

RACE-BASED REMEDIES IN CRIMINAL LAW

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ABSTRACT

This Article evaluates the constitutional feasibility of using race-based remedies to address racial disparities in the criminal system. Compared to white communities, communities of color are over-policed and over-incarcerated. Criminal system stakeholders recognize that these conditions undermine perceptions of legitimacy critical to ensuring public safety. As jurisdictions assiduously attempt race-neutral fixes, they also acknowledge the shortcomings of such interventions. Nevertheless, jurisdictions dismiss the feasibility of deploying more effective race-conscious strategies due to the shadow of a constitutional challenge. The apprehension is understandable. Debates around affirmative action in higher education and government contracting reveal fierce hostility toward race-based remedies.

This Article, however, contends that within the criminal system, strict scrutiny requirements do not pose an insurmountable obstacle to race-based policies. There is promising decisional law surrounding the use of race-conscious efforts to address criminal system challenges. Drawing on this favorable doctrine, this Article tests the constitutionality of race-based remedies in one of the most dynamic areas in the criminal system: the use of risk assessment tools, which jurisdictions are increasingly relying upon to make decisions, even as these tools reproduce racial harms. To enrich the analysis, this

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Article presents a case study of a jurisdiction struggling to mitigate racial harms perpetuated by its pretrial risk assessment tool.

This Article finds reasons to be optimistic about how race-based remedies might fare within the criminal system context, where courts are predisposed to granting broad discretion to the stated needs of criminal law stakeholders. Within this unique context, this Article provides a template for a race-based approach that potentially survives an equal protection challenge.

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INTRODUCTION

The criminal system is a site of alarming, pervasive racial harms.¹ Twenty-four years ago, Professor Paul Butler proposed race-based interventions to address these harms.² In the absence of a race-informed approach, he warned that race-neutral reform would fail to disrupt these conditions.³ Twenty-four years later, the disparities Butler sought to address persist.⁴ Scholars continue to identify the inefficacy of race-neutral interventions and the need for race-informed approaches.⁵ And yet, the feasibility of race-conscious strategies is broadly dismissed.⁶ Looking out over the treacherous

1. See, e.g., Dorothy E. Roberts, *Abolition Constitutionalism*, 133 HARV. L. REV. 1, 4, 34 (2019) (“Criminal punishment has been instrumental in reinstating the subjugated status of black people.... [N]ot to give black people what they deserved, but to keep them in their place.”); Aziz Z. Huq, *Racial Equity in Algorithmic Criminal Justice*, 68 DUKE L.J. 1043, 1046-47 (2019) (“Police respond to black and white suspects in different ways. So do judges and prosecutors.... As a result, criminal justice elicits racial stratification.”); John Rappaport, *Some Doubts About “Democratizing” Criminal Justice*, 87 U. CHI. L. REV. 711, 711 (2020) (“The American criminal justice system’s ills are by now so familiar as scarcely to bear repeating: unprecedented levels of incarceration, doled out disproportionately across racial groups, and police that seem to antagonize and hurt the now-distrustful communities they are tasked to serve and protect.”); Lindsey Webb, *Slave Narratives and the Sentencing Court*, 42 N.Y.U. REV. L. & SOC. CHANGE 125, 129-30 (2018) (“[I]nfluencing all aspects of our criminal justice system is its vastly disparate impact, from arrest to incarceration, on African American as well as Latino people.... African American people are incarcerated at 5.1 times the rate of whites, and Latino people at 1.4 times the rate of whites at the state level.”). See generally Carlos Berdejó, *Criminalizing Race: Racial Disparities in Plea-Bargaining*, 59 B.C. L. REV. 1187, 1189-91 (2018) (illustrating through empirical analysis that documented racial differences at the criminal justice system’s entry point (policing) and exit point (sentencing) also exist throughout the system).

2. Paul Butler, *Affirmative Action and the Criminal Law*, 68 U. COLO. L. REV. 841, 843 (1997).

3. *Id.* at 857.

4. See Colleen Walsh, *Solving Racial Disparities in Policing*, HARV. GAZETTE (Feb. 23, 2021), <https://news.harvard.edu/gazette/story/2021/02/solving-racial-disparities-in-policing/> [<https://perma.cc/XTC3-2QCY>]. Compare Butler, *supra* note 2, at 868 n.97 (“In 1994, for the first time in American history, there were more African American men in prison than white men.”), with John Gramlich, *The Gap Between the Number of Blacks and Whites in Prison Is Shrinking*, PEW RSCH. CTR. (Apr. 30, 2019), <https://pewresearch.org/fact-tank/2019/04/30/shrinking-gap-between-number-of-blacks-and-whites-in-prison/> [<https://perma.cc/J6QS-Z5ZE>] (stating that in 2017, there were still more Black inmates than white inmates in prison).

5. See, e.g., Paul Butler, *The System Is Working the Way It Is Supposed to: The Limits of Criminal Justice Reform*, 104 GEO. L.J. 1419, 1425, 1445-46 (2016).

6. See e.g., Huq, *supra* note 1, at 1133.

waters of equal protection jurisprudence, criminal law scholars conclude that race-based remedies face insurmountable obstacles.⁷

The conclusion is understandable. Since Butler's call for race-informed reform, Supreme Court pronouncements have only become more sweeping and definitive; for example, "the Constitution is not violated by racial imbalance" and any institutional attempt to simply "achieve racial balance" would be "patently unconstitutional."⁸ The Court made clear that whenever a public or federally funded institution implements a race-based policy, strict scrutiny applies.⁹ Criminal system actors are not excepted from this requirement; whether it is a police department attempting to diversify officer ranks or a warden attempting to reduce the threat of prison riots, these decisions are subject to the most searching constitutional review.¹⁰

But a close look at strict scrutiny as applied in the criminal law context reveals a pattern of judicial deference that is uncharacteristic in, for example, higher education and employment spheres.¹¹ Unlike the mixed record of educational institutions' efforts to survive strict scrutiny,¹² efforts of criminal system actors to implement race-based remedies survive strict scrutiny challenges on a comparatively weaker showing.¹³ These successes within the criminal law

7. *See id.* (concluding a race-based remedy would face significant constitutional resistance); Sandra G. Mayson, *Bias In, Bias Out*, 128 YALE L.J. 2218, 2240 & n.66 (2019) (suggesting a race-based remedy might be foreclosed by strict scrutiny); Deborah Hellman, *Measuring Algorithmic Fairness*, 106 VA. L. REV. 811, 852-53 (2020) (stating that "set[ing] different thresholds for the target trait for each racial group" is "legally prohibited").

8. *Parents Involved in Cmty. Schs. v. Seattle Sch. Dist. No. 1*, 551 U.S. 701, 709-11, 721, 723 (2007) (finding unconstitutional the school district's efforts to address racial disparities).

9. *Adarand Constructors, Inc. v. Peña*, 515 U.S. 200, 227 (1995) (noting "all racial classifications" are subject to strict scrutiny and are "constitutional only if they are narrowly tailored measures that further compelling governmental interests").

10. *See Johnson v. California*, 543 U.S. 499, 502-03, 505-06 (2005); *Detroit Police Officers' Ass'n v. Young*, 608 F.2d 671, 679, 694 (6th Cir. 1979).

11. *Compare Gratz v. Bollinger*, 539 U.S. 244, 251 (2003), and *Detroit Police Officers' Ass'n*, 608 F.2d at 679, 694, with *Wittmer v. Peters*, 87 F.3d 916, 920-21 (7th Cir. 1996).

12. *See, e.g., Gratz*, 539 U.S. at 251 (rejecting race-based admission policy); *Fisher v. Univ. of Tex. at Austin (Fisher I)*, 570 U.S. 297, 303, 312-13 (2013) (remanding case with directions to apply a rigorous vetting of prior attempts to address stated interests through race-neutral means).

13. *E.g., Wittmer*, 87 F.3d at 920 (finding, based on outside experts' representations and despite the lack of empirical evidence or prior attempts to implement race-neutral remedies, that inmate perceptions of operational fairness justified hiring Black supervisors).

arena remain uncontroversial, if unnoticed, while battles over affirmative action in education and employment draw oxygen.¹⁴ Among the institutions that have considered race-based remedies, criminal system actors appear more favorably positioned to weather constitutional scrutiny.¹⁵ What ultimately accounts for the “as applied” exceptionalism in the criminal law context is unarticulated, but the broadly observed judicial deference to the exercise of police and prosecutor discretion seems to be at play, even within strict scrutiny review.¹⁶

This Article seeks to unearth and clarify interests within the criminal system that courts find compelling, and examines features of criminal law that provide favorable conditions within strict scrutiny review. To anchor this constitutional analysis, this Article addresses ongoing efforts to improve risk assessment tools. There are a number of reasons to do so. Risk assessment instruments (RAIs) are increasingly used by prosecutors, judges, and correctional personnel in making pretrial detention, charging, sentencing, and supervision decisions.¹⁷ Intended to mitigate decision maker bias, RAIs have been found to reproduce racial disparities.¹⁸ To better appreciate challenges that jurisdictions face in addressing these racial disparities, this Article presents a case study of Milwaukee County, which has made nationally recognized efforts to address

14. See Louis Menand, *The Changing Meaning of Affirmative Action*, NEW YORKER (Jan. 13, 2020), <https://www.newyorker.com/magazine/2020/01/20/have-we-outgrown-the-need-for-affirmative-action> [<https://perma.cc/25FX-GE8N>] (discussing the history and continued controversy surrounding affirmative action in education and employment without once mentioning affirmative action in the criminal system). Though difficult to prove a negative, where scholarship analyzing strict scrutiny review within the employment and educational spheres is robust, there is little scholarship discussing race-based remedies in the criminal law sphere. See, e.g., Hina B. Shah, *Radical Reconstruction: (Re) Embracing Affirmative Action in Private Employment*, 48 U. BALT. L. REV. 203, 205-08 (2019); Robert A. Friedman, *Affirmative Action in Education*, 8 GEO. J. GENDER & L. 395, 396 (2007).

15. See *Wittmer*, 87 F.3d at 920.

16. See Sarah Spiegel, Comment, *Prison “Race Riots”: An Easy Case for Segregation?*, 95 CALIF. L. REV. 2261, 2267-68, 2270, 2291-92 (2007).

17. Jessica M. Eaglin, *Constructing Recidivism Risk*, 67 EMORY L.J. 59, 61 & n.1 (2017) (“Predictive technologies are spreading through the criminal justice system like wildfire.”).

18. Mayson, *supra* note 7, at 2222 (stating RAIs are “poised to entrench the inexcusable racial disparity so characteristic of our justice system, and to dignify the cultural trope of black criminality with the gloss of science”). Because racial disparities can be baked into the data, the flawed data used by the tool can then generate flawed results. See Eaglin, *supra* note 17, at 72.

racial inequities in its criminal system.¹⁹ Based on multiple studies and stakeholder interviews, the challenges in Milwaukee County put in full relief the importance of the option to implement race-based remedies.²⁰

This Article also proposes a race-based remedy particularly well-suited to address racial disparities reproduced by RAIs. The proposed remedy emerges from the rich scholarship discussing RAIs and the insights of Professor Sandra Mayson, who recognized that because RAIs are data-informed, they are susceptible to a statistical analysis that permits racial disparities to be numerically expressed.²¹ The proposed remedy can be described as a “racial disparity cap”: a jurisdiction would assess the mean risk score of racial groups and subtract any differential from the scores of individual members of burdened racial groups. Clearly, the “racial disparity cap” is race-based. Virtually all scholars in this area fear that such attempts would fail under a strict scrutiny analysis.²² This Article, however, finds reasons to be optimistic about how the remedy fares under equal protection constraints.

This Article proceeds in two parts. In Part I, it provides essential background to understanding RAIs, presents a case study of a jurisdiction that has struggled to use race-neutral approaches to mitigate racial disparities reproduced by its RAI, and proposes a race-based remedy that would significantly reduce racial harms associated with the use of RAIs. In Part II, this Article articulates a compelling interest available to criminal system stakeholders that, applied within existing constitutional constraints, provides a way forward for jurisdictions to survive equal protection challenges.

19. Jeffrey Toobin, *The Milwaukee Experiment*, NEW YORKER (May 4, 2015), <https://www.newyorker.com/magazine/2015/05/11/the-milwaukee-experiment> [<https://perma.cc/XU99-WBJU>].

20. *See id.*

21. Mayson, *supra* note 7, at 2222, 2224.

22. *See e.g.*, Huq, *supra* note 1, at 1133; Mayson, *supra* note 7, at 2240 & n.66; Hellman, *supra* note 7, at 853.

I. RISK ASSESSMENT TOOLS IN THE CRIMINAL SYSTEM

Racial disparities remain in jurisdictions that have launched race-neutral reform.²³ This dynamic is particularly on display in jurisdictions that adopt RAIs to mitigate racial bias, and then seek to mitigate the racial disparities that RAIs reproduce.²⁴ Illustrating this dynamic, Milwaukee County adopted a nationally prevalent RAI to reduce racial bias in pretrial detention hearings,²⁵ a significant decision point; studies show outcomes are significantly worse for detained defendants, compared to similarly situated defendants who are released.²⁶ Before examining Milwaukee's particular experience with RAIs, it is worth assessing the promise and perils of RAIs generally.

A. *The Promise and Perils of Risk Assessment Tools*

Increasingly, Big Data influences criminal system outcomes.²⁷ Algorithms burrow through data to predict recidivism—how likely is it that a criminal defendant will re-offend?²⁸ To predict that likelihood, risk tools rely on data points, like a person's criminal history,

23. See MARC MAUER & NAZGOL GHANDNOOSH, SENT'G PROJECT, INCORPORATING RACIAL EQUITY INTO CRIMINAL JUSTICE REFORM 2-3 (2014), <https://www.safetyandjusticechallenge.org/wp-content/uploads/2015/05/incorporating-racial-equity-into-criminal-justice-reform.pdf> [<https://perma.cc/WKT7-D4SP>].

24. See *id.* at 12.

25. See *infra* notes 112-26 and accompanying text.

26. Paul Heaton, Sandra Mayson & Megan Stevenson, *The Downstream Consequences of Misdemeanor Pretrial Detention*, 69 STAN. L. REV. 711, 717 (2017); Megan T. Stevenson, *Distortion of Justice: How the Inability to Pay Bail Affects Case Outcomes*, 34 J.L. ECON. & ORG. 511, 511-12, 516 (2018).

27. See Mayson, *supra* note 7, at 2221-22; Eaglin, *supra* note 17, at 61 & n.1; Huq, *supra* note 1, at 1052 (observing RAIs in criminal justice will “soon become pervasive”); Shima Baradaran, *Race, Prediction, and Discretion*, 81 GEO. WASH. L. REV. 157, 176-77 (2013). See generally Christopher Slobogin, *A Defence of Modern Risk-Based Sentencing*, in PREDICTIVE SENTENCING: NORMATIVE AND EMPIRICAL PERSPECTIVES 107, 107-08 (Jan W. de Keijser et al. eds., 2019) (providing history of risk assessment development).

28. See Eaglin, *supra* note 17, at 73-78 (observing varied approaches to the sourcing of algorithms (data that will be used) and choices that inform algorithm architecture (how data is weighted and what definition of “recidivism” is used)); Huq, *supra* note 1, at 1060 (observing that tools apply “an automated protocol to a large volume of data to classify new subjects in terms of the probability of expected criminal activity and in relation to the application of state coercion”).

age of first arrest, affiliation with felons, education level, work history, frequency of moving residences, and missed court hearings.²⁹ Some tools use a constellation of data points, some use just a few.³⁰ Different tools might weigh similar factors differently.³¹ Some tools require personal interviews, while some rely on pre-existing data.³² Some tools are specifically designed to aid in pretrial decision-making, while others might be designed to assist a judge during the sentencing phase.³³ Algorithms reduce information to

29. See, e.g., J.C. Oleson, *Risk in Sentencing: Constitutionally Suspect Variables and Evidence-Based Sentencing*, 64 SMU L. REV. 1329, 1400 (2011) (noting data used by the Violence Risk Appraisal Guide includes whether offender lived with biological parents up to age 16, the offender's age, marital status, elementary school maladjustment, and history of alcohol use); Brian J. Ostrom & Neal B. Kauder, *The Evolution of Offender Risk Assessment in Virginia*, 25 FED. SENT'G REP. 161, 163 (2013) (noting Virginia Criminal Sentencing Commission's risk tool considers offender's gender, employment status, felony record, current offense type, additional offenses at time of conviction, record of arrest or confinement in past eighteen months, and criminal adult record); Sonja B. Starr, *Evidence-Based Sentencing and the Scientific Rationalization of Discrimination*, 66 STAN. L. REV. 803, 812-13 (2014) (noting the Level of Services Inventory-Revised (LSI-R) tool considers subjective factors such as performance and interactions at work, dependence on social assistance, and personal attitudes).

30. See Eaglin, *supra* note 17, at 81-82.

31. See, e.g., *id.* at 82 (noting how data points related to criminal history, such as with the LSI-R, are afforded greater weight when the same event may be counted more than once by asking about "prior adult convictions, arrests, charges, parole violations, and other official records of violence"); Ostrom & Kauder, *supra* note 29, at 163 (noting each factor of the Virginia Criminal Sentencing Commission's risk tool "receives a risk score commensurate with its contribution to the prediction of reconviction").

32. E.g., Melissa Hamilton, *Risk-Needs Assessment: Constitutional and Ethical Challenges*, 52 AM. CRIM. L. REV. 231, 238 (2015) (noting that LSI-R risk assessment tool gathers its information from a "semistructured interview and review of available file information"); Kevin S. Douglas & Kim A. Reeves, *Historical-Clinical-Risk Management-20 (HCR-20) Violence Risk Assessment Scheme: Rationale, Application, and Empirical Overview*, in HANDBOOK OF VIOLENCE RISK ASSESSMENT 147, 157 (Randy K. Otto & Kevin S. Douglas eds., 2010) (describing the Historical-Clinical-Risk Management-20 tool, or HCR-20, that gathers its information from a review of files, an interview with the offender, psychological testing, interviews with people who know the offender, and general observation).

33. *Public Safety Assessment: How it Works*, ADVANCING PRETRIAL POL'Y & RSCH. 1 (May 2020), [https://cdn.filestackcontent.com/security=policy:eyJleHBpcnkiOjQwNzg3NjQwMDAsImNhbGwiOlsicGljayIsInJlYXQiLCJ3cm10ZSIIndyaXRlVXJsIiwic3RvemUiLCJjb252ZXJ0IiwicmVtb3ZlIiwicnVuV29ya2Zsb3ciXX0=,signature:9df63ee50143fbd862145c8fb4ed2fcc17d068183103740b1212c4c9bc858f63/5gCeQzRTuWKKCf5WL7mg](https://cdn.filestackcontent.com/security=policy:eyJleHBpcnkiOjQwNzg3NjQwMDAsImNhbGwiOlsicGljayIsInJlYXQiLCJ3cm10ZSIIndyaXRlVXJsIiwic3RvemUiLCJjb252ZXJ0IiwicmVtb3ZlIiwicnVuV29ya2Zsb3ciXX0=) [https://perma.cc/8S3M-FFTQ] (discussing a tool designed to aid in pretrial release); Huq, *supra* note 1, at 1075-76 (noting Virginia Sentencing Commission's use of its risk tool to divert "nonviolent, low-risk offenders to alternative punishments such as probation, jail time, and restitution" and the use of the Correctional Offender Management Profiling for Alternative Sanctions tool, or COMPAS, in the sentencing context); Douglas & Reeves, *supra* note 32, at

numerical values, but the tools' results are commonly expressed in terms of low, medium, or high risk.³⁴ The meaning of these terms can vary across jurisdictions; for example, low risk to one jurisdiction might be medium risk in another. An aspiration is that a validated, algorithmic analysis will mitigate decision maker bias.³⁵ These tools also promise to reduce recidivism by assessing "risk, need, and responsivity" to determine the appropriate "level of correctional intervention."³⁶

As jurisdictions increasingly adopted RAIs, an impressive body of criticism also emerged.³⁷

1. Criticism That Tools Attribute Risk to Individuals

For the typical decision maker, the RAI answers, "what is *this defendant's* risk score?"; however, tools ultimately predict the *average* likelihood of recidivism for individuals who *share* a characteristic.³⁸ Data used by the RAI also reflects characteristics that are *attributed to a defendant and not reflective of a defendant's* exercise of agency.³⁹ Risk levels are determined by "characteristics and

150-51 (noting use of HCR-20 in the contexts of monitoring individuals who are incarcerated, institutionalized, or under community supervision, and also in making release decisions).

34. See, e.g., ADMIN. OFF. OF THE U.S. CTS., PROB. & PRETRIAL SERVS. OFF., AN OVERVIEW OF THE FEDERAL POST CONVICTION RISK ASSESSMENT 14 (2018) [hereinafter AOUSC OVERVIEW].

35. See *id.* at 4; Crystal S. Yang, *Free at Last? Judicial Discretion and Racial Disparities in Federal Sentencing*, 44 J. LEGAL STUD. 75, 77 (2015) (revealing that in removing an external constraint (the Federal Sentencing Guidelines), there were "significantly increased racial disparities" in sentencing decisions).

36. AOUSC OVERVIEW, *supra* note 34, at 3; accord Jessica M. Eaglin, *Against Neurorehabilitation*, 66 SMU L. REV. 189, 215 (2013). This "risk, need, and responsivity" approach finds robust support in publications seeking institutional acceptance. See, e.g., CRIMINOLOGY, <https://onlinelibrary.wiley.com/journal/17459125> [<https://perma.cc/W63C-LL94>] ("devoted to the study of crime and deviant behavior"); CRIME & DELINQ., <https://journals.sagepub.com/home/cad> [<https://perma.cc/P9PR-LBD2>] (research on "victims, criminals, courts and sanctions"); CRIM. JUST. & BEHAV., <https://journals.sagepub.com/home/cjb> [<https://perma.cc/Z5Y2-TCWE>] (designed "to help the correctional professional develop successful programs"); J. EXPERIMENTAL CRIMINOLOGY, <https://www.springer.com/journal/11292> [<https://perma.cc/26EE-MWYV>] (committed to "the development of evidence based crime and justice policy").

