

**AMERICAN BAR ASSOCIATION
JUSTICE KENNEDY COMMISSION**

REPORT TO THE HOUSE OF DELEGATES

RECOMMENDATION

1 RESOLVED, That the American Bar Association urges states, territories and the federal
2 government to strive to eliminate actual and perceived racial and ethnic bias in the
3 criminal justice system by enacting measures that would:
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5 (1) Establish Criminal Justice Racial and Ethnic Task Forces to:
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7 (a) include individuals and entities who play important roles in the
8 criminal justice process, and invite community participation
9 from interested groups such as advisory neighborhood
10 commissions and local civil rights organizations; and
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12 (b) design and conduct studies to determine the extent of racial and
13 ethnic disparity in the various stages of criminal investigation,
14 prosecution, disposition and sentencing; make periodic public
15 reports on the results of their studies; and make specific
16 recommendations intended to eliminate racial and ethnic
17 discrimination and unjustified racial and ethnic disparities.
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19 (2) Require law enforcement agencies to develop and implement policies and
20 procedures to combat racial and ethnic profiling, including education and training,
21 data collection and analysis and other “best practices” that have been
22 implemented throughout the country through voluntary programs and legislation.
23

24 (3) Require legislatures to conduct racial and ethnic disparity impact analyses to
25 evaluate the potential disparate effects on racial and ethnic groups of existing
26 statutes and proposed legislation; review the data gathered and recommendations
27 made by Criminal Justice Racial and Ethnic Task Forces; and propose legislative
28 alternatives intended to eliminate predicted racial and ethnic disparity at each
29 stage of the criminal justice process.

REPORT

I. Introduction

Nationwide, more than 40% of the prison population consists of African-American inmates. About 10% of African-American men in their mid-to-late 20s are behind bars. In some cities, more than 50% of young African-American men are under the supervision of the criminal justice system.¹

When Justice Anthony Kennedy spoke these words in his address to the American Bar Association on August 9, 2003, he identified an issue of enormous concern to many people who have been involved in federal, state and territorial criminal justice systems, and to many citizens who have been alarmed by the increasing number of African-American men incarcerated in America's jails and prisons. As striking as Justice Kennedy's numbers were, he did not exaggerate the problem. Instead, he offered numbers that some observers believe are at the low end of the estimates of the actual number of African-American men who are incarcerated.

Others place the percentage of prisoners who are African-American at close to 50%² and even slightly higher.³ In 1995, a study by the Sentencing Project found that almost one in three black males between the ages of 20 and 29 were under some form of criminal justice supervision – either in prison or jail, or on probation or parole.⁴ A report released by the Bureau of Justice Statistics found that a black male had a 1 in 3 chance of being imprisoned during his lifetime, compared to a 1 in 6 chance for a Latino male and a 1 in 17 chance for a white male.⁵ Although there are not as many African-American women in prison as men, their numbers increased by an alarming 204% between 1985 and 1995.

Disparities also exist for Latino men and women, although to a lesser degree.⁶ In fact, the number of African-American and Latino men, women and juveniles in prisons

¹ August 9, 2003 Address to ABA House of Delegates.

² Marc Mauer, *Race to Incarcerate* 124 (1999).

³ David Cole, *No Equal Justice* 4 (1999).

⁴ Marc Mauer and Tracy Huling, *Young Black Americans and the Criminal Justice System: Five Years Later*, The Sentencing Project (1995). A recently released report by the Sentencing Project reveals that fifty years after the Supreme Court's decision in *Brown v. Board of Education* nine times as many African-Americans are in prison or jail as in 1954 (884,500 versus 98,000).

⁵ Press Release, Bureau of Justice Statistics, Prevalence of Imprisonment in the U.S. Population, 1974-2001 (Aug. 17, 2003) available at <http://www.ojp.usdoj.gov/bjs/abstract/piusp01.htm>.

⁶ Statistics for Latinos are difficult to obtain due to differences in classification and other causes. For statistics showing the disproportionate representation of Hispanics at every step of the process in the federal system, see Angela Arboleda, *Latinos and the Federal Criminal Justice System*, National Council of La Raza, Statistical Brief No. 1 (July 2002).

and jails and at every stage of the criminal justice process is vastly disproportionate to their numbers in the overall population.

These racial disparities in the prison population are a relatively recent phenomenon in American history. In 1930, whites were 77 percent of prison admissions, African Americans were 22 percent, and other racial and ethnic groups were only 1 percent.⁷ By 2000, the racial and ethnic makeup of American prisons was virtually reversed, with African Americans and Latinos comprising 62.2 percent of the total federal and state prison population.⁸

Youth of color in the juvenile justice system face similar disparities:

- African-American and Latino youth are treated more severely than their similarly situated white counterparts.
- In 1997, white youth represented 71% of the youth arrested for crimes across the country but only 37% of detained or committed juveniles.
- African-American youth were *48 times* as likely as white youth to be sentenced to state juvenile facilities for drug offenses. Latino youth were 13 times as likely.
- Among those not previously admitted to a secure facility, African-American youth were six times as likely as white youth to be incarcerated. When charged with a violent offense, they were nine times as likely to be incarcerated.
- For youth charged with violent offenses, the average length of incarceration was 193 days for whites, 254 days for African-American youth, and 305 days for Latino youth.⁹

Youth of color also are overrepresented among juveniles transferred from juvenile to adult criminal court. Reviewing data from 18 of the largest jurisdictions in the country, researchers from the Pretrial Services Resource Center found that youth of color, particularly African-American youth, were over-represented and received disparate treatment at several stages of the process.¹⁰

There is vast disagreement about the cause of racial disparities in the criminal justice system, but few dispute that the problem exacts monumental social, financial, and

⁷ U.S. Department of Justice, Bureau of Justice Statistics, *Race of Prisoners Admitted to State and Federal Institutions, 1926 – 1986*, February 1994, p. 14, Table 7.

