

**Position Paper on
State Courts' Responsibility to
Address Issues of Racial and
Ethnic Fairness**

Conference of State Court Administrators

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**White Paper on State Courts' Responsibility to
Address Issues of Racial and Ethnic Fairness**

A. Introduction

Racial and ethnic prejudice persists in American society today despite the achievements, legal and otherwise, that have been made over the years at both the local and national level to ensure that all citizens are treated fairly and equally. Recent events such as controversy over racial profiling by the police, highly-publicized trials in which race became a central factor and renewed debate on affirmative action have served to highlight the problem. A long-running series in one of the nation's leading newspapers last year turned a sometimes uncomfortable spotlight on "How Race Is Lived in America," focusing on race relations in disparate parts of the country, in personal and business relationships, in schools, the military and the police force, and illustrating how much has been accomplished and how much remains to be done. Such events and such media scrutiny, and the public's reaction to them, reveal not just evidence of actual prejudice but the perception of many Americans that prejudice and bias pervade many of our institutions, including the entire justice system, i.e. all agencies relating to law and the administration of justice (e.g., law enforcement, the bar, etc.). This paper discusses the courts' responsibility to address bias within the courts and within the justice system in general.¹

¹While some would argue that the very concept of "race" is invalid, and that to continue to use the term only serves to perpetuate the problem, this paper adopts the term and concept in its generally accepted usage, rather than engage in a necessarily protracted examination of that proposition.

B. Defining the Issue

The judicial system faces both documented incidents and widespread perception of unequal treatment in the courts. Both demand a swift and unequivocal response, because even the perception of unfairness impacts the public's trust and confidence in the courts and the justice system. "How the Public Views the State Courts," a 1999 survey conducted by the National Center for State Courts (NCSC) in connection with the National Conference on Public Trust and Confidence in the Justice System, revealed that African-Americans "consistently" voiced the most negative opinions about the courts, with almost 70 percent believing that they, as a group, receive "somewhat" or "far" worse treatment from the courts than other citizens; this perception was affirmed by over 40 percent of other respondents. Similarly, over half of all respondents said that non-English speaking individuals received "somewhat worse" or "far worse" treatment in the courts. Fifty to 60 percent of respondents agreed that "most juries are not representative of the community," with African-Americans and Hispanics more likely to agree than Whites/Non-Hispanics;² and compared to Whites/Non-Hispanics, African-Americans were far less likely to agree that court personnel are "helpful and courteous." Many, if not most, states have conducted similar surveys that generated similar findings. Such a profound challenge to the fairness of our courts requires, in the words of Justice Sandra Day O'Connor in her address to the National Conference in May of 1999, "action at every level of our legal system, especially at the local level."

In considering what action to take to meet this challenge, it is clear that some of the problems cited arise in or are related to other components of the justice system, and that the courts do not have direct responsibility for or control over them. Yet the courts occupy a unique

²These are the terms used in the NCSC survey.

position within the justice system, as a neutral body and the ultimate arbiter of disputes, whose proceedings are open to the public. Thus, the public often sees the courts as the ultimately responsible entity, holding the courts accountable for the actions of the entire system. Indeed, precisely because the public looks to the courts above all for fairness and equal treatment, the courts should take the lead role in addressing the issue of racial and ethnic bias throughout the justice system, as well as do everything possible to ensure fairness and eliminate injustices within the courts themselves. The two sections below list how states can work to do both.

C. Strategies and goals for the judiciary: working to improve the courts

States have approached the issue of racial and ethnic fairness in various ways. The following are some of the best practices currently implemented by states across the country. The strategies listed confront the issue of racial and ethnic bias on many levels, directly and/or indirectly, but all with the underlying premise that they will have both immediate and long-term effect.

- 1. Establish state court task forces or commissions** to identify problems in the courts, make recommendations and promote dialogue. These should be ongoing entities, not groups that disband once their reports are made. Adequate funding for these bodies is essential to their effectiveness and long-term viability. In connection with such commissions or on their own, the courts could undertake a comprehensive review of court policy, protocol, rules, etc., to ensure that language and practice are bias-free. Although time-consuming, this self-examination is a worthwhile preventive measure. The National Consortium of Task Forces and Commissions on Racial and Ethnic Bias in the Courts began with four member states in 1988 and now has 28.

