

Prosecutorial Discretion and Racial Disparities in Federal Sentencing: Some Views of Former U.S. Attorneys



LYNN D. LU

Katz Fellow & Counsel, Brennan Center for Justice at NYU School of Law*

The federal criminal sentencing system is notorious both for its overall severity and for its disproportionate impact on people of color. Whether federal sentences are appropriately or excessively severe and whether their attendant racial disparities reflect the influence of legitimate or illegitimate factors are both subjects of intense ongoing debate among civil rights and sentencing reform advocates. Yet no actor tasked with enforcing and ensuring respect for the nation's laws can ignore concerns about the integrity of a criminal justice system increasingly perceived as reserving its harshest punishments for people of color.

Federal prosecutors today wield unprecedented influence in the sentencing of criminal defendants through discretionary decisions made at multiple stages of a criminal prosecution, including charging decisions, plea agreements, and sentencing recommendations. With prosecutorial power comes an obligation to address racial disparities in the criminal justice system wherever and how ever possible without jeopardizing effective crime prevention. Despite the importance of prosecutorial decision-making to fair and equitable sentencing outcomes, the U.S. Sentencing Commission ("USSC") has concluded that, in comparison with legislative and judicial sentencing choices, prosecutorial decisions that affect federal sentencing "have been relatively neglected, in part because of the paucity of data that can be used to investigate them."¹

What little data do exist provide some evidence of unexplained racial disparities in the outcomes of federal prosecutorial decision-making. For example, based on a sample of cases for which detailed factual data were collected and coded for analysis, the USSC detected notable differences in prosecutorial decisions to seek sentence enhancements for certain federal offenses involving a firearm depending on the race of the defendant.² Similarly, an exploratory multivariate study of prosecutors' motions for sentence reductions in exchange for cooperating defendants' substantial assistance using a small sample size of data from 1994 concluded that "the currently available data . . . raise questions of racial, ethnic, nationality, and gender disparities in the awarding of [substantial assistance] motions" and in the extent of any reduction in sentence granted.³ These findings demonstrate the need for greater scrutiny and oversight, whether

external or internal, of prosecutorial decision-making in order to identify sources of and solutions to racial disparities in the federal criminal justice system.

In November 2005, the Brennan Center for Justice and the National Institute for Law and Equity convened a focus group of twelve former U.S. Attorneys, the majority of whom served during the Clinton administration, to explore ways in which individual U.S. Attorney's Offices ("USAOs"), overseen centrally by the Department of Justice ("DOJ") and accountable locally to the communities in which they operate, might mitigate the corrosive effects of racial disparities in sentencing on communities devastated by mass, long-term incarceration and on public confidence in federal law enforcement.⁴ This report summarizes the themes that emerged during that discussion.⁵ Some members of the group, joined by other former state and federal prosecutors, then produced a set of prosecutorial guidelines for addressing racial disparities as a starting point for enlisting and engaging prosecutors in the hard work of eliminating unwarranted racial disparities from the federal criminal justice system. The guidelines, to which thirteen former U.S. Attorneys have signed on, appear in the Appendix.

I. CONFRONTING RACIAL DISPARITIES IN PROSECUTORIAL DECISION-MAKING

Unwarranted racial disparities in decision-making may result from outright conscious animus, including the use of race-neutral criteria (such as class or geography) as a pretext for impermissible consideration of race, or from unconscious racial stereotyping. The perspectives related by former U.S. Attorneys during the November 2005 focus group reveal the constant need for federal prosecutors and their supervisors to remain attentive to racial disparities in the criminal justice system and, in particular, the difficulties of addressing unconscious racial bias. One former U.S. Attorney recounts,

I had an [Assistant U.S. Attorney ("AUSA") who] wanted to drop the gun charge against the defendant [in a case in which] there were no extenuating circumstances. I asked, "Why do you want to drop the gun offense?" and he said, "He is a rural guy who grew up

Federal Sentencing Reporter, Vol. 19, No. 3, pp. XXX-XXX, ISSN 1053-9867 electronic ISSN 1533-8363
© 2007 Vera Institute of Justice. All rights reserved. Please direct requests for permission to photocopy or reproduce article content through the University of California Press's Rights and Permissions website, <http://www.ucpressjournals.com/reprintInfo.asp>. DOI: fstr.2007.19.3.XXX.

on a farm. The gun he had with him was a rifle. He is a good ol' boy, and all the good ol' boys have rifles, and it's not like he was a gun-toting drug dealer." But he [was] a gun-toting drug dealer, exactly.

