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Confronting Race in the Criminal Justice System

The ABA's Racial Justice Improvement Project

BY CYNTHIA JONES

The criminal justice system in the United States is not post-racial. Across the country, African Americans, Latinos, and other minorities are overrepresented at each stage in the adjudication process. It is not uncommon for some to dismiss these disparities with oversimplified explanations, such as “*Minorities just commit a disproportionate amount of crimes,*” or “*The cops, prosecutors, and judges are racist and treat minorities more harshly.*” Neither of these sentiments reflects the complexity of the problem of racial disparities in the criminal justice system. While minorities have a higher rate of criminal activity in some crime categories, this does not explain why minority defendants who commit the same crimes and have the same criminal history as white defendants are more likely to be denied pretrial release and are sentenced more harshly. Likewise, while there are some bad actors in the criminal justice system whose professional judgment is infected by racial bias, “race neutral” laws that are fairly and evenly enforced across all racial groups can still have a disparate impact on minority defendants.

To the extent there is a single cause of racial disparities in the criminal justice system, the culprit is likely discretionary power—who has it and how they use it to administer the criminal laws. Most criminal justice officials have wide latitude to make discretionary decisions that affect everything from whether a person will be stopped, frisked, arrested, or strip searched to discretionary determinations about whether a defendant will be charged with a serious felony, offered a plea bargain, detained prior to trial, or placed in a diversion program. Even during the posttrial stage, there are discretionary decisions made by judges, corrections officials, and community supervision officers regarding the conditions of probation, the location of confinement, and whether a parolee will be sent back to prison for a very minor technical violation.

Most agree that the goal of “achieving justice” necessitates criminal justice officials having flexibility to take into account the special circumstances in a particular case. Thus, discretionary authority is not undesirable when the actors engage in fair, bias-free decision making, applying policies and practices that do not have a disparate impact on minority communities. Therein lies the problem; many of the critical discretionary decisions that fuel the criminal adjudication process are made pursuant to informal (and often unwritten) policies and practices, and there is usually no entity inside or outside the criminal justice system charged with examining these discretionary decisions to determine whether they produce a pattern of racial disparities.

In this article, I briefly explore some of the legal barriers that prevent defendants from presenting evidence of racial disparities as a means of seeking relief from government action in criminal cases. I will also discuss the innovative work of the Racial Justice Improvement Project, a Criminal Justice Section initiative designed to reform policies and practices that produce racial disparities in local criminal justice systems.

Litigating Racial Disparities as a Defense to Criminal Charges

The most direct route to attacking racial disparities in the criminal adjudication process is for individual defendants who are adversely affected by a pattern of racial disparities to challenge the practice in their case (i.e., move to dismiss the indictment or suppress the evidence). This would shed much needed light on the problem and could serve as the impetus for critical systemic reforms in the way criminal justice officials use their discretion to administer the criminal laws. Under the current state of the law, however, even if a criminal defendant could access data and prove that he or she is in a class of minority

defendants adversely (and disproportionately) affected by a policy or practice, it is unlikely that the defendant could successfully use the existence of the racial disparity as grounds for relief from the government's actions. For example, a Latino parolee who is arrested on a new charge is unlikely to prevail in halting a parole revocation proceeding by arguing (and proving) that the parole office either has not instituted revocation proceedings against similarly situated white parolees who were arrested, or that parole revocation is sought at a significantly higher rate against Latinos.

Despite the fact that there is a wealth of research showing racial disparities in the state and federal adjudication process from pretrial to postconviction, and notwithstanding a constitutional prohibition against the selective enforcement of the criminal laws based on race, a criminal defendant faces significant hurdles in attempting to assert a constitutional challenge to the government's discretionary decisions in criminal cases. Such claims, rooted in (and restricted to) the equal protection clause of the Fifth and Fourteenth Amendments to the United States Constitution, are extremely difficult to litigate.

If a minority defendant is stopped by the local police for a minor traffic infraction and wants to allege that he or she is the victim of racial profiling because the local police department disproportionately stops and searches minority motorists during routine traffic stops, even if true, the defendant would not likely prevail in challenging the actions of the police. In *Whren v. United States*, 517 U.S. 806 (1996), the defendant, an African-American motorist, claimed that the traffic stop by the police was pretextual, and that the police used their observation of a relatively minor traffic infraction as a basis to stop the defendant's vehicle to investigate unrelated crimes. In rejecting the defendant's claim that the traffic stop was an unreasonable seizure in violation of the Fourth Amendment, the Supreme Court held that, as long as the officer has probable cause to believe there is a traffic violation, however minor, the individual officer's "subjective intentions play no role" in the Fourth Amendment analysis. In so doing, the Supreme Court effectively placed the pervasive problem of racial profiling beyond the reach of the

Fourth Amendment. Post-*Whren*, even if the defendant could show that the officers used their discretionary authority to stop a vehicle because the driver is a Muslim, as long as the police officer can point to some minor traffic infraction as the basis for the traffic stop, the actions of the police do not violate the Fourth Amendment.

