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The Urban Criminal Justice System Can Be Fair

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THE URBAN CRIMINAL JUSTICE SYSTEM CAN BE FAIR

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I. Introduction

To achieve fairness in the urban criminal justice system, prosecutors constantly must balance their obligation to victims and their responsibility to the public with the rights of defendants. To improve fairness in the urban criminal justice system, prosecutors continually must strive to find and promote those legal measures that will ensure equal justice and must maximize their familiarity with and sensitivity to the people of the cities in which they work.

An urban prosecutor must work within the legal system to advocate positions that protect the rights of all citizens, including jurors and victims. The prosecutor should be able to assure the community that it is fairly represented on the prosecutor's staff and that its grievances will be heard by the prosecutor. If necessary, administrative reforms should be instituted to further these goals.

Perhaps no single event raised the issue of fairness more than the acquittal of four police officers in the first Rodney King case in April 1992, in Los Angeles, in what may have been the most publicized allegation of police brutality in recent history. The videotaped recording of King's beating was probably seen more times and by more people than any single piece of film in history with the possible exception of the Abraham Zapruder film of the assassination of President Kennedy. Could any African-American citizen in the United States believe that justice was administered fairly in California?

Our entire society was forced to deal with the perception of what happened to Rodney King. In the wake of the acquittal of the police officers, full-scale rioting regrettably broke out in Los Angeles. Fifty-three people were killed, 2,380 people were injured, 16,000 people were arrested and property damage was estimated to be $785 million.[1] It is not surprising that the riots spread to cities other than Los Angeles causing additional deaths, injuries, and property damage. The ac-

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1. *L.A. Chief Admits Error During Riots*, CHI. TRIB., May 10, 1992, at 4.

quittal of the police officers who beat Rodney King was a lesson to America that urban prosecutors are under a continuing obligation to demonstrate that equal justice is being provided to all.

In my own experience as a prosecutor, I became vividly aware of this obligation when I served as a Special Prosecutor in the "Howard Beach Case." This case began during the early morning hours of December 20, 1986, when three African-American men whose car had broken down near the Howard Beach section of Queens, New York, were chased by a gang of white young men wielding sticks and bats and screaming racial epithets. One of the African-Americans was pursued until he was forced onto a six-lane highway where he was struck by a car and killed. A second was severely beaten and the third was able to escape without injury.

Public apprehension about the fairness of the investigation and prosecution led to my appointment as a Special Prosecutor to replace the then District Attorney of Queens County. As Special Prosecutor, I was able to learn what had occurred on December 20, 1986 and, eventually, I was able to gain the confidence of the victims of the case. These were essential components in developing cases against those who had committed crimes that night. But it was also necessary to prosecute the case in a manner that would ensure the community that justice was being administered fairly in Queens County.

II. Jury Selection

One of my primary responsibilities in the Howard Beach Case was to try the case before a jury that fairly represented the community. I firmly believed that discrimination in the selection of jurors, by the defense or by the prosecution, would undermine the public's confidence in our court system and would deny excluded jurors the opportunity to participate in the justice system. I could think of nothing more unfair than excluding a prospective juror on the basis of race alone. More than fifty years ago, Supreme Court Justice Hugo Black wrote:

> It is part of the established tradition in the use of juries as instruments of public justice that the jury be a body truly representative of the community. For racial discrimination to result in the exclusion from jury service of otherwise qualified groups not only violates our Constitution and the laws enacted under it, but is at war with our basic concepts of a democratic society and a representative government.[2]

2. Smith v. Texas, 311 U.S. 128, 130 (1940).

I was familiar with *Batson v. Kentucky*,[3] a then-recent United States Supreme Court case that prohibited a prosecutor from excluding prospective jurors from service on the basis of race. Upon a *prima facie* showing by defense counsel that the prosecutor was excluding prospective jurors on the basis of race, the court would require the prosecutor to offer a "race-neutral reason" for peremptorily challenging an African-American from the jury. If the prosecutor is unable to provide a race-neutral reason, the challenge should be denied and the juror should be seated.

