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***RACE DATA MATTERS: USING EXPERT TESTIMONY
AND SOCIAL SCIENCE DATA ABOUT DISCRIMINATORY
POLICING TO WIN PRETRIAL MOTIONS***

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Race Data Matters: Using Expert Testimony and Social Science Data about Discriminatory Policing to Win Pretrial Motions (9/15/17)

Rahsaan D. Hall & Alison Siegler

Outline of Rahsaan Hall's Presentation

- **Context: Outrage in the Streets**
 - In the aftermath of police killing of Black people recently people have taken to the streets to express their frustration, anger and demands for justice.
 - The uprisings in Ferguson, Baltimore and Baton Rouge demonstrated the public outrage over what seems like unfettered police violence.
 - There are an endless list of names of Black, Latino and Native people who disproportionately are the victims of police violence.
 - As a part of their project *The Counted: People Killed by Police in the US*, The Guardian showed that in the United States people of color are killed at rates that surpass those of their white counterparts.
<https://www.theguardian.com/us-news/ng-interactive/2015/jun/01/the-counted-police-killings-us-database>
 - 2015 of the 1146 people killed by police Black people were killed at a rate of nearly 8 per million, Native American 5.5 per million, Latino 3.5 per million and White 3 per million.
<https://www.theguardian.com/us-news/ng-interactive/2015/jun/01/the-counted-police-killings-us-database#>
 - 2016 of the 1093 people killed by police Native Americans were killed at a rate of 10.13 per million, Black nearly 7 per million, Hispanic/Latino 3 per million and White 3 per million.
<https://www.theguardian.com/us-news/ng-interactive/2015/jun/01/the-counted-police-killings-us-database#>
 - Those numbers are particularly disturbing when looking at people who are unarmed and conceivably pose no immediate threat to officers that would warrant the use of lethal force.
 - 2015 Unarmed
 - White 45%
 - Black 34%
 - Latinx 17%
 - Other 4%
 - 2016 Unarmed
 - White 56%
 - Black 25%
 - Latinx 16%
 - Other 3%
 - For as much as police need to be held accountable for their actions in these encounters, their training that prepares them for these encounters and the existence of departmental culture that condone certain actions in these encounters, we cannot hold the rest of the system blameless.

- **Framing: From the Streets to the Courts**
 - In a 2016 opinion piece entitled *Beyond #BlackLivesMatter: Police Reform Must Be Bolstered By Legal Action*, ACLU of Massachusetts legal director Matt Segal suggested that “The movement for police reform should be joined by an equally ambitious movement for court reform.”
<https://www.theguardian.com/commentisfree/2016/jul/27/beyond-black-lives-matter-police-reform-legal-action>
 - The architecture of police violence and discriminatory conduct is premised on the erosion of Fourth Amendment protections in Supreme Court jurisprudence with the “Supreme Court most often rely[ing] on the need for effective law enforcement when ruling for the government.” Shima Baradaran, *Rebalancing the Fourth Amendment*, 102 Geo. L.J. 1, 16 (2013).
 - Some of the most notable among the cases that have framed the violent policing that disproportionately impacts communities of color are:
 - *Tennessee v. Garner* 471 U.S. 1 (1985)
 - *Graham v. Connor* 490 U.S. 386 (1989)
 - *Whren v. United States* 517 U.S. 806 (1996)
 - It is imperative that both federal and state courts begin to grapple with the realities of their far reaching decisions and the impact those decisions have on the most vulnerable populations in the country. Rulings that recalibrate the deference to police officers and value the lives of historically marginalized people will begin to undo the decades of legal precedent that have eroded community trust of law enforcement.
- **Advocacy: A Multifaceted Approach to Reform**
 - In his 2016 book *Engines of Liberty* ACLU legal director David Cole posits that the predicate to major constitutional law reform occurred outside of the federal courts. Cole’s premise is that civil society is the true drivers of constitutional change.
 - Community Advocacy – civil society has been responsible for creating a climate that is ripe for departure from stare decisis
 - Litigation – However, the focus of this session is on using social science data to win pre-trial motions.
 - Judges influenced by external realities.
 - Cultural Cognition explains the correlations between cultural values and perception of empirical fact. Ben K. Grunwald, *Suboptimal Social Science and Judicial Precedent*, 161 U. Pa. L. Rev. 1409, 1431 (2013).

- Choice of Venue – it is worth noting that Cole also points out that “most constitutional reform work takes place outside of federal courts.”
- Social Science Data – There are instances when social science research and empirical evidence is relied on by the court. Taken in context, pre-trial motions that elucidate the racial and public safety implication through empirical social science data can lead to distinction or further clarification of existing precedent... in some instances it may even lead to a departure. Joseph Ross, *Can Social Science Defeat a Legal Fiction?* 18 Wash. & Lee J. Civil Rts & Soc. Just. 315, 345 (2012). “The doctrine of stare decisis does not require us to approve routine constitutional violations” *Arizona v. Gant*, 556 U.S. 332, 359-60 (2009) (Alito, J., dissenting)
 - *Brown v. Board* – One of the most notable cases that relied on empirical social science research to challenge the existing Supreme Court precedent established in *Plessy v. Ferguson*. David L. Faigman, *Normative Constitutional Fact-Finding: Exploring the Empirical Component of Constitutional Interpretation*, 139 U. Pa. L. Rev. 541, 566 (1991).
 - Imagine if we could do the same thing for policing...
- **Example: *Commonwealth v. Warren*, 457 Mass. 530, 540 (2016)**
 - *Disclaimer*: Although the social science data that the court relied on – to demonstrate the lack of reasonable suspicion to stop Mr. Warren – was not provided to the court as part of a pre-trial motion, it illustrates the value of said data. The court’s use of this data also underscores the earlier point regarding the external influences on judges. The ACLU report containing the data was the subject of heightened media attention in late 2014. Finally, the importance of these issues should not be left to happenstance or the well-designed public education campaigns of advocacy organizations. Rather, they should be intentionally contextualized through a racial justice lens and consistently presented before the court.
 - Appellate History *Commonwealth v. Warren*, 87 Mass.App.Ct. 476, 494 (2015)
 - In the dissenting opinion Judge Agnes challenged the majority’s determination that there was reasonable suspicion for the officer to functionally seize Mr. Warren based on nothing more than him matching a general and vague description, a mile away from the scene of the crime, and fleeing an admittedly consensual encounter.

