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Discretionary Justice and the Black Offender

Taunya Lovell Banks
University of Maryland School of Law, tbanks@law.umaryland.edu

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Introduction

Although formal substantive and procedural laws exist today which govern almost every aspect of the American criminal justice system, whether a person enters the system and the treatment the offender receives in the system is determined to a large degree by the exercise of informal discretionary powers by public officials at all levels. These discretionary decisions often result in the development of behaviors, attitudes and policies which are not subject to formal review through the traditional channels in the legal system.

The existence of discretionary decision-making laws has, in the main, operated to the distinct disadvantage of the minority offender. The attitudes, value system, and characteristics of the persons empowered with exercising discretion and the absence of structures or guidelines for reviewing decisions has contributed to this discretionary justice. Discretionary decisions exercised by the local patrolman in a real sense determine what laws are enforced, and against whom. Discretionary decisions made by the prosecutor determine who will be charged with an offense and what the charge will be. The judge, exercising discretionary powers with respect to sentencing, determines how long a person will remain in the system.

The use of discretion is available to criminal justice officials whenever the limits on power involve a choice among possible courses of action or inaction. With extensive latitude existing throughout the system, there is little doubt that a very great proportion of all discretionary action in the criminal justice system is either illegal or of doubtful legality. Unfortunately, discretionary decision-making is justified today because of the absence of rules to govern much discretionary justice. Davis (1969) cites two critical reasons for the absence of rules: (1) the inability of legislative bodies to fashion rules to govern all situations that must arise; and (2) the mistaken belief that the individualized justice which discretion allows produces a more equitable result.

Regardless of the justification for its existence, it is all too clear that discretionary powers in the administration of justice have been oppressive to blacks. Police procedures in the black community have been known to differ from those in the white community. Blacks, for example, are more likely to be suspected of criminal activity and be arrested. If the alleged offender is known to be black, police are more likely to make mass arrests of all blacks near the scene of the crime, something that rarely happens in the white community with

white offenders. Although release prior to indictment or trial is essential to adequately prepare one's defense, once a black is arrested, he is not likely to secure bail. If the offender remains in jail, he is more likely to be indicted and convicted. Once convicted, the black or minority offender is less likely to be placed on probation or considered for parole. All of these activities involve some degree of informal discretionary action by officials in the criminal justice system.

The root of the problem is deep. Janowitz (1971) describes the scope of the problem by suggesting that the racial relationship in our country is very much responsible for blacks being denied equal protection and due process in criminal justice agencies. As a result, blacks generally have a more negative attitude than whites toward police effectiveness, courtesy, conduct, and honesty (President's Commission, 1967).

Statistical data tend to support contentions of discrepancies in the administration of justice. Although many people inaccurately believe that all state and federal prisons in the United States have majority inmate populations of blacks and other minorities, there is no question that the prison population is composed of a disproportionately high percentage of minorities. According to the FBI 1973 Uniform Crime Reports, 26.2 percent of all arrests were of blacks and 51.3 percent of arrests for violent crimes were of blacks (U.S. Department of Justice, 1974).

Criminologists in general reject theories that any racial or ethnic group is more prone to criminal activity than other groups. Some authorities believe that crime is directly linked to economic deprivation, cultural nonassimilation, pure prejudice, differential treatment, and social maladjustment (Barnes and Teeters, 1959; Bontempts, 1974). This belief can be substantiated, in part, by Janowitz's findings (1971) that race riots and other racially motivated disturbances are less likely to occur in cities where (1) there is a more racially integrated police force; (2) there is a more representative form of local government; and (3) there is a large percentage of blacks who are self-employed in retail trade. All of these factors indicate a degree of economic independence as well as cultural and social adjustments which reduce frustration in the minority community. However, since these conditions are not so prevalent in many minority communities, the criminal justice systems must look to other devices to insure equality of treatment in all situations.

It is, perhaps, naive to think that the mere presence of more blacks and minorities on the police force, in the prosecutor's office, on the bench, and in administrative positions in prisons will solve the problem of inequality in the administration of justice. The employment of blacks in the system will likely never be in sufficient numbers to drastically affect policy-making. In addition, the mere presence of minorities, even in significant numbers, is often no guarantee that discretionary powers will be exercised fairly. In fact, there has

been evidence that even some black law officers harbor negative feelings about black citizens (Reiss, 1971).

