

**REJECTING THE WRONGS OF YESTERDAY: A MULTIFACETED
APPROACH TO ELIMINATING RACIAL DISPARITIES IN THE
ARKANSAS CRIMINAL JUSTICE SYSTEM¹**

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I. Introduction	107
II. The Development of the Racial Disparities in the Arkansas Criminal Justice System Research Project.....	109
A. Development of a Statewide Steering Body.....	110
B. Legislative Strategy Connected to Research Development.....	112
C. Development of the Research Modules.....	113
1. ADC Record Research.....	114
2. Prosecutor Discretion Research.....	114
III. Report of Research Modules.....	115
A. ADC Record Review Module.....	115
1. Methodology.....	115
a. Protection of Human Subjects.....	115
b. Data Collection.....	116
c. Records Reviewed.....	116
d. Data Analysis.....	116
2. Results.....	116
a. Characteristics of Prisoners in Sample.....	116
b. Characteristics of Court-Related Factors.....	118

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c. Characteristics of Crime-Related Factors.....	119
3. Implications.....	130
4. Limitations.....	131
B. Prosecutorial Discretion Module.....	132
1. Methodology.....	132
2. Data Collection.....	132
3. Data Analysis.....	132
a. Homicide.....	133
b. Robbery.....	135
C. Findings and Implications.....	136
IV. Recommendations.....	136
A. Arkansas Department of Corrections Record Reviews of Prisoners Convicted of Homicide and Sentenced to Life, Life Without Parole, or Death.....	137
B. Prosecutor Discretion Module.....	139
C. Overall Recommendations.....	140
1. Educating Policy Makers, Law Enforcement, and the Community.....	140
2. Data Collection and Centralization.....	141
V. Conclusion.....	141

In 1928 Thorsten Sellin, one of the nation's most respected white sociologists, argued that African Americans were unfairly stigmatized by their criminality. . . . [F]our decades of statistical research on black criminality began to be called into question. . . . African American researchers in the 1920s published a flurry of new statistical reports of racism among police officers, prosecutors, and court and prison officials. Convinced by the weight of the evidence . . . Sellin brought their work to the attention of his white academic peers. Speaking as a representative of the white majority in a Jim Crow nation, he exposed the "unreliability" of racial crime statistics and the deeply troubling

*ways in which blackness and criminality shaped racial identity and racial oppression in modern America. . . .*⁴

I. INTRODUCTION

It is the same old story—when blacks and whites are accused of the same crime, blacks receive harsher punishment. In 2011, the racial disparities in the Arkansas criminal punishment⁵ system were significant: black people comprised 15% of the state’s population but 42% of those incarcerated.⁶ This naturally prompts the question: “Why?” Was 2011 a mere coincidence? What role did race play, if any, in this significant racial disparity in Arkansas’s criminal punishment system?

In 2011, the inaugural director of the University of Arkansas at Little Rock (UALR) Institute on Race and Ethnicity and co-author Adjoa A. Aiyetoro chose to investigate the racial disparities in Arkansas’s criminal punishment system as the research focus for the Institute. A steering body was formed, along with a team of researchers composed of social scientists and law professors, and a research study was developed. The project’s work centered around three aspects: (1) community collaboration and education; (2) research; and (3) policy development.

The project’s primary goal was to develop a research approach to examine the racial disparities in Arkansas’s criminal punishment system and determine whether observed racial disparities are due to racial discrimination. Those arguing that disparities are evidence of racial discrimination base their conclusion on the general racial disparity statistics on the incarcerated population and anecdotes of racially disparate treatment.⁷ There are several examples of anecdotal evidence. For example, in 2012, Earnest Hoskins—a 21-year-old black father and husband—was attending a business meeting in Lonoke County, Arkansas—a predominantly white county.⁸ The meeting was at the home of his white male employer, 34-year old Christopher Reynolds, whom owned Reynell Industries.⁹ According to witnesses, Reynolds complained that Hoskins was

⁴ KHALIL GIBRAN MUHAMMAD, *THE CONDEMNATION OF BLACKNESS: RACE, CRIME, AND THE MAKING OF MODERN URBAN AMERICA 2* (2010).

⁵ The authors use the phrase criminal “punishment” system because significant racial disparities in the system strongly support a conclusion that its objective is punishment, not justice.

⁶ UNITED STATES CENSUS BUREAU, QUICK FACTS, <http://www.census.gov/quickfacts/table/SEX255214/05> (last visited Apr. 6, 2017); Leah Sakala, *Breaking Down Mass Incarceration in the 2010 Census: State-by-State Incarceration Rates by Race/Ethnicity*, PRISON POL’Y INITIATIVE, <http://www.prisonpolicy.org/reports/rates.html> (last visited Apr. 6, 2017).

⁷ *Id.*

⁸ *Id.*

⁹ *Id.*

under-producing and shot him in the head with a .44 magnum.¹⁰ Hoskins had worked for the company for two months and had received a promotion days before the shooting.¹¹ Reynolds was sentenced to only 10 years for the killing.¹²

Arkansas's history of targeting African Americans¹³ for criminal punishment is legendary yet (like other states) presently disguised by the all-too-frequent assertions that the criminal punishment system functions fairly from arrest to conviction, providing requisite due process to the accused. These assertions leave the stereotypic impression in place that blacks are more predisposed to criminality than are whites;¹⁴ and, in fact, they strengthen that stereotype. Often, even when evidence of systemic or institutional racism is identified, there is a tendency to blame individual characteristics for outcomes. This form of denial leads to "blaming the victim" for their failure to follow the criminal laws rather than an examination of the policies and practices of law enforcement—inherently an institution of power and privilege.¹⁵ Thus, the project's research was designed to respond to those who say that the fault for racial disparities lies with the individual and not the system.

Arkansas, like other former "slave"¹⁶ states, stripped blacks of fundamental rights including the right to be judged fairly for accusations of criminal conduct via a jury of their peers.¹⁷ After the abolition of slavery, southern states had to recreate a punishment system as prisons had been destroyed in the Civil War and states were bankrupted.¹⁸ Southern states responded by creating a convict

¹⁰ *Id.*

¹¹ *Id.*

¹² Janelle Lilley, *Employer Arrested in Ward Shooting Death*, KATV LITTLE ROCK (Apr. 6, 2017), <http://www.katv.com/story/20177083/breaking-man-arrested-in-ward-shooting-death>.

¹³ African American and black will be used interchangeably. Some scholars prefer black so as not to exclude non-African American blacks in the United States.

¹⁴ RANDALL KENNEDY, *RACE, CRIME AND THE LAW* 12–13 (1997) (view of blacks has been "besieged" by beliefs about predispositions toward criminal behavior that can be traced back to slavery); MARC MAUER, *RACE TO INCARCERATE* (1999) (indicating that whites have viewed [incomplete thought] as an inherent trait of blacks); Muhammad, *supra* note 4, at 35–87; Kelly Welch, *Black Criminal Stereotypes and Racial Profiling*, 23 J. CONTEMP. CRIM. JUST. 276, 276 (2007).

¹⁵ Sandra Hinson, Richard Healey & Nathaniel Weinsberg, *Race, Power and Policy: Dismantling Structural Racism*, GRASSROOTS POL'Y PROJECT (2011) http://www.raciaequitytools.org/resourcefiles/race_power_policy_workbook.pdf; Lynn C. Holley & Russell K. VanVleet, *Racism and Classism in the Youth Justice System: Perspectives of Youth and Staff*, 10 J. POVERTY 45 (2006); Garrick L. Percival, *Ideology, Diversity, and Imprisonment: Considering the Influence of Local Politics on Racial and Ethnic Minority Incarceration Rates*, 91 SOC. SCI. Q. 1063 (2010); Melissa Thompson, *Race, Gender, and the Social Construction of Mental Illness in the Criminal Justice System*, 53 SOCIOLOG. PERS. 99 (2010); Kimberly Westcott, *Race, Criminalization, and Historical Trauma in the United States: Making the Case for a New Justice Framework*, 21 TRAUMATOLOGY 273 (2015).

¹⁶ Africans were enslaved in the United States, including in Arkansas. To call enslaved Africans "slaves" is to identify with their status and another way to demean their personhood.

