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DISCRETIONARY DECISION-MAKING IN THE CRIMINAL JUSTICE SYSTEM AND THE BLACK OFFENDER: SOME ALTERNATIVES

Taunya L. Banks*

I. 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 how the system treats the offender 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 vital policy which is not subject to review through the traditional channels in our legal system and often is hidden from the general public.

It is contended that the existence of discretionary decision-making has operated to the distinct disadvantage of the Black offender due primarily to the characteristics of the persons empowered with this discretion and the absence of structural guidelines for making these non-reviewable decisions exercised by the local patrolman, who in a real sense determines what laws are enforced, where they are enforced, and against whom. Discretionary decisions made by the prosecutor determine how long a person will stay in the American criminal justice system as does the exercise by the judge of his discretionary powers with respect to sentencing.

In order to insure impartiality of treatment regardless of race or economic status, standards and guidelines must be established to govern the exercise of discretionary power and in some circumstances minimize discretionary decisions at all levels of the criminal justice system. The recommendations in this paper are addressed to four areas in the system: (1) police law enforcement; (2) the prosecutor; (3) jury selection; and (4) sentencing.

II. AN OVERVIEW

"A public official has discretion whenever the effective limits of his power leave him free to make a choice among possible courses of action or inaction."¹ There is little doubt that a very great proportion of all official discretionary action in the criminal justice system is either illegal or of doubtful legality.² Unfortunately, discretionary decision-making is necessary

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1. K. DAVIS, *DISCRETIONARY JUSTICE: A PRELIMINARY INQUIRY* 4 [hereinafter cited as DAVIS].

2. *Id.* at 12.

today because of the absence of rules to govern much discretionary justice. The most important reasons for the absence of rules are: (1) the inability to fashion rules to govern many situations; and (2) the mistaken belief that the individualized justice which discretion allows produces a better, more equitable result.³

It is perhaps naive to think that the mere presence of more Blacks 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 never be in significant enough numbers to drastically affect policy-making. In addition, the mere presence of Blacks, even in significant numbers is often no guarantee that discretionary powers will be exercised fairly. The many instances of police brutality toward Blacks by Black law officers are examples.

The root of the problem is much deeper.

The history of race relations in the United States has been grounded in a system of law enforcement that has denied to Negroes due process and equal protection, and that therefore has weakened the legitimacy of the agents of law enforcement, especially in the lowest Negro income areas.⁴

Blacks generally have a more negative attitude than whites toward police effectiveness, police courtesy and conduct, and police honesty. This applies to minority group attitudes generally.⁵

Statistical data tend to support contentions of racism in the administration of justice. According to the F.B.I. 1973 *Uniform Crime Reports*, 26.2% of all arrests were of Blacks and 51.3% of arrests for violent crimes were of Blacks.⁶ As a consequence, the inmate population in our federal and state prisons is composed of a disproportionately high percentage of Blacks and other minorities.

In addition, studies have consistently found that Blacks have been disproportionately sentenced to death;⁷ and one might logically conclude that Blacks generally receive more severe sentences for criminal conduct.⁸ Per-

3. *Id.* at 15.

4. M. Janowitz, *Patterns of Collective Racial Violence* in 2 CRIME AND JUSTICE, THE CRIMINAL IN THE ARMS OF THE LAW (L. Radzinowitz & M. Wolfgang eds. 1971) [hereinafter cited as Janowitz]. See also S. BLACKBURN, WHITE JUSTICE: BLACK EXPERIENCE TODAY IN AMERICA'S COURTROOM (1971); I.D. BALBUS, THE DIALECTICS OF LEGAL REPRESSION: BLACK REBELS BEFORE THE AMERICAN CRIMINAL COURTS (1973).

5. See Radzinowitz & Wolfgang, *Public Attitudes Toward the Police* in 2 CRIME AND JUSTICE, THE CRIMINAL IN THE ARMS OF THE LAW (Radzinowitz & Wolfgang eds. 1971). See also REPORT OF THE NATIONAL ADVISORY COMMISSION ON CIVIL DISORDERS 183 (1968) which noted:

The belief is pervasive among ghetto residents that lower courts in our urban communities dispense 'assembly line' justice; that from arrest to sentencing, the poor and uneducated are denied equal justice with the affluent, that procedures such as bail and fines have been perverted to perpetuate class inequities . . . Too often the courts have operated to aggravate rather than relieve the tensions that ignite and fire disorders.