2. **Develop strategies to promote a representative workforce.** Such strategies include formalizing hiring practices and conducting outreach in untapped communities, so that the pool of qualified applicants is larger and more diverse.
3. **Improve the representativeness of the jury pool and reduce the burdens of jury service.** The use of additional source lists and the elimination of exemptions increase the number of residents in the general pool, while reducing the length and frequency of service, raising compensation, even providing child-care, all make it easier for individuals to serve without unduly interfering with work and family obligations. Juries that are more representative of the community increase the public's overall confidence in the fairness of the system. At least one state now monitors the racial composition of its jury pools in every judicial district.
4. **Increase access to justice,** particularly for those groups who feel most disenfranchised. This is one of the most important ways in which to address perceptions that the courts do not treat racial and ethnic minorities fairly. Often self-represented (by necessity, not choice), these litigants may be discouraged from pursuing their legal rights or fail to do so properly because of lack of information, complicated procedures and forms and little or no assistance in navigating the system.
 - a. Courts should make all relevant information easily available in plain English and other languages spoken in the community, with respect to general information, court forms, signage and kiosks; offices for the self-represented should be provided at least in the courts that draw the most self-represented litigants.
 - b. Court administration should examine whether attitudes about or conduct in courts where ethnic and racial groups are "over-represented" (e.g., criminal, family, housing, etc.) manifest or contribute to bias. Efforts should be made to identify tangible ways to improve the "reputation" of these courts, such as ensuring that they have adequate facilities, staffing and hours of operation.

- 5. Conduct educational, professionalism and sensitivity awareness programs** on racial and ethnic bias for all judicial and nonjudicial court employees, both as stand-alone programs and as an integral part of the substantive training that is offered regularly to both judges and court personnel; incorporating the element of cultural diversity and its ramifications in all aspects of the courts' business can help address subtle, unintended ways in which racial/ethnic bias manifests itself as well as blatant incidents. Programs should also address the problem, sometimes overlooked, faced by individuals who identify with more than one "minority" group, i.e., the prejudice they encounter as members of a particular racial or ethnic group may be compounded because they are women, disabled, gay, etc.
- 6. Promote diversity in all court appointments** (e.g., fiduciaries and assigned counsel) by improving the diversity of the pool of qualified individuals. A similar effort should be made with respect to appointments to court committees and other court-related working groups. One court system has adopted administrative rules to promote diversity in this respect.
- 7. Provide adequate interpreter services**, so that non-English speaking litigants are not deterred from pursuing their legal rights because of language barriers and can participate fully in the proceedings. Interpreters working in the court system should receive appropriate training in cultural diversity. One jurisdiction works closely with universities to establish high-quality training programs for court interpreters. Judges and court staff should be trained regarding the need to ensure that interpreters are used whenever necessary, and that no short-cuts are taken in the interests of time or cost, at the expense of the individual's understanding of the proceedings.

8. **Engage in outreach** to increase awareness about how the courts work, especially in minority communities. The more these communities learn about the courts, the more confidence they will have to participate in the court process, whether as a litigant, juror or spectator. One collaborative effort of the judiciary, local chamber of commerce and bar association produced a 12-week program for the public in which lawyers and judges lecture in Spanish on topics such as family, business and immigration law. A number of states work with local community organizations to disseminate information about the kinds of litigation that most frequently touch the lives of their residents, e.g., landlord-tenant and child support matters. Each such small, though not unambitious, program can empower the targeted population and thereby also increase trust and confidence in the courts.
9. **Provide relevant information about court policy relating to bias** of any kind and create a mechanism to investigate allegations of bias in the courts. These measures, for both the public and court personnel, promote confidence that such policies are enforced and that problems of this nature will be addressed promptly.

Specific information about the different strategies adopted in various states and a list of states that currently have task forces or commissions can be found through the National Consortium and the National Center for State Courts. States would benefit from a structured method of sharing their respective programs and strategies with each other, and one way to do this would be by designating a contact person in each state's court administration through whom the NCSC could obtain and share information regularly. In addition, it should be noted that, while adopting specific strategies is important, the issue of racial and ethnic fairness in the courts must be a visible priority for court leadership at the highest levels.