37. Starr, *supra* note 29, at 817-21; Slobogin, *supra* note 27, at 107.

38. Starr, *supra* note 29, at 842.

39. See Dawinder Sidhu, *Moneyball Sentencing*, 56 B.C. L. REV. 671, 702-09 (2015) (criticizing the tying of punishment to group membership and factors beyond the individual's control).

circumstances *statistically associated* with an increased chance of recidivism.”⁴⁰ In doing so, RAIs often consider factors over which a defendant has no control, for example, having family members with a felony, a socio-economic status, or being part of a particular racial group.⁴¹ Reliance on RAI factors also limits the universe of risk factors; an RAI may not measure “lack of self-esteem,” but “self-esteem issues can and do occasionally lead to serious violence.”⁴² A tool can assign risk that, upon closer evaluation, is not there because information is stale or incorrect.⁴³ Even if a decision maker is made aware of such an error, making an adjustment is not possible. A decision maker has no way of considering updated information *within* the tool; such an attempt would threaten the assessment’s validity.⁴⁴ These criticisms, all fair, are not limited to RAIs, but also reflect human decision-making: we rely on stereotypes and incomplete information to assess others.⁴⁵

2. Criticism About What Tools Measure

Critics question what the data and tools actually measure.⁴⁶ For example, does a tool measure what it purports to measure—the likelihood a defendant will engage in criminal conduct—or the likelihood of being caught?⁴⁷ This distinction matters in a jurisdiction

40. AOUSC OVERVIEW, *supra* note 34, at 4 (emphasis added). The National Council on Crime & Delinquency (NCCD) warns about conflating individual and group characteristics: “[a] general statistical relationship between a need and recidivism does not mean that need is ‘criminogenic’ for an individual offender.” CHRIS BAIRD, NAT’L COUNCIL ON CRIME & DELINQ., CRIMINOGENIC NEEDS 2 (2017), http://www.evidentchange.org/sites/default/files/criminogenic_needs.pdf [<https://perma.cc/Y9V6-TLDQ>].

41. *See* Sidhu, *supra* note 39, at 675 & n.24.

42. BAIRD, *supra* note 40, at 3.

43. *See* Andrew Guthrie Ferguson, *Policing Predictive Policing*, 94 WASH. U. L. REV. 1109, 1156 (2017) (“[T]he heightened risk factor for being an unemployed high school dropout might be remedied by a career training program. The risks can change, but the lists of risk-associated people might not, distorting even the correlative accuracy of the prediction.”).

44. *See generally* Bo Cowgill & Megan T. Stevenson, *Algorithmic Social Engineering*, 110 AEA PAPERS & PROC. 96, 96, 99-100 (2020) (discussing how a decision maker attempting to compensate for a perceived flaw in the risk tool will distort the result).

45. *See id.*

46. *See, e.g.*, Christopher Slobogin, *Principles of Risk Assessment: Sentencing and Policing*, 15 OHIO ST. J. CRIM. L. 583, 584 (2018).

47. *See* Sheldon X. Zhang, Robert E. L. Roberts & David Farabee, *An Analysis of Prisoner Reentry and Parole Risk Using COMPAS and Traditional Criminal History Measures*, 60

that over-surveils Black versus white persons; if the tool identifies Black persons to have a higher risk of recidivism, the tool is accurate only so far as it reflects the likelihood of unlawful behavior being detected by discriminatory policing practices.⁴⁸

3. Criticism About What Type of Recidivism Is Being Detected

To the extent an assessment may predict whether a person may recidivate, it does not indicate “*how* they are likely to recidivate,” for example, whether it will be the commission of “a serious offense or a low-level drug or property crime.”⁴⁹ Tools thus tell stakeholders little about what institutional consequence most effectively serves to reduce that recidivism.⁵⁰

4. Criticism About Lack of Transparency

Companies with proprietary software have guarded against legal challenges to look under the hood.⁵¹ Details about data collection, data use, and the weight attributed to data points can remain in a “black box.”⁵² Without crucial efforts by stakeholders to uncover “data collection methods, weaknesses, and gaps” and attempts to “understand[] the challenges associated with inputting and analyzing the data,” a jurisdiction’s criminal “system runs the risk of being built on an unknown and unknowable database.”⁵³

CRIME & DELINQ. 167, 184 (2014).

48. See Michael Brenner, Jeannie Suk Gersen, Michael Haley, Matthew Lin, Amil Merchant, Richard Jagdishwar Millett, Suproteem Sarkar & Drew Wegner, *Constitutional Dimensions of Predictive Algorithms in Criminal Justice*, 55 HARV. C.R.-C.L. L. REV. 267, 275 (2020) (noting the data relied upon by these tools reflect “discriminatory policing and the financial impact of structural racism”); Zhang et al., *supra* note 47, at 184 (stating “[r]earrests are more reflective of police activities than of the offender’s actual criminal involvement” and “official records are an imprecise proxy for actual criminal activity, which COMPAS was designed to predict”).

49. Erin Collins, *Punishing Risk*, 107 GEO. L.J. 57, 65 (2018); see also, Cecelia Klingele, *The Promises and Perils of Evidence-Based Corrections*, 91 NOTRE DAME L. REV. 537, 576 (2015).

50. See Starr, *supra* note 29, at 855.

51. See Rebecca Wexler, *Life, Liberty, and Trade Secrets: Intellectual Property in the Criminal Justice System*, 70 STAN. L. REV. 1343, 1350-53 (2018).

52. Ferguson, *supra* note 43, at 1165.

53. *Id.* at 1165-66.

5. *Criticism That Tools Insulate Unfair Practices*

Risk tools were intended to facilitate “impartiality, predictability, and rationality” and mitigate discriminatory decision-making.⁵⁴ Yet, there is no empirical indication that RAIs provide significantly different outcomes than humans, which one would expect if the tool was corrective.⁵⁵ Tools thus threaten to reproduce pathologies under a veneer of objective fairness. Similar to the reorganization of worthless loans into averaged-out tranches of collateralized debt that are then validated by credit rating agencies, risk assessment tools repackage flawed inputs to promise predictable, fair, and cost-effective criminal justice.⁵⁶ Professor Cecelia Klingele suggests reformers suspecting this result nevertheless adopted RAIs because “they promise financial savings, increased efficiency, and ‘scientifically proven’ results.”⁵⁷ Even proponents of these tools acknowledge the potential for data to embed error, but proclaim optimism in the ability to reduce bias over time and, at worst, maintain the status quo.⁵⁸

6. *Criticism About Racial Harms*

The explicit use of race as a risk factor in RAIs is no longer permitted.⁵⁹ Nevertheless, race-neutral data points serve as proxies for racial discrimination.⁶⁰ The data point most predictive of

54. See Klingele, *supra* note 49, at 562.

55. See Starr, *supra* note 29, at 851.

56. See Ferguson, *supra* note 43, at 1124-25; Klingele, *supra* note 49, at 539; see also John Monahan, *Risk Assessment in Sentencing*, in 4 REFORMING CRIMINAL JUSTICE: A REPORT BY THE ACADEMY FOR JUSTICE 77, 79, 94 (Erik Luna ed., 2017).

57. Klingele, *supra* note 49, at 567; accord AOUSC OVERVIEW, *supra* note 34, at 4 (“[A]ctuarial devices in combination with professional judgement are generally more accurate and consistent than professional judgment alone.”).

58. See Marsha Garrison, *Taking the Risks Out of Child Protection Risk Analysis*, 21 J.L. & POL’Y 5, 19 (2012) (“Algorithms also have the capacity to improve the quality of predictive judgments, and they are particularly valuable in taming the biases that can flow from interview situations, where first impressions often overpower other important data.”).

59. Eaglin, *supra* note 36, at 215.

60. See Mayson, *supra* note 7, at 2222; Bernard E. Harcourt, *Risk as a Proxy for Race: The Dangers of Risk Assessment*, 27 FED. SENT’G REP. 237, 237 (2015); Ferguson, *supra* note 43, at 1148; Eaglin, *supra* note 36, at 215-16. This is further complicated by the fact that some of these proxies for racial discrimination, such as criminal history, are among the strongest predictors of recidivism. See Paul Gendreau, Tracy Little & Claire Goggin, *A Meta-Analysis*

recidivism—criminal history—is especially susceptible to being shaped by discriminatory practices.⁶¹ Professor Sonja Starr takes a more expansive view, arguing “the use of demographic, socioeconomic, family, and neighborhood variables ... amounts to overt discrimination based on demographics and socioeconomic status.”⁶² Where there is consensus that disparate policing practices distort data, there is less agreement about whether or how to credit the impact of structural racism on data.⁶³

Racially discriminatory policing practices include over-surveillance and constant detentions and searches in neighborhoods of color.⁶⁴ Despite much lower returns of contraband and weapons in searches of Black persons vis-à-vis white persons,⁶⁵ the disproportionate number of citations and arrests of Black people results from police saturation and expanded police discretion in communities of color.⁶⁶ Compounding the profusion of misdemeanor-level arrests in

of the Predictors of Adult Offender Recidivism: What Works!, 34 CRIMINOLOGY 575, 588 (1996).

61. See Harcourt, *supra* note 60, at 237; BERNARD E. HARCOURT, *AGAINST PREDICTION: PROFILING, POLICING, AND PUNISHING IN AN ACTUARIAL AGE* 111-16 (2007); Jennifer L. Skeem & Christopher T. Lowenkamp, *Risk, Race, and Recidivism: Predictive Bias and Disparate Impact*, 54 CRIMINOLOGY 680, 683-84, 704-05 (2016) (noting correlation between race and criminal history); Mayson, *supra* note 7, at 2229.

62. Starr, *supra* note 29, at 806; accord CATHY O’NEIL, *WEAPONS OF MATH DESTRUCTION: HOW BIG DATA INCREASES INEQUALITY AND THREATENS DEMOCRACY* 25-26 (2017) (asserting that an RAI that considers convictions, past police involvement, and whether the defendant has friends and family with criminal records is destined to produce racial disparity in results).

63. See Harcourt, *supra* note 60, at 240-41 (criticizing RAI data given policing practices that target racial groups and the disproportionate imprisonment of persons of color); Ngozi Okidegbe, *When They Hear Us: Race, Algorithms and the Practice of Criminal Law*, 29 KAN. J.L. & PUB. POL’Y 329, 332 (2020) (“[M]embers of historically marginalized communities are arrested at higher rates than their white counterparts due to racial profiling.”).

64. Paul D. Butler, *Poor People Lose: Gideon and the Critique of Rights*, 122 YALE L.J. 2176, 2183 (2013) (“The spaces that poor people, especially poor African Americans, live in receive more law enforcement in the form of police stops and arrests.”).

65. See, e.g., Nazgol Ghandnoosh, *Black Lives Matter: Eliminating Racial Inequity in the Criminal Justice System*, SENT’G PROJECT (Feb. 3, 2015), <https://www.sentencingproject.org/publications/black-lives-matter-eliminating-racial-inequity-in-the-criminal-justice-system/> [<https://perma.cc/Q2KQ-MRUP>].

66. See Walsh, *supra* note 4. For case law on furtive glances and high crime areas, see Chan Tov McNamarah, *White Caller Crime: Racialized Police Communication and Existing While Black*, 24 MICH. J. RACE & L. 335, 346-47 (2019); Jamelia N. Morgan, *Rethinking Disorderly Conduct*, 109 CALIF. L. REV. (forthcoming 2021) (manuscript at 43-45); Devon W. Carbado, *Blue-on-Black Violence: A Provisional Model of Some of the Causes*, 104 GEO. L.J. 1479, 1483 (2016); I. Bennett Capers, *Policing, Race, and Place*, 44 HARV. C.R.-C.L. L. REV. 43, 71-74 (2009).

communities of color, statutory schemes often convert multiple misdemeanors into felonies, manufacturing risk that is then imported by RAIs.⁶⁷ A destructive cycle serves to justify these conditions— “[t]he targeting of certain areas or certain races creates the impression of higher crime rates in those areas, which then justifies continued police presence there.”⁶⁸

It is within this (growing) body of criticism that jurisdictions weigh RAI options.⁶⁹ For a jurisdiction seeking to flatten sentencing swings among its judges and to reduce bias in decision-making, RAIs seem promising.⁷⁰ As to the concerns that RAIs reproduce racial disparities, jurisdictions tend to consider race-neutral tweaks that are ultimately ineffective.⁷¹ Milwaukee, for example, adopted an RAI in 2011.⁷² After a decade of attempts to mitigate racial disparities, they remain.

67. See *Misdemeanor Justice: Statutory Guidance for Sentencing*, NAT'L CONF. STATE LEGISLATURES (July 16, 2019), <https://www.ncsl.org/research/civil-and-criminal-justice/misdemeanor-justice-statutory-guidance-for-sentencing.aspx#Habitual%20Offending> [<https://perma.cc/KQ3W-HKP2>] (discussing habitual offender laws, which “apply to those who have been convicted multiple times, even if each incident is a misdemeanor”). For example, a repeat offender in Wisconsin includes “someone convicted of any misdemeanor on three separate occasions over a five-year period. If someone is a repeater, then a maximum term of imprisonment of one year or less may be increased to up to two years of incarceration.” *Id.*

68. Ferguson, *supra* note 43, at 1148-49; accord Aaron Cantú, *Algorithms and Future Crimes: Welcome to the Racial Profiling of the Future*, SAN DIEGO FREE PRESS (Mar. 1, 2014), <https://sandiegofreepress.org/2014/03/algorithms-and-future-crimes-welcome-to-the-racial-profiling-of-the-future/#.YHXf6ehKhPY> [<https://perma.cc/QE5F-6B3A>] (“Any attempt to predict future criminality will be based on the crime rates of the past.... If that’s the reality that is supposed to inform who we criminalize in the future, won’t initiatives like predictive policing just perpetuate the racist criminal justice policies and practices of the present?”); Bryan Llenas, *Brave New World of ‘Predictive Policing’ Raises Specter of High-Tech Racial Profiling*, FOX NEWS (Jan. 11, 2017), <https://www.foxnews.com/world/brave-new-world-of-predictive-policing-raises-specter-of-high-tech-racial-profiling> [<https://perma.cc/HXY7-3CA9>] (“The algorithm is telling you exactly what you programmed it to tell you. ‘Young black kids in the south side of Chicago are more likely to commit crimes,’ and the algorithm lets the police launder this belief.... [I]f the data is biased to begin with and based on human judgment, then the results the algorithm is going to spit out will reflect those biases.”).

69. See Ferguson, *supra* note 43, at 1152-53, 1157.

70. See *id.* at 1117.

71. See *id.* at 1152.

72. *21 Cities, States Adopt Risk Assessment Tool to Help Judges Decide Which Defendants to Detain Prior to Trial*, ARNOLD VENTURES (June 26, 2015), <https://www.arnoldventures.org/newsroom/more-than-20-cities-and-states-adopt-risk-assessment-tool-to-help-judges-decide-which-defendants-to-detain-prior-to-trial/> [<https://perma.cc/2SMR-Y46J>].

B. A Case Study: Milwaukee County

Milwaukee County occupies a portion of southeast Wisconsin.⁷³ The City of Milwaukee, situated on the shores of Lake Michigan, experienced an influx of Black migrants in the 1950s.⁷⁴ The city was already racially segregated; twenty years earlier, the federal government's redlining policy deemed Black persons a financial threat to white residents, laying ruin to Black neighborhoods.⁷⁵ Milwaukee is now the most segregated city in the United States.⁷⁶ Three out of every four Black residents in Milwaukee would have to move to achieve integration.⁷⁷

Though Milwaukee County is over 60 percent white,⁷⁸ when viewing Milwaukee's criminal courts, county jails, and probation offices, one is struck by how people of color are subject to a system run by white people.⁷⁹ Wisconsin has one of the highest incarceration

73. *Milwaukee*, ENCYCLOPEDIA BRITANNICA (July 1, 2021), <https://www.britannica.com/place/Milwaukee> [https://perma.cc/H78G-CPEC].

74. *See id.*; *Peoples*, ENCYCLOPEDIA OF MILWAUKEE, <https://emke.uwm.edu/peoples> [https://perma.cc/7GYU-4V7R].

75. *See* Ashley Luthern, *In One of America's Most Segregated Cities, There's Unequal Violence and Unequal Justice*, MILWAUKEE J. SENTINEL (July 10, 2019), <https://projects.jsonline.com/news/2019/7/10/murder-in-milwaukee-segregation-shapes-racial-disparities-and-crime.html> [https://perma.cc/R7K9-R8FV].

76. German Lopez, *Milwaukee's Riot Didn't Happen in a Vacuum. It Happened in the US's Most Segregated City.*, VOX (Aug. 15, 2016, 12:50 PM), <https://www.vox.com/2016/8/15/12480930/milwaukee-riots-race-segregation-police> [https://perma.cc/UH2X-TREA].

77. William H. Frey, *Black-White Segregation Edges Downward Since 2000, Census Shows*, BROOKINGS (Dec. 17, 2018), <https://www.brookings.edu/blog/the-avenue/2018/12/17/black-white-segregation-edges-downward-since-2000-census-shows/#:~:text=Black%2Dwhite%20segregation%20fell%20in%20most%20metro%20areas%20since%202000&text=Y&et%2016%20areas%20did%20show%20declines%20of%205%20points%20or%20more> [https://perma.cc/3QQ4-8A9C].

78. *QuickFacts: Milwaukee County, Wisconsin*, U.S. CENSUS BUREAU (July 1, 2019), <https://www.census.gov/quickfacts/milwaukeecountywisconsin> [https://perma.cc/89WS-PHU2].

79. Observations of author, serving as assigned counsel for the Wisconsin Public Defender (2008-2009) and a Supervising Attorney at the Wisconsin Innocence Project (2010-2014); *cf.* Michele L. Jawando & Allie Anderson, *Racial and Gender Diversity Sorely Lacking in America's Courts*, CTR. FOR AM. PROGRESS (Sept. 15, 2016, 9:00 AM), <https://www.americanprogress.org/issues/courts/news/2016/09/15/144287/racial-and-gender-diversity-sorely-lacking-in-americas-courts/> [https://perma.cc/4L73-SRHP]; Dan Keating & Kevin Uhrmacher, *In Urban Areas, Police Are Consistently Much Whiter than the People They Serve*, WASH. POST (June 4, 2020), <https://www.washingtonpost.com/nation/2020/06/04/urban-areas-police-are-consistently-much-whiter-than-people-they-serve/> [https://perma.cc/N859-W4EA]; *Bailiffs, Correctional Officers, & Jailers*, DATA USA, <https://datausa.io/profile/soc/bailiffs-correctional->

rates of Black persons in the nation, second only to South Dakota.⁸⁰ Of Wisconsin's fifty-six Black neighborhoods—"defined as 'a certain area where the majority of residents are African Americans'" —thirty-one are actually jails or prisons.⁸¹ Wisconsin's rate of incarcerating Black people is almost twice the national average.⁸² Nationally, for every one white person imprisoned, five Black individuals are imprisoned; in Wisconsin, that ratio is one to ten.⁸³ Milwaukee County drives this disparity: Milwaukee County is home to 76 percent of the state's Black population.⁸⁴ More than half of Milwaukee's Black "men in their thirties ha[ve] served time in state prison."⁸⁵

The apartheid apparent, Milwaukee stakeholders nevertheless needed empirical evidence before concluding racial discrimination was afoot in the county's criminal system.⁸⁶ "You can't change what

officers-jailers [<https://perma.cc/Y5Q3-EJ4G>] ("57.2% of [b]ailiffs, correctional officers, & jailers are White (Non-Hispanic), making that the most common race or ethnicity in the occupation."); *Probation Officers & Correctional Treatment Specialists*, DATA USA, <https://datausa.io/profile/soc/probation-officers-correctional-treatment-specialists> [<https://perma.cc/8MB3-A449>] ("54.1% of [p]robation officers & correctional treatment specialists are White (Non-Hispanic), making that the most common race or ethnicity in the occupation.").

80. See Marc Mauer & Ryan S. King, *Uneven Justice: State Rates of Incarceration by Race and Ethnicity*, SENT'G PROJECT (July 2007), <https://www.sentencingproject.org/wp-content/uploads/2016/01/Uneven-Justice-State-Rates-of-Incarceration-by-Race-and-Ethnicity.pdf> [<https://perma.cc/6JCU-RUTZ>]. Only 20,000 Black people reside in South Dakota, compared to 390,000 in Wisconsin. *Compare QuickFacts: South Dakota*, U.S. CENSUS BUREAU (July 1, 2019), <https://www.census.gov/quickfacts/SD> [<https://perma.cc/D5P6-CN3B>], with *QuickFacts: Wisconsin*, U.S. CENSUS BUREAU (July 1, 2019), <https://www.census.gov/quickfacts/WI> [<https://perma.cc/PG8L-6NEF>].

81. Brentin Mock, *Half of Wisconsin's Black Neighborhoods Are Jails*, BLOOMBERG CITYLAB (Aug. 9, 2016, 3:40 PM), <https://www.bloomberg.com/news/articles/2016-08-09/half-of-wisconsin-s-black-neighborhoods-are-jails> [<https://perma.cc/MCZ8-XG9Z>].

82. See Mauer & King, *supra* note 80.

83. See *id.*

84. *Wisconsin's Racial and Ethnic Diversity: Census 2000 Population & Percentages*, U. WIS. EXTENSION & APPLIED POPULATION LAB'Y (2001), https://blogs.extension.wisc.edu/wacec/files/2014/12/WACEC_full_report.pdf [<https://perma.cc/KP66-UU39>].