I saw no reason why the principles established in *Batson* should not be applied to a defendant who exercised peremptory challenges to exclude African-Americans. I concluded that discriminatory jury challenges should be no more necessary or legitimate when used by a criminal defendant than by a prosecutor. The constitutional prohibition against discrimination in jury selection should not be subject to an invisible barrier around the defense table in a public courtroom. The defense is as much a part our justice system as the prosecution.

So, when defense counsel used their peremptory challenges to strike all African-Americans from the first jury panel, I brought my "reverse-*Batson*" motion. My initial motion was denied. When defense counsel used their peremptory challenges to strike all African-Americans from the second jury panel, I renewed my "reverse-*Batson*" motion. This time, my motion was granted by Justice Thomas Demakos. He required defense counsel to offer race-neutral reasons for their final three peremptory challenges against African-American jurors. After defense counsel offered their reasons for their final three peremptory challenges, Justice Demakos disallowed one challenge and the juror was seated.

After three defendants were convicted at trial, they appealed to the New York Supreme Court, Appellate Division, Second Department. They argued that when a defense lawyer "reasonably believes that blacks *qua* blacks (or for that matter whites *qua* whites or greens *qua* greens) are more likely to convict his client based upon specific race-related issues in a particular case, he must exercise whatever lawful means are available to him to strike such jurors from the panel."[4] A defense attorney in that case publicly defended race-based peremptory challenges stating, "I want the best for an acquittal. And any lawyer who tells you otherwise is a damn liar."[5] The defense lawyers argued

3. 476 U.S. 79 (1986).

4. Brief for Appellant, People v. Kern, 545 N.Y.S.2d 4 (App. Div., 2d Dept. 1989).

5. *See* Joan M. Cheever, *Defense Jeers Ruling Denying Peremptories in Howard Beach*, MANHATTAN LAWYER, Oct. 6-12, 1987, at 5.

that Justice Demakos's ruling was wrong because there was no state involvement in the exercise of peremptory challenges by the defense.

I responded that because peremptory challenges occur in public courtrooms during the course of public trials and are enforced by judges, the perception and the reality in a criminal trial is that the court has excused jurors on the basis of race, an outcome that undoubtedly will be attributed to the state. I also argued that public confidence in the fairness of criminal proceedings should not be destroyed by allowing racial discrimination in the courtroom — criminal defendants have no right to violate the Equal Protection rights of prospective jurors.

The Appellate Division rejected the contentions of the defendants and affirmed their convictions:

> [P]eremptory challenges exercised solely on the basis of race, whether it be by the prosecution or the defense, necessarily result in injury not only to the excluded juror but to the community-at-large and to society's confidence in and respect for our system of justice . . . . [T]he courts cannot permit such conduct; justice cannot remain blindfolded, but rather must proclaim and insist that the guarantee of equal protection against all forms of racial discrimination, particularly in our system of justice, be enforced.[6]

The New York Court of Appeals, interpreting the State's Constitution and civil rights laws, affirmed the decision of the Appellate Division, stating that jury service "is a civil right established by Constitution and statute. . . . Service on the jury has long been recognized to be both a privilege and duty of citizenship."[7] Later in its opinion, the court wrote:

> The harm from discriminatory jury selection extends beyond that inflicted on the defendant and the excluded juror to touch the entire community. Selection procedures that purposefully exclude black persons from juries undermine public confidence in the fairness of our system of justice. Discrimination within the judicial system is most pernicious because it is "a stimulant to that race prejudice which is an impediment to securing to [African-American citizens] that equal justice which the law aims to secure to all others." By their application to restrict defense peremptory challenges, the People have asserted the rights both of excluded jurors and the community-at-large.[8]

Thus, it was ironic that the "Howard Beach Case," which began

6. *Kern*, 545 N.Y.S.2d at 34.
7. People v. Kern, 554 N.E.2d 1235, 1242, *cert. denied*, 111 S. Ct. 77 (1990).
8. *Id.* at 1243-44 (quoting *Batson*, 476 U.S. at 87-88).

