendiary rhetoric than reason.") (footnote omitted); William J. Stuntz, *Plea Bargaining and Criminal Law's Disappearing Shadow*, 117 HARV. L. REV. 2548, 2558 (2004) ("Every generation has its high-profile crime stories and media frenzies, which leave behind a trail of new criminal prohibitions.").

⁶ Anti-Drug Abuse Act of 1986, Pub. L. No. 99-570, 100 Stat. 3207.

⁷ See David A. Sklansky, *Cocaine, Race, and Equal Protection*, 47 STAN. L. REV. 1283, 1287 (1995).

⁸ Crack cocaine is made by boiling powder cocaine (cocaine hydrochloride) with baking soda. Crack generally is smoked, while powder is sniffed. *Id.* at 1290–91.

⁹ See 21 U.S.C. § 841(b)(1) (2006 & Supp. 2009).

Much has been written about the reasons Congress settled on the 100:1 ratio for powder and crack cocaine.¹⁰ From those reports, it is clear that Congress set that ratio without considering any data on either the relative harmfulness of the drugs at issue¹¹ or the amounts of these drugs that “kingpins” ordinarily would traffic.¹² The Act itself was passed in record time,¹³ without committee hearings to debate the issues in the bill.¹⁴ Instead of focusing on the science of crack cocaine and data on its usage, debate centered on congressional concerns about the “crack epidemic” in urban areas that had been the subject of numerous media stories,¹⁵ including a high-profile *Newsweek* article.¹⁶ Much attention also focused on the recent death of basketball star Len Bias, a University of Maryland standout who died of a cocaine overdose the night after he was drafted by the Boston Celtics.¹⁷

¹⁰ See, e.g., Marc Mauer, *Racial Impact Statements as a Means of Reducing Unwarranted Sentencing Disparities*, 5 OHIO ST. J. CRIM. L. 19, 20–21 (2007); Sklansky, *supra* note 7, at 1290–97.

¹¹ See Eric E. Sterling, *The Sentencing Boomerang: Drug Prohibition Politics and Reform*, 40 VILL. L. REV. 383, 409 (1995) (noting that the Subcommittee on Crime “did not determine the relative harmfulness of different drugs”).

¹² As Professor Sklansky observes, there really is no such thing as a “kingpin” crack trafficker because “[a]s Congress appears to have recognized, large-volume drug traffickers generally do not deal in crack; they deal in its precursor, powder cocaine. Defendants caught trafficking in crack thus are almost always the street-level retailers of the cocaine trade, not the wholesalers.” Sklansky, *supra* note 7, at 1288 (citation omitted).

¹³ See U.S. SENTENCING COMM’N, REPORT TO CONGRESS: COCAINE AND FEDERAL SENTENCING POLICY 117 (1995), available at http://www.ussc.gov/Legislative_and_Public_Affairs/Congressional_Testimony_and_Reports/Drug_Topics/199502_RtC_Cocaine_Sentencing_Policy/chap5-8.pdf [hereinafter USSC REPORT] (“Apparently because of the heightened concern [over crack], Congress dispensed with much of the typical deliberative legislative process, including committee hearings.”).

¹⁴ See Sterling, *supra* note 11, at 408–09 (noting that the House Judiciary Subcommittee on Crime completed all of its work on the bill in just five weeks, and that much of the usual procedure was “circumvented” for this bill).

¹⁵ See USSC REPORT, *supra* note 13, at 122 (“Some assertions made in these [media] reports were not supported by data at the time and in retrospect were simply incorrect. One report in 1986, for example, labeled crack cocaine as ‘America’s drug of choice.’ . . . The first statistics on crack cocaine use compiled by NIDA subsequent to the report showed that snorting powder cocaine was still the preferred method of ingestion by 95 percent of cocaine users.”) (internal citations omitted).

¹⁶ See Sklansky, *supra* note 7, at 1294.

¹⁷ See, e.g., USSC REPORT, *supra* note 13, at 122–23; Sterling, *supra* note 11, at 408 (describing the compressed time frame for consideration of the Anti-Drug Abuse Act of 1986 following Bias’s death of a purported cocaine overdose); Michael Tonry, *Rethinking Unthinkable Punishment Policies in America*, 46 UCLA L. REV. 1751, 1787 (1999). Interestingly, although the media initially reported that Bias had died of crack overdose, it turned out that Bias had snorted powder cocaine. USSC REPORT, *supra* note 13, at 123.

Congress's failure to consider any scientific or usage data before passing the Anti-Drug Abuse Act of 1986, and in particular before adopting the 100:1 ratio, has had negative consequences for federal drug policy. First, the Act has been used primarily to prosecute minor street-level retail sellers of crack cocaine, rather than wholesale sellers of drugs, completely undermining the purpose of the Act.¹⁸ To put it another way, the resources that Congress intended to allocate to combat large-scale drug traffickers instead were diverted to prosecuting and incarcerating street-level dealers. Second, as discussed below, the focus on prosecuting street-level retailers of crack cocaine, combined with the severe penalties for those convicted under the Act, has led to the mass incarceration of young, African-American men.¹⁹

The history of the Anti-Drug Abuse Act of 1986 illustrates the dangers of making criminal law policy in the absence of sound data. Fortunately, there are also numerous examples of legislators and policymakers collecting and using data to develop criminal justice policy. Sentencing guidelines legislation provides one example,²⁰ and the developments of drug courts and of mental health courts provide two more. The data used in formulating these programs are far from perfect and certainly have been subject to criticism. Nonetheless, these reforms demonstrate the benefits both of considering data in the development of criminal justice policy and of creating mechanisms to collect data in order to assess the effectiveness of those policies over time.

1. Sentencing Guidelines

Through the late 1970s and 1980s, a number of states developed sentencing guidelines that were designed to curb sentencing discretion of judges. Although the development of guidelines varied across jurisdictions, data played a critical role both in the initial creation of guidelines systems and in monitoring their impact. Concerns about lack of sentencing uniformity and problems with prison overcrowding spurred sentencing

¹⁸ See USSC REPORT, *supra* note 13, at 158 (reporting that 59.6% of crack cocaine defendants in federal prisons were street-level retailers).

¹⁹ See *infra* Part II.B.

²⁰ See, e.g., Chanenson, *supra* note 5, at 12 (“[T]he necessity of sentencing data should be virtually self-evident. How else can we hope to know if what we are attempting to do through both sentencing policy and individual sentencing decisions is actually working?”); Marc L. Miller & Ronald F. Wright, “*The Wisdom We Have Lost*”: *Sentencing Information and Its Uses*, 58 STAN. L. REV. 361, 377–78 (2005) (arguing that although we now have significantly more data on sentencing than we did thirty-five years ago, that data still is incomplete).

reform.²¹ Believing that finding solutions to both of these problems required collection and consideration of information related to sentencing practices, drafters of guidelines in at least some states used data to set initial guidelines ranges. Perhaps more importantly, sentencing commissions collected extensive data on the implementation of the guidelines in order to ensure that they were meeting their statutory goals.²²

Minnesota, the first state to develop sentencing guidelines, provides a telling example. In 1978, the state legislature established the Minnesota Sentencing Guidelines Commission and directed the commission to develop sentencing guidelines.²³ The legislature instructed the commission, when developing and amending the guidelines, to consider “capacity constraint”—the relationship between the severity of prison sentences and the space available to house prisoners—among other factors.²⁴ Focusing on the capacity constraint goal, the commission developed a detailed computer model to project expected prison populations that would result from different variations of proposed guidelines.²⁵ The commission also began collecting data almost immediately after its formation and has continued to collect data on sentencing in Minnesota ever since.²⁶ Relying on this information, Minnesota authorities have crafted changes to the guidelines over time, including amendments that reduced the durations of prison sentences for some offenses because the data showed that Minnesota was approaching its prison capacity.²⁷

The data collected by the commission, along with the legislature’s directives concerning relevant factors for sentencing, have resulted in a much more coherent overall sentencing policy than had previously existed.²⁸ In particular, because of the commission’s focus on considering

²¹ See, e.g., Richard S. Frase, *Sentencing Guidelines in Minnesota, 1978–2003*, 32 CRIME & JUST. 131, 132 (2005) (noting Minnesota’s legislative goals of reducing “disparity in the treatment of similarly situated offenders” and “coordinat[ing] sentencing policy with available correctional resources, especially prison and jail capacities”).

²² See Chanenson, *supra* note 5, at 1 (“Legislatures and sentencing commissions can and do use data to craft and improve sentencing policy on a systemic level.”).

²³ See DALE G. PARENT, *STRUCTURING CRIMINAL SENTENCES: THE EVOLUTION OF MINNESOTA’S SENTENCING GUIDELINES* 28 (1988).

²⁴ *Id.* at 51.

²⁵ See Frase, *supra* note 21, at 147.

²⁶ See Richard S. Frase, *Implementing Commission-Based Sentencing Guidelines: The Lessons of the First Ten Years in Minnesota*, 2 CORNELL J.L. & PUB. POL’Y 279, 279 n.2 (1992) (observing that the Minnesota commission has “routinely collected a large amount of data on all felony sentences” giving rise to a “rich source of data and commentary”).

²⁷ See *id.* at 286.

²⁸ Minnesota’s policy decisions have been the subject of at least some criticism, but regardless whether one agrees with those policy choices, the overall sentencing scheme appears to have advanced those goals. See Frase, *supra* note 21, at 136–37.

capacity constraints in developing and modifying the guidelines, Minnesota, at least through the 1980s, managed to reserve its prison space for the most serious offenders thereby avoiding the prison overcrowding problems that plagued the rest of the country.²⁹ In 1979, the nationwide incarceration rate for state prisoners was 126 per 100,000 people.³⁰ By 1990, the nationwide rate had more than doubled to 272 per 100,000 people,³¹ and prison systems throughout the country were struggling with prison overcrowding issues. In large part because of the effect of the guidelines, the incarceration rate in Minnesota during that same period did not rise nearly as significantly. In 1979, the year before the Minnesota guidelines went into effect, the incarceration rate in Minnesota was 51 per 100,000 people, and by 1990, it had risen only to 72 per 100,000 people.³² Perhaps most importantly, because Minnesota had carefully considered how the limited prison resources should be allocated, it did not run out of space as other state prison systems did.

Since 1990, incarceration rates in Minnesota have increased much more significantly, but primarily as a result of factors beyond the commission's control. Two factors have radically affected incarceration rates in Minnesota.³³ First, the number of defendants prosecuted and sentenced has increased significantly, at least in part due to the increased number of defendants sentenced for drug crimes.³⁴ Second, the Minnesota legislature, like Congress and state legislatures across the country, has increased the number of crimes that carry with them mandatory minimum sentences.³⁵ Thus, as one commentator notes, although sentencing policy "under the guidelines has become much more data driven, comprehensive, and consistent . . . it has only been partially insulated from political

²⁹ See Frase, *supra* note 26, at 334 (concluding that because of the sentencing guidelines, Minnesota through the 1980s "manag[ed] to avoid the serious problems of prison and jail overcrowding (and court intervention) which have become the norm in most states").

³⁰ See PAIGE M. HARRISON, BUREAU OF JUSTICE STATISTICS, U.S. DEP'T OF JUSTICE, INCARCERATION RATES FOR PRISONERS UNDER STATE OR FEDERAL JURISDICTION, PER 100,000 RESIDENTS (2000), available at <http://bjs.ojp.usdoj.gov/index.cfm?ty=pbdetail&iid=2040>.

³¹ *Id.*

³² *Id.*

³³ The Minnesota guidelines, like the sentencing guidelines in many states, also have been affected by the Supreme Court's decision in *Blakely v. Washington*, 542 U.S. 296 (2003), holding that Washington's sentencing guideline system was unconstitutional because it required the court to sentence the defendant for conduct not proven to a jury. The effects of *Blakely* on incarceration rates, however, are not yet clear.

³⁴ See Frase, *supra* note 21, at 136 (noting that in the period from 1981 through 2002, the total number of felons sentenced for drug crimes per year more than quadrupled, resulting in a doubling of the total number of felons sentenced per year).

³⁵ See *id.* at 159–62.

pressure.”³⁶ Data have not completely solved the problem of politics and sentencing policy in Minnesota, but the experience with the guidelines suggests that data in the hands of policymakers—here the sentencing commission—can lead to much more coherent and effective criminal justice policy.

2. Drug Courts

Another example of the use of data to influence criminal justice policy has come in the area of drug courts, which provide intensive and court-monitored treatment to defendants whose involvement in the criminal justice system is primarily attributable to their drug addiction.³⁷ Drug courts have developed over the past twenty years primarily through the initiative of local courts, with the help of state and local legislation and assistance from Congress. Reform legislation has been the direct result of data documenting the extent of drug use among those charged with criminal offenses and data evaluating the success of the drug court approach.

The court system in Miami-Dade County created the first drug treatment court in 1989.³⁸ The effort was motivated both by concerns about prison overcrowding³⁹ spawned by increases in drug-related prosecutions and penalties,⁴⁰ and by the concerns of those who worked within the

³⁶ *Id.* at 137.

³⁷ This is a very broad definition, but a more detailed definition is not possible because there is significant variation among drug court programs. See RYAN S. KING & JILL PASQUARELLA, *DRUG COURTS: A REVIEW OF THE EVIDENCE 2* (2009), available at http://www.sentencingproject.org/doc/dp_drugcourts.pdf (“Because drug courts are designed and operated at the local level, there are fundamental differences . . .”). One point of clarification regarding the use of the term “drug court” is, however, in order. This Article uses the term “drug court” to refer to drug treatment courts modeled after the Miami-Dade County drug treatment court described below. The term drug court has also been used to refer to courts that implemented programs to “fast-track” drug possession cases. See Richard C. Boldt, *Rehabilitative Punishment and the Drug Treatment Court Movement*, 76 WASH. U. L.Q. 1205, 1207 (1998). However, this Article uses the term only to include drug treatment courts.

³⁸ John S. Goldkamp, *The Drug Court Response: Issues and Implications for Justice Change*, 63 ALB. L. REV. 923, 942 (2000) (“[K]ey Miami justice leaders in 1989, such as Chief Judge Gerald Wetherington, Judge Herbert Klein, Dade County’s State Attorney Janet Reno, Public Defender Bennet Brummer, and Timothy Murray (the Office of Substance and Abuse Control Director), improvised by using drug courts to respond to a crisis in the criminal justice system.”).

