

**RACISM,
EMPIRICISM**
and
CRIMINAL JUSTICE

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***RACISM,
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and
CRIMINAL
JUSTICE***

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***To all those persons
struggling for social justice***

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PREFACE

At the November, 1989 meetings of the American Society of Criminology, we advanced the idea of preparing a reader on the subject of discrimination in the American Criminal Justice System as our way of helping to successfully launch the newly formed Division on Critical Criminology. The project was unanimously endorsed, and the contents of the following pages represent the product of a collective effort from a variety of individuals.

In framing the project, it was decided that we should attempt to prepare a book which was structured in such a way as to provide somewhat of an alternative to a more traditional pedagogical style. We asked the authors to prepare shorter discussion essays unconstrained by rigid academic parameters. In this way, we bring to the introductory student a set of lively debates which are readily intelligible, and which facilitate participation in classroom discussion by students and instructors alike. Given the ideological barrage of claims concerning the fairness of contemporary justice, and the heated debates which these foster, we felt that an investigation into the case both for and against discrimination would be timely.

The book is organized into three sections which fall between our introductory and concluding chapters. In Section One, noted authors debate the 'no discrimination' thesis (NDT). Wilbanks first spells out the NDT, followed by critiques from Richey Mann and Georges-Abeyie. Wilbanks then replies to the criticisms raised in these two short essays. In the three essays which follow, a methodologically-based polemic is developed by Lynch, Ansari and Georges-Abeyie. In Section Two, "Racism, Empiricism, and Policy Implications", the discrimination issue is addressed at different levels by different studies. Lynch and Patterson challenge the Wilbanks' thesis with their analysis of primary data secured from four jurisdictions. DeKeseredy and MacLean criticize Wilbanks' method, and use his own arguments to demonstrate the way in which Native criminality is constructed by the Canadian parole process. Wilbanks then comments on a recent U.S. Supreme Court decision which disallows the introduction of statistical evidence (the 'Baldus study') against the infliction of the death penalty. In the last chapter of the section, Milovanovic reacts to both Wilbanks' criticisms of the Court decision and 'reverse discrimination' decisions, identifying the latter as cases of 'repressive formalism'. Section Three serves as the synthesis section in which Headley, Zatz, French, and Danner and Landis evaluate the arguments presented in the first two sections.

We leave the final conclusions to the reader; however, the chapters in the last section, and our concluding chapter, hopefully, will serve as a guide to clarifying the issues pertaining to discrimination, and how these are to be studied.

Despite the brevity of presentation, to bring this small project to fruition in such a short period of time would not have been possible without the assistance of a number of people. This final presentation has benefitted greatly from the efforts of Celesta A. Albonetti, Dawn Currie, Marty Schwartz and Jim Thomas who all reviewed various sections of the manuscript at different stages of its completion. We should also like to thank the Division on Critical Criminology of The American Society of Criminology for providing us with the encouragement and support to undertake this project. The assistance of P. J. MacLean around the office, proved invaluable. Also, we should like to thank each of the contributors for their innovative efforts and for meeting the restrictive deadlines necessary to the timely completion of the project.

As the editors of this work, our own bias should be articulated. We argue that the criminal justice system in North American society is, perhaps, one of the most discriminatory sets of organized practices currently operant in liberal democratic social formations. As academics, we analyze this situation — as participants in the struggle for social justice, we applaud the efforts of those who struggle for dignity, equality and fairness in their treatment. May the combined efforts of all those involved in producing this book be useful to this struggle, while sensitizing the readership to the importance of a critical scrutiny of the contemporary administration of justice.

Brian D. MacLean
July, 1990

Dragan Milovanovic

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CHAPTER 1

INTRODUCTION

An Anatomy of The 'No Discrimination Thesis'

B. MacLean / D. Milovanovic

Race, gender and class biases in the criminal justice system have been observed at many levels by divergently oriented theorists employing both quantitative and qualitative research techniques. Conversely, there are a number of researchers who deny the existence of such discrimination and argue that the criminal justice system is fair. Most recently, William Wilbanks makes this claim with his 'no discrimination thesis' (NDT). As critical criminologists we want to debate this issue. With some reluctance to give undue legitimacy to these contentions, we fear that by not addressing the NDT, much of what has been gained by minorities through bitter struggles stands to be lost by the increasing mis-use of 'data' to support the notion of 'no discrimination', particularly by the courts.

