SYMPOSIUM ON RACIAL BIAS AND THE CRIMINAL JUSTICE SYSTEM

Introduction

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At Seattle University School of Law's Symposium on Racial Bias and the Criminal Justice System, students, faculty, judges, scholars, lawyers, and community members gathered to address racial disparity in the criminal justice system and to explore ways to keep the promise of our democracy that we all are equal before the law. Race, ethnicity, skin color, and national origin profoundly influence our legal structure and our liberty. The way that race influences perceptions and actions is critically important in the context of our criminal justice system—a system that changes lives, disrupts and protects communities, and represents a key part of our struggle for justice.

Washington's Task Force on Race and the Criminal Justice System (Task Force) came together to investigate disproportionalities in the criminal justice system and their possible causes, with the aim of making recommendations for changes to promote fairness and instill public confidence.[1] The symposium is part of the Task Force's call to action, and the scholars who contributed articles to this issue of the *Seattle University Law Review* share a commitment to this effort. The articles form a valuable collection as they examine a wide range of actors in the criminal justice system: criminal defense attorneys, prosecutors, judges, and law enforcement. The articles are diverse in subject and style, but read to-

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1. Task Force on Race & the Criminal Justice Sys., *Preliminary Report on Race and Washington's Criminal Justice System*, 35 SEATTLE U. L. REV. 623, 626 (2012).

gether they highlight the key steps for moving toward our dream of completely eliminating racial bias in criminal, civil, juvenile, and family law matters. Those steps include (1) acknowledging that racial bias exists, (2) engaging in research and discussion regarding its causes and impact, and (3) collaborating in order to achieve solutions.

I. ACKNOWLEDGE

The Task Force began by acknowledging the indisputable fact that there is racial and ethnic disproportionality in Washington's criminal justice system.[2] Scholars in this issue similarly start with important acknowledgements about our social and legal landscape.

In *O.P.P.: How "Occupy's" Race-Based Privilege May Improve Fourth Amendment Jurisprudence For All*, Lenese C. Herbert acknowledges that race is not biology but rather a social and legal construct around which structures have been built and identities formed.[3] She describes race as a distorted prism through which we—even those of us who are the object of racial biases—think about the world and perceive our experiences.[4] Viewing the world through the distorted prism of race has resulted in a collective unconsciousness about police violence toward blacks.[5] Occupy protesters' shock about police violence, despite the similar experiences of recent civil rights protestors, makes it apparent that expectations of privilege and power have developed along racial lines.[6] In positioning a historically immune group of people who are white as victims of police violence, Occupy reveals that "whiteness" is a social and legal construct—an ideological proposition about who has privilege, power, and property. The outcry over police violence, regardless of color, positions us to acknowledge collectively what should have been acknowledged before—that race-based stratifications and differentiation are a result of political and social, not scientific or actual, constructs. Herbert's work brings consciousness to the ways that discrimination and injustice are still undeniable social facts because race has been built into our social structures and self-identities in distorted ways.

Mario L. Barnes, Robert S. Chang, Clayton Mosher, and J. Mitchell Pickerill acknowledge the racially disparate rates of citations and vehicle

2. *Id.* at 627.

3. Lenese C. Herbert, *O.P.P.: How "Occupy's" Race-Based Privilege May Improve Fourth Amendment Jurisprudence For All*, 35 SEATTLE U. L. REV. 727 (2012).

4. *Id.* at 737 (quoting Wahneema Lubiano, *Introduction* to THE HOUSE THAT RACE BUILT vii (Wahneema Lubiano ed., 1998)).

5. *Id.* at 744.

6. *Id.* at 732 n.25.

searches in Washington State.[7] Mosher and Pickerill broaden the traditional academic definition of racial profiling in a way that acknowledges the potential for bias to influence not only decisions to stop or apprehend, but also decisions about whom to cite and arrest, who to search, and against whom to use force.[8] Barnes and Chang acknowledge that our antidiscrimination laws fall short and that "much discrimination occurs for which there is no legal remedy."[9] They advocate for an investigation of the ways that unconscious or implicit bias operate to produce disparate outcomes.[10]

In *The Impact of Implicit Racial Bias on the Exercise of Prosecutorial Discretion*, Robert J. Smith and Justin D. Levinson acknowledge that "the power to be lenient is . . . the power to discriminate."[11] They examine how implicit bias affects decisions at key points of prosecutorial discretion. Bias operates when prosecutors make charging decisions; it operates when prosecutors make strategic pretrial decisions, such as whether to oppose bail, offer a plea bargain, or disclose potentially exculpatory evidence to the defense; and it operates in trial strategy when prosecutors decide to strike potential jurors.[12]