³⁹ In 1988, the prison population in two-thirds of the states exceeded their maximum prison capacity. See BUREAU OF JUSTICE STATISTICS, *PRISONERS IN 1988*, at 5 (1989).

⁴⁰ See Craig Haney, *The Wages of Prison Overcrowding: Harmful Psychological Consequences and Dysfunctional Correctional Reactions*, 22 WASH. U. J.L. & POL’Y 265, 269 (2006) (describing the “massive influx of prisoners” in the late 1970s and early 1980s as

criminal justice system that prison sentences were not solving the drug problem.⁴¹ The original concept was to involve defendants in drug treatment programs with hands-on oversight by judges assigned to their cases as a key part of the resolution of the criminal charges.⁴² Although the idea of a drug treatment court initially met with “embarrassed silence and out-of-hand dismissal,”⁴³ in the ensuing twenty years, drug courts have become commonplace. In 2009, 2,038 drug courts were operating across the country, in 1,416 of the 3,155 counties in the country.⁴⁴ Moreover, as of 2007, forty-one states had enacted legislation related to the planning, operation, or funding of drug courts.⁴⁵

The tremendous growth in the number of drug courts is attributable to two data-driven factors. First, these courts have made a concerted effort, supported by the federal government, to evaluate the effectiveness of the programs they operate—both in terms of reducing recidivism⁴⁶ and in terms of cutting prison and jail costs⁴⁷—and at least some of those assessments

“unprecedented”); Franklin E. Zimring, *Drug Treatment as a Criminal Sanction*, 64 U. COLO. L. REV. 809, 809 (1993).

⁴¹ See Peggy Fulton Hora, William G. Schma & John T.A. Rosenthal, *Therapeutic Jurisprudence and the Drug Treatment Court Movement: Revolutionizing the Criminal Justice System's Response to Drug Abuse and Crime in America*, 74 NOTRE DAME L. REV. 439, 448–49 (1999) (“The emergence of [drug courts] reflects the growing recognition on the part of judges, prosecutors, and defense counsel that the traditional criminal justice methods of incarceration, probation, or supervised parole have not stemmed the tide of drug use among criminals and drug-related crimes in America.”).

⁴² See Goldkamp, *supra* note 38, at 936.

⁴³ *Id.* at 927.

⁴⁴ See DRUG COURT CLEARINGHOUSE PROJECT, BUREAU OF JUSTICE ASSISTANCE, SUMMARY OF DRUG COURT ACTIVITY BY STATE AND COUNTY (2009), available at <http://www1.spa.american.edu/justice/documents/2150.pdf>.

⁴⁵ See DRUG COURT CLEARINGHOUSE PROJECT, BUREAU OF JUSTICE ASSISTANCE, DRUG COURT ACTIVITY UPDATE 114 (2007), available at <http://www1.spa.american.edu/justice/documents/2105.pdf>.

⁴⁶ See DRUG COURT CLEARINGHOUSE PROJECT, BUREAU OF JUSTICE ASSISTANCE, SUMMARY ASSESSMENT OF THE DRUG COURT EXPERIENCE 2–3 (May 1997), available at <http://www1.spa.american.edu/justice/documents/2079.pdf> (reporting that “[m]ost criminal justice system professionals estimate that at least 45% of defendants convicted of drug possession will recidivate with a similar offense within two to three years,” but “[i]n comparison . . . recidivism among all drug court participants has ranged between five percent to twenty-eight percent and less than four percent for graduates [of the drug court program]”). *But see* Morris B. Hoffman, *Commentary: The Drug Court Scandal*, 78 N.C. L. REV. 1437, 1479–80 (2000) (arguing that there is no real empirical evidence that drug courts reduce recidivism among all participants).

⁴⁷ See DRUG COURT CLEARINGHOUSE PROJECT, BUREAU OF JUSTICE ASSISTANCE, MEMORANDUM RE: COST BENEFITS/COSTS AVOIDED REPORTED BY DRUG COURT PROGRAMS AND DRUG COURT PROGRAM EVALUATION REPORTS 2–3 (Apr. 10, 2009), available at <http://www1.spa.american.edu/justice/documents/2526.pdf> (noting that jurisdictions with

report positive outcomes. As more and more jurisdictions have struggled both with jail overcrowding and with recidivism, the existence of these reports has made drug courts an increasingly attractive option.

Second, the federal government has funded both implementation of drug courts and assessment of these programs. In 1994, Congress passed legislation providing funding for a new Drug Court Program Office within the Office of Justice Programs at the Department of Justice designed to provide technical assistance to drug court programs, and it also appropriated twelve million dollars to support the development and assessment of those programs.⁴⁸ By 2002, this program had grown to the point that the Department of Justice awarded ninety-four grants totaling \$34.19 million.⁴⁹ In addition to awarding money, participation by the Department of Justice has been critical to fostering assessment of drug court outcomes. In 1997, the Department sponsored an initiative by the National Association of Drug Court Professionals, which developed a list of the ten necessary elements for a successful drug court program.⁵⁰ The Department also has sponsored a clearinghouse to maintain all of the data related to drug court programs across the country.⁵¹

The widespread implementation of drug courts has not escaped criticism both by academics and by lawyers who represent defendants in the drug court system. In particular, some have argued that drug courts' claims of success have been somewhat (if not completely) overstated and that there is no empirical evidence that drug courts actually reduce recidivism.⁵² Part

drug court programs reported in 2001 that the program saved them an average of 10,133 prison/jail days or \$667,694).

⁴⁸ See Goldkamp, *supra* note 38, at 948. Then-Attorney General Janet Reno, who had been instrumental in creating the first drug court in Miami-Dade County, played a critical role in the Department of Justice's support of drug courts.

⁴⁹ See BUREAU OF JUSTICE ASSISTANCE, U.S. DEP'T OF JUSTICE, OFFICE OF JUSTICE PROGRAMS DRUG COURTS GRANTS, FISCAL YEAR 2002, available at <http://www.ojp.usdoj.gov/BJA/grant/DrugCourts/02DCgrants.htm>.

⁵⁰ See Goldkamp, *supra* note 38, at 936.

⁵¹ The clearinghouse is operated by American University's School of Public Affairs in conjunction with the Department of Justice's Bureau of Justice Assistance. See *Drug Court Clearinghouse/Adult Technical Assistance Project*, AM. UNIV. JUST. PROGRAMS OFFICE, <http://www1.spa.american.edu/justice/project.php?ID=1> (last visited Nov. 4, 2010).

⁵² See, e.g., Hoffman, *supra* note 46, at 1479–80 (“Perhaps the most startling thing about the drug court phenomenon is that drug courts have so quickly become fixtures of our jurisprudence in the absence of satisfying empirical evidence that they actually work.”). Some academics also have criticized the non-adversarial nature of drug court programs, suggesting that the nature of the program can infringe on the defendant's constitutional rights or force defense counsel to abandon the role of zealous advocate. See, e.g., Tamar M. Meekins, “*Specialized Justice*”: *The Over-Emergence of Specialty Courts and the Threat of a New Criminal Defense Paradigm*, 40 SUFFOLK U. L. REV. 1, 3 (2006) (“The standard premise behind [treatment] courts is the emasculation of the traditional role of the criminal

of the dispute over the success of drug court programs stems from differences in how to measure success. In particular, in determining whether drug courts reduce recidivism rates, some examine the recidivism rates of drug court *graduates*,⁵³ while others argue that the relevant group for study is those who *participate* in the drug court program (which would include drug court dropouts).⁵⁴ Because the recidivism rates of graduates are so much lower than those of dropouts (indeed, most studies demonstrate that drug courts reduce recidivism of graduates),⁵⁵ any assessment of the success of the program depends on the group being tracked.

That having been said, the dispute over how to measure the success of the program demonstrates the value of having collected this data. As a result of the data collection, we now know that drug courts have a much greater impact on those who graduate than on those who do not finish, so that programs should focus on ways to lower the dropout rates.⁵⁶ Whether or not one concludes that drug courts solve the problems they were intended to address, the fact that we now have data to measure their success and improve their outcomes sets them apart from the vast majority of criminal justice programs.⁵⁷

3. *Mental Health Courts*

Mental health courts arose out of the same therapeutic justice movement that created drug courts,⁵⁸ and as was the case with drug courts,

defender as a zealous advocate fighting against the system.”); Mae C. Quinn, *An RSVP to Professor Wexler’s Warm Therapeutic Jurisprudence Invitation to the Criminal Defense Bar: Unable to Join You, Already (Somewhat Similarly) Engaged*, 48 B.C. L. REV. 539 (2007). While these arguments have force, for purposes of this Article, I am more concerned with the empirical questions surrounding drug courts than the constitutional questions.

⁵³ See Peggy Fulton Hora & Theodore Stalcup, *Drug Treatment Courts in the Twenty-First Century: The Evolution of the Revolution in Problem-Solving Courts*, 42 GA. L. REV. 717, 801–03 (2008) (citing statistics suggesting that nationally, drug court graduates have significantly lower recidivism rates than defendants convicted of drug offenses who have not participated in a drug court program).

⁵⁴ See Hoffman, *supra* note 46, at 1483 (“[M]ost evaluators now agree that the most meaningful target group against which the control group must be compared is all drug court defendants, not just drug court graduates.”).

⁵⁵ KING & PASQUARELLA, *supra* note 37, at 7 (“[D]rug court participants who graduate tend to have much lower recidivism rates than drug court dropouts.”).

⁵⁶ See *id.* (“[The fact that dropouts have a higher recidivism rate than graduates] suggests that drug courts experiencing a less than desired effect on rearrest rates may want to focus on addressing the program design to encourage higher rates of retention.”).

⁵⁷ See Douglas B. Marlowe, *The Verdict on Adult Drug Courts*, 51 ADVOC.: OFFICIAL PUBLICATION IDAHO ST. B. 14, 14 (Sept. 2008) (arguing that “[f]ew, if any, other criminal justice programs have been put to” the same level of scientific scrutiny as drug courts).

⁵⁸ Drug courts were the first of the so-called problem-solving courts, and mental health courts, like drug courts, attempt to solve the root causes of the defendant’s perpetration of

data have fostered their development. The first mental health court was founded in 1997, nearly a decade after the first drug court, and it was designed to provide treatment and resources for defendants who had become involved in the criminal justice system primarily because of mental illness.⁵⁹ Because of the similarities in design and inception, the path of mental health courts has been remarkably similar to that of drug courts.

Like drug courts, mental health courts have multiplied rapidly—although not nearly as rapidly as drug treatment courts⁶⁰—and much of the same pattern of growth has marked their evolution. First, although mental health courts use the same general approach to the problem—namely the provision of mental health treatment enforced by the threat of court sanctions—courts have adapted the model depending on the needs of particular jurisdictions.⁶¹ This fine-tuning has meant that jurisdictions seeking to develop mental health courts have had to study the mental illness problem in their localities and the varying models to determine which model will work most effectively.

Second, the growth of mental health courts has largely been the result of cooperation among localities, states, and the federal government. That cooperation, in turn, was driven by data establishing the scope of the problem of mentally ill defendants in the criminal justice system. In 2000, Congress passed America's Law Enforcement and Mental Health Project.⁶² The Act authorized ten million dollars per year for fiscal years 2001 through 2004, to support state or local courts in establishing and running mental health courts. The debates over the Act, as well as the findings contained within the Act, were dominated by data on the prevalence of mental illness among defendants in the criminal justice system.⁶³ In introducing the bill in the Senate, for example, Senator Mike DeWine of

the crime. See BRUCE J. WINICK & DAVID B. WEXLER, *JUDGING IN A THERAPEUTIC KEY: THERAPEUTIC JURISPRUDENCE AND THE COURTS* 3–5 (2003).

⁵⁹ See *Developments in the Law: The Law of Mental Illness*, 121 HARV. L. REV. 1114, 1168, 1170 (2008).

⁶⁰ As of 2009, a dozen years after the first mental health court opened, there were more than 250 mental health courts in this country. See LAUREN ALMQUIST & ELIZABETH DODD, *MENTAL HEALTH COURTS: A GUIDE TO RESEARCH-INFORMED POLICY AND PRACTICE* 2 (2009), available at http://consensusproject.org/jc_publications/mental-health-courts-a-guide-to-research-informed-policy-and-practice/Mental_Health_Court_Research_Guide.pdf.

⁶¹ See Stacey M. Faraci, *Slip Slidin' Away? Will Our Nation's Mental Health Court Experiment Diminish the Rights of the Mentally Ill?*, 22 QUINNIPIAC L. REV. 811, 826–32 (2004).

⁶² See America's Law Enforcement and Mental Health Project, Pub. L. No. 106-515, 114 Stat. 2399 (2000).

⁶³ See *id.* at § 2 (setting forth findings, including data from a Bureau of Justice Statistics report that 16% of all inmates in state prisons and local jails suffer from mental illness, and that 75% of mentally ill inmates had at least one prior conviction).

Ohio highlighted both nationwide statistics establishing that a high percentage of defendants in state prisons and local jails are mentally ill and recidivate at a high level, and statistics from individual states and localities demonstrating high rates of mental illness.⁶⁴ Similarly, virtually all of the representatives who spoke in support of the bill in the House of Representatives cited data on mentally ill defendants gathered by the Bureau of Justice Statistics and private groups.⁶⁵

As a result of the funding and assistance provided by states⁶⁶ and the federal government, since the passage of America's Law Enforcement and Mental Health Project in 2000,⁶⁷ mental health courts have expanded steadily. By 2005, there were 125 mental health courts operating in counties across the country, a number of which received funding from the Bureau of Justice Assistance to help cover the start-up costs,⁶⁸ and between 2004 and 2009, the number of mental health courts doubled to 250.⁶⁹

Most importantly, the cooperative efforts of federal, state, and local government agencies have led to the development of research on what does and does not work in mental health court operation.⁷⁰ As with drug courts, mental health courts have raised concerns as to fairness and effectiveness.⁷¹

⁶⁴ See 145 Cong. Rec. S13972-02, S13983 (1999).

⁶⁵ See 146 Cong. Rec. H10636-01, H10637-39 (2000).

