



James E. Coleman, Jr. is the John S. Bradway Professor of the Practice of Law at the Duke University School of Law. He serves as co-director of the Wrongful Convictions Clinic and director of the Center for Criminal Justice and Professional Responsibility at Duke Law School. He also served, from 2007 to 2013, as co-director of the Appellate Litigation Clinic, and is a faculty adviser to the Innocence Project at Duke Law. He is Chair of the North Carolina Commission on Racial and Ethnic Disparities in the Criminal Justice System and formerly served on NCAJ's Executive Committee as Legal Affairs Vice President.



Chloe F. Johnson is the Program Manager of the North Carolina Commission on Racial and Ethnic Disparities in the Criminal Justice System (NC-CRED). She received her J.D. from the University of Georgia School of Law in 2009 and previously served as a public defender in Athens, GA.

An Update on the Work of the NC Commission on Racial and Ethnic Disparities in the Criminal Justice System

by James E. Coleman, Jr. and Chloe F. Johnson

Racial disparities permeate the criminal justice system. In one study, for instance, researchers found that police officers were 77 percent more likely to search African American motorists after a traffic stop than White motorists; they were 96 percent more likely to search a Latino motorist under the same circumstances.¹ In North Carolina, African American youth are almost three times more likely to be referred to juvenile court than Caucasian youth.² African Americans make up 22 percent of the North Carolina population, but account for 57 percent of our prison population.³ Such disparities are sobering. But the relevant question is: what can account for these results?

Too often statistics such as these are used to raise ire and advance an agenda, foreclosing any opportunity to uncover the factors responsible for such disproportionate outcomes. We assume that most of the officials who make up the criminal justice system are well-meaning individuals who do not harbor racial animus; they do not oversee a system that intentionally treats people differently because of their race. In other words, overt racism does not explain the extent of racial disparities that we witness today. A much more likely explanation, however, is unexamined implicit bias. Some racial disparities undoubtedly are the product of decisions made by well-meaning individuals who are unconsciously influenced by deeply held racial beliefs.

Implicit biases are essentially unconscious stereotypes. They are distinct from prejudices, which are adverse, preconceived judgments held consciously about another person, group, or thing (and usually endorsed by the holder). We are unaware of our implicit biases; in fact, they may run counter to our sincerely stated beliefs and values. But, because they function automatically, these biases can dictate our behavior. It is human nature to categorize information rapidly in order to make sense of the world. We do this every day; most of the time it is a helpful mechanism. However, when this

process is informed by historical biases promulgated by the media, one's peers, family, and general environment and then applied to people, our natural tendency to categorize can become a storehouse for negative stereotypes that operate at the subconscious level. Harvard Psychologist Anthony Greenwald has developed an enlightening tool that gauges one's own implicit biases across a range of categories: race, class, gender, and many more. The test can be self-administered, for free, at <https://implicit.harvard.edu/implicit/>.

There is a strong, often implicit, cultural association between black people and criminality. Numerous studies have demonstrated this pervasive bias. In 1976, a researcher demonstrated it by having participants watch a video of two men interacting. During the encounter, one of the men made an ambiguous gesture toward the other; the gesture could have been interpreted as playful, dramatic, aggressive, or potentially violent. However, the study found that how the gesture was interpreted was influenced overwhelmingly by the race of the person who made it. More than 80 percent of the observers characterized the gesture as an aggressive one when the person who made it was black; in contrast, only 15 percent of the observers characterized the same gesture that way when the person who made it was white.⁴ This study suggests that individuals interpret identical behaviors in a more negative light when the actor is a black person. If this reaction is automatic, it helps to explain the larger association of blackness and crime. If people are accustomed to interpreting conduct by black people negatively, they likely will make that assumption when thinking about crime. Consequently, it follows logically that, at times, people who call 911, the police, defense attorneys, Judges, and District Attorneys would all fall prey to these same implicit biases. Such engrained stereotypes and negative associations, then, must play a role in the widespread racially disproportionate land-

scape of the criminal justice system.

