The Criminal Justice System: A Questionable Egalitarian Model

Two basic forces can be found at work in the daily operation of the criminal justice system. On the one hand, it can be seen that the components of the criminal justice system are parts of organizational bureaucracies, which emphasize "initiative," often times at the expense of adherence to rules and regulations. On the other hand, there is the "rule of law," which emphasizes the rights of individual citizens and is designed to maintain constraints on the initiative of legal officials. The tension between these two forces constitutes one of the main problems of criminal justice agencies in their attempts to operate as democratic institutions. Furthermore, the tension between "order" and "legality" is related to the public demand that the institutions of criminal justice actually provide justice, rather than merely intending to provide it. For various reasons, there is widespread suspicion in society that the institutions of criminal justice are failing to actually secure justice. This suspicion, in turn, is eroding the trust and confidence imbued upon these institutions by the very constituency they are responsible for serving. This paper will discuss this statement as it relates to the three major segments of the criminal justice system: law enforcement, courts, and corrections.

Many scholars in the social science, and legal field contend that the problems of attaining justice are related to the issue of using initiative for the sake of efficiency, rather than to the

existence of the rule of law to protect the rights of citizens. This view is expressed, for example, by Steven Vago (2000) in his book Law and Society, where the concept of "initiative" is referred to as "discretion." According to Vago, "a high degree of discretion is characteristic of every phase of criminal prosecution" (p. 130). The police, for example, are given discretion in regard to whether or not they will arrest a particular lawbreaker. When arrests are made, judges are then able to exercise discretion in setting the amount of bail (p. 130). Vago notes that the use of discretion is particularly integral "to the daily routine of police officers" (p. 159). There are some benefits to the ability of police officers to use initiative; for example, it increases the efficiency of law enforcement operations on the streets by processing suspects expediciously and leaving the courts to decide their faith. However, this is a situation that also opens the way to possible miscarriages of justice. From this perspective, as stated by Vago, this is because there is "a thin line between discretion and discrimination in discretionary law enforcement" (p. 161). In other words, many police officers might be inclined to regard particular suspects as being likely criminals, simply because they match a preconceived notion of the type of person most likely to commit crimes. In the world of law enforcement, this notion is often based on racial stereotyping. In this regard, Vago notes that various studies have shown an increased chance of youth offenders being referred to

juvenile court when they are black as opposed to white (p. 161). In addition to race, there are also other characteristics that might lead to some form of profiling and thus cause particular types of persons to be viewed as latent criminal activity. Again, Vago admits that the evidence is "sketchy" on this matter, yet he claims there is reason to believe that "young adults, poor citizens, minority members, migrants, and individuals who look disreputable by police standards" are more likely to be harassed, brutalized, or arrested by police than those who have the appearance of being 'respectable' (p. 162).

The use of discretion can also be found in the courts. For example, plea bargaining is a legal practice that is associated with the ability of prosecutors to take initiative in handling criminal cases. Plea bargaining occurs when a prosecutor negotiates with a defendant to accept a guilty plea for a lesser crime because it is uncertain that a costly jury trial will bring a guilty conviction on the larger crime that the defendant is being charged with. There are certain benefits to be found in the practice of plea bargaining, especially in light of the current problem of the courts being overburdened with cases. A plea bargain eliminates the need for a trial and thus it is cost-efficient in the long run. In addition, as Ewick and Silbey (1998) claim, plea bargains are only entered into when a finding of guilt is a foregone conclusion anyway (p. 147). However, it is also apparent that the use of plea bargaining is

problematic because it conflicts with the ideal of due process. The due process model is considered to be inherently fair because it works on the premise that all defendants are innocent until proven guilty. By contrast, it has been claimed that plea bargaining results in injustice because it results in criminals receiving more lenient sentences than they otherwise deserve.

According to Vago, plea bargaining allows too much power of initiative on the part of prosecutors. As Vago states, "in many cases involving plea bargaining, the prosecutor acts as a de facto judge and makes most of the decisions regarding the disposition of a case" (p. 132). In addition, as Vago further notes, plea bargaining has been greatly overused in the American court system. In this regard, it has been established that "roughly 90 percent to 95 percent of all criminal convictions are arrived at through plea bargaining" (p. 132). Vago agrees with the view that plea bargaining is a serious problem in terms of the attainment of justice. Using this analysis, by making criminal justice more of an "administrative process" than an "adversarial one," plea bargaining is increasingly "generating cynicism about criminal justice among the accused, the system's participants, and the public at large" (p. 133).