85. Toobin, *supra* note 19.

86. See *id.* There was concern by some stakeholders who sought to escape accountability that these racial disparities were traceable to actions by police and prosecutors, as opposed to "deeply entrenched negative indices in relation to poverty, segregation, poor health outcomes, unemployment and poor educational outcomes." *Prosecution and Race in the Criminal Justice System—Milwaukee's Experience*, UNIV. WIS.-MADISON SOC. SCI. COMPUTING COOP., <https://www.ssc.wisc.edu/soc/wiscidea/wp-content/uploads/2017/08/PROSECUTION-AND-RACE-IN-THE-CRIMINAL-JUSTICE-SYSTEM.pdf> [<https://perma.cc/7QUA-EYH6>] [hereinafter *Prosecution and Race*].

you don't measure," stated Milwaukee District Attorney John Chisholm.⁸⁷ In 2005, the Milwaukee District Attorney granted access to the Vera Institute of Justice to review departmental files.⁸⁸ Some of the findings include:

[P]rosecutors in Milwaukee declined to prosecute forty-one per cent of whites arrested for possession of drug paraphernalia, compared with twenty-seven per cent of blacks; in cases involving prostitution, black female defendants were likelier to be charged than white defendants; in cases that involved resisting or obstructing an officer, most of the defendants charged were black (seventy-seven percent).⁸⁹

The Vera study indicated that prosecutorial racial bias compounded police racial bias; for example, though marijuana use does not differentiate by race, Black people in Wisconsin are "six times more likely to be arrested" for possession than white people.⁹⁰ And yet, prosecutors were around 50 percent more likely to decline bringing possession charges against white persons than Black persons.⁹¹ Other disparities surfaced. Of non-domestic violence (DV) felony and misdemeanor cases in 2007, 33 percent of the caseload was white, while 66 percent was nonwhite.⁹² If white people faced similar conditions as nonwhite Milwaukee citizens, annual cases against white people would increase from 8,000 to 30,000.⁹³ If white people were subject to the same conditions as nonwhite people, the total non-DV caseload in Milwaukee would increase from 24,500

87. Harvard Law School, *Vera Conference at HLS: Panel on Challenges and Opportunities faced by Offices of the DA*, YOUTUBE (Dec. 2, 2014), https://www.youtube.com/watch?v=o2I1zLTqhMo&feature=emb_logo [<https://perma.cc/NWD2-CNGY>]. This was a statement repeated by the Vera Institute of Justice. See *Prosecution and Race*, *supra* note 86.

88. *Id.*

89. Toobin, *supra* note 19.

90. Michael M. O'Hear, *Arrest Trends in Milwaukee, 1980-2011—Part One*, MARQ. UNIV. L. SCH. FAC. BLOG (June 30, 2013), <https://law.marquette.edu/facultyblog/2013/06/arrest-trends-in-milwaukee-1980-2011-part-one/> [<https://perma.cc/KNN8-DHPY>].

91. See Toobin, *supra* note 19.

92. See Wayne McKenzie, Don Stemen, Derek Coursen & Elizabeth Farid, *Prosecution and Racial Justice: Using Data to Advance Fairness in Criminal Prosecution*, VERA INST. JUST. 6 (Mar. 2009), https://www.vera.org/downloads/Publications/prosecution-and-racial-justice-using-data-to-advance-fairness-in-criminal-prosecution/legacy_downloads/Using-data-to-advance-fairness-in-criminal-prosecution.pdf [<https://perma.cc/86V3-FLHT>].

93. See *id.*

cases to 47,000.⁹⁴ Milwaukee County stakeholders concluded these racial disparities had anchors in policing and prosecution practices influenced by unconscious racial bias.⁹⁵ Some still wondered, however, if racial disparities—say, in arrest rates—resulted because police were “merely responding to different rates of crime-commission among different racial groups.”⁹⁶ A *Milwaukee Journal Sentinel* study indicated racial bias, not (racist assertions of) race-based behavior, was the culprit.⁹⁷

In 2011, Milwaukee stakeholders sought to address disparities by improving the RAIs used during pretrial detention hearings.⁹⁸ A pretrial detention hearing determines much.⁹⁹ Pretrial detention significantly contributes to Wisconsin’s jail population; in 2013, pretrial detainees held in local jails outnumbered those who had already been convicted.¹⁰⁰ Pretrial detention is not only correlated with race, but also poverty; in Milwaukee, a 2009 study found that 23 percent of jail inmates were serving pretrial detention because they could not post bail of \$500 or less.¹⁰¹ Studies across the nation confirm the importance of this pretrial disposition.¹⁰² Pretrial detainees held for two to three days are 40 percent more likely to

94. *See id.*

95. *See id.*

96. *See* O’Hear, *supra* note 90. This view ensures that, irrespective of studies, racial disparities will persist.

97. Ben Poston, *Racial Gap Found in Traffic Stops in Milwaukee*, MILWAUKEE J. SENTINEL (Dec. 3, 2011), <https://archive.jsonline.com/watchdog/watchdogreports/racial-gap-found-in-traffic-stops-in-milwaukee-ke1hsip-134977408.html> [<https://perma.cc/E8TE-TA4A>] (finding also that searches of Black and white drivers resulted in similar rates of contraband hits).

98. *See* ARNOLD VENTURES, *supra* note 72.

99. In Wisconsin, a defendant who is arrested is eligible for release “under reasonable conditions designed to assure his or her appearance in court, protect members of the community from serious bodily harm, or prevent the intimidation of witnesses. Bail [a requirement to post a bond] may be imposed ... [if a court finds] a reasonable basis to believe that bail is necessary to assure appearance.” WIS. STAT. § 969.01 (2021).

100. *See Wisconsin Profile*, PRISON POL’Y INITIATIVE, <https://www.prisonpolicy.org/profiles/WI.html> [<https://perma.cc/3B7B-WGUF>].

101. *See Milwaukee County’s Pretrial Release Decision Process & Pretrial Services Re-Design*, MILWAUKEE CNTY. CMTY. JUST. COUNCIL 3 (July 24, 2013), <https://www.milwaukee.gov/ImageLibrary/Groups/cjccouncil/2013JulyCJCCPresentation.pdf> [<https://perma.cc/NZ9V-7AL2>] [hereinafter *Pretrial Release Decision Process*].

102. *See generally* Léon Digard & Elizabeth Swavola, *Justice Denied: The Harmful and Lasting Effects of Pretrial Detention*, VERA INST. JUST. (Apr. 2019), <https://vera.org/downloads/publications/Justice-Denied-Evidence-Brief.pdf> [<https://perma.cc/R9P6-HFMZ>].

commit a new crime compared to a similar cohort of defendants held for no longer than twenty-four hours, a stunning pattern given that detention is often justified on public safety grounds.¹⁰³ Pretrial detention increases a defendant's likelihood of conviction and severity of any sentence.¹⁰⁴ Where release significantly increases the likelihood of case dismissal,¹⁰⁵ detention correlates to a higher likelihood of conviction: in a study of a general cross-section of defendants, more than three days of pretrial detention increased the likelihood of conviction by 13 percent;¹⁰⁶ and, in a study of misdemeanor cases, persons detained were 25 percent more likely to be convicted than similarly situated persons who were released.¹⁰⁷ Pretrial detention also correlates to sentence severity.¹⁰⁸ In a study of misdemeanor defendants, those detained were 43 percent more likely to serve time than similarly situated persons who were released;¹⁰⁹ and, in a study of felony cases, those subject to pretrial detention served on average five months more than those released (as to those released, 20 percent were sentenced to incarceration, whereas 87 percent of those detained were so sentenced).¹¹⁰ Underscoring the significance of this decision point, even if a defendant is released, a court has discretion to impose restrictions that can have serious collateral consequences.¹¹¹

103. See Christopher T. Lowenkamp, Marie VanNostrand & Alexander Holsinger, *The Hidden Costs of Pretrial Detention*, ARNOLD FOUND. 20 (Nov. 2013), https://craftmedia.bucket.s3.amazonaws.com/uploads/PDFs/LJAF_Report_hidden-costs_FNL.pdf [<https://perma.cc/PX7G-N6BC>].

104. Digard & Swavola, *supra* note 102, at 1. Pretrial detention obviously increases prosecutorial leverage. See *id.* at 4-5. When a person with familial responsibilities is faced with the prospect of pretrial detention, the person is incentivized to immediately plea to minor charges, minimizing any consultation with a defense attorney, and creating or contributing to criminal history, all regardless of innocence or guilt. See *id.*

105. *Id.* at 4.

106. Stevenson, *supra* note 26, at 532.

107. Heaton et al., *supra* note 26, at 717.

108. See Mary T. Phillips, *A Decade of Bail Research in New York City*, N.Y.C. CRIM. JUST. AGENCY, INC. 104-05 (Aug. 2012), <https://www.prisonpolicy.org/scans/DecadeBailResearch12.pdf> [<https://perma.cc/H8JE-E8P4>].

109. Heaton et al., *supra* note 26, at 717.

110. Phillips, *supra* note 108, at 118, 121 (stating “the strongest *single* factor influencing” this differential is pretrial detention). Those released have the opportunity to work and support family, permitting a defense attorney to make arguments to mitigate sentencing. *Id.* at 118.

111. See, e.g., Chaz Arnett, *From Decarceration to E-carceration*, 41 CARDOZO L. REV. 641, 644-46 (2019).

Recognizing the importance of this phase, stakeholders reformat-
ted the Milwaukee County Pretrial Risk Assessment Instrument
(MCPRAI).¹¹² The MCPRAI used six data points deemed predictive
of failure to appear, including the number of cases filed against a
defendant and whether the defendant was arrested while on bond;
both are factors that can reproduce racial disparity.¹¹³ Scoring was
applied to a grid, which, based on the charge, assigned risk.¹¹⁴ For
defendants deemed appropriate for release, the grid recommended
the bond amount, level of supervision (none, standard, or intensive),
and conditions upon release.¹¹⁵

The MCPRAI was intended to improve racial equity; according to
Chief Judge Jeffrey Kremers, the “old approach of relying entirely
on experience and local custom often leads to institutional biases
that leave disproportionately more poor and minority defendants
awaiting trial in jail.”¹¹⁶ Judge Kremers observed: “Certainly [in]
Milwaukee, minorities are a higher percentage of the ‘poor’ and
hence a higher percentage of the detained pretrial-defendant

112. Jeffrey A. Kremers, *Milwaukee Moves Away from Money Bail System*, WIS. LAW. (June 1, 2017), <https://www.wisbar.org/NewsPublications/WisconsinLawyer/Pages/Article.aspx?Volume=90&Issue=6&ArticleID=25667> [<https://perma.cc/KL64-TQGW>]; see also *Milwaukee County Pretrial Risk Assessment Instrument—Revised (MCPRAI-R)*, MILWAUKEE CNTY., <http://ebdnoneless.org/documents/Milwaukee-MCPRAI-Revised.pdf> [<https://perma.cc/Q4D3-VUEB>] [hereinafter *MCPRAI-R Form*] (showing that the risk factors considered are: the number of cases filed against the defendant, prior failure to appear in court, whether the defendant was arrested while out on bond, employment or primary caregiver status, amount of time living at residence, and substance abuse score).

113. *MCPRAI-R Form*, *supra* note 112; see Beth Schwartzapfel, *Can Racist Algorithms Be Fixed?* MARSHALL PROJECT (July 1, 2019, 6:00 AM), <https://www.themarshallproject.org/2019/07/01/can-racist-algorithms-be-fixed> [<https://perma.cc/J3JG-2GDJ>].

114. *Pretrial Release Decision Process*, *supra* note 101, at 7-8.

115. *Id.* These conditions can include no contact orders, drug tests, curfews, and electronic monitoring. Kremers, *supra* note 112. To decrease missed court dates, many jurisdictions are testing new solutions, such as reminders sent through text messaging. Jason Tashea, *Text-Message Reminders Are a Cheap and Effective Way to Reduce Pretrial Detention*, ABA J. (July 17, 2018, 7:10 AM), https://www.abajournal.com/lawscribbler/article/text_messages_can_keep_people_out_of_jail [<https://perma.cc/APK4-38SJ>]. A study in New York found that using a texting service to encourage attendance at hearings reduced failure to appear (FTAs) by 26 percent (the efficacy of such a program relies on certain factors, such as number of texts, information included in texts, and whether the jurisdiction has the defendant’s phone number). *Id.*

116. Bruce Vielmetti, *Milwaukee County’s New Pretrial Release System Takes Hit*, MILWAUKEE J. SENTINEL (Jan. 31, 2012), <https://www.archive.jsonline.com/news/crime/pretrial-release-system-takes-hit-tp40r57-138459384.html> [<https://perma.cc/R4K3-B7X2>].

population. It is possible then to see the beginnings of what has contributed to the racial disparities in jail populations.”¹¹⁷

In 2015, to further encourage pretrial release and achieve racial equity, Milwaukee County transitioned to the Public Safety Assessment (PSA) tool developed by Arnold Ventures.¹¹⁸ In Judge Kremers’ opinion, the PSA did not “consider factors that could be discriminatory, such as race, sex, level of education, socioeconomic status, and neighborhood.”¹¹⁹ The PSA is designed to predict the likelihood that releasing a defendant will result in three outcomes: (1) a “failure to appear (FTA)” for a court hearing; (2) a “new criminal arrest (NCA)”; and (3) a “new violent criminal arrest (NVCA).”¹²⁰ Arnold Ventures claims the PSA is associated with “higher rates of pretrial release” with no negative effect on “crime or court appearance rates.”¹²¹ To inform its data set, the PSA draws on 750,000 cases in 300 different jurisdictions.¹²² To minimize racial disparities, the PSA limits its data points to nine factors that “most effectively predict the likelihood of successful pretrial outcomes.”¹²³ The PSA is transparent about how data points are weighted and calculated.¹²⁴ The PSA is continuously evaluated to improve accuracy and “minimize its impact on racial disparities.”¹²⁵ Evaluations have yet to show the PSA to “exacerbate racial disparities.”¹²⁶

As the DA’s office and the courts tried to make RAIs more fair, policing practices worked against these efforts.¹²⁷ Compared to white drivers, Black drivers were seven times more likely, and Latino

117. Kremers, *supra* note 112.

118. ARNOLD VENTURES, *supra* note 72.

119. Kremers, *supra* note 112.

120. *Public Safety Assessment: How it Works*, *supra* note 33, at 2-4.

121. *About the Public Safety Assessment: What Is the PSA?*, ADVANCING PRETRIAL POL’Y & RSCH. (May 2020), <https://advancingpretrial.org/psa/about/> [<https://perma.cc/6S8V-RZ4J>].

122. *Id.*

123. *Id.* The factors are: (1) age at current arrest; (2) current violent offense; (3) pending charge at the time of the arrest; (4) prior misdemeanor conviction; (5) prior felony conviction; (6) prior violent conviction; (7) prior failure to appear in the past two years; (8) prior failure to appear older than two years; and (9) prior sentence to incarceration. *Public Safety Assessment: How it Works*, *supra* note 33.

124. *About the Public Safety Assessment: What Is the PSA?*, *supra* note 121.

125. *Id.*

126. *Id.*

127. *See* Poston, *supra* note 97.

drivers five times more likely, to be subject to a traffic stop.¹²⁸ In 2015, police “conducted 196,434 traffic and pedestrian stops,” a number “staggering in light of the City’s ... population of 599,498.”¹²⁹ Mitigating some of these racial harms, in 2015, the DA’s office ceased prosecutions for possession of drug paraphernalia and reduced prosecutions for low-level drug offenses that disproportionately impacted the Black population.¹³⁰ In 2018, in response to *Collins v. City of Milwaukee*, the police department agreed to a settlement to “end practices amounting to a decade-long stop-and-frisk program that resulted in hundreds of thousands of baseless stops as well as racial and ethnic profiling.”¹³¹ Experts in *Collins* controlled for crime rates and found “traffic and pedestrian stop rates” to be “six times higher for Black people than for white people.”¹³² The settlement inserted an independent monitor to assess whether the Milwaukee Police Department met “certain benchmarks”; recently, the “monitor has found progress to be slow and uneven.”¹³³ In 2018, Black people in Milwaukee County were 4.2 times more likely than white people to be arrested for marijuana possession.¹³⁴ District Attorney Chisholm attributes some of the racial disparity to forces out of his control, including poverty and educational attainment.¹³⁵ But such conditions are only exacerbated by criminal prosecution of low-level crimes, given the deleterious consequences of incapacitating young men and saddling families

128. *Id.*

129. Complaint at 33, *Collins v. City of Milwaukee*, No. 2:17-cv-00234, (E.D. Wis. Feb. 27, 2017) [hereinafter *Collins* Complaint].

130. See Toobin, *supra* note 19.

131. Nusrat Choudhury, *Stop-and-Frisk Settlement in Milwaukee Lawsuit Is a Wakeup Call for Police Nationwide*, ACLU (July 13, 2018, 5:30 PM), <https://www.aclu.org/blog/criminal-law-reform/reforming-police/stop-and-frisk-settlement-milwaukee-lawsuit-wakeup-call> [https://perma.cc/R45Z-79KA]. The settlement imposed a higher level of supervision over and accounting of police stop and frisks to ensure that “officers who conduct unlawful encounters are counseled, retrained, or disciplined.” *Id.*

132. *Id.*

133. Ashley Luthern, *The Rise and Fall of Alfonso Morales: How a Milwaukee Native Became the City’s Top Cop, Only to Be Ousted After Two-and-Half Years*, MILWAUKEE J. SENTINEL (Aug. 14, 2020, 8:55 AM), <https://www.jsonline.com/story/news/local/milwaukee/2020/08/14/promise-unmet-alfonso-morales-time-milwaukees-police-chief/3317693001/> [https://perma.cc/JC2N-L9JW].

134. *Extreme Racial Disparities Persist in Marijuana Arrests: Wisconsin*, ACLU, <https://graphics.aclu.org/marijuana-arrest-report/WI> [https://perma.cc/4HTM-DZ95].

135. Toobin, *supra* note 19.

with fines and fees, and then releasing those young men into the community with a criminal history that renders poor employment prospects worse.¹³⁶

Racially disparate criminal outcomes take a village; police, prosecutors, defense attorneys, and probation officers have a role in contributing to, or mitigating, these disparities.¹³⁷ Police target Black people.¹³⁸ Prosecutors charge Black people more often and more severely than similarly situated white people.¹³⁹ One study suggested that in certain counties in the United States, “judges value freedom less for blacks than whites” and treat white defendants with higher risk profiles more leniently than Black defendants.¹⁴⁰ These dynamics result in the assignment of higher risk scores to people of color; this manufacturing of risk then justifies harsher treatment.¹⁴¹

Recognizing that the criminal system is an ecosystem with each institution contributing to or undermining efforts to decrease racial harm, Milwaukee County established the “Race, Equity and Procedural Justice Committee,” which was created to “advance racial equity and procedural justice in Milwaukee’s criminal justice system through collaboration.”¹⁴² Other government organizations in Milwaukee also adhere to the policy that multidisciplinary criminal

136. See Dorothy E. Roberts, *The Social and Moral Cost of Mass Incarceration in African American Communities*, 56 STAN. L. REV. 1271, 1293-94 (2004).

137. See Tom Reed & John Chisholm, *From Funnels to Large-Scale Irrigation: Changing the Criminal Justice System Paradigm to Improve Public Health and Safety*, HARV. KENNEDY SCH. 23 (Dec. 2019), https://www.hks.harvard.edu/sites/default/files/centers/wiener/programs/pcj/files/reed_chisholm_changing_the_criminal_justice_system_paradigm.pdf [<https://perma.cc/YDF9-WY5R>].

138. See, e.g., Radley Balko, *There’s Overwhelming Evidence That the Criminal Justice System Is Racist. Here’s the Proof.*, WASH. POST (June 10, 2020), <https://www.washingtonpost.com/graphics/2020/opinions/systematic-racism-police-evidence-criminal-justice-system/> [<https://perma.cc/8UCW-E56D>].

139. See, e.g., *id.*

140. See Shawn D. Bushway & Jonah B. Gelbach, *Testing for Racial Discrimination in Bail Setting Using Nonparametric Estimation of a Parametric Model*, BERKELEY PROGRAM IN L. & ECON. 37 (Oct. 28, 2010), https://eml.berkeley.edu/~webfac/kline/e251_s11/gelbach.pdf [<https://perma.cc/D9AB-EK23>].

141. See Andrew Guthrie Ferguson, *Big Data and Predictive Reasonable Suspicion*, 163 U. PA. L. REV. 327, 402 (2015).

142. *Race, Equity, and Procedural Justice Committee*, MILWAUKEE CNTY. JUST. COUNCIL, <https://www.milwaukee.gov/cjc/equity> [<https://perma.cc/UT94-2MKF>].

justice teams are essential to reducing racial harms.¹⁴³ Milwaukee judges, reflecting this institutional concern, have formed an *ad hoc* racial justice council to address racial discrimination and to prevent implicit racial bias.¹⁴⁴ Thus, Milwaukee stakeholders recognize the shared responsibility of institutional actors to work toward racial justice.¹⁴⁵

District Attorney Chisholm has emphasized the need to mitigate racial disparities.¹⁴⁶ A critical piece to Chisholm's reasoning is the correlation between racial disparity and public safety.¹⁴⁷ As the court in *Collins* stated, Milwaukee's racially discriminatory practices undermine law enforcement objectives and damage "the trust between police and the public central to achieving public safety."¹⁴⁸ But despite the institutional commitment to achieving racial equality, dramatic inequality remains, and frustration over this status quo is acute.¹⁴⁹ The persistence of racial inequality undermines the criminal system's mission-critical objective of ensuring public safety, leading "in many ways to a 'crisis of confidence' in the criminal justice system's ability to achieve fair and equitable outcomes."¹⁵⁰

But what are Milwaukee's options to further address these concerns by improving its RAI? If Milwaukee is limited to the consideration of race-neutral remedies, additional options are scarce—one race-neutral "fix" after another has not mitigated the gaping disparities.

