5.5 Beyond Litigation

Partnerships. The high bar set by the United States Supreme Court in *United States v. Armstrong*, 517 U.S. 456 (1996) "establishes the need for creative non-judicial remedies" in addressing potential issues of race in prosecutorial decisions. Angela Davis, *Prosecution and Race: The Power and Privilege of Discretion*, 67 FORDHAM L. REV. 13, 42 (1998). For example, external organizations have worked with prosecutors to analyze their record of decision-making and exercise of discretion. The Vera Institute's Prosecution and Racial Justice Program (PRJ) partners with prosecutors "to enhance fairness, efficiency, and accountability and to address unwarranted racial disparity in the exercise of discretion[;] . . . serve[s] as a resource for research, technical assistance, innovation, and policy development; and . . . seek[s] to engage communities in improving prosecutorial accountability[.]" Alice Chasan, *Q & A with Whitney Tymas, Director of the Prosecution and Racial Justice Program*, JUST 'CAUSE, Summer/Fall 2012, at 4, 4–5. The first step taken by the PRJ when working with a prosecutors' office is to "present them with an accurate picture of what is actually happening in their offices" by "analyz[ing] voluminous data to see whether they are exercising discretion in a racially neutral way." This analysis consists of multivariate statistical calculations controlling for a number of factors to isolate the influence of race at various decision points. *Id.* Prosecutor's offices in Milwaukee, Wisconsin; Mecklenburg County, North Carolina; San Diego, California; Lancaster County, Nebraska; and Manhattan, New York have worked with the PRJ to collect and analyze data reflecting the exercise of prosecutorial discretion.

The PRJ attributes its success in finding prosecutors' offices to partner with to the "great benefits associated with getting in front of the toxic issue of race and addressing it head on." *Id.* Among other things, such efforts may help ease "[t]ensions . . . between prosecutors and . . . the general public." As Whitney Tymas explains:

> Prosecutors are often frustrated by weak participation among communities, particularly in the context of violent crime. They complain that witnesses won't come forward, victims won't testify, and therefore even cases most needing attention can't be prosecuted successfully—meaning less justice and safety for everyone. We help potential partners recognize that working with PRJ will increase their accountability to the communities that trust them least, leading to better public safety outcomes.

Id.; *see also* BESIKI KUTATELADZE ET AL., VERA INSTITUTE OF JUSTICE, RACE AND PROSECUTION IN MANHATTAN 3 (2014) (quoting Manhattan District Attorney Cyrus R. Vance, Jr. as stating: "The shame is not in finding that we have unconscious biases or that our current policies have a disproportionate racial impact—the shame lies in refusing to ask the questions and correct the problems.").

Case study: Partnership between the Vera Institute's Prosecution and Racial Justice Program and the Mecklenburg County District Attorney's office. One of the first

partnerships formed by the PRJ was with the Mecklenburg County District Attorney's Office (MCDA) in 2005. That partnership is the subject of the reflections of Peter S. Gilchrist III, Mecklenburg County District Attorney (Ret.) 1974–2010, below.

Around 2003, Nick Turner and Dan Wilhelm of the Vera Institute of Justice (Vera) told me that they were interested in studying how prosecutors make discretionary decisions. I stated that I was interested in related topics: early screening of cases, allocation of limited resources, identification of active and repeat offenders, and consistency in treatment of like offenders.

Our conversations continued intermittently and in 2005 when their Prosecution and Racial Justice Program (PRJ) was launched, the Mecklenburg County District Attorney's Office (MCDA) was invited to join as a partner. The goal of this partnership was to develop data collection systems that would allow our office to identify and address racial disparities in the exercise of prosecutorial discretion. The vision of the PRJ—to enhance fairness and efficiency in prosecutions and reduce unwarranted racial and ethnic disparities by collecting empirical data about the exercise of prosecutorial discretion—is one that I wholeheartedly endorse. Data collection is important because it allows district attorneys to better understand what's going on in their own offices. Also, the release of such information to the public increases transparency, accountability, and trust between prosecutors and the communities they serve.