Although Kaminer (1999), does not discuss plea bargaining, she does refer to the problems that are associated with prosecutors taking initiative in the legal process. Kaminer notes that an increase in prosecutorial power has come about as a result of public

demands for the criminal justice system to get "tougher on crime" (p. 20). This attitude on the part of society has led to various injustices in the system. For example, Kaminer points out that the frenzy to catch and convict criminals has led to an erosion of rights (Ibid, 20). In particular, an increasing number of minority members have been targeted by police officers as potential criminals based on sterotypical bias observation (in effect, profiling). Along with this, effort have intensified to decrease crime, which have allowed prosecutors to obtain an undue amount of power in their discretionary rights to handle criminal cases. Further, as Kaminer claims, this rise in prosecutorial power has not been accompanied by any parallel efforts to prevent abuses on the part of prosecutors. Therefore, the result of the increase in the power of prosecutors has been a simultaneous increase in the opportunities for "prosecutorial misconduct" (p. 20). On the basis of Kaminer's argument, it is clear that the public demands for a "tougher" stance on crime in the criminal justice system have created authoratative prosecutors without the benevolence of a check and balance apparatus.

However, as noted by Judge Ralph Fine (1986) in his book *Escape of the Guilty*, the potential for injustice in the criminal justice system is not only related to the use of initiative on the part of police officers and prosecutors. In addition, there are also cases in which justice is not served as a result of overly strict adherence to the rule of law. In such cases, it is not usually a matter of the

innocent being presumed guilty but rather of the guilty being able to get away with their crimes. One of Fine's concerns in this regard is the practice of plea bargaining, as discussed above. In addition, Fine discusses the problems with the exclusionary rule, which limit the admissibility of certain types of evidence that has been illegally obtained by law enforcement agents in courtroom trials (see the concurrent opinion in *Mapp v. Ohio*, U.S. 643, 1961). As Fine points out, the Fourth Amendment of the Constitution protects American citizens from unlawful search and seizure. Basically, this protective right can be seen as a positive element in American law. However, court precedents have determined that if evidence is not collected properly, it cannot be used to convict criminals, even when they are otherwise obviously guilty (Ibid, *Mapp v. Ohio*). According to Fine, a 1925 Supreme Court ruling decided that even an illegal substance can be excluded as evidence if police make a mistake in the way they retrieve it from the suspect (p. 151). Fine also notes that the case of *Mapp vs. Ohio* resulted in state courts, as well as federal courts, being subjected to the requirements of the exclusionary rule (p. 151). Fine argues that the exclusionary rule is unjust because it often enables criminals to go free when police make minor errors in the collecting of evidence. In such cases, there is no concrete evidence, legally speaking, to convict the criminal or show his guilt. Because of this problem (as well as others, such as the overuse of plea bargaining), Fine concludes that

the American criminal justice system is simply "not working" in the way it was originally intended to.

Bridges (1996) agrees that the evidence rules that exist in today's courtrooms are serving to undermine the administration of criminal justice. Although the intent of the criminal justice system is to arrive at the "truth" in a given case, a growing number of judges and other legal professionals have come to the conclusion that "the legal establishment says quite openly that it cares not about the truth, but about 'procedural safeguards'" (Bridges, 1996, p. 50). As defined by Vago, procedural law refers to the rules of the court and the legal system, in contrast to substantive law, which consists of the actual "rights, duties, and prohibitions" that make up the law (p. 10). In Bridges discussion of the problems with current procedural law, she refers to the situation involving the exclusion of certain types of evidence. As Bridges states, "if the arresting policeman made the slightest slip in collecting evidence, the evidence is withheld from the jury" (p. 50). Citing Professor David Forte, Bridges further notes that the exclusionary rule has a corrupting influence on the police officers who are responsible for collecting evidence in the field. In the words of Forte, "police lie all the time, and they lie because the truth is not available to them" (Bridges, 1996, p. 50).

Brown (1998) also criticizes the recent developments in procedural rules and their negative impact on the criminal justice

system. In the *journal of Michigan Law Review*, Brown notes that the doctrines of criminal procedure were designed to protect defendants; yet, they have actually done very little in terms of increasing justice in the criminal justice system (p. 2146). According to Brown, various Supreme Court decisions have resulted in criminal court procedure being subject to fairly strict regulations. However, because the criminal justice system in the United States is "dynamic," other "institutional players" have responded to the development of these procedural rules and have thereby undermined the ability of the courts to effectively carry out their functions. Specifically, Brown claims that legislatures have reacted by "expanding substantive criminal law" and by "underfunding criminal defense (as well as prosecution offices)" (p. 2146). As discussed earlier in this paper, the expansion of substantive criminal law (as seen in efforts to "get tougher on crime") often results in decreased justice for minorities and other types of people who are labeled as being potentially "disreputable." The under-funding of prosecutors and defense lawyers contributes to this problem, as does the expansion of procedural rules, which Brown notes increase prosecution costs. According to Brown, these situations may cause prosecutors to avoid trying to build cases against wealthier defendants, who "can afford to invoke the procedural rights as defense mechanisms" (p. 2146). In such cases, greater effort will be pursued in securing destitute defendants. Therefore, the problem described by Brown

provides yet another indication that people are justified when they have suspicion that the institutions of criminal justice are failing to secure true justice.