D. Strategies and goals for the justice system: collaboration among partners

Beyond its obligation to address issues of bias within the courts themselves, the judiciary should work with the other branches of government and justice system institutions to eliminate bias elsewhere in the justice system. Areas that should be examined in such a collaborative process include sentencing statutes that may have a disproportionate impact on minorities; enforcement of bias offenses; treatment of minority litigants and crime victims; and racial profiling. Ideally, as the branch of government that is neutral by definition--and because the public often holds us ultimately accountable for the entire justice system--the judiciary should take a leadership role in promoting inter-branch and inter-agency dialogue and efforts to this end, particularly with respect to the more difficult and sensitive issues that can cause conflict and division among the many components of the justice system. A first step toward acknowledging and addressing such issues would be the following:

- 1. Create inter-branch entities to begin a dialogue that airs problems and works toward identifying comprehensive solutions.** It is easy enough to say that the judiciary should take the lead in bringing all branches of government together, along with the many institutions and agencies that make up the broader justice system; the difficulty lies in creating a collaboration capable of producing concrete solutions, in getting past inevitable finger-pointing and disclaimed responsibility to formulate joint strategies that genuinely tackle the problem. The initial hurdle may be getting everyone to the table in the first place--no matter who takes the first difficult step--as politics, timing, and a myriad of other factors may make various participants reluctant to take on the issue in such a broad and public fashion, embracing as partners those whom they typically hold at arms-length or view as adversaries. It may require significant groundwork to get everyone to see that it ultimately serves them--as well as the public--to get ahead of this issue, rather than wait and react when divisive events occur. Efforts by others to initiate or take the lead in this endeavor would of

course be welcome, but to the extent that the judiciary may be well-situated to bring parties together, we must be willing to do so.

An inter-branch entity or coalition, whose members have authority to implement change and come from the full spectrum of the system (e.g., law enforcement, adult and juvenile corrections and probation, prosecutors, the defense bar, and the judiciary, executive and legislative branches of government) and includes community leaders, represents an opportunity to respond to even the most politically sensitive issues, such as a racial profiling or sentencing disparities, in a deliberate fashion, rather than on an ad hoc, defensive basis. It also provides a ready-made forum to handle issues or respond to incidents as they arise and help defuse potentially volatile situations.

A permanent coalition would provide a means of constant access and exchange among the many players in the justice system, establishing ongoing communication and building trust. But open dialogue, while a necessary foundation, is not enough. Concrete steps must be taken, and such a coalition could serve as the umbrella under which the following measures could be pursued more easily and with far more credibility than if undertaken by any one branch or institution:

- a. **Establish a clear, understandable process to address systemic issues.** No one approach will work for all states, but the judiciary should take the lead in formulating the means or process by which issues of a systemic nature would be identified and handled. Through the coalition or an inter-branch effort, this could take the form of local cross-disciplinary intergovernmental committees or a combination of state and local programs, charged with developing guidelines or protocol for addressing systemic bias issues. Such programs, tied to an inter-branch coalition rather than a single branch, would build public confidence that systemic issues would be fairly and promptly addressed; optimally, such a structure would promote early and local-based resolution. Such programs would also be able to respond promptly and evenhandedly to a “hot-button” issue or high-profile incident, thereby reducing friction among

the justice system components. Such programs would not, of course, take the place of the mechanisms within each branch that address intra-branch issues.

b. Promote and contribute to data collection practices as appropriate.

