

Lessons and Legacy of Amadou Diallo

by {ga=jvitullomartin}

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The sad saga of the Amadou Diallo case in the American criminal justice system has come to an end with the Jan. 31 announcement by the Justice Department that it would not prosecute the four New York City police officers who had shot and killed the young West African immigrant in February 1999.

Familiar as they are, the facts of the case and its journey are worth recalling. On the evening of Feb. 4, 1999, four white plainclothes officers from the Police Department's Street Crime Unit were investigating a rape in the Bronx. Seeing the 22-year-old Diallo standing in front of what turned out to be his Bronx home, the cops mistook a wallet he was holding for a gun, and fired 41 shots. Diallo was hit by 19 bullets, and killed.

The next day the Reverend Al Sharpton called the shooting "a police slaughter." Nearly simultaneously, U.S. Attorney Mary Jo White said her office would investigate the case, along with the Bronx district attorney, Robert Johnson. On Feb. 16, 1999, D.A. Johnson convened a grand jury to begin hearing evidence.

Demonstrations erupted throughout the city, the largest probably being the March 3 rally on Wall Street demanding the indictment of the officers. Six days later, twelve protestors outside police headquarters were charged with disorderly conduct. Rallies seemed to happen almost daily. More than 1200 people were arrested, including actors Susan Sarandon, Ossie Davis, and Ruby Dee, and politicians including Congressman Charles Rangel and former Mayor David Dinkins.

Looking bellicose but using conciliatory words, Police Commissioner Howard Safir announced on March 26 that he would modify the Street Crime Unit, requiring officers to wear uniforms.

On March 30, several hundred police officers demonstrated in support of the four cops--who were indicted the next day for second-degree murder. The four officers entered pleas of innocence.

Citing pretrial publicity and suggesting that a fair trial could not be held in the Bronx, a state appeals court ruled on Dec. 16 that the trial should be moved to Albany.

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On Feb. 1, 2000, the jury was seated. Four jurors were black, as was the forewoman, who once lived in the Bronx. All four officers were acquitted of all charges on Feb. 25. Almost immediately U.S. Attorney Mary Jo White in Manhattan and the Justice Department in Washington announced that federal prosecutors would review evidence for civil rights violations.

One day short of a year later, the Justice Department announced that its civil rights investigation had concluded that no federal charges were warranted.

The Diallo family still has a \$81 million civil suit, its last legal recourse, against the city and the four officers.

Several hundred mourners gathered on Feb. 5 outside Diallo's Bronx building to mark the second anniversary of his death. Otherwise things have been very quiet.

What are we to learn from this terrible saga? Should the trial have been conducted in the Bronx, where the killing occurred? Should federal prosecutors have taken the case? Should the family persist in a civil suit? In sum, what recourse is there to a family whose beloved and unquestionably unarmed son was gunned down by New York City officers standing on his own street, in front of his own home--where he had every right to be? Do the procedures and prerogatives of our justice system yield justice, and if not, what should be done?

Trial by jury: What it entails

At the time of the indictment, many--perhaps most--legal observers thought the officers would follow the usual practice of police officers accused of capital crimes and request a trial by judge rather than by jury. (Technically the defendants "waive" their right to a jury trial and "consent" to a bench trial.) This is a defendant's right under New York law--although it is an unusual and controversial one which should, in my opinion, be reexamined by New Yorkers and their legislators. Prior to the officers in the Diallo case, only one police officer charged in the Bronx with a civilian death had chosen a jury trial since 1977.

Instead, the defense attorneys for the officers took a different route. They argued that pretrial publicity and protests had made it impossible to find impartial jurors in New York City. The

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appeals court agreed, and moved the trial 140 miles north to Albany. The result was an outcry on the part of New Yorkers throughout the five boroughs.

From both a constitutional and a political point of view, moving the jury trial from the Bronx was unfortunate. The founders of this nation saw the jury as both a needed protection for individual rights and a means of ensuring communal support for judicial procedures. The judicial system cannot function fairly or efficiently without communal support. Just as elections are the central means by which the people participate in the legislative and executive branches, so juries are the central means by which the people participate in the judiciary.

Even more important, the jury trial is the nation's chief means of ensuring that the morals and standards of the community will be heeded in criminal proceedings--and not just any community. The U.S. Constitution is specific. The Sixth Amendment guarantees that in "all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the state and district wherein the crime shall have been committed." In this language, as well as in American tradition, the district in which the crime was committed has been as important as the state. A jury trial is the right of every American--and the right of every American community, including the Bronx.

Should the federal government have agreed to prosecute?

Federal prosecutors spoke up so quickly after the not-guilty verdict that many New Yorkers concluded that a federal prosecution would follow. In fact, this was never a strong possibility.

A dual federal prosecution--familiar to much of the country because of several notorious trials, including the police beating of Rodney King in Los Angeles--is based on the constitutional reality of dual sovereignty, which says the federal government and state governments are independent sovereigns.

This constitutional reality is backed up by a piece of Reconstruction-era legislation that authorizes federal prosecution of criminal cases in which a state refused to prosecute public officials, including cops. The Ku Klux Klan Act of 1871 was passed after the Memphis riot of 1866, when policemen went untried and unpunished for beating and killing black people. Federal law was extended to cover private citizens as well as public officials after the murder of three civil rights workers in Mississippi in 1964.

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Until recently, the feds have been very cautious about undertaking dual prosecutions. Following what is known as the Petite Policy, named for the 1960 Supreme Court decision that laid out the groundwork, they will prosecute only after state proceedings have failed to "vindicate vital federal interests."