⁸ Human Rights Watch, World Report 2002, p. 4.

⁹ Testimony of Judge Ernestine Gray, Justice Kennedy Commission Hearings, November 14, 2003, p. 3 (citing the Building Blocks for Youth reports *And Justice for Some: Differential Treatment of Minority Youth in the Justice System* and *Donde Esta La Justicia? A Call To Action on Behalf of Latino Youth in the U.S. Justice System*).

¹⁰ Written testimony of Mark L. Soler, President, Youth Law Center, American Bar Association Justice Kennedy Hearings, November 14, 2003 (citing Jolanta Juszkiewicz, *Youth Crime/Adult Time: Is Justice Served?* (Building Blocks for Youth, 2000)).

human costs on the individuals who are incarcerated, their families, and society as a whole. That Justice Kennedy noted the problem in a major address to the largest organization of lawyers in the country speaks to its import. The ramifications of the disproportionate involvement of African-Americans and Latinos in the criminal justice system extend to issues as broad and significant as disenfranchisement, disqualification from public housing and welfare benefits, and the dissolution of families.¹¹ The financial costs to society are as predictable as the costs of building and maintaining prisons. When society incarcerates an individual it not only punishes that person, but it deprives families of financial support. There are real costs imposed upon those who are dependent upon the economic support of a father, mother, or other family member who is incarcerated. The costs increase along with the length of the sentence.

This report will first address three issues that are fundamental to understanding the problem of racial disparity in the criminal justice system: the scope and breadth of the underlying causes, the complexity of discrimination in the criminal process, and the impact of the War on Drugs. It will then address racial profiling, prosecution practices, the indigent defense crisis, and sentencing laws, and the cumulative effect of these issues. Finally, the report will discuss a model project implemented by a community that made a commitment to the elimination of racial disparity in its criminal justice system.

The recommendations that we offer to the House of Delegates will not eliminate the problems of conscious and unconscious bias in our criminal justice system. Nor will they eliminate racial disparity in prison populations. They are, however, necessary steps toward reducing bias and racial disparity, and they signal a societal recognition that the problem is real and requires constant monitoring.

¹¹ See generally *Invisible Punishment: The Collateral Consequences of Mass Imprisonment*, Marc Mauer and Meda Chesney-Lind, editors (2002).

II. Discrimination or Disproportionate Offending?

“All three of my boys smoked pot [growing up]. I knew it. But I also knew if one was caught he would never go to prison. But if any of my neighbors got caught,” Carter said, adding that his neighbors were black, “they would go to prison for 10, 12 years.”¹²

Understanding the causes of racial disparity in the criminal justice system is key to its elimination, and the causes are varied, complex, and many. Some scholars express the issue as a debate over whether the disparity results from racial discrimination by criminal justice officials such as police, prosecutors or judges or from disproportionate offending.¹³ The Commission concluded that a debate that pits claims of discrimination against allegations of over-offending over-simplifies the issues and holds little promise of improvement. The questions that must be asked are subtler, and the answers are more difficult to divine.

Some of the questions that must be asked are these: If there is discrimination, is it intentional or the result of the racially disparate effects of race neutral decisions by police, prosecutors and judges? If there is disproportionate offending, does it exist in all categories of crimes or only a few, and what are the reasons for the disproportionate offending when it does exist? If there are explanations for disproportionate offending, do they involve the realities of such factors as poverty, unemployment, poor education, and poor physical and emotional health? If they do involve such factors, are they distinct and unrelated to a history of racial discrimination in American society that spans centuries? If these factors account in any considerable measure for disproportionate offending, should these factors mitigate the sentences that are imposed on those affected by these factors?

Available data support some theories about racial disparities in prosecution and punishment. Criminologists have documented the socio-economic causes of crime for decades. People who live in poverty are more likely to engage in certain types of criminal behavior, and the data suggests that we know why people living in poverty commit certain kinds of crimes in their communities. Since there are a disproportionate number of African-Americans and Latinos living in poverty and suffering from various forms of socio-economic disadvantage, it is not surprising that they engage in disproportionate offending in some crime categories.¹⁴

However, the existing research does not support a conclusion that African-Americans and Latinos disproportionately offend in all crime categories. It seems clear that there is proportionate offending in certain crime categories, and there are discretionary decisions made by criminal justice officials that contribute to the racial disparity that exists in the criminal justice system.

¹² Eric Rangus, “Carter lays down challenge for law,” Emory Report, October 20, 2003 (quoting former President Jimmy Carter).

¹³ See Katheryn K. Russell, *The Color of Crime* 26-46 (1998), for an in-depth discussion of this debate.

¹⁴ African-Americans also are disproportionately victimized by crime. Katheryn K. Russell, *The Racial Hoax As Crime: The Law As Affirmation*, 71 INLJ 593, 606 (1996).

