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CAUSES, CONSEQUENCES AND CURES OF RACIAL AND ETHNIC DISPROPORTIONALITY IN CONVICTION AND INCARCERATION RATES: AN INTRODUCTION*

Janet Moore¹

In a January 1987 memorandum to his colleagues, Justice Antonin Scalia bluntly acknowledged that “the unconscious operation of irrational sympathies and antipathies, including racial,” on prosecutors and jurors “is real [and] acknowledged in our cases[.]”² The contemporary infection of the nation’s criminal justice systems with race-based “sympathies and antipathies” was incubated through centuries of *de jure* and *de facto* privileging of whites over blacks.³ Colonial and antebellum periods saw race-based hierarchy embodied in laws from 18th century slave codes and constitutions through 19th century Black Codes.⁴ Fed by theories of “scientific racism,” racial hierarchy burst into aggressive new life with the post-Reconstruction white supremacy movement

* I thank Charles Becton, David Cecelski, David Weiss, and Tim Tyson for their thoughtful comments and suggestions during the research and writing of the amicus brief on behalf of historians, civil rights attorneys, and law professors supporting claims raised under North Carolina’s Racial Justice Act, from which portions of this Introduction are drawn. Brief for State v. Al-Bayyinah as Amici Curiae Historians and Law Professor, Davie County No. 98 CrS 836, 1009 (filed Sept. 15, 2010). Any remaining errors are my own.

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2. Memorandum to the Conference from Justice Antonin Scalia in No. 84-6811 - McCleskey v. Kemp of Jan. 6, 1987, *McCleskey v. Kemp* file, in Thurgood Marshall Papers, The Library of Congress, Washington, D.C.; cf. ROBERT M. ENTMAN & ANDREW ROJEČKI, *THE BLACK IMAGE IN THE WHITE MIND: MEDIA AND RACE IN AMERICA* (The University of Chicago Press 2000) (Table 2.1 detailing complex spectra of white racial attitudes toward blacks).

3. “[T]he black man has functioned in the white man’s world as a fixed star, as an immovable pillar: and as he moves out of his place, heaven and earth are shaken to their foundations.” James Baldwin, *My Dungeon Shook: Letter to My Nephew on the One Hundredth Anniversary of the Emancipation*, in *THE PRICE OF THE TICKET: COLLECTED NONFICTION, 1948-1985*, at 336 (St. Martin’s Press 1985).

4. Seth Kotch & Robert P. Mosteller, *The Racial Justice Act and the Long Struggle with Race and the Death Penalty in North Carolina*, 88 N.C. L. REV. 2031, 2043-51 (2010).

and Jim Crow laws.⁵ Mutations through the post-Civil Rights “War on Crime” and “War on Drugs” led to the 21st century’s interlocking systems of mass incarceration and post-release collateral consequences⁶ which block access to the family and community ties, jobs, housing, education, and transportation that are proven to reduce crime.⁷ Incarceration rates for African American men aged 20-34 have skyrocketed to 1 out of 9.⁸ The ratio of black children with at least one parent locked up is identical — 1 out of 9.⁹ The infection of the nation’s criminal justice systems with racial disparity has become an epidemic. It is destroying individual lives and whole communities. Simultaneously posing the biggest civil rights and public health challenges of our time, this crisis demands new, evidence-based approaches to reform.

At the back end of the system, recent national metastudies have interrogated available data to assess whether race and ethnicity affect contemporary sentencing decisions; they found a significant correlation.¹⁰ More nuanced regression or “interactive” analysis examines race as one factor alongside other legal and extralegal factors, such as charge severity, defendants’ criminal histories, and demographic and other characteristics (including education and income level) that affect defendant and victim status. By controlling for such variables, researchers seek to identify and evaluate any statistically significant role of race or ethnicity — including victim race — in case outcomes.¹¹ An indirect or

5. David S. Cecelski & Timothy B. Tyson, *Preface to DEMOCRACY BETRAYED: THE WILMINGTON RACE RIOT OF 1898 AND ITS LEGACY* xiv (David S. Cecelski & Timothy B. Tyson eds., The University of North Carolina Press 1998) [hereinafter *DEMOCRACY BETRAYED*]; Michael Honey, *Class, Race, and Power in the New South: Racial Violence and the Delusions of White Supremacy* in *DEMOCRACY BETRAYED*, at 174; see also 1898 WILMINGTON RACE RIOT COMM’N, 1898 WILMINGTON RACE RIOT REPORT 35, 46 (2006) available at <http://www.history.ncdcr.gov/1898-wirc/report/report.htm>.

6. See generally MICHELLE ALEXANDER, *THE NEW JIM CROW: MASS INCARCERATIONS IN THE AGE OF COLORBLINDNESS* (The News Press 2010); JONATHAN SIMON, *GOVERNING THROUGH CRIME: HOW THE WAR ON CRIME TRANSFORMED AMERICAN DEMOCRACY AND CREATED A CULTURE OF FEAR* (Oxford University Press 2007).

7. See STEVE AOS, MARNA MILLER, & ELIZABETH DRAKE, WASH. STATE INST. FOR PUB. POLICY, *EVIDENCE-BASED PUBLIC POLICY OPTIONS TO REDUCE FUTURE PRISON CONSTRUCTION, CRIMINAL JUSTICE COSTS, AND CRIME RATES* (Oct. 2006) (metastudy evaluating costs and benefits of crime reduction programs); THE PEW CHARITABLE TRUSTS, *COLLATERAL COSTS: INCARCERATION’S EFFECT ON ECONOMIC MOBILITY* (2010) [hereinafter *COLLATERAL COSTS*].

