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Raising Race

"It is not permissible that the authors of devastation should be innocent. It is the innocence which constitutes the crime."

James Baldwin

My Dungeon Shook: Letter to My Nephew on the One Hundredth Anniversary of Emancipation

I. Introduction

A. Disproportionate Minority Contact: The Problem

The statistics are familiar and jarring. Beating out even China, the United States has the highest incarceration rate in the world.[1] The U.S. incarceration rate has increased roughly six-fold, from fewer than 350,000 people in state and federal prisons and jails nationwide in 1972,[2] to more than 2.3 million people as of June 30, 2009.[3] This number translates to 748 inmates per 100,000 U.S. residents.[4] More than one in every 100 adult U.S. residents lives behind bars.[5]

The racial dimension behind these numbers is well-known to criminal defense attorneys. In 2009, Blacks comprised less than 13 percent of the U.S. population, but accounted for almost 40 percent of the jail and prison population.[6] In that same year, Latinos also comprised less than 15 percent of the U.S. population, but accounted for 20 percent of the jail and prison population.[7] In 2009, African American men, with an incarceration rate of 4,749 inmates per 100,000 U.S. residents, were incarcerated at a rate more than six times higher than that of white men (708 inmates per 100,000 U.S. residents), and Latino men (1,822 inmates per 100,000 U.S. residents) were incarcerated at a rate more than 2.5 times higher than white men.[8] Also in 2009, African American women, with an incarceration rate of 333 per 100,000, were 3.6 times more likely than white women (91 per 100,000) to be in prison or jail, and the incarceration rate for Latino women, at 142 per 100,000, was one and a half times the incarceration rate for white women (91 per 100,000).[9] U.S. taxpayers spend upwards of $35 billion each year to build and maintain prisons.[10] Switching from the view at 30,000 feet to the view on the ground, these numbers mean that one in nine black men between the ages of 20 and 34 is behind bars, and one in one hundred black women in their mid- to late-30s is incarcerated.[11]

This trend extends to juvenile delinquency courts. For example, in 2007 juvenile arrest statistics showed that while African American youth accounted for only 17 percent of the general population, they comprised 51 percent of arrests for juvenile violent arrests and 32 percent of arrests for juvenile property arrests. It is well-documented that "youth of color enter and stay in the system with much greater frequency than White youth" in nearly all juvenile justice systems.[12]

The criminal justice system has exploded outside of the prison walls, as well. As of 2009, the number of people under criminal justice supervision — including those who are in jail, in prison, on probation, and on parole — totaled 7.2 million people.[13] In a dismaying parallel to incarceration rates, people of color are also overrepresented among arrestees, probationers, and parolees.[14] There are more

BY ROBIN WALKER STERLING

African Americans under correctional control today than were enslaved in 1850.[15] And as of 2004, there are more African American men who are denied the right to vote due to felon disenfranchisement laws than were denied the right to vote in 1870, the year the Fifteenth Amendment outlawed measures that explicitly denied the right to vote on the basis of race.[16]

Perhaps surprisingly, the rising incarceration rate does not track crime rates. Sociologists have long noted that punishment has more to do with social control than with crime rates, and the United States exemplifies this reality.[17] The U.S. prison population has grown almost every year since 1970.[18] And that growth has been constant — increasing "in years of rising crime and falling crime, in good economic times and bad, during wartime and while we were at peace."[19] In stark contrast, the current crime rate hovers around 1970s levels, when just under 200,000 people were incarcerated, and when the incarceration explosion started. Nor can the prison boom be credited with the subsequent decline in crime rates to historic lows.[20] A close look at the data reveals that the prison population continued to grow independent of crime rates, which, after the mid-1990s, began to decline and remained relatively low.[21]

With numbers like these, it is clear that this overrepresentation of minorities in the criminal justice system, or disproportionate minority contact (DMC), is one of the major human rights violations of our time.

B. Disproportionate Minority Contact: The Causes

Although DMC has been extensively documented in jurisdictions across the country and is widely decried, the numbers consistently climb. The possible social causes behind this disparate treatment are complex and varied and include conscious or unconscious racial bias by various criminal justice system actors in arrest decisions,[22] charging decisions, bail determinations, sentencing,[23] and parole and probation practices;[24] the disparate impact of the war on drugs;[25] and the consistent and widespread underfunding of public defender services.[26]