An examination of the mechanics through which discretion is exercised in four key areas in the criminal justice system will shed further light on the abuse of discretionary power.

Police

Since the beginning of the twentieth century there has been a tremendous increase in policy responsibility and activity. The increase has been caused by the rising number of criminal and regulatory offenses at every level of government. Unfortunately, there has been no equivalent increase in the size of police manpower. The discrepancy between more responsibility and limited manpower has influenced the selective enforcement of laws rather than total enforcement; it is here that the discretionary powers of the police have been increased and grossly abused. Police, and especially the individual patrolman, must exercise some discretion in determining which laws are enforced. Hence, discretion is influenced by political forces and expressed community priorities. Consequently, inconsistent policy decisions of arrest or nonarrest are often made, with differing results, from one patrolman to another in the same precinct.

Many authorities support the need for police discretion by saying that discretion is inescapable due to poor draftsmanship of criminal laws, the failure by legislative bodies to revise criminal codes to eliminate obsolete provisions, and the undesirability of highly specific criminal laws. All of these reasons are unsound. Poor draftmanship could be eliminated through aggressive court decisions voiding vague laws, which could be replaced by legislative bodies with model criminal codes. Legislative bodies could be required to revise criminal codes every five to ten years. Finally, requiring highly specific criminal laws could logically result in the enactment of laws which could be enforced and which adequately reflected community sentiment. There is no conclusive documentation that specific criminal laws are impossible or result in injustice. As law exists today, with no guidelines or principles to guide police discretion, there is neither total nor equal enforcement of the law.

Perhaps if we lived in a homogenous community the exercise of police discretion would pose no real problem. However, since ours is a heterogeneous country, police objectives in law enforcement too often fail to reflect the differences in the cultures of each community. Some limited recognition of the problem has led to increased attempts to recruit blacks and other minorities into the police force (Egerton, 1974). The problem still remains that the interests, needs, and values being enforced in most communities by most policemen are those of the dominant white culture. Law enforcement efforts seem to

concentrate on protecting the white communities rather than the minority communities in which residents are more likely to be victims of crime.

There is no question that there is a need to increase police sensitivity on all levels to the interests, needs, and values of the minority community. Most recommendations for creating sensitivity have been based upon the assumption that it is impossible to eliminate or substantially minimize police discretion. Grossman (1974) suggests creative police training that takes into consideration the importance of discretionary alternatives and their applicability to a variety of situations, cultures, and subgroups.

In a report to the National Commission on the Causes and Prevention of Violence, suggestions were made for improving police sensitivity to the community (Campbell et al., 1970). While there were some excellent suggestions made for improved policy-community relations, their recommendation showed that they did not realize the danger of allowing widespread discretionary justice to be exercised at lower levels of law enforcement. For example, one recommendation for handling certain disorders suggested that the patrolman be given a wider range of *options* (discretion) such as detoxification center for drunks, family service units for handling domestic quarrels, and community service information centers to handle complaints. This recommendation only increases the opportunity for abuses of discretionary powers. The patrolman would still decide who to detain for drunkenness and who not to detain. In addition, he would also be allowed to decide who goes to jail for the offense and who is sent to a detoxification center. The existence of family service units would still not eliminate the initial discretionary decision concerning which family quarrels the police will respond to. Lastly, the community service information centers would be of doubtful aid unless they were structured to minimize discretion. As long as the employees could determine what complaints to consider or not consider the center would never engender the confidence and trust of the minority community. Procedures such as written reports stating disposition of all complaints, including reasons for not investigating some complaints, should be required. These reports should be reviewed regularly by superiors and made available to the persons who made the complaint.

It is highly probable that discretionary decisions in law enforcement can never be entirely eliminated, but they certainly can be minimized. The discretionary power that exists should only be exercised by top level police personnel. The individual patrolman should be governed strictly by administrative rules. However, corresponding action by legislative bodies directed to revising and specifying crimes and appropriating funds for increases in the size of police forces will be needed to effect change at this most crucial level of the criminal justice system.

The Prosecutor

Most citizens believe that criminal law operates almost mechanically in that the formal judicial system is constant and impervious to influences and pressures. Few realize the tremendous discretion exercised by a prosecutor in deciding to prosecute, nol prosse, or drop criminal charges against an alleged offender. Most often the prosecutor is not required by law to prosecute individuals against whom there is sufficient evidence of criminal conduct. His decision is based on his own judgment. Few jurisdictions require that any written reason be given for failure to prosecute. Even those few states which restrict the decision to prosecute generally do not limit the prosecutor's power to reduce the charge, something that frequently happens when there is plea bargaining.