Using this framework, at least as a first step, provides a more nuanced view of how racism functions in our society. It also should cause us to be less invested in trying first to attribute corrosive blame to particular individuals or institutions for racially disparate outcomes. Since we often cannot isolate individuals who are responsible for the problem of racial inequities, always looking for overt discrimination will not eliminate the problem. Consequently, our entire methodology must change. That is what the North Carolina Commission on Racial and Ethnic Disparities in the Criminal Justice System is trying to do.

In June 2011, James E. Williams, Jr. Public Defender for Orange and Chatham counties, published a piece in **Trial Briefs** explaining the evolution of the NCAJ Task Force on Racial and Ethnic Bias in the Criminal Justice System. That group continued to evolve, and now has been replaced by the North Carolina Commission on Racial and Ethnic Disparities in the Criminal Justice System (NC-CRED/“Commission”). The Commission is more professionally diverse; we’ve added the important perspective of Police Chiefs, District Attorneys, and Judges to what was mostly a defender and advocate organization. Our goal is to arrive at a consensus on the existence and causes of racial disparities in particular areas of the criminal justice system so that we can make recommendations for reform that command the support of both prosecutors and defenders, the police, and community advocates. Without input from all of the stakeholders in the criminal justice system, reform efforts and policy changes are doomed to a life of continuous battle, one or two votes or a change of personnel away from being repealed, dropped, and forgotten. The Commission wants to create lasting change, beginning with cross-agency coalition building. Our goal is to find common ground and avoid polarization.

NC-CRED is made up of state-wide leaders in the criminal justice system who are committed to finding sustainable, practical, and effective reforms or poli-

cies that target preventable racial disparities. The Commission meets four times a year; we do most of our work through Subcommittees that meet monthly. Our current projects are on Pretrial Release and Juvenile Justice. Our aim is to identify and document racial and ethnic disparities at various points along the criminal justice continuum. Through robust statistical analyses of data collected from across the state, we will produce reliable and consensus based reports that may be the bases for policy changes or reform efforts. Working collaboratively to distribute and publish our findings, the Commission will seek reforms or advocate for policies that address the avoidable disparities we have found. Because implicit bias is a cornerstone of our analysis, we also will host training sessions on the topic.

Our research inevitably will uncover what we refer to as disproportionalities—that the numbers of African Americans, Latinos, and other minorities who have contact with the criminal justice system are out of synch with what one would expect based on their representation in the general population. Our more difficult work will be to determine which of these disproportionalities are due to disparate treatment—where similarly situated groups of individuals are treated differently, i.e., where the disproportionality cannot be explained by some other neutral factor. The Commission intends to work to alleviate disparate treatment of racial and ethnic minorities, whatever the source.

Pretrial Release

Many policies in the criminal justice system are neutral on their face. Bail setting, for example, is governed by an analysis of several factors aimed at determining whether the defendant poses a risk of flight or a danger to the community. Judges are asked to consider prior criminal histories, prior failures to appear in court, community ties, and other personal information. If a particular defendant’s risk factors are high, he or she is required to post a higher level of collateral in order to be released from confinement prior to trial. This procedure is seemingly neutral, but it rou-

tinely produces significant disparate outcomes for minority defendants.⁵

The Commission will determine, through careful study, how neutral policies like these can produce disparate outcomes. Implicit biases doubtless are responsible for some of these results. Many different actors, all with a great deal of discretion, are involved in the bail setting process. A Magistrate sets an initial bond; a District or Superior Court Judge will review that decision for defendants unable to post bond; the District Attorney is present and makes recommendations; Pretrial Services, if available in that jurisdiction, will be present; a few defendants will have defense attorneys; and, often, information from the police can have an impact on the bond decision. Another potential source of disparities is Judges and Magistrates giving too much weight to one factor over another, or perhaps even considering impermissible factors.