In that case, the question of whether to dismiss a gun charge carrying a statutory mandatory minimum sentence turned on the prosecutor's perception of the defendant's culpability, which was in turn informed in part by race.

Because unconscious racial bias is so difficult to detect, attempts to reduce its effects must include education and cultural sensitivity training, as well as diversity in hiring and supervision. One former U.S. Attorney stated,

I was the very first Hispanic [Assistant U.S. Attorney] to be hired [in a border district]. At the first meeting I went to, one guy started talking about immigration, and he said, "wets," and he looked at me, and the word was never used in that office again. That little bit makes a difference The person you hire will be a supervisor in somebody else's administration down the line, and it's important they bring in that cultural difference.

Another former U.S. Attorney added,

We [took] all the senior management and talked very openly about race and talked very openly about racial disparities in the system For the most part, race is never discussed, it never gets talked about, it never gets objectively dealt with in any meaningful way, in most of the offices we came from. That was a real difference-maker. And then on top of that, bringing in people who are more diverse and look more like the people you have to prosecute . . . doesn't mean the case doesn't get handled, [but] it means that the case may be handled in a different way. . . . I think those things are significant and meaningful.

Another former U.S. Attorney noted, however, "If you are going to say to supervisors, 'The issue of racial disparity needs to be considered,' that's a teaching process, because they're just words to many people. So how you translate that is a meaningful part of the process." Similarly, one former U.S. Attorney offered,

I think public education is the most important thing. Craft a way to communicate with the people in general in the country about what the problem is, why it is a problem, what the constitutional ramifications are, what equal justice means to us, and why we need it. I just think there is very little attention being paid [to racial disparity] generally out in the world unless it affects people individually. So you need to tell them why it matters to them individually. So public education would be my first [priority].

Disparate racial effects in decision-making outcomes may also result not from conscious or unconscious racial targeting but from the application of race-neutral rules or

policies adopted to further legitimate law enforcement purposes in spite of, albeit not because of, their disparate racial impact. Such effects may be unnecessarily exacerbated where race-neutral rules are insufficiently narrowly tailored to achieve legitimate law enforcement goals. For example, the 1-to-100 crack-to-cocaine federal sentencing ratio results in much higher sentences for defendants convicted of drug trafficking offenses involving crack, of whom approximately 85 percent are black, than those whose offenses involve the same quantity of cocaine powder, of whom only 30.5 percent are black⁶—even though "recent research indicates that the current penalty structure . . . greatly overstates the relative harmfulness of crack cocaine."⁷ Similarly, research has shown that the use of criminal history, including convictions for nonviolent drug offenses, to impose sentence enhancements also disproportionately affects black and minority defendants, who are more likely to have come into contact with state criminal justice systems—while conferring little additional benefit in the way of reduced recidivism rates.⁸

To be sure, achieving the right balance between effective law enforcement and equitable sentencing outcomes in order to reduce crime and increase public safety—particularly where facially neutral policies or rules may exacerbate existing social imbalances—is a delicate task. One former U.S. Attorney described experiencing local pressure from communities of color who felt insufficiently protected by local law enforcement:

What I came to conclude over the course of my tenure was that all disparities in our society show up most pronounced in our criminal justice system. And yet . . . our job, our goal, our personal integrity [required us] to make better some very bad circumstances, . . . and those aren't easy decisions or black-and-white decisions. The victims that came to us . . . said, "Can't you help us with this?" So while we talk about . . . a disproportionate impact falling on minority defendants, the brunt of the crime, violence, and all the fallout, for lack of a better word, that we were seeing was also falling on black victims and minority victims. So my point is that you can't just look and say that this is all bad because it is affecting and falling upon poor and minority people. If you look at the other side, it's the poor and minority people that have the same goals and aspirations all of us have. The difference is it is more likely that we are driving [home] into a community that is a lot safer than those people were left to contend with. So those aren't easy decisions, and I think we do a disservice to approach them in a way that is good or bad or black-and-white because they are a lot more . . . involved than that.

