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Laurence French
University of Nebraska, Omaha

BLACKS AND CAPITAL PUNISHMENT: AN ASSESSMENT OF LATENT DISCRIMINATORY JUSTICE IN THE UNITED STATES

BY Laurence French, Ph.D., Criminal Justice, University of Nebraska-Omaha

INTRODUCTION: Manifest and latent criminal justice controls.

A major consideration in interethnic relations is the control factor and how this is maintained in minority/majority situations especially those occurring within heterogeneous societies. Granted numerous subtle control processes operate at both the primary and secondary levels of interethnic interaction but a critical measure of the effectiveness of minority subjugation is reflected in judicial discrimination. This formal legal control apparatus has a legal mandate to deny social members their freedom, to punish and even to execute them. In the United States the criminal justice system's avowed mandate is to provide 'equal justice' for all citizens without discrimination due to race, ethnic origin, sex, class or age. However, in reality, a distinctive latent process of discriminatory justice actually operates. This paper looks at the nature and extent of discriminatory justice and how it effects the nation's single largest racial minority-- American blacks.

As a formal control apparatus the criminal justice system's mandate is a powerful one, giving the impression of equity in its application. Basic to our judicial ideals is the assumption that all men are treated equal before the law and that rational men play the adversary judicial game objectively. This requires a separation of the three judicial components comprising the adversary system: the defense, court, and prosecution as well as guidelines concerning the operation of law enforcement and corrections, the input and output of the judiciary. These distinctions in the criminal justice system were designed to maintain the system's objectivity and the interest of fair and equal justice. Furthermore, it was recognized that this powerful control apparatus could work only if its practitioners

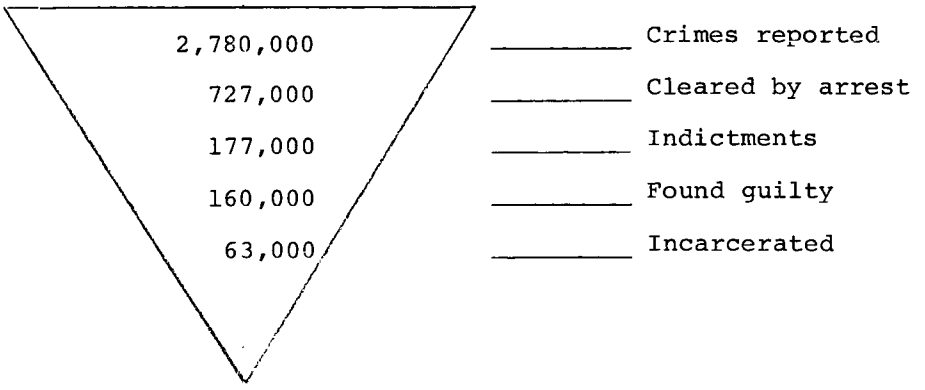
abided by the system's underlying philosophy based on certain premises: the presumption of innocence until proven guilty beyond a reasonable doubt and the guarantee of 'due process' for all those accused.

Unfortunately, our criminal justice system operates quite contrary to its avowed ideals. Political and economic interest seems to supercede judicial interest with our archaic, overburdened criminal justice system facilitating these latent processes. Police, judicial and correctional discretion, selective attrition of criminal cases and questionable practices such as bargain justice and the like have become the norm creating a tremendous variance between our avowed judicial ideals and actual criminal justice practices.

Sykes, Wald, Quinney and Douglas clearly pointed this out in their respective arguments. Sykes (1967) and Wald (1967) addressed themselves to the issue of selective justice notably the attrition of criminal cases as they proceeded through the criminal justice process. Sykes, using the nation-wide statistics provided by the 1966 FBI, Uniform Crime Report, noted that, "the number of persons arrested is only a small proportion of offenses known to the police (23 percent) and of those arrest, only 26 percent were in fact found guilty of the offense with which they were charged (1967:91)." The President's Commission on Law Enforcement and Administration of Justice (1967), commonly referred to as the 'Presidential Task Force Report,' provided a graphic representation of selective justice in the United States, again using the most comprehensive source available--the FBI's 'crime index.' Here seven 'serious' crimes are used (criminal homicide, forcible rape, aggravated assault, armed robbery, burglary, grand larceny and auto theft) to measure national crime trends for the year of 1965. Figure I illustrates the attrition of these crimes as they proceed through the adjudication process.