⁶⁶ In addition to the funding provided by the federal government, some states also have set up agencies to support the planning and implementation of mental health courts. See Kirk Kimber, *Mental Health Courts—Idaho's Best Kept Secret*, 45 IDAHO L. REV. 249, 253–54 (2008) (describing the Idaho Drug Court and Mental Health Court Act, which sets forth the legislature's intent to support drug courts and mental health courts).

⁶⁷ Additional funding, beyond 2004, was approved with the passage of the Mentally Ill Offender Treatment and Crime Reduction Act of 2004, Pub. L. No. 108-414, 118 Stat. 2327 (2004). That Act authorized funding of up to \$50 million per year for fiscal year 2005 and such sums as may be necessary for fiscal years 2006–09.

⁶⁸ See *Developments in the Law*, *supra* note 59, at 1170.

⁶⁹ See ALMQUIST & DODD, *supra* note 60, at 7–8. Between 2002 and 2003, the Bureau of Justice Assistance provided funding to thirty-seven mental health courts, but between 2006 and 2009, it provided funding for an additional seventy-four mental health courts. See E-mail from Ruby Qazilbash, Senior Policy Advisor for Substance Abuse and Mental Health, Bureau of Justice Assistance, to Professor Erica J. Hashimoto, University of Georgia School of Law (March 15, 2010) (on file with author).

⁷⁰ See ALMQUIST & DODD, *supra* note 60, at 21–28 (discussing the state of the research, and suggesting further questions about mental health courts for research and data collection); HENRY J. STEADMAN, BUREAU OF JUSTICE ASSISTANCE, A GUIDE TO COLLECTING MENTAL HEALTH COURT OUTCOME DATA 3 (2005) (soliciting data from mental health court providers and noting that “[t]he core question in evaluating mental health courts is not, ‘Do mental health courts work?’ but rather, ‘What works, for whom, under what circumstances?’”).

⁷¹ See *id.* (noting the concern of some criminal justice and mental health experts that mental health courts work primarily with low-level offenders who otherwise would have received either dismissal or minimal punishment, and mental health court participants

But the fact that they continue to be the subject of so much study means that it is likely they will develop and address those criticisms over time.⁷²

B. ENSURING FAIR AND EQUITABLE ENFORCEMENT OF CRIMINAL STATUTES

The three examples discussed above demonstrate that data can lead to sound decisions in the enactment, implementation, and evaluation of criminal justice policies. In addition to its importance for the development of rational criminal justice policy, data collection also must be undertaken in order to ensure even-handed enforcement of statutes. Race discrimination provides an illustrative example. Allegations of race discrimination at all levels have dogged the criminal justice system since at least the 1970s.⁷³ But without the collection of data, including data broken down by the race of defendants, one can neither assess whether people of color are being prosecuted and convicted at higher rates than are whites, nor, even if one could show that disproportionate numbers of African Americans were being prosecuted, substantiate claims that race discrimination played a role in the unequal prosecution.

Before turning to the ways in which data can be used to assure equal enforcement, it is helpful to understand the types of data that currently are available. Collecting data on the race of defendants in the criminal justice system is a practice of relatively recent vintage, and although the data remain incomplete, there is much more statistical information on race now than there was twenty years ago. In the federal courts, a variety of agencies—including the Executive Office for U.S. Attorneys in the Department of Justice, the Pretrial Services Agency, the United States Marshals Service, the Administrative Office of the United States Courts, the United States Sentencing Commission, and the Bureau of Prisons—collect

therefore may end up under court supervision longer than they would have been with traditional court adjudication).

⁷² *Id.* at 3 (“Mental health courts are better known and more studied than any other court-based initiative focused on mental health.”).

⁷³ *See, e.g.*, CORAMAE RICHEY MANN, *UNEQUAL JUSTICE: A QUESTION OF COLOR* (1993) (documenting evidence of discrimination on the basis of race and ethnicity in the criminal justice system); Derrick A. Bell, Jr., *Racism in American Courts: Cause for Black Disruption or Despair?*, 61 CALIF. L. REV. 165 (1973); Angela J. Davis, *Prosecution and Race: The Power and Privilege of Discretion*, 67 FORDHAM L. REV. 13, 16 (1998) (asserting that “[a]t every step of the criminal process, there is evidence that African Americans are not treated as well as whites—both as victims of crime and as criminal defendants,” and recommending that legislatures require prosecutors to complete “racial impact studies” containing data on the race of the defendant and victim in each case and actions taken at each step in the process); Sheri Lynn Johnson, *Black Innocence and the White Jury*, 83 MICH. L. REV. 1611 (1985) (documenting evidence that white jurors are more likely to convict black defendants than white defendants).

data on persons prosecuted in the federal criminal justice system. The Bureau of Justice Statistics compiles the data and makes it available through the Federal Justice Statistics Resource Center.⁷⁴

As set forth in Table 1, data on the race of federal defendants (or suspects) have been collected by the Pretrial Services Agency of the Courts,⁷⁵ the United States Sentencing Commission,⁷⁶ the Bureau of Prisons,⁷⁷ and the United States Marshals Service⁷⁸ since 1987. Neither the Administrative Office of the Courts⁷⁹ nor the Executive Office for U.S. Attorneys,⁸⁰ however, collects data of this kind.

At a practical level, this means that data related to race and sentencing are available (both from the Sentencing Commission and, if the defendant is

⁷⁴ See *About the Federal Justice Statistics Resource Center*, BUREAU OF JUSTICE STATISTICS, DEP'T OF JUSTICE, http://bjs.ojp.usdoj.gov/fjsrc/index.cfm?p=about_fjsp (last visited Nov. 4, 2010).

⁷⁵ The U.S. Courts Pretrial Services Act Information System collects and records a wealth of data on defendants in federal court, including the defendant's gender, race, age, Hispanic origin, employment status at arrest, education level, criminal history, criminal justice status (i.e., whether the defendant was on parole, probation, or pretrial release at the time of arrest), history of drug abuse, and whether the defendant was released. See BUREAU OF JUSTICE STATISTICS, FEDERAL JUSTICE STATISTICS: 2006 STATISTICAL TABLES tbl.3.2 (2009), available at <http://bjs.ojp.usdoj.gov/content/pub/html/fjsst/2006/fjs06st.cfm> [hereinafter 2006 STATISTICAL TABLES].

⁷⁶ The U.S. Sentencing Commission collects data on every criminal defendant sentenced in federal court. Each line of data includes a wealth of information not only about the case, including the charge(s), the method of adjudication, and the sentence imposed, but also about the defendant, including race, gender, age, education level, criminal history, and citizenship. See U.S. SENTENCING COMM'N, SOURCEBOOK OF FEDERAL SENTENCING STATISTICS tbls.4-9 (2008), available at <http://www.ussc.gov/ANNRPT/2008/SBTOC 08.htm>.

⁷⁷ The Bureau of Prisons collects data on all federal defendants who are sentenced to incarceration and confined within the Bureau of Prisons' system. Data on inmates includes race, age, gender, citizenship, and whether the inmate is of Hispanic origin. See 2006 STATISTICAL TABLES, *supra* note 75, at tbl.7.10.

⁷⁸ The U.S. Marshals Service collects data on all suspects it arrests. The data includes the gender, race, age, and citizenship of the suspect. See 2006 STATISTICAL TABLES, *supra* note 75, at tbl.1.3.

⁷⁹ The Administrative Office of the U.S. Courts keeps data on all criminal defendants processed through the federal courts. Most of the data are case-related, including the types of charges, the outcome of the case, and the method of adjudication. The database keeps very little data on defendants and does not keep data on the race of defendants. See FED. JUSTICE STATISTICS RES. CTR., BUREAU OF JUSTICE STATISTICS, DATA DICTIONARY FOR DEFENDANTS IN CRIMINAL CASES TERMINATED, available at <http://fjsrc.urban.org/datadictionary.cfm> (describing all of the data variables collected by the Administrative Office of the United States Courts).

⁸⁰ The Executive Office for the U.S. Attorneys collects data on all suspects investigated by the United States Attorney's Office, including the investigating agency, the nature of any charges filed, and the outcome, but it does not collect any data on the race or gender of the suspect. See *id.*

Table 1
Data Collection by Federal Agencies

| Agency | People Included in Data Collection | Types of Information Collected | Collect Data on Race? |
|---|--|--|--------------------------|
| Executive Office for U.S. Attorneys | Suspects Investigated | Investigating agency, whether charged, and outcome | No |
| Pretrial Services Agency | Defendants in federal court | Information related to pretrial release | Yes |
| United States Marshal's Service | Suspects arrested and booked | Information related to suspect | Yes |
| Administrative Office of the Courts | Defendants in federal court | Case-related data, including type and method of adjudication | No |
| United States Sentencing Comm. | Defendants convicted and sentenced | Information regarding charge, adjudication, and sentencing-related factors | Yes |
| Bureau of Prisons | Defendants sentenced to prison | Information related to prisoners | Yes |

sentenced to a term of imprisonment, from the Bureau of Prisons), as are data on race and arrest (from the U.S. Marshals Service), and on race and pretrial release (from the U.S. Courts Pretrial Services System). Because neither the Executive Office for the U.S. Attorneys nor the Administrative Office of the U.S. Courts collects data on race of defendants or suspects investigated,⁸¹ however, data on race and adjudicatory outcomes and data on race and the decision to prosecute simply do not exist. While this leaves

⁸¹ See Email from Thomas H. Cohen, Statistician, Bureau of Justice Statistics, to Professor Erica J. Hashimoto, University of Georgia School of Law (Mar. 9, 2010) (on file with author).

a serious gap in the data, because a high percentage of defendants in federal court are convicted either by way of trial or by guilty plea, the Sentencing Commission's data still provide a relatively complete profile of those persons prosecuted in the federal courts.

In state courts, where the vast majority of criminal defendants are prosecuted, the collection of data on criminal defendants varies widely depending on the jurisdiction. Since 1988, the federal Bureau of Justice Statistics has collected data from pretrial services agencies on a sample of felony defendants in forty of the largest seventy-five counties in the country.⁸² These data include the types and number of charges, the pretrial release status of the defendant, the criminal history of the defendant, the age, race, and sex of the defendant, the outcome of the case, and the sentence.⁸³ The dataset did not originally include data on the race of the defendant, but this information has been collected since 1990. The primary problem with this dataset is that it collects data only in the most populous counties and only on defendants charged with felonies. Thus, there are no data from smaller jurisdictions or rural areas or for misdemeanor defendants.

The Bureau of Justice Statistics also collects data on felony sentencing from individual states (or counties if the data are kept by counties) through the National Judicial Reporting Program.⁸⁴ The database contains extensive information on the criminal history, race, gender, ethnicity, and age of the defendant, along with information about the method of conviction, the type of charges, and the sentence imposed.⁸⁵

Some individual states, in particular states that have sentencing commissions, collect and make available sentencing data on defendants in their criminal justice systems.⁸⁶ In most states, the department of corrections also compiles demographic information on inmates in the state

⁸² See BUREAU OF JUSTICE STATISTICS, *1990–2006 Cumulative Codebook*, in STATE COURT PROCESSING STATISTICS, 1990–2006: FELONY DEFENDANTS IN LARGE URBAN COUNTIES 4 (2007), available at <http://www.icpsr.umich.edu/icpsrweb/ICPSR/studies/2038/documentation>.

⁸³ See *id.*

⁸⁴ See MATTHEW R. DUROSE & PATRICK LANGAN, BUREAU OF JUSTICE STATISTICS BULLETIN: FELONY SENTENCES IN STATE COURTS, 2004 (2007), available at <http://bjs.ojp.usdoj.gov/content/pub/pdf/fssc04.pdf>.

⁸⁵ See *id.*

⁸⁶ See, e.g., TAMARA FLINCHUM ET AL., N.C. SENTENCING AND POLICY ADVISORY COMM'N, STRUCTURED SENTENCING STATISTICAL REPORT FOR FELONIES AND MISDEMEANORS FISCAL YEAR 2007/08, at 9–10 (2009), available at <http://www.nccourts.org/Courts/CRS/Councils/spac/Documents/07-08statisticalreportR.pdf> (listing convictions by age, race, and gender of defendant); MINN. SENTENCING GUIDELINES COMM'N, SENTENCING PRACTICES: ANNUAL SUMMARY STATISTICS FOR FELONY OFFENDERS SENTENCED IN 2009 (2010), available at http://www.msgc.state.mn.us/msgc5/sentencing_practices.htm.

prison system, at least as to race, age and gender.⁸⁷ In addition, in Minnesota, court clerks ask criminal defendants to complete a questionnaire requesting information on gender, race, and ethnicity.⁸⁸ The clerks then forward those forms to statisticians for analysis.⁸⁹ With the exception of Minnesota, however, states do not appear to be collecting data on criminal defendants except as it relates to sentencing or corrections.⁹⁰

While the data admittedly remain incomplete, those concerned about issues of racial discrimination in the criminal justice system have used the existing data to assess the extent to which the laws operate impartially. In addition, criminal defendants have used the data to try to prove claims of race discrimination. While equal protection claims have rarely succeeded in courts,⁹¹ at the very least the statistics on race do appear to have influenced legislative debates.⁹²

1. The Use of Data to Prove Equal Protection Violations

Criminal defendants' claims that they have been unconstitutionally singled out for prosecution or punishment have not fared well in the courts. In spite of that fact, collecting data on race remains critically important because, as the Supreme Court's selective prosecution cases make clear, without data, a defendant cannot prevail on a selective prosecution claim. Thus, while such claims continue to be very difficult to prove even with data, it is possible that more sophisticated data collection may ultimately make the claims more readily provable.⁹³

The Court has recognized that, while the government retains "broad discretion as to whom to prosecute . . . the decision to prosecute may not be deliberately based upon an unjustifiable standard such as race, religion, or

⁸⁷ See, e.g., GA. DEP'T OF CORR., ANNUAL REPORT FY 08, at 17 (2009), available at http://www.dcor.state.ga.us/Reports/Annual/pdf/FY08_Annual_Report.pdf. Some jurisdictions keep much more detailed information. For instance, in addition to collecting data on gender, race, and sex, the Massachusetts Department of Corrections collects data on the marital status, citizenship, religion, and educational level of inmates. See MASS. DEP'T OF CORR., JANUARY 1, 2009 INMATE STATISTICS tbls.17-22 (2009) available at http://www.mass.gov/Eeops/docs/doc/research_reports/112009.pdf.