with ugly and vile racial epithets and insults, left as its legacy a rule in New York that effectively destroyed the last vestige of racial discrimination in criminal trial procedure. I believe it is significant that even before the New York State appellate courts had definitively ruled on the issue, every New York criminal trial judge to address the question ruled that *Batson* applied to defense counsel, basing his or her decision on state constitutional and common law grounds, as well as the Fourteenth Amendment to the Federal Constitution.[9]

Recently, in Georgia, a prosecutor filed a pretrial motion to prohibit defendants from exercising their peremptory strikes in a racially discriminatory manner. The trial court denied the State's motion but certified the issue for immediate review. After the Georgia Supreme Court granted an interlocutory appeal and affirmed the trial court, the United States Supreme Court granted Georgia's petition for writ of certiorari.[10]

In its decision on the merits, the United States Supreme Court held that the Fourteenth Amendment to the United States Constitution prohibits racially discriminatory peremptory strikes by defense attorneys.[11] The Court wrote:

> But there is a distinction between exercising a peremptory challenge to discriminate invidiously against jurors on account of race and exercising a peremptory challenge to remove an individual who harbors racial prejudice. The Court firmly has rejected the view that assumptions of partiality based on race provide a legitimate basis for disqualifying a person as an impartial juror. As this Court stated just last term in *Powers*, "[w]e may not accept as a defense to racial discrimination the very stereotype the law condemns."[12]

The decision of the Supreme Court in *McCollum* banning discrimination in jury selection removed yet one more vestige of discrimination against African-Americans. It is a welcome reaffirmation of "equal justice for all" and should be applauded by all fair-minded individuals.

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9. People v. Muriale, 526 N.Y.S.2d 367, 374 (Sup. Ct. 1988), *appealed on other grounds*, 553 N.Y.S.2d 39 (App. Div.), *appeal denied*, 557 N.E.2d 1198 (N.Y. 1990); People v. Gary M., 526 N.Y.S.2d 986, 992 (Sup. Ct. 1988); People v. Davis, 537 N.Y.S.2d 430, 433-36 (Sup. Ct. 1988); People v. Piermont, 542 N.Y.S.2d 115, 117-18 (Westchester County Ct. 1989).

10. State v. McCollum, 405 S.E.2d 688 (Ga.), *cert. granted sub nom.*, Georgia v. McCollum, 112 S. Ct. 370 (1991). I filed an *amicus curiae* brief pursuant to United States Supreme Court Rule 37 on December 19, 1991. This brief supported the position of the State of Georgia.

11. Georgia v. McCollum, 112 S. Ct. 2348 (1992).

12. *Id.* at 2359 (citation omitted).

Since *Batson*, *Kern*, and now *McCollum*, many attorneys have requested that trial courts rule on peremptory challenges of potential jurors when they believed that jurors of a particular race, religion, ethnicity, or sexual orientation were being purposefully excluded. While one might argue that defense attorneys have used the principles and procedures described in *Batson* as just one more tool to zealously protect the legal rights of their clients or that *McCollum* will be used by prosecutors to obtain a more favorable jury for the prosecution, I believe that, ultimately, these cases will serve to require that juries be more representative of the community.

Batson-type challenges by defense attorneys that have been denied by trial courts already have been appealed in numerous cases. One appeal recently considered by the United States Supreme Court emanated from the Office of the Kings County District Attorney.[13] In that case, counsel for the defendant Hernandez objected at his trial that the prosecutor had used peremptory challenges to exclude potential Latino jurors. Without waiting for the trial court to issue a ruling, the prosecutor volunteered that he had "struck" two jurors, who were bilingual, because he was uncertain whether they would be able to listen to and follow an interpreter. The prosecutor explained that the two potential jurors had looked away from him and hesitated before responding to his inquiry whether they would accept the translator as the final arbiter of the witnesses' responses; that he did not know which jurors were Latinos; and that he had no motive to exclude Latinos from the jury, since the complainants and the civilian witnesses were Latinos.

