
As then-candidate Obama observed, so many of the disparities between black and white Americans can be directly traced to inequalities sanctioned by our state and federal laws: first, laws protecting slavery, and, later laws imposing and perpetuating segregation—Jim Crow laws—laws legalizing discrimination, preventing blacks, Asians, and other nonwhites from owning property or even becoming citizens; Fair Housing Act regulations that denied mortgages to African Americans; employment legislation; and jurisdictions

2. Id. Faulkner wrote: “The past is never dead. It’s not even past.” WILLIAM FAULKNER, REQUIEM FOR A NUN 92 (1950).
3. E.g., U.S. CONST. art. I, § 9, cl. 1 (permitting the states to sanction slave trade until 1808); id. art. IV, § 2, cl. 3 (prohibiting free states from granting amnesty to the fugitive slaves of another state); id. art. I, § 2, cl. 3 (counting a slave as three-fifths of a person for congressional districting and federal taxation purposes). Before the Civil War, states endorsed slavery through their “Slave Codes.” See Jonathan A. Bush, Free to Enslave: The Foundations of Colonial American Slave Law, 5 YALE J.L. & HUMAN. 417, 432-34 (1993). After the Civil War, those states sought to achieve the same effect as slavery by enacting “Black Codes.” See Alexander M. Bickel, The Original Understanding and the Segregation Decision, 69 HARV. L. REV. 1, 12 (1955).
4. E.g., Plessy v. Ferguson, 163 U.S. 537 (1896) (validating “separate but equal” legislation), abrogated by Brown v. Bd. of Educ., 347 U.S. 483 (1954); Dred Scott v. Sandford, 60 U.S. (19 How.) 393 (1857) (holding that the descendants of people brought into the country as slaves were not citizens of the United States), superseded by constitutional amendment, U.S. CONST. amend. XIV; Kraemer v. Shelley, 198 S.W.2d 679 (Mo. 1946) (enforcing a racially discriminatory restrictive covenant in a deed to real property that barred nonwhites from owning or occupying the residence), rev’d, 334 U.S. 1 (1948); see also Racial Restrictive Covenants, SEATTLE C.R. & LAB. HIST. PROJECT (2005), http://depts.washington.edu/civilr/covenants.htm (providing examples of deed restrictions near Seattle, Washington that precluded nonwhites from owning property in certain neighborhoods).
laws and regulations that excluded blacks and other nonwhites from unions, the police force, or fire departments; and laws and policies that have, at times, brought the near extinction of native cultures and, indeed, Native Americans themselves.

In a speech shortly after his appointment as Attorney General of the United States, Eric Holder had a conversation about race and racism with his colleagues at the Department of Justice. He explained the need for understanding, and for a basic grasp of history, which is so often missing from current discussions of racial progress. He noted—quite correctly—that “this nation has still not come to grips with its racial past nor has it been willing to contemplate, in a truly meaningful way, the diverse future it is fated to have. To our detriment, this is typical of the way in which this nation deals with issues of race.”

Race is a difficult topic, in part, because race is a social construct—it has no genetic roots. This means that people have constructed the notion of race—often to gain advantage over others. The history of race in America is a history of injustice, and this is very difficult for Americans to hear and to accept. White Americans work hard, and they don’t feel they have any special privileges. Many lack information about the history of race, and of the laws and policies impacting Americans because of their color. Race is not an issue that should be whispered in the privacy of a home or simply ignored; it is a weighty subject that calls for public debate—even if that debate causes discomfort.

During this conference you have been asked to examine the weighty topic of race and the criminal justice system in the western states. Over the past two days, you have been given a massive amount of information regarding the treatment of racial minorities in our justice system. You have learned about the historical treatment of racial minorities with regard to crime. You have heard eye-opening

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6. E.g., Int’l Bhd. of Teamsters v. United States, 431 U.S. 324 (1977) (holding that an employer’s hiring patterns or practices violated Title VII of the Civil Rights Act of 1964 by regularly and purposefully treating minorities less favorably than whites).
7. E.g., Indian Removal Act, ch. 148, § 1, 4 Stat. 411, 411-12 (1830) (authorizing the president to exchange lands with Native Americans and relocate them west of the Mississippi River).
9. Id.
11. See Jennifer Rae Taylor, Constitutionally Unprotected: Prison Slavery, Felon
statistics about the overincarceration of racial minorities in our criminal justice system. I hope this information concerns and alarms you, as it does me. You have also heard about the experiences of minorities who interact with our justice system. In his book, The Presumption of Guilt, Professor Charles Ogletree writes of the experiences of many well-educated, established African American men retelling experiences about police harassment and racial profiling—men like Henry Louis Gates, Jr., a renowned professor at Harvard University who was arrested for breaking and entering into his own home. Professor Ogletree tells of men who have worked hard to overcome the negative stereotypes that society has placed on people of color—branding them as uneducated or unteachable; lazy, shiftless hoodlums; or drug dealers and thieves—only to learn that even today race trumps class.

