

After Garner, Ferguson: Finding fairness in justice system

By Patricia Sears Doherty

Even as they acknowledged a national climate of distrust and suspicion about the motives of police officers, a panel of powerful members of New York's legal and law enforcement communities told a packed roomful of lawyers, judges and activists during Annual Meeting that there is hope for improved cooperation between prosecutors, defenders and police, and more understanding of citizens' right to protest.

The three-hour discussion, "Justice, Race and Police Force: Going Beyond Ferguson and Garner," was sponsored by the Committee on Civil Rights and the Committee on Diversity and Inclusion.

Panelists—who represented both sides of the racial, First Amendment, and law enforcement issues that are dividing contemporary American society—vowed continued cooperation in finding solutions.

The discussion covered implicit bias and policing, law enforcement training, the role of prosecutors in grand jury proceedings, civil rights laws and police misconduct, the role of the judiciary and the lawyer as racial justice activist.

Albany attorney Mark S. Mishler, who proudly touts his racial justice activism, described a recent judgment in Albany against a 16-year-old African American, who was sent to prison for nine years for stealing sneakers.

"I am filled with despair, anger and hope," said Mishler. Despair and anger over the case and its outcome, and because this case is "hardly unique," but "hope because this is a time of change, creativity, courage and caring nationally, with a growing realization of public officials that the criminal justice system has to change," he said.

Dr. Darrin Porcher, a retired New York City police lieutenant with experience in the Internal Affairs Bureau, said police officers must be trained in recognizing their own implicit racial biases.

"When I was in internal affairs, I saw where officers' implicit bias affected their interactions" with suspects.

Manhattan District Attorney Cyrus Vance, Jr. said he supports Governor Cuomo's proposal to raise the minimum age of criminal responsibility to 18.

"It is safe to say that anyone who enters our courtroom is struck by the fact that 90 percent of our clients are men of color," said Vance. As co-chair of Gov. Andrew Cuomo's Commission on Youth, Public Safety and Justice, Vance said he knows that "this is a moment in time where legislators... give me hope" that the age of criminal responsibility will be raised.

Hon. Shira Scheindlin of New York



Responsibility—Manhattan District Attorney Cyrus Vance, Jr. discusses raising the age of criminal responsibility while attorney Mark S. Mishler, a self-proclaimed racial justice activist, listens.



Scheindlin

City (U.S. District Court, Southern District) detailed 12 racially charged cases since the 1990s that "set the stage to this becoming an escalating problem" in New York City.

Mishler pointed out that "in most of those 12 examples, there was little or no consequence to the police, although there were civil settlements in many of those cases."

"Young black men in recent years are at far greater risk of being shot by police than their white counterparts," said Mishler. He noted that the U.S. incarcerates a higher percentage of its population than any other nation.

"Racism has been a central feature of our legal system since the very beginning," he said. "What can we do to force the necessary changes?"

Zachary W. Carter, New York City's corporation counsel, said that in "situations in which law enforcement policy is implicated in law implementation, we are the canary in the coal mine."

When the issues concern operational policies, such as in *Floyd v. City of New York*, that are compounded by overlying federal civil rights laws, adversaries often use highly charged language that they don't really mean.

"That is, I am not accusing you of being racist, I am accusing you of being human," said Carter.



Justice, Race and Police Force—Frederick K. Brewington makes a point during a three-hour discussion on issues ranging from bias and policing, law enforcement training, the role of prosecutors in grand jury proceedings, civil rights laws and police misconduct, the role of the judiciary and the lawyer as racial justice activist. Michael W. Warren of Brooklyn, left, and consultant Darrin Porcher listen. (Photos by Jacques Corneil/Happening Photos)

Scheindlin said that was the difficulty with *Floyd*. "How do you prove racial bias? It is not easy. There were no precedents concerning racial bias. Nobody had ever gone to trial and tried to prove in concrete terms bias," she said.

Vance discussed the increasingly difficult positions faced by prosecutors in cases involving alleged law enforcement prejudice and aggression, especially where someone is killed by police.

"The question is can prosecutors be trusted to prosecute police when there are accusations of criminal violations of the law? I acknowledge that this is occurring at a time when there is fear, distrust, and anxiety across the country," Vance said. "I can say that prosecutors take their jobs seriously." But, because of the volume of defendants making the allegations, "I cannot answer that question with a blanket response."

Opening grand juries

Scheindlin asked Vance how he keeps grand jury proceedings from becoming a trial and determining guilt or innocence.

"A grand jury is not determining guilt or innocence and jurors are told they are not to decide guilt or innocence. Their job is to decide whether there is enough evidence to go to trial," Vance said. "And we have to presume that instructed grand juries understand their instructions."

He praised the governor's proposal to appoint a special monitor in cases of alleged law enforcement bias or misconduct to decide whether a special prosecutor is needed. "That's a wise move," said Vance, "because we as prosecutors need to understand that

greater transparency is not something that we need to be afraid of."

Michael W. Warren of Brooklyn (Michael W. Warren, P.C.) expressed concern that when police officers appear before a grand jury to answer accusations of violence, they appear "with a halo swirling around their heads."

The answer lies in proposals such as Cuomo's that is meant to ensure transparency, said Vance. "The way we can deal with it is not to be afraid of it.... and the hope that you will look for a middle ground without hurting secrecy and privacy."

Lawyers speaking out

Warren recounted a personal experience in 2007 when he and his wife were beaten, handcuffed and arrested by police after observing and speaking up about the treatment of a young black man being arrested. They eventually were released.

"In most situations, the police have never been interviewed by anybody about their alleged wrongful actions," said Frederick K. Brewington of Hempstead (Law Offices of Frederick K. Brewington). "Most people who get beat up and arrested falsely don't have the resources to get legal" investigations, he said. "We have got to look into this to see how uneven it is for plaintiffs to go into court to get some reasoning."

Warren noted the need for lawyers to speak up. "What we can do as lawyers is be aggressive in bringing the issues in these enforcement cases and providing a nexus between us as lawyers and those that go into the streets to protest are related to by the police."

Sears Doherty is State Bar News editor.