When the Commission viewed the criminal justice system as a whole – all crime categories and all communities – we could only conclude that both disproportionate offending (and the various causes thereof) and discretionary law enforcement decisions contribute to racial disparities in our criminal justice system. Thus, our view is that the debate between those who claim discrimination (whether intentional or unintentional) and those who allege over-offending as the cause of racial disparity not only oversimplifies the problem, but it sets forth a false dichotomy. Both explanations account in part for the racial disparities that are so apparent throughout the United States, and it is impossible to identify with precision the extent to which each cause is responsible.¹⁵ Similarly, we cannot be certain as to the extent to which the various causes of disproportionate offending contribute to the racial disparities we observe. Many causes may play a significant role, and all would need to be addressed to successfully resolve the problem.

Although we confess our uncertainty as to the exact contribution that various factors make to racial disparity, we do not lack certainty as to what must be done. Our Commission believes that, first, racial disparity must be recognized as a serious problem; and, second, that problem must be addressed in a serious way. So many of the numbers we offer at the beginning of this Report are disturbing, but none is more so than the fact that a black male has a 1 in 3 chance of being imprisoned during his lifetime. Whatever the causes, this cannot be permitted to continue.

We recognize that in many communities minorities are disproportionately victims of crime¹⁶ and may demand and benefit from strong law enforcement. It is nonetheless true that there is a perception among substantial numbers of minorities that the criminal justice system is discriminatory, and the perception frequently is based upon reality. That perception itself may lead to crime, disrespect for the law, and even a willingness to nullify or subvert the law. Accordingly, we must recognize how racial disparities may undermine confidence in our criminal justice system and its ability to prevent crime. We must reduce these disparities by identifying and reducing the factors that produce disproportionate offending, and develop procedures and processes designed to minimize conscious and unconscious bias in the criminal justice system. As we go forward, we must also remember that Justice Kennedy and President Archer asked this Commission to begin a national conversation about this and other issues, not to pretend that we can solve the racial disparity problem in a single report or a single year.

With this caution in mind and with full appreciation that the American Bar Association cannot single-handedly resolve the deeply entrenched socio-economic issues that contribute to the marginalization and criminal involvement of African-Americans and Latinos, we conclude that society will not benefit if we pretend that racial disparity does not exist or that it cannot be reduced. We believe that it is important to encourage responsible officials to identify racial disparities in the criminal process, whether intentional or unintentional, that result in the dissimilar treatment of similarly situated individuals. That racial disparities (or what some observers would call racial

¹⁵ *But see generally* Alfred Blumstein, *Racial Disproportionality of U.S. Prison Populations Revisited*, 64 *University of Colorado Law Review* 743 (1993), concluding that, with the exception of drug offenses, 24 percent of the higher black rate of imprisonment may be caused by racial bias or other factors. For drug offenses, Blumstein notes that blacks are over-represented in prison by 43% as compared to their arrest rates. He concludes that drug arrest rates are not necessarily indicative of offending patterns but probably associated with the over-arresting of blacks as compared to whites. *Id.* at. 751-754.

¹⁶ *Supra* note 16.

discrimination) may exist does not mean that most officials intentionally discriminate against minorities. There is evidence that harsher treatment of minorities as compared to similarly situated whites may result from discretionary decision-making by criminal justice officials who are often unaware of the racially disparate effects of their actions. Once these discretionary decisions are identified, law enforcement officials can develop policies and practices that serve to reduce or eliminate unintentional discrimination.

III. The Complexity of Race Discrimination in the Criminal Justice System

Although we cannot quantify the precise effect of discretionary decisions on identifiable racial disparities, no seasoned observer of the American criminal justice system can doubt that discretionary decisions are made at each stage of the process, from investigation, stops, and arrests to prosecution and sentencing. Given the vast amount of discretion that exists and the numerous opportunities for its exercise, it is undeniable that many African-American and Latino/a men, women, and juveniles in our nation's prisons and jails arrive there as a result not only of their criminal acts, but also because of the discretionary decisions made at various stages of the criminal process.

It is not difficult to see how disparities may occur and how similarly situated individuals might be treated differently based on race or ethnicity. For example, when a police officer decides to stop a black driver who commits a traffic violation while ignoring the white driver committing the same offense, the officer treats like individuals in disparate ways. Or, when the officer stops both drivers but arrests the black driver while citing or warning the white driver, the officer again treats like individuals in disparate ways. The end result is disparity along racial grounds. In making his decisions, the officer may be unaware of why he or she is reacting to individuals differently. One person's manner or approach may suggest to the officer that leniency is or is not appropriate, and the officer will gauge that behavior based on his or her own experience. If the driver looks and behaves like the officer, the officer naturally may be inclined toward leniency; and, if the driver looks, dresses and behaves differently from the officer, the officer may be inclined against leniency. The officer making decisions may have no conscious idea that decisions are affected by the interaction between officer and driver.

Similarly, when a prosecutor decides to offer a favorable plea bargain to a white defendant but not to a black defendant charged with the same offense and having the same criminal record, there is a racially disparate result. The prosecutor, like the police officer, may honestly and sincerely believe that one suspect is contrite while another is not because of the suspect's manner and behavior. To the extent that the suspect looks and behaves like the prosecutor, the prosecutor may tend toward leniency. To the extent that the suspect looks and behaves differently from the prosecutor, the prosecutor may be inclined against leniency. The prosecutor may have no more conscious idea than the officer in the previous example that a prosecutorial decision may be affected by subconscious views about a particular suspect.