The possible legal causes of DMC are just as vexing. The legal standard for proving impermissible invidious racial discrimination is hopelessly tied to overt intent in a time when the social opprobrium attached to overt expressions of racial bias is significant. The U.S. Supreme Court has played a key role in creating this dilemma. Perhaps the most famous (and disappointing) example of the Supreme Court's failure to address race bias in the criminal justice system is its decision in *McCleskey v. Kemp*.[27] *McCleskey* considered racial disparities in the administration of the death penalty through presentation of the findings of an intensive and meticulous study of 2,000 capital cases in Georgia. The Court held that racial bias in sentencing could not be challenged on Fourteenth Amendment equal protection grounds without evidence of clear, discriminatory intent. More than insulating criminal sentencing against challenges based on race bias, this decision established that a certain amount of racial bias in administration of the death penalty was constitutionally acceptable.[28] Stating that "[a]pparent disparities in sentencing are an inevitable part of our criminal justice system,"[29] the Court expressed concern that "[i]f we accepted McCleskey's claim that racial bias has impermissibly tainted the capital sentencing decision, we could soon be faced with similar claims as to other types of penalty."[30] In his dissent, Justice Brennan summed up the majority's rationalization with five words: "fear of too much justice."[31]

Two other cases provide examples of the Court's treatment of race bias in the criminal justice system. The first is well-known to any criminal defense attorney who has filed a suppression motion for a traffic stop in a "high drug area."[32] In *Whren v. United States*,[33] the Court held that police officers may use minor traffic violations as a pretext to stop drivers for suspected drug involvement. The *Whren* facts are particularly striking because the *Whren* police officers had no evidence to suspect the defendant and his passenger, both Black,[34] of involvement in a drug crime besides the Washington, D.C., neighborhood in which they were stopped. According to the Court, a police officer's possible racial bias in making traffic stops is inconsequential to the determination of whether the officer's behavior was "reasonable" under the Fourth Amendment so long as the officer can point to an actual traffic violation.[35] The second is *United States v. Armstrong*,[36] in which the Court ruled that, in order to win discovery on a selective prosecution claim, the defendant must first present evidence that similarly situated white defendants have been treated differently. The Court literally required the defendant to produce in advance the exact evidence the defendant was asking to be allowed to obtain as part of discovery. With cases like these, it seems almost impossible to vindicate constitutional claims based on race discrimination.

Juxtaposing the cold record of these cases and the cold reality of the country's record of disproportionate minority contact brings the paradox into stark relief: the practice of race discrimination has evolved, but the law against race discrimination has not. While the shadow cast by the criminal justice system has grown darker and larger, the cultural understanding of what constitutes racism has narrowed.[37] We subscribe to the "perpetrator model of racism," which "defines racism narrowly and sees discrimination from the perspective of the perpetrator."[38] But the reality of contemporary racism is that it is difficult, if not impossible, to ascribe its effects to the discrete, intentional action of a single person. As it operates now, the criminal justice system ensnares unprecedented numbers of people of color "with penal policies broadening in ways that render the identification of racial intent and causation especially difficult."[39] Although we do have political leaders engaging the issue of race using coded language, we do not often see people shouting anything as overt as "Segregation now, segregation tomorrow, segregation forever!" Instead, it feels as though the criminal justice system has taken on a life of its own, becoming more than the sum of the millions of individuals who make up its parts, to simply charge ahead and accomplish with almost unassailable efficiency the discrimination that George Wallace advocated.

Many of those millions of individuals are police officers, prosecutors, and judges, and how the discretion they command contributes to the problem has been well-documented.[40] Simply put, the realities of day-to-day practice allow DMC to flourish. The problem starts with discretion at arrest and is compounded at every stage. In the initial on-the-street encounter, police officers enjoy virtually untrammeled discretion regarding where to police and whom to stop, search, arrest, and charge. Prosecutors have even more discretion, including whether to charge at all, what to charge (or overcharge) and, as a corollary, what possible penalties the defendant will face, whether to offer a reasonable plea agreement, the time limit to put on the plea agreement, and whether to condition the plea offer on what motions defense counsel might file. For their part, once the case is in court, judges grant extraordinary deference to both the officer's on-the-street judgment call, considering the "totality of the circumstances" as the officer relays them, and to the prosecutor's charging decision. And of course,

judges have enormous discretion in conducting the trial as well as at sentencing if the defendant is convicted.

C. Disproportionate Minority Contact: Role of the Defense Attorney

But what is the role of the defense attorney? Are they the check on the system? Are they inadvertently complicit, exacerbating the problem instead of alleviating it? Are other system actors correct when they complain that defense attorneys are simply unreasonable obstructionists, elevating rights instead of doing right? If defense attorneys can make sure that police officers abide by the Fourth and Fifth Amendments, that prosecutors observe due process, and that judges do not abuse their discretion, shouldn't they be able to confront this problem, too?