A prosecutor's attitude toward an offender may be colored by many factors such as economic background, nature of the offense, public sentiment toward the case, caseload of the prosecutor's office, and the race of the offender and victim. The typical prosecutor is generally from a middle-class background and may be easily influenced by simple factors such as the dress, speech, and manners of an offender. The President's Commission on Law Enforcement and Administration of Justice (1967) notes that the prosecutor's response to his background and attitudes can result in distortions. A certain manner of dress or speech, common in another culture, may be perceived as an indication of moral unworthiness. The prosecutor may also believe that a neatly dressed, humble person is merely a victim of circumstances. In light of these considerations, it is not at all surprising to find oversentencing and undersentencing to be an everyday occurrence in our criminal justice system.

Must the discretionary power of the prosecutor be uncontrolled? Kenneth C. Davis (1969) feels that the German system of criminal justice, were the prosecutors possess no discretion with respect to prosecutions, can be a guide. In Germany the prosecutor is part of a hierarchial system headed by the minister of justice. He is directly responsible for his actions to his superiors. In addition, the German prosecutor is required to prosecute all cases where there is sufficient evidence. Those cases where the evidence is doubtful must be submitted to a judge who determines the sufficiency of the evidence and the proper interpretation of the law. The German prosecutor is not allowed to close the file on a case unless there is a written statement of the reasons. In important cases the statement must be approved by the prosecutor's superior and reported to both the victim and any suspect who has been investigated.

There can be little doubt that some of the problems that exist in the operation of the prosecutor's office are due to the fact that most prosecutors are elected, often inexperienced, and generally politically partisan. Perhaps nonpartisan elections or selection of prosecutors on the basis of merit would reduce

abuses of discretion, but the human element would still be a factor which could result in further discriminatory practices. Removal of discretion is still the best solution for assuring equal treatment.

The American Jury System

Kalvin and Zeisel (1966), in a major study conducted during the 1950s on the American jury system, found that racial prejudice influenced jury decisions. Smith and Pollack (1972) inferred that poor and black people are vastly underrepresented in all juries throughout the United States. Nevertheless, the courts have been very reluctant to interfere with jury selection practices in this country. In the landmark case *Swain* v. *Alabama* (1965), the United States Supreme Court held that blacks could be tried by juries on which there were no members of their race. As long as the method used for selecting juries was not a conscious or deliberate attempt to exclude blacks or minorities from juries, no constitutional rights have been violated. However, the court has refused to seriously consider other practices which allow racial imbalances in the composition of juries.

One of the common legal procedures that can be used prejudicially is the preemptory challenges to remove prospective black jurors from the panel. No reason for the exclusion need be given. Some might argue that the numerical limit on these challenges is a sufficient check on potential abuse. However, this argument is valid only in those jurisdictions with a substantial number of black citizens who are subject to call for jury duty.

A large number of jurisdictions have used voter registration rolls as a means of selecting prospective jurors. Unfortunately, blacks, other minorities, and the poor are not registered in as great numbers as whites and middle and upper income groups. The result is that poor and minority offenders are tried by juries which do not adequately reflect their cultural and economic background. These juries may have little understanding of the offender's life-style or environmental influences and may be hostile toward the offender because of his background.

Since little can be done about jury discretion short of abolishing jury trials, a possible solution to abuses of discretionary powers by juries lies in restructuring the jury system. Derrick Bell (1973) has suggested several methods which might produce significant numbers of blacks and minorities on juries trying cases directly affecting the interest of minority litigants or the minority community. He suggested redrawing jury districts in the northern urban areas so that each minority community would constitute a jury district and require that every jury be proportionately representative of the black population in the heavily black areas of the rural South. In addition, it should be required that the jury be selected in civil cases from the community where the action arose, and in criminal cases where the crime occurred.

It will continue to be difficult for minority offenders to believe that they are receiving equal justice before juries as long as they are judged solely by juries comprised of persons from different cultural and economic backgrounds. There may be some merit to that belief. It would be hard for an all white southern jury to comprehend the contention of a young black political radical that he shot a policeman in self-defense because he believed that his life was endangered because he was black. Although they may end up with the same verdict, there is a chance that a jury composed of some ethnic jurors could evaluate the evidence without being prejudiced by the color of the defendant or his political or cultural beliefs. This would truly be justice.