To intervene, the Justice Department must show a substantial federal interest. Prosecutions against the mob or corrupt state officials are good examples, as are the 1964 "Mississippi Burning" cases.

In addition, the state prosecution must have left the federal interest "demonstrably unvindicated." In other words, if a conviction failed because of incompetent state prosecution or the jury's disregard of evidence, the feds can enter.

None of that applies in Diallo. No serious observer doubts the integrity of the jury, the efficient, fair character of the trial itself or the essential competence of the Bronx district attorney.

Finally, the feds must believe that the defendants' conduct constituted a federal offense and that the evidence will be sufficient to obtain a conviction. But the problem for them in Diallo is the same that faced the state and D.A. Johnson: proving intent on the part of the four police officers. This probably could not be done, and the federal prosecutors withdrew.

Does this mean the end of the line for justice for the Diallo family?

No. This means the end of the line within the criminal justice system, but we have another system altogether--the civil justice system. Simply because a defendant has been found not guilty in criminal court does not free the defendant from potential civil damages.

Nor are civil suits thwarted by the double jeopardy clause of the Fifth Amendment, which protects citizens only against a second trial by the government, not by fellow citizens.

Because civil suits have a far lower evidentiary standard-- preponderance of evidence rather than beyond reasonable doubt-- they are often won after a criminal case has been lost. The most famous recent example: O.J. Simpson.

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The four officers were found not guilty of murdering Diallo by a criminal jury. Whether they caused his wrongful death remains to be determined by a civil jury.

The Street Crime Unit

Whatever happens with the civil case, Amadou Diallo does leave an important legacy for New York--and that is greater public and federal scrutiny of the police and revised procedures instituted by newly appointed Commissioner Bernard Kerik.

A few weeks after Amadou Diallo's death, a federal investigation began of the Street Crime Unit's aggressive tactics. The unit's supporters said that it had swept thousands of guns off the street and reduced violent crime in Northern Manhattan and the Bronx. But U.S. Attorney Mary Jo White's office demurred. Under civil rights legislation that had been passed in 1994 after the videotaped beating of Rodney King by Los Angeles police officers, White's staff investigated whether New York officers had systematically deprived blacks and Hispanics of their rights by stopping them based on their race.

The city voluntarily turned over its databases holding stop-and-frisk data, plus arrest and complaint information, from 1994 through the first three months of 1999. But it withheld more recent data, preventing investigators from assessing the many changes in procedures introduced by the police department since the Diallo shooting.

The Police Department, for example, began using new stop-and-frisk forms last fall that required more detailed explanations for stopping or searching anyone on the street. While the forms are generally being applauded, the department refused to release the data from the new forms.

Under federal law, federal prosecutors must negotiate with the police department before bringing suit to force changes. The city's tactic may be to withhold data until it has a cue from the new Republican administration in Washington of how a newly constituted Justice Department will regard such suits.

Civilian Complaint Review Board

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In a move reminiscent of Nixon's going to China, Mayor Giuliani announced on his radio show late in January that police officers accused of misconduct would no longer be prosecuted by the Police Department. Instead, accused officers would be charged and prosecuted by the Civilian Complaint Review Board, the independent agency that now evaluates civilian complaints of abuse. (By "abuse" the board means such things as excessive force, discourtesy, offensive language or abuse of authority. The board does not usually handle criminal matters.)

Noting that the mayor had been one of the harshest critics of civilian oversight of the police, the New York Times called this a "major turnaround." (In his 1992 mayoral campaign, Giuliani had opposed the board's creation.)

Almost no one had been happy with the previous system by which the review board investigated cases, but then referred them to the police department for prosecution. Critics of the police argued that far too many legitimate cases simply languished after referral. Under the new system, the board will investigate and prosecute, but the police commissioner will retain discretion on punishment, which can range from a loss of vacation days to firing.

The commissioner has promised to release an official plan in early spring.

Commissioner Kerik has also announced--and then followed through on--a new policy of encouraging his commanders to attend important community board meetings. Commanders (many newly appointed) all over the city have startled community activists by appearing in their midst, signaling "a police-community warmth that we haven't seen since the early days of the Lindsay administration," says a member of the West Side's Community Board 7.

And while the Police Department is stalling federal prosecutors on the data they want, it is also presenting a data-friendly face to the general public. The department has started posting crime figures for each of the city's 76 police precincts on both the [department's](#) and the [city's](#) official websites.

The statistics are now posted for most precincts. In late March, the commissioner hopes to post precinct maps showing where crimes are being committed.

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Perhaps the Lindsay Administration analogy has some merit. Mayor Lindsay tried decentralizing the police and (unsuccessfully) making police precincts coterminous with natural neighborhood boundaries. Commissioner Kerik is going one better: having commanders introduce themselves to their neighborhoods and giving neighborhoods the data to evaluate just how well those commanders are doing.

Finally, in releasing his semiannual management report, Mayor Giuliani noted that the number of police officers firing their guns had declined to 174 in 2000, down from 194 in 1999, the year Amadou Diallo was killed. In fact, the number of police shootings had been declining--and declining substantially--for most of the Giuliani administration. This is to be applauded, as is the city's 2.8 percent decrease in what are called index crimes--murder, rape, robbery, and car theft.

In his remarks, however, the mayor said nothing of Amadou Diallo--who nonetheless remains in the thoughts of many New Yorkers during this February, the second anniversary of his death.

Julia Vitullo-Martin, a long-time editor and writer on urban affairs, is the former director of the Citizens Jury Project at the Vera Institute of Justice. She is now writing a book entitled *The Conscience of the American Jury*.