



American Bar Association and NAACP Legal Defense Fund Joint Statement on Eliminating Bias in the Criminal Justice System

July 16, 2015

The American Bar Association and the NAACP Legal Defense and Educational Fund, Inc. have long and proud traditions of fighting for civil rights, human rights and equal justice. Although, over the years, we have celebrated much progress in these arenas, we are now confronted by a troubling and destabilizing loss of public confidence in the American criminal justice system. The growing skepticism about the integrity of the criminal justice system is driven by real and perceived evidence of racial bias among some representatives of that system. This crisis of confidence must be addressed, and the time to act is now.

While we believe that the overwhelming percentage of law enforcement officers, prosecutors, and judges are not racist, explicit bias remains a real factor in our country –and criminal justice system – and implicit or unconscious bias affects even those who may believe themselves to be fair. Indeed, as Supreme Court Justice Anthony Kennedy once observed (in the 2001 case of *Board of Trustees v. Garrett*), prejudice may arise from not just overt “malice or hostile animus alone,” but also “insensitivity caused by simple want of careful, rational reflection or from some instinctive mechanism to guard against people who appear to be different in respects from ourselves.”

One would have to have been outside of the United States and cut off from media to be unaware of the recent spate of killings of unarmed African American men and women at the hands of white law enforcement officers. Several of these killings, like those of Walter Scott in South Carolina, 12-year-old Tamir Rice in Ohio, and Eric Garner in New York, have been captured by citizen video and viewed nationwide. More recently, the in-custody death of Freddie Gray sparked days of unrest in Baltimore City, which ended only when the officers (who were of multiple races) were charged by the local prosecutor.

Given the history of implicit and explicit racial bias and discrimination in this country, there has long been a strained relationship between the African-American community and law enforcement. But with video cameras and extensive news coverage bringing images and stories of violent encounters between (mostly white) law enforcement officers and (almost exclusively African-American and Latino) unarmed individuals into American homes, it is not surprising that the absence of criminal charges in many of these cases has caused so many people to doubt the ability of the criminal justice system to treat individuals fairly, impartially, and without regard to their race.

That impression is reinforced by the statistics on race in our criminal justice system. With approximately 5% of the world's population, the United States has approximately 25% of the world's jail and prison population. Some two-thirds of those incarcerated are persons of color. While crime rates may vary by neighborhood and class, it is difficult to believe that racial disparities in arrest, prosecution, conviction, and incarceration rates are unaffected by attitudes and biases regarding race.

And, to the extent that doubts remain, the U.S. Department of Justice's recent investigation of law enforcement practices in Ferguson, Missouri, should put them to rest. In Ferguson, the Justice Department found that the dramatically different rates at which African-American and White individuals in Ferguson were stopped, searched, cited, arrested, and subjected to the use of force could not be explained by chance or differences in the rates at which African-American and White individuals violated the law. These disparities can be explained at least in part by taking into account racial bias.

Given these realities, it is not only time for a careful look at what caused the current crisis, but also time to initiate an affirmative effort to eradicate implied or perceived racial bias – in all of its forms – from the criminal justice system.

As lawyers, we have a very special role to play. As the Preamble to the American Bar Association Model Rules of Professional Conduct states,

As a public citizen, a lawyer should seek improvement of the law, access to the legal system, the administration of justice and the quality of service rendered by the legal profession. In addition, a lawyer should further the public's understanding of and confidence in the rule of law and the justice system because legal institutions in a constitutional democracy depend on popular participation and support to maintain their authority.

What must we do? The answer lies in making both macro and micro changes in our criminal justice system.

At the macro level, Congress and state legislatures must look at the vast array of laws that criminalize behaviors that pose little, if any, danger to society. We have over-criminalized conduct throughout the United States and have come inappropriately to rely on the criminal justice system to address problems of mental health and poverty. We have adopted unnecessary zero-tolerance policies in schools that inappropriately require police officers to take the place of teachers and principals and become behavioral judges. We need fewer criminal laws, and fewer

circumstances in which police, prosecutors, and judges are called upon to deal with social, as opposed to criminal, issues.