Significantly, the *Whren* court stated that "the constitutional basis for objecting to intentionally discriminatory application of laws is the Equal Protection Clause." The court made this statement, however, with full knowledge that one month before *Whren*, in *United States v. Armstrong*, 517 U.S. 456 (1996), the court imposed a significant restraint on the ability of defendants seeking to raise such equal protection challenges to the discretionary authority of criminal justice officials. In *Armstrong*, the defendant sought discovery and/or dismissal of federal drug charges and claimed that, because he is black, the government chose to indict him in federal court (where he faced stiffer penalties) as opposed to state court. To prove his race-based selective prosecution claim, the defendant filed a discovery motion seeking information in the government's possession regarding the race of others prosecuted under the same federal drug statute. In support of the motion, the defendant provided information that all others prosecuted under the federal drug laws were black. The Supreme Court overruled the district court's order for the government to produce discovery on the race of those prosecuted and the criteria used by the government for prosecuting certain drug cases in federal court. As in *Whren*, the court stated, "so long as the prosecutor has probable cause to believe that the accused committed an offense defined by statute, the decision whether or not to prosecute, and what charge to file or bring before a grand jury, generally rests entirely in [the prosecutor's] discretion."

Although the *Armstrong* court acknowledged that prosecutorial discretion is subject to Fifth Amendment equal protection restraints and cannot be exercised "based on . . . race, religion, or other arbitrary classification," *Armstrong* is troubling because the court did not reach the merits of the selective prosecution claim. Instead, the court denied the defendant the right to obtain the discovery needed to prove there was even merit to his claim. The court ruled that before a criminal defendant may even obtain discovery on a selective prosecution claim, the defendant must produce credible evidence that similarly situated defendants of other races could have been prosecuted, but were not prosecuted. As many scholars have noted, because this information is almost always exclusively in the possession of the government, the burden imposed by the court in *Armstrong* unduly restricts the ability of defendants to use the equal protection clause to obtain relief for claims of discriminatory application of the criminal laws. (See generally ANGELA J. DAVIS, *ARBITRARY JUSTICE: THE POWER OF THE AMERICAN PROSECUTOR* 102-03 (Oxford 2007).) Not surprisingly, the holding in *Armstrong* has proved virtu-

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ally insurmountable. (See *United States v. Venable*, 666 F.3d 893 (4th Cir. 2012) (holding African-American defendant's evidence that two white defendants were not prosecuted in federal court under Project Exile for weapons-related offenses and evidence of a pattern of African Americans subjected to federal prosecution insufficient to obtain discovery in support of selective prosecution claim).)

Defendants face similar barriers to presenting evidence of racial bias and patterns of racial disparities in death penalty cases. In *McCleskey v. Kemp*, 481 U.S. 279 (1987), the court found no equal protection violation, despite the uncontroverted evidence that the death penalty was sought more frequently in cases where the victim is white and the defendant is black. In upholding the death sentence, the court reasoned that McCleskey failed to prove that there was discrimination by the government against him in seeking the death penalty. In 2012, however, 25 years after *McCleskey*, a condemned prisoner was able to get his death sentence overturned by using a state statute, North Carolina's Racial Justice Act, to prove, among other things, that "race was a significant factor in decisions to seek or impose the death sentence" (See *State v. Robinson*, No. 91 CRS 23143 (N.C. Super. Ct. Apr. 20, 2012).)

In sum, direct litigation to challenge the discretionary authority of police and prosecutors is generally not a viable strategy for addressing racial disparities in the criminal justice system. As discussed below, a collaboration among criminal justice officials is more likely to produce systemic changes that will ultimately reduce racial disparities in the adjudication process.

The Racial Justice Improvement Project

In fall 2010, the ABA Criminal Justice Section, in collaboration with the Bureau of Justice Assistance, launched the Racial Justice Improvement Project. The purpose of this two-year project is to work with officials in state and local criminal justice systems to identify the discretionary decision points in the adjudication process where policies and practices have an adverse impact on minorities and to develop evidence-based policy reforms to correct these racial disparities. The four jurisdictions chosen for the project are the state of Delaware; Saint Louis County, Minnesota; Kings County (Brooklyn), New York; and New Orleans, Louisiana. The task force in each jurisdiction received training, technical support, and oversight by the ABA, and a total of \$24,000 to assist them in developing and implementing their racial justice reform. The ABA also advocated for (and frequently received) supplemental funding to assist each task force with training programs and other services needed along the way to develop their reform initiatives.