The Commission’s Pretrial Subcommittee (PTSC) is funded in part by the American Bar Association’s Racial Justice Improvement Project. We are collecting data in an urban area, Guilford County, and a rural area, Halifax County, to determine whether there are disparate outcomes for minority defendants at the pretrial stage; we are looking primarily at bond amounts and conditions for defendants charged with Class H felonies. We are collecting data in two very different parts of the state in order to determine if geographic differences correlate to any pretrial release patterns.

This effort involves data collection and analysis by race and ethnicity across a range of indicator variables. The Pretrial Release study is collecting information about only one class of cases, and each defendant’s race/ethnicity, age, sex, economic status, employment, mental and physical health, case disposition, length of time in custody, bond amount, method of posting bond, criminal history, and failure to appear history. Duke Law School Professor Neil Vidmar is our research director. After our data are collected and presented to the Commission as a whole (planned for June 2014), we will explore the cause or causes of any uncovered racial

disparities and try to identify an approach to eliminate or minimize the disparities.

Juvenile Justice

The Commission's Juvenile Justice Subcommittee (JJSC), with funding from the Governor's Crime Commission, has already published one report. Dr. Susan McCarter, on the faculty of the University of North Carolina Charlotte, authored "The School-to-Prison Pipeline: Implications for North Carolina Schools and Students" in June of 2013. This effort was the first of its kind in North Carolina. The report identifies pertinent North Carolinian processes and policies, such as how a student is referred to the courts from school, the types and number of year-long mandatory suspensions, and how the state's age of majority (16 years old) affects statistics on school disciplinary procedures.

Dr. McCarter's report concluded that African-American students are three times more likely to be suspended than

similarly situated white students and that more than one in seven students who were suspended or expelled from school at least once had subsequent contact with the juvenile justice system.⁶ In North Carolina during the 2008–2009 school year, black youth were much more likely to be suspended for minor offenses, such as cell phone infractions, dress code violations, disruptive behavior, and public displays of affection than were their white peers.⁷ Recognizing the link between suspensions and later involvement in the juvenile justice system, the Juvenile Justice Subcommittee will move forward, once funding is received, with a project designed to interrupt one of the first stages of the phenomenon often referred to as the "school-to-prison-pipeline."

National statistics show that only three percent of disciplinary actions in schools involve conduct for which state law mandates suspensions and expulsions. Most disciplinary actions are taken at the dis-

cretion of school officials, primarily in response to violations of the local school's conduct codes. Such discretionary actions result in minority youths being suspended at a much higher rate than their white counterparts. In order to address these issues, the JJSC anticipates utilizing structured decision-making matrices for classroom teachers and/or a comprehensive risk and needs assessment tool for principals and administrators. Our goal is to introduce the practice of using decision guides in order to channel the discretion of teachers and administrators in a way that will reduce racially disproportionate outcomes in school suspensions, and, because they are directly linked, in the juvenile justice system.

The JJSC is exploring the feasibility of developing these actuarial risk assessments and discretionary decision guides in partnership with the W. Haywood Burns Institute (BI) and the National Council on Crime and Delinquency (NCCD), both

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of Oakland, California. We are currently in the process of identifying North Carolina pilot sites in which to implement these tools. The criteria for potential pilot sites are: a preexisting collaborative relationship among multiple agencies, a willingness and ability to share data, a medium size school district with leadership that supports the idea of risk assessment development, and a racially diverse enrollment with high levels of racial disparities. The tools will be tailored to suit the needs of each individual pilot site, though the two-year project will produce data sharing agreements, model risk assessments or decision matrices, and research that can be replicated throughout North Carolina in subsequent phases of the project.

Training

Because the implicit bias analysis is a cornerstone of the Commission's work, we hosted a training seminar sponsored by the ABA's Achieving an Impartial Jury Project in October 2013. University of New Hampshire School of Law Professor Emeritus Sarah Redfield led a three-hour interactive training event that covered implicit bias, group dynamics, and strategies to minimize implicit bias in the context of judicial proceedings. Five Superior Court Judges were in attendance, as well as District Attorneys, a Police Chief, professors, researchers, Capital and Public Defenders, and advocates. The Judges participated in pre- and post-training interviews with Professor Redfield as part of the ABA's ongoing Impartial Jury Project. The Commission also supports the work of organizations such as the Racial Equity Institute, who host detailed historical workshops entitled "Dismantling Racism;" a majority of our Commissioners have attended one of the Institute's two-day workshops.