Of two and three-quarter million 'index offenses' reported, only 727,000 were 'cleared through arrest' giving the police an overall 26 percent performance rating. Moreover, of those crimes cleared through arrest only 24 percent of those were formally charged by the prosecutor.

Figure I: Index crime attrition for 1965



Yet of those charged at arraignment, 90 percent of these cases resulted in 'guilty pleas' while only 39 percent of these 'convicts' were eventually incarcerated resulting in only 2 percent of the total reported criminal population for 1965. Clearly, this illustrates that 'justice is not done' and that crime apparently does pay. But who benefits from this structured process of selective justice? Mainly it is those involved in the administration of justice itself, i.e., policemen, prosecutors, defense attorneys, judges and the like, those members of the legal guild who often use the criminal justice system as a political vehicle for accomplishing either personal or group ends--that is their own self interest. And when it is realized that most criminal justice practitioners are white males then we can better understand some of the traditional biases associated with selective justice and its latent process of discriminatory justice.

Police discretion determines which crimes are investigated and the records indicate that lower class, mainly non-white, communities are those which are over-policed while middle and upper-class white neighborhoods are under-policed regarding the intensity of criminal investigation of the activities of the indigenous population. But even then the vast majority of those arrested, even for 'index crimes,' are white. Next the prosecutor utilizes his dis-

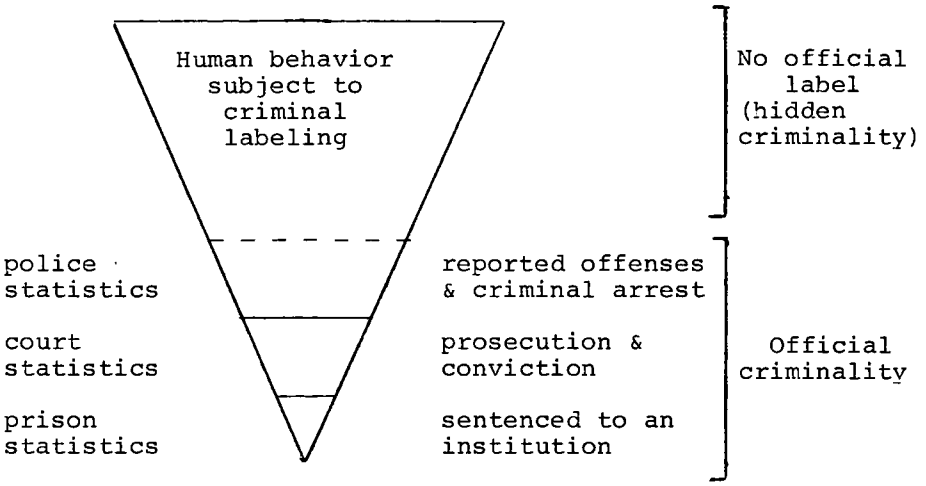
cretion to nolle prosequi and his influence to manipulate the grand jury accounting for the tremendous loss between those arrested and those indicted. Moreover, the use of plea bargaining, whereby the prosecutor and defense attorney conspire to make a deal usually entailing a reduction in charge(s) for a guilty plea at arraignment, accounts for the high proportion of 'bench trials' in our criminal justice system. Court statistics bear this out with over 90 percent of all indictments resulting in bench trials at arraignment and very few resulting in jury trials. Incidently, this procedure usually guarantees the prosecutor with an impressive conviction record.

Yet while the vast majority of those arrested are white, the opposite is true for those incarcerated. Wald (1967) noticed that, "the poor are arrested more often, convicted more frequently, sentenced more harshly, rehabilitated less successfully than the test of society (1967:151)." This plus Sykes' (1967) revelation that blacks and other non-whites are heavily over-represented in our nation's prison population adds considerable insight as to the nature of discriminatory biases within the criminal justice system.

Quinney and Douglas both elaborated on the particular latent functions associated with discriminatory justice. Quinney (1972) carried the funneling attrition process a step further by associating it with labeling. He argued that criminal statistics are not indicative of the true nature of criminality but merely reflects the differential biases employed by the criminal justice system, i.e. those who are official labeled as being criminally deviant (1972:122).