An essential component of this policy reform initiative is having the work of each task force developed and implemented under the watchful eye of the top criminal justice officials in each jurisdiction, all of whom have the ability to make and

change policies and practices, and the expertise needed to successfully implement reforms. Thus, the composition of each task force was required to consist of the district attorney, the chief public defender, the police chief, the chief judge of the criminal court, and a representative from a community organization that focuses on criminal justice reform.

At the outset, we placed several restrictions on the work of each task force. First, each task force was cautioned that purely legal reforms that require legislative action or a litigation strategy to reverse binding precedent are outside the scope of this project. Second, broad, long-range reforms that cannot be implemented during the two-year grant period are not well-suited to the goals of the project. Also, to avoid the inevitable tension, finger-pointing, and defensiveness that often accompanies discussions of race and racial disparities, all policy reforms of the project must be supported by research and data collected from the various agencies within the local criminal justice system. This evidence-based approach also provides a baseline to measure the success of the reform post-implementation.

Within these parameters, each task force was charged with applying their considerable collective knowledge to identify a racial disparity in their local criminal justice system that was caused by (and could be redressed by) a discretionary policy or practice. In the first year, each task force formulated a "working hypothesis" regarding the exact cause of the disparity and collected and analyzed data to confirm the hypothesis and document the extent of the racial disparity. Currently, during the second year of the project, each task force is actively developing and implementing a specific racial justice reform.

Minnesota

Saint Louis County, Minnesota, spans over 170 miles across the northeastern border of Minnesota and sits within the Sixth Judicial District of the state court system. There are approximately 226,000 people who reside in Saint Louis County, which is overwhelmingly (93 percent) Caucasian, with a small (1 percent) African-American population, a slightly larger (2 percent) Native-American population, and a very small Latino population. Both Native Americans and African Americans are overrepresented in the county criminal justice system. The task force chose to focus its work on racial disparities in pretrial detention and began collaborating with the criminal justice entities that oversee arraignments and bail determinations.

Current practices. Under Minnesota law, judges have wide latitude in making pretrial release decisions. Rule 6.02 of the Minnesota criminal procedure statute states that in making bond decisions, the court should consider factors such as community safety, the nature and circumstances of the offense, family ties, employment, financial resources, residence, criminal convictions, and prior history of appearing in court. In practice, however, not much of this information is actually

known by the arraignment court judge when the bail determination is made. The judge usually knows only the name of the arrestee, the current charge, and the arrestee's prior criminal history in the state of Minnesota. The probation office prepares pretrial release reports and provides community supervision to the arrestees if released by the court. Pretrial release reports are prepared when requested by the judge, but reports are not prepared in every case. Moreover, Rule 6.02 states that the "court must set money bail . . . on which the defendant may be released" in every case, but there are no specific guidelines on the amount of bail that should be imposed. As a result, many defendants are held in jail while awaiting trial because they cannot afford the bail imposed, and not because the court has sufficient information to determine whether they are a flight risk or pose a threat to community safety. The problem of overincarceration of the pretrial population is so severe that, for the last few years, Saint Louis County spends approximately \$1 million to house its detainees (most of whom are pretrial) in jails in neighboring counties in the state.

Proposed racial justice reform. The task force used a portion of its grant funds to hire a criminal justice research expert from the University of Minnesota to review and analyze pretrial release data obtained from the court. The expert's examination of felony cases in 2009 and 2010 showed that Caucasians were at least twice as likely as other racial categories to be released on their own recognizance, and minority defendants were more likely to have bail set, even after accounting for offense severity level and number of felony charges. Even Caucasians arrested while on probation were twice as likely to be released on their own recognizance than were similarly situated minority arrestees.

Over the course of the last year, the task force has been working with the judges and probation officers involved in the arraignment process to determine the reasons for the racial disparities in pretrial detention and how they can be corrected. One factor explored by the task force is whether the geographical distance that the arrestee lives from the courthouse is a factor used by arraignment judges and probation officers when evaluating an arrestee's suitability for release. If so, this race-neutral factor could have a disparate impact on many Native-American arrestees who live on distant reservations in the county. Another potential factor is the courtroom culture during arraignment proceedings. Judges are very deferential to the release/detention recommendations of the probation officers, and if probation officers do not recommend supervised release, that recommendation is generally honored by the court.