¹⁷ JOHN HOPE FRANKLIN & ALFRED A. MOSS JR., *FROM SLAVERY TO FREEDOM: A HISTORY OF AFRICAN AMERICANS* 141 (7th ed. 1994).

¹⁸ Calvin R. Ledbetter Jr., *The Long Struggle to End Convict Leasing in Arkansas*, 52 ARK. HIST. Q. 1, 2 (1993).

leasing system that targeted black men, charging and convicting them of violations of petty crimes and then leasing them to private companies.¹⁹ However, Arkansas's convict leasing system *pre-dated* the abolition of slavery; prison officials began the practice of leasing prisoners to the private sector in 1846.²⁰ After abolition, convict populations swelled with recently freed Africans.²¹ By 1908, African Americans, overwhelmingly male, were 70 percent of the convict leasing system.²²

Their treatment by these companies was often worse than the treatment of the enslaved, many of them dying due to harsh work conditions.²³ The convict leasing system did not end the targeting of blacks—particularly black males—for harsher treatment by the criminal punishment system than was allotted to whites.²⁴ The convict leasing system was a tool of white supremacy used to maintain the inferior status of blacks by marking them as criminals.²⁵ The system is the parent of the mass incarceration that furthers the disparate, harsher treatment of blacks (and increasingly Latino men) by utilizing the criminal punishment system as a tool to maintain white supremacy.²⁶

This article presents the research results from the study conducted by the UALR William H. Bowen School of Law's Racial Disparities in the Arkansas Criminal Justice System Research Project.²⁷ It describes the overall project, shares the methodologies for the two components of the research, summarizes the results, and makes recommendations for minimizing, if not eliminating, the racial disparities in charges, convictions, and sentences. The overarching finding that applies to both components is that race plays a significant role in the charging and sentencing decisions in those accused of homicide and the charging decisions of those accused of robbery.²⁸

II. THE DEVELOPMENT OF THE RACIAL DISPARITIES IN THE ARKANSAS CRIMINAL JUSTICE SYSTEM RESEARCH PROJECT

The Racial Disparities in the Arkansas Criminal Justice System Research Project is a project of the UALR William H. Bowen School of Law. It was

¹⁹ DOUGLAS A. BLACKMON, *SLAVERY BY ANOTHER NAME: THE RE-ENSLAVEMENT OF BLACK AMERICANS FROM THE CIVIL WAR TO WORLD WAR II* 5–9 (2008).

²⁰ Ledbetter Jr., *supra* note 19, at 4.

²¹ *Id.*

²² *Id.* at 6, 16–17.

²³ *Id.* at 6–8; BLACKMON, *supra* note 20.

²⁴ *Id.*

²⁵ *Id.*

²⁶ See MICHELLE ALEXANDER, *THE NEW JIM CROW: MASS INCARCERATION IN THE AGE OF COLORBLINDNESS* (2010).

²⁷ Adjoa A. Aiyetoro returned to UALR in 2013, and the Chancellor asked that the project become a project of the law school.

²⁸ *See id.*

developed in 2011 when the director—Adjoa A. Aiyetoro—served as the Inaugural Director of the UALR Institute on Race and Ethnicity. Professor Aiyetoro collaborated with Dr. David Montague, a professor in the UALR Criminal Justice Department, in conceiving the project. The purpose of this research project was to examine the longstanding racial disparities in the Arkansas Criminal Justice System, and—based on research and analysis and the expertise of members of the project’s steering committee—to develop policy, practice, and community programming recommendations to minimize, if not eliminate, these disparities.

Before the UALR research project, David Baldus led a study investigating racial disparities in the Arkansas criminal punishment system.²⁹ The Baldus study was on the administration of capital punishment in Arkansas Judicial Circuits 8 and 8S from January 1, 1990 through December 31, 2005, which includes four counties in the southwest corner of Arkansas.³⁰ The study found that: (1) black defendants are at greater risk of advancing procedurally and ultimately receiving a death sentence than other defendants; (2) only black defendants receive death sentences; (3) only cases involving white victims have death sentences; (4) there are consequently no white defendant cases or black victim cases on death row, which raises questions about equal treatment based on the defendant’s and victim’s race; and (5) these troubling patterns in disparate outcomes persist even after controlling for criminal culpability by equating cases according to the number of aggravating circumstances.³¹

A. Development of a Statewide Steering Body

For the research and recommendations that flowed from the project to have the credibility to result in changes in policy and practice, not to mention gain community support for addressing the racial disparities, Aiyetoro felt that a diverse group of people from throughout the state should serve as a guiding body for the work. We decided that diversity in the steering body was essential in several categories including race, ethnicity, gender, occupation or profession, and location in the state. The plan was to invite approximately thirty people to serve on the steering committee. Aiyetoro and Montague presented this idea to the Chancellor’s Committee on Race and Ethnicity.³² Although the goal for the steering committee was thirty people, we invited ninety people and received an overwhelmingly positive response—sixty-five people agreed to serve. These willing participants are racially, ethnically, and gender diverse, and are representative of every region in Arkansas. Among the members of the steering committee are legislators, judges, prosecutors, defense attorneys, community

²⁹ David C. Baldus, Neil A. Weiner & George Woodworth, *Evidence of Racial Discrimination in the Administration of the Death Penalty: Arkansas Judicial Circuits 8 & 8S, 1990-2005* (2008).

³⁰ *Id.*

³¹ *Id.* at 2.

³² A university ad hoc committee organized by Chancellor Joel Anderson in 2006 as a part of his focus on race with the slogan “you have to face it to fix it.”

activists, victim groups, prison reform and criminal punishment reform groups, the Arkansas Department of Corrections (ADC), academics, and a representative of the NAACP Legal Defense and Education Fund.

The Steering Committee adopted a statement of purpose that provides a context for the work of this project: first, Arkansans have confronted racial injustices throughout our State's history; second, we must now confront the racial disparities in our criminal justice system; third, we must identify and correct the policies and practices that contribute to this racial disparity, as people of color make up less than a quarter of the population of Arkansas but constitute almost half of the incarcerated population. This inequity separates families, divides communities, and comes at a social and economic cost to our state that we cannot endure. To protect all Arkansans, we must identify and correct the policies and practices that contribute to this racial disparity.

The steering committee meets quarterly, and at least twenty-five of the sixty-five members consistently attend each meeting. Steering committee members have assumed leadership roles, including chairing and participating on subcommittees—including the education/communication subcommittee, as well as the legislative subcommittee—and taking a lead role in community events organized by the project. In 2013, the steering committee sponsored a screening of the documentary, *Slavery by Another Name*, which featured a panel discussion on how to address the current racial disparities in the Arkansas criminal punishment system. In 2015, the Steering Committee sponsored a one and a half day conference during which the research results were released and approximately one hundred participants from throughout the state discussed strategies for going forward.³³ The steering committee also scheduled meetings with political leaders in the state. Efforts to meet with community leaders and begin training stakeholders in the Arkansas punishment system, by both judges and attorneys, continue.

³³ The conference, entitled *Reveal, Restore and Resurrect: The Truth About Racial Disparities in the Arkansas Criminal Justice System*, took place on August 28–29, 2015. Panelists included former Arkansas Governor Jim Guy Tucker, and Arkansas Judges Wiley Branton, Jr., and Wendell Griffen. The keynote speaker was Wilbert Rideau, an award-winning journalist who spent forty-four years in Louisiana's Angola Prison; his address was entitled, "*Barriers to Restoration*." Closing remarks were from Dr. John Kirk, current director of UALR's Institute on Race and Ethnicity, and Judge Olly Neal, former Arkansas Court of Appeals judge. Co-Authors Aiyetoro and DeJohn, along with UALR Economics Professor Sara Quintinar, presented the findings of the study. Law professors Carlton Mark Waterhouse (Professor of Law and Dean's Fellow at Indiana University Robert H. McKinney School of Law) and andré douglas pond cummings (Professor of Law and Dean for Admissions and Student Affairs at Indiana Tech Law School) also presented.