⁸⁸ See Jon B. Gould, *Studying Inequality with One Eye: A New Agenda for Evaluating Disparate Treatment in the Courts*, 23 JUST. SYS. J. 317, 325 (2002).

⁸⁹ See *id.*

⁹⁰ See *id.* at 321 (concluding that except the studies relating to sentencing, "[b]y and large, the courts lack similar analyses of judicial verdicts, whether they are criminal findings of guilt or civil judgments of liability").

⁹¹ See *infra* Part II.B.1.

⁹² See *infra* Part II.B.2.

⁹³ See Gould, *supra* note 88, at 321 (arguing that courts should collect more data so that litigants can assess whether disparate outcomes exist, and if they do, analyze the reasons for those disparate outcomes).

other arbitrary classification.”⁹⁴ Most scholars date the “selective prosecution” prohibition to 1886, when the Supreme Court held in *Yick Wo v. Hopkins*,⁹⁵ that California violated the Equal Protection Clause when it treated people of Chinese descent differently when enforcing an ordinance than it treated white people.⁹⁶ *Yick Wo* held that the Equal Protection Clause protects against the discriminatory enforcement of a facially neutral statute, while leaving open what a defendant must show in order to prevail on a selective prosecution claim.

Nearly a century later, the Court answered that question, holding that a defendant alleging discriminatorily selective prosecution of a facially neutral statute in violation of the Equal Protection Clause must demonstrate both discriminatory effect *and* discriminatory purpose.⁹⁷ While the Court has intimated that statistical proof demonstrating a “stark” pattern may be sufficient to establish discriminatory intent,⁹⁸ the Court has set a very high threshold for using statistical proof in this way. In *McCleskey v. Kemp*, for instance, the defendant relied on the Baldus study, a detailed statistical analysis that showed that African Americans who were charged with and convicted of killing white people in Georgia (as McCleskey was) had a statistically significantly higher likelihood of being sentenced to death compared to both white people who killed white people and African

⁹⁴ See *Wayte v. United States*, 470 U.S. 598, 607–08 (1985) (citations omitted) (internal quotation marks omitted).

⁹⁵ *Yick Wo v. Hopkins*, 118 U.S. 356 (1886).

⁹⁶ See, e.g., DAVID COLE, NO EQUAL JUSTICE 159 (1999) (“[T]he principle the court established in *Yick Wo* is straightforward: where the government discriminates based on race in its enforcement of the criminal law, it denies equal protection.”). The petitioner in *Yick Wo* was convicted of violating a San Francisco ordinance that prohibited operating a laundry in a wooden building without the permission of the Board of Supervisors. *Yick Wo*, 118 U.S. at 374. The undisputed record established that 200 laundry owners of Chinese descent applied for such permits and all were denied, while eighty-one white laundry owners applied for permits and all but one were granted the permits. *Id.* At least one scholar has concluded that because *Yick Wo* “was not fundamentally a criminal case,” *i.e.*, the discrimination was perpetrated by civil authorities—the Board of Supervisors—rather than by prosecutors, it does not recognize the selective prosecution doctrine for which it is so often cited. See Gabriel J. Chin, *Unexplainable on Grounds of Race: Doubts About Yick Wo*, 2008 U. ILL. L. REV. 1359, 1363 (2008). Regardless whether the doctrine originated with *Yick Wo* or in later cases, it indisputably now exists.

⁹⁷ See *Wayte*, 470 U.S. at 608–09; *Oyler v. Boles*, 368 U.S. 448 (1968).

⁹⁸ See *McCleskey v. Kemp*, 481 U.S. 279, 293–94 (1987) (citing *Yick Wo* for the proposition that “statistical proof normally must present a ‘stark’ pattern to be accepted as the sole proof of discriminatory intent under the Constitution”). *But see* *United States v. Armstrong*, 517 U.S. 456 (1996) (suggesting that in order to prevail on a selective prosecution claim, a defendant must provide evidence that a similarly situated person of a different race was treated differently).

Americans who killed African Americans.⁹⁹ The Court concluded that “[b]ecause discretion is essential to the criminal justice process, we would demand exceptionally clear proof before we would infer that the discretion has been abused,” and it therefore held that “the Baldus study is clearly insufficient to support an inference that any of the decisionmakers in *McCleskey*’s case acted with discriminatory purpose.”¹⁰⁰

In the wake of *McCleskey*, the challenge facing defendants trying to establish selective prosecution claims has only become more difficult. In *United States v. Armstrong*, the Court held that defendants in federal court are not entitled to discovery to prove selective prosecution claims unless they first come forward with some evidence that “similarly situated defendants of other races could have been prosecuted, but were not.”¹⁰¹ The decisions in *McCleskey* and *Armstrong* highlight the importance of collecting data on the race of defendants because, without such data, a defendant cannot even begin to establish a selective prosecution claim.¹⁰² Indeed, even with the data that are now being collected, selective prosecution claims remain virtually (if not completely) impossible to prove.¹⁰³ Thus, court systems ought to expand the data being collected in order to ensure that the Constitution is being respected.¹⁰⁴

⁹⁹ As the Court described the study, it concluded that

even after taking account of 39 nonracial variables, defendants charged with killing white victims were 4.3 times as likely to receive a death sentence as defendants charged with killing blacks. According to this model, black defendants were 1.1 times as likely to receive a death sentence as other defendants. Thus, the Baldus study indicates that black defendants, such as *McCleskey*, who kill white victims have the greatest likelihood of receiving the death penalty.

McCleskey, 481 U.S. at 287. The defendant also argued that the study established that the death penalty in Georgia violated the Eighth Amendment. The Supreme Court rejected that argument as well. *Id.* at 313.

¹⁰⁰ *Id.* at 297.

¹⁰¹ *United States v. Armstrong*, 517 U.S. 456, 469 (1996).

¹⁰² This is particularly so since *Armstrong* so severely limits the discovery to which defendants are constitutionally entitled.

¹⁰³ See *COLE*, *supra* note 96, at 159 (concluding that there were “no reported federal or state cases since 1886 that had dismissed a criminal prosecution on the ground that the prosecutor acted for racial reasons”); *Chin*, *supra* note 96, at 1361 n.11 (“It is always dangerous to make claims that there are ‘no reported cases’ on a question of law, but my research assistant and I looked, and we, like many other researchers, could find none.”).

¹⁰⁴ Some argue that court systems are understandably reluctant to keep data on race of defendants both because the data can be misused to reinforce stereotypes about African Americans and because there is a lack of consensus about the racial classifications themselves. See Paul Knepper, *Race, Racism, and Crime Statistics*, 24 S.U. L. REV. 71, 72–73 (1996). Although those arguments have force, I think the potential benefits flowing from the collection of data—namely, ensuring the fairness of the criminal justice system—outweigh those concerns.

2. Use of Data on Race in the Legislative Process

Although data on race have not yet led to systemic reform through the Equal Protection Clause, they have proven useful in the legislative arena in two ways. First, although many African Americans perceive the criminal justice system as unfair,¹⁰⁵ legislators and those who work within the system want to believe that it treats defendants equally, regardless of race. Data suggesting that defendants are being treated differently based on race upset that view, and therefore may lead to change. Second, even if data are not sufficiently “stark” to prove an equal protection violation, data demonstrating disparate impact of laws may still make legislators worry that the law is vulnerable to such challenges. For both of these reasons, data that fall short of proving a selective prosecution claim still may result in legislative action. A couple of examples demonstrate this point.

First, as discussed above, the mandatory minimum penalties set forth in the Anti-Drug Abuse Act of 1986 provided for equal penalties for one hundred times the amount of powder cocaine as crack cocaine.¹⁰⁶ Because the overwhelming majority of defendants convicted of crack cocaine offenses in federal court over the past twenty years have been African-American,¹⁰⁷ and because crack cocaine penalties in federal court have greatly exceeded the penalties for powder cocaine offenses, the percentage of African Americans incarcerated in the federal Bureau of Prisons has mushroomed over the past twenty-five years.¹⁰⁸

Although the data show that the low quantity threshold for mandatory minimum crack penalties has had a disproportionate impact on African Americans, equal protection challenges to these mandatory minimums

¹⁰⁵ See Paul Butler, *Much Respect: Toward a Hip-Hop Theory of Punishment*, 56 STAN. L. REV. 983, 998 (2004) (describing hip-hop artists' view of the criminal justice system as a means of suppressing those who “rebel[] against the oppressive status quo”).

¹⁰⁶ Anti-Drug Abuse Act of 1986, Pub. L. No. 99-570, 100 Stat. 3207.

¹⁰⁷ See U.S. SENTENCING COMM'N, REPORT TO THE CONGRESS: COCAINE AND FEDERAL SENTENCING POLICY 16 tbl.2-1 (2007) (setting out figures establishing that in 1992, 91.4% of those convicted of crack offenses in federal court were African-American, in 2000, 84.7% were African-American, and in 2006, 81.8% were African-American). In contrast, African Americans constitute a relatively small percentage of those convicted of powder cocaine offenses in federal court. See *id.* (setting forth data that African Americans constituted between 27% and 30% of those convicted for powder cocaine offenses).

¹⁰⁸ See Marc Mauer, *Racial Impact Statements as a Means of Reducing Unwarranted Sentencing Disparities*, 5 OHIO ST. J. CRIM. L. 19, 22–29 (2007) (attributing disparities in rates of black imprisonment in part to federal crack cocaine penalties); Note, *Winning the War on Drugs: A “Second Chance” for Nonviolent Drug Offenders*, 113 Harv. L. Rev. 1485, 1485–86 (2000) (noting that the “dramatic increase” in incarceration rates for African-American males was caused by changes to crack cocaine sentencing laws).

“have failed miserably in court.”¹⁰⁹ Those same statistics, however, have made headway with policymakers. In 2007, the United States Sentencing Commission reduced the disparity between crack and powder cocaine penalties under the Sentencing Guidelines.¹¹⁰ More recently, Congress has acted to modify the mandatory minimums for crack offenses. On August 3, 2010, President Obama signed into law the Fair Sentencing Act of 2010, which changed the amounts of crack cocaine necessary to trigger five-year mandatory minimum sentences from five grams to twenty-eight grams, and for ten-year sentences from fifty grams to two hundred eighty grams.¹¹¹ This amendment reduces the disparity between the quantities of powder and crack cocaine necessary to trigger mandatory minimum sentences from 100:1 to 18:1. And this change indisputably was the result of evidence that the crack cocaine sentences were disproportionately affecting low-income minority defendants.

Racially disproportionate sentencing statistics in drug cases also led to reform of sentencing laws in Georgia. In 1987, the Georgia legislature passed a two-strikes provision for drug offenses.¹¹² Under that provision, a defendant convicted of a “second or subsequent” drug trafficking offense was subject to a mandatory minimum life sentence if the state notified the defendant prior to trial of its intent to seek the enhanced penalty.¹¹³ By May 1994, the state Board of Pardon and Parole’s records indicated that 98.4% of the defendants “serving life sentences for drug offenses . . . were African-American, although African-Americans comprise only 27% of the state’s population.”¹¹⁴

In *Stephens v. State*, an African-American defendant sentenced to life under the repeat offender provision used those statewide statistics, in conjunction with evidence that all of the defendants serving life sentences under that provision in Hall County (where Stephens was convicted) were African-American, to argue that the statute was being enforced in a discriminatory manner in violation of the equal protection guarantees of both the United States Constitution and the Georgia constitution. Over a strong dissent, a majority of the court concluded that Stephens had failed to

¹⁰⁹ See Sklansky, *supra* note 7, at 1298. Defendants have challenged the Act itself as a violation of the Equal Protection Clause, *id.*, and also have brought selective prosecution claims against the government for the enforcement of the statute. See *United States v. Armstrong*, 517 U.S. 456 (1996).

¹¹⁰ See U.S. SENTENCING COMM’N, AMENDMENTS TO THE SENTENCING GUIDELINES 70 (2007), available at <http://www.ussc.gov/2007guid/may2007rf.pdf>.

¹¹¹ See Fair Sentencing Act of 2010, Pub. L. No. 111-220, 124 Stat. 2372 (2010).

¹¹² See GA. CODE ANN. § 16-13-30(d) (West 2009 & West Supp. 2010) (repealed).

¹¹³ See *Mays v. State*, 414 S.E.2d 481 (Ga. 1992).

¹¹⁴ *Stephens v. State*, 456 S.E.2d 560, 561 (Ga. 1995).

establish an equal protection violation because he had not identified a similarly situated white person in Hall County who could have been prosecuted under the two-strikes law but was not.¹¹⁵ The dissent found Stephens' statistical showing—establishing that an African-American defendant in Georgia convicted of two or more drug offenses was 2,761% more likely to receive a life sentence than a white defendant in Georgia convicted of two or more drug offenses—sufficiently “stark” to require the government, under a modified *Batson* framework, to provide a legitimate non-discriminatory reason for its decision to prosecute Stephens under the repeat offender law.¹¹⁶

Although Stephens failed to prevail in court, his case provided the foundation for a change in the repeat offender law. Five months after the case was decided, the Georgia Supreme Court Commission on Racial and Ethnic Bias in the Court System issued a report citing the statistics set forth in *Stephens*, and calling for a more detailed study broken down by judicial circuit on the use of the repeat offender law.¹¹⁷ Faced with these bleak statistics, and the possibility of future successful equal protection challenges if circuit-specific statistics were kept, the Georgia legislature repealed the mandatory life sentence in two-strikes cases.¹¹⁸

As these examples illustrate, data demonstrating unequal enforcement of the laws, even in the absence of a finding that there has been a constitutional violation, may lead to legislative reform. Thus, data collection remains of critical importance to ensure that laws are enforced fairly.

¹¹⁵ *Id.*

¹¹⁶ *Id.* at 568–69 (Benham, P.J., dissenting). When the slip opinion in the case was first released, a majority of the Court concluded that the statistics presented by the defense were “so grossly disproportionate . . . as to shock the conscience,” and therefore required the Government to provide a legitimate non-discriminatory reason for its conduct. See *Stephens v. State*, No. S94A1854, 1995 WL 116292 (Ga. Mar. 17, 1995), *withdrawn*, 456 S.E.2d 560 (Ga. 1995). The court’s slip opinion caused great consternation and prompted a scathing letter from district attorneys across the state. See James P. Fleissner, *Criminal Law and Procedure: A Two-Year Survey*, 48 MERCER L. REV. 219, 222 (1996). Less than two weeks later, the court vacated the slip opinion and issued a new majority opinion concluding that there was no violation of either the state or the federal Constitution. Justice Thompson, who switched his vote between the two opinions, authored a concurring opinion noting that although there was no constitutional violation, “only a true cynic can look at these statistics and not be impressed that something is amiss.” *Stephens*, 456 S.E. 2d at 564 (Thompson, J., concurring specially). He therefore urged the Georgia legislature to step in and address the problem. *Id.* at 565–66.

