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African Americans and the Administration of Justice

by
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The status of African Americans in relationship to the administration of justice has improved since the 1940s. Significantly, however, researchers continue to find racial discrimination and racial disadvantage operating in various aspects of the criminal justice process in numerous jurisdictions. Such findings are unacceptable in a society that claims to honor equal justice under law.

Historically, the law, the police, the courts, and the prisons have been used as instruments of oppression and subordination based on race. When the Supreme Court in its *Brown* decision[1] articulated for the first time in constitutional history that black Americans had a right to equal protection of the law, it began the process of repudiating those historically oppressive instruments and began the process of reconciling black Americans to the institutions of criminal justice. The *Furman* decision,[2] which outlawed the arbitrary and discriminatory use of the death penalty, and the *Coker* decision,[3] which outlawed the use of the death penalty in rape cases (over 90% of those executed for this crime were black men), were moves in the right direction, but discrimination and disadvantage based on race continued to be found in this and other important aspects of criminal justice processing.

If the nation is to complete the process of reconciliation in this area, if it is to win the trust of black Americans in its police, courts, and correctional policies, it must move to eliminate all vestiges of racial bias from the administration of justice. To aid in that process, scholars composing the study group on the administration of justice have closely examined the existing literature, made assessments of contemporary practices, and produced an evaluation of criminal justice that identifies those areas where discrimination abounds.

Capital Punishment

One of the areas of concern is the unequal application of the death penalty. Between 1930 and 1967, 3,586 people were executed. Over half of those executed for murder and 92% of those executed for rape were black Americans. Some scholars attribute the 1972 *Furman* decision in part to this overwhelmingly disproportionate use of capital punishment. The informal moratorium on executions that began in 1967 continued for another five years after the *Furman* decision abolished the death penalty as it was being imposed, because of its arbitrary and discriminatory application. That moratorium ended in 1977 after the Supreme Court ruled in *Gregg*[4] and four companion cases that capital punishment was constitutional under certain circumstances.

In the decade between 1977 and 1987, black Americans continued to represent a higher proportion of those executed than the proportion of black citizens in the population. Of the 70 persons put to death during those years, 24 were black Americans (34.3%), 42 were white Americans (60%), and 4 were Hispanic (5.7%). Of the 1,901 persons on death row in 1987, 50.4% were white Americans, 41.4% were African Americans, 5.8% were Hispanics, and 1.4% were native Americans. In spite of all the efforts to make the death penalty statutes more fair

during the last fifteen years, the minority population on death row has been reduced by less than 1%.

In capital punishment cases the variable exerting the strongest predictive power in correlation with sentencing is the race of the victim. After controlling for 230 variables, a massive statistical study done in the *McCleskey v. Kemp* case[5] demonstrated that defendants charged with killing whites are 4.3 times as likely to receive the death penalty as defendants charged with killing blacks. Black defendants charged with killing whites are sentenced to death seven times more often than whites who kill blacks. Studies on the use of the death penalty since *Gregg* indicate that racial disparities in capital sentencing remain. Black defendants convicted of killing whites are more likely to receive the death penalty than any others convicted of capital crimes.

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In *McCleskey v. Kemp* (1987) the Supreme Court considered a petition to overturn a death penalty conviction in Georgia. The petition was supported by a massive statistical study using sophisticated statistical analysis. The study demonstrated that in Georgia the race of the defendant and the race of the victim were critical variables in the decision to execute. The court in its ruling acknowledged that that disparity was proven in the imposition of the death penalty. The justices further acknowleged that this disparity reflected racial bias against black defendants. Nevertheless the court in a five-to-four decision ruled:

> [S]uch discrepancies do not violate the Equal Protection Clause of the Fourteenth Amendment. In order to prevail under that Clause, a criminal defendant (unlike an employment discrimination plaintiff, for example) must prove that decisionmakers in this case acted with discriminatory purpose.[6]

Reminiscent of *Plessy's* 1896 legal justification of segregation,[7] the *McCleskey* ruling provides a legal justification for the discriminatory application of the death penalty. Execution is the most extreme form of punishment our nation imposes on its citizens. Giving legal sanction to discrimination in the application of the death sentence makes a mockery of the ideal of equal justice under law, and it moves the country backwards to the pre-1967 era when capital punishment was systematic manifestation of racial oppression.