To date, the task force has taken several steps to address racial disparities in pretrial detention. First, the task force has met with every trial judge in the county, attended training on best practices and national standards for pretrial release, and consulted with the Washington, D.C.-based Pretrial Justice Institute on its pre-

trial detention practices. The task force plans to work with the court and probation office to shift and redefine the role of the judges and the probation officers during arraignment. Specifically, the task force plans to try to limit the role of probation to collecting and verifying the background information on arrestees that the arraignment judge is required to consider under Rule 6.02. This would empower the judge to make an informed and independent determination regarding pretrial release. Likewise, the task force hopes to work with the court to ensure that arraignment court judges have pretrial release investigations in each case before ordering pretrial detention, and expand the use of supervised release. Finally, the task force plans to work with judges to decrease reliance on money bonds that have effectively become a form of preventive detention for poor and minority arrestees. Finally, over the course of the year, the task force plans to host training sessions for probation officers and judges on pretrial release, implicit bias, and bias-free decision making. This training is a critical component of reforming how both groups exercise their discretion in evaluating minorities for pretrial release.

Delaware

The Delaware Racial Justice Task Force is the only group in the project that covers an entire state—all 1,954 square miles. The population of Delaware is approximately 65 percent Caucasian (non-Hispanic), 21 percent African American, and 8 percent Latino, but African Americans and Latinos are overrepresented throughout the Delaware criminal justice system. The task force decided to focus on racial disparities in probation revocation practices, and received enthusiastic support and cooperation from the director of Delaware Probation and Parole.

Current practices. While there are Delaware statutes governing the authority of probation officers, Delaware law gives probation officers broad discretion in determining how to supervise probationers and when to seek revocation, as opposed to the imposition of less drastic community-based sanctions. The Delaware Department of Corrections oversees probation, parole, and the state detention facilities. The Delaware probation authority supervises approximately 20,000 probationers and has six probation offices located throughout the state. A 2012 preliminary study showed that 39 percent of admissions to Delaware prisons were probation violators, a substantial number due to missed appointments, curfew violations, or positive drug tests. In addition, probation data from 2009–2011 showed that, across all three years, there were racial disparities in probation revocation. Specifically, African-American probationers were revoked at a higher rate than Caucasian probationers.

Proposed racial justice reform. The main focus of the task force reforms will be to work with the probation officials to develop policies and standards to guide the discretion

of probation officers in the supervision of probationers. The task force has already taken specific steps to address how race might be influencing the discretionary decisions of probation officers. The task force sponsored a day-long training on implicit bias and bias-free decision making for all supervisory probation officers. Implicit bias training has now been incorporated into the mandatory training that all new probation officers receive, and the Department of Probation and Parole professional conduct policy was amended to expressly prohibit discriminatory decisions by probation officers. Beyond these initial steps taken during the first year of the project, the task force is actively planning training programs on implicit bias for all probation officers, public defenders, and judges in Delaware. The task force also met with officials in the District of Columbia to examine their approach to addressing probation violations with graduated sanctions. This model could prove effective in providing probation officers with alternatives to seeking revocation for probation violators. The task force plans to monitor these and other reforms and track their impact on racial disparities in probation revocation rates.

New Orleans

Unlike the other jurisdictions in the project, the overwhelming majority of the residents of New Orleans are African American. Post-Katrina, there is also a growing number of Latinos in the city. This racial composition is, of course, reflected throughout the local criminal justice system. While there are areas of racial disparities in the New Orleans criminal justice system, many of the reforms needed to address these disparities have been initiated by other reform projects or the reforms did not fit within the limited parameters of this project. The task force, therefore, decided to focus its energy on increasing the capacity of their criminal justice system to address an unmet need of minorities in the New Orleans criminal justice system. Specifically, the task force proposed an expansion of the diversion program run by the Orleans Parish District Attorney's Office. The task force felt the diversion program was too restrictive to accommodate the many nonviolent defendants who should be able to participate in diversion and avoid prosecution for low-level criminal conduct.

Current practices. For the past few years, the Orleans Parish District Attorney's Office has run a drug treatment-based pretrial diversion program. Unlike many other diversion programs across the country, this diversion program is not governed by any statute or court rule, and the program was not developed or implemented in collaboration with the court or any other entity in the local criminal justice system. The DA's office has complete discretion to select and reject participants for the program. Moreover, there were no readily available written materials explaining the eligibility criteria for the program or setting forth the requirements for participants to com-

plete the program. As a result, little was known about the operation of the diversion program outside of the DA's office. This lack of information generated both suspicion and resentment in the community and throughout the local criminal justice system. To further complicate matters, criminal court judges were not kept informed about the status or progress of diversion participants whose cases languished for months on their court dockets. Although the expert hired by the task force examined extensive data and did not identify any racial disparities in the diversion program, the DA's office and the task force joined forces to implement numerous reforms to improve the program.

