

Racial Disparities in the Criminal Justice System

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I would like to thank the House Judiciary Committee Chair John Conyers, Jr. and the Subcommittee on Crime, Terrorism and Homeland Security for the opportunity to present testimony regarding my work at the Vera Institute of Justice on prosecutorial discretion and racial disparities in the criminal justice system. I am Wayne McKenzie, the director of the Prosecution & Racial Justice Program at the Vera Institute of Justice, an organization whose mandate is making justice systems fairer through research and innovation—or as I am fond of saying, “a think and do tank”! Prior to arriving at Vera, I was a management level prosecutor in the Kings County District Attorney’s Office in Brooklyn, NY. I am a past president of the National Black Prosecutors Association, the current co-chair of the ABA Criminal Justice Section Committee on Racial & Ethnic Justice and Diversity in the Criminal Justice System, and a member of the ABA Council on Racial & Ethnic Justice. In addition to my specific work at Vera, I have been involved with several local and national efforts to address the issue of unwarranted racial and ethnic disparities in the criminal justice system and to promote fairness and justice for people of color within the justice system.

My presence here today is to discuss the topic of prosecutorial discretion in the context of the role it plays in disparities in the criminal justice system, and Vera’s groundbreaking work with a few forward thinking prosecutors to create systems to assist them and their peers in their quest to uncover, reduce and guard against unwarranted racial disparities and inconsistent outcomes in prosecutions. As I am certain this subcommittee is already aware of—and will hear testimony from others concerning—the statistical evidence of the racial and ethnic disparities in

the criminal justice system, my testimony will focus on providing a brief background on the topic of prosecutorial discretion and its implication on the subject matter of racial disparities; the work of the Prosecution and Racial Justice Program; the challenges and lessons learned from our work; and the promising potential of our partnership with prosecutors committed to reducing racial disparities while promoting public safety and confidence in the criminal justice system.

The Anatomy of Discretion

It is often stated that the primary responsibility of a prosecutor is to ensure that justice is done. This concept of justice is not defined by the singular purpose of seeking convictions, but ideally by the prosecutor discharging his or her duties with fairness to victims, defendants and the community. It is a responsibility that necessarily includes the obligation to promote public safety while also safeguarding the integrity of the criminal justice process.

Prosecutors in the United States have an unrivaled level of influence within the criminal justice system. They decide, amongst other things, whether to file criminal charges, the number and severity of offenses to charge, whether to offer a plea bargain, whether to offer a diversionary or alternative to incarceration program, and what sentence to recommend for defendants who are convicted at trial. These decisions can have a profound impact on the outcome of a case and the life of a defendant. Yet, as they exercise this significant discretion, prosecutors also have unrivaled independence. Unlike officials in law enforcement and the judiciary, who have come under varying degrees of oversight in recent years, prosecutors are the system actors with the least amount of transparency and oversight.

The discretion that prosecutors have is valuable for a number of reasons. It is intended to preserve the independence of prosecutors from political pressures and influence, both in cases they prosecute and criminal investigations they undertake. Equally as important, it provides flexibility so prosecutors can tailor an appropriate response to individual cases depending upon available resources, enforcement and public safety concerns, and community interest and values. Additionally, clearly articulated legal factors, internal policies and practices, ethical considerations and the prosecutor's role as a political figure responsible to her constituency constrain or regulate the exercise of discretion; and historically this has been sufficient to sustain public confidence in the integrity of the prosecution function. Yet, unchecked decision making may also lead to unfair and disparate treatment. For many people, the possibility that

communities of color, especially African Americans and Latinos, might be prosecuted differently from white defendants is of particular concern.

In fact, in many quarters, that integrity is in question because of the belief that the criminal justice system is biased against African Americans, Hispanics and other people of color. Racial profiling, disproportionately high arrest and incarceration rates of people of color have all played a part in the erosion of public confidence and the perception of racial bias in the system, particularly in communities of color. And, in terms of the prosecutor, recent media scrutiny in cases like the Jena 6 in Louisiana, the Duke Lacrosse Team in North Carolina, the Genaro Wilson prosecution in Georgia, and the alleged politically motivated forced resignations of several United States Attorneys, for example, have led to heightened public interest and scrutiny on prosecutors.