- “In addition to an understanding of the local geography and particularized suspicion, ‘a page of history’ about encounters between young black men and the police in Roxbury ‘is worth a volume of logic.’” *Id.* at 494, citations omitted.
 - Citing to the 2014 ACLU report and the surrounding press she states “Although there is no evidence in this case that a ‘search on sight’ policy continues to exist, the debate continues regarding whether certain street encounters between members of the Boston police department and civilians are influenced by race and not simply by the existence of reasonable suspicion or probable cause.” *Id.*
 - In a separate dissent Judge Rubin wrote, “[I]t is impermissible for the police to stop any two black men walking on the street wearing hoodies simply because thirty minutes earlier and one mile away two black men in dark clothing, at least one of whom was wearing a hoodie, were among three men involved in a burglary. Action of this type clearly violates the protection of our Massachusetts Declaration of Rights provides to all persons in the Commonwealth. It is also corrosive to the relationship between law enforcement and the members of communities they are sworn to protect. Yet that describes what happened here.” *Id.* at 500.
 - Of particular note was the court’s reliance on the ACLU’s 2014 report to address Mr. Warren’s flight from the police noting “black men in the city of Boston were more likely to be targeted for police-civilian encounters such as stops, frisks, searches, observations, and interrogations.”
- *Black, Brown and Targeted: A Report on Boston Police Department Street Encounters from 2007 - 2010*

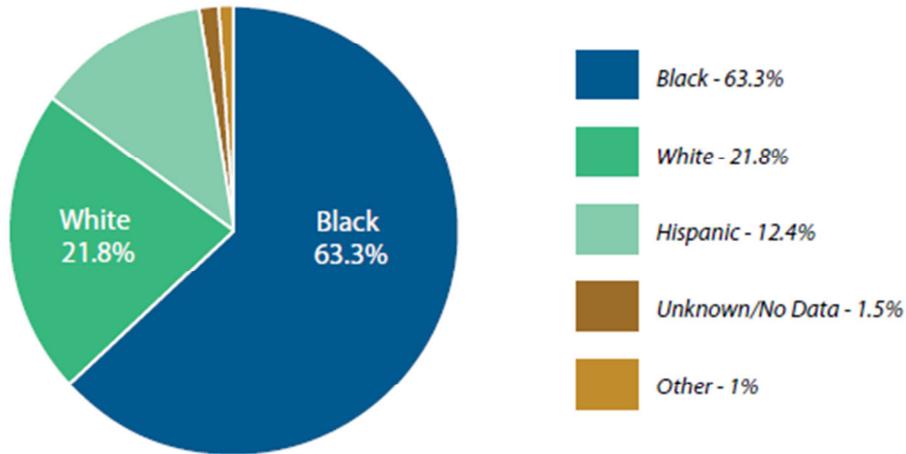
<https://aclum.org/wp-content/uploads/2015/06/reports-black-brown-and-targeted.pdf>

- ACLU of Massachusetts had received reports that Boston Police Department officers were unfairly targeting people of color for stops and frisk. Requested access to Field Interrogation Observation Frisk Stop reports (FIOFS).
- Findings
 - 204,000 BPD reports of police-civilian encounters recorded in FIOFS Reports from 2007 to 2010.
 - Blacks were subjected to 63% of these encounters, even though they made up just 24% of Boston’s population.

Who's Stopped and Who's Not

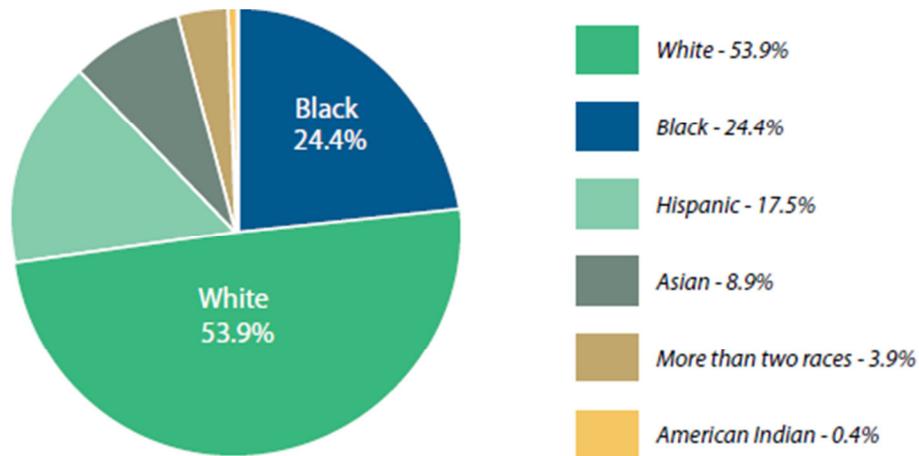
Boston Police-Civilian Encounters

Blacks accounted for more than 3 out of 5 FIOFS (Field Interrogation, Observation, Frisk and/or Search) in 2007-2010 but represent less than 1 of 4 people in Boston.