Make no mistake: tackling DMC from the defense side is an uphill battle. There are enormous systemic, financial, and other pressures that make it extremely difficult for criminal defense attorneys to raise and vindicate claims based on racial bias. The problems are widespread and well-documented. States almost uniformly underfund their criminal defense delivery systems. Across the country, public defenders, contract counsel, and appointed counsel have caseloads so staggering as to compromise representation in ways too numerous to list; cases must be triaged instead of tried. Particularly in small jurisdictions where defense counsel's contract or appointment must be approved by a judge or prosecutors, raising a powder keg of an issue like race discrimination might be the difference between having a job and losing a job. As described above, creative legal advocacy in this area too often leads to precedents that make raising race issues more difficult for subsequent defendants. And, there can be tension between the tactics a defender would employ on behalf of an individual client and tactics that would support systemic change. This tension can especially characterize DMC strategies, for example, where an individual case might not have overtly racial issues, but where the client fits into a population of defendants that is disproportionately arrested, overcharged, or incarcerated or detained.

But defense attorneys are the ones positioned to take this on, if not by virtue of power and discretion, then by virtue of the urgency of firsthand experience. Studies show that defense attorneys are more concerned than other system actors about DMC. According to a recent study, "[b]y a very wide margin, defense attorneys are most inclined to strongly agree or agree that minority overrepresentation is a problem, followed by probation officers and judges. Few prosecutors express any agreement with this statement."[41] Criminal defense attorneys are more likely to agree that DMC is a problem because their clients feel its impact in courts across the country every day.

The goal of this short article is to suggest concrete tactics and strategies that criminal defense attorneys might use[42] in individual cases to get race discrimination and bias issues before the court and on the record. These tactics will not necessarily win the substantive argument. Here, winning means creating a courtroom situation in which race discrimination and bias issues are openly joined on the record instead of relegated to the background. This is a sensitive and frustrating topic because, while most defense attorneys agree there is a serious problem with disproportionate minority contact that affects the day-to-day practice in criminal cases, there is little agreement on effective ways that defense attorneys can attack the problem in the cases of their individual clients. Perhaps individual defense attorneys around the country have tried many of these ideas. This list is not exhaustive. Certainly, there are many other ideas that could be added to the list. The hope is that the beginning of a collection of ideas, here, will inspire an intentional and concerted effort — in specific courthouses, in specific counties, or even in courtrooms across the country. The article will proceed in two parts. Part II will suggest steps that public defender offices, as well as appointed and contract defense attorneys, can take to address the problem systemically. Part III will propose motions and arguments that defense attorneys can make at various stages of litigation to bring DMC to the court's attention.

II. Systemic Changes

As of 2004, only 19 states have a government-funded, statewide public defender system providing trial and appellate level representation statewide in felonies, misdemeanors, and juvenile delinquency cases.[43] Other states have hybrid systems, providing public defense services through a combination of contract and appointed counsel. The following suggestions are meant to be adopted by public defender offices, but can also be adopted in counties like Clark County in Washington, where contract counsel are organized and work together to advocate for issues on their own behalf and on behalf of their clients.

A. DMC Practice Group

Public defense offices that want to make combating DMC a priority will dedicate resources to litigating it. These resources can include the time, talent, and effort of a small number of staff attorneys allowed to develop expertise in this area of criminal and juvenile practice; office file space for a DMC bank of cases, case law, pleadings, and other materials; and trainings by these attorneys.

This type of practice group is familiar to public defender offices around the country, but the practice groups usually center on creating a core group of attorneys specializing in a particular kind of case, such as sex offenses or homicides, or around a legal issue such as forensic evidence or sex offender registration. Offices can import this same model to designate a core group of attorneys who will specialize in raising and litigating issues of race in criminal and juvenile cases. This practice group should plan to attack the issue from at least three different dimensions: (1) collecting data; (2) drafting motions and developing arguments; and (3) working with community groups, participating in state DMC coalitions, and engaging in legislative advocacy.