143. See *Prosecution and Race*, *supra* note 86.

144. Telephone Interview with Milwaukee County Circuit Court Judge (Dec. 19, 2020).

145. See *Prosecution and Race*, *supra* note 86.

146. See Toobin, *supra* note 19.

147. See *id.*

148. *Collins et al. v. The City of Milwaukee et al.*, ACLU (July 16, 2019), <https://www.aclu.org/cases/collins-et-al-v-city-milwaukee-et-al> [<https://perma.cc/FAX4-CH8M>]. Though Chisholm believes certain violent offenders should be incapacitated, he notes this is "a relatively small group." Toobin, *supra* note 19.

149. Telephone Interview with Paige Styler, Deputy Regional Attorney Manager, Milwaukee Trial Division, Wisconsin State Public Defender (Jan. 12, 2021) (stating defense attorneys are constantly communicating to each other the alarm over disparate treatment of similarly situated defendants, but for each defendant's race).

150. Reed & Chisholm, *supra* note 137, at 22.

C. Potential Approaches to Remove Racial Bias from RAIs

Race-neutral approaches to improve RAIs have been assiduously deployed to mitigate the reproduction of racial harm.¹⁵¹ And yet, scholars and tool designers recognize the diminishing returns of further race-neutral approaches.¹⁵² Increased transparency, for example, can improve data selection and accuracy.¹⁵³ But knowing what data points inform a tool does not remedy racial disparity caused by remaining data points.¹⁵⁴ Some propose that where data points are proxies for race they should be eliminated, and in fact, there has been some success in removing data points where costs of racial harm overwhelm any predictive benefits they bring to a tool.¹⁵⁵ Yet, as some variables associated with racial discrimination “are struck from assessment tools, the predictive power of these instruments wanes.”¹⁵⁶ Recognizing the lack of race-neutral options, some scholars have considered race-informed adjustments to RAIs.¹⁵⁷

151. See Eaglin, *supra* note 36, at 214-17.

152. See *id.* at 216-18.

153. Not only can the selection of data be scrutinized, but also its completeness. Samuel R. Wiseman, *The Criminal Justice Black Box*, 78 OHIO ST. L.J. 349, 359 (2017) (advocating reliance on more comprehensive data sets that reduce fragmentation).

154. See Starr, *supra* note 29, at 806. Former Attorney General Eric Holder warned that RAIs based on education level, socioeconomic background, or neighborhood could exacerbate criminal system disparities. Devlin Barrett, *Holder Cautions on Risk of Bias in Big Data Use in Criminal Justice*, WALL ST. J. (Aug. 1, 2014, 2:10 PM), <https://www.wsj.com/articles/u-s-attorney-general-cautions-on-risk-of-bias-in-big-data-use-in-criminal-justice-1406916606> [<https://perma.cc/TNE4-E9GJ>].

155. See O'NEIL, *supra* note 62, at 210 (“Are we going to sacrifice the accuracy of the model for fairness?... In some cases, yes. If we're going to be equal before the law, or be treated equally as voters, we cannot stand for systems that drop us into different castes and treat us differently.”).

156. Oleson, *supra* note 29, at 1337 & n.42 (“[O]mitting factors that are correlated with race from a model to predict recidivism reduced the accuracy of the model by five to twelve percentage points.” (citing Joan Petersilia & Susan Turner, *Guideline-Based Justice: Prediction and Racial Minorities*, 9 CRIME & JUST. 151, 174 (1987))).

157. See, e.g., Huq, *supra* note 1, at 1129; Hellman *supra* note 7, at 819; Mayson, *supra* note 7, at 2268-69. It should be mentioned that some consider race-informed approaches in order to increase transparency, as opposed to mitigating racial disparity. See Crystal S. Yang, *Toward an Optimal Bail System*, 92 N.Y.U. L. REV. 1399, 1466-71 (2017) (using race as a variable with predictive value so as to make transparent the role of race in algorithmic calculations).

A race-informed remedy will have different objectives: to ensure white and Black people are forecast to have similar risk rates (statistical parity);¹⁵⁸ to ensure the same proportion of white and Black people are wrongfully forecast for re-arrest (false-positive parity);¹⁵⁹ or to ensure the same proportion of white and Black people are arrested who were not forecasted to be re-arrested (false-negative parity).¹⁶⁰ Professor Sandra Mayson, for example, proposed using a tool's false-positive disparity as a diagnostic to assess where a community should direct additional resources to disadvantaged communities.¹⁶¹

Professor Aziz Huq's race-informed approach addresses the statistical disparity between the risk scores of racial groups.¹⁶² Huq asserts that "our policing and adjudicative institutions play significant roles in the reproduction and entrenchment of social stratification," particularly when it comes to the distribution of low-level, nonviolent crimes.¹⁶³ Huq opined that "it will sometimes be necessary to use race to achieve substantively accurate policy results."¹⁶⁴ As to a race-informed remedy, Huq expressed concern that an under-correction would result in racial "stratification effects" due to "asymmetrical spillovers from criminal justice for minority but not majority populations."¹⁶⁵ But Huq also worried about an over-correction that releases high-risk individuals into a community.¹⁶⁶ Huq concluded any race-based adjustment should allocate state coercion so that the spillover costs of that coercion on a minority group do not outweigh the benefits afforded by the algorithm to that group.¹⁶⁷ Huq's remedy would adjust the thresholds for assessing low, medium, and high-risk groups by race.¹⁶⁸ Thresholds would

158. See Huq, *supra* note 1, at 1115-16.

159. Hellman, *supra* note 7, at 819; Mayson, *supra* note 7, at 2243-44.

160. Mayson, *supra* note 7, at 2244.

161. See *id.* at 2268-70.

162. See Huq, *supra* note 1, at 1102.

163. *Id.* at 1103.

164. *Id.* at 1102. Huq acknowledges an "irreconcilable tension ... between having equally accurate predictions of high risk and equalizing the rates of false positives within the pool of nonrecidivist suspects." *Id.* at 1055.

165. *Id.*

166. See *id.* at 1046-47.

167. *Id.* at 1111, 1113 ("If an algorithmic tool generates public security by imposing greater costs (net of benefits) for blacks as a group, it raises a racial equity concern.").

168. See *id.* at 1129-31.

depend on “the immediate costs of coercion ... balanced by its benefits” to any community.¹⁶⁹ Huq predicts that the threshold for Black persons would be moved farther out (be more forgiving) than for white persons in the assessment of low-risk individuals, but that any racially informed adjustment between high-risk thresholds would be relatively small.¹⁷⁰ Huq left it to a future project to ascertain how one might identify the point in which racially asymmetrical coercion becomes unjustified.¹⁷¹

Irrespective of approach, scholars considering a race-informed remedy recognize the shadow of strict scrutiny.¹⁷² Huq thought a race-based remedy would face significant constitutional resistance.¹⁷³ Mayson predicts constitutional foreclosure of a race-conscious approach.¹⁷⁴ Professor Deborah Hellman contends race-based adjustments to the same tool face an insurmountable constitutional terrain.¹⁷⁵ In contrast to these assessments, this

169. *Id.* at 1129, 1131 (“Accordingly, the point on the x-axis at which costs are equal to benefits for the minority is to the right of the same break-even point for the majority group.”).

170. *Id.* at 1056-57 (stating more work needs to be done to properly assess downstream coercion costs to making algorithmic adjustments). As to such racial disparities, Huq referenced Professor Randall Kennedy’s “racial tax” and argued that “there is no *a priori* reason why state coercion should be equally distributed among racial groups.” *Id.* at 1120, 1131.

171. *Id.* at 1131-33.

172. *See id.* at 1133; Mayson, *supra* note 7, at 2240 & n.66; Hellman, *supra* note 7, at 852-53. *But see* Hamilton, *supra* note 32, at 259 (“[I]f racial and ethnic variables significantly improved the predictive validity of risk-needs models, then including them would appear to be narrowly tailored to the government’s compelling interests.”). What about using equal protection to challenge racial disparities generated by RAI? This may be viable where an RAI explicitly uses race. *See, e.g.,* *United States v. Paradise*, 480 U.S. 149, 167-68 (1987) (inferring intentional discrimination where agency never hired a Black trooper); *Clark v. Thompson*, 313 F.2d 637, 638 (5th Cir. 1963) (per curiam) (finding town’s segregation intentional and unconstitutional). But risk tools typically rely on race-neutral data and developers recite a commitment to racial fairness; thus, a challenge would typically be limited to a disparate impact theory. *Washington v. Davis* likely shields race-neutral tools from challenge regardless of disparate effects. 426 U.S. 229, 242 (1976). In the criminal context, *McCleskey v. Kemp* arrives at the same destination. 481 U.S. 279, 293-95, 352-53 (1987). *But see* Brenner et al., *supra* note 48, at 296-97 (providing alternative theories to challenge racial disparities in RAIs, for example, under a theory that “continued use” of such tools constitutes the requisite intent to violate equal protection).

173. Huq, *supra* note 1, at 1133.

174. Mayson, *supra* note 7, at 2240 & n.66.

175. Hellman, *supra* note 7, at 852-53 (concluding “different thresholds for the target trait for each racial group” is “legally prohibited”). Professor Hellman, however, proposes that known racial disparities can inform an algorithm’s design as to different racial groups; under this approach, white defendants and Black defendants would be subject to different tools that

Article contends a race-based remedy potentially satisfies strict scrutiny review. This analysis requires vetting a proposed race-based remedy, and so the Article proposes one: the Racial Disparity Cap. This Article then subjects the remedy to traditional doctrinal treatment.

D. A Proposed Remedy: The Racial Disparity Cap

The Racial Disparity Cap (RDC) seeks to achieve racial parity in the use of risk assessment tools. A jurisdiction would first take measure of any racial disparities unique to the jurisdiction. To do so, a jurisdiction would calculate the average risk scores of different racial groups over a period of time.¹⁷⁶ The average risk score of the white population would presumably serve as the baseline. If the average risk score of Black defendants, for example, exceeds this baseline, the differential captures some portion of racial harm and discrimination visited on Black defendants in that jurisdiction. When a Black defendant is then assigned a preliminary score, the disparity differential is subtracted out before the tool assigns a low, medium, or high-risk designation. In sum, the RDC assesses the mean risk score of racial groups; any assessed disparities are subsequently applied to the scores of individual members of burdened racial groups.¹⁷⁷

Assume the mean score for the tool used in a county was five for white defendants, six for Latino defendants, and seven for Black defendants. This would mean, compared to the white population, the average raw score of Latino defendants was 20 percent higher, and for Black defendants 40 percent higher, than average white

nevertheless rely on race-neutral data points. *Id.* Under this approach, a designer chooses a set of race-neutral data points that best mitigate racial discriminatory results for that racial group. This means that, as to a white defendant and a Black defendant, the data points that are used to generate a risk score would differ.

176. Eaglin, *supra* note 17, at 85 (“The algorithm produces an instantaneous quantitative outcome based on the information selected from the predictive model.... Most risk tools translate that quantitative outcome into a qualitative ‘risk score.’”).

177. Hellman described two ways to achieve racial parity: (1) “segment the data to create two different predictive algorithms” (for example, one for Black defendants, one for white defendants), or (2) “use [race] within the algorithm.” Hellman, *supra* note 7, at 849. The RDC is a third approach: it applies a separately generated race-based adjustment to an individual’s raw score.

scores. The disparity differential for Latino defendants (+1) and for Black defendants (+2) would be used to adjust raw scores for individual defendants. Scores of white defendants would remain unchanged since the average for the white population serves as the baseline. A white defendant with a raw score of 7.3 would remain so ($7.3-0=7.3$). For a Latino defendant, however, a raw score of 7.3 would be adjusted to 6.3 ($7.3-1=6.3$). A Black defendant's raw score of 7.3 would be adjusted to 5.3 ($7.3-2=5.3$).

Because jurisdictions use different tools, and because racial harms vary by jurisdiction,¹⁷⁸ the calculation of the disparity differential would vary. For example, in Milwaukee County, Black residents are 3.2 times more likely to be arrested than white residents for marijuana possession, but immediately north in Ozaukee County, Black residents are 34.9 times more likely to be arrested than white residents for possession.¹⁷⁹ One would expect the disparity differential in Milwaukee to be less than in Ozaukee.

Some scholars see a tension between predictive accuracy and achieving statistical parity across races.¹⁸⁰ But the validity of predictive accuracy depends on what one wants to measure. Tools are intended to predict the likelihood that an individual will recidivate.¹⁸¹ But what if the tool is not predicting the chance a person engages in unlawful conduct, but instead is predicting a person's chance of being caught in a racially discriminatory regime?¹⁸² Acknowledging these troubling conditions, some still worry that

178. For instance, in Milwaukee County, the Black population (39 percent) comprises 70 percent of the arrest rate, and nearby Glendale's Black population (14 percent) comprises 78 percent of the arrest rate. Chloe Frankovic, *Racial Disparities in Arrest Rates in Milwaukee County*, U. WIS.-MADISON CARTOGRAPHY LAB'Y, https://geography.wisc.edu/cartography/project/G370/2019SP/Spring2019_FrankovicChloe.pdf [<https://perma.cc/9GJM-T2YJ>].

179. Corrinne Hess, *Report: Black Wisconsinites 4.3 Times More Likely to Be Convicted for Possession of Marijuana*, WIS. PUB. RADIO (Mar. 22, 2021, 5:00 AM), <https://www.wpr.org/report-black-wisconsinites-4-3-times-more-likely-be-convicted-possession-marijuana> [<https://perma.cc/DYC6-NPJZ>].

180. See Mayson, *supra* note 7, at 2228-33; Huq, *supra* note 1, at 1124-25.

181. Eaglin, *supra* note 17, at 61-62.

182. See Eaglin, *supra* note 36, at 215-16; Michael M. O'Hear, *Rethinking Drug Courts: Restorative Justice as a Response to Racial Injustice*, 20 STAN. L. & POL'Y REV. 463, 471 (2009) ("[M]ore serious criminal records of black drug defendants are at least in part a byproduct of law enforcement policies and practices that systematically result in higher arrest risks for black drug offenders than white."); Capers, *supra* note 66, at 67; Carbado, *supra* note 66, at 1485.

“unless we know actual offending rates (which we generally do not), reconfiguring the data or algorithm to reflect a statistical scenario we prefer merely distorts the predictive mirror, so that it reflects neither the data nor any demonstrable reality.”¹⁸³ But the application of the RDC arguably reflects both the data and the demonstrable reality; it uses standardized data to measure racial disparities that emerge from racially oppressive conditions, which in turn reflect demonstrable realities for different racial groups.¹⁸⁴ As Mayson observed, a tool’s measurement of racial disparity “puts the dragon of predictive inequality out on the plain. It is frightful, but at least we can see it.”¹⁸⁵ With the application of the RDC, a portion of a person’s reality attributed to racism is accounted for, and we approach a clearer picture of someone’s actual risk profile within a legitimate criminal system.¹⁸⁶

What assumptions are at play with the RDC approach? (1) Any significant racial disparity between white persons and persons of color is explained by racial discrimination; for example, if a lower socioeconomic condition correlates with race, it is either because a racial group is biologically wired to underperform (this is obviously false) or, due to discrimination, a racial group has been impeded from obtaining power, status, and wealth (the RDC credits this view).¹⁸⁷ (2) Racial discrimination is perpetrated by policing, prosecution, public defending, and adjudication, as Black people are detained by police more often, arrested at higher rates, given declinations at lower rates, subject to more severe charging decisions, subject to higher pretrial detention rates, more vulnerable to jury prejudice, and given more severe sentences.¹⁸⁸ (3) The state’s

183. Mayson, *supra* note 7, at 2225.

184. See Pauline T. Kim, *Data-Driven Discrimination at Work*, 58 WM. & MARY L. REV. 857, 863-64 (2017) (contending that racially disparate results of assessment tools reflect demonstrable realities created by racial discrimination).

185. Mayson, *supra* note 7, at 2281.

186. See Anupam Chander, *The Racist Algorithm?*, 115 MICH. L. REV. 1023, 1025 (2017) (observing algorithmic approaches in criminal justice are inevitably “deeply suffused with invidious discrimination”); Mayson, *supra* note 7, at 2264 (“A colorblind algorithm ... inflates the black man’s risk score and deflates the white man’s relative to their true values.”).

187. See Angela Hanks, Danyelle Solomon & Christian E. Weller, *Systematic Inequality*, CTR. FOR AM. PROGRESS (Feb. 21, 2018, 9:03 AM), <https://www.americanprogress.org/issues/race/reports/2018/02/21/447051/systematic-inequality/> [<https://perma.cc/EE7B-NE2T>].

188. See Webb, *supra* note 1, at 129-30 n.14; Berdejó, *supra* note 1, at 1189; Balko, *supra* note 138.

overuse of police discretion, surveillance, and force in communities of color causes significant harm by breaking up families through incarceration and imposing collateral consequences that erode economic security and political engagement.¹⁸⁹ (4) A criminal system that continues to reproduce these racial harms will never be viewed as fair or legitimate by the very communities in need of protection.¹⁹⁰ (5) In the absence of public confidence, the criminal system cannot ensure public safety and health.¹⁹¹ (6) Race-based environmental risks should be excluded from one's risk profile, as they represent a "co-constituted social and ecological context,' which shapes 'health, disease, and well-being within and across historical generations.'"¹⁹² As Professor Sara Jacoby found in her empirical study of Philadelphia:

When we look at the 1937 [Redlining] Map in relationship to contemporary violence and firearm assaults, we find that the same places that were imagined to be areas unworthy of economic investment by virtue of the races, ethnicities, and religions of their residents are more likely to be the places where violence and violent injury are most common almost a century later.¹⁹³

(7) Harms perpetrated by state-mandated discrimination and violence should not be compounded by increased state coercion, which itself constitutes racial discrimination.¹⁹⁴

189. See Roberts, *supra* note 136, at 1272-73; Gabriel J. Chin, Review, *Felon Disenfranchisement and Democracy in the Late Jim Crow Era*, 5 OHIO ST. J. CRIM. L. 329, 330 (2007) (noting as to employment, a felony conviction results in a life of "limited employment prospects" and, as to the right to vote, some states (Florida, Kentucky, and Virginia) disenfranchise "persons with felony records for life").

190. See Balko, *supra* note 138.

191. See *id.*

192. Sara F. Jacoby, Beidi Dong, Jessica H. Beard, Douglas J. Wiebe & Christopher N. Morrison, *The Enduring Impact of Historical and Structural Racism on Urban Violence in Philadelphia*, 199 SOC. SCI. & MED. 87, 87 (2018) (quoting Nancy Krieger, *Living and Dying at the Crossroads: Racism, Embodiment, and Why Theory is Essential for a Public Health of Consequence*, 106 AM. J. PUB. HEALTH 832, 832 (2016)).

193. *Id.* at 92.

194. This state-mandated harm, absent governmental investment to counter the negative consequences, is ongoing: "Representations of urban space like the [Redlining] Maps have social meaning and create cascading feedback loops by encouraging people to move out of degraded areas whenever possible, leading to further stigmatization." *Id.* at 93.

The RDC approach breaks rank with Huq's theory that a racially asymmetrical deployment of state coercion can be legitimate.¹⁹⁵ The RDC approach would, under Mayson's view, distort "the statistical mirror to ignore [racial] difference [which] will just produce disparate rates of error, which might increase the net burden on the very communities the intervention was intended to protect."¹⁹⁶ Under these views, the RDC threatens to release defendants of color into the community who are prone to violent recidivism, undermining public safety.

Some responses. First, application of the RDC—which would reduce the risk assessment of some persons of color—brings the assessment closer to one's risk of recidivism, versus one's risk of getting caught.¹⁹⁷ Second, Huq's theory conflates a person's actual risk profile with the state's manufacture of a person of color's risk assessment by increasing the number and severity of charges imposed due to the person's race.¹⁹⁸ Third, Huq's assumption that some incremental increase in state coercion asymmetrically applied to a community of color will improve public safety is far from a received truth.¹⁹⁹ Where Huq credits the notion that asymmetrically deployed state power based on race may be justified,²⁰⁰ the RDC approach assumes any racially asymmetrical distribution of state coercion exacerbates existing structural harms. In application, the RDC provides limited mitigation of the harms of an ever-present exertion of an increased level of state coercion in communities of color.

Huq's discussion of risk and its relationship to state coercion illuminates an additional issue.²⁰¹ If we reduced the police force by 80 percent, people would be caught less, and, as a result, risk scores

195. See Huq, *supra* note 1, at 1131. Huq contends increased state intervention is legitimate to the extent that it is not exceeded by negative externalities caused by disparate treatment—a cost-benefit “break-even point.” *Id.* This Article contends that disparities in the application of state coercion, in which the marginalized group carries the increased burden, should not be permitted.

196. Mayson, *supra* note 7, at 2272.

197. See Zhang et al., *supra* note 47, at 184.

198. See Huq, *supra* note 1, at 1054-57.

199. See *id.* at 1131.

200. *Id.* Disagreement over what sort of criminal intervention is congruent with public safety is fierce, and studies are subject to widely different interpretations; for example, did the crime rate go down because of zero-tolerance policing or because the economy improved?

