Racism and the Economy
focus on Criminal Justice

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Title of proposal:

Give first-time defendants a second chance: A proposal to reduce racial disparities in the criminal justice system

Racial disparities are a prominent feature of the U.S. criminal justice system. In 2019, 26.6% of individuals arrested were Black, 19.1% were Hispanic or Latino, and 2.4% were American Indian or Alaska Native (FBI UCR, 2019); 32.8% of sentenced inmates were Black, and 23.2% were Latino (Carson, 2020). However, only 13.4% of U.S. residents are Black, 18.5% were Hispanic or Latino, and 1.3% were American Indian or Alaska Native (Census, 2019). Reducing these disparities is a top priority for many policymakers, advocates, and citizens.

Disparities in arrests, convictions, supervision, and incarceration have important consequences for individuals and their communities. Defendants often accumulate substantial court debt that they need to pay even if their charges are dismissed. And a period of incarceration can mean lost wages, lost time with family, and emotional trauma. Racial disparities in who experiences these costs contribute to racial disparities in broader economic outcomes.

Criminal legal contact can continue to have an impact even after a case is completed. Audit studies have shown that employers discriminate against job applicants with criminal records (Pager, 2003; Uggen et al. 2014; Agan and Starr, 2018). Given racial disparities in who has a record, this discrimination has a disparate impact on people of color and Indigenous people.

The effects of convictions on subsequent arrests

So, given the large racial disparities in who winds up with a criminal record, how can we reduce the disparate impact of the criminal justice system on the Black community and people of color generally?

Recent research provides some good news about one potential policy option. The most effective strategy may be reducing the share of men of color who receive a criminal record in the first place. While this doesn't help those who already have a record—an important area for future research and policy experimentation—it would have an important benefit of stemming the flow of new people into the system (with all the collateral consequences that entails).

Agan, Doleac, and Harvey (2021) consider the effect of prosecuting defendants for nonviolent misdemeanor offenses on those defendants' subsequent criminal justice involvement. We use data from Suffolk County, Massachusetts, where nonviolent misdemeanor cases are assigned to prosecutors in a way that is unrelated to case and defendant characteristics (e.g., the details of the alleged offense or the criminal record of the defendant). However, prosecutors vary quite a bit in their leniency, so some defendants get lucky and are assigned a lenient prosecutor who is less likely to prosecute the case, and other defendants are unlucky and are assigned a harsh prosecutor who is more likely to prosecute the case. We use this (effectively)

random assignment to lenient versus harsh prosecutors in the initial arraignment hearing to measure the effect of the prosecution decision. We find that not prosecuting those charges—that is, dismissing the case at the arraignment hearing—has big benefits. Nonprosecution reduces the probability of a subsequent criminal complaint (basically an arrest) over the subsequent two years by 58%.

An important mechanism driving the Suffolk County effects appears to be criminal record acquisition. In Massachusetts, as in many other jurisdictions, arrests are only entered into the statewide criminal records system if prosecutors pursue charges at the arraignment hearing. Cases that prosecutors decline to prosecute are not entered into the criminal records system. By contrast, misdemeanor charges that are prosecuted remain on a defendant's statewide criminal record even if those charges are later dismissed or the defendant is acquitted. These criminal records of misdemeanor charges appear to have damaging collateral consequences for defendants.

Recent research by Mueller-Smith and Schnepel (2021) provides complementary evidence. They consider the effects of deferred adjudications for nonviolent felony defendants; in such cases, charges are dismissed if the defendant successfully completes a probationary period. The authors use two policy changes in Harris County, Texas, to measure the effects of deferred adjudications on subsequent criminal justice involvement and employment. They find big benefits: Those who receive a deferred adjudication are 45% less likely to be convicted of any new crime over the subsequent 10 years and 49% more likely to be employed.

In both our research and that of Mueller-Smith and Schnepel, effects are driven by first-time defendants. This is in line with the hypothesis that the first criminal record at a particular level (misdemeanor or felony) has particularly important collateral consequences.

The prosecution decision thus serves as a fork in the road: prosecutors can pull first-time defendants into the criminal justice system, or send them on their way. If they choose the former – prosecuting the case and putting the arrest and/or conviction on their criminal record – the person will be on a different, worse path, at much higher risk of future criminal justice contact. If prosecutors choose the latter – dismissing the case, perhaps after a probationary period – a large share of those defendants will not come back. Perhaps those low-level offenders never would have reoffended in the first place, or perhaps the arrest and possibility of a conviction serves as a wake-up call that pushes them to behave better. Regardless, giving first-time defendants a second chance to avoid a criminal record appears to be a highly effective way to reduce future criminal justice involvement. And because Black and Latino men are disproportionately represented in the criminal justice system, they will disproportionately benefit from increased leniency. This could in turn reduce racial disparities in employment.

