

## Chair's Counsel

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# Racial Bias in the Criminal Justice System and Why We Should Care

Is there racial bias, either conscious or subconscious, in the operation of the criminal justice system? Even those who answer, "No," would likely concede that a perception of bias exists within communities of color. The community simply looks at the number of its members who are arrested and imprisoned, compared to the white community.

Numerous research projects have demonstrated at least a prima facie case of racial bias in the criminal justice system. Statistics show significant disparity in jail and prison populations. (Alfred Blumstein, *Race and Criminal Justice*, in AMERICA BOOMING: RACIAL TRENDS AND THEIR CONSEQUENCES, VOL. II (2001), 21, 22 (Comm'n on Behav. and Soc. Sci. and Educ.) available at <http://www.nap.edu/openbook/0309068401/html/21.html>.) While African, Hispanic (Latino), and Asian Americans make up only 26 percent of the general population, they make up 58 percent of the prison population. (See [http://www.ethnicmajority.com/criminal\\_justice\\_reform.htm](http://www.ethnicmajority.com/criminal_justice_reform.htm).) In New York, where the state's adult minority population is less than 31.7 percent, nine out of 10 new prisoners are from an ethnic or racial minority. (*Hispanic Prisoners in the U.S.*, THE SENTENCING PROJECT (2003) available at <http://www.sentencingproject.org/pdfs/1051.pdf>.) In 1997, the statewide population of Maryland, Illinois, North Carolina, Louisiana, and South Carolina was two-thirds or more white, but for each, prison growth since 1985 was 80 percent nonwhite. (*Id.*)

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Blacks are arrested, convicted, and incarcerated at far higher rates than whites or any other ethnic or racial group. (Randall Kennedy, *Racial Trends in the Administration of Criminal Justice*, in AMERICA BOOMING: RACIAL TRENDS AND THEIR CONSEQUENCES 1-20 (2001).) Nationally, black

Americans account for fewer than half of the arrests for violent crimes, but they account for just over half of the convictions, and approximately 60 percent of the prison admissions. (Christopher Stone, *Race, Crime, and the Administration of Justice: A Summary of the Available Facts*,

NAT'L INST. JUST. J., 28 (1999) (citing unpublished analysis of various data provided to the author by the U.S. Department of Justice, Bureau of Justice Statistics).) Hispanics are the fastest growing group being imprisoned, increasing from 10.9 percent of all state and federal inmates in 1985 to 15.6 percent in 2001. (*Hispanic Prisoners*, *supra*.) From 1985 to 1995, the number of Hispanics in federal and state prisons rose by 219 percent, with an average annual increase of 12.3 percent. (*Id.*) Despite equal rates of drug use proportionate to their populations, Hispanics are twice as likely as whites, and equally as likely as blacks, to be admitted to state prison for a drug offense. (*Id.*)

The overwhelming data contribute to a perception of bias. "In a 1995 Gallup poll, more than half of black Americans said the justice system was biased against them. Moreover, two-thirds of black Americans in that same Gallup poll said that police racism against blacks is common across the country, and a majority of white Americans (52 percent) agreed." (Christopher Stone, *supra*, at 27.) Many

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prosecutors, judges, corrections officials, and law enforcement personnel look at their acts and deny individual bias, or reject its presence in their places of work. Thus, they see no need for change, and ask communities to simply trust them. This simplistic self-analysis misses two important considerations. The first is that bias may not be as apparent to them as it is to a person of color. The second is that the perception of bias, real or not, must be overcome.

### Why we should care

Although the debate over the cause of racial disparity in the system may continue indefinitely, the lack of trust, fear, and suspicion with which some communities view law enforcement is undeniable. (Randall Kennedy, *supra*, at 2.) Why should we care?

We should care because lack of trust severely impacts the criminal justice system's ability to serve and protect society. One symptom of growing distrust is that these communities are less inclined to participate in the criminal justice process. (Lawrence W. Sherman, *Trust and Confidence in Criminal Justice*, 248 NAT'L INST. JUST. J. 25 (2002); Peter Finn & Kerry Murphy Healey, *Preventing Gang- and Drug-Related Witness Intimidation* at 2 (U.S. Dep't of Just., Off. of Just. Programs, Nat'l Inst. of Just., Nov. 1996).) A witness may be hesitant to testify due to fear and distrust, strong community ties, or a personal history of criminal behavior. (Finn & Healey, *supra*, at 1.) Some communities of color may see law enforcement as the oppressor—an adversary rather than an ally. Crimes may be less frequently reported, and intimidated community members may think, "Do not inform on the gang, the system is not to be trusted; Do not testify, the system is not to be trusted; Do not engage in discussions with law enforcement, they will find a way to act against family or neighbors." (Robert C. Davis & Edna Erez, *Immigrant Populations as Victims: Toward a Multicultural Criminal Justice System*, at 1, 2, U.S. Dept. of Just., Off. of Just. Programs, Nat'l Inst. of Just., May 1998); Finn & Healey, *supra*, at 2, 15.)

