Race, Class and Criminal Prosecutions: The Supreme Court’s Role in Targeting Minorities

David Cole
Georgetown University Law Center, cole@law.georgetown.edu

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DAVID COLE

RACE, CLASS AND CRIMINAL PROSECUTIONS: THE SUPREME COURT’S ROLE IN TARGETING MINORITIES

In No Equal Justice¹, I examine the ways in which race and class disparities have an effect at each stage of the criminal justice system. Much of the disparity concerns discriminatory police practices. My argument is that the Supreme Court, and our society, have constructed a set of rules that virtually ensure there will be racially disparate prosecution of the criminal law by the police. The way the Court has done that, I suggest, is by creating pockets of discretion that police can use without having to identify any objective, individualized basis for suspicion.

When the police are free to act without having to point to an objective, individualized basis for suspicion, they tend to revert to stereotypes. One that they rely upon is the stereotype that “a minority is more likely to be engaged in crime” and therefore police most frequently stop members of minority groups.

Consent Searches

One example of this phenomenon is the “consent search” doctrine, which states that the police need have no objective justification for approaching an individual and asking to search the car, the backpack, the luggage, etc. The Supreme Court has held that the police are not required to tell the person that he, or she, has the right to say “no,” and that saying “no” should have no further consequences for that person’s dealing with the police.² In rejecting the argument that the police must always tell people they have the right to say “no,” the Court stated that we want to encourage consent in our society. If we tell people that they have the right to say “no” when the police ask them for permission to search, we will be discouraging consent.

However, if we’re encouraging consent, we are only doing it by exploiting ignorance and fear at the moment of the request. In writing my book, I looked at a set of cases over a several year period in which the consent search doctrine had been used. I found that 90 percent of those approached and asked for consent were minorities. There is also a great deal of evidence that virtually everybody who is approached and asked for consent says “yes.”

The Fourth Amendment comes at a cost. It makes it harder for the police to investigate, because they must have an objective individualized basis for suspicion before they can search. This is a way the legal system has found to

¹ David Cole, the author of No Equal Justice, is a professor of law at Georgetown University Law Center, and cooperating attorney at the Center for Constitutional Rights. He is also the author, with Jack X. Dempsey, of Terrorism and the Constitution, published by the First Amendment Foundation.
save on the cost of the Fourth Amendment: by giving the police the authority
to search without any objective basis. It accomplishes this cost saving in a
way that exploits ignorance of the law, and targets African Americans and
other minorities disproportionately.

“Profiling” Minorities

Another example is the “drug courier” profile. The fact that someone meets
a “drug courier” profile does not justify stopping them, but apparently lower
courts have not read the Supreme Court decisions, because virtually every
time an agent says “I’ve stopped this person because he fit the drug courier
profile” the lower courts uphold the stop. The profile is a very confidential
document that is rarely revealed in court, on the theory that smart drug couri­
ers would avoid the characteristics of the profile. They would subscribe to the
Federal Register, read the “drug courier” profile, and then change accord­
ingly. It is not published, but it is possible to reverse engineer the profile by
reading the cases in which the DEA agents say someone matched a profile
and compare what they said. I did just that, and I published the resulting
profile. I want to give you a sense of what the profile is, because I think it is
very important to understand it to properly litigate cases involving the use of
the drug courier profile.

This is the United States Drug Enforcement Agency’s “profile” of those it
dems suspicious at airports:

• arrives late at night/arrives in the afternoon/arrives early in the morning;
• one of last to deplane/one of the first to deplane/deplaned in the middle;
• bought coach ticket/bought first-class ticket/used one-way ticket/used round-
trip ticket;
• made local telephone call after deplaning/made long distance call after
deplaning/ pretended to make telephone call after deplaning;
• carried no luggage/carried brand new luggage/carried small bag/carried
medium sized bag/carried two bulky garment bags/carried two heavy suit-
cases;
• overly protective of luggage/disassociated self from luggage;
• traveled alone/traveled with a companion;
• acted too nervous/acted too calm;
• made eye contact with officer/avoided making eye contact with officer;
• wore expensive clothing/dressed casually;
• walked slowly through airport/went to restroom after deplaning/walked
quickly through airport/walked aimlessly through airport.

What you quickly see, when you reconstruct the “profile,” is that it doesn’t
tell DEA agents how to focus their suspicions. What it does provide is a
checklist they can use to justify stopping anyone who gets off the airplane,
because every person who gets off the airplane will fit five or six or seven of
these characteristics.

I also did a search of all the cases involving the use of the profile to stop people. I found that 95 percent of those who were stopped under the “drug courier” profile were minorities. One way to try to bring these issues to the surface in litigation, is to call this kind of information to the judges’ attention so that they are not so readily deferential to the profile. If the judges see what the profile really is, they might be more suspicious of the claim that it was the profile, and not a concern about race, that led to the stop.

Changing the “Culture” of Law Enforcement

A chapter in the book discusses how difficult it is to litigate challenges to racial discrimination in the criminal justice system. The Court has set up a set of barriers which have made it extremely difficult to litigate. But, that is not the end of the picture. What we must do is change the criminal justice “culture” by making the racial and class disparities, that operate as an undercurrent to the criminal justice system, much more explicit. We must make people confront them and urge them to recognize the role that race and class inequality play in the criminal justice system. That can be done by public advocacy. It can be accomplished through the reporting of data.

Some of the incredible progress made in the last two years on the issue of racial profiling is not due in any real respect to court decisions. It is due to the publication of data about the problem so that it can no longer be rejected and dismissed as a number of anecdotes by a number of African Americans and Latino motorists. “Racial profiling” is a demonstrated statistical problem that we need to address. The kind of work that uses our experiences in the criminal justice system to try to speak to the broader public about these issues, is what is critically needed.

NOTES

4 Id. See discussion at 47-52, Cole, supra note 1.
5 Id. at 48-49.
6 Id. at 101, et. seq.