Prosecutors and judges, who have been to college and law school, may tend to find defendants more attractive if they are educated and well employed. When a prosecutor offers a plea bargain to a white defendant that permits the defendant to avoid jail time but fails to offer a similar deal to a black defendant with the same charge and criminal background, race is rarely, if ever, a conscious consideration. The black defendant may be less educated, might be more likely to be unemployed, and may not have community supporters of the same stature as the white defendant. The prosecutor may feel that the white defendant is more deserving of leniency, because the defendant has better prospects, not because the defendant is white. Judges may approve plea bargains favoring white defendants for the same reasons prosecutors offer the bargains. The judges may not know that a black defendant charged with the same crime and having the same criminal record was not offered as good a deal.

Such decisions are made daily. They involve judgments that are made on the basis of experience and intuition, and that often are random and not based on any firm set of charging policies or procedures. The potential for unconscious views to influence judgments about criminality is great. A white criminal justice official -- police officer, prosecutor or judge -- may empathize with a white, first-offender arrested with a small quantity of drugs, viewing his involvement in the criminal justice system as a youthful mistake. The official may think “there but for the Grace of God go I” while reflecting on what are regarded as the prosecutor’s own youthful “indiscretions.” The same official may view a similarly- situated black first-offender in a very different light based upon experience with a greater number of similar defendants. These nebulous, subconscious views, although not quantifiable, are very significant because they form the basis for important, discretionary decisions that result in racial disparity.

Interactions between suspects or defendants, on the one hand, and justice officials, on the other hand, occur at every stage of the process. Police, prosecutors, judges, defense counsel, pre-sentence officers, and others interact with suspects or defendants throughout the criminal justice process. They also interact with victims. The reaction to victims on the part of criminal justice officials may also be affected by the similarity or differences between the victims and the criminal justice officials. In short, opportunities to choose whether to be harsh or lenient exist at every stage of the process, and discretionary decisions are made every step of the way. The cumulative effect of discretionary decisions at each step of the process ultimately contributes to the racial disparity in our prisons and jails.

There is little evidence that in 21st century America criminal justice officials intentionally, or even consciously, base their discretionary decisions on race.¹⁷ Few police officers or prosecutors consciously seek out African-Americans or Latinos to arrest or prosecute. However, deep-seated views about criminality often produce a self-fulfilling prophecy. The knowledge that the majority of drug offenders in prison are African-American produces the misperception that African-Americans are more likely to be drug offenders than whites. This misperception causes some police officers to be more suspicious of African-Americans than whites, even when they engage in the same behavior.

The Commission concludes that unconscious biases or preferences undoubtedly create racial disparities. Although there is no evidence of widespread intentional discrimination, we would be naïve to deny that such discrimination might exist. Given the size of our criminal justice systems, it is difficult to believe that the racism that is found in other pockets of society has completely escaped actors in the criminal justice system. It might seem that intentional discrimination would be easier to identify than unconscious or unintentional bias. However, even when intentional discrimination is suspected, it is difficult to prove; and, unless an aggrieved party is able to prove intentional discrimination, he or she has no constitutional legal remedy in the context of

¹⁷ *But see* Vanita Gupta, Assistant Counsel, NAACP Legal Defense & Educational Fund, Inc., *Written Submission to the American Bar Association Justice Kennedy Commission* (November 14, 2003, Washington, D.C.) for a discussion of the Tulia, Texas cases. These cases present a startling modern-day example of intentional discrimination by a law enforcement officer that caused tremendous harm to one African-American community.

his criminal case.¹⁸ Civil lawsuits pose similar legal hurdles that are almost impossible to overcome.¹⁹

The relationship between race (and ethnicity) and social class adds to the difficulty of attributing racial explanations to official decisions. It is frequently difficult to distinguish whether an individual experiences different treatment because of his socio-economic status or because of his race or ethnicity. There are a disproportionate number of African-Americans and Latinos living in poverty,²⁰ and the vast majority of criminal defendants are indigent.²¹ Indigence affects not only the quality of counsel and therefore the effectiveness of representation, but also the availability of community-based alternatives to incarceration.

For example, an overworked public defender with a heavy caseload and without substantial resources might be unable to locate a drug program or other alternative to incarceration for an African-American defendant that might be acceptable to a prosecutor. A white defendant with resources to pay for drug treatment in a residential facility, represented by private counsel with time to devote to the defendant, might be offered a plea bargain that would permit this outcome. In this example, socio-economic advantage (or disadvantage, depending on where the emphasis is placed) may have more to do with the disparate outcomes than race. Often, both race and class play a role in the decision-making process, and rarely in an intentional or even conscious way.

¹⁸ *Whren v. United States*, 517 U.S. 806 (1996); *United States v. Armstrong*, 517 U.S. 456 (1996); *Washington v. Davis*, 426 U.S. 229 (1976); *McCleskey v. Kemp*, 481 U.S. 279 (1987); see Pamela S. Karlan, *Race, Rights, and Remedies in Criminal Adjudication*, 96 Mich.L.Rev. 2001 (1998) for an in-depth discussion of this issue.

¹⁹ See Angela J. Davis, *Prosecution and Race: The Power and Privilege of Discretion*, 67 Fordham L. Rev. 13, 40 (1998).

²⁰ *Id.* at note 12; Scott L. Cummings, *The Paradox of Community: A View From the Prismatic Metropolis*, 13-FALL JAHCDL 8, 12 (2003).

²¹ Francis D. Doucette, *Non-Appointment of Counsel in Indigent Criminal Cases: A Case Study*, 31 New Eng. L. Rev. 495, 511 (1997).