¹¹⁷ See Fleissner, *supra* note 116, at 230.

¹¹⁸ *Id.* at 224.

III. THE IMPORTANCE OF DATA ON ECONOMIC STATUS OF DEFENDANTS

Among the various categories of data that can be kept on criminal defendants, data regarding the economic status¹¹⁹ of the defendant may be one of the most important to collect and analyze. This is true because the data we have demonstrate that criminal defendants are disproportionately poor.¹²⁰ Thus, the development of rational and effective criminal justice policy requires both that we study this data to determine what programs might be most effective and that we collect additional data that might provide clues as to why poor people are so overrepresented in the criminal justice system. In addition, in order to assure that laws are not being applied discriminatorily against poor people, we need to analyze the data we have and collect more complete data on those defendants. Before turning to how data on income levels can be used, this Part explores the limited data we currently have on the economic status (broadly defined) of criminal defendants.

A. DATA CURRENTLY BEING COLLECTED ON ECONOMIC STATUS OF CRIMINAL DEFENDANTS

Accurately estimating the income levels of individuals in the criminal justice system presents challenges. As of now, no complete data are being systematically collected on the income levels of all criminal defendants in either the state or federal courts. Neither the Bureau of Justice Statistics' database on criminal defendants in federal court¹²¹ nor its database on felony defendants in state courts in the seventy-five largest counties¹²²

¹¹⁹ For purposes of this Article, I use economic status, defined primarily by income level, rather than the more robust concept of socioeconomic status, which can encompass many other factors including occupation, education, and housing tenure. See Albert F. Osborn, *Assessing the Socio-Economic Status of Families*, 21 *SOCIOLOGY* 429 (1987). Collecting complete data on socioeconomic status of criminal defendants may provide a more accurate picture than economic status data alone, but collecting economic status data is a necessary first step. Accordingly, this Article primarily addresses the arguments for collecting economic status data.

¹²⁰ See *infra* Part III.A.

¹²¹ See FED. JUSTICE STATISTICS RES. CTR., BUREAU OF JUSTICE STATISTICS, DATA DICTIONARY FOR DEFENDANTS IN CRIMINAL CASES TERMINATED, <http://fjsrc.urban.org/datadictionary.cfm> (last visited Oct. 22, 2010) (describing all of the data variables collected by the Administrative Office of the United States Courts).

¹²² INTER-UNIV. CONSORTIUM FOR POLITICAL AND SOC. RESEARCH, VARIABLES FOR STATE COURT PROCESSING STATISTICS SERIES, <http://www.icpsr.umich.edu/icpsrweb/ICPSR/series/00079> (last visited Oct. 22, 2010) (follow "List all variables in this series" hyperlink) (listing the data variables collected for the State Court Processing Statistics Series).

collects data on the income level of criminal defendants. It also appears that no state currently collects this data.¹²³

Although complete data do not exist in any jurisdiction, we do have some information regarding the economic status of some actors within the criminal justice system. First, we have survey data documenting pre-arrest income levels for a sample of inmates in correctional facilities. Second, we have information regarding rates of appointment of counsel in felony cases in federal court and in state courts in the largest counties. Finally, we have data on educational levels of inmates in some state prisons and of defendants convicted in federal court. As discussed below, each of these datasets has limitations and jurisdictions ought to be collecting more complete data, but these sources provide at least some information related to economic status.

Beginning with data on income levels of incarcerated defendants, the Bureau of Justice Statistics collects data on pre-arrest income levels in a survey it administers to a sample of prisoners in state and federal prisons and inmates in local jails. As discussed in Part III.B., *infra*, one problem with this dataset is that the data on income level collected in these surveys have not been comprehensively analyzed, but the data are being collected. Every five to seven years, the Bureau of Justice Statistics conducts a survey of a sample of inmates in state and federal prisons, and that survey includes a question regarding the prisoner's income level in the month prior to arrest.¹²⁴ In 2004, approximately thirty-three percent of surveyed inmates in state prisons reported that they had earned less than \$800 in the month preceding their arrest.¹²⁵ That income would have put all of them at or below the 2004 poverty threshold for a single person.¹²⁶ Because some percentage of the prisoners reporting higher monthly incomes very likely had dependents,¹²⁷ moreover, using \$800 as the relevant cutoff probably

¹²³ As discussed in Part IV, *infra*, Arkansas may start collecting this data, but at least as of right now, it is not available.

¹²⁴ See BUREAU OF JUSTICE STATISTICS, U.S. DEP'T OF JUSTICE, CODEBOOK FOR THE SURVEY OF INMATES IN STATE AND FEDERAL CORRECTIONAL FACILITIES 611–12 (2004), available at <http://www.icpsr.umich.edu/cgi-bin/bob/archive2?study=4572&path=NACJD&docsonly=yes> (login and password required) [hereinafter BJS STATE AND FEDERAL SURVEY]. The surveys were done in 1991, 1997, and 2004.

¹²⁵ See *id.* The survey directs respondents to include income from both legal and illegal sources.

¹²⁶ The U.S. Census Bureau sets the poverty threshold for single people and families, and it collects data on how many people in the United States fall below that threshold. In 2004, the poverty threshold for a single person was \$9,645. See U.S. CENSUS BUREAU, POVERTY THRESHOLDS (2004), available at <http://www.census.gov/hhes/www/poverty/data/threshld/thresh04.html>.

¹²⁷ There are a number of survey questions regarding the number of children the inmate has and the number of people in the inmate's household pre-arrest, and there also is a

excludes a number of prisoners who were under the poverty threshold.¹²⁸ In 2004, approximately eleven percent of adults between the ages of eighteen and sixty-four were in a household that was under the poverty threshold.¹²⁹ Thus, those below the poverty threshold were three times more likely to be incarcerated in a state prison than the average person, and were four times more likely than those above the poverty threshold.¹³⁰

The Bureau of Justice Statistics also conducts a survey of jail inmates that includes a question about monthly income prior to arrest,¹³¹ and the statistics from the jail survey are even more striking. In the 2002 survey, forty-seven percent of inmates reported that they earned less than \$800 in the month before their arrest.¹³² Those below the poverty threshold therefore were more than four times more likely to be jailed than the average person, and seven times more likely than those above the poverty threshold.¹³³

question regarding whether the inmate was the primary financial support for any children prior to arrest. See BJS STATE AND FEDERAL SURVEY, *supra* note 124, at 594–603. The difficulty is that the survey does not ask how many children were financially dependent on the inmate, whether any other household members (for instance spouses or parent) were financially dependent on the inmate, or whether the household had any other source of income. Thus, it is impossible to ascertain the percentage of inmates falling below the poverty threshold.

¹²⁸ The poverty thresholds vary depending on the size of the family and the ages of the members of the household. See U.S. CENSUS BUREAU, HOW THE CENSUS BUREAU MEASURES POVERTY (2009), available at <http://www.census.gov/hhes/www/poverty/about/overview/measure.html>.

¹²⁹ See U.S. CENSUS BUREAU, *Age and Sex of All People, Family Members and Unrelated Individuals Iterated by Income-to-Poverty Ratio and Race: 2003—Below 100% of Poverty—All Races*, in CURRENT POPULATION SURVEY: 2004 ANNUAL SOCIAL AND ECONOMIC SUPPLEMENT (2004), available at http://pubdb3.census.gov/macro/032004/pov/new01_100_01.htm. I use the census figures for adults age eighteen to sixty-four because the correctional population figures capture adult inmates, and the vast majority of adult inmates are over the age of eighteen and under the age of sixty-five.

¹³⁰ Because the 11% of the population that is poor contributes 33% of the prison population, a poor person's chance of going to prison is three times greater than the average person. By contrast, because the 89% of the population that is not poor constitutes only 67% of the prison population, a non-poor person's risk of going to prison is less than the average person's by a factor of 0.75:1. Thus, a poor person is four times (3/.75) more likely to be imprisoned than a non-poor person.

¹³¹ See BUREAU OF JUSTICE STATISTICS, CODEBOOK FOR THE SURVEY OF INMATES IN LOCAL JAILS, 2002 (2006), available at <http://www.icpsr.umich.edu/cgi-bin/bob/archive2?study=4359&path=NACJD&docsonly=yes>.

¹³² The jail survey includes both inmates who have been convicted and sentenced to a jail term and pretrial defendants who are being detained pending trial. Because indigent defendants are less likely to be able to post bond and therefore are more likely to be detained pending trial, the sample of jail inmates may be poorer than criminal defendants generally.

¹³³ Because the 11% of the population that is poor contributes 47% of the jail population, a poor person's chance of going to jail is 4.3 (47/11) times greater than the average person.

Although the data collected in these surveys provide a useful starting point, they are marked by two significant limitations. First, they reflect only the income levels of defendants who were either convicted and sentenced to prison or held in a local jail. As a result, the dataset excludes all defendants who were not incarcerated. Second, because the Bureau of Justice Statistics collects these data nationally, the data provide no information on the income levels of defendants on a state-by-state basis.¹³⁴

Data on income levels of defendants therefore are sparse, but there are a couple of proxies that can be used to estimate the economic status of criminal defendants. Each of these proxies has limitations. They leave no doubt, however, that the criminal justice system prosecutes and incarcerates poor people at a much higher rate than non-poor people.

First, appointment of counsel serves as a proxy for indigence. Since 1963 when the Supreme Court decided *Gideon v. Wainwright*, the Constitution has required that states appoint counsel to defendants who are “too poor to hire a lawyer.”¹³⁵ In 2004, appointed counsel represented seventy-eight percent of felony defendants in state courts in the seventy-five largest counties.¹³⁶ The fact that appointed counsel represented these defendants means that someone made a determination that these defendants could not afford counsel.

The data on appointment of counsel have the advantage of capturing the status of all criminal defendants who are prosecuted, not just those who are convicted and sentenced to incarceration. Nonetheless, the data have several limitations. The most significant of these is that the standard for

By contrast, because the 89% of the population that is not poor constitutes only 53% of the jail population, a non-poor person’s risk of going to prison is less than the average person’s by a factor of 0.6:1. Thus, a poor person is seven times (4.3/.6) more likely to be jailed than a non-poor person.

¹³⁴ Because of the way the sample for the Bureau of Justice Statistics survey was done, “[s]tate, local, or other subnational estimates cannot be made.” *Id.* at 8.

As discussed below, *see infra* Part III.B, data regarding defendant demographics broken down by state are particularly important both to the development of policy, which primarily happens at the state level, and to ensuring that prosecutions, the majority of which happen in state courts, are conducted fairly.

¹³⁵ 372 U.S. 335 (1963) (holding that indigent defendants being prosecuted in state court have a constitutional right to state-appointed counsel). At the time *Gideon* was decided, the vast majority of states already provided counsel to indigent defendants charged with felonies, but *Gideon* made clear that the right to counsel applied to all defendants charged with felonies in state courts. *Id.* at 345. Since *Gideon*, the Court has held that the right to counsel also applies in any case in which the court either imposes a sentence of imprisonment, *see Argersinger v. Hamlin*, 407 U.S. 25 (1972), or suspends incarceration, *see Alabama v. Shelton*, 535 U.S. 654 (2002).

¹³⁶ This statistic comes from an analysis of data collected by the Bureau of Justice Statistics as part of the State Court Processing Statistics Series, *available at* <http://dx.doi.org/10.3886/ICPSR20281>.

appointment of counsel varies widely among jurisdictions,¹³⁷ and appointment of counsel therefore means different things in different places. For instance, in Georgia, there is a presumption that felony defendants are entitled to appointment of counsel if they earn less than 150% of the federal poverty guidelines,¹³⁸ and a presumption that they are ineligible for appointment of counsel if they earn over 150% of the federal poverty guidelines.¹³⁹ Similarly, in Washington state, the statute provides very specific guidelines for determining indigency, and counsel is generally provided only if the defendant makes less than 125% of the federal poverty guidelines.¹⁴⁰

In Alabama, by contrast, the statute establishes no income-based rules or presumptions of any kind; instead the court must examine a broad array of factors, including the net income of the defendant, the extent and liquidity of assets, and the projected length and complexity of the legal proceedings in determining whether the defendant qualifies for appointed counsel.¹⁴¹ In Arkansas, courts have likewise emphasized that determinations of indigence should be made on a case-by-case basis.¹⁴² Because there is no uniform standard for determining eligibility for appointed counsel, it is difficult to make any assessment regarding the income levels of those who use appointed counsel.¹⁴³

There is a second problem with using appointment of counsel as a proxy for determining the income level of criminal defendants: our data are limited to federal defendants and state felony defendants in forty of the seventy-five largest counties. We have complete data on appointment rates

¹³⁷ See Adam Gershowitz, *The Invisible Pillar of Gideon*, 80 IND. L. REV. 571, 572 (2005). The Supreme Court has never provided any guidance regarding how states should determine whether a person is indigent for purposes of the constitutional right to counsel, and jurisdictions therefore have adopted very different standards governing the inquiry. See *id.* at 572 (“In the forty years since *Gideon* was decided, there has not been a single Supreme Court case defining what makes a criminal defendant poor enough to be entitled to appointed counsel.”).

¹³⁸ The 2009 federal poverty guideline for a single person is \$10,830, and for a family of four is \$22,050. See ASSISTANT SEC’Y FOR PLANNING AND EVALUATION, U.S. DEP’T OF HEALTH AND HUMAN SERVS., 2009 HHS POVERTY GUIDELINES (2010), available at <http://aspe.hhs.gov/poverty/09poverty.shtml>.

¹³⁹ See GA. CODE ANN. § 17-12-8(b) (West 2009).