Boston Population

2010 U.S. Census data

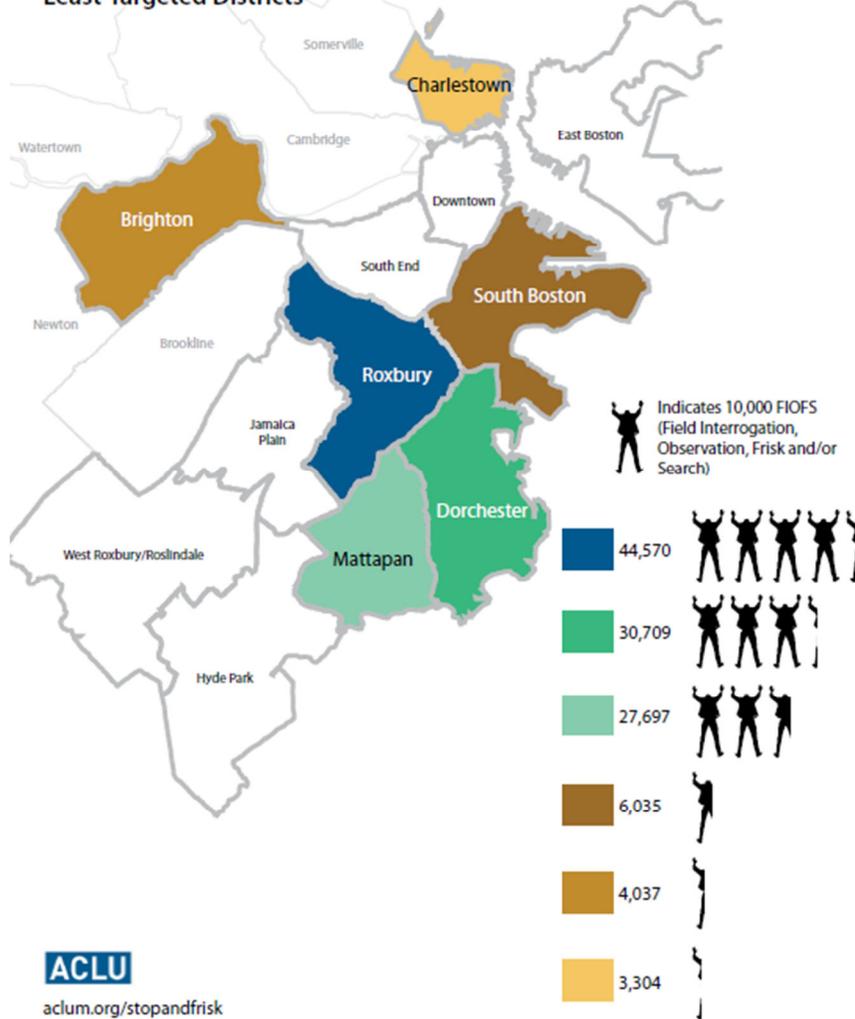


ACLU

aclum.org/stopandfrisk

- Analysis also showed that crime – whether measured by neighborhood crime rates or the arrest record or alleged gang involvement of the civilians subjected to these encounters – does not explain away this racial disparity.
- The mere presence of Black residents increased the numbers of police-civilian encounters. The higher concentrations of Black residents yielded even more police-civilian encounters.

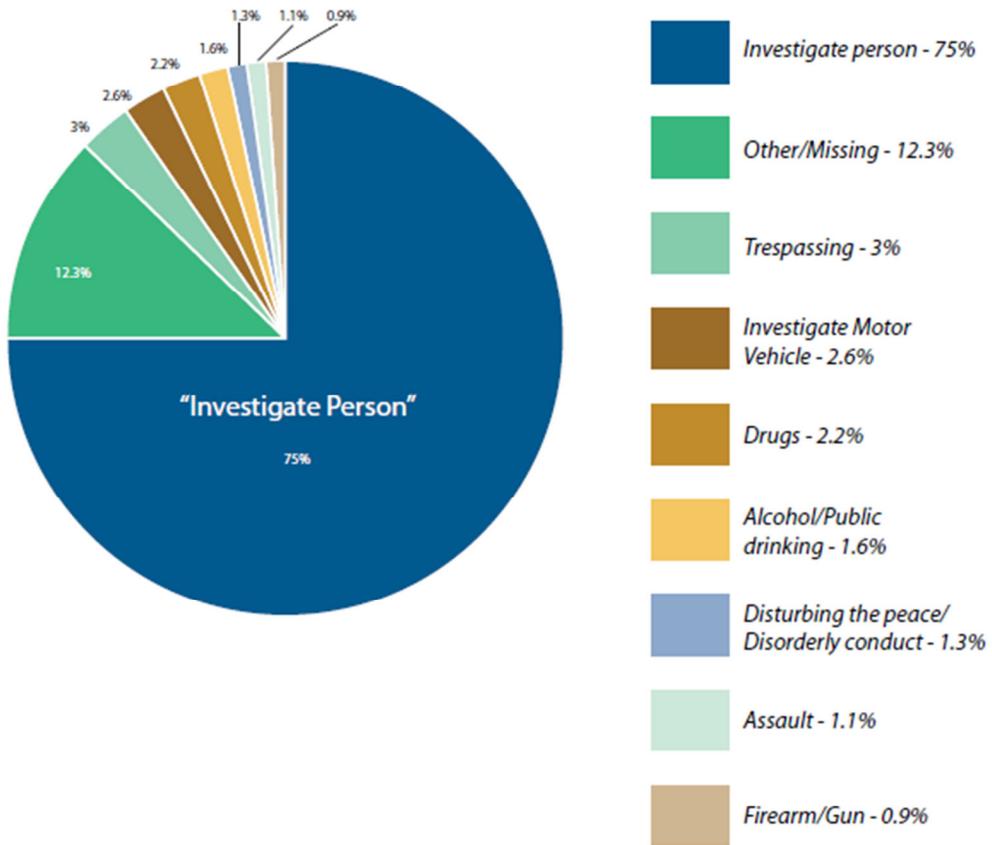
Neighborhood Disparities: Boston Police-Civilian Encounters from 2007 – 2010, in the Three Most-Targeted and Three Least-Targeted Districts



- In 75% of all FIOFS Reports, BPD officers cited “investigate person” as the reason for the interrogation, observation, frisk or search.