Judicial Sentencing

Judges in the American legal system have almost unchecked powers to fashion sentences. For example, some offenses are punishable by a fine, imprisonment, or both; the judge has three options. If the judge chooses imprisonment, he has the additional option of placing the offender on probation, giving him a "split-sentence" (part imprisonment, part probation), or sentencing the offender to the full term. Even in the last situation the judge has tremendous discretion in determining the length of the sentence. Criminal statutes only compound the problem. The federal kidnapping law, for example, authorizes sentences for any number of years or for life. This is not at all uncommon, even on the federal level. Not only are extremely high maximum sentences a problem, but an even more common flaw is mandatory minimum sentences. This means that the convicted offender often has no way of predicting with reliability whether he will be released on probation, be given a short term, or be sentenced for a long period of time. This problem is further compounded by the fact that the United States Supreme Court has held that it will not review a sentence based only on the assertion that it was too harsh (*Townsend* v. *Burke*, 1948).

Once again, the human factor is a great influence on the length of sentences and can include such things as geographic background and political or religious beliefs. Traditionally, judges imposing sentences have considered the gravity of the offense, the existence of a prior criminal record, and the offender's age and background. Nevertheless, there are no set guidelines to determine the relevant criteria to be used and their relative importance. The criteria and importance assigned them depend in large part upon the individual beliefs and bias of each judge.

A 1958 federal statute authorizes the establishment of sentencing institutes and joint councils on sentencing which are designed to formulate criteria, policies, and standards for sentencing. The statute is an excellent piece of legislation, but few jurisdictions have chosen to make widespread use of it. Other attempts to provide solutions to the problem of sentencing disparities include the Model Sentencing Act and Model Penal Code of the American Law Institute (U.S.

Department of Justice, 1975). Both of these codes recommend limiting judicial discretion. They recommend increased use of probation and fewer severe sentences. Presentencing investigations are mandatory in certain cases and the offender has some opportunity to challenge investigative reports. Severe sentences are to be supported by findings of specified facts which are to be incorporated in the record. Both codes establish major new categories such as "dangerous offenders," "atrocious crime" (Model Act), "persistent offender," "professional criminal," "a dangerous mentally abnormal," and "a multiple offender" (Penal Code). Each of these terms are elaborately defined in order to guide judicial discretion.

Widespread discretionary powers for judges may allow "individualized" justice, but "individualized" justice does not necessarily mean equal justice. Until better standards are established, blacks and other minorities will continue to be underpenalized for certain types of offenses involving black crimes and overpenalized for other offenses including robbery and black on white rape (Overby, 1972; Bell, 1973). Where there is any discretion, no matter how limited, abuses will probably occur. Until the courts are willing to provide appellate review of sentencing, disparity will continue to occur and will most adversely affect the minority offender.

Conclusion

In order to insure impartiality of treatment regardless of race or economic status, standards and guidelines must be established concerning the exercise of discretionary power. The recommendations proposed for controlled discretion in the administration of justice require legislative action. Because legislators are reluctant to intervene, it is doubtful that any substantive change will eliminate all the abuses of discretion in the near future. The only other course of action lies in administrative action by the police departments, the prosecutors' offices, and the courts. The process may be slow and not as effective as legislative action. Administrative rules enacted by each of these units would attempt to establish specific structures and guidelines for the performance of their discretionary functions. Unfortunately, the police, prosecutors, and the courts are all overloaded, understaffed, and financially strained. As long as these factors persist, these units will continue to resist recommended reforms in their areas.

The future for the black offender looks very bleak because change must occur in all of these areas before impartiality can be achieved. Without change, there is little hope of drastically reducing the crime rate among blacks in this country. As long as discretion is used to the disadvantage of a group because of race, culture, or economic level, blacks will continue to be discriminated against in the criminal justice system. It is highly unlikely that the attitude of

the majority race in this country toward blacks will change sufficiently to cause them to be truly concerned with black crime and the black offender. It is much easier to remove from the larger society those persons who have outlived their usefulness than to seek the means to insure their meaningful participation in such a society. What is needed is a restructuring of society. Reform measures are merely bandages, only covering the problems but never really solving them.

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