¹⁴⁰ See WASH. REV. CODE ANN. § 10.101.010(1) (West 2002 & West Supp. 2010); WASH. STATE OFFICE OF PUB. DEF., UPDATE ON CRITERIA AND STANDARDS FOR DETERMINING AND VERIFYING INDIGENCY 7 (2007), available at <http://www.opd.wa.gov/Reports/Other Reports/080228 10-22-07 Indigency Report - revised.pdf>.

¹⁴¹ See ALA. CODE § 15-12-1 (1995).

¹⁴² See *Hill v. State*, 805 S.W.2d 651 (Ark. 1991).

¹⁴³ In most jurisdictions, defendants are required either to file some sort of an affidavit in order to establish their indigence or to respond to questions posed by the court on the subject. See Gershowitz, *supra* note 137, at 580.

in all federal cases, and data exist with regard to appointment rates for a sample of defendants in state felony cases in the seventy-five largest counties,¹⁴⁴ but beyond this, no useful data exist. Thus, there is no information with regard to appointment rates in state felony cases in rural areas. Nor is there information on appointment rates for defendants in suburban counties, even though it is far from clear that the appointment rates in suburban counties even loosely track those rates in more urban settings.¹⁴⁵ There is, moreover, no data of any sort regarding appointment of counsel in state misdemeanor cases, despite the fact that appointment of counsel in felony cases may well differ from the appointment rate in misdemeanor cases.¹⁴⁶

Finally, using appointment of counsel as a proxy for the income level of defendants may be misleading because some defendants become indigent and eligible for the appointment of counsel precisely because they are charged with a criminal offense. If a defendant is held without bail pending trial (or is held because he cannot afford bail) then he very likely will lose his employment. Unless such a defendant has saved money or has some assets, he will be unable to afford counsel and likely will be found eligible for court-appointed counsel. These “post-arrest indigents,” however, stand in very different shoes from “pre-arrest indigents,” primarily because the former group is indigent only as a result of the fact that the criminal justice system itself has removed them from self-sufficiency and gainful employment.

Despite these complexities, it remains significant that available data indicate that almost eighty percent of felony defendants in state courts in the seventy-five largest counties have court-appointed representation. Using incomes of less than 150% of the federal poverty guidelines as a benchmark for appointment of counsel,¹⁴⁷ in 2008, nineteen percent of Americans between the ages of eighteen and sixty-four were part of a

¹⁴⁴ See TRACEY KYCKELHAHN & THOMAS H. COHEN, BUREAU OF JUSTICE STATISTICS, FELONY DEFENDANTS IN LARGE URBAN COUNTIES 4 (2004), available at <http://bjs.ojp.usdoj.gov/content/pub/pdf/fdluc04.pdf> (describing collection of data for database).

¹⁴⁵ Of course, some urban counties include suburbs within the county limits. For instance, Cook County, Illinois, includes Northbrook, IL, with a median household income of \$95,665, Wilmette, IL, with a median income of \$106,773, and the city of Chicago, with a median income of \$38,625. See RECORD INFO. SERVS., COOK COUNTY MUNICIPALITIES AND DEMOGRAPHICS (2010), available at <http://www.public-record.com/content/municipalities/cook/index.asp>.

¹⁴⁶ See Erica Hashimoto, *The Price of Misdemeanor Representation*, 49 WM. & MARY L. REV. 461, 489–90 (2007) (reporting that in federal court, of defendants for whom type of counsel was reported, only twenty-five percent had appointed counsel).

¹⁴⁷ See GA. CODE ANN. § 17-12-8(b) (West 2003 & West Supp. 2010).

household that made less than that amount.¹⁴⁸ In other words, less than a fifth of the population was charged with seventy-eight percent of the felonies in criminal cases across the country. If one calculates the risk of being charged with a crime, those with incomes of less than 150% of the federal poverty guidelines have a risk of being charged with a felony about four times greater than the average person and about fifteen times greater than the risk for those above the 150% marker.¹⁴⁹

Educational level provides another rough proxy for economic status. Unfortunately, with the exception of the Massachusetts Department of Correction and the South Carolina Department of Corrections, state systems do not publish data on the educational level of criminal defendants.¹⁵⁰ In the federal system, the United States Sentencing Commission collects data on the education level of defendants convicted in federal court. According to that data, in 2006, 48.9% of convicted offenders had less than a high school diploma.¹⁵¹ By contrast, the Census Bureau reported that in April 2000, only twenty percent of the overall United States population lacked a high school degree.¹⁵² Again, however, the usefulness of these data is somewhat limited.¹⁵³ First, and most obviously, education level correlates

¹⁴⁸ See U.S. CENSUS BUREAU, *POV01: Age and Sex of All People, Family Members and Unrelated Individuals Iterated by Income-to-Poverty Ratio and Race: 2008*, in CURRENT POPULATION SURVEY: 2009 ANNUAL SOCIAL AND ECONOMIC SUPPLEMENT (2009), available at http://www.census.gov/hhes/www/cpstable/032009/pov/new01_150_01.htm. In 1996, the rate was 23.5%. See U.S. CENSUS BUREAU, ANNUAL DEMOGRAPHIC SURVEY tbl.2 (1996), available at http://pubdb3.census.gov/macro/031996/pov/2_001.htm.

¹⁴⁹ Seventy-eight percent of the cases involved the 19% of the population below the 150% marker; thus the chance of a person under that marker being charged with a felony was a little over four times (78/19) greater than the risk for an average person. By contrast, the risk that a person over that marker would be charged with a felony was almost four times less likely than an average person to be charged with a felony (22/81 or .27). As a result, the chance of a person below the marker being charged with a felony is fifteen times greater (4.1/.27) than the risk for a person above the marker.

¹⁵⁰ The Massachusetts Department of Correction data shows that in 2009, 66% of the DOC population reported completing eleventh grade or less. See MASS. DEP'T OF CORR., JANUARY 1, 2009 INMATE STATISTICS v (2009), http://www.mass.gov/Eeops/docs/doc/research_reports/Jan_1_population/112009.pdf [hereinafter MASS. 2009 INMATE STATISTICS]. Similarly, in 2009, 58% of South Carolina inmates reported that they did not have either a high school diploma or a GED. See S.C. DEP'T OF CORR., PROFILE OF INMATES IN INSTITUTIONAL COUNT AS OF JUNE 30, 2009, at 1 (2009), http://www.doc.sc.gov/research/InmatePopulationStats/ASOF_InstitutionalCount_Profile_FY09.pdf.

¹⁵¹ See BUREAU OF JUSTICE STATISTICS, FEDERAL JUSTICE STATISTICS 2006 tbl.4.4 (2006), <http://bjs.ojp.usdoj.gov/content/pub/html/fjsst/2006/fjs06st.pdf> [hereinafter FEDERAL CRIMINAL JUSTICE STATISTICS, 2006].

¹⁵² See KURT J. BAUMAN & NIKKI L. GRAF, EDUCATIONAL ATTAINMENT 2000, at 1 (2003), available at <http://www.census.gov/prod/2003pubs/c2kbr-24.pdf>.

¹⁵³ The same Bureau of Justice Statistics survey that captures data on the income level of inmates in federal and state prisons and in local jails, see BJS STATE AND FEDERAL SURVEY,

only in a general way with income level. Second, patterns shown in federal cases may tell us little about what occurs in state systems. Indeed, the federal data may well overestimate the education level of inmates as a whole, because the statistics from Massachusetts indicate that sixty-six percent of their inmates,¹⁵⁴ as opposed to forty-nine percent of federal inmates, have less than a high school diploma. Finally, because federal data are collected only by the U.S. Sentencing Commission, we have no data on the educational level of defendants who are not convicted.

We have, then, sufficient data to establish that low-income people constitute a disproportionate percentage of criminal defendants. Based on this data, however, we do not—and cannot—know how disproportionate that percentage is in general in the state system or in individual states. And without any data as to the level of disproportionality, it is particularly difficult to examine the reasons why any level of disproportion exists.

B. THE IMPORTANCE OF COLLECTING AND CONSIDERING DATA ON INCOME LEVEL OF CRIMINAL DEFENDANTS

Just as collecting data on the race, mental health status, and drug addiction of criminal defendants has been important for the implementation of rational criminal justice policy and for ensuring that laws are enforced in an evenhanded way, data collection on income levels of criminal defendants is of paramount importance. In order to develop the most successful and cost-effective solutions for the crime problems we face, we need to target criminal justice programs towards the people most likely to be defendants. Based on the data we have, the overrepresentation of poor people exceeds the overrepresentation of any other definable group with the exception of drug-dependent and mentally ill defendants.¹⁵⁵ At least some crime-reduction programs therefore need to be targeted towards poor people. Policymakers, however, have all but ignored the data that exist on the

supra note 124, also collects data on the educational level of the inmates in those institutions. Those data, however, are subject to the same limitations as the data for the income levels and therefore are not discussed separately here.

¹⁵⁴ See MASS. 2009 INMATE STATISTICS, *supra* note 150, at v.

¹⁵⁵ For instance, African Americans are significantly overrepresented in the prison population. In 2008, approximately 33% of inmates in state and federal prison were African-American. See WILLIAM J. SABOL, HEATHER C. WEST, & MATTHEW COOPER, BUREAU OF JUSTICE STATISTICS BULLETIN: PRISONERS IN 2008, at 2 tbl.1 (2009), available at <http://bjs.ojp.usdoj.gov/index.cfm?ty=pbdetail&iid=1763>. That same year, approximately fourteen percent of the American population was African-American. Thus, African Americans were approximately three times more likely to be prisoners than non-African Americans. While that ratio is high, the overrepresentation of poor people is even higher, with poor people being more than four times more likely to be in state prison than non-poor people. See *supra* Part III.A.

overrepresentation of poor people and have not called for the collection of any additional data.¹⁵⁶ Thus, the data we currently have on the economic status of defendants and the income levels of prisoners need to be carefully analyzed, and we need to collect additional data to fill the gaps in the data.

*1. Using Data on Economic Status to Develop Rational
Criminal Justice Policy*

Low-income people constitute a large percentage of those prosecuted and incarcerated in the criminal justice system. That fact suggests that criminal justice policymakers should focus on solutions targeted specifically at those who are poor. Unfortunately, with one possible exception discussed below,¹⁵⁷ this has not happened. This is so for a couple of reasons. First, although some data related to economic status have been collected, very little analysis has been done of that raw data. Second, most of the data being collected cannot be broken down by state and so is not particularly useful for state legislators. Because it is at the state level that most of these policies and programs need to be developed, states probably need to begin collecting data on the income levels of defendants prosecuted in their courts so that they can analyze, among other things, the types of offenses poor defendants, as compared with wealthier defendants, are committing and the rates of recidivism of poor defendants as compared with the recidivism rates of non-poor defendants. This section first will examine the ways in which the federal government should be using the existing data and then will turn to the ways in which states should consider collecting data in order to develop effective programs targeted towards low-income defendants.

The existing databases compile a wealth of survey data on inmates in state and federal prisons and in local jails, and provide some data on the cases of felony defendants represented by court-appointed counsel. The problem is that although the raw data are available online, the assembled information cannot speak for itself; the data need to be analyzed before we can get any information about the economic status of defendants. Unfortunately, the Bureau of Justice Statistics, the entity that provides most of the reports from data it collects, has not made information on the income levels of inmates from the surveys readily accessible. Indeed, the last time a Bureau of Justice Statistics report included data on income levels of prisoners from the survey data described above dates back to the 1991

¹⁵⁶ As discussed in Part IV, *infra*, Arkansas is the one exception.

¹⁵⁷ See *infra* notes 162–168 and accompanying text.

survey.¹⁵⁸ Since then, the few publications with any data on income levels of prisoners report that information only in association with some other variable, making it very difficult to draw conclusions about the economic status of prisoners from those reports.¹⁵⁹

Even a basic analysis of that data could lead to more involvement by the federal government in developing crime reduction strategies targeted towards low-income offenders. As discussed above, the federal government played a critical role in the development of drug treatment courts and mental health courts. And the federal government's decision to fund those initiatives was driven in large part by the data establishing the extent of the criminal justice system's problems with drug-addicted and mentally ill defendants. While the government's support of those programs certainly was warranted, the data make clear that the percentage of poor felony defendants—however the term “poor” might be defined—in state courts approaches that of drug-addicted defendants,¹⁶⁰ and is significantly higher than that of mentally ill defendants.¹⁶¹

Thus, there certainly are enough data for the federal government to support the development of state programs targeted towards low-income defendants in the way that it has with both drug courts and mental health courts. Thus far, however, the federal government has only provided one set of funding designed to reduce recidivism rates by comprehensively addressing the needs, including in the areas of employment and education, of offenders reentering communities after prison terms. Efforts to address prisoner reentry began with the Serious and Violent Offender Reentry Initiative (SVORI), a collaboration among the Departments of Justice, Labor, Education, Housing and Urban Development, and Health and Human Services to fund initiatives in the states to ease the reentry of

¹⁵⁸ ALLEN BECK ET AL., BUREAU OF JUSTICE STATISTICS, SURVEY OF STATE PRISON INMATES, 1991, at 3 (1993), *available at* <http://bjs.ojp.usdoj.gov/index.cfm?ty=pbdetail&iid=1073> (reporting income levels of inmates in the year before arrest).

¹⁵⁹ *See, e.g.*, CAROLINE WOLF HARLOW, BUREAU OF JUSTICE STATISTICS, SPECIAL REPORT: EDUCATION AND CORRECTIONAL POPULATIONS 10 (2003) (reporting income data on state prisoners broken down by highest level of education reported by the prisoner).

¹⁶⁰ In 2004, 53% of state prisoners met the DSM-IV criteria for drug dependence or abuse. *See* CHRISTOPHER J. MUMOLA & JENNIFER C. KARBERG, BUREAU OF JUSTICE STATISTICS SPECIAL REPORT: DRUG USE AND DEPENDENCE, STATE AND FEDERAL PRISONERS, 2004, at 1 (2006).