Reasons for Interrogation Observation, Frisk, or Search from 2007 – 2010

“Investigate Person” was the most common reason given, yet it doesn’t reference a crime.



aclum.org/stopandfrisk

Bibliography for Rahsaan Hall's Presentation

- Segal, Matthew *Beyond #BlackLivesMatter: Police Reform Must Be Bolstered By Legal Action* found at <https://www.theguardian.com/commentisfree/2016/jul/27/beyond-black-lives-matter-police-reform-legal-action>
- Shima Baradaran, *Rebalancing the Fourth Amendment* 102 Geo. L.J. 1, 16 (2013)
- Cole, David *Engines of Liberty*. New York: Basic Books (2016)
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- David L. Faigman, *Normative Constitutional Fact-Finding: Exploring the Empirical Component of Constitutional Interpretation*, 139 U. Pa. L. Rev. 541, 566 (1991)
- Commonwealth v. Warren, 87 Mass.App.Ct. 476 (2015)
- Commonwealth v. Warren 457 Mass. 530 (2016)
- ACLU Foundation of Massachusetts (2014). *Black, Brown and Targeted: A Report on Boston Police Department Street Encounters from 2007 – 2010* found at <https://aclum.org/wp-content/uploads/2015/06/reports-black-brown-and-targeted.pdf>

Outline of Alison Siegler's Presentation

- Issue: Bringing motions for discovery and motions to dismiss on the grounds of selective law enforcement on the basis of race
 - Will discuss in the context of litigation in Chicago challenging the ATF's "fake stash house operations" in federal court
 - We can challenge these and other sting cases by filing discovery motions and motions to dismiss when a disproportionate percentage of the people the law enforcement agency targets are people of color.
- The vast majority of the people the ATF chooses to commit the created crime of "stash house robbery" are people of color.
 - Nationwide, 91% of the ATF's targets are people of color.
 - In Chicago, nearly 100 people have been charged with this crime in the past decade alone.
 - Race breakdown is just as bad as nationally: 92% are people of color
- Of the people charged with this fake crime in Chicago
 - 43 clients are still pending trial in federal district court.
 - Those 43 clients are spread across 12 separate pending federal criminal cases which are before 9 different federal district court judges.
- My Federal Criminal Justice Clinic at the University of Chicago Law School recently filed motions to dismiss in all 12 of the cases.
 - *See, e.g.*, Motion to Dismiss for Racially Selective Law Enforcement in *United States v. Cousins*, 12-CR-865 (N.D. Ill.) (DE 265, filed 10/11/16) (Expert Report of Professor Jeffrey Fagan attached as Exhibit A)
 - All 12 of the motions and the expert report can be found at this link: <http://www.law.uchicago.edu/news/federal-criminal-justice-clinic-moves-dismiss-cases-because-atf-discriminated-basis-race>
- Press related to Chicago stash house litigation
 - *ATF Sting Operation Accused of Using Racial Bias in Finding Targets—the Majority of Them Being Minorities*, Chicago Tribune (Mar. 3, 2017), <http://www.chicagotribune.com/news/local/breaking/ct-atf-stash-house-sting-racial-discrimination-met-20170303-story.html>
 - *ATF Drug Stings Targeted Minorities, Report Finds* (9/23/16), <https://www.usatoday.com/story/news/2016/09/23/atf-stash-house-stings-minorities/90950474/>
- Our Chicago litigation is an example of how the defense bar can collaborate on systemic litigation to combat race-based practices.
- Federal criminal defense attorneys in other districts are pursuing similar challenges
 - San Francisco Federal Defender and panel spearheaded an incredible combined selective enforcement and prosecution challenge against a DEA operation there.
 - Systemic challenge litigated on behalf of 37 clients in 12 separate cases.
 - Filed discovery motion: Amended Motion to Compel Discovery on Selective Prosecution and Enforcement and Memorandum of Points and Authorities in Support of Motion in *United States v. Mumphrey et al.*, 3:14-CR-00643 (EMC) (N.D. Cal.) (DE 119, filed 12/2/15) (not attached; available on Pacer)
 - Won discovery regarding selective enforcement.