201. *Id.*

would decline (irrespective of whether less, more, or the same number of people engaged in unlawful conduct). Whether a person's unlawful conduct is detected or acknowledged occurs within the state's purview.²⁰² The RDC assumes that the state's deployment of coercion applied to white people produces the most "reasonable" assessment of risk, given that a more politically responsive level of state coercion occurs in white spaces. The RDC attempts to correct for the increased coercion that occurs outside white spaces, and for less merciful conditions that occur in the absence of being white. In this way, the RDC is a limited intervention, as it does not attempt to account for other conditions society might not want to contribute to a risk assessment. For example, the distortion to risk assessments caused by class disparities is not directly attended to by the RDC. Even as to racial harm, the RDC is limited in its remediation. For example, the RDC does nothing to prevent a person of color from being arrested because of targeted surveillance; it does not attend to the harm related to that arrest and the initial detention, and other than providing a downward adjustment to correct for racial disparity at a particular intersect point, it does not mitigate racial disparities that emerge in the individual's subsequent interactions with criminal system actors.

Some scholars warn of unintended consequences in using a race-informed remedy to mitigate an RAI's racial harm.²⁰³ Professors Bo Cowgill and Megan Stevenson, for example, consider the consequences of a tool's developer inputting preferences into the algorithm as a form of social engineering.²⁰⁴ This becomes particularly problematic in the absence of algorithmic transparency, where the designer "chooses to obfuscate because she does not approve of what the judge will do with this information."²⁰⁵ A possible consequence—when the judge uses the tool and becomes aware of the developer's preferences, she will "place less weight on the algorithmic scores."²⁰⁶ In addition to undermining the tool's accuracy, this dynamic can subvert the designer's intentions, however laudatory.²⁰⁷ For

202. See Zhang et al., *supra* note 47, at 184.

203. See, e.g., Cowgill & Stevenson, *supra* note 44, at 96, 99-100.

204. *Id.* at 96, 98.

205. *Id.* at 98.

206. *Id.*

207. *Id.*

example, as to an algorithmic feature designed to improve racial parity, a resistant judge may compensate in a way that actually increases racial disparities.²⁰⁸ A better approach, it is argued, may be to target the judge's preferences.²⁰⁹

Some responses. First, the tool's algorithmic processing of data and the RDC's adjustment remain separate functions, and even if there is no algorithmic transparency (there should be), the disparity differential *is* transparent. The disparity differentials in the jurisdiction are known, reducing suspicion that could exaggerate the size and impact of any judicial adjustment. Second, as to concerns over decision maker resistance to a modified score, one can track judicial decision-making; judges who significantly fall outside the bell curve of a judge's expected deviation from the RAI's recommendation could be counseled on use of the tool. As Professor Vincent Southerland observed, these tools can "flip the gaze," and decision-making patterns of particular stakeholders—like judges—can be scored and appropriately evaluated.²¹⁰ Decision maker bias that undermines the application of the RDC would be accounted for when the jurisdiction periodically recalculates the racial disparity differentials in the jurisdiction (which serves as a report card for efforts to achieve racial parity within use of the tool).

A few more observations. The RDC ignores differences between algorithms. Although transparency of data lends integrity to the process, even if the nature of a vendor's data points are unknown, any algorithm always reduces risk to a number. Thus, the RDC can be applied even where proprietary interests prevail in cloaking the tool's innards. The RDC's indifference to transparency becomes even more important as machine learning approaches predominate; algorithmic behavior will only become more opaque as artificial intelligence will "sift through vast numbers of variables, looking for combinations that reliably predict outcomes" and "combin[e] them in nonlinear and highly interactive ways."²¹¹ As Huq notes, errors that emerge in the machine learning context can be hard to

208. *See id.*

209. *Id.* at 99.

210. Vincent M. Southerland, *The Intersection of Race and Algorithmic Tools in the Criminal Legal System*, 80 MD. L. REV. 487, 547-49 (2021).

211. Ziad Obermeyer & Ezekiel J. Emanuel, *Predicting the Future—Big Data, Machine Learning, and Clinical Medicine*, 375 NEW ENG. J. MED. 1216, 1217 (2016).

diagnose and accordingly, can be “durable.”²¹² And yet, the RDC is indifferent to the methodology employed. The RDC does not interfere with jurisdictional efforts to undermine or improve the tool’s integrity—the RDC will measure the racial disparities unique to a jurisdiction generated by local practices, the type of RAI used, and the underlying process in reaching final decisions.

A final observation. As Professor Sonja Starr observed, implementation of RAIs may not change outcomes at all, but only serve to provide false legitimacy.²¹³ But there is inherent value in the use of RAIs; they have engendered discussions over criminal system decision-making, increased opportunities to measure and address disparities, and provided some resistance to arbitrary swings that unbridled discretion generates.²¹⁴ The RDC helps an RAI achieve these goals.

Should a jurisdiction consider implementing the RDC, it is likely a white defendant would bring a lawsuit alleging he should be given the same calculation the jurisdiction afforded to a Black defendant. Before engaging in an equal protection analysis, a preliminary question would be the plaintiff’s standing: could he show he was actually injured? The white defendant might argue, for example, that if he received the same adjustment given to a Black defendant in the jurisdiction, he would have been released. According to this reasoning, solely because of the white defendant’s race, he was denied a benefit accorded to members in a different racial group. This opportunity-centric standing analysis arguably tracks the Court’s analysis in *Bakke*,²¹⁵ as a petitioner in an affirmative action case is

212. Huq, *supra* note 1, at 1067.

213. See Starr, *supra* note 29, at 851-52 (reviewing studies that indicate an insignificant deviation in outcomes, whether or not the RAI is employed); see also Julia Dressel & Hany Farid, *The Accuracy, Fairness, and Limits of Predicting Recidivism*, SCI. ADVANCES, Jan. 17, 2018, at 1, 1.

214. See *About the Public Safety Assessment: What Is the PSA?*, *supra* note 121.

215. See Cass R. Sunstein, *Standing and the Privatization of Public Law*, 88 COLUM. L. REV. 1432, 1465-66 (1988) (“The device of recharacterization of the injury may seem artificial, but it is at work in at least one Supreme Court decision.... There was no showing that Bakke would have been admitted to the medical program of the University of California at Davis if the affirmative action program were invalidated. The Court responded that ‘even if Bakke had been unable to prove that he would have been admitted in the absence of the special program, it would not follow that he lacked standing ... The trial court found such an injury, apart from failure to be admitted, in the University’s decision not to permit Bakke to compete for all 100 places in the class, simply because of his race.’” (quoting *Regents of Univ. of Cal. v. Bakke*, 438

considered injured by the loss of opportunity to earn a benefit (admission to a university), a white defendant is injured by the loss of opportunity to earn a benefit (pretrial release).²¹⁶ Here, the injury is arguably more concrete: it is conceivable a white defendant could show that, in fact, application of the RDC to his or her case would have resulted in a different outcome. Conversely, the standing argument is also arguably weaker: Bakke did not argue for a similar race-based benefit (for example, a set number of spots in the admission process being reserved for white applicants), but rather argued that in the *absence* of the race-based remedy his chances of admission were better.²¹⁷ Here, however, a white defendant could not argue that in the absence of applying the RDC a different outcome for the white defendant was possible. Still, assuming that a plaintiff's arguments might find the receptive ears of at least one judge, the next question emerges: what standard of review applies?

This Article does not take a position on the appropriate standard of review. It would be reasonable for a jurisdiction to argue that to stop discrimination against people of color, it must adjust the RAI's algorithm, and that an action to stop active discrimination does not require a showing of strict scrutiny, especially where the remedy places no burden on members of any racial group. However persuasive this approach may be, this Article assumes a worst-case scenario for the sake of argument. Should a court impose strict scrutiny in testing the constitutionality of the RDC, this Article is intended to aid the jurisdiction in satisfying the standard, however unjustified the imposition of strict scrutiny may be.²¹⁸

U.S. 265, 280-81 n.14 (1978)).

216. Even if this is not wholly convincing, the flimsiness of standing doctrine is readily acknowledged. See Maxwell L. Stearns, *Constitutional Law's Conflicting Premises*, 96 NOTRE DAME L. REV. 447, 452-63 (2020). Moreover, a defendant could also allege a stigmatic injury, that a jurisdiction's use of the RDC stigmatizes white defendants by leading those defendants to receive less favorable pretrial and sentencing outcomes. See generally Thomas Healy, *Stigmatic Harm and Standing*, 92 IOWA L. REV. 417 (2007). Given the mathematic precision of the RDC, this defendant could likely allege such an injury with the particularity absent from the stigmatic injury alleged in *Allen v. Wright*. See 468 U.S. 737, 755-56 (1984).

217. See *Bakke*, 438 U.S. at 280-81 n.14.

218. The moment strict scrutiny comes into play is far from clear, despite sweeping statements in cases like *Adarand Constructors, Inc. v. Peña*. See 515 U.S. 200, 227 (1995) ("All racial classifications, imposed by [the government] ... must be analyzed by a reviewing court under strict scrutiny."). Yet, one would expect that a police department engaging in a practice of racial profiling need not satisfy strict scrutiny before ending the practice. The remedial line

II. RACE-BASED REMEDIES, EQUAL PROTECTION, AND THE CRIMINAL LAW

Although strict scrutiny presents significant obstacles for affirmative race-based remedies in higher education and employment spheres,²¹⁹ in the context of criminal law, equal protection challenges to race-based interventions have been largely unsuccessful.²²⁰ The RDC is well-situated within the protective awning courts extend to criminal system actors to achieve public safety objectives, regardless of the level of scrutiny applied.

To survive strict scrutiny, the government must demonstrate its race-based intervention is narrowly tailored to address a compelling state interest.²²¹ The *anticlassification* interpretation of this standard makes no distinction between benign and malignant intent to discriminate.²²² Justice Roberts summarized the philosophy in *Parents Involved*: “The way to stop discrimination on the basis of race is to stop discriminating on the basis of race.”²²³ The anti-classification principle has roots in tempering white apprehension over equal protection’s potential to disrupt the status quo. For example, in the *Civil Rights Cases of 1883*, which reassured white people of their right to discriminate against Black people free from

in which strict scrutiny applies is unclear and contested.

219. See *Gratz v. Bollinger*, 539 U.S. 244, 251 (2003); *Detroit Police Officers’ Ass’n v. Young*, 608 F.2d 671, 697-98 (6th Cir. 1979).

220. See, e.g., *United States v. Clary*, 34 F.3d 709, 712-14 (8th Cir. 1994) (upholding a racially significant sentencing regime between crack and powder cocaine). *But see* *Batson v. Kentucky*, 476 U.S. 79, 87, 93-94 (1986) (holding a person’s race “is unrelated to his fitness as a juror” and cannot be taken into consideration during voir dire (quoting *Thiel v. S. Pac. Co.*, 328 U.S. 217, 227 (1946) (Frankfurter, J., dissenting))).

221. *Parents Involved in Cmty. Schs. v. Seattle Sch. Dist. No. 1*, 551 U.S. 701, 720 (2007); *Republican Party of Minn. v. White*, 536 U.S. 765, 774-75 (2002); *Adarand*, 515 U.S. at 227 (noting “all racial classifications” are subject to strict scrutiny and “are constitutional only if they are narrowly tailored measures that further compelling governmental interests”); *Bakke*, 438 U.S. at 299.

222. See *Wygant v. Jackson Bd. of Educ.* 476 U.S. 267, 310-11 (1986) (Marshall, J., dissenting); *Parents Involved*, 551 U.S. at 752 (Thomas, J., concurring).

223. 551 U.S. at 748. A similar sentiment can be found in *Plessy v. Ferguson*: “Legislation is powerless to eradicate racial instincts or to abolish distinctions based upon physical differences, and the attempt to do so can only result in accentuating the difficulties of the present situation.” 163 U.S. 537, 551 (1896).

federal interference, the Court construed government protection from racial harm as favoritism to Black persons:

When a man has emerged from slavery ... there must be some stage in the progress of his elevation when he takes the rank of a mere citizen, and ceases to be the special favorite of the laws, and when his rights as a citizen, or a man, are to be protected in the ordinary modes by which other men's rights are protected.²²⁴

Accommodating white attachment to principles of neutrality, the Court has often employed the anticlassification principle to constitutionally prohibit race-based remedies.²²⁵ The colorblind view deems racial discrimination abhorrent as it impedes any path to accountability for racial harms.²²⁶ Worse, the colorblind approach protects the dividends of racism from criticism by facilitating an identity formation that permits white beneficiaries of racism to nevertheless see themselves as victims of racism.²²⁷

In contrast, the *antisubordination* interpretation is more deferential to government attempts to identify interests that can be solved with race-based remedies.²²⁸ Proponents believe it possible to differentiate between government efforts to account for racial harm and efforts to maintain racial oppression, like Jim Crow and red-lining conditions.²²⁹ The Equal Protection Clause is viewed as a response to “legacies of racial subordination” and a corrective to “advantages gained through intergenerational white privilege.”²³⁰

224. 109 U.S. 3, 25 (1883).

225. See, e.g., *Shaw v. Reno*, 509 U.S. 630, 643 (1993).

226. See *id.* (“Classifications of citizens solely on the basis of race ‘are by their very nature odious to a free people whose institutions are founded upon the doctrine of equality.’” (quoting *Hirabayashi v. United States*, 320 U.S. 81, 100 (1943))).

227. Osamudia R. James, *White Like Me: The Negative Impact of the Diversity Rationale on White Identity Formation*, 89 N.Y.U. L. REV. 425, 431-32 (2014).

228. See, e.g., *City of Richmond v. J. A. Croson Co.*, 488 U.S. 469, 529, 551-53 (1989) (Marshall, J., dissenting) (discussing the city’s determination showing “that minority-owned businesses have received virtually no city contracting dollars” to constitute a compelling interest and stating that strict scrutiny should not apply to race-conscious remedial measures).

229. See KHIARA M. BRIDGES, *CRITICAL RACE THEORY: A PRIMER* 5-7 (2019).

230. Mario L. Barnes, *We Will Turn Back?: On Why Regents of the University of California v. Bakke Makes the Case for Adopting More Radically Race-Conscious Admissions Policies*, 52 U.C. DAVIS L. REV. 2265, 2277 (2019); accord Jack M. Balkin & Reva B. Siegel, *The American Civil Rights Tradition: Anticlassification or Antisubordination?*, 58 U. MIA. L. REV.

The Constitution, which for centuries permitted “ingenious and pervasive forms of discrimination” against people of color, should not “stand[] as a barrier” to attempts to remedy “that legacy of discrimination.”²³¹ The antisubordination approach would embrace a more deferential form of judicial scrutiny, like intermediate scrutiny.²³²

The antisubordination view finds no traction in the doctrine. But an orthodox anticlassification view fails to explain the doctrine as well. Rather, a denomination of the anticlassification view, the *contextual* approach, accommodates current doctrine. First articulated by Justice O’Connor, this approach is highly skeptical of race-based remedies, but permits reluctant deference in the presence of certain contextual factors.²³³ In explaining the departure from unyielding resistance,²³⁴ she stated, “[c]ontext matters when reviewing race-based governmental action under the Equal Protection Clause.”²³⁵

9, 30-31 (2003); Reva B. Siegel, *Equality Talk: Antisubordination and Anticlassification Values in Constitutional Struggles over Brown*, 117 HARV. L. REV. 1470, 1540 (2004).

231. *Regents of the Univ. of Cal. v. Bakke*, 438 U.S. 265, 387 (1978) (Marshall, J., concurring).

232. See Reva B. Siegel, *From Colorblindness to Antibalkanization: An Emerging Ground of Decision in Race Equality Cases*, 120 YALE L.J. 1278, 1335 n.162 (2011); Ruth Colker, *Anti-Subordination Above All: Sex, Race, and Equal Protection*, 61 N.Y.U. L. REV. 1003, 1036 (1986) (noting four Justices in *Bakke* “found it necessary to apply intermediate scrutiny to race-based affirmative action policies in order to justify validation of those policies”).

233. Eric K. Yamamoto, Carly Minner & Karen Winter, *Contextual Strict Scrutiny*, 49 HOW. L.J. 241, 248-49 (2006) (charting Justice O’Connor’s “evolving” jurisprudence, from “*Richmond v. J.A. Croson Co.*, *Shaw v. Reno*, *Adarand*, *Grutter*, and *Johnson v. California*” (footnotes omitted)); Linda S. Greene, *The Constitution and Racial Equality After Gratz and Grutter*, 43 WASHBURN L.J. 253, 274 (2004) (“Though Justice O’Connor did offer obeisance to strict scrutiny, her joinder of strict scrutiny with ‘context’ and ‘deference’ weakens the standard and signals a retreat from the ‘skepticism’ about all racial classifications that marked her *Metro* dissent and her *Adarand* opinion.” (footnote omitted)).

234. Justice O’Connor’s journey took her from *Croson*, where she rejected a city’s race-based remedy, to *Grutter* fifteen years later, where she deferred to a university’s announced need for race-based admission policies. *Compare City of Richmond v. J. A. Croson Co.*, 488 U.S. 469, 476-81, 511 (1989) (determining that a plan requiring businesses awarded city construction contracts to subcontract at least 30 percent of the value of their contract to minority-owned businesses violated equal protection), and *id.* at 529 (Marshall, J., dissenting) (commenting how O’Connor was so intent on “second-guessing Richmond’s judgment” as to the existence of past discrimination), with *Grutter v. Bollinger*, 539 U.S. 306, 315, 318, 328 (2003) (upholding admissions policy’s “flexible assessment” that considered undergraduate GPA and test scores, but also “‘soft’ variables,” including how an applicant might help the school reach a “critical mass of underrepresented minority students”).

235. *Grutter*, 539 U.S. at 327.

In an almost confessional tone, she observed: “[j]ust as growing up in a particular region or having particular professional experiences is likely to affect an individual’s views, so too is one’s own, unique experience of being a racial minority in a society, like our own, in which race unfortunately still matters.”²³⁶ Dissenting justices thought her shift was a break with anticlassification orthodoxy.²³⁷ It was.

Justice O’Connor’s contextual approach helps draw a thread through an otherwise disjointed doctrine. Before and after her articulation of equal protection doctrine, courts have recognized the importance of context. As Judge Posner observed, a plaintiff cannot merely cite to and rely on decisional language that seems to preclude the constitutionality of a race-based remedy; rather, “the weight of [prior] judicial language depends on context.”²³⁸ The Court in *Johnson v. California* similarly stated, “Prisons are dangerous places, and the special circumstances they present may justify racial classifications in some contexts.”²³⁹ A contextual approach was employed in *Fisher v. University of Texas (Fisher II)*, where Justice Kennedy focused analysis on particular challenges that face a university and the interests in diversity that are unique to the educational mission.²⁴⁰ In his dissent, Justice Alito further anchored the conceptual shift, stating, “Racial discrimination [is] invidious in *all contexts*,” and that “in ‘*all contexts*,’ racial classifications are permitted only ‘as a last resort.’”²⁴¹ The majority disagreed.²⁴²

Within contextual features unique to the criminal system, this Article attempts to provide guidance to criminal system stakeholders that are considering race-based responses to racial harms. Recognizing the different interpretive approaches one can take, and the ideological lifting each does, this Article attempts to situate the

236. *Id.* at 333.

237. *Id.* at 379-80 (Rehnquist, C.J., dissenting).

238. *Wittmer v. Peters*, 87 F.3d 916, 919 (7th Cir. 1996) (citing *Barhold v. Rodriguez*, 863 F.2d 233, 238 (2d Cir. 1988); *Talbert v. City of Richmond*, 648 F.2d 925, 931-32 (4th Cir. 1981); *Detroit Police Officers’ Ass’n v. Young*, 608 F.2d 671, 695-96 (6th Cir. 1979); *Minnick v. Cal. Dep’t of Corr.*, 157 Cal. Rptr. 260, 268-69 (Ct. App. 1979)).

239. 543 U.S. 499, 515 (2005).

240. 136 S. Ct. 2198, 2214 (2016).

241. *Id.* at 2221 (Alito, J., dissenting) (emphasis added) (quoting *Edmonson v. Leesville Concrete Co.*, 500 U.S. 614, 619 (1991)).

242. *See id.* at 2214-15.

constitutional analysis within existing doctrinal constraints: a contextual, anticlassification approach to determining whether a race-based intervention is narrowly tailored and supported by a compelling governmental interest.

A. *Compelling Interest*

What constitutes a compelling interest under existing doctrine is contested; there is debate over whether a broad range of interests are potentially in play,²⁴³ such as ensuring diversity in employment and education,²⁴⁴ fighting societal discrimination,²⁴⁵ carrying out an institution's mission or objective,²⁴⁶ and addressing an institution's past acts of racial discrimination.²⁴⁷ Not all interests carry equal

243. Richard H. Fallon, Jr., *Strict Judicial Scrutiny*, 54 UCLAL REV. 1267, 1321-22 (2007) (stating "the Supreme Court has frequently adopted an astonishingly casual approach to identifying compelling interests," and noting that the Court will accept "interests as compelling on the basis of little or no textual inquiry"); see, e.g., *Parents Involved in Cmty. Schs. v. Seattle Sch. Dist. No. 1*, 551 U.S. 701, 720 (2007) (recognizing that the list of compelling interests is not static, stating, "Without attempting ... to set forth all the interests a school district might assert, it suffices to note that our prior cases, in evaluating the use of racial classifications in the school context, have recognized two interests that qualify as compelling" (emphasis added)).

244. See *Fullilove v. Klutznick*, 448 U.S. 448, 453-54 (1980) (ensuring racial diversity in federal workplace); *Adarand Constructors, Inc. v. Peña*, 515 U.S. 200, 211-12 (1995) (ensuring socioeconomic diversity of federal contractors); *City of Richmond v. J. A. Croson Co.*, 488 U.S. 469, 486 (1989) (attempting to remedy past discrimination in the construction industry); *Regents of the Univ. of Cal. v. Bakke*, 438 U.S. 265, 314-15 (1978) (finding racial diversity in higher education a compelling interest); *Gratz v. Bollinger*, 539 U.S. 244, 278 (2003) (O'Connor, J., concurring) (noting diversity includes geographical, racial, linguistic, and socioeconomic diversity in higher education); *Grutter v. Bollinger*, 539 U.S. 306, 338 (noting the same factors as in *Gratz*).