Proposed racial justice reform. The DA's office is quite proud of the overall success of its diversion program in providing drug treatment and related services, and was initially reluctant to open the program to task force scrutiny. Over time, top officials in the office welcomed the efforts of the task force to try to identify more nonviolent offenders for diversion, which would, in turn, allow the DA's office to devote its prosecution resources to the most violent offenders. In addition, the DA's office expressed interest in working with the task force to improve program participation by women with a history of prostitution-related offenses, and to get assistance with resources needed to better serve the growing population of Spanish speakers who, due to language barriers, could not fully participate in the diversion program.

Once all of the pertinent information regarding the diversion program was compiled, the task force and the DA's office produced a set of written materials that fully explain the eligibility criteria and program requirements for the diversion program. The task force then had the materials translated and reproduced in Spanish. In addition, the task force brokered a partnership between the diversion program staff and a local support group for women sex workers, and is currently working to arrange an onsite training with a Baltimore-based prostitution diversion program.

Prior to tackling the onerous task of proposing substantive changes to the diversion program, the task force hired an expert in pretrial diversion to provide critical guidance on "best practices" and national diversion standards. The task force also hosted a training program in New Orleans with representatives from several successful diversion programs across the country, and several members of the task force attended diversion training programs at a national conference. Armed with this wealth of knowledge and technical assistance, the task force began a productive collaboration with the DA's office to create a new, supplemental diversion program that will serve an additional population of defendants who do not need the intensive services and drug treatment required in the existing diversion program. Over the next year, the task force hopes to continue working with the DA's office to finalize and launch the new diversion program and track the progress of the participants.

New York

Kings County (Brooklyn), New York, encompasses over 71 square miles and is home to over 2.5 million people. The population of Brooklyn is incredibly diverse. More than 30 percent are African American, 19 percent are Hispanic, over 7 percent are Asian, slightly more than 40 percent are Caucasian, and others identify themselves as mixed-race. Brooklyn is also home to a wide range of immigrants from around the world. In fact, in many Brooklyn neighborhoods, English is not the predominate language spoken. The task force was initially formed and housed in the district attorney's office. Despite the initial vigor and enthusiasm of the task force, its reform efforts were hampered from the start. First, the task force was unable to gain the participation of the local police. Thus, regardless of the policy reform the task force initiated, it could not be a reform that would require coordination with the police department. Second, the task force did not have the active participation of a judge from the local trial court. While the task force was staffed by a very capable court representative, a supervising court attorney, proceeding without a trial judge meant that any racial justice reform agreed to by the task force could not be guided by the wisdom and insight of a member of the bench. In addition to the court representative, the core members of the task force are top level officials in the district attorney's office, the chief of the Brooklyn Defender Services office, and a very engaged community representative from the 88th Precinct Community Council, an organization that facilitates communication between the police and the community to address public safety issues in the local neighborhoods.

The task force decided to focus its reform efforts on DUI offenses. They operated on the premise that DUI was likely an "equal opportunity offense" committed by all racial groups at or about the same rate and, therefore, racial disparities in the

adjudication of DUI offenses at any point from arrest to sentencing warranted closer scrutiny by the task force. The expert selected and hired by the task force examined a representative sample of DUI cases from 2009. The data compilation for the DUI study was onerous and involved manual examination of files by the research team. Although the initial report prepared by the researcher identified a pattern of racial disparities in sentencing misdemeanor DUI offenders, the report failed to take into account many key factors, such as new arrests, immigration detainers, parole violations, and probation violations, all of which explained the apparent racial disparity. That is, once the full criminal history of the DUI defendants was taken into account in the analysis, the researcher concluded that there was no racial disparity in the sentencing patterns in DUI cases. Upon receiving this final report, the DUI-focused racial justice reform was abandoned and the work of the task force shifted to other areas, including drug treatment for immigrants and increased access to alternative sentences for DUI offenses. The task force hopes to forge ahead in the coming months with a new reform initiative that can be implemented over the course of the next year.

Conclusion

The work of the Racial Justice Improvement Project is promising, and the racial justice reform process developed and implemented in the project has already yielded success in very diverse jurisdictions. While many jurisdictions have formed criminal justice coordinating committees to facilitate collaboration among criminal justice officials on criminal justice reform, few (if any) have been created to focus solely on addressing racial disparities. The creation of a standing racial justice task force is one way that local jurisdictions can make a sustained institutional commitment to racial justice reform. ■