- Order Granting Selective Enforcement Discovery in San Francisco: *United States v. Mumphrey*, 2016 WL 3548365 (N.D. Cal. June 30, 2016)
 - *See Federal Judge Finds Evidence of Racial Bias by S.F. Police*, San Francisco Chronicle (June 30, 2016), <http://www.sfchronicle.com/news/article/Federal-judge-finds-evidence-of-racial-bias-by-8335739.php?t=21608d1409baa6eec6&cmpid=twitter-premium>
 - US Attorney’s Office then dismissed all of the cases!
- Albuquerque Federal Defender is challenging a different ATF gun and drug sting which the ATF calls Operation “Worst of the Worst”
 - Filed a motion requesting discovery in support of a selective enforcement claim in which they showed that, of the 103 defendants pursued in the operation, 27% were black, while the population of Albuquerque is only 3% black.
 - Defendant’s Motion to Compel Discovery re Selective Enforcement in *United States v. Lonnie Jackson*, 16-CR-2362-MCA (D.N.M.) (DE 29, filed 4/19/17)
 - ATF was criticized by the local press for this operation. *See Feds’ Sting Ensnared Many ABQ Blacks, not “Worst of the Worst,”* <http://nmindepth.com/2017/05/07/feds-sting-ensnared-many-abq-blacks-not-worst-of-the-worst/>
 - The judge granted discovery: Order Granting Selective Enforcement Discovery re ATF operation in New Mexico: *United States v. Casanova*, 16-CR-02917-JAP (D.N.M. June 12, 2017)
- SDNY Federal Defender marshaled statistics like ours to bring an excellent selective enforcement discovery motion in an ATF fake stash case called *Lamar*
 - Cites to motions
 - Discovery Motion with exhibits A, B, F in *United States v. Lamar et al.*, 14-CR-726 (PGG) (SDNY) (DE 28-30, filed 3/16/15)
 - Reply Brief with expert declaration in *Lamar* (DE 34, filed 4/20/15)
 - Motions denied

Legal Standard

- There are two different stages to any litigation regarding selective law enforcement or selective prosecution:
 - 1. The first stage is discovery
 - 2. The second stage is a motion to dismiss the indictment for selective pros or enforcement.
 - This is a pretrial issue, not a defense at trial; doesn't go to guilt/innocence
 - The problem is that even to get the discovery necessary to prevail on a motion to dismiss, we have to provide a certain amount of evidence of discrimination!
 - This often feels like a catch 22.
- The legal standard is similar at both the discovery stage and the motion to dismiss stage.
 - We need to prove 2 things.
 - We have to show that the law enforcement policy ““had a discriminatory effect and that it was motivated by a discriminatory purpose.”” *United States v. Armstrong*, 517 U.S. 456, 465 (1996) (quoting *Wayte v. United States*, 470 U.S. 598, 608 (1984)).
 - To demonstrate discriminatory effect, *Armstrong* requires us to provide “evidence that similarly situated defendants of other races could have been prosecuted, but were not.” *Armstrong*, 517 U.S. at 469.
 - Chicago: Since this is a selective enforcement case, we had to show that there were similarly situated white people available to be targeted, but that the ATF was not targeting them to the same degree as people of color.
- To meet that standard, we have to obtain evidence about the racial composition of 2 groups of people.
 - (1) The group of people subjected to the problematic tactic: The defendant group or the targeted group
 - In stash house context: the 94 defendants charged in fake stash house cases in Chicago since 2006
 - (2) The similarly situated comparison group
 - In stash house context is defined by the ATF's targeting criteria.

Steps in the Litigation

- 1) Obtain evidence about the Defendant Group before requesting discovery
- 2) Consult with potential expert witnesses
- 3) Request discovery re the Defendant Group & law enforcement criteria; file discovery motions
- 4) Obtain evidence of the racial composition of the similarly situated comparison group
- 5) Obtain expert report
- 6) File Motions to Dismiss

1) Obtain evidence about the Defendant Group before requesting discovery

- The first step in this kind of systemic litigation is to obtain as much evidence about the defendant group as possible on your own, before requesting discovery.
- Coordinate w the PD's office and any legal clinic.
- Acquire information about all of the defendants in your district who've ever been charged in this type of case.

- Gather case numbers, clients' names, and client's race
- If possible, gather clients' criminal histories
- For pending, pretrial cases, join forces
- Example: Chicago stash house cases
 - Figured out full universe of clients charged in these cases
 - Pacer searches.
 - Search Pacer through Bloomberg
 - Gathered information about the race of each client by reaching out to the assigned attorney.
 - Discovered the stark race disparity in the defendant group in Chicago

2) **Consult with potential expert witnesses**

- Consult with potential expert witnesses
 - Google search and a search of your local university and law school websites
 - Want someone who conducts empirical analyses of race disparities:
 - Law professors with a focus on empirics, economics, or statistics.
 - Profs from other disciplines: economics, public policy, etc
 - Ask people to consult w/you in a pro bono capacity:
 - Who's the best expert for this?
 - What kind of analyses would an expert do?
 - What kind of data might an expert need?
 - Lay out the legal standard for them so they understand exactly what needs to be proved
- Example: Chicago cases
 - One of the experts we consulted with is Issa Kohler-Hausmann, who was hired by attorneys at the SDNY Fed Defender to launch a similar challenge in the Lamar case (see above)
 - We hired a nationally recognized expert on race disparities in policing to perform an empirical analysis to support our motions to dismiss.
 - Professor Jeffrey Fagan from Columbia Law School.
 - Was the expert in the successful Stop and Frisk Litigation against NYPD
 - To hire Professor Fagan, we needed to file a motion for the appointment of an expert under § 3006A of the CJA, since all of our clients are indigent
 - For that motion, we joined forces with all of the attorneys on the current pending, pretrial cases to hire a single expert

3) **Request discovery re the Defendant Group & law enforcement criteria; file discovery motions**

- Request discovery from the government and file discovery motions.
- In Chicago: defense surmounted Armstrong's high bar and won selective enforcement discovery motions in 7 of the cases Won discovery about the racial composition of the Defendant Group
 - Order, *United States v. Brown*, 12-CR-632, DE 153 (N.D. Ill. July 31, 2013) (Castillo, C.J.)
 - *United States v. Paxton*, 2014 WL 1648746 (N.D. Ill. April 17, 2014)