B. Legislative Strategy Connected to Research Development

State Senator Joyce Elliott was one of two state legislators that agreed to serve on the steering committee. At the first steering committee meeting in June 2012, Elliott proposed a legislative agenda, recommending creation of racial impact statement legislation as one mechanism for identifying criminal punishment legislation that may have a disparate effect on African Americans.³⁴ According to Elliott, black state legislators in various national organizations were discussing this type of legislation as a vehicle to bring awareness of the likelihood that certain criminal punishment legislation would lead to higher arrest rates and convictions of people of color.³⁵ The Sentencing Project³⁶ had been advocating for the passage of such legislation for some time,³⁷ and indeed, Iowa, under the leadership of State Senator Wayne Ford, was the first state in which the legislation became law.³⁸

In 2012, Senator Elliott engaged the state legislative staff to draft Racial Impact Statement legislation with assistance from the Steering Committee's legislative subcommittee. The drafters used the Iowa bill and materials from the Sentencing Project as a guide. The legislation was introduced in the 2013, 2015 and 2017 legislative sessions, and requires a racial impact statement for any legislation that would: (A) create a new misdemeanor or felony offense; (B) substantively change an element of an existing misdemeanor or felony offense; (C) change the penalty for an existing misdemeanor or felony offense; or (D) change existing sentencing, parole, or probation procedures.³⁹ Aiyetoro and her staff organized, with steering committee assistance, community meetings in counties throughout the state in 2013 through March 2017 to discuss the legislation and encourage community residents to ask their legislators to support it.

The first community meetings regarding the proposed legislation were held in March 2013.⁴⁰ This panel presented at the first two community meetings in Little Rock and Harrison, Arkansas, respectively, as well as at a meeting of the Arkansas Legislative Black Caucus. The initial presentations were

³⁴ See Marc Mauer, *Racial Impact Statements: Changing Policies to Address Disparities*, 23 CRIM. JUST. 17 (2009).

³⁵ The federal legislation on drug crimes, including sentencing guidelines for crack and powder cocaine, is a glaring example of how criminal punishment legislation that on its face appears racially neutral has a debilitating racial impact on the black community. See ALEXANDER, *supra* note 27.

³⁶ The Sentencing Project was founded in 1986 and works for a fair and effective United States criminal justice system by promoting reforms in sentencing policy, addressing unjust racial disparities and practices, and advocating for alternatives to incarceration.

³⁷ See *supra* note 28.

³⁸ I.C.A. § 8.11.

³⁹ S. 237, 91st Leg. (Ark. 2017).

⁴⁰ The organized panel included Marc Mauer, Executive Director of The Sentencing Project, former State Senator Wayne Ford, Dennis Henderson—who worked with Senator Ford and had spent 25 years in the Iowa State Prison—and Aiyetoro.

videotaped; then, an edited version was used in other communities across the state, supplemented by live commentaries from steering committee members and Aiyetoro. In addition, steering committee members approached members of the executive branch seeking support for the legislation.

In early 2015, steering committee members Senator Elliott, retired State Appellate Court Judge Olly Neal, former governor Jim Guy Tucker, and Aiyetoro met with Ms. Kelly Eichler and Mr. Justin Tatem, members of Governor Hutchinson's staff focusing on criminal justice issues. The purpose of the meeting was to gain the newly elected governor's support for the legislation. There was a sense that this legislation may be something he would support given his position on the racial disparities caused by the crack and powder cocaine sentencing guidelines when he was the head of the Drug Enforcement Administration under President George W. Bush.⁴¹ In 2016, the NAACP Legal Defense Fund, a member of the steering committee, hired an Arkansas lobbyist to assist in getting the bill passed.

The bill passed through the State Agencies Committee with one "no" vote in the 2013 session and went to the floor of the Senate, where it failed to pass by three votes. In the 2015 session, it was assigned to the Senate Judiciary Committee and passed out of that committee with a unanimous vote. The bill went to the floor of the Senate and failed to pass by only one vote. In 2017, the bill passed the Senate and was voted out of the House Judiciary Committee going to the floor of the House, led by House member Clarke Tucker. It failed on the House floor. Representative Ballinger, who opposed the bill, indicated "he did not believe in systemic racism."⁴²

C. Development of the Research Modules

The research has two components. The first component is a review and analysis of the ADC records of those who were convicted for homicide and sentenced to life, life without parole, or death. The initial plan was to examine homicide and drug-related crimes. This plan was modified to only examine homicides after it was clear that simply assessing homicides was a mammoth undertaking requiring all the resources available to the project. The second component is a review and analysis of prosecutor decisions in homicide and robbery cases.

⁴¹ *New Drug Law Narrows Crack, Powder Cocaine Sentencing Gap*, PBS NEWSHOUR, (Mar. 24, 2017) http://www.pbs.org/newshour/bb/law-july-dec10-sentencing_08-03.

⁴² Benjamin Hardy, David Koon, & Lindsey Millar, *How the 2017 Arkansas Legislature Made Life Worse for You*, ARK. TIMES (Apr. 13, 2017), <https://www.arktimes.com/arkansas/how-the-2017-arkansas-legislature-made-life-worse-for-you/Content?oid=6114988>.

1. ADC Record Research

A team of faculty researchers from UALR was organized in late 2012 and early 2013.⁴³ Based on a review of the literature on racial disparities in the criminal punishment system, the team, including Aiyetoro, developed a list of factors that they agreed were important in discerning whether, and if so, what role race played in the sentencing of persons convicted of homicide and receiving a sentence of life, life without parole, or death. Co-author, Dr. DeJohn drafted the code book for use in data retrieval based on the factors the team decided were important to doing an analysis. The code book had seventy-four factors including race, date of crime, location of crime, prior arrests and convictions, race of the victim, victim's relationship to the prisoner, the judge, and whether the attorney was a court-appointed public defender or privately engaged by the prisoner.

Members of the team went to the Central Office of the ADC and reviewed electronic and paper files to determine the best source for the data collection.⁴⁴ Generally, the paper records were more complete than were the electronic records. We chose to review the paper records, which required going to the prison facilities where the prisoners in our subject group were housed.⁴⁵ The data collection began in May 2013 and was completed in June 2015.⁴⁶

2. Prosecutor Discretion Research

During the September 2012 steering committee meeting, State Representative and member of the steering committee Fred Love raised the question of the role prosecutor discretion played in creating the racial disparities in the Arkansas criminal punishment system. The steering committee then decided to form a prosecutorial discretion subcommittee.⁴⁷ The prosecutor

⁴³ Tara V. DeJohn, Ph.D., School of Social Work; David Montague, Ph.D.; Shaun Thomas, Ph.D.; Jim Golden, Ph.D.; Jeff Walker, Ph.D., Criminal Justice Department; and Avinash Thombre, Ph.D., Speech Communications.

⁴⁴ The ADC Director, Ray Hobbs, was on the Steering Committee, as well as the ADC Director of Research, Tiffanye Compton.

⁴⁵ The facilities included Cummins–277 records; Varner and Varner Max–204 records; Tucker and Tucker Max–150 records; East Arkansas Regional Unit–99 records; McPherson–52 records; Quachita River Correctional Unit–39 records; Wrightsville–28 records; Delta–2 records; and Pine Bluff–1 record.

⁴⁶ From May 2013 to June 2015, the researchers retrieving data from the records dwindled from five to one, co-author Aiyetoro. The co-authors decided in January of 2015, since by that point it was just the two of them doing the data collection, Aiyetoro would complete the data collection, and DeJohn would work on the data analysis.