6. 1973 UNIFORM CRIME REPORTS, CRIME IN THE UNITED STATES 133 (1974).

7. M. WOLFGANG & M. RIEDEL, RACE, JUDICIAL DISCRETION AND THE DEATH PENALTY IN THE ANNALS OF THE AMERICAN ACADEMY OF POLITICAL AND SOCIAL SCIENCE 119-133 (1973). See especially *id.* at 124 n.24.

8. This conclusion applies especially when the offender is Black and the victim is white. For a variety of reasons judges, prosecutors, and juries tend to hold Black offenders to a less

haps it is unnecessary to interject that criminologists reject contentions that any racial or ethnic group is more prone to criminal activity than another. Most authorities believe that crime is directly linked to economic deprivation,⁹ cultural non-assimilation, pure prejudice and differential treatment, and social maladjustment.¹⁰ This belief can be substantiated by findings 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 the retail trade.¹¹ All of these factors indicate a degree of economic independence, cultural and social adjustment which results in lower levels of frustration in the Black community. However, since these conditions are not prevalent in many areas of this country which have a substantial minority community, we must look to other devices to insure equality of treatment in the criminal justice system which can be applied to all situations.

An examination of the mechanics through which discretion is exercised in four key areas in the criminal justice system will further support the contention that our legal system is a victim of institutional racism.

III. POLICE LAW ENFORCEMENT

Since the beginning of the twentieth century there has been a tremendous increase in police activity. This increase has been caused by the increase in the number of criminal and regulatory offenses at every level of government. Unfortunately, there has been no co-equal increase in the size of police manpower. This factor has resulted in the selective enforcement of laws rather than total enforcement of laws and 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 what laws are enforced. This discretion is colored, of course, by political and expressed community priorities. Nevertheless, these policy-decisions which are made primarily by subordinates often cause uneven results in law enforcement with policies differing from one patrolman to another in the same precinct.

Many authorities support the need for police discretion by saying that it is inescapable because of 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. There is some question about the soundness of these reasons. Poor draftsmanship could be eliminated through aggressive court decisions voiding such laws. This could be combined with the adoption by legislative bodies of model criminal codes, or at least adhering to the standards set forth in such codes. Legislative bodies

strict standard of conduct when the victim is Black. For further discussion see A. Overby, *Discrimination Against Minority Groups* in 2 CRIME AND JUSTICE, THE CRIMINAL IN THE ARMS OF THE LAW (L. Radzinowitz & M. Wolfgang eds. 1971) [hereinafter cited as A. Overby]; and Bontemps, *Black Crime: A Special Report*, 21 RACE RELATIONS REP. 12-15 (1974) [hereinafter cited as Bontemps].

9. Bontemps, at 12.

10. H. BARNES & N. TEETERS, *NEW HORIZONS IN CRIMINOLOGY* 166 (3d ed. 1959).

11. Janowitz, *supra* note 4, at 363-4.

could also be required to revise criminal codes every five to ten years. Finally, requiring highly specific criminal laws could arguably 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. With no guidelines or principles to guide police discretion, there is neither total nor equal enforcement of the law.¹²

Perhaps if we lived in a homogeneous community, the exercise of police discretion would pose no real problem. However, since ours is a non-homogeneous country, police objectives in law enforcement too often fail to reflect the differences in the cultures of each community. Some limited recognition of this has led to increased attempts to recruit Blacks and other minorities into the police force.¹³ The problem still remains that the interests, needs, and values being enforced in all communities by most policemen are those of the dominant white culture. Law enforcement efforts seem to be governed by a desire to protect the order in the white community rather than the order in Black communities where there is a greater chance of the resident being a victim of crime. This point can be substantiated by an examination of sentencing practices and jury attitudes toward Blacks, both of which will be discussed later on in this article.