Just as in recent years, other significant actors in the criminal justice system who once enjoyed similar autonomy have become subject to increasing levels of external oversight, for instance the imposition of strict guidelines to limit sentencing options available to judges, and a number of police departments discovered to be treating people differently based on their race coming under federal scrutiny or direct oversight, prosecutors can no longer assume that they are immune to similar forces. In both cases involving the judiciary and law enforcement, a loss of public confidence was an important catalyst for the change. The prosecution business has a strong need to guard against potential loss of faith in its practices by ensuring that integrity and accountability are integral to the way prosecutors do business.”¹

The Prosecution & Racial Justice Program

At the inception of Vera’s Prosecution & Racial Justice Program, a number of prosecutors at the local, state and federal levels, were wondering how much longer their offices would be free from the scrutiny and curtailed discretion that has been focused on other justice system actors because of worries about racial fairness. At the time there existed no comprehensive structured attempt to regulate—externally or internally—racial discrimination in the application of prosecutorial discretion. Legal approaches proved unworkable for a number of reasons, including deference shown by courts to prosecution decisions and the high barrier

¹ Dillingham, Steve; Nugent M. Elaine; and Whitcomb, Debra. (2004) *Prosecution in the 21st Century*-Goals, Objectives and Performance Measures. American Prosecutors Research Institute: Alexandria, VA. p 1.

erected by the Supreme Court to a defendant's claim of selective prosecution based on race.² Moreover, no legislative schemes explicitly seek to regulate prosecutor behavior in regard to race. While there is extensive scholarship on the subject matter of prosecutorial discretion, there is a paucity of research with both the extended access to data and to the prosecutors themselves that PRJ enjoys. Additionally, to the extent that prosecutors were interested in the question of whether racial bias was absent from or infecting their decision-making, prior to PRJ, there existed no processes for their routine examination of this question.

In partnering with district attorneys in three major metropolitan counties—John Chisholm in Milwaukee, Wisconsin; Peter Gilchrist in Mecklenburg, North Carolina; and Bonnie Dumanis in San Diego, California—PRJ is piloting an internal oversight procedure designed to help prosecutors identify evidence of racially disparate effects in the decision-making practices of their staff and to respond to unwarranted disparity or biased decision-making by enacting appropriate remedial responses. PRJ does this by helping district attorneys collect data at the key discretion points in case processing so they can use this information to management decision making and drive reform.

PRJ further helps to create a measure of transparency and accountability by assisting our prosecutor partners to share their findings and any remedial actions they have taken with community stakeholders. These efforts aim to provide prosecutors with a safe environment in which to pursue this politically risky undertaking, while promoting community confidence in their offices. Finally, with the assistance of our partner prosecutors and national advisory board members, PRJ has begun to share the early accomplishments, challenges and lessons learned with other prosecutors, criminal justice professionals, civil rights organizations and scholars.

Strategic Approach

The main thrust or strategic approach of the project is to create a set of data-driven management tools that enable prosecutors in the three pilot jurisdictions to develop a sharper view of how discretion is used and its impact on race in their offices; and to manage that discretion differently where needed. For example, project research staff collects case and race

² The Court has ruled that, in order to prove selective prosecution based on race, a defendant must prove that similarly situated whites could have been prosecuted, but were not. See *Wayte v. U.S.*, 470 U.S. 598, 609 (1985); *U.S. v. Armstrong*, 517 U.S. 456, 470 (1996). Additionally, in order to obtain evidence to support such a claim, a defendant must show discriminatory intent on the part of the prosecutor simply to obtain materials in discovery.

related data of all cases screened by the district attorney's office. These cases are then organized by crime and charge categories and examined by a series of factors including race, gender, age and criminal history. By grouping similarly situated defendants within crime and charge categories, separating out the cases that the office decided to prosecute from those where prosecution was declined, and comparing this data by race, charts are produced which uncover any existing racial disparity patterns. This information allows managing prosecutors to assess how discretion is being wielded in their offices; provides opportunity to identify and isolate sources and factors that may influence or contribute to any observed disparity patterns; and inform management responses designed to institute corrective policies where suspicions of adverse racial impact are confirmed.

This analysis, when applied to each key decision making point in the life of a case—the decision to decline or prosecute, the decision on the specific charges to be filed, the decision to divert the case from prosecution, the decision on what plea to offer (including alternative to incarceration programs) and post trial conviction sentence recommendations—provide a more accurate picture of discretion and how each key decision point contributes to the final outcome of a case. This improved understanding leads to a more accurate assessment of the causes of any uncovered disparities. Equally as important, the process can identify areas of consistent decision making and high performance. By creating a process where data is routinely generated and quarterly discretion management reports are produced, managers will have the power to measure, monitor, question and respond to areas indicating unwarranted disparate outcomes.