⁴⁷ The members included Darnisa Johnson, Deputy Attorney General over the criminal division, several defense attorneys, Joseph Jones, Ph.D., Director, Philander Smith College Social Justice Initiative, and in summer 2015, Omavi Shukur, a former public defender—all of whom were members of the Steering Committee. Law school professor, Anastasia Boles, with an interest in implicit bias and cultural proficiency in the legal system, visiting law school professor Michael Johnson, a former U.S. Attorney, and a social scientist from UALR, Assistant Professor Sarah Quintanar, UALR Department of Economics and Finance, joined the subcommittee and

discretion research module analyzed data on homicides and robberies from four Arkansas counties (Crawford, Faulkner, Lee, and Pulaski). The data was collected from the Administrative Office of the Courts

III. REPORT OF RESEARCH MODULES

A. ADC Record Review Module

1. Methodology

a. Protection of Human Subjects

Prior to any actual data collection, the UALR Institutional Research Board (IRB) required all faculty and students involved in the research project to complete the basic training from the Collaborative Institutional Training (CITI) for protecting human subjects in research as well as the CITI *Prisoner Population Module*. The IRB approved the research project after submission of the project design including mechanisms for maintaining confidentiality and the CITI certifications.

b. Data Collection

The faculty and students involved in data collection were trained in the use of the codebook and inputting the data onto spreadsheets that were sent to a secure server in the UALR Criminal Justice Department. Students were trained by members of the faculty research team to find and insert needed data not found in the ADC records using information related to the date and location of the crime or the trial through searches in the public domain (e.g., newspaper archives and general internet searches). Most of the missing data items related to information on judges, attorneys, and victims.

c. Records Reviewed

This research was based on “point of time data” - meaning the review was conducted on records of prisoners who were in the system as of spring 2013, and who were convicted of homicide with sentences of life, life without parole, or death. There were 1033 prisoners in ADC who fit this description. Of these, 836 signed a release of information form enclosed in a letter describing the research project, giving permission for review of all their institutional records. The researchers reviewed and collected data from 538 of these records.

d. Data Analysis

Quintanar served as the lead research analyst of the prosecutor discretion module.

Because the majority of data existed at the nominal/categorical level, the options for statistical analyses were limited to two primary areas. The first area focused on obtaining frequency information to define characteristics of the prisoners, characteristics of court-related factors, and characteristics related to the crime. The second area focused on exploring the correlation relationship between variables.

2. Results

a. Characteristics of Prisoners in Sample

The majority of records reviewed were those of male prisoners, specifically 490 (91%) male and 48 (9%) female. Slightly over half of the prisoners (50.7%) were identified as black; slightly under half of the prisoners (48%) were identified as white (see Table 1).⁴⁸

Table 1. Records reviewed by race/ethnicity

Race/Ethnicity	Count	Percent
Black	273	50.7%
White	258	48%
Latino	5	0.9%
Other	2	0.4%

Blacks were represented in this sample of those convicted of homicide and serving sentences of life, life without parole, and death, at even higher percentages than in the Arkansas incarcerated population (43.8%) and the Arkansas general population (15.4%) (see Table 2).

Table 2. Comparison of sample to other Arkansas populations for race/ethnicity

Population Group	Black	White	Latino	Other
Project Sample	50.7%	48%	0.9%	0.4%
AR Incarcerated	43.8%	52.5%	3.1%	0.7%
AR General	15.6%	80%	6.8%	2.6%

⁴⁸ Because the percentage of records identified as being of Latino or “other” prisoners is so small, most of the results of the study will focus on prisoners identified in the records as black or white.

Forty-six percent of the prisoners were in their twenties at the time of arrest and the percentage of those arrested past the age of thirty-nine steadily declined. Almost 50% of the prisoners had less than a high school education (46.3%) and 39.4% only had a high school diploma or GED. The majority of those in the sample were unemployed (59.1%) at the time of arrest (see Table 3).

Table 3. Other demographic characteristics of prisoners

Characteristic	Count		Percent	
Marital Status	Single	276	Single	51.3
	Married	123	Married	22.9
	Divorced/separated	92	Divorced/separated	17.1
	Widowed	31	Widowed	5.8
	Missing	16	Missing	3.0
Has one or more dependents (children)	Yes	303	Yes	56.3
	No	234	No	43.5
Employed at time of arrest	Yes	217	Yes	40.3
	No	318	No	59.1
Military history	Yes	93	Yes	17.3
	No	444	No	82.5

b. Characteristics of Court-Related Factors

The majority of noted court personnel were identified as being white (75.7%). The majority of prisoners (66.7%) were represented by a public defender or court appointed counsel. There was no relationship between race/ethnicity of prisoner and type of counsel.

c. Characteristics of Crime-Related Factors

Sixty percent of the records reviewed had a charge of capital murder. The sentence for the majority of prisoners was life without parole (55.2%). The overwhelming majority of the records (82.9%) indicated that there was only one victim associated with the charge (see Table 4). The records indicated that there were a variety of types of relationships between the prisoner and first noted victim.

Table 4. Relationship between prisoner and victim⁴⁹

Relationship	Count	Percent
Spouse/significant other	68	12.6%
Other family member	45	8.4%
Friend/acquaintance	134	24.9%
Co-worker/employer/employment related	6	1.1%
Stranger/no known prior relationship	190	35.3%
Missing	95	17.7%

The majority of prisoners had either no or only one prior arrest (30.3%, 14.3% respectively) and no or only one prior conviction (40.9%, 19.7% respectively).

d. Relationships Among Prisoner Characteristics, Charges and Sentences

A total of 15 questions were explored to gain a greater understanding of the potential influences and relationships that impact charges and sentencing patterns in Arkansas for those arrested for homicide related crimes. The questions were structured to address the role that factors other than race may play in charging and sentencing. The commonly held view among many is that factors such as education, mental health, and substance use/abuse are drivers of charging and sentencing patterns rather than race. The following provides a brief overview of the findings by each question. The discussion of each finding indicates if a statistically significant result was obtained at either the $p < .01$ (highest research standard for statistical significance) or $p < .05$ (acceptable research standard for statistical significance). Findings that are noted as statistically significant mean that the existing relationship is not occurring by chance.

Question 1. Is there a relationship between prisoners' race/ethnicity and current charge?

There is a statistically significant ($p < .01$) relationship between race/ethnicity and current charge. Black prisoners were more likely than white prisoners to be incarcerated for capital murder (55.1% vs. 44%), whereas white

⁴⁹ Pertains to first victim noted in record and does not account for relationships of additional victims.

prisoners were more likely to be incarcerated for first-degree murder than black prisoners (54% vs. 44.2%) (see Table 5).

Table 5. Relationship between prisoners' race/ethnicity and current charge

Current Charge	Black	White	Latino	Other
Capital murder	55.1%	44%	0.3%	0.6%
First-degree murder	44.2%	54%	1.9%	0%

Question 2. Is there a relationship between prisoners' race/ethnicity and length of sentence?

A statistically significant relationship between prisoners' race/ethnicity and length of sentence was also found ($p < .01$). Black prisoners were more likely than white prisoners to be sentenced to death (71.4% vs. 28.6%) or life without parole (54.2% vs. 44.8%). White prisoners were more likely to be sentenced to life with parole compared to black prisoners (53.9% vs. 44.3%) (see Table 6).

Table 6. Relationship of prisoners' race/ethnicity and length of sentence

Length of Sentence	Black	White	Latino	Other
Death	71%	29%	0%	0%
Life without parole	54%	45%	0.03%	0.06%
Life with parole	44%	61%	0.02%	0%

Question 3. Is there a relationship between prisoners' race/ethnicity, current charge, and length of sentence?

Since there were statistically significant relationships between prisoners' race/ethnicity and current charge, as well as prisoners' race/ethnicity and length of sentence, it was important to explore the relationship between length of sentence and prisoners' race/ethnicity when controlling for current charge. We

looked at all capital murder and life without parole charges to determine if there continued to be a significant difference in sentencing in relation to prisoners' race/ethnicity. It was shown to be statistically significant ($p < .01$) that even when controlling for charge, blacks are still more likely to receive a sentence of death as compared to whites for charge of capital murder and to receive life without parole for charge of first-degree murder (see Tables 7 and 8).

Table 7. Relationship between prisoners' race/ethnicity, capital murder charge and length of sentence

Length of Sentence	Black	White
Death	71%	29%
Life without parole	54%	45%

Table 8. Relationship between prisoners' race/ethnicity, first-degree murder charge and length of sentence

Length of Sentence	Black	White
Life without parole	71%	29%
Life with parole	43%	55%

Question 4. Is there a relationship between prisoners' race/ethnicity and achieved educational level at time of arrest?

A larger percentage of black prisoners were noted as having less than a high school education as compared to white prisoners. When exploring achieved level of education of prisoners within their own racial/ethnic group, blacks had a greater percentage of having less than a high school education compared to whites. A statistically significant relationship between prisoner race/ethnicity and achieved educational level at time of arrest for this sample was obtained ($p < .01$) (see Tables 9 and 10).