The trial court rejected the defendant's claim, and its decision was affirmed by a plurality of the Supreme Court. The Court concluded that the prosecutor did not use peremptory challenges in a manner which violated the Equal Protection Clause[14] or which constituted discriminatory intent.[15]

Recently, another criminal case shook the fundamental belief of some in the validity and fairness of the jury system. On August 19, 1991, in Crown Heights, Brooklyn, Yankel Rosenbaum, a twenty-nine-year-old scholar visiting from Australia, was stabbed to death during the unrest that followed the death of Gavin Cato, an African-American child struck by a car driven by a Hasid. Lemrick Nelson

13. Hernandez v. New York, 111 S. Ct. 1859 (1991).

14. *Id.* at 1867 (opinion by Justice Kennedy, which was joined by Chief Justice Rehnquist, Justice White and Justice Souter).

15. *Id.* at 1874 (opinion by Justice O'Connor, which was joined by Justice Scalia).

was subsequently accused of killing Mr. Rosenbaum, tried, and acquitted.

Members of the Jewish community reacted to Nelson's acquittal in a variety of ways. Some angrily marched with a symbolic coffin across the Brooklyn Bridge to protest the verdict at City Hall. Others wrote letters to local newspapers castigating city leaders, denouncing the jury's verdict, demanding a further investigation or criticizing the work of the police department. Still others met with me in community meetings. As the chief law enforcement officer of Kings County, it would be highly improper for me to suggest criticism of any judge or jury. Each has its role in the pronouncement of justice: judges must decide the law of each case; juries must determine the facts.

Fairness in the criminal justice system is dependent upon the selection of jurors that are representative of the community. Jury lists are drawn from voter registration lists, state and local tax rolls, utility subscribers and motor vehicle license lists. Some citizens choose to "excuse themselves as prospective jurors" at the outset of jury selection during preliminary screening. These citizens cite personal or professional commitments or answer questions about fairness and objectivity in ways calculated to ensure their dismissal. It is unconscionable to shirk the call to jury duty and to leave this vitally important responsibility to others. In our society, each of us has a continuing responsibility to protect the civil rights of others.

The elimination of peremptory challenges based upon race is a recent and important example of how prosecutors have used legal challenges to promote fairness in the criminal justice system. Further, if our criminal justice system is to be fair, all individuals have an obligation, a sacred civic responsibility, to be jurors when asked. But increased fairness also has resulted from administrative action that does not require court decisions. To make the system fairer and more responsive, I decided early in my administration that the prosecutors in my Office had to be familiar with the problems of the community which they serve.

III. Administrative Programs

Urban prosecutors who daily handle hundreds of criminal cases have wrestled for years with the problem of providing justice to the citizens of our cities. Unlike small towns in America where prosecutors are familiar with the crimes and criminals of their communities, today's crushing volume of cases in urban areas has made it difficult for urban prosecutors to understand the crime problems of the huge number of people in the cities.

But urban prosecutors, like small town prosecutors, work best when they balance justice with compassion and a strong sense of humanity. They must strive each day to sensitize themselves to the depth of feelings of the people in the area they serve. They cannot represent a rule of law within their communities unless they find a way to understand and to respond to the sources of crime and disorder in their communities. Frequently, this requires urban prosecutors to take appropriate administrative action.

A. Community-Based Prosecution

I recently reorganized my Office, one of the largest prosecutorial offices in the country, along community lines into five geographic prosecution zones. The zones are smaller and more responsive to the people they serve. A prosecution team, consisting of a bureau chief, two deputy chiefs, and twenty-four lawyers, has been assigned to each zone, and given the responsibility for prosecuting felonies which occurred in that zone. Assistant district attorneys who previously prosecuted cases spanning all of Brooklyn now focus on a particular area. Rather than trying to understand the problems of crime that exist in a population of almost 2.5 million people, covering an area of over seventy square miles, these prosecutors now serve approximately 400,000 to 500,000 people in an area of ten to fifteen square miles. In addition, they regularly attend community meetings at local planning boards, police precincts and neighborhood associations. This reorganization capitalizes upon the effectiveness of the new community policing philosophy implemented by the New York City Police Department. It recognizes that if police officers walk regular beats and become closer to the community, prosecutors who handle the arrests made by these officers must also become closer to these communities in order to better understand the communities' problems.