8. THE PEW CENTER ON THE STATES, THE PEW CHARITABLE TRUSTS, *ONE IN 100: BEHIND BARS IN AMERICA 2008*, at 6 (2008).

9. *COLLATERAL COSTS*, *supra* note 7, at 19.

10. See TUSHAR KANSAL, THE SENT’G PROJECT, *RACIAL DISPARITY IN SENTENCING: A REVIEW OF THE LITERATURE* (Marc Mauer ed. 2005); Cassia C. Spohn, *Thirty Years of Sentencing Reform: The Quest for a Racially Neutral Sentencing Process*, 3 CRIM. JUST. 427 (2000).

11. Kansal, *supra* note 10, at 4-6.

interaction effect occurs when “an independent variable influences a dependent variable *through* some other factor, rather than directly.”¹² For example, race could affect sentence severity indirectly when low-income status — which correlates strongly with racial or ethnic minority status — reduces or eliminates opportunities for pretrial release and, in turn, interferes with opportunities to get or keep a job, to stay in school, and to assist counsel in case investigation.

As race emerges as a factor in these complex and often unconscious ways — including in discretionary decision-making at pivotal points in criminal cases — Justice Scalia’s blunt acknowledgement of this effect remains the exception instead of the rule. Race remains an “emotionally freighted topic,” upon which “candor is socially discouraged.”¹³ The tension between historic commitments to equal liberty and *de jure* and *de facto* systems of white supremacy is “so fundamental — and so morally embarrassing — that we have gone to such lengths to obscure it.”¹⁴ Justice Scalia himself, after admitting that race affects decision-making by prosecutors and jurors, joined the 5-4 majority that declined to address the issue under the Eighth and Fourteenth Amendments. Instead, the five-member majority handed the problem off to the states.¹⁵

In 2009, North Carolina’s General Assembly accepted that challenge by passing the Racial Justice Act.¹⁶ The RJA is the nation’s most direct, comprehensive response to the “real, acknowledged” effect of race on the discretionary decision-making of prosecutors and jurors in death penalty cases. The statute allows challenges to death sentences and capital prosecutions based on statistical and other evidence that race was a factor in charging, sentencing, and jury selection decisions. By promoting the collection and assessment of detailed criminal case data, and focusing specifically on racial disparities in charging, sentencing, and jury selection, the RJA dramatically increases the transparency and accountability of discretionary decision-making at key pivot points in capital cases.

Equally important, the RJA is fully responsive to empirical research indicating that contemporary racial disparities often do not result from conscious or openly articulated racial bias. For example, some social scientists report that, in recent years, “the majority of White Americans experience ambivalent thoughts and feelings about African Americans, a complex mixture of animosity and yearning

12. Spohn, *supra* note 10, at 432-435.

13. ENTMAN & ROJECKI, *supra* note 2, at 5.

14. William H. Chafe, *Epilogue from Greensboro, North Carolina: Race and the Possibilities of American Democracy*, in DEMOCRACY BETRAYED, *supra* note 5, at 278.

15. McCleskey v. Kemp, 481 U.S. 279, 319 (1987).

16. N.C. GEN. STAT. §§ 15A-2010-2012 (2009).

for racial harmony.”¹⁷ That longing for “racial harmony” may mask discomfort with racial tension, or preference for hierarchical order, more than it reveals a hunger for meaningful relationship grounded in equal respect and dignity of persons. Nevertheless, the effects of deeply-rooted racial feeling in what some describe as a “post-racial” society are often subtle, and manifest through stereotyping and racial empathy instead of open racial hostility.¹⁸ And, as Justice Scalia acknowledged, that racial “sympathies and antipathies” are often unconscious renders them no less real or effective in the discretionary decision-making that drives criminal case outcomes.

Like North Carolina’s Racial Justice Act, Wayne McKenzie’s data-driven assessment of the effect of race on prosecutorial decision-making tackles these complex challenges head on. Through his work with the Vera Institute of Justice, McKenzie offers path-breaking new methods for identifying and curing causes of racial disparity in criminal cases. Significantly, McKenzie’s methods promote greater transparency and accountability in criminal justice systems. As a result, these methods can open doors to more robust community involvement in self-directed, participatory research and advocacy on criminal justice issues¹⁹ and, in turn, lend community-based prosecutorial policies²⁰ a stronger, more stable foundation. As discussed below, McKenzie’s work is a crucial and most welcome step toward fulfilling what John Hope Franklin called “the promise of real equality, made by the Founding Fathers more than two centuries ago, a promise neither they nor their successors kept.”²¹

17. ENTMAN & ROJECKI, *supra* note 2, at 3 and Table 2.1.

18. Kotch & Mosteller, *supra* note 4, at 2101-06.

19. Cf. Anthony V. Alfieri, *Post-racialism in the Inner City: Structure and Culture in Lawyering*, 98 GEO. L.J. 921, 962-63 (2010) (describing participatory community research aimed at diverting African American youth from the school-to-prison pipeline).

20. See, e.g., Anthony V. Alfieri, *A Colloquium on Community Policing: Community Prosecutors*, 90 CALIF. L. REV. 1465, 1474-80 (2002).

21. John Hope Franklin, *Foreword* to DEMOCRACY BETRAYED, *supra* note 5, at xi-xii.