Table 9. Comparison of achieved educational level at arrest across race/ethnicity groups⁵⁰

Educational Level	Black	White
Less than high school	60.6%	37.8%
High school/GED	45.8%	53.8%
Some College	45.7%	52.2%
College degree(s)	0%	100%

Table 10. Comparison of achieved educational level at arrest within race/ethnicity group

Educational Level	Black	White
Less than high school	55.3%	36.4%
High school/GED	35.5%	44.2%
Some College	7.7%	9.3%
College degree(s)	0%	4.3%
Education status unknown	1.5%	5.8%

Question 5. Is there a relationship between prisoners' race/ethnicity and notation as having a mental health history?

A larger percentage of white prisoners (68.3%) were noted as having a mental health history as compared to prisoners in other racial/ethnic groups. A statistically significant relationship between prisoner race/ethnicity and mental health history at time of arrest was obtained ($p < .01$) (see Table 11).

⁵⁰ Rows and columns will not equal 100% due to the omission of data on Latino and "other."

Table 11. Notation of mental health history status by prisoners' race/ethnicity

Mental Health History Noted	Black	White
Yes	30.8%	68.3%
No	57%	41.6%

Question 6. Is there a relationship between prisoners' race/ethnicity and notation as having an active substance use/abuse at time of arrest?

A larger percentage of white prisoners (55.2%) were noted as having a substance use/abuse history as compared to prisoners in other racial/ethnic groups. However, this difference did not occur at a statistically significant level ($p = .253$), as evidenced in Table 12.

Table 12. Notation of substance use/abuse history status by prisoners' race/ethnicity

Substance Use/Abuse History Noted	Black	White
Yes	43.8%	55.2%
No	54.7%	43.8%

Question 7. Does the achieved educational status impact the current charge based on prisoners' race/ethnicity?

A strong interactive effect between race/ethnicity and achieved educational status was obtained when testing for the relationship between current charge and the combined factors of education and race/ethnicity ($p < .01$). Blacks with less than a high school education are more likely to be convicted of capital murder than whites with the same level of education (66.7% vs. 32.7%). However, when both blacks and whites have achieved a high school diploma or GED, whites are slightly more likely, although not statistically significant ($p > .05$), to be convicted of capital murder than blacks with this same level of education (52.4% vs. 47.6%). This reverse outcome does not occur when both groups have achieved some college education, with 51.6% of blacks and 45.2%

of whites being charged with capital murder (i.e., this difference was statistically significant, $p < .05$) (see Table 13).⁵¹

Table 13. Impact of prisoners' race/ethnicity and achieved educational status on current charge.

Charge	Less Than High School		High School/ GED		Some College		College Degree(s)	
	Capital Murder	Black	66.7%	Black	47.6%	Black	51.6%	Black
White		32.7%	White	52.4%	White	45.2%	White	100%
First Degree Murder	Black	51.5%	Black	43.2%	Black	33.3%	Black	0%
	White	45.5%	White	55.7%	White	66.7%	White	100%

Question 8. Does the achieved educational status impact the length of sentence based on prisoners' race/ethnicity?

An additive effect between race/ethnicity and achieved educational status was obtained when testing for the relationship between length of sentence and the combined factors of education and race/ethnicity, the effect impacts blacks and whites in different directions at a statistical significance ($p < .01$). Specifically, when examined separately, of those sentenced to death, 71% were black and 29% were white. However, when combined with achieved educational status, of those sentenced to death and having less than a high school education, 91% are black and 9% are white (see Table 14). Changes within race/ethnicity by educational level are noted across all categories of sentencing.

⁵¹ In this sample, none of the black prisoners were noted as having any college degrees, so the influence of higher education on convicted charges was unable to be assessed.

Table 14. Impact of prisoners' race/ethnicity and achieved educational status on length of sentence.

Length of Sentence	Less Than High School		High School/ GED		Some College		College Degree(s)	
	Race	Percentage	Race	Percentage	Race	Percentage	Race	Percentage
Death	Black	91%	Black	67%	Black	0%	Black	0%
	White	9%	White	33%	White	0%	White	100%
Life without Parole	Black	64.4%	Black	47.5%	Black	51.6%	Black	0%
	White	34.8%	White	52.5%	White	45.2%	White	100%
Life with Parole	Black	52.4%	Black	42.5%	Black	33%	Black	0%
	White	44.7%	White	56.3%	White	67%	White	100%

Question 9. Does the presence of a mental health history impact the current charge based on prisoners' race/ethnicity?

There is a statistically significant relationship ($p < .01$) between race/ethnicity and noted mental health history. Blacks without a noted mental health history were more likely to have a charge of capital murder than whites without a noted mental health history (61.4% vs. 37.8%). However, whites with a noted mental health history were more likely to have a charge of capital murder than blacks with a noted mental health history (63% vs. 35.6%) (see Table 15).

Table 15. Impact of prisoners' race/ethnicity and noted mental health history on current charge

Charge	Black		White	
	Capital Murder	No MH	61.4%	No MH
Yes MH		35.6%	Yes MH	63%
First-Degree Murder	No MH	50.3%	No MH	47.2%
	Yes MH	23.4%	Yes MH	76.6%

Question 10. Does the presence of a mental health history impact the length of sentence based on prisoners' race/ethnicity?

An additive effect between race/ethnicity and presence of mental health history was obtained when testing for the relationship between length of sentence and the combined factors of mental health history and race/ethnicity. The effect impacts blacks and whites in different directions and the relationship of these variables exist at a statistically significant level ($p < .01$). Specifically, when examined separately from those sentenced to death, 71% were black and 29% were white. However, when combined with mental health status, all those on death row with a noted mental health history are white. In contrast, of all those on death row without a noted mental health history, 87.5% are black and 12.5% are white. Changes within race/ethnicity by mental health history are noted across all categories of sentencing (see Table 16).

Table 16. Impact of prisoners' race/ethnicity and noted mental health history on length of sentence

Length of Sentence	Black		White	
	Death	No MH	87.5%	No MH
	Yes MH	0%	Yes MH	100%
Life without Parole	No MH	60.2%	No MH	38.9%
	Yes MH	36.8%	Yes MH	61.8%
Life with Parole	No MH	50%	No MH	47.6%
	Yes MH	25%	Yes MH	75%

Question 11. Does the presence of a substance use/abuse history impact the current charge based on prisoners' race/ethnicity?

A statistically significant interactive effect ($p < .01$) between race/ethnicity and noted substance use/abuse history as related to charge was obtained when testing for the relationship between current charge and the combined factors of noted substance use/abuse history and race/ethnicity. The effect of this combination has a relationship that is statistically significant ($p < .01$). Blacks with a substance use/abuse history were more likely to have a charge of capital murder than whites with a noted substance use/abuse history (52.7% vs. 46.4%). However, whites with a substance use/abuse history were more likely to have a charge of first-degree murder than blacks with a substance use/abuse history (65.6% vs. 33.3%) (see Table 17).

Table 17. Impact of prisoners' race/ethnicity, noted substance use/abuse history on current charge

Charge	Black		White	
	Capital Murder	No SA	56.3%	No SA
Yes SA		52.7%	Yes SA	46.4%
First-Degree Murder	No SA	52.1%	No SA	45.5%
	Yes SA	33.3%	Yes SA	65.6%

Question 12. Does the presence of a substance use/abuse history impact the length of sentence based on prisoners' race/ethnicity?

An additive effect between race/ethnicity and presence of substance use/abuse history was obtained when testing for how the combination of prisoners' race/ethnicity and noted substance use/abuse history impacted length of sentence. A statistically significant ($p < .01$) relationship was found between length of sentence and the combined factors of substance use/abuse and race/ethnicity. However, the effects of this additive relationship seem to impact blacks and whites in different directions. Specifically, when examined separately, of those sentenced to death, 71% were black and 29% were white. However, when combined with substance use/abuse status, of those sentenced to death and having a noted positive substance use/abuse history, 40% are black and 60% are white. Whereas, if substance use/abuse history is not noted, then of those sentenced to death, 80% are black and 20% are white. This is similar to the effect of having a noted mental health history on sentencing; that is, whites with a noted substance use/abuse problem are more likely than blacks with a noted substance use/abuse history to receive a death sentence. Changes within race/ethnicity by mental health history are noted across all categories of sentencing, as noted in Table 18.