Over-criminalization is such a significant problem that virtually every careful observer of criminal justice in America, conservative or liberal, recognizes it. This consensus presents a unique opportunity to unflinchingly confront the need to improve our justice system.

De-criminalization is, however, not a short-term solution to the current crisis of confidence. Every day, law enforcement officers, prosecutors, and judges are making discretionary decisions in a country where, literally, any person could be arrested for something if government officials focused sufficient time and energy on him or her.

We must therefore take immediate action at the micro level to begin the process of rebuilding trust and confidence in the criminal justice system and fulfilling the promise of equal justice.

Prosecutors play an important and vital role within the criminal justice system and should be leaders in this effort. We have begun what we anticipate will be a series of conversations focused on identifying ways in which prosecutors can play a more powerful role in addressing the problem of racial bias in our justice system. Our organizations arranged an off-the-record discussion that included prosecutors and other participants in the criminal justice system committed to equal justice. We emerged from our discussion with a commitment to advancing the reforms listed below. We regard these reforms as necessary investments that are essential to strengthening public confidence in the rule of law and the legitimacy of our justice system.

1. We need better data on the variety of interactions between law enforcement and citizens. Earlier this year FBI Director James Comey – himself a former federal prosecutor – acknowledged that gathering better and more reliable data about encounters between the police and citizens is “the first step to understanding what is really going on in our communities and our country.” Data related to violent encounters is particularly important. As Director Comey remarked, “It’s ridiculous that I can’t know how many people were shot by police.” Police departments should be encouraged to make and keep reports on the racial identities of individuals stopped and frisked, arrested, ticketed, or warned for automobile and other infractions. Police departments should report incidents in which serious or deadly force is used by officers and include the race of the officer(s) and that of the civilian(s). This will certainly require investment of funds, but that investment is key to a better future. We cannot understand what we cannot measure, and we cannot change what we cannot understand.

2. Prosecutors should collect and publicly disclose more data about their work that can enable the public to obtain a better understanding of the extent to which racial disparities arise from the exercise of prosecutorial discretion. While this data collection will also require investment of funds, it is essential to achieving the goal of eliminating racial bias in the criminal justice system.

3. Prosecutors and police should seek expert assistance from organizations with expertise in conducting objective analyses to identify and localize unexplained racial disparities. These and similar organizations can provide evidence-based analyses and propose protocols to address any identified racial disparities.

4. Prosecutors' offices, defense counsel, and judges should seek expert assistance to implement training on implicit bias for their employees. An understanding of the science of implicit bias will pave the way for law enforcement officers, prosecutors, and judges to address it in their individual work. There should also be post-training evaluations to determine the effectiveness of the training.

5. Prosecutors' offices must move quickly, aggressively, unequivocally – and yet deliberately – to address misconduct that reflects explicit racial bias. We must make clear that such conduct is fundamentally incompatible with our shared values and that it has an outsized impact on the public's perception of the fairness of the system.

6. Prosecutors' offices and law enforcement agencies should make efforts to hire and retain lawyers and officers who live in and reflect the communities they serve. Prosecutors and police should be encouraged to engage with the community by participating in community forums, civic group meetings, and neighborhood events. Prosecutors' offices should build relationships with African-American and minority communities to improve their understanding about how and why these communities may view events differently from prosecutors.

7. There should be a dialogue among all the stakeholders in each jurisdiction about race and how it affects criminal justice decision making. In 2004, the ABA Justice Kennedy Commission recommended the formation of Racial Justice Task Forces – which would consist of representatives of the judiciary, law enforcement and prosecutors, defenders and defense counsel, probation and parole officers, and community organizations – to examine the racial impact that policing priorities and prosecutorial and judicial decisions might produce and whether alternative approaches that do not produce racial disparities might be implemented without compromising public safety. There is little cost associated with the assembly of such Task Forces, and they can develop solutions that could be applicable to a variety of jurisdictions provided that the various stakeholders were willing to do the hard work of talking honestly and candidly about race.

