

Introduction

- Justices of the Supreme Court, distinguished members of bar, Judge Gonzales and Professor Chang, and other members of the local bar and community.
- My name is Jason Gillmer, and I am a professor of law at Gonzaga University School of Law, and a member of the Task Force on Race and Criminal Justice.
 - I want to echo the words of Judge Gonzales and the others and start by thanking you for the opportunity to present some of our preliminary research and recommendations on this very important topic.
- Although I'll be touching on some of these issues, after me, you are going to be hearing from my friends and colleagues in much more detail about current racial disparities in our criminal justice system.
 - My role is different: I'm here to provide you with some historical background and some context.
- Indeed, this is my training – I am not an empiricist or a sociologist but a legal historian.
 - But if you believe – as I do, and as the Task Force does – that it is difficult to understand where we are today on these issues without some understanding of what came before, then you'll agree that history and tradition are important aspects of addressing current racial bias and barriers in our criminal justice system today.

Theme – Associating Race and Criminality

- With that, let me turn to an unfortunate theme that emerges from our history on this issue.
 - This is a theme which posits that, over our nation's history, we have regularly and routinely associated race with criminality.
- We have done so through two primary methods:
 - first, we have a tradition in this country of enhancing criminal penalties when non-whites are involved.
 - second, we have a tradition in this country of making non-criminal activity criminal when engaged in by non-whites.

The First Era – Racially Explicit Laws

- There was a time when these methods were explicit.
- 160 years ago in the South, laws on their face explicitly enhanced the penalties for blacks committing the same crime as whites.
 - In fact, Southern legislatures routinely described a host of criminal activity – from rape to assault to all types of homicide – which merited the death penalty, for example, when committed by blacks, while whites generally received the ultimate sentence for just one – murder.
- During this era, legislatures also explicitly criminalized non-criminal activity when engaged in by non-whites.
 - In many places, non-criminal activity like possessing guns, gathering in groups larger than 3, or even learning how to read and was made criminal when blacks were involved.

The Second Era – Racially Neutral Laws with a Discriminatory Purpose

- The enforceability of these racially explicit laws was thrown into serious doubt with the Reconstruction Amendments and related civil rights laws, causing many state legislatures to redraw their laws in race neutral terms.
 - But that does not mean that some of these laws did not survive, and it does not mean that local sheriffs, prosecutors, and judges did not implement the new race-neutral versions with a discriminatory purpose.
- Again, we see our same two themes emerge.
- First, enhancement.
 - We needn't look any further than infamous case of the Scottsboro Boys – the case that reportedly served as the basis for Harper Lee's novel, *To Kill a Mockingbird*.
 - In the middle of the century in many areas, including Alabama, race often served as a proxy for guilt, and nine black teenagers were given the punishment of death based on an accusation of rape so filled with holes that it defies modern sensibilities.
- Second, non-criminal activity made criminal because of race.
 - Perhaps the best illustration of this method is the bans on interracial marriages – bans which lasted until 1967.
 - As you might remember from reading Loving v. Virginia, during the middle of the 20th century, more than half the states criminalized the non-criminal activity of marriage based solely and exclusively on the race of the participants.

The Notion of Washington Exceptionalism

- I'm new to Washington; but I'm learning quickly that many here pride themselves on a notion of Washington exceptionalism – the idea that what happened in the South and other parts of the West did not happen here.
- It may be true that some of these more egregious laws did not reach all the way to Washington.
 - Unlike the South, we didn't segregate our schools by law.
 - Unlike Oregon and Idaho and California, we didn't outlaw interracial marriages.
- But we do see evidence of associating race with crime, and we certainly see evidence of discrimination.
- One of the most egregious examples is Japanese internment during WWII.
 - In Washington State, close to 13,000 people of Japanese descent were interned in camps.
 - These were children, these were the elderly, these were men and women – most of whom were American citizens or legal resident aliens – whose only crime was their color and their ancestry.
- Professor Quintard Taylor, a leading historian on the question of race and race relations in the State of Washington, also documents numerous examples of discrimination against Af-Am in such areas housing, employment, and education.
 - This discrimination, of course, indirectly but inevitably affected crime and punishment.

The Current Era – Racially Neutral Laws with a Disparate Impact

- This brings us to the present.
 - Today, we are dealing with racially neutral laws that many people would say were not enacted, and are not being enforced, with a *conscious* discriminatory purpose.
 - But, nonetheless, the evidence detailed in our report shows that some of these laws and policies – from juvenile justice, to drug enforcement, to traffic stops – are having a devastating impact on minority communities.

The Studies

- As you know, the State of Washington in general and leaders in the bench and bar in particular have taken the problem of racial bias and barriers in the criminal justice system seriously since the early 1980s.
- My understanding is that the catalyst for this involvement came after a study in 1980 by Scott Christianson which indicated that Washington led the nation in the over imprisonment of blacks.
 - Comparing the state's prison population to the racial composition of the state, he found blacks made up 28% of the prison population but only 3% of the state's population.
 - This was a ratio of 9.33 to 1, the worst in the nation. (nation was 4 to 1.)
- This prompted the State Legislature to commission a study to evaluate if in fact Washington had high rates of racial disparities in imprisonment, and if so why, and to later request the Supreme Court to create the Minority and Justice Task Force (1987), which became the Minority and Justice Commission (1990).
- Over the years we have seen a number of different studies, reports, and evaluations.
 - My colleagues after me will be discussing some of these, together with their own work.
 - But, at the end of the day, one thing seems clear (to me at least) – that is, race matters; race still matters today.
 - Dr. Robert Crutchfield (UW) put it this way: *race and ethnicity of individuals continues to matter when people face the risk of arrest and throughout the processing of the criminal cases that follows these arrests.*
- Our experts will probably tell you that, today, unlike the past, this is not necessarily the result of any one individual's conscious attempt to discriminate.
 - That happens, surely, but much more likely the cause for the disparities is institutional or structural arrangements.
 - This is a conclusion that I believe Professors Beckett and Harris will be commenting upon in a moment, and appears to be borne out by their research.

Perceptions Regarding Treatment of Minorities

- But I'd like to close my remarks from a different angle, by focusing on what this history and our current practices mean for regular people.
- In 1990, after holding a series of public forums, the Minority and Justice Task Force concluded in their final report that there is a *perception*, among minority groups here in Washington, that "bias pervades the entire legal system in general," and the criminal justice system in particular.
- Some of their findings:
 - "There is a perception that in criminal proceedings, minorities receive disparate treatment and harsher sentences despite the guidelines set out in the Sentencing Reform Act"
 - "There is a perception that a lack of uniformity exists in prosecutorial decision-making regarding criminal cases involving minority persons."
 - "There is a perception that some judges, lawyers, other officers of the court, and court staff [have demonstrated] biased attitudes toward minorities appearing in court."
- After hearing of the history of associating race with crime that I have detailed, and after we are done hearing from my colleagues about some of the empirical research, it hardly seems surprising that this perception exists.
 - And, in my view, this perception is not aided when high-ranking officials, whether members of the judiciary or other branches, dismiss concerns about the high prosecution rates and the high incarceration rates among certain racial groups as simply the natural outgrowth of a high rate of criminality.
 - Such comments undermine the public's confidence in our judicial system; they tend to perpetuate the belief – rightly or wrongly held – that if you are of one color you will be treated differently than if you are of another color.
 - I would hope that we could come together with some common sense ideas about how we should address this problem, and about how we can eradicate this problem.
- Thank you.