Table 18. Impact of prisoners' race/ethnicity and noted substance use/abuse history on length of sentence

Length of Sentence	Black		White	
	No SA	80%	No SA	20%
Death	Yes SA	40%	Yes SA	60%
	No SA	54.9%	No SA	44%
Life without parole	Yes SA	53%	Yes SA	46%
	No SA	51.2%	No SA	46.3%
Life with parole	Yes SA	35.1%	Yes SA	63.9%

Question 13. Does the combination of achieved educational status and mental health history impact the current charge based on prisoners' race/ethnicity?

A statistically significant ($p < .01$) interaction effect of race/ethnicity, achieved educational status, noted mental health history, and relationship to current charge was found. Specifically, if a prisoner is black, has less than a high school education, and does not have a noted mental health history, that prisoner is more likely to receive a charge of capital murder than any other racial/ethnic group (blacks at 70.1%; whites at 29.1%). Further, if a prisoner is white, has a high school education/GED or higher, and has a noted mental health history, that prisoner is more likely to be charged with capital murder than any other racial/ethnic group (see Table 19).

Table 19. Impact of prisoners' race/ethnicity, achieved educational status, and noted mental health history on current charge

Charge by Education	Black Yes/No MH	White Yes/No MH
Capital murder and Less than high school	54.5% 70.1%	45.5% 29.1%
Capital murder and High school/GED	23.1% 55.2%	76.9% 44.8%
Capital murder and Some college	20% 70%	70% 30%
First degree murder and Less than high school	22.2% 57.7%	77.8% 38.5%
First degree murder and High school/GED	35.3% 46.4%	64.7% 52.2%
First degree murder and Some college	0% 41.7%	100% 58.3%

Question 14. Is there a relationship between gender and current charge and does the prisoner's race/ethnicity influence the current charge based on gender?

Males accounted for a greater percentage of subjects in this study than females (92.2%, 7.8% respectively) and comprised a larger percentage than females convicted of capital murder (89.3%, 10.7% respectively). This difference was not found to be statistically significant. However, when controlling for race, a statistically significant ($p < .01$) relationship between the combination of sex and race/ethnicity and current charge was found. A greater percentage of white females are incarcerated for both capital murder and first-degree murder as compared to black females, while more black males are incarcerated for capital murder and more white males for first-degree murder (see Table 20). It is expected that the small sub-sample of female records reviewed influences these findings.

Table 20. Impact of prisoners' race/ethnicity and sex on current charge

Sex & Race/Ethnicity	Capital Murder	First Degree Murder
Black Males	56.9%	45.8%
Black Females	36%	30.4%
White Males	42.1%	52.1%
White Females	64%	69.6%

Question 15. Is there a difference in the relationship between the male and female prisoners and their relationship to the identified first victim?

Females are more likely to have a known prior relationship with their victim compared to males. This difference was found to exist at a statistically significant level ($p < .01$). Specifically, the relationship between a female prisoner and the victim was more commonly one of spouse/significant other with few stranger and no employment-related victims noted (see Table 40). Further, a statistically significant ($p < .01$) relationship was found when exploring the impact by controlling for race/ethnicity to further understand the relationship of sex to relationship to the victim. White females were even more likely to have had a spouse/significant other relationship (28.6%) or family relationship (17.2%) compared to black females (4%, 0%, respectively) (see Table 21).

Table 21. Comparison of the noted relationship between the first victim and the prisoner by sex

Prisoner Sex	Spouse or Significant Other	Other Family Member	Friend or Acquaintance	Coworker or Employment Related	Stranger or No Known Relationship
Females	19.1%	11.4%	11.9%	0%	5.8%
Males	80.9%	88.6%	88.1%	100%	94.2%

3. Implications.

The findings from this research clearly support that there are disparities within the Arkansas criminal punishment system that can only be attributed to

race. Similar to the findings reported by David Baldus,⁵² blacks were more likely than whites to receive the death penalty. This research adds to the knowledge regarding disparities in that the role of education seems to have an interactive effect such that the less education achieved, especially by blacks, the more likely death or life without parole and the most severe charge (i.e., capital murder).

Although the study's purpose was to focus on racial disparities, this study revealed a troubling relationship between race/ethnicity, charges, sentencing, and the notation of mental health and substance use/abuse histories. That is, only when the record noted a history of mental health or substance use/abuse did whites incur more severe charges (i.e., capital murder) and harsher sentences (i.e., death).

Another finding that may implicate domestic violence occurred when exploring charge and sentencing patterns in terms of sex. This study found that women are more likely than men to have been convicted of murder of someone close to them, such as a spouse, significant other, or friend.

4. Limitations

As with all social science research, there were some limitations in the study that do not affect the significance of the findings. These are reported for transparency and to support the need for further research. The majority of limitations relate to administrative record keeping and general practices that occurred across the ADC system.

There were a number of issues with obtaining data during the review of records and additional sources. First, the ADC records were uneven in the amount of information provided. Some records included materials from sheriffs, judges, and prosecutors that had details about the convicted person and the victims, and others did not. Most records provided very little about the victims, and a number had no information. Attempts to obtain information about victims from other sources had varying degrees of success. Second, the Mental Health Records were particularly problematic; many records did not have the initial social history, and a number of records had no initial mental health assessment although it was clear from the institution record and often the mental health record, that the prisoner had some mental health problems at the time of entering the ADC. Third, we did not obtain data on those accused and acquitted of homicide to be able to compare racial characteristics between these two groups. Fourth, we did not obtain the races of most of the attorneys representing the prisoners during trial.

⁵² Baldus et al., *supra* note 30, at 571–72.

B. Prosecutorial Discretion Module

1. Methodology

The committee determined that the manner of assessment should be based on prosecutor decisions for charging and final outcome of cases. A request was made to the Administrative Office of the Courts (AOC) for data on cases between 2007 and 2013. The case information was for all Arkansas counties and included numerous charges including simple robbery, aggravated robbery, negligent homicide, manslaughter, second-degree murder, first-degree murder, capital murder, drug offenses, and terroristic threats. In order to make the research more manageable, the committee decided in late 2013 to focus on four counties in Arkansas (Crawford, Faulkner, Lee, and Pulaski), and to narrow the crimes to homicides and robbery.

2. Data Collection

Much of the data the committee received from the AOC were missing dispositions. The committee augmented the data with record-by-record searches. Most of the missing information was located through the Arkansas Judiciary Administrative Office of the Court's "Court Connect" program. Docket filings were searched using the case identification number (e.g. 17CR-11-263), and Sentencing or Commitment Orders were found providing most of the additional information needed for the data analysis. Some information was gathered from news archives and obituaries.

3. Data Analysis

The committee created a homicide master spreadsheet containing approximately 250 cases.⁵³ The committee also created a robbery master spreadsheet containing approximately 18,500 cases divided into the aforementioned columns (victim, race, and gender was compiled for only 120 victims). Dispositions in this spreadsheet were labeled "guilty," "not guilty," "nolle prosequi," "not guilty-mental defect," "incompetent," and "transferred to juvenile." Approximately 550 cases were labeled "pled guilty," "guilty by judge," and "guilty by jury."

