2016

Racism in the Cook County Criminal Courts

Richard H. Chused

Racism in the Cook County Criminal Courts

April 28, 2016

On April 15 Nicole Gonzalez Van Cleve's op-ed piece entitled *Chicago's Racist Courts* was published by the New York Times. It was prompted by the report recently issued by Mayor Rahm Emanuel noting that racism was rampant in the Chicago Police Department. Van Cleve, a Tulane University scholar and the author of another just released publication—Crook County: Racism and Injustice in America's Largest Criminal Court (Stanford University Press 2016)—used her first hand knowledge of the Chicago criminal court system to opine on the pervasive, shockingly overt racism among those running the prosecuting and judicial systems in the city. In short, if you put together the Mayor's report and Van Cleve's scholarly work, there can be little doubt that Chicago's criminal justice system is a cauldron of misbehavior.

At one level this is not surprising. The ongoing series of exposes about police violence, the pervasive use of low level charges and arrests to wring money from the pockets of the poor, wrongful convictions and death sentences, and an array of other forms of injustice has created a sense that something is deeply wrong with the American legal system. Why should Chicago be any more immune from public criticism than Ferguson or New York City?

But the ongoing, contemporary series of police and judicial crises may lead us to forget how long this sort of racism has been allowed to operate. Just shy of fifty years ago when I was on the Editorial Board of the University of Chicago Law Review while a law student, the Review published a lengthy student generated and written study of continuances in the Cook County court system. Laura Banfield & C. David Anderson, *Continuances in the Cook County Criminal Courts*, 35 U. Chi. L. Rev. 259 (1968). The intent was to investigate the connections between delay and the provision of justice in the courts. An enormous amount of data was gathered, including information about the race of the defendants, whether they had private or publicly provided attorneys, the charges laid against them, the number of continuances in each case, the prior criminal records of the defendants, and a host of other items. As the study unfolded a series of conclusions reaching well beyond the original intent of the project emerged—including the existence of pervasive racism in the Chicago courts. The authors of the study wrote:

> The cases of white defendants involve more court appearances than the cases of nonwhites, and this differential holds when whites and non-whites are matched by type of crime, seriousness of crime, type of lawyer, bail status, and plea history. This disparity cannot be attributed to the relative poverty of non-whites, and the consequent inability to command a tenacious defense. Some racial differences exist between the public defender and jailed defendant populations on the one hand, and the general defendant population on the other. Non-whites comprise almost the same portion of the total defendant population (58%) as of the Public Defender's clients (62%); they comprise 66% of the defendants not able to make bail, as against 58% of the total defendant population for which both bail and race information were available. But these differences do not explain why 32% of white defendants' cases, but only 20% of non-white defendants' cases, last for more than 8 court appearances. Among both the Public Defender's clients, and the jailed defendants, where difference in resources are presumably not significant, whites get more continuances. The relationship between race and continuances was somewhat surprising to the authors of this study, who had assumed that it would be more or less camouflaged in other categorizations rather than visible on the surface. The sample data points to the conclusion, however, that lawyers—and probably judges, states' attorneys, and the system as a whole—pay less attention to Negro defendants and take less time with their cases.**[1]**

As a member of the Editorial Board of the Law Review, I had the pleasure of doing the final rewrite and edit of the article over the summer and fall of 1967. As I pored over the tables, it became obvious that the project's focus on continuances left much unsaid about the racism in the operation of the courts. After much thought, I took the unusual step of asking my fellow Editorial Board members to allow me to draft an "editorial" to be published as a frontispiece statement from all the members of the board. They agreed. That editorial, *Editorial Note: The Continuances Project*, 35 U. Chi. L. Rev. 256 (1968), is certainly one of the few if not the only such essays ever to be authorized by the editorial board of an American law review. In light of all the recent controversy about race and the American legal system, it is well worth the time to read the editorial essay on the same subject published almost fifty years ago.

In the following pages, the *Review* publishes a detailed study of the role of continuances in the administration of the Cook County Criminal Courts. It would be unfortunate if the narrow confines of the "continuance" label or the complicated appearance of a large group of tables were to obscure some of the broader implications of the data. In the hope that our readers will be moved to study further the data presented in the Continuances Project, we would like to suggest some of these broader implications.