As is evident in Quinney's paradigm of selective justice (Figure 2), most criminal offenses go unrecorded making criminal statistics unreliable to begin with. The Sykes and Task Force Report address themselves to the lower tip of the Quinney model saying little about the other unrecorded criminal cases. This does not invalidate the works of Sykes and others, but rather reinforces the nature of selective justice by dealing with those cases which are most indicative of criminal justice discretion. Douglas (1972) posited that this discretion was reflective of a

Figure 2: Quinney's paradigm of selective justice



larger societal bias, one where members of the society are artifically dichotomized into either the 'unacceptable out-group' or the 'acceptable in-group' whereby members of the former are those of as being potential deviates while those from the latter are viewed as being normative. What follows then is a self fulfilling prophecy whereby the criminal justice system acts in such a way as to create this situation. For this to occur the criminal justice apparatus utilizes a dual system of justice--one for the 'acceptable in-group' and yet another for the 'unacceptable out-group.' It is this manipulated judicial system which supports latent discriminatory justice.

Watergate best illustrates the phenomenon of dualistic justice and its preferential judicial treatment for the 'acceptable in-group.' Not only does the 'acceptable in-group' have better access to qualified counsel, they are invariably offered some non-judicial recourse whereby the initial charge or charges are drastically reduced and public stigma all but eliminated in exchange for some contrition of guilt. Examples of these self-serving devices

common to the 'acceptable in-group' and widely used during Watergate to avert "the letter of the law" includes bargain pleas for reduced charges, jury manipulation, judicial delay tactics, special incarceration facilities and even new non-judicial devices such as unsupervised probation for Agnew and an unconditional pardon prior to any indictment for Nixon. During this same period harsher penalties and longer sentences were introduced for the "common" criminal -- those from the 'unacceptable outgroup.'

CAPITAL PUNISHMENT: The Ultimate Social Control

The ultimate social control is that of legal homicide and the criminal justice system has used this device over the years accounting for 3,859 deaths between the years of 1930 and 1967 alone. Although judicial punishment is considered justifiable retribution, capital punishment has been justified because it is felt to be a deterrent to serious crime. This reflects the ideal judicial philosophy especially that of "due process" and rational, objective justice. It also corresponds with the ideal definition of first degree murder for which capital punishment is commonly associated. Here two factors, premeditation and intent, are thought to be objective, well thought out psychological processes where the fear of capital punishment would serve as an adequate deterrent. In support of this contention Sellin stated, "among the utilitarian arguments there is no doubt that the most widely used is the argument that the death penalty is a social necessity because it effectively deters people from committing murder (1959:19)."

Yet we know that the criminal justice ideals are not implemented and that considerable biases exist in the administration of justice. Statistics bear this out. Capital punishment has long been abused with blacks and other non-whites being the ones most discriminated against. And even if it was used objectively for all premeditated murders, world-wide evidence indicates that capital punishment does not act as a deterrent to others. Reckless, in his multi-national study of the death penalty concluded:

> All these sources--a comparison of homicide rates in abolition states and contiguous retention states, a contrast of murder incidence in states which abolished and later restored capital punishment, the number of homicides just before and after sentence or execution, the count on killings of policemen in cities of abolition and retention states, and the incidence of fatal assaults in prisons--contain no evidence that the absence or non-use of the death penalty encourages murder, and no evidence that the presence or liberal use of the death penalty deters capital offenses (1969:56).

States held a moratorium on capital punishment in the late 1960's (1968 on) awaiting the 1972 Supreme Court decision. In Furman v. Georgia the nation's highest court in a 5 to 4 decision held that the imposition and carrying out of the death penalty constitutes crual and unusual punishment in violation of the Eighth and Fourteenth Amendments. This action cleared the country's death row population, placing most into the general prison population. Nonetheless this narrow decision coupled with the political turbulence of the 1960's and 1970's led to a renewed interest in capital punishment. The President of the United States actively encouraged the reintroduction of the death penalty as is evident in his publically broadcasted State of the Union Message of March 10, 1973:

> Americans in the last decade were often told that the criminal was not responsible for his crimes against society, but that society was responsible. I totally disagree with this permissive philosophy. Society is guilty of crime only when we fail to bring the criminal to justice. When we fail to make the criminal pay for his crime, we encourage him to think that crime will pay.
>
> I am further proposing that the death penalty be restored for certain Federal crimes. At my direction, the Attorney General has drafted a statute consistent with the Supreme Court's recent decision on the death penalty. This statute will

provide capital punishment for cases of murder over which the Federal Government has jurisdiction, and for treason and other war-related crimes.