There is no question but that there is a need to increase, on all levels, police sensitivity to the interests, needs, and values of the Black community. Most recommendations for creating this sensitivity have been based upon the assumption that it is impossible to eliminate or substantially minimize police discretion. Authorities suggest "innovative police training that recognizes the critical potential of discretionary alternatives and their applicability to a variety of cultures as well as situations."¹⁴

In a report of the National Commission on the Causes and Prevention of Violence suggestions were made for improving sensitivity to the community.¹⁵ However, the report failed to recognize the danger of allowing wide-spread discretionary justice to be exercised at lower levels of law enforcement. For example, one recommendation suggested that the patrolman be given an even wider range of *options* (discretion) in determining courses of action such as detoxification centers for drunks and family service information centers to handle complaints. This recommendation only increases the opportunity for

12. For a full discussion of the problem and its implications, see W.R. LAFAVE, *ARREST: THE DECISION TO TAKE A SUSPECT INTO CUSTODY* (1965); G.M. SYKES & T. DRABEK, *LAW AND THE LAWLESS* (1969).

13. Since 1970, there has been more than a 150% increase in the number of Blacks on police forces and a 40% increase in other minorities. Nevertheless, according to a study by the International Association of Chiefs of Police and the Police Foundation published in 1974, nationwide only 4% of minority-group males are sworn police officers. See Egerton, *Minority Police, How many are There?* 21 RACE RELATIONS REP. 19-21 (1974).

14. B. GROSSMAN, *THE DISCRETIONARY ENFORCEMENT OF LAW POLITICS AND CRIME* 73 (S. Sylvester & E. Sagarin eds. 1974).

15. J. Cambell, J. SAHIEL & D. STANG, *LAW AND ORDER RECONSIDERED: REPORT OF THE TASK FORCE ON LAW AND LAW ENFORCEMENT TO THE NATIONAL COMMISSION ON THE CAUSES AND PREVENTION OF VIOLENCE* (1970). Other recommendations included provocative training programs, use of foot patrols by police who live in the neighborhoods, neighborhood centers staffed by police and resident civilians, increased minority recruitment, human relations courses and civilian complaint mechanisms. Some of these recommendations have been adopted by police agencies across the nation.

abuses of discretionary powers. The patrolman would still decide who to detain for intoxication and who not to. Now 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 of what family quarrels the police will respond to. Lastly, the community service information centers would be of doubtful aid unless they were structured so as to minimize discretion. As long as the employees could determine what complaints to consider or not to consider the center would never engender the confidence and trust of the Black community. Procedures such as written reports stating disposition of all 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. That discretionary power that exists should only be exercised by top level police personnel. Of course, concentrating such power in top level police officials would create a strong need for citizen police review boards or other mechanisms to check abuses in discretion in which the community had a strong voice. The individual patrolman should be governed strictly by administrative rules. Without corresponding action by legislative bodies directed to revising and specifying crimes, creating citizen watchdog committees and appropriating funds for increases in the size of the police forces, little can be done at this most crucial level of the criminal justice system.

IV. 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 amount of discretion possessed by a prosecutor with respect to the decision to prosecute or drop criminal charges against an alleged offender. The average 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 judgement and is not subject to control of anyone. Although some jurisdictions require that written reasons be given for failure to prosecute, most statutes generally do not cover a decision by the prosecutor to prosecute for a lesser charge, something that frequently happens as a result of 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. He is generally from a middle-class background and can be easily influenced by simple matters such as dress, speech, and manners of an offender. All of these factors come into play when the prosecutor is considering a case. The prosecutor because of his background and attitude "may often have no way of judging how the defendant fits into his own society and culture."¹⁶

16. H. RUTH, JR., *THE CHALLENGE OF CRIME IN A FREE SOCIETY: A REPORT BY THE PRESIDENT'S COMMISSION ON LAW ENFORCEMENT AND THE ADMINISTRATION OF JUSTICE* 317 (1969) [hereinafter cited as RUTH].