Nowhere is witness intimidation more evident than in the area of drug- and gang-related crimes. (Nat'l District Attorneys Assoc. Pres., Robert P. McCulloch, testimony before a hearing of the Committee on the Judiciary on Gang Violence &

Witness Intimidation (September 17, 2003); Finn & Healey, *supra*, at 1.) Prosecutors, police officers, judges, and victim advocates struggle with witness intimidation as the single biggest hurdle facing gang prosecution. (*Id.*) The problem is widespread, increasing, and impacting the prosecution of crime across the country. (Finn & Healey, *supra*, at 1.) A 1994 survey of a sample of 192 prosecutors found that intimidation of victims and witnesses was a major problem for 51 percent of prosecutors in large jurisdictions (counties with populations greater than 250,000) and 43 percent of prosecutors in small jurisdictions (counties with populations between 50,000 and 250,000). (*Id.* at 5.) Witness intimidation can become so pervasive that case filings decrease as crimes increase. (McCulloch, *supra*.)

A second symptom of community distrust is that local juries may be less likely to convict regardless of the evidence, instead rendering their verdicts on extralegal motivations:

Recent cases involving controversial acquittals and deadlocked juries highlight both the dangers and advantages of placing the power to nullify in the hands of the jury. Extra-judicial sympathy for the defendant may have been at play in the racially-charged acquittals of ex-football star O. J. Simpson on charges of murder, the Los Angeles police officers who beat African-American motorist Rodney King, and former District of Columbia mayor, Marion Barry, who was filmed smoking crack cocaine with undercover police confederates.

(18 GEO. J. LEGAL ETHICS 1097, 1101 (2005).)

Documented cases of jurors who admit disregarding the law show that jury nullification is present in the criminal justice system. (*Id.* at 1102.)

Communities with high concentrations of immigrant residents are particularly affected by a lack of trust in law enforcement. A national assessment program survey conducted for the National Institute of Justice (NIJ) reflected the consensus that recent immigrants report crimes less frequently than other victims. (Davis & Erez, *supra*, at 2.) Local law enforcement acting as immigration agents compound any existing perception of mistrust, and are just another reason for immigrant citizens to fear and avoid contact. (Finn & Healey, *supra*, at 4.)



### What to do

If we are to improve our ability to make our communities safe we must deal directly with issues of bias, whether real or perceived. A 1992 report by the ABA's Task Force on Minorities and the Justice System, entitled, "Achieving Justice in a Diverse America," included numerous recommendations for restoring America's trust in the justice system. Police, prosecutors, and corrections officials could begin by making their practices and decisions as transparent as possible. Cross-cultural training could be provided to police officers, and cultural sensitivity training could be offered in the courts. (*Id.*) Leaders should work to have their offices reflect the ethnic distribution of their jurisdiction. Frank discussions with community leaders can often establish renewed trust in the system, and communities could develop more effective grievance and disciplinary procedures for police misconduct. (*Id.*) Processes within the criminal justice system could also impact change. Plea bargaining practices could be modified to eliminate discrimi-

natory impacts, and racial and ethnic bias could be eliminated in peremptory challenges. (*Id.*)

Sentencing provisions could be reexamined, jury selection practices could be changed to ensure proportionate minority representation, and the number of minority judges could be increased. (*Id.*) Steps can also be taken to prevent witness intimidation, including high bail for known intimidators, aggressive prosecution of reports of intimidation, close management of key witnesses, and expansion of victim/witness assistance programs. (Jim Kouri, *Organized Crime: Cops and Prosecutors Frustrated Over Witness Intimidation* (June 2006), available at <http://www.lincolntribune.com/modules/news/article.php?storyid=4669>.)

The ABA is working to deal with these issues. The ABA Council on Racial and Ethnic Justice is working on specific programs, strategies, and partnerships. Our Section's Race and Racism Committee is also engaged in seeking solutions. Although change can trigger resistance, if we fail to face this challenge, we will have failed to give meaning to the pledge, "with liberty and justice for all." ■