Contrary to the views of some social theorists, I am convinced that the death penalty can be an effective deterrent against specific crimes. The death penalty is not a deterrent so long as there is doubt whether it can be applied. The law I will propose would remove this doubt.

The potential criminal will know that if his intended victims die, he may also die. The hijacker, the kidnapper, the man who throws a fire bomb, the convict who attacks a prison guard, the person who assaults an officer of the law--all will know that they may pay with their own lives for any lives that they take.... I have directed the Attorney General to submit a death penalty statute as a separate proposal so that the Congress can act rapidly on this single provision (Presidential Documents: Vol. 9. #10:246).

At the time of the 1976 United States Supreme Court decision 35 states had reintroduced capital punishment. On July 2, 1976 the nation's highest court again ruled on this issue passing judgment on five capital cases before it. It found the death penalty legal in Georgia, Florida and Texas while finding it unconstitutional in North Carolina and Louisiana.

The indication now is that if a state has a separate review procedure which considers aggravating and mitigating factors surrounding each particular capital offense then the death penalty is legal. The 1976 decision apparently settled the issue concerning cruel and unusual punishment (Marshall and Brennen dissenting) placing focus now on how capital punishment is implemented.

Clearly the issue of discriminatory justice has not been settled by the Supreme Court although there is little left to the imagination regarding the death penalty's

racial and class bias. Clark (1972) noticed that an analysis of the national statistics on capital punishment since their start in 1930 shows that of those executed over half were blacks, a group who only represents one-eighth of the overall general population. He also revealed that blacks accounted for 89 percent of those executed for rape during this same period. Similarly Wolfgang (1962) conducted a study of 439 persons sentenced to death in Pennsylvania from 1914 to 1958. In his analysis he found that 89 percent of the blacks were executed (11 percent commuted) in comparison to 80 percent of the whites actually executed (20 percent commuted).

Furthermore, most criminal homicides in our country are not of the premeditated type but rather occur in the heat of passion. Unfortunately most of these result in first degree murder indictments and convictions. The FBI's Uniform Crime Report lends considerable support to this contention by reporting that for the 20,510 criminal homicides recorded in 1975, over 30 percent directly involved immediate relatives such as spouse, child or lover while another 38 percent occurred during arguments involving non-relatives. Only 23 percent of the murders were clearly associated with felonious activity (UCR, 1976:19). Wolfgang (1961) observed that many of these passionate murders were victim precipitated, indicating that the victim contributed to his or her own demise in the course of the altercation.

CAPITAL PUNISHMENT IN THE SOUTH: The North Carolina Example.

North Carolina led the nation with its death-row population prior to the recent 1976 Supreme Court decision with 122 inmates, 49 more than its closest rival--Florida. Interestingly, the eight states with the highest death-row populations were from the South: North Carolina (122), Florida (73), Georgia (66), Louisiana (47), Texas (43), Mississippi (20), Tennessee (32), and South Carolina (26) (SCR, Vol. 3, #4, August, 1976). Graham and Gurr (1969) noted that violence has long been one of the characteristics most frequently attributed to Southerners, this stereotype being reinforced historically through duels, slavery, lynching, chain gangs and brutal police tactics. The FBI's

Uniform Crime Report bears this out with the South consistently having the highest murder rate in the country. Paradoxically much of this violence is generated by the harsh formal control mechanisms directed mainly toward the poor and non-white members of Southern society.

Overby (1967) intimated that justice in the South has a deliberate latent function designed to deny blacks equal justice. Garfinkel (1949) in an eleven year investigation of the judicial philosophy and practices in North Carolina concluded that, in fact, a dual system of justice does operate--one for white homicide offenders and yet another for black homicide offenders. More importantly, Garfinkel found that the objective, secular judicial ideals surrounding our criminal justice system were discarded by the white controlled formal control apparatus when dealing with black offenders whose victims were white. In these instances justice became a sacred issue. Here the primary judicial objective was, "to get the nigger responsible for this." In the opposite situation where the victim was black and the offender white, Garfinkel found that, "the fact of the crime taps no deep lying sentiments of wrong but is seen rather with reference to sentiments of serious misdemeanor.' And when a black killed another black, Garfinkel found the summary reaction to be: "Murder? Another one? Who is the man? Where is he from? Whom did he kill? Are we going to try him or did he enter a plea? (1949:370-81).