- *United States v. Brown et al.*, 12-CR-632 (N.D. Ill.): DE 153 (7/31/13); DE171 (11/8/13); DE 261 (10/3/14)
- *United States v. Alexander, et al.*, 11-CR-148 (N.D. Ill.): *United States v. Alexander*, 2013 WL 6491476 (N.D. Ill. Dec. 10, 2013); DE 171 (12/10/13); DE 243 (2/10/15)
- Also won discovery of the ATF manuals
 - Order, *United States v. Brown*, 12-CR-632, DE 153 (N.D. Ill. July 31, 2013) (Castillo, C.J.)
 - Manuals state the agency’s targeting criteria and its internal requirements for its stash house operations.
 - Manuals are key to constructing the similarly situated comparison group and to ascertaining whether the agency is following its own rules.
 - Chicago: Manuals are still under seal, but our motion and expert report are public and include important information from the manuals.
- USAO appealed one of our discovery wins to the Seventh Circuit.
 - Clinic & Fed Defender litigated appeal of discovery victories
 - *United States v. Davis*, 766 F.3d 722 (7th Cir. 2014): Govt appeal dismissed!
 - USAO sought en banc rehearing
- En banc opinion: *United States v. Davis*, 793 F.3d 712 (7th Cir. 2015)
 - “The racial disproportion in stashhouse prosecutions remains troubling, . . . and it is a legitimate reason for discovery provided that the district court does not transgress *Armstrong* or an applicable privilege.” *Davis*, 793 F.3d at 722
 - Support for a discovery motion requesting the ATF’s criteria
 - If the judge has “reason to think that suspects of another race, and otherwise similarly situated, would not have been offered the opportunity for a stashhouse robbery, it might be appropriate to require the FBI and ATF to disclose, in confidence, their criteria for stashhouse stings. Analysis of the targeting criteria (and whether agents followed those rules in practice) could shed light on whether an initial suspicion of race discrimination . . . is justified.” *Davis*, 793 F.3d at 723.
 - *Davis* distinguished the *Armstrong* scenario, where the defense is requesting discovery about the practices of the USAO, from a scenario in which we’re asking for discovery about the practices of a law enforcement agency.
 - “But some of the discovery asks for information from supervisors or case agents of the FBI and ATF, and this is outside the scope of *Armstrong*, the executive privilege, and the deliberative-process privilege.” *Davis*, 793 F.3d at 722 (emphasis added).
 - “In sum, the sort of considerations that led to the outcome in *Armstrong* DO NOT APPLY to a contention that agents of the FBI or ATF engaged in racial discrimination when selecting targets for sting operations, or when deciding which suspects to refer for prosecution.” *Davis*, 793 F.3d at 721 (emphasis added).
 - “But the defendants’ principal targets are the ATF and the FBI. They maintain that these agencies offer lucrative-seeming opportunities to black and Hispanic suspects, yet not to those similarly situated in criminal background and interests but of other ethnicity. If the agencies do that, they have violated the

Constitution—and the fact that the United States Attorney may have prosecuted every case the agencies presented, or chosen 25% of them in a race-blind lottery, would not matter, since the constitutional problem would have preceded the prosecutor’s role and could not be eliminated by the fact that things didn’t get worse at a later step. Cf. *Connecticut v. Teal*, 457 U.S. 440, 102 S. Ct. 2525, 73 L. Ed. 2d 130 (1982) (rejecting a “bottom-line defense” in an employment-discrimination suit).” *Davis*, 793 F.3d at 720.

- Outcome: We kept the discovery we’d received in 6 of the cases.
- Filed additional discovery motions
 - Supplemental Discovery Motion in *United States v. Hummons & Williams*, 12-CR-887 (N.D. Ill.) (DE 178, filed 2/16/15) (redacted per protective order)
 - Judge ordered the government to provide us with the complete criminal histories of the 94 stash house defendants
 - We also got an ATF document called a “Takedown Memorandum” that described the details of the ATF’s investigation in each case.

4) Obtain evidence of racial composition of the similarly situated comparison group

- The next step is to obtain evidence about the racial composition of that second group, the similarly situated comparison group (SSCG).
- Example: Chicago cases
 - SSCG is defined by law enforcement’s purportedly race-neutral targeting criteria.
 - From the discovery, we learned that the ATF purported to be targeting people with prior convictions for guns, robbery, and other violent crimes.
 - Obtained criminal history data re the universe of people who had those convictions and were in the same geographic area and time period in which the stash house cases arose.
 - There were 292,442 people who had convictions for the offenses the ATF claimed to be targeting.
 - In our case, the government’s expert takes a very different position on the definition of the SSCG. See Govt Response Brief & expert report.

5) Obtain expert report

- Chicago cases: Expert prepared a report that provides statistical evidence that the ATF selected its targets on the basis of race—see Exhibit A to our motion to dismiss

6) File Motion to Dismiss

- In Chicago, we filed motions to dismiss in 12 cases:
 - *U.S. v. Brown*, 12-cr-632 (Castillo, J.); *U.S. v. Williams*, 12-cr-887 (Castillo, J.); *U.S. v. Alexander*, 11-cr-00148 (St. Eve, J.); *U.S. v. Jackson*, 13-cr-636 (Durkin, J.); *U.S. v. Paxton*, 13-cr-103 (Gettleman, J.); *U.S. v. Hadley*, 12-cr-713 (Feinerman, J.); *U.S. v. Cousins*, 12-cr-865 (Feinerman, J.); *U.S. v. Davis*, 13-cr-63 (Ellis, J.); *U.S. v. Flowers*, 11-cr-779 (Coleman, J.); *U.S. v. Mayfield*, 15-cr-497 (Chang, J.); *U.S. v. DeJesus*, 12-cr-511 (Coleman, J.); *U.S. v. Elias*, 13-cr-476 (Leinenweber, J.)