Relevant data can serve to document or highlight existing inequities in the justice system, but only when the method of collection and presentation is unassailable, i.e., when its objectivity is not in doubt. Data abounds, but rarely advances a productive dialogue because it is rarely accepted by all necessary parties to the conversation. For example, data released by a city police department relating to the race of crime victims, stop-and-frisk subjects, etc., was challenged as skewed, with local legislation proposed to mandate additional data disclosure. Yet data collection and analysis is a prerequisite to a meaningful effort to address many bias issues, and most particularly to begin any discussion about issues such as racial profiling, sentencing disparities, or jury composition. Data collected or coordinated through the coalition or local intergovernmental committees could transcend “partisan” criticism and possess credibility for the evenhandedness of the process and result, thus moving the parties past the usual sticking point and toward solutions. Credible data collection would also, as a general matter, enhance the courts’ accountability with the public. Any data collection, however, must include careful consideration of potential ramifications (e.g., who actually collects it; may data, once collected, be used for another purpose; must the individual providing the data consent to how that data is used or shared).

c. Set an agenda with a timetable to reach specific goals and report to the public regularly.

The coalition or local intergovernmental entities should articulate specific goals and adopt a plan to achieve them. This promotes accountability and enables the partners in the enterprise to work together toward a particular accomplishment, rather than engage only in general discussion. For example, the coalition could decide to collect various data and publish a timetable of collection and disclosure, or conduct a series of public hearings on specific issues. It could produce an annual status report on Law Day or publish occasional issue-focused newsletters, or use other means to make the public aware of the coalition’s ongoing work and its importance to all branches of government.

In addition to this collaborative effort, the judiciary should work independently as well as with other institutions on the following strategies, which are fundamental to any effort to change reality and perception about bias in the justice system:

2. **Encourage diversity in the judiciary, the bar and law enforcement.** With respect to the bar, efforts include encouraging diversity in law faculty; promoting opportunities for attorneys of all racial and ethnic backgrounds within the justice system and all branches of government; and promoting diversity in bar leadership at the local, state and national level. By increasing diversity in the bar, the potential pool for a more diverse judiciary is increased as well. A state's method of judicial selection--elective versus appointive--may affect which strategies are most effective to achieve diversity. One state has gone so far as to propose legislation requiring minority and female representation on the bench. In addition, judicial mentoring at all educational levels can increase interest in the law and the bench, making what might otherwise seem an unreachable goal a viable one.
3. **Promote and support the availability of legal representation for the poor in both civil and criminal matters.** The judiciary must be at the forefront of the effort to encourage an adequate and qualified pool of attorneys--of all racial and ethnic backgrounds--for pro bono and court-appointed representation and seek to ensure their adequate compensation. Even where legislation and funding are necessary to accomplish this, the courts can play a pivotal role in proposing and advocating specific solutions. Without improvement in this critical area, the reality and perception of bias will continue.

E. Conclusion and Recommendations

Implementation of the initiatives and best practices discussed in this paper can help to eliminate and prevent racial and ethnic bias and bolster public perception of fairness in the courts and throughout the justice system. We know that even while much progress has been made, no state would say that its work is finished; indeed, the issues we face today are more complex than they were just a decade ago. The recent census data, illustrating just how diverse a nation we are, only affirms the importance of meeting this challenge and how timely our efforts are. We also recognize that variations in local legal, judicial and political structure and culture may render some measures discussed in this paper more suitable for one jurisdiction than another. Similarly, the level of diversity in a given state's population may require an individually-tailored approach. And, a state without a unified court system or administration may find it difficult to adopt or implement a comprehensive strategy to combat prejudice in the courts. But given the central importance of these issues to the credibility and fundamental fairness of the courts and the justice system, court systems should identify those practices best suited to their jurisdiction and affirmatively pursue them. We recommend that the following serve as the underlying principles to each state's efforts.

- 1. Outreach and access to justice.** Everything the judiciary does to improve access to justice for all citizens and to increase public understanding of the courts and their role in the justice system will improve public perceptions of fairness.
- 2. Inter-branch dialogue and cooperation at the local, state and national level.** The judiciary should take a leadership role in bringing governmental partners and agencies together to address the broader justice system's bias issues.
- 3. Information-sharing among jurisdictions.** The National Center for State Courts could regularly collect and share best practices around the nation, through a designated contact person in each state court system. States should also be encouraged to become members of the National Consortium of Task Forces and

Commissions on Racial and Ethnic Bias in the Courts, which meets annually to discuss specific topics.

- 4. Issue visibility.** Permanent intra-branch and inter-branch entities that have specific agendas are one way to maintain focus on the issue, but it also must remain a visible priority for court leadership.