245. *Wygant v. Jackson Bd. of Educ.*, 476 U.S. 267, 276 (1986) ("Societal discrimination, without more, is too amorphous a basis for imposing a racially classified remedy." (emphasis added)).

246. As to carrying out an agency's mission, see, for example, *Talbert v. City of Richmond*, 648 F.2d 925, 928, 931 (4th Cir. 1981); *Johnson v. California*, 543 U.S. 499, 515 (2005) ("Prisons are dangerous places, and the special circumstances they present may justify racial classifications in some contexts."). As to carrying out objectives, see, for example, *Barhold v. Rodriguez*, 863 F.2d 233, 238 (2d Cir. 1988) (stating law enforcement must appear to be unbiased to "carry out its mission effectively"); *Wittmer v. Peters*, 87 F.3d 916, 920 (7th Cir. 1996) (finding inmates' perceptions of operational fairness to be a compelling need).

247. *United States v. Paradise*, 480 U.S. 149, 166, 167 (1987) (stating that "[t]he Court is in agreement that ... remedying past or present racial discrimination ... is a sufficiently weighty state interest to warrant" a race-based remedy, and "[t]he Government unquestionably has a compelling interest in remedying past and present discrimination by a state

weight, but depending on the circumstances, they may all qualify as compelling.²⁴⁸

From the Court's perspective, even if an interest may be compelling in the abstract, particular circumstances may render it insufficient. In *Parents Involved*, for example, the Court recognized the importance of addressing the effects of past discrimination in the abstract, but noted the absence of any showing by the school district that it had actually engaged in such acts.²⁴⁹ It is thus incumbent on the institutional actor to demonstrate why a stated interest is in fact compelling.

In making that showing, contextual circumstances that can find judicial receptivity include: a clearly articulated institutional interest,²⁵⁰ a close fit between the interest and the institution's core objectives,²⁵¹ expert opinion supporting the institution's interest,²⁵²

actor" (quoting *Wygant*, 476 U.S. at 286 (O'Connor, J., concurring)); *Parents Involved*, 551 U.S. at 720 (acknowledging interest in addressing past discrimination to be potentially compelling).

248. Courts have hotly debated the importance of diversity in education, but more easily accept the importance of criminal system actors to ensure public safety. *Grutter*, 539 U.S. at 356-57 (Thomas, J., concurring in part and dissenting in part) (stating that diversity in higher education is not a compelling interest, given that the justification is nothing more than a call for "marginal improvements in legal education"); Antonin Scalia, *The Disease as Cure: "In Order to Get Beyond Racism, We Must First Take Account of Race."*, 1979 WASH. U.L.Q. 147, 147-48 (1979) (stating that under the diversity justification, we want students in medical school, for example, to "work and play with pianists, maybe flute players ... people from the country, from the city ... bespectacled chess champions and football players. And, oh yes, we may want some racial minorities, too. If that is all it takes to overcome the presumption against discrimination by race, we have witnessed an historic trivialization of the Constitution").

249. *Parents Involved*, 551 U.S. at 720-21 (noting neither district could assert "the compelling interest of remedying the effects of past intentional discrimination" because Seattle had no evidence that it had engaged in this discrimination and because Jefferson County had "achieved unitary status").

250. *See id.*

251. *See* Eboni S. Nelson, *In Defense of Deference: The Case for Respecting Educational Autonomy and Expert Judgments in Fisher v. Texas*, 47 U. RICH. L. REV. 1133, 1148 (2013) (noting "the recognition of educational autonomy in higher education, and ... the complexity of academic judgments involved in making such decisions" as influential to granting deference to the need for a diverse student body); *Regents of the Univ. of Cal. v. Bakke*, 438 U.S. 265, 313 (1978).

252. *See, e.g.*, *Wittmer v. Peters*, 87 F.3d 916, 920 (7th Cir. 1996) (demonstrating judicial deference to the opinions of subject matter experts); *Grutter*, 539 U.S. at 328-31 (acknowledging the persuasiveness of amici briefs of experts supporting institutional assessments of need).

supplemental constitutional concerns that amplify an institution's stated interest,²⁵³ and the institution's current or past acts.²⁵⁴ These circumstances are neither exhaustive nor mutually exclusive.²⁵⁵ A jurisdiction's persuasive framing of a compelling interest within these circumstances may convince a court that a proposed race-based remedy is "motivated by a truly powerful and worthy concern."²⁵⁶ The following analysis considers these potential circumstances within the criminal system.

1. What Is the Compelling Interest of the Criminal System That Is at Play, and What Is the Basis for That Interest?

An institution must first articulate what the compelling interest *is*. What is it here? That existing racial disparities undermine the criminal system's ability to achieve its core public safety objectives. Stakeholders concede that in the absence of public confidence and community perceptions of fairness, the criminal justice system cannot operate effectively to ensure public safety.²⁵⁷ In framing a compelling interest, courts will often refer to the "operational need[s]" of the criminal system.²⁵⁸ "[O]perational need[s]" are those conditions identified by an institution that are essential to accomplishing criminal system objectives within a community served.²⁵⁹ A universally recognized operational need is the maintenance of

253. See, e.g., *Bakke*, 438 U.S. at 313 (acknowledging the supplemental weight of First Amendment concerns that support the institution's stated interest).

254. See *United States v. Paradise*, 480 U.S. 149, 171-72 (1987).

255. See, e.g., *Parents Involved*, 551 U.S. at 720-21 (holding that the school system failed to show racial imbalance was traceable to segregation); *Wygant v. Jackson Bd. of Educ.*, 476 U.S. 267, 274 (1986) (stating that the school system failed to show that societal discrimination was compelling by itself without a further showing of past discrimination and that the asserted importance of role models for children was not sufficient).

256. *Wittmer*, 87 F.3d at 918.

257. See PAUL H. ROBINSON & SARAH M. ROBINSON, *SHADOW VIGILANTES: HOW DISTRUST IN THE JUSTICE SYSTEM BREEDS A NEW KIND OF LAWLESSNESS* 13-14 (2018) (discussing how "ordinary people sometimes believe they have reason to doubt the criminal justice system's devotion to doing justice" which "undermine[s] the criminal justice system's ability to harness the powerful forces of social influence and internalized norms").

258. See *Barhold v. Rodriguez*, 863 F.2d 233, 237 (2d Cir. 1988) (stating, as to the employment policy within a parole office, two possible justifications for a race-based policy, "a history of past discrimination" or "operational need").

259. *Id.* at 238.

public confidence and community perceptions of fairness given that criminal system interventions involve coercion and system actors are afforded broad discretion to investigate,²⁶⁰ detain,²⁶¹ prosecute,²⁶² and incarcerate.²⁶³ Stakeholders recognize that coercion alone is insufficient to maintain public safety; the swing of the state's hammer must also be perceived as legitimate.²⁶⁴

Courts, too, have recognized that maintaining community perceptions of fairness is an operational need. Within the criminal system context, where a jurisdiction has implemented a race-based remedy to achieve the community's confidence, courts have routinely found the interest in doing so compelling.²⁶⁵ A number of these remedies have been applied to law enforcement, as police are so visible to the public.²⁶⁶ In *Barhold v. Rodriguez*, for example, the

260. See, e.g., *Whren v. United States*, 517 U.S. 806, 813-14 (1996) (permitting an officer to provide a justification for the stop after conducting the stop, regardless of the officer's subjective intent in effectuating the detention); *Minnesota v. Dickerson*, 508 U.S. 366, 375-76 (1993) (permitting a script for law enforcement to use to justify otherwise unconstitutional searches during a *Terry* stop).

261. See Sheri Lynn Johnson, *Race and the Decision to Detain a Suspect*, 93 YALE L.J. 214, 214-15 (1983).

262. Gabriel J. Chin & Charles J. Vernon, *Reasonable but Unconstitutional: Racial Profiling and the Radical Objectivity of Whren v. United States*, 83 GEO. WASH. L. REV. 882, 888 (2015) (stating "prosecutors are free to bring charges supported by probable cause for any reason, except that they may not charge based on race, religion, or other unconstitutional considerations" (citing *Oyler v. Boyles*, 368 U.S. 448 (1962))).

263. See *United States v. Booker*, 543 U.S. 220, 233 (2005) (stating the Court has "never doubted the authority of a judge to exercise broad discretion in imposing a sentence within a statutory range"). But see Matthew Van Meter, *One Judge Makes the Case for Judgment*, ATLANTIC (Feb. 25, 2016), <https://www.theatlantic.com/politics/archive/2016/02/one-judge-makes-the-case-for-judgment/463380/> [<https://perma.cc/44Y8-A8VT>].

264. See ROBINSON & ROBINSON, *supra* note 257, at 13-14.

265. See, e.g., *Barhold v. Rodriguez*, 863 F.2d 233, 238 (2d Cir. 1988); *Talbert v. City of Richmond*, 648 F.2d 925, 931-32 (4th Cir. 1981); *Detroit Police Officers' Ass'n v. Young*, 608 F.2d 671, 695-96 (6th Cir. 1979).

266. *Detroit Police Officers' Ass'n*, 608 F.2d at 695-96 (finding the jurisdiction's assertions for sufficient racial diversity on the police force particularly compelling because "the relationship between government and citizens is seldom more visible, personal and important than in police-citizen contact"). Police are considered to be the "gatekeepers of the criminal justice system." S. Rebecca Neusteter, Ram Subramanian, Jennifer Trone, Mawia Khogali & Cindy Reed, *Gatekeepers: The Role of Police in Ending Mass Incarceration*, VERA INST. JUST., Aug. 2019, at 5, <https://www.vera.org/downloads/publications/gatekeepers-police-and-mass-incarceration.pdf> [<https://perma.cc/ZG7Y-822F>] (stating that rifts between the public and police force "continue to raise questions of basic fairness, undermining the perceived legitimacy of police by the public they serve and heightening the risk that communities may be unwilling to rely on and cooperate with police in order to help prevent and solve crimes"); see U.S. DEP'T

Second Circuit agreed it was a compelling interest for law enforcement to appear unbiased in order to “carry out its mission effectively.”²⁶⁷ In *Talbert v. City of Richmond*, the Fourth Circuit acknowledged the connection between the community’s perception of law enforcement and public safety:

[E]ffective crime prevention and solution depend heavily on the public support and cooperation which result only from public respect and confidence in the police. In short, the focus is not on the superior performance of minority officers, *but on the public’s perception of law enforcement officials and institutions.*²⁶⁸

All institutional actors—the police officer, prosecutor, judge, and probation agent—are responsible for ensuring perceptions of legitimacy. The Court has recognized that “[r]ace discrimination is ‘especially pernicious in the administration of justice’ ... [a]nd public respect for our system of justice is undermined when the system discriminates based on race.”²⁶⁹ Racially disparate prosecution, sentencing, and probation practices “damage[] social networks, distort[] social norms, and destroy[] social citizenship” in

OF JUST., BUILDING TRUST BETWEEN THE POLICE AND THE CITIZENS THEY SERVE 3, 33 (2009) (“Building and maintaining community trust is the cornerstone of successful policing and law enforcement.... The police department is often one of the most visible public representations of a municipal government ... [and therefore] has a stake in building trust between the police department and the public.”); CONG. RSCH. SERV., R43904, PUBLIC TRUST AND LAW ENFORCEMENT—A DISCUSSION FOR POLICYMAKERS 1 (2018).

267. 863 F.2d at 238 (finding the jurisdiction’s race-based remedy to racially diversify its police force constitutional).

268. 648 F.2d at 931 (emphasis added) (quoting *Detroit Police Officers’ Ass’n*, 608 F.2d at 695-96).

269. *Johnson v. California*, 543 U.S. 499, 511 (2005) (citation omitted) (quoting *Rose v. Mitchell*, 443 U.S. 545, 555 (1979)). The Court also recognized that “[g]ranting the CDC an exemption from the rule that strict scrutiny applies to all racial classifications would undermine our ‘unceasing efforts to eradicate racial prejudice from our criminal justice system.” *Id.* at 512 (quoting *McCleskey v. Kemp*, 481 U.S. 279, 309 (1987)); accord CHARLES W. OSTROM, BRIAN J. OSTROM & MATTHEW KLEIMAN, U.S. DEP’T OF JUST., JUDGES AND DISCRIMINATION: ASSESSING THE THEORY AND PRACTICE OF CRIMINAL SENTENCING 2 (2004) (“The sentencing decision is the symbolic keystone of the criminal justice system: in it, the conflicts between the goals of equal justice under the law and individualized justice with punishment tailored to the offender are played out, and society’s moral principles and highest values—life and liberty—are interpreted and applied.” (quoting NAT’L INST. JUST., RESEARCH ON SENTENCING: THE SEARCH FOR REFORM 1 (Alfred Blumstein ed., 1983))).

communities of color.²⁷⁰ Prosecutorial offices are acutely aware of the need to earn public confidence through the fair administration of justice. The Department of Justice's mission places equal emphasis on its objective "to ensure public safety" and its obligation to "ensure fair and impartial administration of justice."²⁷¹ The California Attorney General similarly pledges to "[e]nforce and apply all of our laws fairly and impartially"; "[e]nsure justice, safety and liberty for everyone"; and "[e]ncourage economic prosperity, equal opportunity and tolerance."²⁷² The perception of legitimacy, the National Institute of Justice asserts, creates an environment of trust and cooperation necessary to ensure public safety.²⁷³ Jurisdictions are increasingly viewing racial equality as essential to earn legitimacy from the communities served.²⁷⁴ The asymmetrical use of force against communities of color has eroded criminal system legitimacy.²⁷⁵ In 2003, the DOJ formally recognized the damage done by racially disparate policing.²⁷⁶ Public confidence in law enforcement is at an all-time low,²⁷⁷ especially in communities of color.²⁷⁸ Racially disparate practices present "a 'high risk' of contravening the core police objectives of controlling crime and promoting public safety."²⁷⁹

In the case study of Milwaukee, stakeholders have recognized the urgency of addressing the erosion of trust within the county's

270. See Roberts, *supra* note 136, at 1281.

271. *About DOJ*, U.S. DEP'T OF JUST., <https://www.justice.gov/about> [<https://perma.cc/S26C-UUHD>].

272. *About the Office of the Attorney General*, CAL. DEP'T OF JUST., <https://oag.ca.gov/office> [<https://perma.cc/2W3D-V7UC>].

273. See NAT'L INST. JUST., U.S. DEP'T OF JUST., FACTORS THAT INFLUENCE PUBLIC OPINION OF THE POLICE 10 (2003).

274. See *Race, Trust, and Police Legitimacy*, NAT'L INST. JUST. (Jan. 9, 2013), <https://nij.ojp.gov/topics/articles/race-trust-and-police-legitimacy> [<https://perma.cc/FH6B-R5R7>].

275. See, e.g., *Floyd v. City of New York*, 959 F. Supp. 2d 540, 664-65 (S.D.N.Y. 2013).

276. CIV. RTS. DIV., U.S. DEP'T OF JUST., GUIDANCE REGARDING THE USE OF RACE BY FEDERAL LAW ENFORCEMENT AGENCIES 1 (2003).

277. Aimee Ortiz, *Confidence in Police Is at Record Low, Gallup Survey Finds*, N.Y. TIMES (Aug. 12, 2020), <https://www.nytimes.com/2020/08/12/us/gallup-poll-police.html> [<https://perma.cc/4YWK-LRB3>] ("For the first time in its 27 years of measuring attitudes toward the police, Gallup found that a majority of American adults do not trust law enforcement.")

278. See *id.*

279. CIV. RTS. DIV., U.S. DEP'T OF JUST., INVESTIGATION OF THE FERGUSON POLICE DEPARTMENT 63 (2015) (quoting JACK GLASER, SUSPECT RACE: CAUSES AND CONSEQUENCE OF RACIAL PROFILING 96-126 (2015)).

communities of color. Milwaukee leaders have convened a Race, Equity and Procedural Justice Committee wholly focused on achieving racial equity in its criminal justice system.²⁸⁰ The courts have found that people of color in Milwaukee, for example, “feel alienated from the police,” which damages “the trust between police and the public central to achieving public safety.”²⁸¹ District Attorney Chisholm has publicly discussed how Milwaukee citizens’ “crisis of confidence” in the criminal system’s ability to operate in a racially fair manner undermines public safety.²⁸² The asymmetrical use of force against communities of color has eroded criminal system legitimacy.²⁸³

Milwaukee is not an outlier. Many jurisdictions are facing a crisis in public confidence in communities of color where the criminal system’s obligation to ensure public safety is frequently unfulfilled; as such, “policing and the criminal justice system as a whole suffer from low levels of perceived legitimacy.”²⁸⁴ In its 2017 task force report, the American Bar Association was blunt:

There is much evidence to show that racial minorities believe the criminal justice system does not treat them fairly. According to a June 2016 Pew Research Poll, 84% of blacks reported their belief that blacks are treated less fairly than whites in their interactions with the police, and three-quarters say blacks are treated less fairly in the courts. A January 2015 Reuters poll reported that 69% of blacks and 54% of Latinos believe that the police unfairly target minorities, compared to 29% of whites who believe the same.²⁸⁵

Overwhelming evidence establishes that the criminal justice system exerts a heavier toll on racial minorities.²⁸⁶ That burden is

280. See MILWAUKEE CMTY. JUST. COUNCIL, *supra* note 142.

281. See ACLU, *supra* note 148.

282. Reed & Chisholm, *supra* note 137, at 22.

283. See *Floyd v. City of New York*, 959 F. Supp. 2d 540, 664-65 (S.D.N.Y. 2013).

284. ZOE MENTEL, U.S. DEP’T OF JUST., RACIAL RECONCILIATION, TRUTH-TELLING, AND POLICE LEGITIMACY iv (2012).

285. AMERICAN BAR ASSOCIATION, TASK FORCE ON BUILDING PUBLIC TRUST IN THE AMERICAN JUSTICE SYSTEM 12 (2017) (footnotes omitted), https://www.americanbar.org/content/dam/aba/administrative/office_president/2_8_task_force_on_building_trust_in_american_justice_system.pdf [<https://perma.cc/77BU-GFQ8>].

286. See, e.g., WILLIAM RHODES, RYAN KLING, JEREMY LUALLEN & CHRISTINA DYOUS,

perhaps most notable in the context of policing, but it extends throughout the criminal justice system, culminating in lengthy terms of incarceration.²⁸⁷ For all these reasons, in order to remedy these disparate conditions, “law-enforcement and correctional settings” provide “the very *clearest* examples of cases in which departures from racial neutrality are permissible.”²⁸⁸

a. A Close Fit Between the Stated Interest and the Institution’s Core Expertise and Mission

A court is more likely to defer to an institution’s assessment that an interest is compelling if it relates to the institution’s *mission*. In *Bakke*, the Court found it significant that the university was “seeking to achieve a goal that is of paramount importance in the fulfillment of its mission.”²⁸⁹ In the criminal law context, courts applying strict scrutiny will routinely defer to criminal system claims that a need is mission critical; for example, that racial diversity on the force is essential to security or public safety,²⁹⁰ or that racial diversity of guards is essential to the success of a prison’s new boot camp.²⁹¹

Courts are more inclined to acknowledge an interest’s compelling nature where the interest relates to an institution’s *area of expertise*. In *Grutter*, the Court signaled its deference to the university’s assessment that diversity in higher education is compelling by explaining, “[t]he Law School has determined, based on its experience and expertise, that a ‘critical mass’ of underrepresented minorities is necessary” to fulfilling its educational mission.²⁹² Courts also will strongly consider assessments of subject-matter experts who attest to an interest’s compelling nature.²⁹³ Where institutional expertise

BUREAU OF JUST. STATS., FEDERAL SENTENCING DISPARITY: 2005-2012 67 (2015).

287. *Id.*

288. *Wittmer v. Peters*, 87 F.3d 916, 919 (7th Cir. 1996).

289. *Regents of Univ. of Cal. v. Bakke*, 438 U.S. 265, 313 (1978).

290. *See Barhold v. Rodriguez*, 863 F.2d 233, 238 (2d Cir. 1988).

291. *Wittmer*, 87 F.3d at 920-21.

292. *Grutter v. Bollinger*, 539 U.S. 306, 333 (2003). The Court was clear that the deference given took place within the Court’s strict scrutiny review. *Id.* at 328 (“Our scrutiny of the interest asserted by the Law School is no less strict for taking into account complex educational judgments in an area that lies primarily within the expertise of the university.”).

293. *Id.* at 330 (“In addition to the expert studies and reports entered into evidence at trial,

is weak, courts are less deferential to the assessment that an interest is compelling, as in *Croson*²⁹⁴ and in *Wygant*.²⁹⁵

Courts recognize the value of hard-won, in-the-trenches experience that criminal law stakeholders bring to their judgment.²⁹⁶ Where a lower court sought to require a correctional institution to produce empirical evidence in support of its challenged policy, the appellate court reversed stating, “the district court’s analysis does not reflect the requisite deference to the expertise and experience of prison officials.”²⁹⁷ Relatedly, the judicial deference to the expertise and discretion of criminal stakeholders only reinforces the judicial crediting of a criminal system administrator’s representation that a particular interest is tied to achieving public safety.²⁹⁸

numerous studies show that student body diversity promotes learning outcomes, and ‘better prepares students for an increasingly diverse workforce and society, and better prepares them as professionals.’”) (quoting Brief for American Educational Research Association et al. as Amici Curiae Supporting Respondents at 3, *Grutter v. Bollinger*, 539 U.S. 306 (2003)); see also WILLIAM G. BOWEN & DEREK BOK, *THE SHAPE OF THE RIVER: LONG-TERM CONSEQUENCES OF CONSIDERING RACE IN COLLEGE AND UNIVERSITY ADMISSIONS* 280-82 (1998); Mitchell J. Chang, *The Positive Educational Effects of Racial Diversity on Campus*, in *DIVERSITY CHALLENGED: EVIDENCE ON THE IMPACT OF AFFIRMATIVE ACTION* 175, 181-83 (Gary Orfield & Michal Kurlaender eds., 2001). See generally *COMPELLING INTEREST: EXAMINING THE EVIDENCE ON RACIAL DYNAMICS IN COLLEGES AND UNIVERSITIES* (Mitchell J. Chang et al. eds., 2003).