- Argued that the expert report prepared by Professor Fagan provides the evidence of discriminatory effect that was missing from *Armstrong* and every case since. This chart from our motion illustrates that point:

FIGURE 1: Stash House Cases— Comparative Evidence		FIGURE 2: Armstrong— NO Comparative Evidence	
<u>Defendant Group</u>	<u>Comparison Group</u>	<u>Defendant Group</u>	<u>Comparison Group</u>
94 Stash House defendants	292,442 people who met ATF's targeting criteria	Defendants in federal crack cocaine cases	NONE PRESENTED
Geographic Area → 8 counties in IL	Geographic Area → 8 counties in IL	Geographic Area → Los Angeles	
Time period → 2006-2013	Time period → 2000-2013	Time period → 1991	
Racial Composition → 78.7% Black	Racial Composition → 55.4% Black	Racial Composit'n → 100% Black	
Likelihood Racial Composition Result of Chance → 0%		Likelihood Racial Composition Result of Chance → ?	

- Another argument is that the Report provides evidence of discriminatory intent
 - Professor Fagan conducts 3 regression analyses that rule out race-neutral explanations for the ATF's decisions.
 - He comes to the conclusion that the stark racial disparity cannot be explained on grounds other than race: "These analyses show that the ATF is discriminating on the basis of race in selecting Stash House defendants."

- Additional evidence that the ATF intentionally selected its targets on the basis of race.
 - We include a chart that shows that the ATF departed from its own internal criteria when it targeted people of color. The red blocks indicate the deviations.
 - But when the ATF pursued white people, they followed their criteria.
 - These racially-skewed departures from substantive and procedural criteria establish discriminatory intent under Supreme Court law. See *Village of Arlington Heights v. Metropolitan Housing Development Corp.*, 429 U.S. 252, 266–68 (1977).

Discriminatory Intent: ATF Departures from Criteria (black)

ATF Departures from Criteria, by Case and Race

No.	Case Name	Case No.	Def. Name	Def. Race	Fulfilled requirement to target established robbery groups	Fulfilled requirement that two targets be violent offenders	Fulfilled requirement that all members be currently criminally active	Fulfilled requirement that one target have a past violent conviction	Fulfilled requirement that the group have access to weapons	Fulfilled requirement to document all known suspects in a Takedown Memo	Fulfilled requirement to identify all suspects before the arrest day	Fulfilled requirement to meet with at least two members of the crew	Fulfilled requirement to meet with the targets three times	Total No. Deviations
Cases Involving All Black Defendants														
1	United States v. Jackson	13-CR-436	Thomas Jackson Calvin Williams, Jr. Densetius Wynton Nolan Swain	Black Black Black Black	No	Yes	No	Yes	Yes	Yes	No	Yes	Yes	3
2	United States v. Paxton	13-CR-103	Korrelan Paxton Randy Wilton Randy Paxton Adonis Berry Matthew Webster	Black Black Black Black Black	Yes	No	No	Yes	Yes	No	No	Yes	Yes	4
3	United States v. Davis	13-CR-063	Paul Davis Alfred Withers Julian Morris Jayvon Byrd Vernon Smith Cory Barbee	Black Black Black Black Black Black	No	No	No	Yes	No	No	No	Yes	Yes	7
4	United States v. Williams	12-CR-487	Antonio Williams John T. Humann Howard Lee	Black Black Black	No	Yes	No	Yes	No	No	No	Yes	Yes	5
5	United States v. Cousins	12-CR-865	David Cousins Michael Cousins Damon Lloyd	Black Black Black	No	Yes	No	Yes	Yes	No	No	Yes	Yes	4
6	United States v. Payne	12-CR-454	William Payne Brandon Jackson Brian Jackson	Black Black Black	No	No	Yes	Yes	Yes	Yes	No	Yes	Yes	3
7	United States v. Brown	12-CR-632	Dwaine Brown Kenneth Taylor Alfred Washington Dwane Jones Christopher Davis	Black Black Black Black Black	No	Yes	No	Yes	Yes	No	No	Yes	Yes	4

ATF Departures from Criteria, by Case and Race

No.	Case Name	Case No.	Def. Name	Def. Race	Fulfilled requirement to target established robbery groups	Fulfilled requirement that two targets be violent offenders	Fulfilled requirement that all members be currently criminally active	Fulfilled requirement that one target have a past violent conviction	Fulfilled requirement that the group have access to weapons	Fulfilled requirement to document all known suspects in a Takedown Memo	Fulfilled requirement to identify all suspects before the arrest day	Fulfilled requirement to meet with at least two members of the crew	Fulfilled requirement to meet with the targets three times	Total No. Deviations
Cases Involving Mostly White Defendants														
22	United States v. Farella	09-CR-087	Frank Farella Donald Catanzaro Michael Blais	White White White	Yes	Yes	No	Yes	Yes	Yes	Yes	Yes	Yes	1
23	United States v. George	07-CR-441	Robert George Michael Spagnola	White White	Yes	Yes	Yes	Yes	Yes	Yes	Yes	Yes	Yes	0
24	United States v. Corson	06-CR-930	Aaron Corson Marcus Corson Oscar Alvarez	White White Hispanic	Yes	Yes	Yes	Yes	Yes	Yes	Yes	Yes	No	1

- We also provided evidence that in some of the cases, the ATF agents expressly recruited black people on the basis of race.
- Current state of stash house cases in Chicago
 - Government filed a response to MTDs supported by responsive report from expert
 - Government's Response to MTD in *United States v. Cousins*, 12-CR-865 (N.D. Ill.) (DE 294, filed 2/17/17) (Expert Report of Professor Max Schanzenbach attached as Exhibit 1)
 - Defense reply briefs due in the fall
 - Joint evidentiary hearing in the winter