⁵³ Columns were categorized as "Case ID," "County," "Defendant Race," "Defendant Gender," "Victim Race," "Victim Gender," "Charge Decision," "Disposition," "Disposition Date," and "Sentence." Dispositions were labeled "guilty," "guilty first-degree murder," "guilty second degree murder," "guilty manslaughter," "not guilty," "not guilty-mental defect," and "nolle prosequi" (i.e. dismissed).

a. Homicide

The committee analyzed the charging decisions and the dispositions of the homicide cases. The committee compared magnitude for charge reductions by ranking homicide cases.⁵⁴

Table 22. Comparison of magnitude for charge reductions by homicide case ranking

Race of Defendant	Cases Receiving Charges 2 Degrees Less Severe	Cases Receiving Charges 1 Degree Less Severe	Cases Receiving Charges of the Same Severity	Cases Receiving Charges 1 Degree More Severe	Total Cases
Black	6.5% of all Black cases (6 cases)	24% of all Black cases (22 cases)	69% of all Black cases (63 cases)	0% of Black cases (0 cases)	91 cases
White	0% of all White cases (0 cases)	15% of all White cases (2 cases)	70% of all White cases (7 cases)	8% of all White cases (1 case)	10 cases
Latino	0% of all Latino cases (0 cases)	0% of all Latino cases (0 cases)	100% of all Latino cases (3 cases)	0% of all Latino cases (0 cases)	3 cases
Total, all races	6% of all cases (6 cases)	23% of all cases (24 cases)	70% of all cases (73 cases)	8% of all cases (1 case)	104 cases

Among the committee's findings were:

- 1) Blacks are more likely to be initially charged more severely than whites in homicide cases. Blacks represent the overwhelming majority of persons initially accused of homicide offenses that are at least one degree more severe than the charges eventually brought by the prosecutor (94%). They are the only group accused of homicide that were initially charged with any offense two degrees more severe than the charge brought by the prosecutor;

⁵⁴ Cases were ranked in the following manner: Capital Murder (5), First-degree Murder (4), Second-degree Murder (3), Manslaughter (2), and Negligent Homicide (1) (*see* Table 22).

- 2) Blacks were more likely to plead guilty as charged in capital and first-degree murder cases, while whites were more likely to plead guilty to a lesser offense; and
- 3) Blacks were more likely to be brought to trial in cases in which juries eventually found the State could not prove its case beyond a reasonable doubt (i.e. not guilty).

Dispositions of the homicide cases were divided into two datasets: (1) guilty pleas; and (2) jury trials. The dispositions of capital murder and first-degree murder are analyzed, as they were the only dispositions for which significant variations were found.⁵⁵ There are a number of cases within the dataset where the same defendant has multiple homicide charges. For ease of interpretation, the committee focused on cases with a single charge. Table 23 shows racial disparities in homicide guilty plea dispositions.

Table 23. Guilty plea dispositions⁵⁶

	Capital Murder			First Degree Murder		
	Black	Latino	Other	Black	Latino	Other
Guilty as charged	50%	100%	0%	0%	100%	100%
Guilty to a lesser crime	50%	0%	0%	0%	0%	0%
Total cases	18	1	0	0	1	1

Albeit a small sample size, only one white person (i.e., a quarter of white people) charged with capital murder pled guilty as charged whereas nine, or half, of the black people charged with capital murder pled guilty as charged. Blacks were twice as likely to plead guilty as charged to capital murder than whites. Similarly, the overwhelming majority of blacks charged with first-degree murder pled guilty as charged whereas most whites charged with first-degree murder pled guilty to a lesser crime.

Only black people charged with capital murder or first-degree murder were found not guilty by a jury, as evidenced by Table 24. The one white person tried by a jury for capital murder was found guilty.

⁵⁵ Only four blacks pled to negligent homicide; whereas, ten whites pled to negligent homicide. This is the only situation in which whites outnumber blacks in guilty plea dispositions. Negligent homicide is the least severe homicide offense in the criminal code.

⁵⁶ Whites not included due to small sample size.

Table 24. Jury trial dispositions

	Capital Murder				First-Degree Murder			
	White	Black	Latino	Other	White	Black	Latino	Other
Guilty	100%	78%	0%	0%	75%	77%	0%	0%
Not guilty	0%	14%	0%	0%	0%	8%	0%	0%
Guilty of a lesser crime	0%	14%	0%	0%	25%	15%	0%	0%

b. Robbery

The committee also analyzed the charging decisions and the dispositions of robbery cases. The committee found that whites were more likely to be initially charged with simple robbery in cases in which the prosecutor eventually pursued aggravated robbery charges. The committee compared magnitude of charge reductions by creating three categories:

- 1) Cases receiving a less severe charge;
- 2) Cases receiving charges of the same severity; and,
- 3) Cases receiving a more severe charge.

Severity of robbery charges are identified as “simple robbery” (less severe) and “aggravated robbery” (more severe).

Most of the initial charges matched that of the charges brought by the prosecutor. Nearly one in five white people charged with a robbery offense were initially charged with an offense (simple robbery) less severe than the charge for which they were tried. Less than .1% of blacks were initially charged with robbery offense less severe than the one for which they were tried, as evidenced by Table 25.

Table 25. Comparison of severity of robbery charges by race/ethnicity

Defendants' Race/ethnicity	Cases receiving a less severe charge (agg. to robbery)	Cases receiving charges of the same severity	Cases receiving a more severe charge (robbery to agg.)	Total Cases
Black	0.18% of all black cases (1 case)	92.83% of all black cases (505 cases)	0.07% of all black cases (38 cases)	544 cases
White	0% of all white cases (0 cases)	81.73% of all white cases (85 cases)	19.23% of all white cases (20 cases)	104 cases
Total, all races	0.15% of all cases (1 case)	90.91% of all cases (590 cases)	8.94% of all cases (58 cases)	100% of cases

The committee did not find any statistically significant differences in the dispositions of robbery cases; however, (1) there is evidence that black defendants are initially charged more severely than whites and (2) more white defendants are subsequently charged with aggravated robbery after an initial simple robbery charge.

C. Findings and Implications

This research module reveals that race factors into the prosecutors' charging decisions in homicides and robbery. For both homicides and robberies, the data suggests that blacks tend to be treated more harshly. In homicides they tend to be charged more severely than whites initially, leading to possible plea agreements on harsher charges and therefore longer sentences. In robbery cases, however, whites tend to be initially charged less severely than blacks. Both scenarios could lead to more severe consequences for blacks. For example, charging blacks more severely in homicide cases may have led, based on the data reviewed, to more blacks pleading to capital murder with a sentence of life without parole. In the robbery data, whites who are charged initially with simple robbery may get benefits such as lower bail than blacks, although their charges are then increased to aggravated robbery.

IV. RECOMMENDATIONS

Since the 1950s there has been a marked change in the percentage of people of color incarcerated in the United States. The deinstitutionalization of mental health facilities of the 1960s and the "War on Drugs" of the 1980s have

been viewed as key contributors to this racial disparity.⁵⁷ Race played a significant role in charging, sentencing, and convictions in this study. This research suggests a need for a number of policy and practice changes in the Arkansas criminal punishment system. Most of the recommended changes comport with best practices.

Both modules provide support for the conclusion that race of the accused is a factor that triggers decision makers' choice of harsher treatment of black people than of whites. Given this finding, it is imperative that law enforcement, police, prosecutors, and judges across the state participate in classes and programs that train them in understanding and recognizing the role that implicit racial bias⁵⁸ plays in decision making. The court should also arrange for training of potential jurors and, along with the attorney bar associations, advocate for community training on implicit racial bias. Also, they should be trained in how to counter this bias including developing procedures in their offices to minimize the effect of such bias.⁵⁹ Clearly, if the disparities based on implicit racial bias are to be minimized, decision makers' choices must be monitored to determine whether there is a difference in treatment of similarly situated whites, blacks, and Latinos.⁶⁰

A. Arkansas Department of Corrections Record Reviews of Prisoners Convicted of Homicide and Sentenced to Life, Life Without Parole, or Death.

The ADC Record Research Module's results illuminate numerous issues related to institutional racism that permeate the criminal punishment system from the charge through sentencing phases. In addition to the overarching need to address the racial disparities that may be due to racial bias, the records suggest that factors related to racial disparities in mental health screening need urgent attention. There was a significant difference in the rate in which blacks were identified as having a mental health history as compared to whites, despite narrative data in the record that suggested otherwise.

The way in which the mental health system nationally has addressed mental illness from diagnostic screening through delivery of services is known to

⁵⁷ Annelle B. Primm, Fred C. Osher, & Marisela B. Gomez, *Race and Ethnicity, Mental Health Services and Cultural Competence in the Criminal Justice System: Are we Ready to Change?* 41 COMMUNITY MENTAL HEALTH J. 557, 559–60 (2005). See also, ALEXANDER, *supra* note 27.

⁵⁸ Implicit bias has an "important impact" at each stage of a criminal case, from arrest to sentencing. Judge Mark Bennett *et al.*, *Implicit Bias in the Courtroom*, 59 UCLA L. REV. 1124, 1135 (2012).