The data clearly reveal that defendants of different racial and economic groups are processed by the Cook County Criminal Courts in very different ways. Defendants who are white or who are represented by retained counsel obtain release on bail more often than other defendants, change not guilty pleas to guilty pleas less often, obtain more continuances, and are found guilty less often. If race and economic status are considered together, we find that white defendants with retained counsel obtain release on bail, continuances, and acquittals at considerably higher rates than other groups of defendants.

These disparities in the treatment of different groups of defendants raise serious doubts that the present system affords various racial and economic groups comparable levels of justice. Although non-whites are charged with serious offenses more often than whites, they are found guilty more often regardless of the type of offense. Non-whites, however, seem to be treated more leniently at the sentencing level; though accused of more serious crimes, guilty non-whites are incarcerated for similar periods of time and given probation with similar frequency as white defendants. One could argue that the higher guilty rate among non-whites is "balanced" by favorable treatment in plea bargaining and sentencing. Such a judgment is crude at best, for there is not adequate data breaking down plea bargaining and sentencing by offense charged. But despite the crude nature of the data such a rationalization of the system seems patently unjust. It overlooks the fact that the non-guilty disposition rate for whites is three times higher than for non-whites. The proportion of whites acquitted is so large (28%) that it nearly equals the combined proportion of non-white acquitted and convicted on reduced charges.

Similar indications of injustice appear when one examines the data on representation of indigents. The non-guilty disposition rate for defendants with retained counsel is more than twice as large as the rate for defendants with public defenders. Plea reductions occur less often among public defender cases than among retained cases. Finally, while clients of the public defender are accused of somewhat more serious offenses, the sentences imposed on public defender clients seem more harsh than the differences in crime type would warrant. Unfortunately, data on sentencing by crime was not tabulated, so no definitive judgments can be made about the level of justice obtained by various types of lawyers. But the possibilities of unfairness are, to say the least, disturbing.

> Suspicion of unwarranted differences in treatment is reinforced when both race and economic status are considered. Non-guilty disposition rates for defendant classes are as follows: white defendant-retained counsel—42%; non-white defendant-retained counsel—12%; white defendant-public defender—17%; non-white defendant-public defender—8%. While only future research will reveal whether these figures truly "speak for themselves," it seems clear that they whisper loudly.
>
> Even if the level of justice granted to the poor non-white were comparable to that given the non-poor white, should such vast differences in processing defendants through the system of criminal justice be tolerated? Simply as a matter of public relations, there must be concern not only with the delaying tactics of some retained counsel, but also with the speedy and perhaps unjust way in which the poor non-white is shuffled through the courts. Though the processing differences may be explainable to some observers, the impression left to the average nonwhite defendant, and perhaps the whole non-white community, must certainly be unfavorable. In fact, the recently issued Report of the National Advisory Commission on Civil Disorders found that unequal treatment has caused the courts to become a focus of ghetto distrust.
>
> The nature of the needed reforms presents the problem. At a minimum, additional resources must be provided for the defense of the poor. The Chicago Public Defender's Office has only twenty-seven attorneys; they simply cannot adequately handle the caseload. But a simple recommendation of increased spending overlooks more basic questions. Are there feasible alternatives to the present system of dual representation, such as adequately paying private counsel from public funds to represent the poor? Do plea bargaining practices allow equally forceful assertion of the rights of members of minority groups and of the poor? Should the burdens of the adversary process be eased by providing the poor investigative and other services? These and other fundamental issues should be the subject of serious consideration.
>
> When the *Review* undertook to study continuances in the Cook County Criminal Courts, the focus of our attention was not centered on problems of discrimination in the treatment of different racial and economic groups. Nevertheless, the indications of discrimination that the findings suggest are so clear that, at the very least, there should be prompt investigation and movement toward reform.**[2]**

That final editorial plea obviously fell on deaf ears.

[1]. Laura Banfield & C. David Anderson, *Continuances in the Cook County Criminal Courts*, 35 U. Chi. L. Rev. 259, 285 (1968). Used with the permission of the University of Chicago Law Review.

[2] *Editorial Note, The Continuances Project*, 35 U. Chi. L. Rev. 256-258 (1968). Used with the permission of the University of Chicago Law Review.