1. Data Collection: Keep Your Own Statistics

Local data is critical to mounting a successful effort at reducing DMC. Sadly, the status of record keeping for DMC statistics varies widely from jurisdiction to jurisdiction. It is fair to say that baseball statistics are kept more meticulously and uniformly than DMC statistics.[44] Most states have some kind of DMC Task Force that focuses on data collection. There are many sources and kinds of data that can contribute to analysis of the depth of the problem and targeted solutions, including:

- *From the police department* — the number of arrests in a given time period, disaggregated by race, gender, age, zip code, officer, and time of day;

- *From schools* — the number of arrests at schools with school security officers compared to the number of arrests at schools without; the number of arrests at schools with zero tolerance policies compared to the number of arrests at schools without; the demographics of schools with school security officers compared to the demographics of schools without; a breakdown of the types of cases that schools refer to police officers and their most common dispositions, disaggregated by race, gender, age, zip code, and time of day;

- *From prosecutors* — the number of cases that are diverted pre-arrest, post-arrest but before arraignment, and at arraignment, disaggregated by race, gender, age, zip code, and prosecutor; plea agreements offered, disaggregated by race, gender, age, zip code, criminal history, charges, and judge the prosecutor is assigned to, and prosecutor;

- *From probation officers* — the number of recommendations of revocation, disaggregated by race, gender, age, zip code, criminal history, and charge; and

- *From judges* — bail determinations made, release conditions set, sentences handed down, and sentences of probation revoked, all disaggregated by race, gender, age, zip code, and criminal history.

Reliance on data has several advantages. First, despite the stunning consistency of the DMC data in jurisdiction after jurisdiction across the country, people still are reluctant to believe that their jurisdiction has a problem with DMC.[45] No one wants to be called racist. George Wallace was racist. Bull Connor was racist. No judge thinks she or he is racist. Neither does any prosecutor, police officer, or defense attorney, for that matter. Not even when the DMC numbers coming out of their jurisdictions show that something must be going horribly wrong.

Data and hard numbers make the hard discussions that must accompany racial progress easier. If a comparison reveals that a particular judge is locking up more people of color than other similarly situated judges, or is locking up more people of color than other similarly situated white defendants, it is easier to confront that judge with data than with what might otherwise feel to the judge like an accusation. As a corollary, it is easier to craft a tailored response with data that helps to pinpoint a source of the problem. If the numbers show that a large percentage of juvenile cases are coming from referrals from a handful of schools, then a meeting with those school principals with a spreadsheet full of data might be in order.

The problem with data is that a full statistical picture requires cooperation from several different governmental agencies that may, for various reasons, be uncommitted to combating DMC. Even assuming that individual agencies like the police department, prosecutors' offices, or the administration of the courts keep the kind of data that DMC tracking might require — which is a big assumption — it is often difficult to get information from these agencies. Add to that the fact that these governmental agencies most likely use different computer software, with different categories (for example, in disaggregating race, schools might use 7 different racial categories, while the police department might use 5), and with different information retrieval mechanisms (again using the example of race, at schools, children might be categorized by their mother's race, while the police department might categorize arrestees by their self-report on what their race is). Also consider that these government agencies might have strained relationships because of the nature of the adversarial process (e.g., the police and defense attorneys, the prosecutor and defense attorneys, the judges and defense attorneys), and the data knot gets harder and harder to unsnarl. Imagine the bureaucracy involved in renewing a driver's license at the DMV, and multiply it times one hundred.

For all these reasons, public defender offices, and even individual contract and appointed counsel, should start to keep their own statistics, for their own information. Most contract attorneys and public defender offices, who are often in the position of having to advocate with state legislatures about their budgets, have some kind of client-tracking system; this might be a good place to start. A member of the DMC Practice Group would need access to this information and the ability to manipulate it to yield information that might be useful for tracking DMC issues.

There are at least three big advantages to defense attorneys tracking their own data. Most importantly, it is critical for defense agencies to examine their own role in creating DMC, and data is an excellent way to ascertain the contours of that role. Defense attorneys can track:

- The number of pleas each year, disaggregated by race, gender, age, zip code, offenses charged and offenses admitted, and time of day;

- The number of cases taken each year, disaggregated by race, gender, age, zip code, and offense;

- The number of motions filed overall, and the number of particular kinds of motions filed in specific zip codes (e.g., if there are one or two zip codes where the majority of the Fourth Amendment suppression motions are filed, is this evidence that these areas are over-policed?);

- Sentences imposed, disaggregated by offense, race, criminal history, whether the case was disposed of by plea or by trial, and judge; and

- The origins of cases (e.g., is there a particular department store that is sending the bulk of the shoplifting cases? Is there a particular school that is sending the bulk of the juvenile cases?).

Second, data can be a cudgel. In the event that there is a state DMC effort involving other government agencies that is stalled because of other agencies' reluctance to turn over data, information from the defense side of the equation showing that there is a DMC problem might be enough to spur the other agencies to apply themselves to the task more diligently. Third, as Part III will detail, these data can be mined for motions, pleadings, and arguments.