An ad hoc sign that there may be a lack of justice in the criminal justice system can be seen in the problem of racial disproportion in the nation's prisons. According to Cannon (2000), the United States, in the year 2000, attained the "dubious milestone" of having put 2 million of its citizens in jails or prisons; this is four times the number of prisoners that had existed in the 1980s (p. 36). However, this dramatic increase in the size of the prison population was not combined with a similar increase in the amount of crime in the country. In fact, the crime rate had been steadily declining since the early 1990s. As noted by Cannon, the "law and order advocates" claim that the decline in the crime rate is related to the increase in the incarceration rate. However, Cannon blames the high incarceration rate on the various new "tough" laws that have been designed to get convicted criminals behind bars and keep them there. One of the specific factors identified by Cannon is the concept of "pro-active policing," in which police officers have been encouraged to detain and frisk anyone who seems to be a "potential troublemaker."

Since racial minorities, stereotypically, match the "profile" of the potential criminal, this situation has resulted in a large percentage of racial minorities being arrested and convicted for such

things as having weapons or drugs in their possession. As a result, African Americans make up 48 percent of the American prison population, even though they only represent 12 percent of the total population. In addition, Latinos comprise 19 percent of the prison population, which is "more than twice their numbers in society" (p. 36). Evidence that there are those in American society who regard this problem as a form of injustice can be seen in the call by the National Association of Criminal Defense Lawyers for reforms that would help to curb "the disproportionate number of minorities improperly stopped by law enforcement officials on a pretext or on some overly-broad, generic 'profile' basis" (p. 36). There are also indications that many of the members of society regard this problem as being related to the overuse of initiative on the part of police officers. Furthermore, many people hold the view that this overuse of initiative is taking place without regard to the rules and regulations that are intended to protect the rights of individual citizens. Thus, as stated by Cannon (2000), there is a common perception among African Americans "that police departments are a hostile force, with their own rules of conduct, and that those rules allow for quicker arrests and harsher use of force against blacks" (p. 36).

Discretion is not something that is used only by officers in law enforcement, but by officers in corrections as well. In their report on a study of the use of discretion by probation and parole

officers in the state of Pennsylvania, Slabonik and Sims (2002) claim that discretion is a vital element in criminal justice generally, and in the field of corrections specifically. As noted by these authors, criminal justice workers must make decisions on a regular basis. Some of these decisions are made in accordance with established policies and procedures, whereas others - for better or worse - are based on the personal initiative of the officer involved (p. 1). Slabonik and Sims note that this type of discretion is found among probation officers, as well as among other types of officers. For example, probation officers are often able to decide whether a particular client will receive bail, or whether another client will be issued an arrest warrant for violating the conditions of his release.

Slabonik and Sims also accentuate that the use of discretion among officers (in general) is often "not limited to what is authorized or what is legal." Thus, lower-level officers often have in their discretionary power the ability "to thwart, disobey or otherwise sabotage the implementation of policy changes as directed by higher-level supervisors or administrators" (p. 1). However, despite the fact that the use of discretion often takes place outside the established rules and regulations, Slabonik and Sims also argue that the ability of officers to make decisions based on their own initiative is basically a positive aspect of criminal justice, rather than a negative one. According to the view of these authors,

discretion is an important element in the criminal justice system because "rules alone, untempered by discretion, cannot cope with the complexities of modern government and modern justice" (Slabonik & Sims, p. 1). This is an argument that contrasts the view that initiative generally has a negative impact on the criminal justice system. In opposition to this view, Slabonik and Sims take the stance that the use of discretion helps to keep things running more smoothly in the system.

Ewick and Silbey (1998) similarly argue that initiative is not a bad thing in criminal justice but is, rather, something that helps to make the system run more efficiently. These authors believe that the ability to make flexible decisions is necessary among criminal justice personnel because the system is not fixed but is constantly changing. As claimed by Ewick and Silbey, legality "embodies the diversity of the situations out of which it emerges and that it helps structure." As such, it is not "sustained solely by the formal law of the Constitution, legislative statutes, court decisions, or explicit demonstrations of state power" (p. 17). Ewick and Silbey further claim that "the multiple and contradictory character of law's meanings, rather than a weakness, is a crucial component of its power" (p. 17). The argument of these two authors regarding the need for flexibility in criminal justice operations stems from their adoption of a "game-like view of legality." From this perspective, Ewick and Silbey acknowledge that rules and procedures exist in the