He can easily mistake a certain manner of dress or of speech, alien or repugnant to him, but ordinary enough in the defendant's world, as an index of moral worthlessness. He can mistake ignorance or fear of the law as indifference to it. He can mistake the defendant's resentment against the social evils he lives with as evidence of criminality. Or conversely, he can be led to believe by neat dress, a polite and cheerful manner, and a show of humility that a dangerous criminal is merely an oppressed and misunderstood man.¹⁷

Considering all of these things, it is not at all surprising to find overcharging and undercharging an everyday occurrence in our criminal justice system.

The question that arises is must the discretionary power of the prosecutor be uncontrolled? The answer should be no. Kenneth C. Davis felt that the German system of criminal justice can be used as a guide.¹⁸ Other authorities have cited the English system as an example of proper procedure in this area. If the elimination of discretion is the goal, the German system is preferable. In Germany the prosecutors possess no discretion with respect to prosecutions. The prosecutor is part of a hierarchical 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, this statement must be approved by the prosecutor's superior and reported to both the victim and any suspect who has been investigated.¹⁹

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 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 discriminatory practices in this area. Removal of discretion is still the best solution for assuring equal treatment.

V. THE AMERICAN JURY SYSTEM

Kalvin and Zeisel in their major study conducted during the 1950's on the American jury system found that racial prejudice was a great influence on jury decisions with respect to the standards of conduct applied to Black offenders when the victim was also Black.²⁰ More recently, the President's Crime Commission found that racial prejudice existed in the operation of jury selection in both the north and south.²¹ Nevertheless, the courts have been very reluctant to interfere with jury selection practices in this country. In the landmark case *Swain v. Alabama*²² the United States Supreme Court held

17. *Id.*

18. DAVIS, *supra* note 1, at 188-195.

19. A statement by the Research and Policy Committee of the Committee for Economic Development published in 1972 recommended that on the federal level a director of prosecutions be appointed by the Governor or state Attorney General. See COMMITTEE FOR ECONOMIC DEVELOPMENT, REDUCING CRIME AND ASSURING JUSTICE 25-26 (1972).

20. H. KALVIN & H. ZEISEL, THE AMERICAN JURY 371 (1966).

21. RUTH, note 16 *supra*.

22. 380 U.S. 202 (1965).

that Blacks have the right to be tried by juries from which members of their race have not been "systematically excluded". As long as the method used for selecting juries makes no *conscious effort* 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 discrimination in the composition of juries.

One of the most commonly abused procedures is the use of preemptory challenges to remove prospective Black jurors from the panel. It should be noted that the court in *Swain* said that the defendant in attacking the discriminatory use of preemptory challenges by the prosecutor must establish on the record that this has been a "systematic" practice in case after case. However, the Court has made the burden of proof so difficult that in the nine years since *Swain* not one single instance has been found where the defendant has prevailed on this issue.²³

A large number of jurisdictions use voter registration rolls as a means of selecting prospective jurors. Unfortunately, Blacks and the poor aren't registered in as great numbers as whites and middle and upper income groups. The result is that you have poor and Black offenders being tried by juries which don't adequately reflect their cultural and economic background. These juries have little understanding of the offender's mentality and often are 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 has suggested several methods which might produce significant numbers of Blacks on juries to try cases directly affecting the interest of minority litigants or the minority community.²⁴ In the heavily Black populated areas of the rural south, the law could require that every jury be proportionately representative of the Black population. One of the federal level federal jury districts could be redrawn to parallel those suggested above. In addition, more effort should be made to require that the jury be drawn in civil cases from the *community* where the action arose and in criminal cases, where the crime occurred.

Black offenders will never believe that they are receiving equal justice before juries as long as the juries are composed of persons from alien backgrounds. Few doubt that there is merit to the 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, and yet, a Black jury could perfectly understand the reasonableness of this fear and judge the accused accordingly. This would truly be justice.

VI. JUDICIAL SENTENCING

Perhaps the strongest evidence of differential treatment appears in connection with sentencing. There are numerous studies indicating that Negroes are likely to receive harsher sentences when the pertinent crime

23. *Id.* at 224-7.