¹⁶¹ A survey of prison and jail inmates found that at midyear 2005, 24% of state prison inmates had a recent history of mental health problems (defined as being diagnosed by a mental health professional with a mental disorder, being hospitalized overnight because of a mental health problem, being prescribed medication, or receiving therapy from a mental health professional). *See* DORIS J. JAMES & LAUREN E. GLAZE, BUREAU OF JUSTICE STATISTICS, MENTAL HEALTH PROBLEMS OF PRISON AND JAIL INMATES 2 (2006), *available at* <http://bjs.ojp.usdoj.gov/content/pub/pdf/mhppji.pdf>.

prisoners back into society and to prevent recidivism.¹⁶² Perhaps not surprisingly, the development of SVORI was spurred by data documenting recidivism rates and barriers to successful reentry. In 2002, SVORI awarded a number of three-year grants totaling \$139 million to fund state efforts to provide comprehensive services—including drug treatment, educational opportunities, job training, and mental health services—to prisoners prior to and after their release.¹⁶³ In addition to providing funding to the states to implement these programs, the SVORI also funded evaluations of the programs created by the states.¹⁶⁴

Citing much of the data that led to the creation of SVORI—including that two-thirds of released state prisoners are expected to be rearrested for a new offense within three years of release, that 70% of prisoners function at the lowest literacy levels¹⁶⁵ and only 32% of state prison inmates have a high school diploma,¹⁶⁶ that a significant percentage of state prisoners were not working prior to entry into prison,¹⁶⁷ and that one year after release, up to 60% of former inmates are not employed¹⁶⁸—Congress enacted the Second Chance Act of 2007: Community Safety Through Recidivism Prevention.¹⁶⁹ The Act authorizes grants, administered through the Department of Justice, to programs providing services to prisoners that are designed to prevent substance abuse and to facilitate reentry into the community, including by providing educational, literacy, vocational, and job placement services while the offender is still in prison and providing supervision and services when the offender is released.¹⁷⁰ The Act also authorizes up to \$10 million per year for research on juvenile and adult offender reentry.¹⁷¹ As a result of the funding through these two programs, a number of jurisdictions have developed reentry programs. Unfortunately, in the only evaluative study of these reentry programs, although SVORI

¹⁶² See PAMELA K. LATTIMORE, ET AL., NATIONAL PORTRAIT OF SVORI: SERIOUS AND VIOLENT OFFENDER REENTRY INITIATIVE 2 (2004), available at <http://www.urban.org/url.cfm?ID=1000692> [hereinafter NATIONAL PORTRAIT].

¹⁶³ See *id.* at 18.

¹⁶⁴ See *id.* at 11–13; PAMELA LATTIMORE & CHRISTY A. VISHER, THE MULTI-SITE EVALUATION OF THE SERIOUS VIOLENT OFFENDER REENTRY INITIATIVE (2010), available at <http://www.urban.org/url.cfm?ID=412075> [hereinafter MULTI-SITE EVALUATION].

¹⁶⁵ Second Chance Act of 2007, Pub. L. No. 110-199, § 3(b)(14), 122 Stat. 657, 660 (2008) (codified as amended in scattered sections of 18 and 42 U.S.C.).

¹⁶⁶ § 3(b)(15).

¹⁶⁷ § 3(b)(16).

¹⁶⁸ § 3(b)(18).

¹⁶⁹ See Second Chance Act of 2007, Pub. L. No. 110-199, § 3(b)(5), 122 Stat. 657, 659–60 (2008) (codified as amended in scattered sections of 18 and 42 U.S.C.).

¹⁷⁰ § 101(1)–(2).

¹⁷¹ § 245.

participants reported that they received services at a higher rate than non-SVORI participants, the evidence tracking recidivism rates of participants in these programs shows at most only a modest decrease in recidivism as compared to non-participants.¹⁷²

Part of the explanation for this outcome could lie in the fact that SVORI participants were “high-risk offenders who had extensive criminal and substance abuse histories, low levels of education and employment skills, and families and peers who were substance and criminal justice system involved.”¹⁷³ Indeed, on average, the male participants had first been arrested at age sixteen and had been arrested more than twelve times, and the female participants had first been arrested at age nineteen and had been arrested more than ten times.¹⁷⁴ Despite its lack of measurable success in reducing recidivism rates, the Initiative was laudable both for its efforts to address prisoner reentry in a comprehensive way and for its commitment to measuring outcomes. SVORI was not, however, a program specifically designed to address the income disparity of inmates in the prisons. Instead, it targeted a particularly high-risk group of serious offenders and tried to address all of their issues, from drug addiction to mental illness to economic challenges.

The only other federal program that seeks to reduce recidivism rates by improving the economic situation of newly released convicted felons provides a federal tax credit to employers who hire ex-felons within a year of their release from imprisonment or their conviction, whichever is later.¹⁷⁵ In theory, this tax credit should provide a significant incentive for employers to hire ex-felons, particularly in lower-wage jobs, that offsets some of the disincentive to hiring applicants with convictions on their records. It is not at all clear, however, that the program is having such an effect. Indeed, the government does not appear to have tried to measure the effect of this particular tax credit in any way,¹⁷⁶ so it is difficult to even

¹⁷² See MULTI-SITE EVALUATION, *supra* note 164, at 86 (documenting relatively minimal effects of SVORI program on recidivism rates over a two-year period).

¹⁷³ See *id.* at ES-8.

¹⁷⁴ *Id.*

¹⁷⁵ See 26 U.S.C. § 51 (2006).

¹⁷⁶ Although the Internal Revenue Service ultimately grants the tax credit, the Department of Labor is charged with primary operation of the program. The only data available from the Department of Labor include the total number of certifications received for all of the groups covered under the statute. See U.S. Dep’t of Labor, Work Opportunity Tax Credit (Apr. 16, 2010), <http://www.doleta.gov/business/Incentives/opptax/> (stating that in fiscal year 2008, 691,421 certifications were issued by state workforce agencies). The statute, however, covers a number of groups, including certain veterans, those receiving benefits from SSI or other designated public assistance, and certain residents of designated

know the extent to which employers are participating in the program. In sum, the federal government's efforts to address criminal justice system issues related to economic status have been both fragmented and modest.

The states have also fallen short in efforts to take account of economic status in the operation of their criminal justice systems. As discussed in Part III.A, very little state-specific data are currently being collected regarding the economic status of criminal defendants. Perhaps as a result, states have done very little to focus on the problem. Like the federal government, a few states have implemented programs designed to reduce recidivism by assisting ex-offenders with getting jobs. For instance, Illinois has enacted a state tax credit similar to the federal credit,¹⁷⁷ and several states have passed "Ban the Box" legislation, which bars employers from asking about prior convictions on job applications.¹⁷⁸ These Ban the Box statutes are limited in their scope—the Minnesota and New Mexico statutes cover only public employers, and the Hawaii law, while purporting to cover all employers, exempts many employers, including the state and any of its branches or agencies, counties, many financial institutions, and private schools¹⁷⁹—but they at least give those with prior convictions on their record a better opportunity to get a foot in the employment door.¹⁸⁰

empowerment or enterprise zones. *See* 26 U.S.C. § 51(d)(1) (2006). Thus, it is impossible to assess the extent to which the program is being used specifically to benefit ex-felons.

¹⁷⁷ *See* 35 ILL. COMP. STAT. ANN. 5/216 (West Supp. 2010) (providing a tax credit of up to \$600 for each qualifying ex-offender that an employer hires and defining a qualifying ex-offender as an offender who has served time in an Illinois adult correctional center and was hired within one year of release from confinement).

¹⁷⁸ *See* HAW. REV. STAT. ANN. § 378-2.5 (LexisNexis 2010) (prohibiting all employers from inquiring about or considering conviction records until after the potential employee has been given a conditional offer of employment); MINN. STAT. ANN. § 364.021 (West 2004 & West Supp. 2010) (prohibiting public employers from asking potential employees about criminal records until after the potential employee has been selected for an interview); N.M. STAT. ANN. § 28-2-3 (1978 & Supp. 2010) (prohibiting state employers from making any inquiry into prior convictions on initial applications for employment and allowing consideration of conviction only after applicant has "been selected as a finalist for the position").

¹⁷⁹ HAW. REV. STAT. § 378-2.5(d).

¹⁸⁰ The EEOC has concluded that an absolute bar on employment of any individual with a criminal conviction on his record violates Title VII of the Civil Rights Act of 1964, 42 U.S.C. §§ 2000e–2000e-17 (2010). *See* U.S. EQUAL EMP'T OPPORTUNITY COMM'N, EEOC POLICY STATEMENT ON THE ISSUE OF CONVICTION RECORDS UNDER TITLE VII OF THE CIVIL RIGHTS ACT OF 1964 (1987), *available at* <http://www.eeoc.gov/policy/docs/convict1.html> [hereinafter EEOC POLICY STATEMENT]. *See also* *Green v. Mo. Pac. R.R. Co.*, 523 F.2d 1290, 1293–99 (8th Cir. 1975) (holding that a blanket policy of refusing employment to anyone with a conviction on his record had a disparate impact on African Americans and could not show that such policy was job-related and consistent with business necessity). In deciding whether or not to hire a person with a criminal conviction on his record, the employer therefore, should consider three factors: (1) the nature and gravity of the offense;

Although programs aimed at removing the barriers to employment faced by ex-offenders may help reduce recidivism, given the high rates of poverty and low rates of education among ex-offenders, it is unlikely that these programs alone will have much impact on overall crime rates. This is an area in which data could provide some guidance. If the data were to show that first-time offenders are as likely to be poor at the time of their arrest as are repeat offenders, this information would suggest that the felony conviction is not the primary barrier to gainful employment. Thus, states might find that tax incentives and Ban the Box initiatives are less effective means of reducing recidivism than other programs. The question, of course, is what other programs might be effective.

One possibility would involve adopting a therapeutic jurisprudence model court designed to divert defendants charged with certain types of offenses into a program that helps them find jobs and stable housing arrangements, while promoting their active participation in the life of the community. The therapeutic jurisprudence model—which encompasses both drug courts and mental health courts—advocates for the law as a therapeutic agent that enhances the physical or psychological well-being of individuals.¹⁸¹ Drug courts, for instance, seek to use the power of the criminal law to enhance the psychological well-being of the participant by helping that person understand the nature and effects of addiction.¹⁸² If poverty in some way psychologically reduces the disincentive to committing crime—for instance, by disconnecting the person from the community ties that ordinarily provide an incentive to engage in lawful behavior—addressing those disconnections through a diversionary court may reduce crime rates.¹⁸³

Of course, the types of offenses that should be diverted will depend on what the data show. But if the data show a correlation between low income

(2) the length of time since the potential employee's conviction or release from confinement; and (3) the nature of the job sought. See EEOC POLICY STATEMENT, *supra*.

Given this law under Title VII, the legislation passed in Minnesota, Hawaii, and New Mexico assists ex-offenders seeking jobs in a couple of ways. First, the statutes prohibit covered employers from asking questions about prior convictions on initial job applications. Once an employer has made the decision to advance the application to the interview stage or has conditionally decided to hire the applicant, the employer has had the opportunity to consider the applicant without regard to his past record, making it more probable that the applicant will be hired even in spite of the later notification of the prior conviction. Second, if the applicant's prior conviction is not particularly related to the expected job duties of the position and the applicant ultimately is not hired, he has a much stronger, and more complete, record that the employer has violated Title VII.

¹⁸¹ See WINICK & WEXLER, *supra* note 58, at 7–9.

¹⁸² *Id.*

¹⁸³ *Cf.* Butler, *supra* note 105, at 998 (suggesting that in the hip-hop culture, prison and punishment have lost their stigmatic effect).

levels and the commission of certain offenses—for instance, shoplifting and petty theft—it may make sense to divert these cases so as to prevent recidivism by resolving the issue that led to the criminal behavior.¹⁸⁴ Other offenses that correlate with income level—in particular drug distribution—may also fit well into a therapeutic justice initiative. In general, courts have been reluctant to address head-on the economic nature of drug distribution, instead trying to shuttle defendants into programs like drug courts that do not address their underlying needs. Indeed, some critics of drug courts have pointed to the fact that, at least in some jurisdictions, many drug traffickers are being diverted into drug courts even if they show few signs of addiction.¹⁸⁵ Part of the reason that these defendants are diverted into drug courts is that judges are reluctant to impose the sentences mandated by harsh drug laws, while prosecutors are unwilling to dismiss the cases altogether.¹⁸⁶ The difficulty with placing non-addicted defendants into addiction-based drug court programs is self-evident. The real problem is that many street-level drug dealers come from impoverished backgrounds, and selling drugs offers a quick way to make significant amounts of money. Helping those defendants find and take advantage of legal work options is much more likely to reduce recidivism than providing them with addiction counseling that they do not need.

In short, a rational criminal justice policy seeking to reduce crime and recidivism rates must recognize that a significant percentage of those who are charged with and convicted of crimes are poor, and it must develop programs to reduce criminal activity among the poor. The development of those programs requires reliable data, both to justify funding and to help determine what programs might be most effective. Finally, data on the operation of any programs are necessary so that the success of the programs can be measured. Such steps will enable modification of programs to maximize their effectiveness and replication of effective programs.

¹⁸⁴ These types of crimes are not as serious as those that were included within the SVORI study. See NATIONAL PORTRAIT, *supra* note 162. The severity of the charged offense may well be one factor that states would want to consider in determining what offenses the alternative court would encompass.

¹⁸⁵ See Josh Bowers, *Contraindicated Drug Courts*, 55 UCLA L. REV. 783, 794–98 (2008) (noting that 95% of the drug court participants in the Bronx Drug Court and 90% of the defendants in the Brooklyn drug court are charged with drug dealing, rather than drug possession).

¹⁸⁶ *Id.*

2. *The Importance of Data on Economic Status for Ensuring Equal Treatment*

Data on the income levels of defendants also provide a means of determining whether our laws are being enforced equally, without regard to either race or class. The data we currently have demonstrates that poor people are disproportionately represented among those prosecuted in criminal cases.¹⁸⁷ Without proper data, it is impossible to ascertain whether this overrepresentation is attributable to a higher rate of committing crimes among poor people or to unequal enforcement of the criminal laws.

Before turning to the types of data we need to have in order to properly assess this issue, a word on the remedy for unequal enforcement of statutes against poor people is in order. To date, the Supreme Court has never held that socioeconomic class is a protected class for purposes of analyzing equal protection claims. Presumably, then, even if there were data establishing discriminatory enforcement, a low-income defendant might well have no cognizable selective prosecution claim. At the least, then, the collection of data on economic status will provide less help in asserting selective prosecution claims than similar data based on race or sex.