2. Participation in Local and National DMC Coalitions

Most states have some kind of inter-agency governmental DMC task force or coalition. It is critically important for the criminal defense perspective to be included in these efforts. Criminal defense attorneys can serve the same function on these kinds of task forces as they serve in court: injecting the voice and stated interests of the client into the debate. Members of the DMC Practice Group can also actively contribute to litigation and legislative campaigns that might affect DMC. They can do this in several ways. Members can partner with national advocacy groups that specialize in civil rights litigation, like the national and local offices of the ACLU, NAACP LDEF, MALDEF, and others, by providing information about potential plaintiffs (with the clients' permission, of course). For example, the ACLU has made mass incarceration one of its major priorities, and is actively seeking client stories from criminal defense attorneys. Criminal defense attorneys can also work with local legislators to provide testimony and education on pending bills that intersect with DMC.

B. Community Outreach

Successful DMC efforts often enjoy community support. The example of the efforts of the San Francisco Public Defender's Office (SFPD) to dispel some of the stereotypes surrounding Asian children and families is instructive. In close collaboration with community leaders, the Juvenile Division of the SFPD developed a fact sheet of recommendations titled, "Ten Tips for Working with Asian Youth and Families." These tips, which were discussed

at a training session, include everything from explanations for why parents might be overly forthcoming with probation officers or seem particularly harsh with their children, to tips about why defense attorneys should not ask close family members to interpret conversations. The goal of this fact sheet is to arm defense attorneys with the knowledge necessary to combat unfair assumptions about Asian youth and families (for example, interpreting a child's stoicism in public as a lack of remorse, when it is much more likely that the child is acting out of a heightened sense of privacy) and inappropriate responses to this population.[46] In another example, the W. Haywood Burns Institute's work with criminal justice stakeholders in Baltimore, Md., led to the development and implementation of low-cost policies that reduced the number of youth securely detained because of a missed court date. The Burns Institute worked with stakeholders to institute a system simply to remind youth of their upcoming court date. As a result, the secure detention of African American youth dropped by almost 50 percent.[47] Given the time and permission to do it, the DMC Practice Group can start the long-term task of forging alliances with community leaders that can bear fruit.

These tactics will not necessarily win the substantive argument. Here, winning means creating a courtroom situation in which race discrimination and bias issues are openly joined on the record instead of relegated to the background.

III. Motions and Arguments

A. Pretrial Motions

1. Motion to Dismiss in the Interests of Justice

Many jurisdictions allow the filing of a motion to dismiss in a case in which the equities, for one reason or another, augur in favor of sparing the defendant the risks of going forward with the case. This filing can be styled a motion to dismiss in the interests of justice or, in some juvenile delinquency courts, a motion to dismiss for social reasons. Because the motion is styled with a title so broad that any reason that serves "the interests of justice" is properly included in it, this might be an excellent vehicle to use to get race-related issues before the court that would not otherwise be admissible. Opportunities for this type of advocacy are clear in cases with overt racial overtones, such as a case in which a client of color is charged with assault on a white police officer (or a police officer who is alleged to have used racial slurs), and the client's defense is self-defense. But there are other opportunities to file this kind of motion as well, such as in cases that would lead to greatly disproportionate sentences. Just as the government frequently relies on the persuasive merit of "public safety," the defense attorney's counter could be, for example, discussion of "public justice,"[48] or the public's interest in a non-discriminatory criminal justice system.

2. Motions Concerning Disparate Arrest Rates, Disparate Incarceration and Detention Rates, etc.

Every criminal defense attorney should have a set of motions educating the court about DMC in his or her arsenal. Just as many defense attorneys file suppression motions or discovery motions in most cases, motions featuring data about and the impact of DMC in their local jurisdictions should be added to motions checklists. Sources for crime statistics in individual jurisdictions abound. For defense attorneys just beginning their search, good places to start include the websites of the Sentencing Project; the Bureau of Justice Statistics; the FBI; and, for juveniles, the Office of Juvenile Justice and Delinquency Prevention. In addition to educating the court, motions of this type at least introduce race into the discussion, and put the judge and prosecutor on notice that the defense attorney is alert to and not afraid to raise issues of race bias in the case. Of course, the presence of a DMC Practice Group might help the line criminal defense attorneys on this point, since the "office" rather than an individual defense attorney will be to blame for race-based litigation.