At the same time, one former U.S. Attorney described feeling significant pressure to explain prosecutorial decisions that contributed to racial disparity in federal sentences in order to retain the respect and trust of the communities that experience the effects of both crime and law enforcement:

We had a situation where the local sheriff's department said, "We are going to come in and do a drug roundup . . . and we want the federal government to maybe take four or five of the worst [cases]. Well, it ends up that . . . 100 people [are arrested], and all of them are young black men who have been marched into these paddy wagons, and they are all being filmed. [Word gets out] that the U.S. Attorney is prosecuting the cases. The distinction wasn't made that we only had four [of the cases]. Well, on Monday morning I had pastors lined up, rightfully so, because they were seeing only . . . that the U.S. Attorney had gone out and put his or her mark on these young men, and they're clamoring to say, "Yes, we want our communities clean, safe, and so forth, but there is much more [to it], . . . and these kids are not the ones bringing these drugs in." So you deal with that hopefully in a way that's positive, and you also pursue the larger case . . . We were able to . . . say, "Well, I understand what you are saying, and the issues you're raising, and we are handling these [cases], and [the state is] handling those . . ." [And] a month or two months later we were able to arrest the guys who were bringing [the drugs] in, . . . some good ol' boys . . . and we were hopefully able to maintain some credibility with that community. . . .

Ultimately, the former U.S. Attorneys who participated in the November 2005 focus group agreed that conscious attention to the role of race in prosecutorial decision-making, as well as concerted efforts to monitor and improve the decision-making process, is essential for mitigating unwarranted racial disparities in the outcomes of federal criminal prosecutions.

II. GUIDING FEDERAL PROSECUTORIAL DISCRETION
A. LIMITATIONS OF CENTRAL OVERSIGHT FOR FEDERAL PROSECUTORS

Guidance for federal prosecutors confronting the complex challenge of addressing racial disparity requires flexibility and thus is difficult to impose by fiat. The publicly available U.S. Attorney's Manual, which includes the Principles of Prosecution, provides guidelines on how federal prosecutors should exercise discretion in making decisions such as whether to prosecute a case federally, which charges to bring, and how to negotiate plea agreements. Principle 9-27.260 explicitly prohibits the use of race and other invidious considerations in prosecutorial decision-making but states only that a "person's race, religion, sex, national origin, or political association, activities or beliefs" may not influence a federal prosecutor's decision "whether to commence or recommend prosecution or take other action against a person."⁹

Supplementing the Principles of Prosecution are occasional national DOJ policy directives issued by the U.S. Attorney General. In 1998, Attorney General Janet Reno emphasized the need for effective local implementation of national DOJ policy to reduce racial disparities in prosecutorial decision-making. Attorney General Reno reported that an internal working group assessing federal prosecu-

tions could not explain away all racial inequities in the incidence of crack cocaine prosecutions, substantial assistance motions, and charging of gun-related offenses or sentence enhancements. She therefore asked each U.S. Attorney to "examine his or her office's practices and procedures" to "ensur[e] that similarly situated defendants are treated the same" and

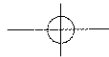
to ensure the use of race-neutral policies in the exercise of prosecutorial discretion within a district. Absent compelling, specific law enforcement imperatives there is ordinarily no justification for differing policies and practices within a district with respect to similarly situated defendants. Moreover, any race-neutral policy that has a disparate racial impact should be carefully reviewed to determine whether the disparity is justified by law enforcement necessity and not the product of conscious or unconscious racial bias.¹⁰

Despite the implementation of a strong national policy designed to reduce racial disparities in the federal criminal justice system, the question remains: What impact may such a sweeping policy actually have in individual USAOs, which must be sensitive to both local community concerns and priorities as well as national directives? The potential for conflict among local, state, district, and federal policy preferences and law enforcement priorities renders implementation of uniform national policy in each of the ninety-three USAOs a complex task. Indeed, two former U.S. Attorneys who participated in the November 2005 focus group recalled, "We ended up being the only two U.S. Attorneys who had written policies in our districts prohibiting racial discrimination in prosecution and law enforcement generally and saying we would not prosecute cases . . . resulting from racial profiling."