Efforts to reduce convictions appear more promising than efforts to reduce the impact of convictions after the fact. One popular policy, Ban the Box, prevents employers from asking about a job applicant's criminal record until late in the hiring process. However, if employers do not want to hire someone with a criminal record, removing this information may lead them to guess—and then statistically discriminate against—applicants from groups that are more likely to have a criminal record. Some recent research has shown that that these policies do just this: they lead employers to discriminate against young Black men with limited education, which hurts men from this group who don't have a criminal record. This widens racial disparities in employment, rather than reducing them (Agan and Starr, 2018; Doleac and Hansen, 2020).[1] While we don't yet know the effects of related policies that broaden record-clearing and expungement (thus hiding information about past criminal records from employers), it's possible that such policies could backfire in similar ways (Doleac and Lageson, 2020).

[1] Other research shows that Ban the Box also widens racial disparities in criminal justice outcomes, by increasing reincarceration rates for Black men but not White men (Sherrard, 2020).

A proposal to reduce criminal convictions

Based on this evidence, we propose that localities focus attention on helping defendants avoid a criminal record. This can be done by implementing a presumption of nonprosecution for nonviolent misdemeanor offenses, and deferred adjudications (dismissing charges after the successful completion of a probationary period) for nonviolent felony offenses. Prosecutors should target such policies at first-time defendants—those without a conviction at the level of the current charge. While such efforts are race-neutral, they will disproportionately benefit Black defendants, as they are overrepresented in the criminal justice system. For instance, District Attorney Rachael Rollins implemented a presumption of nonprosecution for a list of nonviolent misdemeanor offenses after she took office in Suffolk County, Massachusetts, in January 2019. That policy change disproportionately benefited Black defendants, who made up 46% of those charged with such offenses; only 24% of Suffolk County is Black.

While this proposal is supported by rigorous evidence, we see at least two areas where additional policy experimentation would be helpful:

The first is related to how much discretion to give to prosecuting attorneys in the decision of whether to prosecute first-time offenses. If the goal is to reduce racial disparities in outcomes, limiting discretion is probably best. That is, a blanket policy that outlines how charges will be handled given a defendant's criminal history will minimize racial disparities in who benefits from an increase in leniency. (See Yang, 2015, for an example of how increasing prosecutors' and judges' discretion in sentencing increased racial disparities in sentences. Sloan, 2020, finds that prosecutors in New York exercise their discretion in a racially disparate manner.) Put bluntly, simply encouraging prosecutors to increase leniency may disproportionately help White defendants. Limiting prosecutors' discretion to go easy on some defendants but not others may ensure that racial disparities in criminal justice outcomes shrink instead of grow.

That said, such blanket policies—dismissing anyone's first misdemeanor charge, for instance—could have unintended consequences. If such policies are understood in the community to mean that everyone can shoplift or trespass once, with no consequences, we could see a rise in illegal and reckless behavior. Figuring out how to maintain the social expectation that such behavior is wrong and has consequences, without exacerbating racial disparities in who gets a second chance, will require some trial and error. A middle ground—limiting but not eliminating prosecutorial discretion—will likely be the best option. Jurisdictions should try different versions of such a policy to see what produces the best outcomes.

The second area where policy experimentation would be helpful is figuring out which categories of first-time defendants benefit from leniency and how much leniency is warranted. Existing evidence pertains to nonviolent misdemeanors and nonviolent felony offenses. In those cases, the benefits of avoiding a criminal record (in terms of reduced recidivism) outweighed any additional recidivism associated with diminished deterrence and incapacitation. But it is possible that the important beneficial effects found in those studies would also extend to some categories of violent offenders, including those charged with weapon offenses, domestic violence, and assault.

Even in the case of nonviolent felonies, for which we have evidence that dismissing charges after the successful completion of a probationary period is effective, we might not need the probationary period to achieve better public safety outcomes. Dismissing the first-time charges outright could be equally effective from a public safety perspective. Simply being arrested and having to show up in court could be enough of a wake-up call for many defendants that they change course without further intervention.

We still have a lot to learn about how to reduce the burden of the criminal justice system in a way that both maintains (or increases) public safety and is racially equitable. We hope that academic researchers work closely with practitioners to measure the effects of policy changes and iterate on those policies as needed.

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