No doubt it would be much easier to raise and discuss these kinds of DMC-targeted statistics at bail, disposition or sentencing, when the evidentiary standard is much more flexible, and when judges are more apt to be willing to consider information outside the four corners of the charging document. However, as these kinds of stock motions can affect the judge's decision-making *ex ante* by priming the judge to consider the proceedings through a certain lens or urging the judge to question a practice the judge has often adhered to in the past (e.g., a stock motion about disparate arrests for drug crimes might make a judge who has a policy of holding defendants arrested for distribution think twice), it is worth strategizing ways to get the information in pretrial.

In the same way that the relaxed evidentiary standards at bail and at sentencing might allow room for consideration of DMC data, specialty courts, like drug courts and mental health courts, might also be excellent venues to file these types of motions.

3. The Unreliability of Eyewitness Identifications

Motions challenging the reliability of eyewitness identifications are an excellent vehicle for educating the court about DMC-related issues in cases where there are cross-racial identifications. Besides the scientific studies about cross-racial eyewitness identifications, these motions might also contain a discussion regarding the fact that certain neighborhoods are over-policed, oppressive police practices that reoccur in specific neighborhoods, such as jump outs and warrant sweeps, and other issues.

B. Trial: Jury Instruction

Jury instructions offer many opportunities to inject race into the discussion at criminal trials. For example, the fact that African Americans are disproportionately arrested, charged, and convicted of crimes means that a disproportionate number of African Americans are unreliable witnesses because they can be impeached with prior convictions. The numbers are particularly inflated in drug arrests, where nationally, African Americans comprise 38 percent of arrests despite being only 12.2 percent of the population and 13 percent of drug users.[49] Accordingly, criminal defense attorneys might craft a jury instruction that includes some local statistics about dis-

proportionate drug convictions, and adds language that jurors should take these statistics into account as they consider how much a prior drug conviction bears on a witness's credibility.

C. Cultural Experts

In the same way that police departments use longtime police officers to testify as narcotics experts, criminal defense attorneys can offer community leaders as cultural experts when appropriate. Cultural experts have broad applicability, at pretrial, trial, sentencing, and probation violation hearings. Some defense offices are already doing this. As part of its work to educate the juvenile court bench about Asian youth and families, the San Francisco Public Defender's Office has worked with cultural experts who aim to illuminate cultural mores and beliefs for the court as context or background in individual cases.[50] Of course, these experts have the benefit of essentially providing cultural competency training for and educating juvenile court judges. They also are able to offer creative disposition options that, coming from them, have more credibility than the same plan would have coming from a defense attorney.

There are some drawbacks to cultural experts. For example, some judges have reacted to these cultural experts poorly because the judges do not believe that Asian American culture is beyond the kin of the court's understanding, or because the judges are not willing to admit that they are not familiar with the cultural differences that the cultural experts are explaining. In addition, the questions of what qualifies a person as a cultural expert, whether cultural experts would work for a demographic that would be perhaps more difficult for a judge to consider to be beyond the ken of the court (like African American or Latino culture), and finally, how a defender might supply a nexus between expert testimony and the individual client, are all untested.

With respect to arguing in favor of admission of the cultural expert's testimony, defense attorneys can offer that the expert's background and qualifications go to weight and not admissibility. This way, the testimony is admitted and on the record, even if the fact finder does not credit it in the court's ruling concerning guilt or innocence. The judge has still heard the testimony, has perhaps been educated about cultural differences of that individual client, may rely on it in the sentencing disposition, and may apply this knowledge to other cases.

IV. Conclusion

As discussed earlier, the systemic disincentives to take up race issues are too numerous to count — not the least of which is the fact that the law functions to insulate the criminal justice system from race-based challenges. *McCleskey* even explicitly acknowledges that American society must tolerate a certain amount of racial bias. But it is important to remember that the United States Supreme Court defended "separate but equal" before *Brown v. Board of Education*[51] toppled Jim Crow. Perhaps the United States is in the early stages of this next movement. *McCleskey* is our *Plessy v. Ferguson*.[52] *Whren* is our *Dred Scott v. Sandford*.[53] *Armstrong* is our *Korematsu v. United States*.[54] *Plessy* was the law of the land for decades before it was overturned. But it was overturned. Our *Brown v. Board of Education* is ahead of us. Criminal defense attorneys, literally the clients' voices in court, are at the forefront of this next movement. This is a fight worth folding into the defense mission. This is how change comes. This is how justice lives.