In just a short time, the reorganization program has achieved many of its goals. Prosecutors in my Office are now working more closely with police officers who make arrests because they know those police officers. Assistant district attorneys who, in the past, required hours to familiarize themselves with various locations throughout Brooklyn to prepare cases, now know the streets of the neighborhoods of their zones. They also know the problems that exist on those streets. In effect, my assistant district attorneys are no longer responsible for a large, amorphous county but, instead, represent smaller, more defined communities. They are in better touch with the communities they represent and, as a result, I believe that the prosecutorial decisions they are required to make tend to be more fair.

I firmly believe that a prosecutorial office which reflects the culture of the community has a greater opportunity to be fair to the victims, to the defendants and to the community. Therefore, I have made a conscious effort to find and to hire experienced attorneys for supervisory positions who are also women or members of minority groups. Two of my Deputy District Attorneys are women; one is also an African-American. Twelve of my Bureau Chiefs are women. Six of my Bureau Chiefs are either Latino- or African-American. I believe that my staff attorneys also reflect the composition of the community. In the past three years, I have hired almost 100 attorneys who are Latino-, Asian- or African-American. Nearly one-half of the assistant district attorneys in my Office are women.

B. Victims' Rights Initiatives

To have a fair urban criminal justice system, we must take all necessary steps to ensure that the victims of crimes who are too young or too scared to fend for themselves are protected by the system. For example, my Sexual Abuse Unit now features a "Child's Room" to assist children of sexual abuse and the children of sexual abuse victims. Since the Child's Room was opened in July, 1990, 1400 children have "played" in it. The Child's Room is staffed by a Child Abuse Unit composed of lawyers, paralegals, and a child abuse specialist. It provides recreational facilities and educational materials to child abuse victims, as well as video equipment for interviews which may be needed for child abuse prosecutions.

I also have a Crime Victims Counseling Unit, composed of experienced counselors, created to assist victims of crime who may request or desire help. During the first ten months of 1992, this Unit provided services to more than 3,000 people.

Since becoming District Attorney in 1990, I have established two bureaus that I have staffed with assistant district attorneys trained to be sensitive to particular victims. First, I created a Domestic Violence Bureau with the specific responsibility of protecting the victims and prosecuting the perpetrators of crimes that occur in the household. These cases are not limited to crimes perpetrated against a spouse or child; they also concern crimes where parents or grandparents are victimized, usually for their money, by their children or grandchildren. During the first ten months of this year, this Bureau prosecuted over 1400 misdemeanor cases and seventy-five felony indictments. Ninety-six percent of those felony indictments have resulted in convictions.

Second, the Howard Beach Case, and subsequently, the tragic

death of Yusef Hawkins in Bensonhurst, demonstrated that too frequently victims are assaulted merely because of their race, ethnicity, religion or sexual orientation. As a result, in 1990, I created a Civil Rights Bureau to handle these "hate crime" cases. This Bureau is also responsible for prosecuting those who prey on recently-arrived immigrants. In the first ten months of 1992 alone, my Civil Rights Bureau began the investigation and prosecution of sixty-one cases.

The community must be made aware that urban prosecutors also investigate acts of misconduct committed by law enforcement officers. My Law Enforcement Investigations Bureau now specializes in investigating corruption within the police and correction departments, as well as claims of police brutality.

C. Education and Rehabilitation Efforts

Since the Howard Beach Case, I realized that law enforcement is not the answer to ending racial strife. When a person lies on the ground, beaten or murdered simply because of the color of his skin, critical damage has already been committed. Prosecuting the guilty is not enough. Further, a policy of increasing prison populations has little relation to public safety and threatens our fiscal survival. Urban prosecutors have an obligation to ensure that crimes of racial or ethnic bigotry do not occur. Therefore, I launched additional initiatives that I believe will provide long-term solutions to crime and, as a result, increase the fairness in the system.

First, I created an adopt-a-school program in my Office to reach out to young people early on. Urban prosecutors must forge a positive link between the schools and the criminal justice system. In collaboration with former New York City Schools Chancellor Joseph Fernandez and the private and parochial school systems in Brooklyn, I established a program called Project Legal Lives. The program teaches a basic lesson — that the key to community harmony is mutual respect. In its pilot phase, which began shortly after I became District Attorney, I operated a program in fifty-eight schools. During the 1991-1992 school year, I was able to expand the program to 126 schools. This year, my program is in 201 schools working with 12,000 children. By the end of my first term, I expect to have members of my staff in every one of Brooklyn's more than 350 elementary schools.