B. POSSIBILITIES FOR LOCAL OVERSIGHT OF FEDERAL PROSECUTORIAL DISCRETION

The former U.S. Attorneys in the November 2005 focus group emphasized that local implementation and enforcement of national policies prohibiting race discrimination in prosecutorial decision-making require recognition of and responsiveness to local community concerns and local law enforcement needs. For example, the needs to coordinate and secure the cooperation of local, state, and federal law enforcement agents; to optimize resource allocation in light of local crime patterns; and to appreciate the state's ability effectively to prosecute cases all affect how national directives addressing racial disparity may be implemented through individual USAO policies and priorities.

One former U.S. Attorney explained the complicated relationship between federal prosecutors and local law enforcement, in which federal prosecutorial decisions may be influenced by the decisions of local agents: "Where [law enforcement] . . . wants to get a quick statistic is often where . . . the racial disparity occurs. It's a lot easier to go out to the 'hood, so to speak, and pick somebody than to put your resources in an undercover [operation in a] community



where there are potentially politically powerful people.” Another former U.S. Attorney added that local law enforcement “mak[es] those decisions to put all their cars in the black community and not the suburbs At the end of the day, if you are getting a disproportionate number of [people of color] brought to you, then what can you do?” One former U.S. Attorney recalled

doing . . . something . . . in-your-face. . . . One of the first things that happened when I came into office was that a complaint [arose] in the Hispanic community about racial profiling as Hispanics drove through certain affluent neighborhoods. . . . That was all over the news, and when I came in, I said, “We will look at this.” . . . I called up the Civil Rights Department of the DOJ. . . . We were not trying to make a case, [but we] said, we have to look at this, and I think that stopped that problem. . . . It wasn’t aimed at trying to make a case; it was aimed at saying, this can’t happen, and a way of educating [local law enforcement]. . . . It was a way to get the word out that . . . we were not going to arrest anybody; we just wanted to see what was going on, because the perception was that this was racial profiling, and [local law enforcement] didn’t want that, and we didn’t want that. That was a little thing that helped, I think.

The degree to which individual U.S. Attorneys are able to control the allocation of federal funds within their districts also affects their ability to shape national policy to address local concerns. One former U.S. Attorney described frustration with the mandate to implement national policies with potentially disparate racial effects, such as that prioritizing federal prosecution of career offenders:

We were working with state and locals to try to identify . . . prior offenses, so we could give [defendants] federal time so that they would be in custody longer. . . . Clearly, these guys could have been prosecuted at the state level and would have been handled effectively there, and we didn’t need our resources locked in the DOJ policy. . . . I could not do some of the things that I thought we really should be doing, such as environmental crime, white-collar crime, and financial crime, so on and so forth.

Another former U.S. Attorney described ambivalence about the need to oversee state-federal task forces funded with federal dollars earmarked for particular national law enforcement priorities: “the [state-federal] task forces . . . are the best and worst thing that could happen [to you]. There is so much money given to these task forces They generate so many cases, it’s like a self-perpetuating thing. For [state law enforcement] to get money, they have to bring cases to [federal prosecutors]. The more cases you bring, the more money they have.”

One former U.S. Attorney described a creative use of federal task force funds administered by the state to address local concerns and alleviate tensions by educating local and state law enforcement about racial disparities

resulting from overenforcement of federal drug laws, which was fueled, in turn, by the practice of permitting any seized assets to supplement local law enforcement budgets: “It was our belief that local [law] enforcement was focused on making a lot of very small drug-related arrests with the hope of [seizing some forfeited assets] and . . . funneling the money back into their coffers. Forfeiture [of assets is] a great tool, but it can be abused, and we were of the opinion that it was very much prone to abuse. . . .”

In response to this concern, the U.S. Attorney’s office approached the state grant administrators who allocated federal grant funds to federal-state law enforcement task forces and requested that the state grant administrators require all recipients, as a condition of funding, to attend trainings held by the U.S. Attorney’s office to address concerns about racial disparities in law enforcement:

We . . . said to [the grant administrators], . . . “we think the forfeiture laws [permitting state law enforcement to retain assets during state-federal task force investigations] are being used in a manner that leads to disproportionate impacts and are not being used in a manner consistent with what was intended. What we want to do is . . . take on the responsibility of doing training for everybody, but . . . we want you to require . . . that anybody who gets money has to be subject to the training,” and they did. . . . So you couldn’t get [grant] money without the training.