Andrea D. Lyon acknowledges implicit bias on the other side of the adversarial system—a topic that has received less treatment in public discourse. In *Race Bias and the Importance of Consciousness for Criminal Defense Attorneys*, Lyon shares that although she began working at the public defender's office in Chicago with the expectation that she and her colleagues were "good" on race issues, she learned that "there is no person without prejudices."[13] Lyon specifically highlights how she has observed biases exhibited among defense attorneys when interacting with clients and when selecting a jury. By framing the discussion around her own experiences, she brings a uniquely personal tone to this collection of articles. Lyon posits that our most important focus should be to develop a

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7. Mario L. Barnes & Robert S. Chang, *Analyzing Stops, Citations, and Searches in Washington and Beyond*, 35 SEATTLE U. L. REV. 673 (2012); Clayton Mosher & J. Mitchell Pickerill, *Methodological Issues in Biased Policing Research with Applications to the Washington State Patrol*, 35 SEATTLE U. L. REV. 769 (2012).

8. Mosher & Pickerill, *supra* note 7, at 769.

9. Barnes & Chang, *supra* note 7, at 693.

10. *Id.*

11. Robert J. Smith & Justin D. Levinson, *The Impact of Implicit Racial Bias on the Exercise of Prosecutorial Discretion*, 35 SEATTLE U. L. REV. 795, 806 (2012) (quoting McCleskey v. Kemp, 481 U.S. 279, 312 (1987)) (internal quotation marks omitted).

12. *Id.* at 796–97.

13. Andrea D. Lyon, *Race Bias and the Importance of Consciousness for Criminal Defense Attorneys*, 35 SEATTLE U. L. REV. 755, 755 (2012).

willingness to be introspective; it is by acknowledging bias, which is "not invisible or immutable," that we overcome it.[14]

When we acknowledge in an individual and collective way that race is a social construct, that we observe racially disparate outcomes in the criminal justice system, and that implicit bias affects decision-making processes, we provide a platform for engaging in research and discussion.

II. ENGAGE

The work of a group of researchers studying perceptions of judicial bias in Israel gives us an opportunity to reflect on the tone with which we must engage in dialogue and debate: without calling each other names or making assumptions, with openness, and with an awareness of the subjective status of our own views. In *Actual Versus Perceived Performance of Judges* by Theodore Eisenberg, Talia Fisher, and Issi Rosen-Zvi, researchers explore the relation between perceptions of bias and the underlying reality of judicial behavior.[15] They surveyed the Israeli legal community's perceptions of Israel Supreme Court justices' biases in criminal cases and compared the results with justices' actual votes. Ultimately, the researchers conclude that justices' actual voting patterns in mandatory-jurisdiction criminal cases do not explain perceptions of the justices as being either pro-state or pro-defendant.[16] Their research also revealed that media reports of justices correlate better with perceptions and that both prosecutors and defense attorneys tend to view justices as hostile to their clients' positions.[17] The article urges us to move from rhetoric and accusation to debate through empirical research and measurement.[18]

In this symposium collection, two groups of researchers engage in debate about studies of bias in policing in Washington State.[19] Researchers commissioned by the Washington State Patrol have been conducting research on racial profiling since 2001.[20] Bivariate analyses of stops, citations, and searches have revealed racially disparate outcomes. Black, Native-American, Asian, and Hispanic drivers are more likely to be issued citations than white drivers in between twenty-nine and forty of the forty autonomous patrol areas in the state.[21]

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14. *Id.* at 761.

15. Theodore Eisenberg, Talia Fisher & Issi Rosen-Zvi, *Actual Versus Perceived Performance of Judges*, 35 SEATTLE U. L. REV. 695 (2012).

16. *Id.* at 715.

17. *Id.* at 722.

18. *Id.* at 723.

19. Barnes & Chang, *supra* note 7, at 673; Mosher & Pickerill, *supra* note 7, at 769.

20. Mosher & Pickerill, *supra* note 7, at 784.

21. *Id.* at 786.

In *Methodological Issues in Biased Policing Research with Applications to the Washington State Patrol*, Mosher and Pickerill discuss important methodological challenges for analyzing data related to stops, searches, and seizures. To address these methodological issues, Mosher and Pickerill undertake a more detailed multivariate analysis, trying to control for additional factors to see if racial disproportionalities can be accounted for by nonracial factors.[22] Mosher and Pickerill posit that analysis of citations in the context of traffic stops needs to take into account the possibility that "some members of minority groups are less likely to comply with traffic laws, may be more likely to have a higher number of traffic violations, and may be more likely to be involved in more serious traffic offenses, such as driving while impaired."[23] These "nonracial" factors increase the probability of receiving a citation. Mosher and Pickerill find attenuated racial bias in the issuing of citations when the number and seriousness of violations across racial groups are controlled for.[24]