⁵⁹ See Angela J. Davis, *Prosecution and Race: The Power and Privilege of Discretion*, 67 FORDHAM L. REV. 13, 50–53 (1998) (discussing broad prosecutorial discretion and the need for prosecutors to use that discretion to develop mechanisms for protecting against racial bias).

⁶⁰ There were very few Latinos in the study. However, there is a growing Latino population, and many in that community are concerned about disparate treatment by law enforcement, including police, prosecutors, and judges.

vary by gender and race. Case processing decisions are influenced by race, gender, and mental illness, with blacks typically stereotyped as criminal and violent with full responsibility for their actions while women—especially white women—are typically not responsible for their actions because they must be mentally ill in order to act counter to society's norms.⁶¹ Implementing a more thorough and racially unbiased mental health assessment for all persons coming into the ADC would aid legislators and law enforcement in determining the role mental illness may play in homicides, offer insight into whether there is a bias against those with mental illness regardless of race, and provide support to pass and fund legislation to enhance mental health treatment availability in communities throughout Arkansas as well as in jails and prisons in Arkansas.

Another factor that policy makers and law enforcement need to consider when passing and enforcing criminal laws is the scientific data on human development. Sentencing people to death, life, and life without parole who are in their mid-twenties or less punishes them forever in part for impulsive actions while the current science indicates that the area of the brain that controls impulsivity is not fully developed until after the mid-twenties.⁶² In this study, of the 538 records reviewed, 63.9% of the prisoners convicted of homicide were between the ages of 16-29 years old at the time of the offense. Of course there should be some punishment attendant to the taking of a life; however, the punishments of life, life without parole, and death do not take into consideration the important developmental factor that the impulse control portion of the brain is not fully developed until the early to mid-twenties.⁶³

Sentencing people to death, life, and life without parole contradicts the belief in redemption that most religious and spiritual practices embrace. It is a determination that these persons will never be able to rise above their worse act—that of murder—and are murderers, “identities that they cannot change regardless of the circumstances of their crimes or any improvements they might make in their lives.”⁶⁴

The sentences of life and life without parole are virtually the same for those incarcerated. Prisoners who were sentenced to life and those sentenced to life without parole have very little chance of getting out of prison. For example, records of prisoners from the 1980s with these two sentences were reviewed and both were still in prison despite evidence that those with life were performing well in prison. These sentences are representative of a difference without a distinction.

⁶¹ Thompson, *supra* note 16, at 116.

⁶² Mary Beckman, *Crime, Culpability, and the Adolescent Brain*, 305 SCIENCE 596 (2004); B. J. Casey, Rebecca Jones, & Todd A. Hare, *The Adolescent Brain*, 1124 ANN. N.Y. ACAD. SCI. 111 (2008); B.J. Casey, Rebecca M. Jones, & Leah H. Somerville, *Braking and Accelerating of the Adolescent Brain*, 21 J. RES. ON ADOLESCENCE 21, 23 (2011); Adam Ortiz, *The Juvenile Death Penalty: Adolescence, Brain Development, and Legal Culpability*, A.B.A. 1, 2 (2004).

⁶³ Neir Eshel, Eric E. Nelson, James Blair, Daniel S. Pine & Monique Ernst, *Neural Substrates of Choice Selection in Adults and Adolescents: Development of the Ventrolateral Prefrontal and Anterior Cingulate Cortices*, 45 NEUROPSYCHOLOGIA 1270, 1270–71 (2007).

⁶⁴ BRYAN STEVENSON, JUST MERCY 15 (2014).

The sentence of life should have more specific guidelines for the parole board in their review, and for the governor to guide the decision to release the prisoner. There is so much discretion that it appeared as if the discretion was erring on the side, all too often, of simply keeping the person incarcerated. Improving parole procedures after release, which has been suggested on numerous occasions by others, would decrease the likelihood that the person convicted of homicide and given life with parole, would reoffend. Also, research suggests that people convicted of homicide are less likely to reoffend since for many the crime was one of impulse and passion.⁶⁵

B. Prosecutor Discretion Module

The research module on the use of discretion by prosecutors suggests a need for practice changes by prosecutors, both in terms of data collection and reporting as well as in assessing whether the decisions they make in charging, plea offers, and prosecution affect blacks more harshly than whites. Specifically: (1) identification of Latino defendants should be made more consistently and based on the identification the defendant has chosen; (2) the data collection forms developed by the AOC should be thoroughly and accurately completed on each case for which the prosecutor has determined to charge; (3) prosecutors in each county should adopt a system of routine review of cases to assess whether similarly situated whites and blacks have been charged in a similar fashion—any indication that there is a disparity should lead to procedures being developed to minimize the possibility of future disparities; (4) defense attorneys in each county should use this research to advocate for lesser charges for their clients of color if they have at least some knowledge of racially disparate charging practices of the prosecutor; and (5) judges should be alert to racially disparate charging and question prosecutors on this issue when racial disparity is suspected.

⁶⁵ Stephanie Slifer, *Once a Criminal, Always a Criminal?* CBS NEWS (Apr. 23, 2014), <http://www.cbsnews.com/news/once-a-criminal-always-a-criminal/> (discussing 2005 Bureau of Justice Statistics report released in April 24, *Recidivism of State Prisoners Released in 2005*). “The BJS report did find that recidivism was higher among non-violent offenders, however, it also found that about 10 percent of convicted murderers released in 30 states in 2005 were arrested within 6 months, and about 48 percent were arrested within five years.” *Id.* This is compared to “82 percent of property offenders were arrested for a new crime, compared to 77 percent of drug offenders, 74 percent of public order offenders and 71 percent of violent offenders.” *Id.*

C. Overall Recommendations

1. Educating Policy Makers, Law Enforcement, and the Community

Policy and practice changes can only take place by educating people that the long-standing problem of racial disparities is systemic and not based on the view that blacks are just more violent and criminal. This education has begun, as evidenced by the list below, and should continue:

- a) Steering Committee members and the co-authors have met with legislative committees to share these findings. The Chair of the Senate Judiciary Committee has agreed to schedule future meetings, including with the joint General Assembly and Senate Judiciary Committees and with the Legislative Criminal Justice Oversight Task Force that he chairs. Follow-up meetings with the Legislative Black Caucus are also being scheduled.
- b) A member of the Steering Committee is a prosecutor and, along with Senator Joyce Elliot, assisted in getting the project on the agenda of the August 2016 statewide prosecutors' meeting.
- c) The Public Defender's office has scheduled a CLE in which the results of the research will be shared, and one of the members of the Prosecutor Discretion Subcommittee who has expertise in implicit bias will present on that topic.
- d) Community meetings will continue to be held around the state, sharing the research results, providing talking points for those interested to share with other groups with which they are affiliated, and urging their legislators to support the racial impact statement legislation.
- e) Co-author Aiyetoro and members of the steering committee are scheduled to present the study and recommendations for implicit bias training to the Arkansas Judicial Council on June 15, 2017.

2. Data Collection and Centralization

- a) The research study revealed that there is a need to develop a standardized method for collecting data regarding crime. If the state is to make sound policies on crime, including crime prevention, data should be centralized that includes type of crime, location of crime, and characteristics of the perpetrators, victims and their relationship.
- b) Although the state has developed a form that all prosecutors are to complete and forward to the ADC, this form was not completed consistently by all prosecutors. It is essential that there be consistent reporting from all prosecutors' offices using the forms developed for this purpose. This will help not only the ADC

in obtaining needed information about those being committed to it; it will help the state and future researchers in assessing and monitoring the commitment process.

c) Finally, the newly created Joint General Assembly Criminal Justice Task Force should remain as a permanent committee and provide needed oversight of the criminal justice process in Arkansas.

V. CONCLUSION

This research serves as a basis for a call to action on ending systemic institutional racism in the Arkansas criminal punishment system. The data supports the conclusion that black defendants receive harsher treatment in charging and sentencing than whites. To ignore this research and continue to “blame the victim” would be a disservice to all Arkansans and a continuation of the “the deeply troubling ways in which blackness and criminality shaped racial identity and racial oppression in modern America.”⁶⁶

⁶⁶ MUHAMMAD, *supra* note 4, at 2.