To coordinate Project Legal Lives with my Community-Based Prosecution program, attorneys and staff in the program are assigned to a school located within their zones. Assignment by "zone" will increase the staff's understanding of the particular community's

crime program through interaction with the children of the community. In Project Legal Lives, an assistant district attorney or other staff member from my Office is paired with a fifth grade teacher to form a team. Together, they teach the importance of rules and laws to fifth graders. They use a law-related curriculum designed to raise the children's consciousness about bias and drug abuse. The young men and women from my Office visit the classrooms, sit down with the fifth graders and talk with them — openly and honestly. I am confident that these exchanges will lead to self-respect and respect for others, as well as an increase in the students' knowledge about the criminal justice system and its relationship to the community. This program is a sound investment and it will be the legacy of my Office.

Second, I established numerous advisory councils comprised of the major ethnic groups, senior citizens, a women's group, members of the gay and lesbian community and union health and safety experts. The purpose of these councils is to advise me about law enforcement issues facing their constituents. When violence erupted in Crown Heights in 1991, my African-American and Jewish Advisory Councils met in joint sessions to discuss easing tensions and contributed to the calm. My advisory councils also met in joint sessions with the New York AIDS institute to learn more about the prevention and treatment of this terrible disease.

Finally, I designed a prison alternative program called Drug Treatment Alternative to Prison ("DTAP"). In October, 1990, we began identifying 100 non-violent drug offenders and started removing them from the criminal justice system to two highly respected residential drug rehabilitation centers, Daytop Village and Samaritan Village. For a defendant to qualify for the program, not only must the pending criminal offense be non-violent, but the defendant must have no violent crime in his or her background.

The program begins for many of the participants with forty-five days of jail at Rikers Island where the inmate is carefully monitored. Others are sent directly to rehabilitation to set up a controlled model for comparison. The next phase is sixteen to twenty-four months at Daytop or Samaritan Villages. For the final or re-entry phase, we have established a working relationship with a Business Advisory Council made up of Brooklyn business leaders who have agreed to provide jobs to graduates of the program.

To present some idea of the potential of the program: It is generally accepted that to feed his or her habit, each of these 100 addicts commits an average of ten crimes a week; crimes like auto theft and vandalism, burglary and shoplifting. As a result, these 100 addicts

would have committed approximately 50,000 crimes a year. In addition, to incarcerate 100 defendants for one year in the New York City or New York State costs approximately $4.4 million. The cost of treating the same 100 defendants in DTAP for one year is approximately $1.8 million.

Ten addicts recently graduated the program after receiving twenty months of treatment. Nine are now employed and are paying taxes. The tenth is in college. Those are ten people who are not on public assistance, who no longer have significant health care costs which need to be borne by an overburdened public hospital system, and who no longer are committing crimes.

IV. Conclusion

While urban prosecutors must fight crime with vigorous prosecution and strong penalties, they must never lose sight of the need to heal and the need for love. As Dr. Martin Luther King, Jr., once wrote: "[w]e have learned through the grim realities of life and history that hate and violence solve nothing. They only serve to push us deeper and deeper into the mire. Violence begets violence; hate begets hate; and toughness begets a greater toughness. It is a descending spiral, and the end is destruction — for everyone."

The urban criminal justice system is constantly evolving. It is not an inanimate machine that simply can be turned on and off. New laws are always being passed. New judicial opinions are always being rendered. But there is one constant element to the system: as it evolves, its fairness remains dependent on the quality of those who practice in it.

The urban criminal prosecutor must take an active role in the system by being an advocate for positions that protects the rights of all citizens. The urban prosecutor must set an example within his or her own office by establishing programs that assure the community its problems are being acknowledged and by making every effort to recruit staff members who reflect the community which he or she serves. No matter how hard a prosecutor tries to be fair in handling investigations and trials, he or she will only succeed when the community believes that these efforts to reach out to the community are sincere and successful.