

Minutes
Racial Disparities in the Criminal and Juvenile Justice Advisory Panel

August 13, 2019

Present: David Scherr, Ken Schatz, Jenn Firpo, Rebecca Turner, Etan Nasreddin-Longo, James Pepper, Monica Weeber, Garry Scott, Judge Grearson, Xusanna Davis.

Announcements: Shela unable to be present.

Minutes: Pepper asks that the minutes be clarified with respect to his comments: he understood but was not in agreement with the terminology used in the draft report's introductory paragraph. Grearson: intended to say that such usage might push away readers and funders. Also, spell Garry Scott's name correctly.

With those amendments, Grearson moves the approval of the minutes. Monica Weeber seconds and the minutes are approved as modified.

Welcome to Xusanna Davis: Gives overview of biography. New Executive Director of Racial Equity for the state of Vermont. The job is a very big one, but it's really a big job for people of state of VT. Her initial project: looking at disparities with respect to rates of turnover of people of color in state employment and how to fix this. The structure of position: Racial Equity Advisory Panel advises the Executive Director. The next Racial Equity Panel is meeting on the 20th of August. It would be ideal to align objectives between panels. We will work on ways to advance cross-seeding between panels.

Ken Schatz: we need to do better with data, and we work with the Children and Family Council for Prevention Programs (CFCPP). Two areas in particular with respect to disparity: 1. Chittenden County generally seems to be a locus for disparate outcomes, and 2. Anecdotally, the high school to the correction systems pipeline (sometimes called the "school to prison pipeline")—wherein students of color are more likely to be disciplined harshly or even expelled from school, then get in further trouble and can end in places like Woodside.

One big need: resources for more data collection.

It is clear that Woodside is racially disproportionate. Ken explains the avenues by which a youth could be put in woodside. Clarifies that DCF can remove youth from woodside without a further court order—and a court can't place a youth in Woodside without a recommendation from DCF. DCF has considerable discretion. Woodside averages a population of about 16 each day.

Several changes that could be made: have a consistent screening process. Also have a process to help identify alternatives to Woodside placement. DCF has big role to play with placements, but we also need to work with law enforcement on initial arrests.

Rebecca: what about GALs? Are GALs sufficiently sensitive to issues of cultural competency, representing the needs of youth of color?

Rebecca: we need to ask clearly what our report is going to be. Etan's version did a good job of laying out all the things we had talked about. But should we be clearer about specific action items we can change? Specific proposals. Really focus on discretionary points. The reasonableness standard that we all use to argue about cases is not really how the world works—it's an idealized version of the world that doesn't reflect reality and leads to unfairness. I've gathered a lot of points that we can consider with respect to altering discretionary points.

Rebecca verbally runs through some of the proposals in the document she distributed to the committee. Rebecca's document is attached to these minutes.

Etan: How do we move forward on this?

Judge: I think it makes sense for subcommittees to consider these proposals from Ken and Rebecca.

Panel agrees, after much discussion, that we will focus this report on the "Beginning" of the criminal judicial process—this will include:

Police Interaction:

- Stop
- Search
- Citation
- Arrest
- Custody/Detention/Bail

Pre-arraignment Prosecutor Action

- Charging Decision
- Diversion

Juvenile

- Police interaction
- Charging Decisions:
- YO
- Diversion

General considerations:

- What data do we want/need?
- Public engagement, use of media

Xusanna: we should think about public engagement throughout this process: how we and the press and public frame these issues. This is captured in the final bullet point.

James: as we formulate responses I'm going to do so keeping in mind that the purpose of this is to create actionable recommendations for the legislature.

Brief onversation ensues regarding the use of screening tools for the purposes of measuring risk and public safety: the tools have bias built in due to societal factors. Does that render them unusable? Or are they still better than nothing?

Adjournment

Addressing Racial Disparities in Prosecutorial Practices

- Minimizing charging decisions impacted by racial bias:
 - Decriminalize low-level offenses that have minimal impact on public safety, including all first offense misdemeanors.
 - Eliminate mandatory minimums and life without the possibility of parole sentences.
- Ensuring investigations and prosecutions are not tainted by racial bias:
 - Require that temporary detentions be supported by probable cause rather than reasonable suspicion.
 - Establish that evidentiary support for searches and seizures cannot be based on factors that are proxies for racial bias, including flight, nervousness, travel patterns, and associations.
 - Require suppression of evidence in any investigation or prosecution tainted by racial bias or lacking proper language interpretation similar to that available for hearing-impaired individuals in 1 V.S.A. § 338.
 - Amend V.R.Cr.P. 7(b) (criminal procedural rule relating to the contents of the charging document) to require the prosecutor to swear that the investigation and prosecution is free from any racial bias. Proposed amendment in red:
 - (b) Nature and Contents. The indictment or the information shall be a plain, concise, and definite written statement of the essential facts constituting the offense charged. It shall be signed by the prosecuting officer on his oath of office. It shall commence with the words “By the authority of the state of Vermont” and conclude with the words “against the peace and dignity of the state.”, ~~but need not contain any other matter not necessary to such statement of essential facts.~~ The indictment or the information shall also include an attestation by the prosecuting officer that the investigation and prosecution is free from any racial bias. Allegations made in one count may be incorporated by reference in another count. It may be alleged in a single count that the means by which the defendant committed the offense are unknown or that he committed it by one or more specified means. The indictment or information shall state for each count the official or customary citation of the statute, rule, regulation, or other provision of law which the defendant is alleged therein to have violated, including where appropriate a citation of the statute, rule, regulation, or other provision of law which stipulates the penalty that may be imposed upon conviction. Error in the citation or its omission shall not be ground for dismissal of the indictment or information or for reversal of a conviction or any other post-conviction relief if the error or omission did not mislead the defendant to his prejudice.