Victories Along the Way in Chicago Stash House Litigation

- Since our litigation started, U.S. Attorney's Office:
 - 1) Stopped bringing fake stash house cases
 - 2) Dismissed most of the mandatory minimum drug charges in our pending cases.
 - As a result of the dismissals, many clients who were previously looking at mandatory minimum sentences of 15 to 25 years in prison with the drug charges are now facing 5-year mandatory sentences. The FCJC has also successfully litigated bond motions on behalf of its clients in these cases.
 - Chicago Tribune ran a front page story: *Chicago Prosecutors Quietly Drop Charges Tied to Drug Stash House Stings*, Chicago Tribune (1/29/15), at [this link](#).
 - New York Times also ran a story: *Prosecutor Drops Toughest Charges in Chicago Stings That Used Fake Drugs*, N.Y. Times (1/30/15), at [this link](#).
- Bond victories
 - At the beginning, most of the 43 clients were in custody
 - Now, ~30 of the clients are out on bond

Bibliography for Alison Siegler's Presentation

- Motions to Dismiss for Racially Selective Law Enforcement in Chicago
 - *ATF Sting Operation Accused of Using Racial Bias in Finding Targets—the Majority of Them Being Minorities*, Chicago Tribune (Mar. 3, 2017), <http://www.chicagotribune.com/news/local/breaking/ct-atf-stash-house-sting-racial-discrimination-met-20170303-story.html>
 - Motion to Dismiss for Racially Selective Law Enforcement in *United States v. Cousins*, 12-CR-865 (N.D. Ill.) (DE 265, filed 10/11/16) (Expert Report of Professor Jeffrey Fagan attached as Exhibit A)
 - Link to 12 pending Motions to Dismiss: <http://www.law.uchicago.edu/news/federal-criminal-justice-clinic-moves-dismiss-cases-because-atf-discriminated-basis-race>
 - Government's Response to MTD in *United States v. Cousins*, 12-CR-865 (N.D. Ill.) (DE 294, filed 2/17/17) (Expert Report of Professor Max Schanzenbach attached as Exhibit 1)

- Discovery Motions & Briefing (San Francisco, New York, Chicago)
 - Amended Motion to Compel Discovery on Selective Prosecution and Enforcement and Memorandum of Points and Authorities in Support of Motion in *United States v. Mumphrey et al.*, 3:14-CR-00643 (EMC) (N.D. Cal.) (DE 119, filed 12/2/15)
 - Defendant's Motion to Compel Discovery re Selective Enforcement in *United States v. Lonnie Jackson*, 16-CR-2362-MCA (D.N.M.) (DE 29, filed 4/19/17)
 - Discovery Motion with exhibits A, B, F in *United States v. Lamar et al.*, 14-CR-726 (PGG) (SDNY) (DE 28-30, filed 3/16/15)
 - Reply Brief with expert declaration in *Lamar* (DE 34, filed 4/20/15)
 - Supplemental Discovery Motion in *United States v. Hummons & Williams*, 12-CR-887 (N.D. Ill.) (DE 178, filed 2/16/15) (redacted per protective order)

- Discovery Opinions & Orders
 - Order Granting Selective Enforcement Discovery in San Francisco: *United States v. Mumphrey*, 2016 WL 3548365 (N.D. Cal. June 30, 2016)
 - Order Granting Selective Enforcement Discovery re ATF operation in New Mexico: *United States v. Casanova*, 16-CR-02917-JAP (D.N.M. 6/12/17)
 - Seventh Circuit's en banc opinion in *United States v. Davis*, 766 F.3d 722 (7th Cir. 2015)—see Part III
 - *United States v. Paxton*, 2014 WL 1648746 (N.D. Ill. April 17, 2014)
 - *United States v. Brown et al.*, 12-CR-632 (N.D. Ill.): DE 153 (7/31/13); DE171 (11/8/13); DE 261 (10/3/14)
 - *United States v. Alexander, et al.*, 11-CR-148 (N.D. Ill.): *United States v. Alexander*, 2013 WL 6491476 (N.D. Ill. Dec. 10, 2013); DE 171 (12/10/13); DE 243 (2/10/15)

- Press related to selective enforcement and selective prosecution litigation
 - Chicago
 - *ATF Sting Operation Accused of Using Racial Bias in Finding Targets—the Majority of Them Being Minorities*, Chicago Tribune (Mar. 3, 2017), <http://www.chicagotribune.com/news/local/breaking/ct-atf-stash-house-sting-racial-discrimination-met-20170303-story.html>
 - *ATF Drug Stings Targeted Minorities, Report Finds* (9/23/16), <https://www.usatoday.com/story/news/2016/09/23/atf-stash-house-stings-minorities/90950474/>
 - *Chicago Prosecutors Quietly Drop Charges Tied to Drug Stash House Stings*, Chicago Tribune (1/29/15), at [this link](#).
 - *Prosecutor Drops Toughest Charges in Chicago Stings That Used Fake Drugs*, N.Y. Times (1/30/15), at [this link](#).
 - San Francisco
 - *Federal Judge Finds Evidence of Racial Bias by S.F. Police*, San Francisco Chronicle (June 30, 2016), <http://www.sfchronicle.com/news/article/Federal-judge-finds-evidence-of-racial-bias-by-8335739.php?t=21608d1409baa6eec6&cmpid=twitter-premium>
 - Albuquerque
 - *Feds' Sting Ensnared Many ABQ Blacks, not "Worst of the Worst,"* <http://nmindepth.com/2017/05/07/feds-sting-ensnared-many-abq-blacks-not-worst-of-the-worst/>