24. D. BELL, JR., RACE, RACISM AND AMERICAN LAW 949 (1973). See also Note, *The Case for Black Juries*, 79 YALE L.J. 531 (1971).

is committed against a white person than when the crime is committed against a member of the same group, and that whites are likely to receive relatively mild penalties for a crime against a member of a minority group.²⁵

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 basic 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 term of years or for life."²⁶ This is not at all uncommon, even on the federal level.²⁷ 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 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.²⁸

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.²⁹ Traditionally, judges when imposing sentences, have considered the gravity of the offense, the existence of a prior criminal record, 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 biases of each judge.

Many people support the widespread discretion of judges by saying that this allows "individualized" justice, but anyone who is poor or Black knows that "individualized" justice doesn't necessarily mean equal justice.

25. See A. Overby, *supra* note 4 at 575. See also D. Bell, Jr., *Racism in American Courts: Cause for Black Disruption or Despair?*, 61 CALIF. L. REV. 165 (1973).

26. 18 U.S.C. § 1201 (1970).

27. For example, driving a stolen car across state line is punishable by imprisonment for "not more than five years", robbing a federally insured bank is punishable by "not more than twenty-five years." Not only are extremely high maximum sentences a problem, but an even more common flaw is mandatory minimum sentences. While these provisions limit judicial discretion, the limit is one sided and does not operate in favor of the offender. Another example is the response to *Furman v. Georgia*, 408 U.S. 258 (1973) in which the Supreme Court struck down statutes which gave the jury discretion to recommend either life or death penalties. It seems that whenever discretion is removed, it is *not* in favor of the offender. The response of many states to *Furman* has been to enact mandatory death sentences for certain offenses.

28. *Townsend v. Burke*, 334 U.S. 736 (1948).

29. Zumwalt, *The Anarchy of Sentencing in the Federal Courts*, 57 JUDICATURE 103 (1973). See also M. FRANKEL, *CRIMINAL SENTENCES LAW WITHOUT ORDER* (1973), for a general discussion of the problem. A further example of how political factors can influence sentencing is demonstrated by one southern federal district judge who sentenced the participants in the civil rights murders of Chaney, Schwerner, and Goodwin in Mississippi in 1964 to prison terms ranging from three to ten years and yet routinely sentenced draft evaders to the maximum five year term.

A sentence is designed as a punishment for some socially unacceptable conduct. With current notions about the desirability of rehabilitative treatment for offenders, judges have come to view sentences as a prediction of how long it will take an offender to be rehabilitated. Nevertheless, judges don't have much information at their disposal on which to base their predictions and sentencing generally in this country is in chaos. This is truly sad because this is one area of the criminal justice system where discretionary powers could be easily controlled.

A 1958 federal statute³⁰ 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 recommend solutions to the problem of sentencing disparities include the Model Sentencing Act³¹ and the Model Penal Code of the American Law Institute. Both of these codes recommend overall planning of a system designed to limit judicial discretion. They recommend increased use of probation and fewer severe sentences. Pre-sentencing 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", "professional criminal", "a dangerous mentally abnormal person", and "a multiple offender" (Penal Code). Each of these terms are elaborately defined so as to better guide judicial discretion.

Until better standards are established Blacks will continue to be underpenalized for certain types of offenses such as Black on Black murder and overpenalized for other offenses such as robbery and Black on white rape. Of course, structuring judicial discretion in this area is just part of the solution. Anytime there is any discretion; no matter how limited, abuses will occur. Until the courts are willing to provide appellate review of sentencing, disparity will continue to occur and will most adversely affect the Black offender.

VII. CONCLUSION

All of the recommendations made in this article for the elimination of uncontrolled discretion in the administration of justice require some action by legislative bodies. For this reason alone, it is doubtful that anything concrete will be done to eliminate abuses of discretion in the near future. The only hope lies in administrative action by the police department, the prosecutor's office, and the court. This would be slow and of limited effectiveness. This action would be in the form of administrative rules enacted by each of these units which attempt to establish specific structures and guidelines for the performance of their discretionary functions. Unfortunately the police, and the courts are all overloaded, understaffed, underfunded and unresponsive to the Black community. As long as these factors persist none of these units will be willing to consider enlightened reforms in their area.

30. 28 U.S.C. § 334 (1970).

31. 9 CRIME & DELINQUENCY 339-69 (1963).

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 of Blacks in this country. 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 trying to solve them.