Data, or more accurately statistical results, alone do not provide conclusive answers as to whether a finding of racial disparity is unwarranted or the result of bias. It does, however, help to determine what additional questions should be asked. Developing a structured, recurring way to look at -or analyze- such data and then to apply that analysis to managerial protocols is central to the approach developed by PRJ and its partners. This process of drilling down to find answers forces our prosecutor partners to examine and think critically about how training, experience, office policy, priorities, philosophy and culture influence—on the aggregate—case outcomes. The tools that are developed differ according to the jurisdictions participating in the project and are informed by a number of factors, including, the types of cases arising in the jurisdiction, the flow of cases in the office, where and how the data is captured and stored, specific institutional priorities, breadth of available discretion, quality of data, and individual prosecutor management

style. They are being built from data collected at critical decision points in the prosecutorial process.

While data exists in raw form in files and various MIS systems in the three pilot sites, none of the participating prosecutors currently collects or analyzes data in a way that allows for an examination of the existence of potential racial disparity in the exercise of discretion. In addition to probing that central issue, we anticipate that helping offices to develop greater capacity to collect and analyze information about their operations will produce general managerial and administrative benefits beyond those directly related to issues of race.

Examples of Disparity Findings & Remedies

PRJ's partner jurisdictions review data and discuss findings at regularly scheduled management meetings. Mecklenburg and Milwaukee have instituted new meetings dedicated specifically to this undertaking.

In Mecklenburg, managers were surprised to learn that the office had been declining to prosecute only 3-4% of drug cases. Other significant findings were: 1) the group receiving the most disparate treatment was African-American females -the office accepted and prosecuted 100% of those cases, and those cases appear to move further along the process before reaching final disposition- 2) white defendants receive much more favorable outcomes at district court — significantly higher rates of dismissals, deferrals, and reduction in charges; and 3) despite getting rid of cases for white defendants through dismissals, etc. at District Court, white defendants still have lower guilty plea rates than nonwhite defendants. Additionally, DA Gilchrist learned several key facts about the drug unit's cases: 1) in 98.9% of cases, the ADA adopts all the police charges, 2) defendants are 70% non-white defendants, 30% white, and 3) more than 10% of these cases were languishing for extended periods of time or dropping out with less than favorable results at other stages in the prosecution process.

The district attorney responded to this data finding by making a change in leadership and implementing policies that now lead to a more rigorous initial screening of cases. The result has been an increase in the number of cases the office declined to prosecute —up to 12 percent according to most recent data results- and a similar increase in the decision to decline to prosecute where the defendant was an African American female. While it is hard to argue racial disparity where initially only 3 percent of cases were not prosecuted, the end result was that a

larger number of African Americans benefited from the new policy, and the office realized greater efficiency. While the overall rate of dismissal was not significantly affected, identifying these cases earlier in the process leaves prosecutors with more time to address more serious cases.

DA Gilchrist, with PRJ's support, began to share his participation and experience with the Mecklenburg community at the end of 2006. PRJ director Wayne McKenzie co-presented with Gilchrist at local community gatherings where the DA spoke to stakeholders about his interest in building the community's confidence in his office through creating transparency as to his office's policies and procedures. Community members echoed DA Gilchrist's message that fair treatment is identified with procedures that generate relevant, unbiased, consistent, and reliable outcomes, and encouraged him in his participation in the program. We also meet regularly with representatives of the foundations assisting with support of the Mecklenburg work. Recently, we have included the executive director of a new Charlotte initiative that aims to bring together community stakeholders for the purpose of creating civic systems that promote increased racial harmony.

In Milwaukee, when we analyzed the initial case screening decisions by race, we examined the nine most frequently occurring crime types. Results revealed that in six of the nine categories the cases against non whites were declined at a slightly higher percentage than whites. The results were reversed in the area of Public Order and Drug offenses.³ Further examination of the data revealed a disparity against nonwhites in the screening decisions that prosecutors were making in misdemeanor drug cases. For example, in Possession of Drug Paraphernalia cases the decline to prosecute rate for white defendants was 41 percent compared to only 27 percent for nonwhites in the 2005-2006 data. After looking at this disparity finding, the managers considered a number of possible explanations for this disparity. In the course of their discussions, they considered whether police were treating people differently, whether prosecutorial staff had a legally relevant reason to press or decline to press charges differently, and whether the disproportion was based on an unconscious racial bias. One manager inquired why was the office pursuing these cases at all since the possession of paraphernalia was indicative of addiction. We then provided additional data revealing that the majority of these decisions were being made by

³ The 3rd category was sexual morality offenses. But here the over percentage of cases was low enough to be deemed insignificant.

junior misdemeanor prosecutors. The DA instituted a policy that emphasizes diversion to treatment in place of criminal prosecution. When misdemeanor prosecutors feel charging this crime is still appropriate, the decision must now also be reviewed and approved by a more experienced prosecutor. This policy has resulted not only in remedying the disparity, but the overall declination rate of such cases rose significantly.