The author facilitated sessions dedicated to discussion of what defense attorneys can do to combat DMC at the Annual Juvenile Defender Leadership Summits in 2007 and 2008, and is indebted to participants in those sessions for their frank discussion of their struggles with this topic. In particular, the author wishes to thank Patti Lee, Managing Attorney in the San Francisco Public Defender's Office and Co-Director of the Pacific Juvenile Defender Center, for her leadership on this issue; Professor Michelle Alexander, for her meticulous research and inspiring courage in taking this issue on in her book The New Jim Crow: Mass Incarceration in the Age of Colorblindness*; Professor Christopher Lasch, Professor Lindsey Webb, Eric Klein, Esq., and Ann Roan, Esq., for their trenchant comments and suggestions; and Aaron Thompson for his invaluable research assistance.*

Notes

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2. Michelle Alexander, The New Jim Crow: Mass Incarceration in the Age of Colorblindness 8 (2010).

3. Heather C. West, U.S. Department of Justice Bureau of Justice Statistics, Prison Inmates at Midyear 2009 — Statistical Tables, 2, http://bjs.ojp.usdoj.gov/content/pub/pdf/pim09st.pdf (June 2010).

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10. *See* Eric Schlosser, *The Prison-Industrial Complex*, The Atlantic Online, http://www.theatlantic.com/past/issues/98dec/prisons.htm (Dec. 1998).

11. Pew Center on the States, One in 100: Behind Bars in America 2008, 3, http://www.pewcenteronthestates.org/uploadedFiles/One%20in%20100.pdf (2008).

12. Ashley Nellis & Brad Richardson, *Getting Beyond Failure: Promising Approaches for Reducing DMC*, http://www.uiowa.edu/~nrcfcp/dmcrc/documents/NellisRichardson2010_000.pdf. For the past 20 years, the federal Juvenile Justice Delinquency and Prevention Act has required federally funded state juvenile justice systems to adopt the Act's core principles concerning treatment of youth in the juvenile justice system. Tracking and addressing disproportionate minority confinement (DMC) in the juvenile justice system was added to these core principles in 1992. "DMC" came to stand for disproportionate minority contact in 2002, when this core requirement was broadened to encompass racial and ethnic disparity at all points of contact.

13. Bureau of Justice Statistics, Key Facts at a Glance, http://bjs.ojp.usdoj.gov/content/glance/corr2.cfm.

14. Naomi Murakawa & Katherine Beckett, *The Penology of Racial Innocence: The Erasure of Racism in the Study and Practice of Punishment*, 44 Law & Soc'y Rev. 695, 700 (2010).

15. Michelle Alexander, The New Jim Crow, The Huffington Post, February 8, 2010, http://www.huffingtonpost.com/

michelle-alexander/the-new-jim-crow_b_454469.html.

16. *Id*.

17. *See, e.g.*, MICHAEL TONRY, THINKING ABOUT CRIME: SENSE AND SENSIBILITY IN AMERICAN PENAL CULTURE 14 (2004) (observing that "[g]overnments decide how much punishment they want, and these decisions are in no simple way related to crime rates.").

18. James Austin et al., *Unlocking America: Why and How to Reduce America's Prison Population*, 3 (Nov. 2007) *available at* http://www.jfa-associates.com/publications/srs/UnlockingAmerica.pdf.

19. *Id*. at 1.

20. *Id*. at 3.

21. *Id*. at 5.

22. Al Baker, *New York Minorities More Likely to be Frisked*, N.Y. TIMES, May 12, 2010, *available at* http://www.nytimes.com/2010/05/13/nyregion/13frisk.html?_r=1&scp=1&sq=racial%20profiling%20ny%20police%20probable%20cause&st=cse (discussing a study that revealed that blacks and Latinos were nine times as likely as whites to be stopped by the police in New York City in 2009, but, once stopped, were no more likely to be arrested).

23. MICHAEL TONRY, JUDICIAL COUNCIL OF CALIFORNIA, EXECUTIVE SUMMARY OF THE FINAL REPORT OF THE JUDICIAL COUNCIL ADVISORY COMM. ON RACIAL AND ETHNIC BIAS IN THE COURTS, http://www.courtinfo.ca.gov/reference/execrace.htm.

24. George S. Bridges & Sara Steen, *Racial Disparities in Official Assessments of Juvenile Offenders: Attributional Stereotypes as Mediating Mechanisms*, 63 AM. SOCIOLOGICAL REV. 554 (1998).

25. *See* Michael Tonry, *supra* note 17. *See generally* MICHELLE ALEXANDER, THE NEW JIM CROW: MASS INCARCERATION IN THE AGE OF COLORBLINDNESS (2010).