In *Analyzing Stops, Citations, and Searches in Washington and Beyond*, Barnes and Chang challenge the methodology of and conclusions drawn by Mosher and Pickerill.[25] While Barnes and Chang agree that evidence does not support a finding of widespread intentional discrimination on the part of the Washington State Patrol, they argue that race remains a factor that heightens the probability of citation or search, even when age, seriousness of the violation, race of the officer, time of day, and location of the stop are controlled for.[26] Barnes and Chang allege several methodological flaws in Mosher and Pickerill's approach and conclude that their own data point toward the operation of implicit bias.[27]

A group of Seattle University law students also engage in debate over the rules articulated in *State v. Monday*[28] and the impact of implicit racial bias on prosecutorial conduct. In *"If Justice Is Not Equal For All, It Is Not Justice": Racial Bias, Prosecutorial Misconduct, and the Right to a Fair Trial in State v. Monday*, Michael Callahan argues in favor of the concurring opinion's rule, which would not subscribe to the majority's "illusory harmless error standard" and instead advocated reversal

22. *Id.* at 789.
23. *Id.* at 782 (citations omitted).
24. *Id.* at 784.
25. Barnes & Chang, *supra* note 7, at 676.
26. *Id.* at 692.
27. *Id.* at 693.
28. State v. Monday, 257 P.3d 551 (Wash. 2011).

any time racial bias is injected into a criminal trial.[29] On the other hand, in *"Like Wolves in Sheep's Clothing": Combating Racial Bias in Washington State's Criminal Justice System*, Krista L. Nelson and Jacob J. Stender argue that both the majority and concurring opinions in *State v. Monday* at least address the harm of subtle, unconscious racial bias, which is a step in the right direction.[30] They argue that what remains open to debate is how to identify implicit racial bias and how to combat its use.[31]

III. COLLABORATE

We must continue to engage in discussion and explore competing ideas about approaches. Solutions are to be found in collaboration.

Smith and Levinson call for collaboration among researchers and policymakers to tackle an implicit bias research agenda in *The Impact of Implicit Racial Bias on the Exercise of Prosecutorial Discretion*.[32] They discuss the ways in which the "implicit bias revolution" creates opportunities to empirically investigate how actors within the legal system can perpetuate discrimination in ways that have been—until now—almost impossible to detect.[33] Offering that "the best science is collaborative, transparent and forward looking," Smith and Levinson urge researchers to join them in building up a body of proof to support contentions that implicit racial bias affects the decisions of prosecutors.[34] For example, they suggest that researchers can test whether participants subliminally primed with black and white faces make different decisions when deciding how to charge suspects in borderline cases.[35]

Herbert's article about Occupy situates us at a pivotal "moment of clarity"[36] and at a time in history when a current social movement provides a profound opportunity to collaborate across historic barriers. Herbert points to the potential for a paradigm-shift that would be foundational for fostering collaboration and changing our legal framework.[37] Herbert's article connects the past and present, highlighting the historical connection that has been overlooked between civil rights protestors and

29. Michael Callahan, Note, *"If Justice Is Not Equal For All, It Is Not Justice": Racial Bias, Prosecutorial Misconduct, and the Right to a Fair Trial in* State v. Monday, 35 SEATTLE U. L. REV. 827 (2012).

30. Krista L. Nelson & Jacob J. Stender, Note, *"Like Wolves in Sheep's Clothing": Combating Racial Bias in Washington State's Criminal Justice System*, 35 SEATTLE U. L. REV. 849, 865 (2012).

31. *Id.*

32. Smith & Levinson, *supra* note 11, at 822.

33. *Id.* at 795.

34. *Id.* at 822.

35. *Id.* at 801.

36. Herbert, *supra* note 3, at 744.

37. *Id.* at 749.

Occupy protestors.[38] As shared experience brings consciousness of implicit bias and race as a social construct, we hope we can come together over common concern about police conduct, criminal prosecutions, criminal defenses, and judicial determinations. Racial bias in the criminal justice system is not just a "people of color" problem; it is our problem as a society to address. We must collaborate to move beyond incoherent, socially constructed concepts of race.

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There are insufficient studies of implicit racial bias in the criminal justice system and an insufficient legal framework for addressing the bias that affects criminal justice outcomes. The articles in this collection and the dialogue at the symposium begin to fill in missing pieces. We have much to commend and much more that needs work. Progress happens at the level of events, not of words, and participating in this symposium is a valuable response to the *Task Force Report*'s call to action. The varied tone and style of the articles highlight how many areas there are for scholars and citizens of all backgrounds and disciplines to enter the dialogue. Diversity among the voices in the dialogue and in positions within the legal system is valuable for efforts to eliminate the operation of implicit racial bias and improve the quality of decision-making. In addressing racial bias, we are tasked with hard work as a community and as individuals. With the kind of public discourse and introspection that this symposium and collection of scholarly work represents, we can acknowledge, engage, and collaborate to become more culturally competent individuals in a more just society.

38. *See id.* at 731–32.