District Attorney Chisholm has demonstrated a commitment to engaging the community about his participation in the project and has participated in several presentations within the Milwaukee community. Chisholm maintains consistent contact with community groups in Milwaukee. He speaks often on his commitment to reducing rates of crime and incarceration while exhibiting more transparency about his office policies and practices toward achieving these goals. PRJ director Wayne McKenzie has participated in several community presentations and forums with Chisholm, where members of Milwaukee's communities of color have directly engaged Chisholm about accountability to their communities on crime, victimization and bias. Chisholm's articulation about his commitment to PRJ is consistently well received, and is in large part the reason for the many accomplishments at the Milwaukee site.

Lessons Learned

We have learned a number of lessons during our work in the pilot jurisdictions and discussions with prosecutors around the nation. The first is the critical need for adequate systems to collect data. Prosecution offices often use electronic case management systems to follow the progress of their cases. Such systems are rarely designed to marshal the aggregate information required to track disparity, however. A standard case management system may make it possible to follow the decisions of individual prosecutors in specific cases, but it probably cannot identify how an office of prosecutors exercised its discretion collectively.

The second lesson is also data related. Prosecutor offices generally do not capture and store electronically all of the data elements or information required to track, measure and analyze disparity. While this information might be contained in written form within case files, or even captured electronically in other case management systems not available to the prosecutor—for example the race and ethnicity of defendants held on bond may be captured in the sheriff's system, or the race of a victim may be recorded on a police report stored in a case file—to promote routine discretion oversight and management this information must be captured

electronically. Further exacerbating this challenge is that each discretion point will require specific variables or information to accurately determine which factor(s) is influencing the observed outcome.

Potential for Reform

As you may imagine, any initial conversation with a prosecutor suggesting that race or ethnicity may be inappropriately influencing prosecutions and case outcomes in his or her office is likely to be met with varying degrees of denial or skepticism, and understandably so. The overwhelming majority of prosecutors are motivated by a desire to enforce the law in ways that will produce justice for everyone in the communities they serve. However, all too often, prosecutors' well-intentioned charging and plea bargaining decisions result in dissimilar treatment of similarly situated victims and defendants, sometimes along race and class lines.⁴ A growing number of prosecutors understand that as leaders in the criminal justice system, the perception of racial bias supported by disproportionate arrest and incarceration rates and the loss of confidence in the system require they take an active role in reducing racial disparities while, at the same time, ensuring public safety. Courageous prosecutors like Bonnie Dumanis, Peter Gilchrist, John Chisholm and many others have accepted this responsibility. We need only provide them with the tools to get the job done.

A final example, from Milwaukee, shows that supervisors are increasingly recognizing that the interpretation of data, and not the data itself, is the key to management and reform. During a meeting to review declination rates, a finding that minorities were less likely to be prosecuted for property offenses was initially presented as evidence that there was no racial bias in how such cases were handled. Extensive discussions among managers within the office, however, yielded several other plausible and less comforting conclusions. Perhaps there were fewer cases with minority defendants because minority victims were reluctant to step forward, law enforcement was less willing to treat such crimes against minorities seriously, or prosecutors were less inclined to appropriately value the property rights of minority victims who are often demographically similar to their victimizers.

These conversations and remedial efforts in response to data findings illustrate the willingness of some prosecutors to undergo self examination and implement discretion

⁴ Angela J. Davis, *Prosecution and Race: The Power and Privilege of Discretion*, 67 *Fordham L. Rev.* 13, 34–35 (1998).

management protocols. Since the inception of PRJ in 2005, a number of jurisdictions have made inquiries about participating in the program. And while we have a way to go in terms of completing the analysis and developing the management protocol from start to finish, early results have been very positive and well received. In fact, even on the federal level, PRJ has been instructive. The sort of ongoing data collection, analysis and management strategy employed by PRJ is also contemplated in the pending legislation of the Justice Integrity Act.

Conclusion

In concluding, I re-emphasize that in the American criminal justice system, the prosecutor is the actor with the broadest amount of discretion and the least oversight and accountability. The reasons for this are complicated, rooted as much in the direct political accountability of elected prosecutors and the political authority it brings, as in legal doctrines concerning the prosecutor's special role in the system and the necessary independence and deference it implies. As concern about racial disparity and bias in the justice system grows, however, prosecutors may find themselves subject to greater outside scrutiny of their exercise of discretion. If prosecutors assume the leadership role to measure, manage and ensure fair and consistent exercise of discretion, this may forestall recent calls for legislative action to curb their discretion—by the imposition of mandatory guidelines—which may conflict with a prosecutor's practical needs. More importantly, the communication of these efforts to the community will go far to combat the perception of bias and promote confidence in the office of the prosecutor.