legal system to "constrain what can be done legally" (p. 146). However, it is emphasized that these constraints are game-like "human inventions"; as such, "they are understood to be open to challenge, vulnerable to change, and available for self-interested manipulation" (p. 146). In the conclusion of their book, *The Common Place of Law*, Ewick and Silbey refer to their view of legality as "an ongoing production that is created anew daily, rather than a fixed and external entity" (p. 244). By contrast, Ewick and Silbey claim that conceptions of "rights" have a negative impact on human relationships because they tend to "deny the complexity, ambiguity, and contradictions of social experience" (p. 232). This is not to say that rights are not important in the overall processes of criminal justice. As Ewick and Silbey suggest, the conception of "right" is important despite its abstract nature because it "authorizes and legitimizes the imagining of association and community that is denied in practice" (p. 232). Ultimately, however, their book as a whole tends to emphasis the initiative-based approach to the legal system rather than the rights-based approach.

The British writers Raine and Willson (1996) describe the characteristics of criminal justice in entirely different terms. In an article in *The International Journal of Public Sector Managem*ent, these authors discuss how courts and other institutions in the criminal justice system came to be increasingly subjected to the theories and processes of "managerialism" during the 1980s and 1990s.

This trend can be seen, for example, in such things as tighter budgets, greater emphasis on efficiency, and the standardization of polices and practices (p. 20). According to Raine and Willson, this development occurred in the United Kingdom because of the influence of right-wing politicians and their desire to inject the principles and practices of the private sector into the public sector. It can be noted that similar trends have occurred in the United States as well. Raine and Willson postulate that there is a great deal that managerialism has accomplished in its application to criminal justice. However, they also note that "it can be argued that a price has been paid in terms of neglect of other, more traditional themes of criminal justice" (p. 20). As specific examples, Raine and Willson note that the trend of managerialism has had a negative impact on such conceptions as "protection of human rights" and the "promotion of due process." At the same time, however, these authors point out that the managerialism trend has been receding again from the field of criminal justice. Writing from the perspective of 1996, they see the emergence of a new "post-managerial" style of criminal law organization, with a stronger moral base and with the restoration of the traditional priorities and values of criminal justice.

Finally, as discussed in this paper, the criminal justice system is characterized by a tension between bureaucratic order and initiative, on the one hand, and the legality of individual rights, on the other. The existence of this tension raises an important

issue because it relates to the larger question of whether or not the criminal justice system is allowing defendants the rights to attain actual justice. It has been identified that initiative is practiced throughout the system, by prosecutors, judges, police officers, correction officers, and others. However, there have been cases in which the use of initiative, or discretion, has stirred up controversy. For example, the use of discretion by police officers has been challenged because of the common practice of "profiling" suspects on the basis of race or on the basis of having the "appearance" of a potential criminal. It has also been argued that this practice of police initiative has been responsible for the current disproportionate number of racial minorities in the nation's prisons and jails. Yet, it can also be argued that police officers' use of discretion contributes to the overall efficiency of the criminal justice system. Clearly, it is sometimes important for police officers to make decisions on their own when they are subjugated to a precarious situation that involves discretionary application. This paper, has also shown that initiative is widely used throughout the other parts of the criminal justice system. For example, in the courts, judges are generally given a great deal of leeway in making decisions regarding such matters as sentencing or setting bail. However, again, the use of discretion in the courts has resulted in controversies. For example, it has been claimed that prosecutors have obtained too much power as a result of the trend

toward "getting tough on crime." As noted, this type of power is capable of being corrupted, and therefore it gives rise to concerns about the possibility of abuses and injustice.

Another problem in the courts is related to the over-utilization of plea bargaining, a trend that many have claimed undermines the right to due process. Also, plea bargaining has been called unjust because it often results in guilty suspects receiving lighter sentences than they actually deserve. Yet, some legal experts defend plea bargaining because the courts are overburdened, and plea bargains help resolve cases involving guilty suspects more cost-efficient.

The exclusion rule was also discussed as a problem that often results in unjust court decisions; in this case, the exclusion of vital evidence sometimes results in guilty suspects getting away with their crimes. Despite these considerations, it was also shown that there are arguments in favor of criminal justice personal having the ability to make flexible use of initiative whenever it is needed (as long as it does not result in a blatant violation of an individual's rights). Therefore, in response to the suspicion that the institutions of criminal justice are failing to secure justice, it can be seen that this is indeed often the case. However, it does not seem that the solution to this problem is found in eliminating either individual rights or the ability of criminal law professionals to utilize "constrained" forms of initiative. In order for the criminal

justice system to attain a greater sense of justice, some type of cooperative balance needs to be found between these two major forces.

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