Many of the spectacular issues currently associated with the death penalty have their roots in North Carolina. A North Carolina district Attorney from Lumberton County has gained a national reputation in his one-man "crusade for death" recently placing twelve men on death row (Newsweek, July 21, 1975), while the Joanne Little and Tarborro 3 cases provided national attention to the plight of black homicide offenders in the state. This same state which has the nation's highest incarceration rate and had the higest death row population was recently involved in yet another unique homicide situation. This time the 34 year old white wife of a lay fundamentalist preacher was found not guilty of the fatal shooting of an unarmed black man by a Vance County jury (11 white and 1 black) after three hours of deliberation. Her victim was a 21 year old decorated Viet Nam veteran whom she shot and killed in the victim's front yard (Charlotte Observer, July 11, 1967:19A).

Thus while Mrs. Dupree gained a favorable judicial decision after little legation her black counterpart Ms. Little was involved in a very expensive and lengthy legal battle including a change of venue. These two cases tend to substantiate Garfinkel's findings especially since both female offenders committed a similar act--the killing of a male of the opposite race.

Figure 3: Racial distribution of the death penalty in two Southern states.

STATE:	North Carolina	Georgia
Black males	282 (78%)	569 (81%)
Black females	2 (½%)	0
Indian males	5 (1%)	0
white males	73 (20%)	136 (19%)
white females	0	0
Total	362	732

Reviewing North Carolina's execution record since 1910 when the state took over the task of capital punishment, 706 persons were sentenced to die, while 362, or slightly more than half, were actually executed. Of those executed, 78 percent (282) were black males, 20 percent (73) were white males, 1 percent (5) were Indian males and .05 percent (2) were black females. This closely corresponds with the data available for the state of Georgia where 81 percent (596) of those executed since 1924 were blacks and 19 percent (136) white. In addition to their high death row populations these two states currently have the nation's highest incarceration rates (over 200 perople incarcerated for every 100,000 population). An analysis of those incarcerated at the time of the 1976 Supreme Court decision outlawing the North Carolina death penalty shows that two-thirds of those awaiting capital punishment were blacks. This compared with a 25 percent distribution in the general population.

CONCLUSIONS: Future Ramifications of Latent Discriminatory Justice

A basic dilemma facing the United States Supreme Court in its decisions concerning appropriate judicial standards is that the justices seem to state their arguments as if our nation's judicial ideals were indeed implemented. These critical judicial issues are often clouded by political and personal biases which are expounded by public figures. For example Hooton (1939), the Harvard anthropologist, who developed his "criminal stock" theory suggested that since lower class blacks made up most of our nation's prison population we should attempt to prevent this occurrance through a policy of compulsory sterilization of these people before they embark on their criminal careers. The ramifications of his proposal are still being felt with the current turmoil over the use of sterilization, especially in the South, among black welfare mothers. Along similar lines Billy Graham, the noted evangelist from North Carolina, publically advocated castration for convicted rapists and capital punishment for murderers (1973). More recently, U.S. Solicitor Bork petitioned the Supreme Court in favor of the death penalty. This was felt to be an unethical action for the U.S. Justice Department to take since its ideal mandate is to guarantee our judicial ideals and not mold judicial practices. What concerned criminologists most, however, was the use of the Ehrlich thesis in his argument suggesting that contrary to previous scientific research on the matter, capital punishment does serve as a deterrent. Ehrlich, an economic theoretician at the University of Chicago, used regression analysis to project the potential deterrence of the death penalty. Many social scientists are suspect of Ehrlich's data base which has not been disclosed and even if his particular research is eventually proved conclusive, there is no evidence that it has universal application.

Our criminal justice system must face up to the latent discriminatory process of judicial practices and the ramifications of such. This is important since a serious consequence of the continuation of this process is that as selective justice becomes more entrenched and institutionalized as a means of social control, the less likely is it

that the ideals of justice can be met. This trend, if unaltered and carried to its extreme could provide the political and criminal justice control agencies with virtually unlimited power which could be used to alter our form of society, especially as it is described in the Federal Constitution (Skolnick, 1969).

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