In November 2013, Vice Chair of the Commission and its Board of Directors, Ken Miller, Chief of the Greensboro Police Department, retained Lorie Fridell to conduct a training in Greensboro entitled "Fair and Impartial Policing: A Science-Based Perspective." The two-day training presented the science behind implicit biases and demonstrated how those research findings might apply to police

work. Participants reviewed and debated various police department policies on racial profiling, which provided an opportunity for important discussions about the real dangers and difficulties officers face in the field and how to balance that with an understanding of potentially unconscious suspicions that result in the impermissible consideration of race. Further training will be conducted throughout the ranks of the Greensboro police department, so that the science can be brought to bear on policing policies and day-to-day decision-making.

Upcoming Projects

The Commission will continue to follow up on the important groundwork done by the Task Force. The Task Force most notably produced, with the valuable contributions of UNC Political Science Professor Frank Baumgartner, a preliminary analysis of data from the North Carolina Department of Justice on traffic stops made by North Carolina police from January 1, 2000, through June 14, 2011. A persistent criticism of that report has been that the self-reported location data for the traffic stops often were inaccurate or too vague. In response, the Commission, with the help of Dr. Baumgartner, has developed recommendations for changes to the statute under which the data are collected. A small subcommittee is working on a plan to present these recommendations to policy makers so that the statute will produce better quality data.

The Commission also has decided to partner with the Judicial District Executive Committee (JDEC) of Orange and Chatham counties in connection with a review being done by that entity. JDEC is comprised of key court officials in Judicial District 15B who were concerned about issues facing their district's criminal justice system. Like the Commission, JDEC emphasizes the importance of developing consensus among the various actors in the criminal justice system to solve issues where no one office has exclusive responsibility for the problem. The current project, spearheaded by JDEC, will conduct a study of jury pool representativeness in that district. The Commission

will support and follow the work of JDEC, and eventually expand the model to other jurisdictions in North Carolina.

Conclusion

The authors would like to thank all who have contributed to and serve on the Commission. We are proud to be doing this work and are grateful for all of the accomplished stakeholders who have chosen to take part and address this difficult problem as a group. A full list of Commissioners is available at our website, www.ncaj.com/racialjustice. We also acknowledge the Z. Smith Reynolds Foundation, whose support has been integral to our work. Chloe Johnson, our Program Manager, can be reached at chloe@ncaj.com. ♦

1. Baumgartner, Frank. North Carolina Traffic Stop Statistics Analysis (February 1, 2012). Professor Baumgartner's study was produced at the request of, and on the behalf of, the NCAJ and its Task Force on Racial and Ethnic Bias in the Criminal Justice System. Professor Baumgartner was assisted in his work by UNC graduate student Derek Epp. Available at ncaj.com/racialjustice.

2. Baumgartner, Frank. North Carolina Advocates for Justice: Task Force on Racial and Ethnic Bias Executive Summary. Available at ncaj.com/racialjustice.

3. *Id.*

4. Duncan, B. L. 1976. Differential social perception and attribution of intergroup violence: Testing the lower limits of stereotyping blacks. *Journal of Personality and Social Behavior*, 590-8.

5. "Nearly every study on the impact of race in bail determinations has concluded that African Americans are subjected to pretrial detention at a higher rate and are subjected to higher bail amounts than are white arrestees with similar charges and similar criminal histories." Jones, Cynthia E., "Give Us Free: Addressing Racial Disparities in Bail Determinations," 16 *New York University Journal of Legislation and Public Policy* 919 - 961 (2013) at 938.

6. McCarter, Susan, Ph.D. The School-to-Prison Pipeline: Implications for North Carolina Schools and Students, 5.

7. *Id.*, 16.