Just imagine the anger and disappointment that each of these men felt when they realized that their hard work, education, and financial accomplishments do not shield them from the condemnation that our system affords men of color—that they are still more likely than white men to be falsely accused, falsely arrested. And, yes, even falsely convicted. Consider men like Ronald Cotton. Mr. Cotton is a black man who spent eleven years in prison for a rape he did not commit. Robert was lucky—he was eventually exonerated and released. He found peace. He even forgave and befriended his white accuser. Today, Ronald and his accuser travel the country, together, warning about the dangers of racial profiling in the criminal justice system.

In her book, The New Jim Crow, Michelle Alexander describes African American men who, even after serving their time and paying their debt to society, face a life of continued discrimination. Jobs and housing are not available to them, they are excluded from jury service, school loans are beyond their reach, public benefits are withheld, and they are denied their right to vote. Many of these people never recover from the harm imposed by our system. They grapple with the pain that results from their interaction with our flawed system. Often, they pass their hurt and anger on to others—to children, spouses, relatives, and friends. Or, they inflict pain on their communities and on strangers.

Disenfranchisement, and the Criminal Exception to Citizenship Rights, 47 GONZ. L. REV. 251 (2012).


17. Id. at 140-56. See generally Taylor, supra note 11.
Over time, the damage done breaks down trust between neighbors, destroys whole communities, and weakens public trust and confidence in our system. The total cost and damage to society is difficult to measure in terms of dollars. But it takes its toll in broken spirits and lost dreams.

Some information presented at the conference may have been new to you; some of it you may have heard it before. Regardless of when or where you learned about the problem, or how many times you have heard the alarming statistics, there is one “take away” I ask each of you—every current and future lawyer, every prosecutor, every law professor and scholar, every judicial officer, every law enforcement officer, elected official and concerned citizen, everyone in the audience—to remember:

Whether intended or inadvertent—we are the illness that infects our criminal justice system. And we hold the cure. We can stop the epidemic of overincarceration of people of color. And the time is now!

Each day, people with broken lives interact with the triad of criminal justice—law enforcement, courts, or corrections. Indeed, it is our justice system; it belongs to us. We are the architects of the system. With every rule we adopt, every law we pass, with every police, drug, sentencing, and court policy and rule we promulgate, we design and build our system. With every argument, pleading, ruling, and opinion drafted that supports, defends, or opposes a policy or law, we maintain our system.

As the architects, planners, and builders of our system, when we find flaws or cracks in the foundation, we need to remodel. When we find a lack of resources to wage a meaningful defense; or the overincarceration of nonviolent offenders, persons with mental illness, and drug addicts; and a lack of meaningful rehabilitation programs, we need to redesign. When we identify negative, unintended consequences—such as offenders who cannot satisfy legal and financial obligations that can lead to reincarceration and a return to debtor’s prison—18—we need to rebuild. Many of these issues are caused by our faulty raw materials, or poor workmanship and construction. They are the effects of poorly drafted policies, rules, legislation, and regulation, such as the “War on Drugs” and mandatory sentencing enhancements that cannot be reduced.

We must exercise leadership. We must find the voice to address the problems. We must speak up against the conscious and unconscious bias that is damaging our society in many ways.

Each of us must become advocates for the system we desire; we must retrofit and redesign our system—to develop one we can be proud to call our own. We must acknowledge our social and ethical responsibilities. In essence, we must (1)

recognize that there is a problem, (2) seek to understand the problem, (3) devise a corrective action plan, (4) execute the plan, and (5) evaluate our success or failure.

Your presence here today encourages me. I am confident that you know something is awry with our justice system. We have a problem that must be corrected. That means step one has been accomplished. Check off number one. Many papers, statistics, and analyses were presented and discussed—and the panel discussions speak to your efforts to define and understand the problem. Check off number two. Some have proposed recommendations. If there is agreement and consent, these may form the building blocks for corrective action plans for justice system partners. Check off number three.

If it were just that easy. Research indicates that discussing the problem is not enough to move the pendulum from tolerating and accepting differences to embracing inclusion as a justice system imperative.\textsuperscript{19} It will take more than just acknowledging that bias exists and that it is wrong, and then communicating that it will not be tolerated. It will take much more to recondition years of negative influences of laws, regulations, and policies, and the consistent tendency that we all have to favor those who look, behave, and think like us—our own group.

What we see, and what we typically tend to focus on, is the way people look, and based on that appearance, we make judgments. People come to court dressed in orange or blue jumpsuits or come in shackles and handcuffs. Others come in what we consider “inappropriate attire”—saggy pants and white T-shirts with shiny metal belts; bandannas; tight skirts and jeans; their hair all different hues, textures, and styles; and with tattoos. These people speak and behave in ways often foreign to us, with language and gestures we do not understand. In contrast, other people come to court in suits, conservative clothes, with clean-shaven faces and neat hair. They speak like our friends and neighbors. Yet all of these people believe that we will understand them. They have faith that when their story is told, the judges, jurors, and prosecutors will listen and hear. They believe that in the end, the process will be fair.