Once the training condition was put into effect, it required meaningful content:

We focused on value-based training, that is, teaching law enforcement to recognize . . . that to pursue arrests in a racially based manner was inconsistent with all . . . the things they had been taught and, for most of them, with why they got into law enforcement in the first place. That it was unconstitutional, unethical, and all sorts of other things

Overall, the effort had largely positive results:

We recognized that there were some who weren’t going to care one way or another, but for those who cared about values, . . . we were able to communicate to them that to pursue law enforcement in this manner was totally inconsistent with what they wanted to accomplish in the long term, and I think it was somewhat effective. . . . [P]eople started . . . calling us even [when grant money was not at issue] and said, “We want to be subject to the training, we want the training brought to us.” . . . We did it for a period of three years; for that period, no law enforcement entity in the state would get federal grant money without going through this training, and it worked. . . .

Another potential complicating factor affecting the implementation of internal office practices, such as those regarding hiring, training, and supervision, arises from



the fact that Attorneys General and U.S. Attorneys are political appointees, but the line prosecutors they supervise are increasingly career attorneys. The former U.S. Attorneys in the focus group urged close oversight within local USAOs as the only way of establishing office norms and procedures with staying power. For example, implementing a system for close review of charging decisions may help to create enforceable internal standards and help to eliminate the influence of illegitimate factors such as race in decisions affecting charging and, ultimately, sentencing:

I think the supervisor's ability to exercise genuine judgment and supervision depends upon . . . getting all the facts, and I think that can only be done through a face-to-face meeting. Basically, the AUSAs should present the case to the supervisor for sign-off.

Unfortunately, . . . as an AUSA, I had a face-to-face [meeting] with my supervisor on 20 [percent of] my cases . . . ; most of it was paperwork I filled out and sent up, and they signed it and it came back.

Relatedly, another former U.S. Attorney recommended the use of internal indictment review committees:

We did that not only with supervisors, but with AUSAs not even affiliated with the section. . . . A lot of routine cases go fast, but they went through a screening process, and the AUSA would come in and was subject to cross-examination about the case, and not every case made it through that first indictment [review]. We did that in every case. A lot of it was like a grand jury; it gets pretty routine, but on a bigger case and most complex cases, it was a serious process, and I think the office is still doing that today.

Centralized oversight of local USAOs remains a valuable mechanism for monitoring compliance with national directives that address racial disparities in the federal criminal justice system. One former U.S. Attorney suggested that oversight of the racial effects of prosecutorial decision-making be undertaken within DOJ by the Executive Office for United States Attorneys ("EOUSA"), which is responsible for reviewing the performance of each USAO: "One thing might actually be doable . . . when the U.S. Attorneys offices are evaluated [by the EOUSA]. If you have statistics that give the appearance of disproportionality of any type, it would be looked into [to explain] why it exists. There will be times where it's very justified and warranted, and maybe there are going to be times when it is not, but requiring that it be looked at and analyzed by the U.S. Attorney during the evaluation process would be a good step, and probably something that is practically doable."

Finally, the former U.S. Attorneys emphasized, addressing racial disparities at the district level requires local leadership and community support. One former U.S. Attorney highlighted

the very important role the U.S. Attorney as the chief law enforcement officer has in not only [setting] policy in their own offices but identifying and communicating that policy to the community and the community of law enforcement. It is a tremendously powerful tool that is very fundamental to setting the framework as to whether there is going to be disparity or not If your administration is not both allowing you as U.S. Attorney and encouraging you as U.S. Attorney to make this kind of statement and provide this kind of leadership in your community, then something is seriously wrong with that administration, in my view.

Several former U.S. Attorneys expressed the value of simply engaging in conscious self-analysis and being expected to produce explanations of their reasons for particular prosecutorial decisions:

Just trying to make [prosecutors] justify [racial disparities] will have some kind of effect one way or another. . . . If somebody comes into my district from the outside . . . and they see a huge disparity, somebody is going to call us on the carpet It's just a fact of life. . . . We are going to be very defensive about it, and are going to look at it a little closer. It never happened when I was U.S. Attorney, and I know we had [disparities] out there, but I never got that . . . one call or anything else that [asked], "What's going on down there?"