While biases sometimes operate directly within the criminal justice system, at times they are 'extra-legal' in that they operate within broader society to make minorities more vulnerable to criminal justice scrutiny. Sometimes these biases are the direct result of a specific characteristic, and sometimes they are indirect in that they result from a combination of characteristics. Thus we may see the direct discriminatory effects of race on outcomes in criminal justice processing or we may find the indirect effect of race in combination with class and/or gender in these outcomes. Sometimes, discriminatory effects are overt. For example, we may find that a particular judge always sentences people of color to more severe sentences; however, sometimes the biases are covert in that the discrimination is masked by a specific set of categories. For example, we may find that people of color are less likely to receive probation as opposed to incarceration — not because they are considered to have a higher level of 'criminality', but because they are considered to have fewer community supports. The problem for academic criminology is to unravel all of these combinations in the serious attempt to grasp the extent and severity of the dispensation of unfair justice administration to the less powerful people in our society.

Discrimination also can be hidden by definition. For example, Georges-Abeyie introduces the concept of 'petit apartheid' in this book. By this he means that biases are less visible by official data alone, and often come in the

forms of: harassment and insults; excessive stops, searches and questioning by police; condescending judges; narrow instructions by judges to juries; less stringent standards of evidence used in convictions of minorities, and so forth. Wilbanks has attempted to address this definitional issue in his first essay. Racism, he tells us, can be either conscious or unconscious and individual or institutional, including 'the domination of society by white culture'. He suggests that we abandon the concept 'racism' for the concepts of 'racial prejudice' which is an attitude, and 'racial discrimination' which he conceives as an act. In reply, Zatz argues that discrimination must be studied at both the overt and covert levels by both observational *and* statistical methods of analysis. Wilbanks argues against using the former, contending that observation is much too subjective and hence biased research while implying that his own quantitative methods are unbiased.

By way of sharp contrast, Danner and Landis point out that choosing a particular methodology already implicates a particular epistemology. For example, they argue that a 'feminist empiricism' can call into question many of the assumptions of positivistic methodology, indicating, for example, that a researcher's gender, race, or class standing conditions the selection of problems, the definitions to be used, the methodology to be followed, and the implications and conclusions to be drawn. Their argument in favour of greater scrutiny of researchers' assumptions can be situated within the debate concerning 'objectivity' in social sciences.

Zatz suggests that discrimination research has come in four waves: the first wave from the 1930s to the mid 1960s, indicated discrimination which was clear and consistent. The second wave from the late 1960s to the 1970s, was much more empirically sophisticated and concerned itself with controlling for relevant legal factors. Research which indicated a diminishing effect of race was countered by a refocus on the 'indirect' effects that placed minorities in situations of disadvantage. In the 1970s and 1980s, the third wave focused on the findings of the research of wave two and demonstrated that indirect effects were more important than direct effects in their impact on criminal justice decision making. Also, in the late 1970s and 1980s, the fourth wave focused more on sentencing policies, particularly those claiming to reduce discrimination by way of more sensitive standards, criteria, and rules. Here, the jury is still out. Some research substantiates direct and indirect discrimination, while other research, such as that by Wilbanks, claims that the direct effects of race result in no discrimination. The essays in this book attempt to de-construct this debate for the student. We can now turn to the first section of the book in which the extent of the debate is elaborated.

SECTION I:

DEBATES

CHAPTER 2

The Myth of a Racist Criminal Justice System

William Wilbanks
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INTRODUCTION

White and black Americans differ sharply over whether their criminal justice system is racist. The vast majority of blacks appear to believe that the police and courts do discriminate against blacks, whereas a majority of whites reject this charge. A sizable minority of whites even believe that the justice system actually discriminates for blacks in "leaning over backward" for them in reaction to charges of racism from the black community and the media.

The contrasting views of blacks and whites as to the fairness of the criminal justice system are of more than academic interest as research indicates that the higher level of offending by blacks may be due in part to the belief that "the system" is unfair. This belief produces a "justification for no obligation" or the attitude that "I don't respect a system that is racist, and so I don't feel obliged to abide by the laws of that system." This view in the collective has led to riots in Miami and other cities. Furthermore, the hostility to police generated by the belief has led to a mutual expectation of violence between police and blacks that has produced more violence as part of a self-fulfilling prophecy. Finally, the white backlash to affirmative action programs may be due in part to the perception that blacks complain about racism in a society that actually practices reverse discrimination (favoritism toward blacks).