8. As surprising as it might seem, many people do not understand what prosecutors do. Hence, prosecutors' offices, with the help of local and state bar associations, should seek out opportunities to explain their function and the kinds of decisions they are routinely called upon to make. Local and state bar associations and other community organizations should help to educate the public that the decision *not* to prosecute is often as important as the decision *to* prosecute; that prosecutors today should not to be judged solely by conviction rates, but, instead, by the fairness and judgment reflected in their decisions and by their success in making communities safer for all their members; and that some of the most innovative alternatives to traditional prosecution and punishment – like diversion and re-entry programs, drug and veteran courts, and drug treatment – have been instigated, developed, and supported by prosecutors.

9. To ensure accountability, the public should have access to evidence explaining why grand juries issued “no true bills” and why prosecutors declined to prosecute police officers involved in

fatal shootings of unarmed civilians. The release of grand jury evidence, as in Ferguson, is one way to promote the needed accountability.

10. Accountability can also be promoted by greater use of body and vehicle cameras to create an actual record of police-citizen encounters. With the proliferation of powerful firearms in our communities, law enforcement departments reasonably seek equipment that enable them to protect themselves and their communities when called upon to confront armed and dangerous individuals seeking to engage in criminal or terrorist acts. However, while it is appropriate to arm our police and train them in the use of ever more powerful weapons, it is equally important to train our law enforcement officers in techniques designed to de-escalate tense situations, make accurate judgments about when use of force is essential, and properly determine the appropriate amount of force required in each situation.

11. We must recognize that not every lawyer has the judgment and personal qualities to be a successful prosecutor, do justice, and be willing to acknowledge the possibility of implicit bias. Prosecutors who routinely engage in conduct or make decisions that call into question the fairness or integrity of their offices should be removed from office if they cannot be trained to meet the high standards expected of public officers. At the same time, the terms “prosecutorial misconduct” and “police misconduct” should be used with greater care. Even the best prosecutors will make mistakes, much like the best defense lawyers and judges do. There is good reason to limit the characterization of “misconduct” to intentional acts that violate legal or ethical rules.

12. Prosecutors, judges, and defense counsel must pay more attention to the collateral consequences of convictions. In many jurisdictions, after an individual is convicted of an offense and completes his or her sentence (by serving time, paying a fine, or completing probation or parole), the individual nevertheless faces a life sentence of disqualification and deprivation of educational, employment, housing, and other opportunities. This runs counter to the interests we all share in rehabilitation of the offender and positive re-integration into and engagement with the communities in which they live. In many cases, prosecutions can be structured to limit some of the most pernicious of these consequences, provided that the lawyers and the courts take the time and care to examine alternative disposition options. Prosecutors, judges, and defense counsel should join together to urge legislatures and administrative agencies to reconsider the laws and regulations that impose these collateral consequences and determine whether they can be modified to provide more opportunities for former offenders without compromising public safety.

The American criminal justice system is unquestionably at a moment of crisis. But there are many steps we, as members of the bar, can and should take quickly to begin to turn the ship of justice around and ensure that the system delivers the blind justice that it promises. If we commit ourselves to confronting and eliminating the racial biases that now exist, we can restore the much-needed public confidence in our criminal justice system. As Supreme Court Justice Thurgood Marshall once exhorted in accepting the Liberty Medal Award in 1992, “America can do better.” Indeed, “America has no choice but to do better.”

Both the American Bar Association and the Legal Defense Fund will continue to convene meetings with prosecutors and other law enforcement groups to support the reforms we have identified. We also will work to support and advance a robust dialogue among prosecutors and leaders in the profession about how best to eliminate racial bias from our justice system.

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