294. See *City of Richmond v. J. A. Croson Co.*, 488 U.S. 469, 498-502 (1989). In *Croson*, the city had no institutional expertise in the largely privatized construction industry, but according to the Court, engaged in “sheer speculation” regarding the reasons for racial disparities in the construction industry. See *id.* at 499.

295. See *Wygant v. Jackson Bd. of Educ.*, 476 U.S. 267, 276 (1986). There, the school board attempted to retain Black employees by laying off white employees first (irrespective of seniority). *Id.* at 270. The Board failed to connect its stated need for staff diversity to the centrality of the institution’s mission or expertise, instead basing its proposal on an expressed concern of “racial tension in the community that extended to its schools.” *Id.* at 270, 283.

296. Anna Lvovsky, *The Judicial Presumption of Police Expertise*, 130 HARV. L. REV. 1995, 1999 (2017). For example, within the correctional environment, courts often defer to institutional expertise as to what conditions compromise inmate safety. James D. Nelson, Note, *Incarceration, Accommodation, and Strict Scrutiny*, 95 VA. L. REV. 2053, 2080-82 (2009); see also *Hoevenaar v. Lazaroff*, 422 F.3d 366, 371-72 (6th Cir. 2005) (accepting the judgment of prison officials that individualized grooming accommodations would not protect the state’s compelling interest); *Fegans v. Norris*, 537 F.3d 897, 904, 908 (8th Cir. 2008) (affirming a district court judgment that relied on testimony from prison officials that a “hair-length policy was necessary to prevent” contraband and escape attempts).

297. *Hoevenaar*, 422 F.3d at 371.

298. Commentators observe a tradition of judicial deference to criminal system actors exercising discretion within the interpretation of constitutional issues. See, e.g., Carbadó, *supra* note 66, at 1520; Capers, *supra* note 66, at 64; Butler, *supra* note 2, at 865.

b. Supplemental Constitutional Concerns Amplify the Compelling Nature of Institutional Needs

In *Bakke*, First Amendment free association interests fortified the university's assessment that racial diversity was critical to its educational mission.²⁹⁹ Companion constitutional concerns are present at all criminal system intercept points, from arrest, to trial, to sentencing, to incarceration. At the investigative stage, the Fourth Amendment prohibits police from detaining civilians and suspects on the basis of race, especially in geographic areas where a racial group's representation is significant.³⁰⁰ The Court in *Terry v. Ohio* expressed concern over the inadequacy of the exclusionary rule to protect civilians from state harassment and expressly encouraged "the employment of other remedies" that might "curtail abuses."³⁰¹ During the prosecution stage, a defendant's rights are protected by the Fifth, Sixth, and Fourteenth Amendments.³⁰² In the correctional space, Eighth Amendment requirements to provide for inmate safety and welfare inform institutional needs.³⁰³ The constellation of constitutional rights that animate decision-making amplifies the compelling nature of needs identified by criminal law stakeholders to maintain system-wide perceptions of legitimacy and fairness.

299. See 438 U.S. 265, 313 (1978) (finding persuasive the university's argument that it "must be accorded the right to select those students who will contribute the most to the 'robust exchange of ideas,'" which is an assertion that is grounded in the First Amendment).

300. *United States v. Brignoni-Ponce*, 422 U.S. 873, 885-87 (1975) (holding race alone cannot furnish grounds for officer suspicion); *United States v. Montero-Camargo*, 208 F.3d 1122, 1131-32 (9th Cir. 2000) (en banc); *Gonzalez-Rivera v. Immigr. & Naturalization Serv.*, 22 F.3d 1441, 1449-50 (9th Cir. 1994); *Floyd v. City of New York*, 959 F. Supp. 2d 540, 569-70 (S.D.N.Y. 2013).

301. 392 U.S. 1, 15 (1968).

302. See, e.g., *Brady v. Maryland*, 373 U.S. 83, 87 (1963) (recognizing the right to material and exculpatory information at trial); *Miranda v. Arizona*, 384 U.S. 436, 467 (1966) (recognizing the right against self-incrimination); *Gideon v. Wainwright*, 387 U.S. 335, 344 (1963) (recognizing right to counsel in criminal cases where defendant is unable to afford an attorney); *Crawford v. Washington*, 541 U.S. 36, 68 (2004) (clarifying the right to confront the source of testimonial evidence offered against defendant); *Manson v. Brathwaite*, 432 U.S. 98, 114 (1977) (holding that eyewitness examination procedures cannot be unnecessarily suggestive); *Batson v. Kentucky*, 476 U.S. 79, 89 (1986) (finding that a peremptory challenge may not be used to exclude a juror based solely on race); *In re Winship*, 397 U.S. 358, 362 (1970) (discussing the beyond a reasonable doubt standard).

303. See *Estelle v. Gamble*, 429 U.S. 97, 103-06 (1976).

c. The Existence of Current or Past Discrete Acts of Racial Discrimination Can Justify and Make More Urgent the Institution's Stated Interest

Where evidence of past racial discrimination is asserted, courts are more open to race-based remediation when that racial harm is specific to institutional practices that can be statistically expressed.³⁰⁴ A showing of “pervasive, systematic, and obstinate discriminatory conduct” can create a “profound need and a firm justification for ... race-conscious relief.”³⁰⁵ A court will expect jurisdiction-specific showings of racial disparities—for most jurisdictions, to look will be to find that “Black[] [persons] are more likely than others to be arrested in almost every city for almost every type of crime.”³⁰⁶ Milwaukee, for example, has been the site of multiple studies revealing racially unequal treatment in surveillance, arrest rates, charging decisions, pretrial detention, and sentencing that are shocking in scope and significance.³⁰⁷ It is difficult to imagine a locality that has corrected the racist practices within the criminal system. For example, if one drives an hour from Milwaukee to Dane County, which includes the liberal enclave of Madison, Wisconsin, one finds 47 percent of Black males between the ages of twenty-five and twenty-nine under the supervision of the Wisconsin Department of Corrections.³⁰⁸ These conditions that undermine public safety appear to be ever-present and everywhere.³⁰⁹

Racial harm at the site of criminal law is so pervasive that studies in social science observe, “the percentage of a neighborhood’s

304. *See, e.g.*, *Majeske v. City of Chicago*, 218 F.3d 816, 820, 822 (7th Cir. 2000).

305. *United States v. Paradise*, 480 U.S. 149, 167 (1987).

306. Brad Heath, *Racial Gap in U.S. Arrest Rates: ‘Staggering Disparity’*, USA TODAY (Nov. 19, 2014, 2:24 PM), <https://www.usatoday.com/story/news/nation/2014/11/18/ferguson-black-arrest-rates/19043207/> [<https://perma.cc/C4WF-FH6X>].

307. *See supra* Part I.B.

308. PAMELA E. OLIVER, DANE COUNTY RATES OF INCARCERATION AND COMMUNITY SUPERVISION—2006 1 (2008), <https://www.ssc.wisc.edu/~oliver/wp/wp-content/uploads/2014/08/Dane-County-Rates-of-Incarceration-and-community-supervision.pdf> [<https://perma.cc/5XRU-D55Z>].

309. *See Roberts, supra* note 136, at 1281, 1297; Callie Harbin Burt, Ronald L. Simons & Frederick X. Gibbons, *Racial Discrimination, Ethnic-Racial Socialization, and Crime: A Micro-sociological Model of Risk and Resilience*, 77 AM. SOCIO. REV. 648, 650-51 (2012); Amanda Geller, Jeffrey Fagan, Tom Tyler & Bruce G. Link, *Aggressive Policing and the Mental Health of Young Urban Men*, 104 AM. J. PUB. HEALTH 2321, 2323-24 (2014).

black population ... is significantly associated with *perceptions* of the severity of the neighborhood's crime problem.³¹⁰ This toxic association between race and criminality, itself, is an enduring feature of crime control policy.³¹¹ Policing patterns reflect this prejudice, from neighborhood to metropolis.³¹² These conditions are compounded by prosecutorial practices, where declinations, diversion eligibility, and the severity of charging decisions favor white defendants over Black and Brown defendants.³¹³ As to adjudication, pretrial detention and sentencing patterns result in harsher outcomes for defendants of color.³¹⁴ These practices result in an alarming over-representation of inmates of color—in recent years, more than 30 percent of the prison population is Black, despite comprising only 12 percent of the general population.³¹⁵ These racially distorted conditions in the criminal system serve to “entrench wider social patterns of racial stratification.”³¹⁶ Because of the pervasiveness of these racially disparate practices, a jurisdiction's record can be readily reinforced by empirical and qualitative studies within scholarship, litigation, and

310. Lincoln Quillian & Devah Pager, *Black Neighbors, Higher Crime? The Role of Racial Stereotypes in Evaluations of Neighborhood Crime*, 107 AM. J. SOCIO. 717, 718 (2001) (emphasis added); accord Robert J. Sampson & Stephen W. Raudenbush, *Seeing Disorder: Neighborhood Stigma and the Social Construction of “Broken Windows”*, 67 SOC. PSYCH. Q. 319, 322-24 (2004).

311. See KHALIL GIBRAN MUHAMMAD, *THE CONDEMNATION OF BLACKNESS: RACE, CRIME, AND THE MAKING OF MODERN URBAN AMERICA* 1, 3-5 (2010).

312. See Aziz Z. Huq, *The Consequences of Disparate Policing: Evaluating Stop and Frisk as a Modality of Urban Policing*, 101 MINN. L. REV. 2397, 2409-13 (2017). In some communities of color, police intervention is fueled by cultivating informants, a destabilizing intervention that creates a feedback loop forcing innocent and guilty alike to accuse others to avoid or mitigate criminal sanctions. See Alexandra Natapoff, *Snitching: The Institutional and Communal Consequences*, 73 U. CIN. L. REV. 645, 645-46, 648, 650 (2004). What the state looks for, it will find or create, and if the state turns its gaze to Black neighborhoods, it will find or assert unlawful conduct committed by Black persons (including charges for resisting arrest). See Anna Roberts, *Arrests as Guilt*, 70 ALA. L. REV. 987, 988-89 (2019); Ferguson, *supra* note 43, at 1148-49.

313. See Sonja B. Starr & M. Marit Rehavi, *Mandatory Sentencing and Racial Disparity: Assessing the Role of Prosecutors and the Effects of Booker*, 123 YALE L.J. 2, 27-30 (2013); Stephen Demuth & Darrell Steffensmeier, *The Impact of Gender and Race-Ethnicity in the Pretrial Release Process*, 51 SOC. PROBS. 222, 237-38 (2004) (noting significant disparities in pretrial treatment between white and Black or Hispanic defendants).

314. See Richard S. Frase, *What Explains Persistent Racial Disproportionality in Minnesota's Prison and Jail Populations?*, 38 CRIME & JUST. 201, 265 (2009); Yang, *supra* note 157, at 1467 (finding judges “treat defendants of different races differently in setting bail”).

315. Gramlich, *supra* note 4.

316. Huq, *supra* note 1, at 1055.

public policy assessments that continue to uncover ongoing, severe, and systematic racial discrimination.³¹⁷

Persons of color are afforded equal treatment under the Equal Protection Clause,³¹⁸ and throughout criminal investigation and adjudication are entitled to equal treatment under the Fourth, Sixth, and Fourteenth Amendments.³¹⁹ Despite the promise of constitutional protection, policing, prosecution, and sentencing practices continue to reproduce racial harm and threaten system legitimacy.³²⁰ Seeking to meet their obligations of administering justice in the absence of racial discrimination, and realizing that doing so is critical to earning community-wide trust and legitimacy, jurisdictions have considered race-informed remedies.³²¹ This Section assists jurisdictions in the articulation of the compelling interests at play, and how these interests can be best articulated in the attempt to satisfy strict scrutiny.

B. Narrowly Tailored

Any race-based remedy, under strict scrutiny review, must be narrowly tailored.³²² This Section takes up this issue. To do so, the Article turns back to RAIs. As discussed, jurisdictions are finding that racial disparities embedded in the system are undermining the promise of RAIs to ensure the fair administration of justice.³²³

In determining whether a race-based remedy is narrowly drawn, courts assess an institution's prior efforts to achieve the compelling interest through race-neutral means,³²⁴ whether the race-based remedy responds to and is proportional to the particular need,³²⁵ whether the remedy is subject to periodic reevaluation,³²⁶ and the degree of harm a race-based remedy visits on nonbeneficiaries.³²⁷

317. See *supra* note 1 and accompanying text.

318. U.S. CONST. amend. XIV, § 1.

319. See *supra* note 302 and accompanying text.

320. See *supra* Part II.A.1.c and accompanying text.

321. See *supra* notes 292-95 and accompanying text.

322. See *supra* note 9 and accompanying text.

323. See *supra* Part I.B.

324. See, e.g., *Fisher v. Univ. of Tex. at Austin (Fisher II)*, 136 S. Ct. 2198, 2208 (2016).

325. See, e.g., *id.* at 2211.

326. See, e.g., *id.* at 2210.

327. See, e.g., *Grutter v. Bollinger*, 539 U.S. 306, 341 (2003).

Using the RDC remedy proposed here, this Article provides a way forward for jurisdictions to articulate how the implementation of a race-based remedy in the criminal system potentially satisfies the narrowly tailored requirement.

1. Prior Attempts to Use Race-Neutral Remedies

An institution has the “ultimate burden of demonstrating that race-neutral alternatives that are both available and workable do not suffice.”³²⁸ As to RAIs, the search for a race-neutral fix to racial disparities has been exhaustive.³²⁹ Over the last decade, government entities, private vendors, and public policy organizations have sought to reduce racial harm reproduced by these tools.³³⁰ Two approaches ameliorate racial harms. The first is to remove data that contributes to racial disparities, but does not appreciably contribute to a tool’s predictive power.³³¹ The second is to recalibrate how data is reported in an effort to reduce racial distortion while still preserving a tool’s predictive power.³³²

In Milwaukee, for example, the county first attempted to respond to racial disparity in pretrial detention outcomes by implementing an RAI—the MCPRAI.³³³ Racial disparities persisted, and in 2015 Milwaukee attempted an additional race-neutral fix, transitioning

328. *Fisher II*, 136 S. Ct. at 2208 (internal quotation marks omitted) (quoting *Fisher I*, 570 U.S. 297, 312 (2013)).

329. See *supra* Part I.C.

330. See MAUER & GHANDNOOSH, *supra* note 23, at 11-12.

331. Starr, *supra* note 29, at 851 (“[D]emographic and socioeconomic factors could be excluded from risk prediction instruments without losing any significant predictive value.”). For example, the Justice Department removed a person’s “age of first arrest [or] conviction” from its tool, because the factor created more racial distortion than predictive power. See Press Release, U.S. Dep’t of Just., Department of Justice Announces Enhancements to the Risk Assessment System and Updates on First Step Act Implementation (Jan. 15, 2020), <https://www.justice.gov/opa/pr/departments-justice-announces-enhancements-risk-assessment-system-and-updates-first-step-act> [<https://perma.cc/4PLK-TMDJ>].

332. If, for example, algorithms used underlying crime rates instead of actual arrest rates to assess an individual’s recidivism risk, it may help reduce some of the racial harm created by police oversurveillance. See Mayson, *supra* note 7, at 2258-61. Despite this recalibration, a host of racially discriminatory conditions persist: Black people are reported by white people for perceived unlawful conduct; police departments have saturated neighborhoods of color with confidential informants; and higher numbers of crimes occur in neighborhoods of color, due to structurally racist conditions. See *supra* notes 311-15 and accompanying text.

333. See *supra* notes 112-17 and accompanying text.

to the Arnold Ventures' PSA,³³⁴ which did not "consider factors that could be discriminatory, such as race, sex, level of education, socio-economic status, and neighborhood."³³⁵ But the PSA, however improved, relies on factors that are widely understood to be proxies for race, including criminal history.³³⁶ Arnold Ventures itself concedes that it has made efforts to "minimize" the tool's "impact on racial disparities."³³⁷ Even as Milwaukee attempts to improve its RAI, stakeholders recognize the limitation of these race-neutral adjustments: police and prosecutors make racially disparate decisions in Milwaukee that shape the RAI's underlying data, and judges exercise discretion during pretrial hearings that further exacerbates the racial disparities.³³⁸ Milwaukee continues to make further efforts; courts have agreed with residents of color that policing in Milwaukee (which generates arrest and conviction rates) causes dramatic racial inequities, but remedial efforts in this respect have had little impact.³³⁹

The result? If the data informing the algorithm is flawed, the algorithm's results will reflect these flaws.³⁴⁰ When the racial harms resulting from discriminatory practices are baked into the data, race-neutral adjustments have limited effect.³⁴¹ Thus, unless one can extract the racial distortion that is otherwise embedded in a data point, the only way to remove the distortion is to remove the data point (such as, for example, "criminal history"). But doing this can so blunt the tool's predictive power as to obviate its utility. And even if a jurisdiction sets in motion reforms to policing and adjudication practices intended to remove bias from new data (this has yet to occur in any jurisdiction, despite concerted civil rights efforts), the "criminal history" part of the data point remains historically intact, as do illegitimate practices within the judiciary.³⁴² Courts, in

334. See *supra* notes 118-26 and accompanying text.

335. Kremers, *supra* note 112.

336. See *Public Safety Assessment: How it Works*, *supra* note 33, at 1.

337. *About the Public Safety Assessment: What Is the PSA?*, *supra* note 121.

338. See *supra* Part I.B.

339. See *supra* Part I.B.

340. See Eaglin, *supra* note 17, at 72-73. Within the computer science disciplines, this is referred to as the GIGO ("garbage in, garbage out") principle. Mayson, *supra* note 7, at 2224 & n.23.

341. See Mayson, *supra* note 7, at 2294-95.

342. Brenner et al., *supra* note 48, at 276 (noting a study showing that a person reviewing

any event, do not require jurisdictions to try every conceivable race-neutral fix while racially unjust conditions persist.³⁴³ This is especially true if the underlying circumstances are compelling and severe, as they are in the criminal system.³⁴⁴

Milwaukee is not alone. There has been a multi-jurisdictional effort over a sustained period to achieve racial fairness through race-neutral means.³⁴⁵ And yet, jurisdictions are still a long way from achieving this goal.³⁴⁶ Race-neutral fixes have been exhaustively attempted, and despite improvements to the tools, to policing, and to prosecution practices, racial disparity in risk assessments persists.

2. *The Remedy Responds Directly to the Need*

The Court requires a nexus between the remedy and achieving the compelling interest.³⁴⁷ In *Fisher II*, the Court required the university to show how its plan operated to “obtain[] ‘the educational benefits that flow from student body diversity.’”³⁴⁸ There the Court determined that the remedy—to provide a race-based adjustment to applications for admission—responded directly to the need, which was to achieve a holistic sense of diversity in the student body that improved the educational experience for all students.³⁴⁹

similarly situated defendants with the same risk score will tend to conclude Black defendants will act worse than predicted by the RAI, and white defendants will act better than predicted, and highlighting another study that concluded judges “harbor the same kinds of implicit biases as the general population”).

343. *Grutter v. Bollinger*, 539 U.S. 306, 339 (2003) (“Narrow tailoring does not require exhaustion of every conceivable race-neutral alternative.”).

344. For example, in *Wittmer*, Judge Posner upheld a decision to hire a “less qualified” Black lieutenant over white candidates. 87 F.3d 916, 917, 921 (7th Cir. 1996). There, the compelling need was the success of a new boot camp for which, given the authoritative and strenuous environment and that Black inmates comprised 68 percent of participants, racial diversity of personnel was essential to programmatic success, according to experts. *Id.* at 920. Despite the general requirement that an institution attempt prior race-neutral remedies, Judge Posner found no reason to require the attempt of race-neutral remedies (the institution had not), or to assess the possibility of less invasive race-based remedies (such as a shift rotation of existing personnel). *Id.* at 919-20.

345. See MAUER & GHANDNOOSH, *supra* note 23, at 2-3.

346. See *id.*

347. See *Fisher II*, 136 S. Ct. at 2211.

348. *Id.* at 2210 (quoting *Fisher I*, 570 U.S. at 297).

349. See *id.* at 2211, 2214.

The RDC remedy is intended to restore public confidence in the administration of criminal justice that is otherwise undermined by the community perceptions of racially unequal treatment. Communities subject to state coercion will not trust outcomes that significantly differ along racial lines.³⁵⁰ Whether a portion of the racial disparity is attributed to over-policing, to biased prosecution and adjudication, or to systemic racism,³⁵¹ from a community perspective, the asymmetrical distribution of coercion along racial lines is viewed as illegitimate.³⁵² In this way, by implementing the RDC remedy, which extracts the estimated portion of a person's score attributed to racial harm, a jurisdiction can demonstrate that it is making a meaningful effort to administer criminal justice in a racially fair manner, a condition essential to earning legitimacy within the community.

3. *The Remedy Is Proportional to the Harm*

Being narrowly tailored “ensures that the means chosen ‘fit’ [a] compelling goal so closely that there is little or no possibility that the motive for the classification was illegitimate racial prejudice or stereotype.”³⁵³ A light touch is favored, though a remedy with sufficient justification may be invasive.³⁵⁴ An example of a remedy with a light touch is described in *Fisher II*.³⁵⁵ There, the college's assignment of a “plus factor” to an applicant of color applied only to the last 25 percent of class openings.³⁵⁶ Race was not heavily weighted, but considered in addition to GPA, test scores, essays, extracurriculars, work history, and letters of reference—“race [wa]s but a ‘factor of a factor of a factor.’”³⁵⁷ As to the outcome—admission or rejection from the university—the Court seemed placated by the remedy's marginal impact; the consideration of race was “meaningful” but

350. See Rappaport, *supra* note 1, at 714.

351. See *id.*

352. See AMERICAN BAR ASSOCIATION, *supra* note 285, at 12.

353. *City of Richmond v. J. A. Croson Co.*, 488 U.S. 469, 493 (1989).