THE THESIS

I take the position that the perception of the criminal justice system as racist is a myth. This overall thesis should not be misinterpreted. I do believe that there is racial prejudice and discrimination within the criminal justice system, in that there are individuals, both white and black, who make decisions, at least in part, on the basis of race. I do not believe that the system is characterized by racial prejudice or discrimination against blacks. At every point from arrest to parole there is little or no evidence of an overall racial effect, in that the percentage outcomes for blacks and whites are not very different. There is evidence, however, that some individual decision

makers (e.g., police officers, judges) are more likely to give 'breaks' to whites than to blacks. However, there appears to be an *equal* tendency for other individual decision-makers to favor blacks over whites. This "canceling-out effect" results in studies that find no *overall* racial effect.

The assertion that the criminal justice system is not racist does not address the reasons why blacks appear to offend at higher rates than whites before coming into contact with the criminal justice system. It may be that racial discrimination in American society has been responsible for conditions (e.g., discrimination in employment, housing, and education) that lead to higher rates of offending by blacks, but that possibility does not bear on the question of whether the criminal justice system discriminates against blacks. Also, the thesis that racism is not systematic and pervasive in the criminal justice system does not deny that racial prejudice and discrimination have existed or have even been the dominant force in the design and operation of the criminal justice system in the past.

DEFINING RACISM

One of the main barriers to the discussion and resolution of the issue of racism in the criminal justice system involves the multiple uses and meanings of the term 'racism'. Definitions of this term range from a conscious attitude by an individual to an unconscious act by an institution or even to the domination of society by white culture. I have suggested that the term 'racism' be abandoned in favor of the terms 'racial prejudice' (an attitude) and 'racial discrimination' (an act).

Any discussion of the pervasiveness of racism in the criminal justice system is clouded by the tendency of accusers (e.g., those who claim the system is racist) to use a double standard in that the term is used only to apply to whites. For example, it is often pointed out that 50% of the victims of police killings are black and that this fact alone presents a *prima facie* case of racism. But it is seldom pointed out that 50% of the police officers who are killed are victimized by blacks. If the first fact indicates racism by white police officers why does not the second fact indicate racism by black killers of police?

At times the use of the term racism appears to constitute a 'non-falsifiable thesis' in that any result is defined as racist. For example, in *McCleskey v. Georgia* (see attendant article) the petitioner claims that he received the death penalty because he (a black) killed a white whereas those who kill blacks seldom receive the death penalty. Thus lenient treatment given to black killers (or those who kill black victims) is defined as racism. But if black killers had been more likely to be sentenced to death that result would also be (and has been) viewed as racist. Thus the term is defined so that any result is indicative of

racism (i.e., a non-falsifiable thesis). The double standard of racism is also seen in this case in that the death penalty statistics actually indicate harsher treatment of white than black killers but this result is not seen as racism (against whites).

In a similar fashion a lower percentage of blacks (than whites) being convicted has been interpreted by accusers as racist in that this result indicates that charges against blacks were often without substance. On the other hand, if more blacks were convicted this result would also be viewed by accusers as being indicative of racism, since black defendants were treated more harshly.

THE DATA

The book was under-taken to explain why blacks in the U.S. are 8 times more likely, on a *per capita* basis, to be in prison than are whites. The major point of the book is that the approximate 8:1 *per capita* ratio of blacks to whites in prison is the result of an approximate 8:1 level in offending and not the result of racial selectivity by the police and the courts. In other words, the 8:1 black to white ratio at offending is not increased as offenders are brought into and processed by the criminal justice system.

Some original data is presented in an appendix to the book on the black vs. white gap from arrest to incarceration in prison for two states—California and Pennsylvania. In 1980 felony cases, blacks in California were arrested 5.2 times as often as whites. This black/white gap increased to 6.2% at incarceration. Thus the black/white 'gap' increased by 20% from arrest to prison. (However, the reverse occurred in Pennsylvania where the 8.1% gap at arrest decreased to 7.4 at incarceration (a decline of 9%). Overall, it would appear that the black/white gap does not increase from arrest to prison. Thus there is no evidence overall that black offenders processed by the criminal justice system fare worse than white offenders.

But perhaps the black/white gap at arrest is a product of racial bias by the police in that the police are more likely to select and arrest black than white offenders. The best evidence on this question comes from the National Crime Survey which interviews 130,000 Americans each year about crime victimization. Those who are victimized by violent crime are asked to describe the offenders (who were not necessarily caught by the police) as to age, sex and race. The percent of offenders described by victims as being black is generally consistent with the percent of offenders who are black according to arrest figures. For example, approximately 60% of (uncaught) robbers described by victims were black and approximately 60% of those arrested for robbery in the U.S. are black. This would not be the case

if the police were 'picking on' black robbers and ignoring white robbers.