That fact notwithstanding, data on economic status still are critical to preventing unequal enforcement of statutes against lower-income defendants. As discussed above, the constitutional remedy for selective prosecution of racial minorities has provided virtually no relief for individual defendants.¹⁸⁸ Even in the absence of constitutional claims, however, data on the unequal enforcement of statutes can and sometimes does lead to legislative reform.

The data on education levels of defendants gives at least some reason to question whether the government enforces criminal laws equally across economic classes. In federal court, only 30.5% of those with less than a high school diploma were released prior to trial, while 77% of defendants with a college degree were released.¹⁸⁹ Because the Bail Reform Act prohibits judicial officers from “impos[ing] a financial condition that results in the pretrial detention of a person,”¹⁹⁰ the ability to post bail should not account for this difference. Of course, it could be that the nature of the crime charged varies with the educational background of the defendant. But these data should give us pause.

¹⁸⁷ See *supra* Part III.A. Because our data are incomplete, we do not know the extent to which poor people are overrepresented in the criminal justice system, but it is safe to say that there is at least some overrepresentation.

¹⁸⁸ See *supra* Part II.B.

¹⁸⁹ See FEDERAL CRIMINAL JUSTICE STATISTICS, 2006, *supra* note 151, at tbl.3.2.

¹⁹⁰ See 18 U.S.C. §3142(c)(2) (2006).

For lower-level offenses, the effect of poverty may be most apparent. As discussed above, inmates in local jails are significantly poorer than inmates in state and federal prisons.¹⁹¹ That could mean one of two things: Either poor people commit a greater percentage of low-level crimes than more serious offenses, or poor people are more likely to be sentenced to incarceration for relatively minor offenses than wealthier people.¹⁹² The only way to determine which of the reasons results in the disparity is to examine data on offense levels and sentencing, as well as data on the convictions of poor people in local jails. If the data support the latter explanation, then jurisdictions may well want to examine sentencing practices for misdemeanor and low-level felony offenses to promote fair and nondiscriminatory sentencing.

Finally, data might show significant income disparities among those charged with particular offenses, while also demonstrating that rates of offending do not explain the disparity. If so, there is a strong basis for concluding that over-enforcement of certain criminal laws in low-income areas is occurring. Enforcement of drug possession laws provides a rich area for study along these lines, at least in part because the federal government has some data on the profiles of drug users. If the data establish that poor people are significantly overrepresented among those prosecuted under statutes outlawing controlled substance possession, one would then want to turn to the extent to which drug use is primarily a low-income issue. According to a report prepared by the federal government in 2002, current illicit drug use is somewhat higher among adults with less than a high school education (7.6%) than adults with a college education (4.3%).¹⁹³ But adults with a college education also were more likely to have used drugs in their lifetimes (47.2%) than adults who had not completed high school (32%).¹⁹⁴ Those facts suggest that while drug use may be occurring at slightly higher rates in low-income areas than in wealthier neighborhoods, drug use is prevalent across the country. Thus, if low-income people are being prosecuted or are incarcerated or both for drug possession at overwhelmingly higher rates than non-poor people, there may

¹⁹¹ See *supra* Part III.A. In general, those incarcerated in local jails have been convicted of lower level offenses than those sentenced to prison.

¹⁹² For more serious crimes, the sentencing guidelines now in operation in many states have mitigated some of the differences in sentencing based on socioeconomic class. See Frase, *supra* note 21, at 177 (noting that evaluations have indicated that Minnesota's sentencing guidelines have "largely . . . eliminated" race, gender, and class biases as "direct causes of sentencing disparity").

¹⁹³ See OFFICE OF APPLIED STUDIES, U.S. DEP'T OF HEALTH & HUMAN SERVS., 2001 NATIONAL HOUSEHOLD SURVEY ON DRUG ABUSE 20 (2002), available at <http://www.oas.samhsa.gov/nhsda/2k1nhsda/vol1/toc.htm>.

¹⁹⁴ *Id.*

be issues with unequal enforcement of the drug laws. Again, however, without the collection and analysis of data on the economic status of defendants in the criminal justice system, we cannot know whether unequal enforcement is occurring.

IV. A PROPOSAL FOR DATA COLLECTION AND ANALYSIS

Rational criminal justice policy and assurances of equal enforcement of laws both require the collection and analysis of data on the economic status of criminal defendants. In particular, researchers should collect and analyze economic status data on defendants in a database that also includes, at the very least, the charges against the defendant, sentencing data, and criminal history.

Much of this data already exists for prisoners in state and federal prisons and inmates in local jails.¹⁹⁵ But the existing data need to be analyzed much more thoroughly. As an initial matter, we need to determine exactly what percentage of the inmate population is poor. That may require more detailed analysis, not just of the pre-arrest monthly income of each inmate but also of the number of dependents and the household income. Data also should be parsed to determine what types of crimes poor people commit and whether the breakdown of those crimes mirrors the types of crimes committed by non-poor defendants. If poor people are convicted of different crimes than non-poor people, more research needs to be done to determine why that is the case so that policy proposals can incorporate that data.

If poor people are convicted of the same types of crimes as non-poor people and are just generally overrepresented among all types of crimes, the policy responses may well differ because the overrepresentation of poor people may result from a factor other than economic need. Regardless what the data show about the breakdown of offenses, any analysis should try to ascertain whether the overrepresentation of poor people in the system is the result of discrimination against the poor or the result of a higher rate of offending. For at least some crimes, we have rough data regarding the demographic profile of those who engage in criminal behavior.¹⁹⁶ If that profile differs significantly from the profile of those who are imprisoned for those offenses, lawmakers may need to examine the ways in which those laws are being enforced at the arrest level, prosecution level, and trial level. Recidivism rates also provide fertile ground for analysis to assist policymakers. In particular, it would be helpful to know whether repeat

¹⁹⁵ See *supra* Part III.A.

¹⁹⁶ See, e.g., *supra* note 191 and accompanying text.

offenders are more likely to be poor than first offenders, and if so, the magnitude of that difference.

A key purpose of collecting data of this kind is to spur the development of programs that address in a nuanced way the issue of the overrepresentation of low-income people in the criminal justice system. Most of these programs will be implemented, if at all, at the state level. Yet existing datasets—provided primarily by the Bureau of Justice Statistics survey data—give us only a broad nationwide overview. This is the case even though the profile of poor people in different states varies greatly, depending on, among other things, whether the state is predominately rural or urban. In addition, the substantive criminal laws and sentencing provisions, as well as enforcement strategies, differ significantly from jurisdiction to jurisdiction.

For all of these reasons, states need to collect and analyze their own data so that they can develop programs adapted to their local conditions. There are, of course, challenges to collecting these data, particularly at the pretrial stage of the case. Once the defendant has been convicted and sentenced, data collection is less complicated, since prisons and jails in many jurisdictions already gather a great deal of information from inmates. In particular, in order to determine the appropriate security level for inmates, many correctional facilities secure information regarding the inmate's criminal history, the charges on which he was convicted, and the economic background of the inmate, including educational level.¹⁹⁷ None of these data, however, are available in a usable form, either because the state has not compiled the information into a database or because it has not made the database available. As discussed above, Massachusetts and South Carolina are the only jurisdictions that collect and make available data on the educational background of inmates, along with criminal history and other relevant data.¹⁹⁸ States need to establish systems for compiling the information they collect into a single database that can be analyzed to provide more useful information to policymakers.¹⁹⁹

Collection of data from criminal defendants who have been charged but not convicted presents additional challenges. First, to the extent that any of the information is incriminating, criminal defendants may have a

¹⁹⁷ See, e.g., *Assigning Inmates to Prison*, N.C. DEP'T OF CORR., <http://www.doc.state.nc.us/DOP/custody.htm> (last visited Nov. 8, 2010) (noting that in order to determine security classifications, “[p]rison classification specialists develop an individual profile of each inmate that includes the offender’s crime, social background, education, job skills and work history, health, and criminal record, including prior prison sentences”).

¹⁹⁸ See *supra* Part III.A.

¹⁹⁹ Grants from the Bureau of Justice Assistance could prove critical to the ability of states to undertake this task.

Fifth Amendment right to refuse to provide it.²⁰⁰ For instance, if a defendant has been earning income through illegal means and is charged for that illegal conduct, requiring her to report her income may tend to incriminate her. One solution might be to permit pretrial defendants to refuse to answer questions that might incriminate them. Although creating such an exemption will result in missing data, the exemption should apply to only a small percentage of defendants and the datasets likely still will be large.

States also must determine who should be responsible for collecting data from pretrial defendants. At the pretrial stage, a number of different institutional actors interact with defendants, including police officers, prosecutors, courts, and defense lawyers, but pretrial services agencies may be the most logical choice to collect these data. In many jurisdictions, pretrial services agencies collect information from defendants in order to assist the judge in deciding whether to release the defendant prior to trial,²⁰¹ and that information often includes, among other things, defendants' employment history.²⁰² In jurisdictions that rely heavily on pretrial service agency reports, the gathering of data by these agencies makes sense. Of course, these data would not include the end result of the case—that is, whether the defendant was convicted and, if so, the sentence imposed. Nonetheless, these data would provide a very helpful profile of those charged in the criminal justice system.

Other potential sources for data on pretrial defendants are the court system itself and public defender offices. As discussed above, the rules for determining eligibility for court-appointed counsel vary by jurisdiction,²⁰³ but in every jurisdiction, either someone within the court system or someone from the public defender's office collects information from all

²⁰⁰ See Gould, *supra* note 88, at 324–25 (discussing Minnesota's efforts to collect data on race of criminal defendants through a pretrial survey process and noting that the surveys have been deemed “voluntary” in part because of concerns that such information might incriminate the defendant, making any requirement that the defendant complete the survey a potential Fifth Amendment violation).

²⁰¹ See, e.g., JOHN CLARK & D. ALAN HENRY, OFFICE OF JUSTICE PROGRAMS, DEP'T OF JUSTICE, PRETRIAL SERVICES PROGRAMMING AT THE START OF THE 21ST CENTURY: A SURVEY OF PRETRIAL SERVICES PROGRAMS 13 (2003), available at <http://www.napsa.org/publications/prog21stcent.pdf> (noting that in most jurisdictions, pretrial services officers provide judges with verified information on the defendant to be used in making a bail determination, including the residence and employment status, criminal history, mental health status, and status of drug addiction).

²⁰² See, e.g., MARIE VAN NOSTRAND & KENNETH J. ROSE, PRETRIAL RISK ASSESSMENT IN VIRGINIA: THE VIRGINIA PRETRIAL RISK ASSESSMENT INSTRUMENT 13 (2009), available at <http://www.dcjs.virginia.gov/corrections/riskAssessment/assessingRisk.pdf> (identifying employment history as a significant predictive factor for pretrial risk assessment).

²⁰³ See *supra* Part III.A.

defendants seeking court-appointed counsel, including the charges they are facing, employment status, and income level. To be sure, this information is not collected from those who retain counsel, so any database compiled from these data would be incomplete. It would, however, provide some information regarding the income levels of defendants who have appointed counsel, and if this information were collected and maintained by the court, it could be part of a database that also includes the outcomes of cases.

The one other stage at which data are collected is at sentencing, particularly in jurisdictions that have sentencing commissions. In at least some of these jurisdictions, the sentencing commission is specifically charged with collecting and analyzing data about defendants, the crimes they committed, and the sentences they receive.²⁰⁴ In such states, it would impose little added burden to also require the collection and compilation of data on the education level of the defendant, pre-arrest income level, and number of dependents.

The critical point is that states need to make data collection a priority, designating specific actors to collect and compile data on defendants and then funding efforts to do so. Once the data have been collected, there are a number of entities—including the Bureau of Justice Statistics, academics, and non-profit organizations—that can assist with analyzing the data so that policymakers have the critical information they need to create programs that will reduce crime.

It appears that Arkansas is already on the path to developing just such a plan for the collection and analysis of data. In 2009, the state enacted legislation creating a Criminal Justice Task Force, which was charged with examining information about crime victims and criminal defendants, including information about their age, gender, race, ethnicity, and socioeconomic status.²⁰⁵ The legislature directed the task force to determine, among other things, the effectiveness of current criminal penalties in deterring future crime,²⁰⁶ the cost of sentences,²⁰⁷ and the risk that criminal laws are being administered unequally based on the race, gender, age, or socioeconomic status of either the defendant or the victim.²⁰⁸ The legislation also directs the task force to “[d]etermine the adequacy of current data systems to record and retrieve data that will enable ongoing monitoring of the criminal justice system to determine if it is

²⁰⁴ See, e.g., Frase, *supra* note 26, at 279 (discussing the Minnesota Sentencing Commission’s data collection efforts).

²⁰⁵ See 2009 Ark. Acts 4195.

²⁰⁶ *Id.* at § 2(4).

²⁰⁷ *Id.* at § 2(8).

²⁰⁸ *Id.*

functioning fairly and equitably.”²⁰⁹ Because Arkansas currently does not collect most of the data described by the legislature, the task force will have to analyze the best way to collect these data and make a proposal to the legislature to implement that plan.

In sum, while most states do not appear to be collecting data on the economic status of people within the criminal justice system, a few states appear to be moving in that direction. States need to understand that the task is not as large as it might at first seem. Some actors within the criminal justice system—most notably corrections department and pretrial services agencies—already gather much data from defendants, so the primary mechanism that needs to be instituted involves: (1) rounding out the scope of the information gathered from each defendant and (2) compiling and preserving the data that are collected. For every state, the potential advantage of assembling such data involves nothing less than building a criminal justice system that works in the most effective way possible. The benefits of taking these modest steps therefore should be well worth the cost.

V. CONCLUSION

The criminal justice system needs data on economic status both in order to develop rational policy and in order to ensure equal treatment. Some data already are being collected, and we need to begin the process of analyzing that data. States also, however, need to begin collecting data on economic status in their own jurisdictions so that they have more specific data from which to develop sound laws and policies. Agencies in some states already collect this data, and other states can easily put in place similar data collection programs. All states must also take steps to compile the information they do collect into usable databases. Most importantly, once the data have been collected and analyzed, that analysis needs to be used to focus attention on economic status, just as data were used to focus attention on drug addiction and mental illness. The development of programs targeted at poor people has the potential to reduce crime rates significantly, but that potential can only be realized if policymakers focus on the issue and develop coherent policy responses.

²⁰⁹ *Id.* at § 2(8).