IV. The Impact of the War on Drugs

No single policy has done more to contribute to the current racial disparity in the criminal justice system than the War on Drugs.²² The number of drug arrests almost doubled between 1980 and 1990 – from 581,000 to 1,090,000 – and African-Americans constituted a disproportionate number of those arrested.²³ Since the data indicates that African-Americans are not more likely to use or sell drugs than whites, the disproportionate number of arrests suggests either that decisions about where to enforce the drug laws have a discriminatory effect or that discriminatory policies and practices, even if not intentional, are in place.

The Substance Abuse and Mental Health Services Administration of the Department of Health and Human Services (SAMHSA) reported that in 1999, African-Americans comprised 13 percent of monthly drug users, Hispanics, 11 percent, and whites, 72 percent.²⁴ However, in that same year, African-Americans constituted 35 percent of drug arrests, 53 percent of drug convictions, and 58 percent of those in prison for drug offenses.²⁵ These statistics suggest that African-Americans are arrested, convicted, and imprisoned at a much higher rate than their similarly situated white counterparts.

Data focusing specifically on drug distribution offenses is a bit sketchier, but current research suggests that African-Americans are arrested and incarcerated for selling drugs at much higher rates than their white counterparts.²⁶ The responses to SAMHSA surveys indicated that African-Americans were more likely than whites to report that it was easy to buy cocaine in their neighborhoods. Given the segregated nature of housing patterns, these responses would suggest that these drugs were purchased from other African-Americans. However, a report issued by the Wisconsin Policy Research Institute concluded that drug dealing was prevalent in suburban white drug markets as well as the inner-city black and Hispanic neighborhoods of Milwaukee.²⁷ This report found that the inner-city drug sales tended to take place on neighborhood street corners while the suburban sales took place through contacts at work, in bars, and at athletic and cultural events. Thus, suburban sales were likely to be conducted by whites and were more hidden from law enforcement officers. A 1997 National Institute of Justice report

²² Mauer, *Race to Incarcerate* 143 (1999).

²³ *Id.* (citing FBI data).

²⁴ Drug Policy and the Criminal Justice System, The Sentencing Project (2001) p. 4 (citing Substance Abuse and Mental Health Services Administration, Summary of Findings from the 1999 National Household Survey on Drug Abuse, November 2000, pp 6-3 and 6-13).

²⁵ *Id.* at 5 (citing SAMSHSA, FBI and BJS data).

²⁶ In 1995, African Americans constituted 49 percent of all drug distribution arrests. Mauer, *Race to Incarcerate* 149.

²⁷ *Id.* at 150.

supports the Wisconsin study, finding that respondents were most likely to report buying drugs from someone of their own race or ethnicity.²⁸

If African-Americans are not using or selling drugs more than whites (either in overall numbers or proportionately), why then do they constitute an overwhelmingly disproportionate number of arrests and convictions for drug possession and distribution? Law enforcement practices and policies provide one answer. Because so many inner-city drug sales take place in public spaces, these arrests are easier to conduct than the suburban sales that frequently occur in private establishments. In addition, there is more demand for a law enforcement presence in the inner city where the sale of drugs on public streets often endangers the residents and destroys their neighborhoods. Racial profiling, discussed below, is also a major factor that contributes to racial disparity in drug arrests and convictions.

²⁸ *Id.* (citing K. Jack Riley, *Crack, Powder Cocaine, and Heroin: Drug Purchase and Use Patterns in Six U.S. Cities*, National Institute of Justice, Dec. 1997, p. 1).

V. Racial Profiling

Under most circumstances, police officers are not legally permitted to use any show of force to stop an individual without reasonable suspicion to believe they are engaged in criminal activity.²⁹ Likewise, they are not allowed to arrest or search an individual without probable cause to believe that person has committed a crime or is engaged in criminal activity.³⁰ When police officers consider race or ethnicity in the decision to stop, search or arrest an individual, they engage in racial profiling, unless the individual's race or ethnicity is part of description used to identify a suspect.

When police officers racially profile, they do so because they believe that individuals of a particular race or ethnicity are more likely to engage in criminal behavior than others. So when a police officer decides that a young black man walking through a predominantly white neighborhood and carrying a television set is suspicious, he is engaging in racial profiling. Likewise, a police officer engages in racial profiling when she observes numerous cars speeding on the highway, but stops only the car driven by a young black man.

Racial profiling is an ineffective law enforcement tool that greatly contributes to the racial disparity in the criminal justice system and causes great harm to vast numbers of innocent people. It is ineffective because when police officers rely on race rather than behaviors that are indicative of criminal behavior, they are much more likely to stop and detain innocent people. A 1999 New York study revealed that the use of racial profiling made police officers less successful in catching criminals.³¹ Their "hit rate" – the percentage rate at which they found drugs, guns, or criminals when they stopped and searched people – was lower when they engaged in racial profiling. When they stopped and searched whites without using racial cues, they were successful 20 percent more often than when they searched blacks, using race as one of their cues.³²

Racial profiling is also harmful because it results in the detention and harassment of countless innocent individuals. When a police officer uses the pretext of a traffic violation to stop an individual on the highway, the officer creates the opportunity to question the individual and request permission to search. Most individuals consent to police requests to search because they do not realize that they may decline. Such "consent searches" cause humiliation, embarrassment and delay for which there is rarely legal recourse.³³

Racial profiling also greatly contributes to racial disparities throughout the criminal process. It brings a disproportionate number of African-Americans into the

²⁹ *Terry v. Ohio*, 392 U.S. 1 (1968).

³⁰ U. S. Constitution, Amendment IV.