354. See, e.g., *United States v. Paradise*, 480 U.S. 149, 185-86 (1987) (upholding a “one-for-one” hiring policy on the basis that it “was amply justified and narrowly tailored to serve ... legitimate and laudable purposes”).

355. See *Fisher II*, 136 S. Ct. at 2206-07.

356. *Id.*

357. *Id.* at 2207 (quoting *Fisher I*, 645 F. Supp. 2d at 608).

“still limited.”³⁵⁸ That the decision maker assessed race within considerations unique to an individual applicant also appeared the Court.³⁵⁹

Judicial concern is heightened where decision maker discretion is limited because race overshadows other factors.³⁶⁰ A remedy that obviates decision maker discretion is often portrayed as a quota: “a program in which a certain fixed number or proportion of opportunities are ‘reserved exclusively for certain minority groups.’”³⁶¹ The Court is apt to disqualify a set-aside regime, as in *Bakke*, where 16 of 100 slots were reserved for minority applicants to medical school,³⁶² and in *Croson*, where 30 percent of the subcontractors in any municipal bid needed to be minority-owned businesses.³⁶³ The “outcome-determinative” concern also led the Court in *Gratz* to reject the university’s assignment of a twenty-point credit to racial minority applicants.³⁶⁴ Though the remedy did not mandate a certain number of slots for students of color, the size of the race-based credit overwhelmed point allotments given to factors like GPA.³⁶⁵ Importantly, it was the limitation of decision maker discretion that was cause for concern, not that the remedy assigned a fixed front-end value to race.³⁶⁶ For example, in *Grutter* and

358. *See id.* at 2212 (“The fact that race consciousness played a role in only a small portion of admissions decisions should be a hallmark of narrow tailoring, not evidence of unconstitutionality.”).

359. *See id.* at 2207.

360. *See Gratz v. Bollinger*, 539 U.S. 244, 279 (2003) (O’Connor, J., concurring).

361. *See Grutter v. Bollinger*, 539 U.S. 306, 335 (2003) (quoting *City of Richmond v. J. A. Croson Co.*, 488 U.S. 469, 496 (1989) (plurality opinion)). The term “quota” is susceptible to over-simplification and better relegated to the political arena. Still, the term finds doctrinal traction. *See, e.g., Fisher II*, 136 S. Ct. at 2208 (“A university cannot impose a fixed quota or otherwise define diversity as ‘some specified percentage of a particular group merely because of its race or ethnic origin.’” (internal quotation marks omitted)). Some scholars ask for reconsideration. *See, e.g., Barnes, supra* note 230, at 2294 (“With a focus on group access, one goal could be that [university] application processes at least yield diversity and inclusion numbers roughly consistent with demographic representation.”).

362. *See Regents of the Univ. of Cal. v. Bakke*, 438 U.S. 265, 275 (1978).

363. *See Croson*, 488 U.S. at 477.

364. *See* 539 U.S. at 255 (finding a policy in which applicants were given an additional “20 points based upon his or her membership in an underrepresented racial or ethnic minority group” unconstitutional); *see also Croson*, 488 U.S. at 499 (“[A]n amorphous claim that there has been past discrimination in a particular industry cannot justify the use of an unyielding racial quota.”).

365. *See Gratz*, 539 U.S. at 271-72.

366. *See id.* at 273.

Fisher II, the plus factors assigned to race were also “fixed”—yet, the front-end adjustment was not so significant to be determinative of one’s admission to or rejection from the university.³⁶⁷

Importantly, the Court also permits an invasive remedy where the severity of racial harm calls for it.³⁶⁸ Otherwise, a jurisdiction that visited severe harms on a racial group would be insulated from consequence. A court looks for a showing of proportionality between the invasive nature of the remedy and the severity of conditions in need of correction.³⁶⁹ In *United States v. Paradise*, the Court certified a remedy that obviated decision maker discretion; there, the Alabama Department of Safety had to hire a Black officer for every new hire of a white officer.³⁷⁰ The Court concluded the “one-for-one” remedy was narrowly tailored,³⁷¹ given that the Department had engaged in “long term, open, and pervasive” discrimination,³⁷² the Department had resisted less invasive remedies,³⁷³ and the remedy was “flexible in application at all ranks” and “[could] be waived if no qualified black candidates [were] available.”³⁷⁴ The takeaway? There is a direct relationship at play: the more urgent and severe the conditions, the more invasive the remedy can be and still be narrowly tailored. As the Court in *Grutter* observed, narrowly tailored does not mean the remedy treads lightly; rather, the remedy must be “specifically and narrowly framed to accomplish [its] purpose.”³⁷⁵

How does the RDC fare? The RDC is particularly responsive to proportionality concerns, as it is designed to measure the particular

367. See *Grutter v. Bollinger*, 539 U.S. 306, 335-36 (2003); *Fisher II*, 136 S. Ct. at 2206-07.

368. See, e.g., *United States v. Paradise*, 480 U.S. 149, 167 (1987).

369. See, e.g., *id.*

370. See *id.* at 177, 185.

371. *Id.* at 171.

372. *Id.*

373. *Id.* at 155 n.2.

374. *Id.* at 177.

375. See 539 U.S. 306, 333 (2003) (citing *Shaw v. Hunt*, 517 U.S. 899, 908 (1996)). There is yet another proportionality concern; one expects heightened judicial skepticism of “one-size-fits-all” remedies that consolidate discretion in officials who are not responsive to the targeted forum. The more local the remedy’s reach (an institutional, municipal, or county approach), the more confidence there can be in the remedy’s responsiveness to individuals affected. See *Shelby County v. Holder*, 570 U.S. 529, 542 (2013) (“[A] statute’s disparate geographic coverage [must be] sufficiently related to the problem that it targets.” (quoting *Nw. Austin Mun. Util. Dist. No. One v. Holder*, 557 U.S. 193, 203 (2009))).

racial disparities reproduced by a particular jurisdiction's tool.³⁷⁶ The more severe the racial disparity in a jurisdiction, the more significant the RDC adjustment.³⁷⁷ The RDC's disparity differential will be different in every jurisdiction on account of local practices,³⁷⁸ the tool adopted,³⁷⁹ and risk levels set by the jurisdiction.³⁸⁰

Unlike in *Fisher II* or *Grutter*, where the "plus factor" assigned to race was a rough approximation of racial harms,³⁸¹ the RDC's plus factor is a measure of the particular racial harm present, at that time, in that jurisdiction.³⁸² Under the RDC, a certain value will likely be subtracted from a person of color's raw score.³⁸³ This adjustment is likely to be a "factor of a factor of a factor."³⁸⁴ The RDC adjustment may not, in application, alter the tool's final assessment; a person may be designated "high-risk," even with the adjustment.

And if the RDC adjustment does change the RAI's result (say from "medium-risk" to "low-risk")? In jurisdictions, the RAI result tends to be one of many factors a judge considers before making a decision (say as to pretrial detention, probation conditions, or length of sentence); the final outcome remains in the court's discretion, in turn influenced by statutory considerations, arguments of counsel, information from witnesses, pretrial reports, and victim statements.³⁸⁵ Where the judge is expected to adhere to and deviate from the RAI's result according to some formula (for example,

376. See *supra* notes 176-77 and accompanying text.

377. See, e.g., *supra* notes 176-77 and accompanying text.

378. Some observe criminal jurisdictions as "a loose affiliation among independent law enforcement agencies, individual counties, local jails, and state prisons." See Klingele, *supra* note 49, at 558. Practices can vary dramatically. In Milwaukee County, Black residents are 3.2 times more likely than white residents to be arrested for marijuana possession, while immediately north in Ozaukee County, the ratio is 34:1. Hess, *supra* note 179.

379. See Eaglin, *supra* note 17, at 69-72 (providing illustrative list of tools available to jurisdictions).

380. See *id.* at 86-87 (explaining that low, medium, or high risk designations will vary by tool or by jurisdiction).

381. See *Fisher II*, 136 S. Ct. at 2207; *Grutter v. Bollinger*, 539 U.S. 306, 336-37 (2003).

382. See *supra* Part I.D.

383. See *supra* Part I.D.

384. See *Fisher II*, 136 S. Ct. at 2207 (quoting *Fisher I*, 645 F. Supp. 2d at 608).

385. See Jennifer Skeem, Nicholas Scurich & John Monahan, *Impact of Risk Assessment on Judges' Fairness in Sentencing Relatively Poor Defendants*, 44 L. & HUM. BEHAV. 51, 58 (2020); Starr, *supra* note 29, at 865 (observing that it is possible (if not likely) that "judges' current clinical assessments could *overweight* some of those variables relative to the weights assigned by the actuarial instruments").

eighty-twenty), the final decision is still the court's.³⁸⁶ In sum, "[u]ltimately, judges make decisions—not risk assessments."³⁸⁷

In Milwaukee, for example, the PSA's method to calculate whether a person falls within a low, medium, or high-risk category occurs in three stages: the raw score calculation, the scaled score calculation, and the matrix calculation.³⁸⁸ As to a defendant's *raw score*, the PSA employs a binary approach: a "yes" to a question is scored (1), a "no" is scored (0).³⁸⁹ A raw score is generated for each category: the risk of defendant's failure to appear (FTA), new criminal arrest (NCA), and new violent criminal arrest (NVCA).³⁹⁰ Raw scores for each category are then *scaled*.³⁹¹ This means two defendants may have different raw scores as to the risk of FTA, but because the two scores fall within a certain range, they are scored exactly the same.³⁹² Next, these scaled scores are placed within a *matrix*.³⁹³ Each jurisdiction constructs its own matrix.³⁹⁴ The matrix is designed to assess whether a defendant, if released, should be

386. See Skeem et al., *supra* note 385, at 51.

387. *Id.*

388. See *Public Safety Assessment: How It Works*, *supra* note 33, at 1-4; *Guide to the Release Conditions Matrix*, ADVANCING PRETRIAL POL'Y & RSCH. 2 (June 2020), <https://advancingpretrial.org/guide/guide-to-the-release-condition-matrix/> [<https://perma.cc/VY66-ZSN6>].

389. *Public Safety Assessment: How It Works*, *supra* note 33, at 2.

390. *Id.* at 1. The PSA considers different factors when generating raw scores for each category. For FTA, factors include: "[p]ending charge at the time of the arrest," "[p]rior conviction (misdemeanor or felony)," "[p]rior failure to appear in the past 2 years," and "[p]rior failure to appear older than 2 years." *Id.* at 2. For NCA, factors include: "[a]ge at current arrest," "[p]ending charge at the time of the arrest," "[p]rior misdemeanor conviction," "[p]rior felony conviction," "[p]rior violent conviction," "[p]rior failure to appear in the past 2 years," and "[p]rior sentence to incarceration." *Id.* at 3. For NVCA, factors include: "[c]urrent violent offense," "[c]urrent violent offense and 20 years old or younger," "[p]ending charge at the time of the arrest," "[p]rior conviction (misdemeanor or felony)," and "[p]rior violent conviction." *Id.* at 4.

391. See *id.* at 4.

392. An FTA raw score can range 0-7; the scaled score 0-6 (for example, a raw score of 3 or 4 will both be scaled at 4). An NCA raw score can range 0-13; the scaled score 0-6 (for example, a raw score of 9-13 will all be scaled at 6). For NVCA, a raw score can range 0-7; the scaled score 1-6 (a score of 1-3 receives a "no" violence flag, while 4-6 receives a "yes" violence flag). See *id.* at 2-4.

393. See *Guide to the Release Conditions Matrix*, *supra* note 388, at 2.

394. *Id.* at 1.

subject to no conditions or severe conditions.³⁹⁵ The matrix is designed to aid judicial officers in decision-making.³⁹⁶ The matrix in Milwaukee looks like this:

	NCA 1	NCA 2	NCA 3	NCA 4	NCA 5	NCA 6
FTA 1						
FTA 2						
FTA 3						
FTA 4						
FTA 5						
FTA 6						

Risk Information & Recommendation—Risk Indicator Scores:

FTA = 4 NCA = 3 NVCA = No

Pursuant to the matrix, defendants with different scaled scores can find themselves in the same risk category. Because the matrix does not include NVCA, the severity of the crime charged is wholly subject to judicial discretion.³⁹⁷ A defendant charged with a first-degree violent offense who has no criminal history, for example, will score low on the PSA.³⁹⁸ But any final determinations of conditions or confinement are left to the judge.³⁹⁹ Within Milwaukee, courts not only view the PSA assessment as advisory, but consider other factors.⁴⁰⁰ In Milwaukee, application of the RDC would likely be considered a “light touch,” even if the disparity differentials were

395. *Id.*

396. *Id.*

397. *Id.* at 10.

398. *Id.*

399. *See id.* at 4.

400. *See supra* notes 112, 118-19 and accompanying text.

large, because the race-informed adjustment is part of a holistic, discretionary review.

4. A Remedy That Does Not Unduly Burden Members of a Racial Group

Courts are more resistant to and require a higher level of justification for any race-based remedy that “unduly harm[s] members of any racial group.”⁴⁰¹ In *Wygant v. Jackson Board of Education*, for example, the Court observed that the remedy, which contemplated firing white employees first during layoffs, was much more burdensome than an alternative (not considered by the institution) that would make adjustments to retain diversity at the hiring stage, where burdens distributed to white applicants would be more diffuse.⁴⁰² In contrast, in *Fisher II*, the Court found the burden on white applicants acceptable under the circumstances.⁴⁰³ There, the Court noted the race-based remedy only applied after 75 percent of the student body had already been selected through a state-mandated, race-neutral process.⁴⁰⁴ As to filling the remaining quarter of the class, admissions relied on a whole host of factors, of which the applicant’s race might be a “subfactor.”⁴⁰⁵ The Court pointed out, as to the plaintiff, a white applicant, “the largest impact” on her chance of admission was not the race-based remedy but her ineligibility to qualify for consideration under the race-neutral process that accounted for 75 percent of the student body.⁴⁰⁶

Unlike the complainants in *Wygant* and *Fisher II*, a white defendant challenging the RDC would be unable to argue that his status was affected at all by the RDC remedy. A white defendant’s risk assessment would remain the same in the absence or presence of the RDC remedy.⁴⁰⁷ Given the Court’s acceptance of remedies that significantly burden nonbeneficiaries, the remedy proposed here,

401. See *Grutter v. Bollinger*, 539 U.S. 306, 341 (2003).

402. See 476 U.S. 267, 282-83 (1986).

403. See 136 S. Ct. 2198, 2214 (2016).

404. *Id.* at 2206.

405. *Id.*

406. *Id.* at 2208-09.

407. See *supra* Part I.D.

which does not negatively affect a white defendant, is compliant with constitutional demands.⁴⁰⁸

5. *The Remedy Is Subject to Periodic Reevaluation*

The Court requires a “continuing obligation to satisfy the burden of strict scrutiny in light of changing circumstances.”⁴⁰⁹ The Court in *Fisher II* instructed the university to engage in a “periodic reassessment of the constitutionality, and efficacy, of its” race-based approach.⁴¹⁰ The “assessment must be undertaken in light of the experience the school has accumulated and the data it has gathered since the adoption” of the race-based remedy.⁴¹¹ This judicial concern seems prospective—a warning—versus a test of whether the remedy is narrowly tailored right now. And yet, Justice Alito in his *Fisher II* dissent asserted that the university’s goal of achieving a “critical mass” of racial diversity was not an adequately defined goal.⁴¹² According to Justice Alito, it is not only impossible to know whether a remedy addresses a need that is undefined, but it is also impossible to know when the remedy is no longer needed.⁴¹³

The RDC remedy is responsive to Justice Alito’s concerns. The RDC is “ephemeral,” as it “is contingent upon the [jurisdiction’s] own conduct.”⁴¹⁴ The goal—the lack of racial disparity in a jurisdiction’s assignment of risk scores—is measurable.⁴¹⁵ And because the goal is measurable, the RDC remedy has a conditional shelf-life, an articulable end-point: it becomes unnecessary as a jurisdiction attains racial parity across risk scores. The majority in *Fisher II* did

408. See *United States v. Paradise*, 480 U.S. 149, 182 (1987) (“The one-for-one requirement does not require the layoff and discharge of white employees and therefore does not impose burdens of the sort that concerned the plurality in *Wygant*.” (citing *Wygant v. Jackson Bd. of Educ.*, 476 U.S. 267, 283 (1986))).

409. See *Fisher II*, 136 S. Ct. at 2209-10.

410. *Id.* at 2210.

411. *Id.* The Court in *Shelby County v. Holder* underscored this obligation, asserting that Congress had failed to recognize the circumstances no longer justified the original remedy—federal supervision under the authority of the Voting Rights Act. See 570 U.S. 529, 535-36 (2013) (“[C]urrent burdens ... must be justified by current needs.” (quoting *Nw. Austin Mun. Util. Dist. No. One v. Holder*, 557 U.S. 193, 203 (2009))).

412. See 136 S. Ct. at 2216 (Alito, J., dissenting).

413. See *id.*

414. See *United States v. Paradise*, 480 U.S. 149, 178 (1987).

415. See *supra* Part I.D.

not find Justice Alito's concerns compelling—but that lack of concern could have been a function of the remedy's light touch in that case.⁴¹⁶ Still, it is notable that as to the implementation of the RDC, the goal line *is* visible, and the concerns raised by Justice Alito in *Fisher II* are not present here. The need for the RDC can be re-evaluated periodically, and can be done with exacting clarity. Each time the disparity differential is re-evaluated, the disparity differentials will be adjusted or eliminated. The RDC's endpoint is determined by advances within the criminal system to put an end to reproducing the racial harm that distorts the accuracy of the risk tool; if a jurisdiction so succeeds (namely, if the racial disparities are within a tolerable level accepted by the jurisdiction), the RDC remedy would be discontinued.⁴¹⁷

In sum, the criminal system's obligation to ensure public safety presents favorable conditions for the articulation of a compelling interest, especially when coupled with constitutional protections that require fair treatment. Whether a jurisdiction's race-based approach to the mitigation of racial harms is narrowly tailored will be subject to a case-by-case assessment.⁴¹⁸ The examination here of the RDC suggests that making this showing is possible, especially where jurisdictions have a track record of attempting to address racial disparities through race-neutral remedies. In particular, the RDC remedy provides an example of an ephemeral remedy that responds to and is proportional to racial harms present in a jurisdiction, without visiting harms on nonbeneficiaries.⁴¹⁹

CONCLUSION

The call for affirmative, race-based remedies that Professor Butler made over twenty years ago, and the remedies he proposed,

416. Within the criminal justice context, an undefined goal line has not provided an obstacle. In *Wittmer v. Peters*, Judge Posner accepted the remedy of hiring a "black lieutenant [who was] needed because the black inmates are believed unlikely to play the correctional game of brutal drill sergeant and brutalized recruit unless there are some blacks in authority in the camp." 87 F.3d 916, 920 (7th Cir. 1996). When would such remedies not be justified? It was unclear. *See id.* at 920-21. The warden stated the remedy was necessary for the success of the program—a totally undefined marker. *See id.* at 917, 920.

417. *See supra* Part I.D.

418. *See, e.g.*, *Grutter v. Bollinger*, 539 U.S. 306, 327 (2003).

419. *See supra* Part I.D.

deserve reconsideration.⁴²⁰ Since Butler wrote his article, the Supreme Court has provided more guidance as to charting a path that complies with strict scrutiny analysis.⁴²¹ The particular circumstances surrounding the criminal law context, the stakes at issue, and the judicial deference that is afforded to the expertise of criminal stakeholders present an opportunity for jurisdictions to address racial harms. Race-informed approaches to mitigate racial disparities in arrests, declination reviews, charging decisions, sentencing, and incarceration rates provide opportunities to account for a violent and racist system. No doubt, there will be resistance. Equally, jurisdictions seeking to mitigate racist harm will have much to bring to the battle.

Jurisdictions that consider race-informed approaches to addressing racial disparities in criminal law will need to articulate and provide the basis for any stated compelling interest and will need to craft a remedy that is narrowly tailored in the circumstances presented. The compelling interest proposed here—that the people must have confidence that the criminal system is operating fairly to achieve its core mission of ensuring public safety—has a strong anchor in the mission statements of criminal system stakeholders. The expertise that criminal system actors bring to the discussion over jurisdictional objectives, including input from police, prosecutors, judges, and correctional personnel, is a critical component to surviving strict scrutiny review.

As to anticipated equal protection challenges, this Article provides a template for jurisdictions to follow. Most scholarship addresses race-based policies in education and government contracting.⁴²² Flying under the radar are efforts, many successful, of criminal system stakeholders to institute race-informed remedies to achieve public safety objectives.⁴²³ Though strict scrutiny applies, courts seem more deferential in the criminal law context.⁴²⁴ This judicial deference, however uncharacteristic within strict scrutiny review, is a central feature of criminal law scholarship, in which

420. See generally Butler, *supra* note 2.

421. See generally Grutter, 539 U.S. 306; *Fisher II*, 136 S. Ct. at 2198.

422. See *supra* note 14 and accompanying text.

423. See, e.g., *supra* note 280 and accompanying text.

424. See Spiegel, *supra* note 16, at 2290-91.

commentators observe a tradition of judicial deference to criminal system actors exercising discretion.⁴²⁵ Given their uniquely favored position, criminal system actors can and should consider race-informed remedies to address race-based concerns.

425. *See, e.g.*, Carbado, *supra* note 66, at 1520.