III. CONCLUSION

As the focus group of former USAs recognized, federal prosecutors hold the power to evaluate and constrain their own exercise of authority, as well as an obligation to do so in the interest of justice. As advocates and policy makers seek racial justice in an imperfect criminal justice system, federal prosecutors must remain attentive to the racial effects of their own practices and discretionary decisions, in order both to reduce racially disparate treatment and to limit the racially disparate effects of race-neutral law enforcement policies. The sample guidelines reproduced in the Appendix represent one attempt by former U.S. Attorneys to shape the exercise of prosecutorial discretion by increasing transparency and accountability in individual USAOs as a means of mitigating racial disparities in the federal criminal justice system. Perhaps over time, greater experience with the fair exercise of federal prosecutorial discretion will bolster public confidence in a federal law enforcement system that is both effective and just.

Notes

- * The author thanks Professor Rachel Barkow, Buck Buchanan, Veronica Coleman-Davis, Kirsten D. Livingston, Christopher Muller, and Michael Waldman for their feedback and advice, as well as Kara Ervin, Emily Hutters, and David Gopstein for their invaluable research assistance. This report was made possible through the generous support of the Open Society Institute, for which the Brennan Center for Justice is grateful. Any errors are solely those of the author.

- ¹ U.S. Sentencing Comm'n, *Fifteen Years of Guidelines Sentencing: An Assessment of How Well the Federal Criminal Justice System Is Achieving the Goals of Sentencing Reform* 135 (2004). According to the USSC, "[q]uantifying the effects of presentencing decisions is hampered by a lack of systematic data on police and prosecutorial practices. Only a few numerical estimates have been attempted." *Id.* at 88.
- ² *Id.* at 90.
- ³ Linda Drazga Maxfield & John H. Kramer, U.S. Sentencing Comm'n, *Substantial Assistance: An Empirical Yardstick Gauging Equity in Current Federal Policy and Practice* 14 & exh. 9, 12 (1998).
- ⁴ The focus group, hosted by the National Institute for Law and Equity and generously made possible by the Open Society Institute, was held on November 30, 2005, in Memphis, Tennessee. The author sincerely thanks the following individuals for their time, energy, and invaluable contributions during the yearlong process of convening the November 2005 focus group and subsequent discussions and guidelines drafting sessions: Buck Buchanan, Janice McKenzie Cole, Veronica F. Coleman-Davis, Richard H. Deane, Jr., Donnie Dixon, Saul A. Green, Terry Harris, B. Todd Jones, Doug Jones, Gaynelle Griffin Jones, Raquiba LaBrie, Karla Lopez, Sherry S. Matteucci, Wayne S. McKenzie, Luther Mercer II, Jose de Jesus Rivera, Dan Verhine, and Sharon J. Zealey.
- ⁵ All quotations from focus group participants have been edited to eliminate minor grammatical inconsistencies and to improve readability. Brackets are supplied to identify substantive clarifications. Recordings and unedited transcripts are on file with the National Institute for Law and Equity. Thanks to Luther Mercer II for making transcription of the focus group discussion possible.
- ⁶ U.S. Sentencing Comm'n, *Report to the Congress: Cocaine and Federal Sentencing Policy* 63 tbl. 3 (2002).
- ⁷ *Id.* at 93.
- ⁸ See *id.* at 134 (noting overrepresentation of black defendants subject to increased penalties based on criminal history, primarily based on drug-related offenses despite evidence that recidivism rates for defendants with prior drug convictions "are much lower than other offenders who are assigned to [the highest available] criminal history category").
- ⁹ U.S. Dep't of Justice, United States Attorneys' Manual, Title 9, Criminal Resource Manual, Chapter 27, Principles of Federal Prosecution, 9-27.260, "Initiating and Declining Charges—Impermissible Considerations," available at http://www.usdoj.gov/usao/eousa/foia_reading_room/usam/title9/27mcrn.htm#9-27.260 (last visited Nov. 17, 2006).
- ¹⁰ Memorandum of Attorney General Janet Reno to All U.S. Attorneys Re: Ensuring Racial Neutrality in Prosecution Practices (Jan. 9, 1998), available at <http://www.usdoj.gov/ag/readingroom/racenut.htm> (last visited Nov. 15, 2006).