³¹ Testimony of Professor David A. Harris, Justice Kennedy Commission, November 14, 2003, p. 4.

³² *Id.* For a detailed discussion on the ineffectiveness of racial profiling, see generally David A. Harris, *Profiles In Injustice* (2002).

³³ For a discussion of a case in which an African American man successfully sued the Maryland State Troopers for engaging in racial profiling, see generally Angela J. Davis, *Race, Cops and Traffic Stops*, 51 U. Miami L. Rev. 425 (1997).

system and overlooks similarly situated whites that engage in the same criminal behavior. When there are more African-Americans and Latinos brought into the front end of the process, there are more at each successive stage and ultimately more in prison.

VI. Prosecution and Race

Through the exercise of prosecutorial discretion, prosecutors make decisions that contribute to the disparate treatment of African Americans and Latinos as criminal defendants and as victims of crime.³⁴ As discussed in Section III above, these decisions, frequently at the charging and plea-bargaining stage of the process, are rarely intentionally or even consciously based on race. Nonetheless, race neutral decision-making often produces racial effects.

Prosecutors may legitimately consider a number of factors in deciding whether to bring criminal charges. For example, a prosecutor may consider the nature of the offense, the strength of the evidence, the likelihood of conviction, the interest of the victim in prosecution, the cost and complexity of the prosecution, and a number of other race neutral factors. Yet, her evaluation of these factors may be laden with racial considerations. For example, a prosecutor is more likely to take a case to trial when she is confident of securing a conviction. Thus, she may be more likely to proceed to trial in a case involving an African-American defendant and a white victim if the case will be tried in a predominantly white community.

Legal challenges to racially discriminatory prosecutorial decisions are limited to claims of selective prosecution. The legal standard for challenging selective prosecution based on race is exceptionally high. Unless the defendant can prove that the prosecutor engaged in intentional discrimination, he will not prevail.³⁵ Even strong statistical evidence fails to meet the standard of proof.³⁶ Since the discrimination at this stage is most likely unintentional, there are no effective legal remedies.

³⁴ See generally Angela J. Davis, *Prosecution and Race: The Power and Privilege of Discretion*, 67 *Fordham L. Rev.* 13 (1998); Larry Michael Fehr, *Racial and Ethnic Disparities in Prosecution and Sentencing: Empirical Research of the Washington State Minority and Justice Commission*, 32 *Gonz. L. Rev.* 57 (1997); Gary D. LaFree, *The Effect of Sexual Stratification by Race on Official Reactions to Rape*, 45 *Am. Soc. Rev.* 842 (1990); Michael Radelet & Glenn L. Pierce, *Race and Prosecutorial Discretion in Homicide Cases*, 19 *L. & Soc'y Rev.* 587 (1985); Cassia Spohn et al., *The Impact of Ethnicity and Gender of Defendants on the Decision to Reject or Dismiss Felony Charges*, 25 *Criminology* 175 (1987).

³⁵ See *United States v. Armstrong*, 517 U.S. 456 (1996).

³⁶ *Id.*, see also *McCleskey v. Kemp*, 481 U.S. 279 (1987).

VII. The Indigent Defense Crisis

Forty years ago, the Supreme Court guaranteed the right to counsel to every individual facing the threat of incarceration, regardless of ability to pay.³⁷ That guarantee has yet to be fulfilled. The American Bar Association's Standing Committee on Legal Aid and Indigent Defendants (SCLAID) held four public hearings in 2003 to determine whether the states are fulfilling the constitutional requirement of providing effective representation to persons charged with crimes. They heard from public defenders across the country, and the results were discouraging. In far too many jurisdictions, representation for indigent defendants is either nonexistent or inadequate.³⁸ The effect of this crisis is particularly alarming in death penalty cases, where effective representation has been proven to make the difference between life and death.³⁹

As with so many other issues in the criminal justice system, the crisis in indigent defense has a disproportionate impact on African-Americans and Latinos by virtue of their overrepresentation as criminal defendants.⁴⁰ The indigent defense crisis exemplifies the intersection of race and class, and it is difficult to discern which issue has the greatest effect on the outcome of a criminal case. Even when race appears to be a factor in a criminal case – either at the pretrial or trial stage of the proceedings – the criminal defendant with the resources to mount a strong and effective defense will often achieve a more favorable result.⁴¹

³⁷ *Gideon v. Wainwright*, 372 U.S. 335 (1964).

³⁸ See <http://www.abanet.org/legalservices/sclaid/defender/projects.html> for transcripts of SCLAID hearings.

³⁹ See generally Stephen B. Bright, *Counsel for the Poor: The Death Sentence Not for the Worst Crime But For the Worst Lawyer*, 103 Yale L. J. 1835 (1994).

⁴⁰ David Cole, *No Equal Justice* 94 (1999).

⁴¹ The trial and acquittal of O.J. Simpson provides a compelling example.

VIII. The Impact of Sentencing Laws and Practices

Racial disparity in the criminal justice system is most frequently described in terms of the phenomenal number of African-Americans and Latinos who disproportionately occupy the nation's jails and prisons. Yet, the African-American or Latino criminal defendant who receives a criminal sentence has already experienced the cumulative effect of race or ethnicity at each previous stage of the process. The sentencing stage perpetuates this unfortunate pattern.