Given the above figures, those who claim that racism is systematic and pervasive in the criminal justice system should explain why the black/white gap does not cumulatively increase from arrest to prison. Furthermore, those who claim racism is pervasive should be asked to specify the number of black offenders that are thought to receive harsher treatment (e.g., whether 10%, 50% or 100%) and the extent of that 'extra' harshness in cases where 'it' is given. For example, at sentencing do those mistreated black offenders receive on the average a 10%, 50% or 100% harsher sentence?

There is a large body of research on the alleged existence of racial discrimination at such points as arrest, conviction and sentencing. The bibliography of my book lists over 80 sentencing studies which examined the impact of race on outcome. A number of scholars have examined this large body of research and concluded that there is no evidence of systematic racial discrimination. James Q. Wilson, the most prominent American criminologist, asserts that the claim of discrimination is not supported by the evidence as did a three volume study of the sentencing literature by the National Academy of Sciences.

METHODOLOGICAL PROBLEMS

Some studies do claim to have found evidence of racial discrimination. However, as Wilson and others have pointed out, most of these studies are marked by flaws in design or interpretation. One chapter of *The Myth of a Racist Criminal Justice System* is devoted to seven models of design and/or interpretation which have been utilized in studies of the possible existence of racial discrimination. Many of the studies claiming to have found racial discrimination utilized a model of analysis that ensured such a result.

But many readers will be thinking at this point that "one can prove anything with statistics" and thus that the validity of the claim for a racist criminal justice system should be determined by what one knows by personal experience or observation. However, the layperson's confidence in and reliance upon 'common-sense' in rejecting the statistical approach to knowledge in favor of what one knows by personal experience and observation is misplaced. The layperson does not take into account the impact of bias (and in some cases racial prejudice) in personal experience and observation.

Let us take, for example, the question as to whether there is racial discrimination in the use of force by the police. Those who reject studies of large numbers of 'use of force' incidents which do not show

evidence of racial discrimination by race of victim suggest that 'unbiased' observation will reveal racism. But suppose that several people see a white police officer hit a black youth. There are a multitude of explanations (e.g., the youth hit the officer first, the youth resisted authority, the officer was the macho type who would hit any victim who was not properly deferential, the officer was a racist) for such an act. The tendency is for those with a particular bias to select that explanation which is consistent with their bias. For example, other police officers or white citizens might select the explanation that the youth resisted authority while black citizens might select the explanation that the officer was a racist. In either case, the observer simply infers the explanation that is most consistent with his/her bias, and thus knowledge via observation is anything but unbiased. Large-scale statistical studies allow one to control for factors (other than race) which might impact on a decision or act. Without such studies those who disagree on the impact of racism will simply be trading anecdotal ("I know a case where...") to 'prove' their case.

CONCLUSION

Racial prejudice, in my view, is the process by which people assign positive traits and motives to themselves and their race and negative traits and motives to 'them' (the other race). Blacks tend to see the beating of a black youth by a white police officer as being indicative of racism (an evil motive or trait attributed to the 'out-group') while whites (or police officers) tend to see the beating as being the result of some improper action by the black youth. The white view is also influenced by the assigning of evil motives or traits to the out-group (to the black youth). In both cases the observers, whether black or white, have been influenced by racial prejudice in their assigning of blame or cause for the incident.

My basic position is that both the black and white views on the extent of racism in the criminal justice system are 'ignorant' in that personal knowledge is gained primarily via observation and experience — methods which are heavily influenced by bias and racial prejudice. In other words, racial prejudice keeps the races polarized on this issue since each race sees the 'facts' which 'prove' its thesis. Statistical studies of large numbers of blacks and whites subjected to a particular decision (e.g., the use of force) are a safeguard against personal bias and are far more valid as a means to 'truth' than personal observation and experience. It is my view that an examination of those studies available at various points in the criminal justice system fails to support the view that racial discrimination is pervasive. It is in this sense that the belief in a racist criminal justice is a myth.

The Myth of a Racist Criminal Justice System examines all the available studies that have examined the possible existence of racial discrimination from arrest to parole. For example, the chapter on the police examines the evidence for and against the charge that police deployment patterns, arrest statistics, the use of force ('brutality') and the use of deadly force reflect racism. The chapter on the prosecutor examines the evidence for and against the charge that the bail decision, the charge, plea bargaining, the provision of legal counsel, and jury selection are indicative of racism. The chapter on prison looks at evidence concerning the possibility of racism as reflected through imprisonment rates for blacks vs. whites, in racial segregation, in treatment programs, in prison discipline and in the parole decision. In general, this examination of the available evidence indicates that support for the 'discrimination thesis' is sparse, inconsistent, and frequently contradictory.