26. *See* Rebecca Marcus, *Racism in Our Courts: The Underfunding of Public Defenders and Its Disproportionate Impact Upon Racial Minorities*, 22 HASTINGS CONST. L. Q. 219, 238-39 (1994).

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

28. *Id*. at 309.

29. *Id*. at 312.

30. *Id*. at 315.

31. *Id*. at 339.

32. Whren v. United States, 517 U.S. 806, 808 (1996).

33. 517 U.S. 806 (1996).

34. *Id*. at 810.

35. *Id*. at 813 (stating that "[w]e think that these cases foreclose any argument that the constitutional reasonableness of traffic stops depends on the actual motivations of the individual police officers involved.").

36. United States v. Armstrong, 517 U.S. 456 (1996).

37. Naomi Murakawa & Katherine Beckett, *The Penology of Racial Innocence: The Erasure of Racism in the Study and Practice of Punishment*, 44 LAW & SOC'Y REV. 695, 700-01 (2010).

38. *Id*.

39. *See generally id*.

40. *See generally* MICHELLE ALEXANDER, THE NEW JIM CROW: MASS INCARCERATION IN THE AGE OF COLORBLINDNESS (2010). *See also* Angela J. Davis, ARBITRARY JUSTICE: THE POWER OF THE AMERICAN PROSECUTOR (2007).

41. Geoff Ward, Aaron Kupchik, Laurin Parker & Brian Chad Starks, *Racial Politics of Juvenile Justice Policy Support: Juvenile Court Worker Orientations Toward Disproportionate Minority Confinement*, RACE AND JUSTICE 27 (forthcoming April 2011).

42. Of course, criminal defense attorneys have an ethical obligation to serve the expressed interests of their clients, and should make decisions about this kind of advocacy in close cooperation with their clients. Needless to say, this article assumes pressing forward with DMC advocacy when doing so is aligned with the client's interests, and the attorney does so with the client's full knowledge.

43. THE SPANGENBERG GROUP, STATEWIDE INDIGENT DEFENSE SYSTEMS: 2005, http://www.americanbar.org/content/dam/aba/migrated/legalservices/downloads/sclaid/indigentdefense/statewideinddefsystems2005.authcheckdam.pdf (2005).

44. Interview with Patrick Vance, juvenile defense attorney and member of the board of the Colorado Juvenile Defender Coalition, in Denver, Colorado, (March 21, 2011).

45. The numbers are also uniform across jurisdictions. According to The Sentencing Project's July 2007 report *Uneven Justice, State Rates of Incarceration by Race and Ethnicity*, 2000 census data showed that African Americans are disproportionately incarcerated in every state. *See generally*, Marc Mauer and Ryan King, UNEVEN JUSTICE, STATE RATES OF INCARCERATION BY RACE AND ETHNICITY, http://www.sentencingproject.org/doc/publications/rd_stateratesofincbyraceandethnicity.pdf.

46. Interview with Patti Lee, Managing Attorney, San Francisco Public Defender's Office & Co-Director of the Pacific Juvenile Defender Center, in Washington, D.C. (Oct. 20, 2007), as part of the DMC Workgroup at the Juvenile Defender Leadership Summit.

47. THE SENTENCING PROJECT, DISPROPORTIONATE MINORITY CONTACT, http://www.sentencingproject.org/doc/publications/publications/jj_DMCfactsheet.pdf.

48. As Professor Erin Murphy asked in her article, *When Fear Threatens Freedom*: "[W]hy should the prosecution lay sole claim to [representing the interests of] 'the People'? Have we not learned that only tyranny results when the government alone decides what constitutes 'law and order'? . . . Why then should the state earn the monopoly on the commendable values? I am, after all, a *public* defender. My job is to represent, one case at a time, the interests of the people." ERIN MURPHY, WHEN FEAR THREATENS FREEDOM, THE CHAMPION, http://www.nacdl.org/public.nsf/ChampionArticles/A0201p33?OpenDocument (January/February 2002).

49. DRUG POLICY ALLIANCE, RACE AND THE DRUG WAR, http://www.drugpolicy.org/communities/race/.

50. Interview with Patti Lee, Managing Attorney, San Francisco Public Defender's Office & Co-Director of the Pacific Juvenile Defender Center, in Washington, D.C. (Oct. 20, 2007), as part of the DMC Workgroup at the Juvenile Defender Leadership Summit.

51. Brown v. Board of Education, 347 U.S. 483 (1954).

52. Plessy v. Ferguson, 163 U.S. 537 (1896).

53. Dred Scott v. Sanford, 60 U.S. 393 (1857).

54. Korematsu v. United States, 323 U.S. 214 (1944). ■

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