Unfortunately, the research complied by the Task Force on Race and the Criminal Justice System shows that appearances distract and influence us. For example, there are differences in the processing of felony cases involving ethnic minorities that cannot be explained by legally relevant factors.\textsuperscript{20} For some reason, people of color are treated differently. Could it be due to years of negative

\textsuperscript{19} See Judith H. Katz, White Awareness: Handbook for Anti-Racism Training 14 (2d ed. 2003) (discussing prior social-scientific studies and concluding: “[A]t the heart of racism in the United States is a discrepancy between attitude and action, between thought and deed. The white American talks about equality and says that she or he believes in it. Yet alongside this profession is the truth of oppression and denial of selfhood to citizens of other colors.”).

\textsuperscript{20} See Task Force on Race & the Criminal Justice Sys., supra note 13.
conditioning about people of color that cannot be eradicated with reason, research, and statistics?

When people of color are involved, we do not really understand. We have not experienced what they have experienced, and we cannot imagine what their lives are like. And, sadly, many of us do not want to. We have spent years developing mostly inaccurate opinions about their abilities, their propensities, and their differences. This may only be changed with better images and different opinions developed through personal experiences and interacting with people of color in everyday life.

Each of us is personally responsible for acknowledging our negative conditioning and finding opportunities to “hit the reset button.” We must reach out to people of color in personal and professional settings—include them in our circle of friends, associates, and colleagues; listen to and respect their opinions and feelings about race, the justice system, and the treatment of people of color; and never seek to minimize or trivialize their feelings. We must acknowledge that we cannot ever truly know what they feel because we cannot ever know what it is like to live life in brown skin. As leaders, we must model exemplary behavior. Attorneys and court staff look to us for guidance and leadership. Judges can and should correct or sanction attorneys who use racist or other derogatory language or stereotypes during their examination of a witness or during oral argument.

In a recent case, State v. Monday, the Washington State Supreme Court took a huge step in eradicating racial bias in our courts when it overturned a murder conviction because the prosecutor attempted to undermine the credibility of a witness by invoking unfounded stereotypes about African Americans. My colleagues and I acknowledged that the behavior there was so egregious as to deserve severe and swift action—reversal. Judges should be attentive to counsel’s behavior during jury selection. A thorough jury selection process should be permitted to enable attorneys to determine grounds for legitimate challenges for cause and to make informed use of peremptory challenges.

Case law allows a trial judge, in his or her discretion, to adopt a bright line rule that the exercise of peremptory challenges does not extend to challenges that will eliminate racial diversity in a jury panel. During jury selection in State v. Rhone, for example, there were two African Americans in the jury pool. One was dismissed for cause. The other, juror number nineteen, was removed by the prosecutor’s peremptory challenge. Our state supreme court upheld the conviction, but several members of the court suggested that a bright line rule can be used to preserve a diverse jury panel.

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22. 229 P.3d 752 (Wash. 2010).
23. Id. at 758 (Alexander, J., dissenting along with three other justices).
Today, when persons of color walk into a courtroom in Washington, they will likely see a white, middle-aged judge—often a man. They will likely see white court staff, white prosecutors, and mostly white defense attorneys. Moreover, many of these people are likely dealing with years of negative conditioning about people of color. Given our courts’ lack of diversity, it is no surprise that people of color are skeptical of our justice system. These opinions will not change until we create an environment where people of color feel welcomed and respected.

From their leadership position, judges can encourage inclusive recruitment and a commitment to a diverse work force in court and administrative personnel. Judges can also play a key role in diversifying the bench, by mentoring and encouraging attorneys of color to pursue a judicial career. The Washington State Judicial Diversity Program Initiative is an example. Retired Washington judges are helping attorneys of color demystify the judicial appointment and election process by providing professional guidance and support.

Judges have special expertise in the law and court administration. Washington Code of Judicial Conduct Canon 3.2(A) allows judges to speak to legislators and other policy makers in connection with matters concerning the law and the legal system. We are encouraged to share our special knowledge with others, including legislators and other policymakers. We must also encourage our colleagues to seek out and take advantage of continuing education in developing cultural competency. We spend many hours studying the law and understanding rulings and decisions that impact people—perhaps we should spend time understanding people, their culture, and their experiences. Finally, we can initiate and lead a continuous review of court policies, procedures, and rules. We can revise, modify, and delete any policy that either intentionally or unintentionally marginalizes people of color.

Last year, I directed a review of the Washington State Supreme Court’s boards and commissions. Because of comments that were made by members of the supreme court during that process, we were asked to lead a conversation on race. The supreme court agreed, which led to the establishment of the Task Force on Race and the Criminal Justice System. In response to task force recommendations, the court has agreed to participate in additional forums addressing juvenile justice. We are also reviewing the Minority and Justice Commission’s implementation plan to address task force recommendations. The plan requests a critical review of pleas at arraignment, the factors for pretrial release, and the impact of legal financial obligations on convicted felons’ post-release.


25. WASH. CODE OF JUDICIAL CONDUCT R. 3.2(A).
We have many tools available to eradicate bias in our justice system. The key is to plan and execute. Echoing the sentiment of a truly American proverb, we can only reach our goals through the vehicle of a plan, a plan we fervently believe in and upon which we vigorously act. This is the only route to success.

Ladies and gentlemen—it is time to start the engines!