When I informed my staff that I had invited Vera's researchers into our office, I joked that I felt like I had invited a bunch of termites into my house. I knew that they might uncover troubling data, but was committed to the project of examining and addressing any possible problems they discovered. Before starting the project I informed Vera that our existing, paper-based data collection system was completely inadequate. Very little of the data that Vera needed to conduct their analyses was available in our files. Vera made an independent review of our local and state court data as well as police department data and decided that we could still proceed.

After trying to work with our data systems Vera determined that it was too problematic. This led to a joint effort by Vera and our staff to develop a more robust, electronic data collection system called MeckStat that allowed us to conduct a more informed examination of our discretionary decisions. However, the limits of both available software and staff time led to the decision that the project could only examine drug cases. MeckStat represented a vast improvement over our paper-based data systems and ultimately became a model for a new, statewide data collection system implemented by the Administrative Office of the Courts. However, because certain data was not entered into the MeckStat system, it still wasn't robust enough to answer all the questions posed by the Vera researchers.

I was disappointed that our research partnership was inconclusive, but I was proud of and grateful for the unexpected benefits that resulted from this project. These benefits included the development of a better data collection system, both in our office and statewide; enhanced quality control in the handling of our drug cases; the reinforcement of polices—and the development of new policies—regarding the exercise of discretion; and engagement in a number of productive discussions regarding cases that Vera researchers flagged as outliers. I have absolutely no regrets about embarking upon this partnership. If North Carolina data collection systems continue to improve, I expect that even more meaningful conclusions could be drawn from these types of studies.

Guidelines. Another non-judicial remedy to address questions of race is the development of "race-sensitive guidelines for charging, discovery, bail/release recommendations, plea

bargaining and prosecutorial diversion." *See* ASHLEY NELLIS ET AL., THE SENTENCING PROJECT, REDUCING RACIAL DISPARITY IN THE CRIMINAL JUSTICE SYSTEM: A MANUAL FOR PRACTITIONERS AND POLICYMAKERS 34 (2008). The American Bar Association and National District Attorneys Association standards may be useful in developing such guidelines. *Id.*; *see also* American Bar Association Criminal Justice Section Standards: Prosecution Function, Standard 3-3.1(b), Investigative Function of the Prosecutor ("A prosecutor should not invidiously discriminate against or in favor of any person on the basis of race, religion, sex, sexual preference, or ethnicity in exercising discretion to investigate or to prosecute. A prosecutor should not use other improper considerations in exercising such discretion."); National District Attorneys Association, National Prosecution Standards, Third Edition, Standard 3-1.2, Fairness in Investigations (criminal investigation may not be motivated by victim's or offender's race, ethnicity, religion, sexual orientation, or political affiliation), Standard 4-1.4, Factors Not to Consider (screening decision should be made without regard to characteristics of the accused that have been recognized as the basis for invidious discrimination), Standard 5-1.4, Uniform Plea Opportunities (plea agreement opportunities should be made without regard to the defendant's race, religion, sex, sexual orientation, national origin, or political association or belief), In addition to providing guidance to individual prosecutors, such guidelines may be useful in explaining to defense attorneys and the public how the office makes discretionary decisions, such as how to determine whether to seek the full punishment of the law or reduce or dismiss charges.

On a less formal level, prosecutors can create "meaningful liaisons with local community representatives to enhance their understanding of the community's concerns and ways in which the prosecution office can address them, and to enhance the public understanding of how their offices operate." ASHLEY NELLIS ET AL., THE SENTENCING PROJECT, REDUCING RACIAL DISPARITY IN THE CRIMINAL JUSTICE SYSTEM: A MANUAL FOR PRACTITIONERS AND POLICYMAKERS 37 (2008). Regular meetings with public defenders, law enforcement, judges, victims, and community representatives can provide a forum to explore racially sensitive issues. Criminal defense attorneys can play a role in such discussions, as their work has familiarized them with the impact of prosecutorial decisions in individual cases and on communities generally.