Sentencing

Research on sentencing in categories other than capital punishment indicates that racial discrimination varies widely across the United States. Despite disagreements over the reasons and the significance of the findings, researchers agree that black criminal defendants receive more severe sentences than do white defendants. While there should be concern that studies of disparity in sentencing have arrived at different conclusions on the issue of racial bias, such an outcome is expected given the highly decentralized and localized structure of the American judiciary with regard to criminal matters. It should come as no surprise that blacks are discriminated against in some jurisdictions but not in others. Most discrimination is found in the South, but not exclusively so. Aggregate studies do not separate men and women in evaluating outcomes, and this distorts the findings because female defendants are treated less severely by the courts than are males. Still, reputable studies like the Michigan Felony Sentencing Project[8] and the Minnesota Sentencing Guidelines Commission Study[9] provide evidence that race continues to be a consistent factor in criminal sentencing. These studies have been used to fashion new judicial policy nationally as well as in other states.

A number of conclusions are evident. Black males are more likely than white males to be sentenced to prison. Whites receive the probation option more often than blacks in similar circumstances. The race of the victim is important to understanding how discrimination gets involved in sentencing. And there tends to be more discrimination in the less formal aspects of the adjudication procedures, including plea-bargaining, than in the more formal and open trial process. This last observation is especially noteworthy because over 90% of all cases in most jurisdictions do not go to trial. Plea-bargaining is the process by which most criminal cases are disposed of. That most discrimination is found in these less formal aspects of criminal justice processing should be the cause of considerable concern. Most ot the work in the administration of justice is done in the less formal, invisible adjudication processes, away from public scrutiny.

Criminal Processing

Research on discrimination has focused primarily on sentencing, but it now seems clear that race is a significant factor in previous stages of the process. These stages include police treatment of suspects and arrests, prosecutors' decisions to file or dismiss cases, and pretrial treatment of defendants, including bail procedures. One study of a Houston court found that prosecutors consistently failed to charge whites with capital crimes against blacks even with strong evidence. The reason given was that juries

simply would not convict a white person of a capital offense against a black person. Rather than lose the conviction entirely, prosecutors would charge white defendants who had committed capital crimes against black persons with a lesser offense. Thus racial bias as a factor in the final disposition of a criminal case may be incorporated into a decision calculus at various stages of the process. The consequence is the same. Contrary to legal theory, ideals about judicial process, and common standards of decency and fairness, race oftentimes is a primary factor in criminal processing.

Researchers such as Kleck[10] and Wilbanks[11] reject the hypothesis that widespread and pervasive discrimination exists against black people in sentencing. Their claims are questionable at best. Wilbanks uses implication and speculation rather than empirical data to question the findings of racial effects. Kleck uses an arbitrary classification scheme to exclude from his analysis studies that found racial bias in less than half of the offenses studied. Such intellectual slights of hand should not be used as an excuse by policy makers to ignore this vital issue. Racial discrimination will not be found in every state or every locality in the United States. Yet scholarly studies continue to support the finding of racial bias and disadvantage in various jurisdictions throughout the country. When evidence of racial disadvantage and discrimination is uncovered, policy makers in criminal justice have a responsibility to eradicate such bias. One of those areas is juvenile justice.

Juvenile Justice

Minority youth are incarcerated at rates three to four times higher than white youth. The data on the heavy involvement of minority youth in violent crime cannot, by itself, explain such high rates of incarceration. Minority incarcerations in public correctional facilities increased 26% to 5,035 between 1977 and 1982. Black youngsters accounted for almost two-thirds of this increase. Concomitantly, the number of white youth in public facilities decreased by 7%. Earlier policies to remove minor offenders from confinement mostly benefitted white youth. In 1982 incarceration rates per 100,000 by race and gender were: 810 (black males); 183 (white males); 481 (Hispanic males); 98 (black females); 38 (white females); and 40 (Hispanic females).

The rates of minority incarceration continue to grow at a faster rate than the confinement of white youth. The data on minority youth crime are ambiguous and contradictory, and thus do not explain the higher incarceration rates for minority youth. The overrepresentation of minorities in arrest statistics is not as large as the disproportionate number of minority youth who are incarcerated. Additionally, the arrest statistics may overestimate the extent of minority involvement in serious youth crime because black youth are more likely to be arrested and charged with more serious crimes than whites engaged in the same activities. The discrepancies between arrest statistics and incarceration rates have led to concerns about discrimination within the adjudication phase of criminal processing for juveniles.

Our evaluation of juvenile courts indicates that minority and poor juveniles have been subjected to widespread, systematic discrimination. Earlier research efforts that focused on the final disposition of the case, or on one decision point, ignored important discriminatory factors. The influence of class, race, or gender may be most evident in initial stages of the juvenile court process (detention decision or screening decision); but as a juvenile becomes increasingly enmeshed in the judicial system, the impact of social characteristics is incorporated into the newly defined process variables, decision outcomes that inform subsequent decisions. Bias is incorporated into initial legal decisions, and final disposition, the most commonly examined decision, is the last juncture and the point at which this transformation is most likely to be complete.