- Avoiding disparate sentences:
 - Establish clearer sentencing factors reflecting the prioritization of rehabilitation over punishment and retribution.
 - Encourage nonincarcerative and nonsupervisory sentencing.
- Ensuring the integrity of convictions and sentences:
 - Establish a conviction and sentence integrity commission that has the authority to reopen and review convictions and sentences not just for actual innocence, but for any facts that undermine their integrity and to address unjustly long sentences.
- Implement guidelines for prosecutors that:¹
 - Decriminalizes low-level offenses that have minimal impact on public safety.
 - Makes diversion the rule for both felony and misdemeanor charges and establishes factors that, standing alone or in combination, cannot be the basis to exclude people from it, including their criminal history, mental illness, or drug use.
 - Require the filing of charges with restraint and discourages filing the maximum possible charge as a matter of course.
 - Require that charges reflect the evidence supporting all elements of the offense and the circumstances of each case and be designed to achieve a just result.
 - Requires review of charging decisions and requests for pretrial detention, bail, and conditions of release by race and gender to identify where disparities exist and, if so identified, require meaningful action to remedy those decisions.
 - Establish standards for when pretrial detention, bail, or conditions of release will be requested and make clear that requests for pretrial detention, bail, and conditions of release are to be the exception rather than the rule consistent with Vermont bail laws.
 - Require a prosecutor to engage in plea-bargaining fairly, including setting standards that there will be no early withdrawal of a plea offer absent extenuating circumstances, or threats to seek life without the possibility of parole, habitual offender enhancements, an offense having adverse immigration consequences, or transfer from juvenile to adult court to leverage a guilty plea.
 - Require a supervisor to sign off when a sentencing enhancement is sought.
 - Require that evidence-based alternatives to incarceration be the default-position.

¹ See generally Emily Bazelon, Charged, Appendix: Twenty-One Principles for Twenty-First Century Prosecutors at 315-335 (Random House 2019); Fair and Just Prosecution at <https://fairandjustprosecution.org/resources/issues-at-a-glance-briefs/>, Vera Institute, Unlocking the Black Box of Prosecution, available at <https://www.vera.org/unlocking-the-black-box-of-prosecution/for-prosecutors#charging>.

- Reduce use of fines and fees.
- Establish that when removal from the community is deemed absolutely necessary, recommendations will be for shorter sentences in community-based facilities closer to home and designed to rehabilitate rather than to punish and that requests for incarceration be the requested measure of last resort.
- Require consideration of systemic or socioeconomic factors that may have disadvantaged the defendant and played a part in bringing him or her before the court when making sentencing recommendations.
- Support comprehensive reentry services.
- Reduce the collateral consequences of convictions, including immigration consequences and registry requirements.
- Requires review of convictions and sentences not just for actual innocence, but for any facts that undermine their integrity and to address unjustly long sentences.
- Expunge past convictions that would be treated differently today.
- Improve transparency and accountability by requiring data collection, the sharing of data collected, and annual reporting of this data to the Legislature:²
 - Collect...disaggregated, case level data by docket number pertaining to defendants who are eighteen years of age or older at the time of the commission of an alleged offense under each of the categories described in subdivisions (1) to (13), inclusive, of this subsection, as follows:(1) Arrests, including data on citations, summonses, custody arrests, warrants and on-site arrests;(2) Arraignments of individuals in custody;(3) Continuances;(4) Diversionary programs, including data on program applications, program diversions, successful completions by defendants of such programs, failures by defendants to complete such programs and people in diversion on the first of the month;(5) Contact between victims and prosecutorial officials, including data on cases involving victims;(6) Dispositions, including data on pending cases and cases disposed of;(7) Nonjudicial sanctions, including data on nonjudicial sanctions applied, successful completion of nonjudicial sanctions, failure of nonjudicial sanctions and persons on nonjudicial sanction status on the first of the month;(8) Plea agreements, including data on total plea agreements, agreements involving probation, agreements involving prison, other agreements and prosecutor's last

²Taken verbatim, unless otherwise noted, from 2019 Connecticut legislation: “An Act Concerning Fairness and Transparency in the Criminal Justice System” This Act was signed by the Governor and become law on July 1, 2019. The full text of the legislation is available here:

https://www.cga.ct.gov/asp/cgabillstatus/cgabillstatus.asp?selBillType=Bill&which_year=2019&bill_num=880 (last visited Aug. 6, 2019).

best offer;(9) Cases going to trial, including data on cases added per month, pending trial cases, plea offers accepted by the court per month, plea offers rejected by the court per month, disposition by trial, disposition involving probation, disposition involving prison and other dispositions; (10) Demographics, including data on race, sex, ethnicity and age;(11) Court fees or fines, including those imposed by the court at the disposition of the defendant's case and any outstanding balance the defendant may have on such fees or fines; (12) Restitution amounts ordered pursuant to...[Vermont statute], including any amount collected by the court and any amount paid to a victim; and (13) the zip code of the defendant's primary residence.