Although there are no sentencing laws that explicitly target African-Americans or Latinos, a number of sentencing laws and policy changes during the 1980s exacerbated the racial disparity in the prison population. Ironically, some of these changes were implemented to achieve the opposite effect. The movement towards more determinate sentencing was pursued for the purpose of decreasing or eliminating the judicial discretion that many believed was the primary cause of vast sentencing disparities that were frequently based on race or class. It was believed that the reduction or elimination of judicial discretion would result in similarly situated individuals receiving the same sentence. Nothing could have been further from the truth.

What proponents of determinate sentencing did not fully realize was that the elimination of judicial discretion at the sentencing stage would not eliminate disparities as long as police and prosecutors continued to exercise discretion at the arrest, charging, and plea bargaining stages of the process. In essence, the elimination of judicial discretion strengthened the impact of the decisions made by these officials, especially the prosecutor. Judicial discretion had operated as a check on the unbridled, discretionary decisions of prosecutors, who were not otherwise accountable for their decisions. With the removal of judicial discretion and the introduction of sentencing guidelines and mandatory minimum laws, policy makers essentially empowered prosecutors to predetermine the sentence through their charging and plea bargaining decisions.

The shift toward determinate sentencing resulted in sentencing guidelines that either controlled or eliminated judicial discretion. Many of the state guideline systems reduced judicial discretion but permitted departures under certain circumstances.⁴² However, the federal sentencing guidelines instituted in 1987, as well as a variety of federal and state mandatory minimum sentencing laws, totally eliminated judicial discretion while simultaneously inflating the discretion and power of prosecutors. Since over 90 percent of criminal defendants plead guilty to one or more charges,⁴³ the charging and plea-bargaining decisions determine the sentence in most cases where judicial discretion has been eliminated.

The outcome of this shift in discretion should not be surprising. Racial disparities not only continued, but in many instance increased drastically. A Federal Judicial Center report concluded that in 1990, African-Americans were 21 percent and Latinos 28 percent more likely than whites to receive a mandatory prison term for offenses that fell

⁴² Mauer, Race to Incarcerate 136.

⁴³ See Bureau of Statistics, Department of Justice, *Felony Defendants in Large Urban Counties* 29 (1992).

under the mandatory sentencing laws.⁴⁴ Interestingly, some of the state guideline systems that reduced judicial discretion without eliminating it entirely seem to have reduced racial disparity to a certain degree.⁴⁵

In addition to the racial effects of race-neutral decision-making by prosecutors discussed in Section VI above, prosecutors exacerbate racial disparity through the types of offenses they choose to prosecute. The vision of many of the proponents of sentencing guidelines was the elimination of more favorable sentences for white collar and other wealthy defendants. But there is little evidence that either state or federal prosecutors pursue these types of crimes as zealously as they do crimes typically committed by the poor.⁴⁶

There are other sentencing laws that have had a harsher impact on African-Americans and Latinos than on whites. The federal cocaine laws are perhaps the single most notorious example. These laws distinguish between the crack and powder form of this drug, punishing the possession and distribution of the former much more harshly than the latter. The sale of 5 grams of crack results in the same mandatory five-year prison term as the sale of 500 grams of the powder form of the drug. African-Americans constitute the vast majority of individuals charged with crack distribution in the federal system; the percentage was as high as 88 percent in 1992.⁴⁷

As with other sentencing laws, the federal cocaine laws underscore the significance of the exercise of prosecutorial discretion. Almost all drug offenses may be charged either in state or federal court. Since the federal sentencing laws are almost always harsher than the state laws, this decision has great consequences for criminal defendants. The *Los Angeles Times* reported that between 1988 and 1994, not a single white person in the Los Angeles area was prosecuted for crack cocaine distribution in federal court while hundreds of white offenders were prosecuted in state court, receiving sentences as much as eight years less than offenders prosecuted in federal court.⁴⁸ Many of the African Americans prosecuted in federal court were low-level dealers or accomplices.

Other sentencing laws that have a disparate effect on African-Americans and Latinos are drug laws that impose an enhanced criminal penalty when the offenses are committed near certain types of facilities, such as schools or public housing facilities. Although these laws do not explicitly target African-Americans or Latinos, few white people live in public housing projects or attend schools in urban areas. Thus, these laws

⁴⁴ Mauer, *Race to Incarcerate* 136 (citing Barbara S. Meierhoefer, *The General Effect of Mandatory Minimum Prison Terms* (Washington, D.C.: Federal Judicial Center, 1992), p. 20).

⁴⁵ Michael Tonry, *Sentencing Matters* (New York: Oxford University Press, 1995), p. 57.

⁴⁶ Mauer, *Race to Incarcerate* 139.

⁴⁷ *Id.* at 155 (citing United States Sentencing Commission, *Cocaine and Federal Sentencing Policy* (Washington, D.C.: United States Sentencing Commission, February 1995), pp. 122-23).

⁴⁸ Dan Weikel, "War on Crack Targets Minorities over Whites," *Los Angeles Times*, May 21, 1995. The United States Supreme Court rejected a black defendant's attempt to obtain discovery in support of a motion to dismiss for selective prosecution filed to challenge these prosecutions. See *United States v. Armstrong*, 517 U.S. 456 (1996).

treat the residents of these areas differently from their similarly situated counterparts who live in other, more affluent areas.