Contrary to legal theory, ideals about judicial process, and common standards of decency and fairness, race oftentimes is a primary factor in criminal processing.

When juvenile court decision making is studied as a multiphased process, the following conclusions are evident. Black youths receive more severe dispositions than white youths. Black youths are much more likely to be detained prior to a hearing and somewhat more likely to be handled formally. As with adults, this is significant since those detained as well as those handled formally receive more severe dispositions. Consequently, early juvenile court decisions predispose black youths to more severe final dispositions. One way racial bias operates in juvenile courts is when social characteristics like race get transformed into legal variables, and both sets of factors act independently and together to affect the treatment of black youths in the juvenile justice system.

Recommendations

When the situation of black Americans in correctional institutions is reviewed, what is immediately evident is that the numbers of black Americans incarcerated in the country's prisons are immensely disproportionate to their percentage in the general U.S. population. Black Americans, together with

smaller percentages of Hispanics, Puerto Ricans, and members of other racial minorities, currently constitute the majority of American prisoners.[12] In 1982, black Americans accounted for approximately 12% of the U.S. population and 48% of the prison population.[13] Black prisoners under the sentence of death for capital offenses represent almost one-half of all persons awaiting execution.[14] Perhaps most alarming of all, black offenders represent the highest percentages in prison populations in those states where the percentage of black citizens in the general population is low.[15]

Sensible policy making requires an acknowledgement of both the propensity of some individuals to commit crime and the capacity of society to encourage and abet criminality.

Although there are arguments over why such gross disparities occur, the facts of disproportionality are indisputable. The capacity of our analytic tools may not be sufficient to discern the reasons, yet we know what we need to know to cite the administration of justice and corrections as a high priority for effective policy formulation. Sensible policy making requires an acknowledgement of both the propensity of some individuals to commit crime and the capacity of society to encourage and abet criminality. Sober policies and programs are needed that address both the individual and the societal dimensions of the problem with equity and fairness.

The development of policy options needed to eradicate racial bias in corrections, like those needed in other criminal justice institutions, requires not only a concern for eliminating discrimination, but also a desire to improve the substantive performance of these institutions in accomplishing the lofty ideals of their mission. In corrections the policy choices for most communities are simple: to continue to spend large sums of money to build prisons and maintain corrections as a growth industry or to spend roughly equal amounts of money to keep 40 to 60% of the incarcerated population out of prison and engaged in socially productive lives. Criticisms of racial bias made against the criminal justice process are taken by some as evidence that black Americans are "soft on crime." On the contrary, studies of black attitudes on crime and the police reveal that black citizens want fair, effective, "tough" law enforcement. What they do not want is to be presumed to be criminal simply because they are black. When considering the status of black Americans and the administration of justice, the primary question is not whether a uniform indictment or a clean bill of health can be given to American justice with regard to racial discrimination. The important question is whether racial (or gender or status) discrimination is acceptable in any jurisdiction, in any aspect of the judicial process.

Amid national concern over drugs and violent crime, the issue of racial bias in criminal proceedings may not be considered a priority. However, the respect for law necessary to reduce our crime problems is not possible if punishment is perceived to be skewed by race. The system loses legitimacy if citizens are punished or not punished because of their color or the color of their victims, or because of their education and income. Racial disadvantage and discrimination are unacceptable in any system of justice that strives both symbolically and substantively for fair and impartial treatment of those accused and fair and effect punishment of those found guilty.

A wide range of policy options are available to address problems of bias when uncovered. These policy options include:

- Increased employment of black persons at all levels of the criminal justice system;
- Bail reform when bail systems are used as preventive detention for the poor rather than to ensure appearance at trial;
- Upgrading the quality of defense counsel available to indigents with measures such as greater privatization of indigent defense, higher pay, and better working conditions of public defender roles, which might include restructuring the job;
- Establishment of prosecution standards along with guidelines by which prosecutors are held accountable where there is indication of the abuse of prosecutorial discretion;
- Cultural sensitivity training for criminal justice personnel, including judges;
- Guidelines on judicial conduct with respect to discriminatory treatment added to those developed and monitored by judicial conduct commissions;
- Judicial recruitment that stimulated diversity on the bench;
- Better training for judges and other criminal justice personnel;
- Changes in legal education and professional practices that encourage the development of discriminatory attitudes and values; and
- Legal scholarship that challenges aspects of the legal tradition that encourage racism.

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