The Connecticut enhanced penalty statute exemplifies this problem. Any person who distributes, or possesses with intent to distribute, a controlled substance in, on, or within 1,500 feet of a school, public housing project, or licensed day care facility is sentenced to three years of imprisonment, which may not be suspended and must be served consecutively to the term of imprisonment for the underlying drug offense.⁴⁹ Because of the necessary proximity of these facilities in densely populated urban areas, the statute transforms the entire city of New Haven into a targeted crime zone.⁵⁰ The majority of New Haven residents are African-American or Latino.⁵¹

Although the statute obviously applies to the entire state, including the white suburban communities of Connecticut, it will not have the same impact on those communities for a variety of reasons. First, studies have shown that suburban drug sales are generally conducted at the workplace, in bars, and at athletic and cultural events. Second, there are rarely public housing projects in suburban communities. Finally, suburban communities are not as densely occupied as urban areas.

One of the goals of enhancing the penalty for drug dealing near schools or day care centers is to protect children. However, it may not be fair to punish a drug dealer in an urban area more harshly than his similarly situated counterpart in the suburbs if he has no intent to sell near a school or day care center but cannot avoid the enhancement because it applies to the entire city. The statute permits the suburban drug dealer to avoid the enhancement if he sells to a school age child as soon as the child walks outside of the 1,500 foot radius. However, the urban drug dealer who sells the same amount of drugs to an adult within 1,500 feet of a school when there are no children in the area will receive an enhanced sentence.

⁴⁹ C.G.S.A. § 21a-278a(b)

⁵⁰ George Coppolo, *Drug Sales Near Schools, Day Care Centers, and Public Housing Projects*, OLR Research Report, Connecticut General Assembly, Office of Legislative Research, p. 3; Testimony of State Legislator Michael Lawlor, Justice Kennedy Commission Hearings, November 14, 2003.

⁵¹ In the year 2000, 57.5% of New Haven residents were black or Hispanic (36.1% black and 21.4% Hispanic).
http://research.yale.edu/datainitiative/data.php?s=1&t=0&g=11&i=270_275&step=3&y%5B%5D=16

IX. A Case Study: Monroe County, Indiana

Our Report lays out the reasons why we believe that racial disparity in the criminal justice system is a complex and difficult problem. There are multiple complicated causes, many of which occur outside the criminal process. Within the criminal justice system, the causes are cumulative at each stage of the process and often result from the combined effects of discretionary decisions by criminal justice officials and criminal justice laws, policies, and practices that have a disproportionate impact on African-Americans and Latinos. Thus, any effective solution must involve officials and stakeholders at every stage of the criminal process as well as policy makers, legislators, and interested members of the community.

The Monroe County Racial Justice Task Force provides an example of how the criminal justice officials in one community addressed racial disparity in their criminal justice system. The Monroe County NAACP and the Unitarian Universalist Church in Bloomington, Indiana, spearheaded this effort. These organizations issued a preliminary report documenting the racial disparity in the county's criminal justice system and calling for the creation of a task force to address the problem. Participants in the task force included officials from the District Attorney's Office, the Bloomington Police Department, the Monroe County Deputy Sheriff's Office, the Monroe County Circuit Court, the local NAACP, and the Unitarian Universalist Church. Graduate students from the Criminal Justice Department of Indiana University provided research assistance and data collection.

The Monroe County Racial Justice Task Force sought technical assistance from The Sentencing Project, a nationally recognized non-profit organization that promotes alternatives to incarceration and more effective and humane criminal justice policies. The Sentencing Project provided the Task Force with copies of *Reducing Racial Disparity in the Criminal Justice System: A Manual for Practitioners and Policymakers*, which was produced through the support of the Bureau of Justice Assistance of the United States Department of Justice. This manual provides a step-by-step research design to assist communities in identifying and addressing racial disparity.

The Task Force conducted a comprehensive study of the criminal justice system from arrest through sentencing, designed to determine whether there were racial disparities at each stage, to establish the cause of these disparities, and to recommend and implement concrete strategies, practices and policy changes to eliminate them. This study was made possible because of the participation of key high-level officials with the power and discretion to implement changes. Perhaps the most significant factor in the success of the task force's work was the chief prosecutor's willingness to provide access to internal prosecution data, enabling the Task Force to determine whether there were racial differences in charging and plea-bargaining decisions. With the assistance of Marc Mauer and Dennis Schrantz, authors of the manual, the Task Force completed its work and published the completed report in October 2003. It is beginning the process of implementing the report's recommendations.

X. Recommendations

The Justice Kennedy Commission recommends that all communities interested in eliminating racial and ethnic disparity in the criminal process establish Criminal Justice Racial and Ethnic Task Forces that include individuals and entities that play important roles in the criminal justice process, and interested groups such as advisory neighborhood commissions and local civil rights organizations. The Commission urges these task forces to 1) design and conduct studies to determine the extent of racial and ethnic disparity in the various stages of criminal investigation, prosecution, disposition and sentencing; 2) make periodic public reports on the results of their studies; and 3) make specific recommendations intended to eliminate racial and ethnic discrimination and unjustified racial and ethnic disparities.

The Commission further recommends that states, territories, and the federal government require law enforcement agencies to develop and implement policies and procedures to combat racial and ethnic profiling, including education and training, data collection and analysis and other “best practices” that have been implemented throughout the country through voluntary programs and legislation.

Finally, the Commission recommends that states, territories, and the federal government conduct racial and ethnic disparity impact analyses to evaluate the potential disparate effects on racial and ethnic groups of existing statutes and proposed legislation; review the data gathered and recommendations made by Criminal Justice Racial and Ethnic Task Forces; and propose legislative alternatives intended to eliminate predicted racial and ethnic disparity at each stage of the criminal justice process.

Respectfully submitted,

Stephen Saltzburg, Chairperson
Justice Kennedy Commission

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