BOOK REVIEWS

RACE, CRIME, AND THE LAW. By Randall Kennedy.¹ New York: Pantheon Books. 1997. Pp. xiv, 538. \$30.00.

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THREE CHEERS (AND TWO QUIBBLES) FOR PROFESSOR KENNEDY

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Professor Kennedy has written a great and wise book. Surveying “the bitterly contested crossroads” where race and the criminal justice system intersect (p. ix), Kennedy places himself roughly equidistant from Justice Thurgood Marshall, for whom he clerked, and Marshall’s successor, Justice Clarence Thomas. Rhetorically and politically, Kennedy’s middle position renders him vulnerable to potshots from both left and right. But Kennedy defends his ground superbly with a wonderfully rich and eminently readable blend of historical narrative, doctrinal analysis, empirical survey, and commonsense argument.

At every turn, Kennedy strives to steer between overstatement and understatement. Today’s political right often suffers from amnesia about America’s racist past and from complacency about its racial present, while today’s academic left often refuses to acknowledge the real progress that we have made over the last two generations and the resulting complexity of our current situation. In response to both, Kennedy presents a third view — grim but not hopeless, passionate but not paranoid. Precisely because racism has been so real in our history and still exists today, we must take care not to trivialize the “r-word” by calling everything we don’t like “racist.” Precisely because blacks have suffered — and are continuing to suffer — as criminal suspects, defendants, and convicts on the one hand, and as victims of crime on the other, racial justice issues are complicated. Precisely because blacks disagree among themselves (as do whites and other racial groups) about the criminal justice system, many issues are not, well, black-and-white.¹ In such a world, factual punctiliousness and fair-minded treatment of counterarguments are not merely scholarly virtues suitable for a Harvard professor publishing his first book, but democratic virtues appropriate for a public intellectual writing to help fellow citizens make sense of some of the most difficult and divisive issues of our day.

It is impossible to do justice to such a grand and rich book in such a small space, but in what follows I first sketch a few of Kennedy’s most important points and then turn to a couple of places in the book at which he does not persuade me. With a book that aims for fairness and balance, it might seem somewhat unfair and imbalanced to high-

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¹ For another reason why the current landscape is not black-and-white, see Viet D. Dinh, *Races, Crime, and the Law*, 111 HARV. L. REV. 1289 (1998), also reviewing Kennedy’s book.

light two of the spots where I disagree with Kennedy rather than the many places where I find myself persuaded. In defense, I try to show that even when I disagree with Kennedy, I agree with him. That is, on the two topics at issue — the constitutionality of peremptory challenges and the proper remedial response to racially skewed grand juries — I hope to show that Kennedy errs by ignoring the implications of other arguments that he advances elsewhere in his book. And in the spirit of ideological balance, I have chosen one topic (peremptories) on which my position tracks Justice Marshall's views and a second topic (remedies) on which my position might place me closer to the views of Justice Thomas.

I. THREE CHEERS

The American legal system has historically targeted blacks for special disadvantage as "suspects, defendants, and convicts" (p. 76). Kennedy traces the roots of this inequality to black slavery and proceeds to follow the story line up to the present. Even today, judges allow race to be used as a proxy for criminal suspiciousness in various cases. The Supreme Court, for example, has suggested that Border Patrol agents may subject motorists of "apparent Mexican ancestry" to more extensive delay and more intrusive questioning, on the ground that race in this context "clearly is relevant to the law enforcement need to be served."² But if our Constitution is supposed to be color-blind, Kennedy asks, why is this kind of "racial tax" permissible (p. 161)? If race cannot or should not be used as a factor to advantage persons of color in affirmative action scenarios, as many Justices and judges seem to believe,³ why can it be used as a factor to disadvantage persons of color in the border patrol scenario (p. 160)? In posing such provocative questions, Kennedy aims "to facilitate the emergence of a polity that is overwhelmingly indifferent to racial differences, a polity that looks beyond looks" (p. 167).⁴

Kennedy makes similarly provocative points when he turns from suspects to defendants and convicts. Under slavery, blacks as a class

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² *United States v. Martinez-Fuerte*, 428 U.S. 543, 564 n.17 (1976). Professor Kennedy discusses this case and the Court's language (pp. 142-43).

³ Professor Kennedy seems to distance himself from such views. For instance, he says: "I do not believe, as does Justice Thomas, that all racial lines are equally dangerous" (p. 245). For Kennedy's earlier-expressed views on this subject, see Randall Kennedy, *Persuasion and Distrust: A Comment on the Affirmative Action Debate*, 99 HARV. L. REV. 1327, 1328-37 (1986), which offers a qualified defense of affirmative action.

⁴ Elsewhere in the book, Kennedy sounds similar themes. For instance, he states: "Furthermore, there is the deeper question of whether the 'looking like America' metaphor is an appropriate guiding aspiration. I do not think that it is" (p. 252). In addition, in the last chapter's last sentence, he affirms "the uncompromisable ideal of treating all persons equally regardless of race, an aspiration best sought by responding to persons strictly on the basis of conduct not color" (p. 390).

were stripped of their liberty and, even if free, were denied the right to vote (and the right to serve on juries) in most states. In response to Emancipation and Reconstruction, racist laws mutated in form. Under the infamous Southern Black Codes of the 1860s, various forms of behavior were legal for whites but criminal for blacks, and even when the criminal code laid down color-blind rules of conduct, black skin formally triggered harsher (and often savage) punishment. When these laws were invalidated by courts and by Congress, they were ultimately replaced in many jurisdictions by laws that were facially color-blind but racist in both purpose and effect: white-dominated legislatures intentionally targeted behavior thought to be more common among black folk and punished such behavior with prison slavery and disenfranchisement. White-dominated police forces, judges, juries, and prison officials helped administer this scheme with a racially uneven hand and unequal eye. Ironically, even the Reconstruction Amendments could be invoked in support of the new Southern solution. The text of the Thirteenth Amendment, after all, seemed explicitly to countenance prison slavery in its prohibition of slavery and involuntary servitude "except as a punishment for a crime whereof the party shall have been duly convicted,"⁵ and Section 2 of the Fourteenth Amendment seemed explicitly to embrace disenfranchisement as an appropriate criminal punishment.⁶ Once disenfranchised, black convicts were forever barred from voting for legislators and serving on juries, punishments that fed a vicious cycle of white domination of these institutions of criminal justice.

Brutal bodily punishment of black offenders — a regime born in slavery — also survived Emancipation and Reconstruction, albeit in mutated form. Under slavery, "[l]ong after maiming, branding, ear cropping, whipping, castration, and other sorts of physically injurious punishments had waned as an approved method of chastising whites, they remained available for the correction of slaves" (p. 77). Whipping was the punishment of choice, and Kennedy identifies both its ideological and its economic underpinnings. Ideologically, whites viewed blacks as "primitive, wild, inferior beings . . . fundamentally different from whites, and thus in need of more coercive social control" (p. 77). Economically, masters needed to spur slaves to work hard and obey the (masters') rules, but masters also needed to preserve slaves' productive capacities (p. 78). Punishment had to hurt and deter, but a slave's ordinary lot was so poor that the penal options were limited. Criminal fines don't work if a person has no money, and deprivation

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⁵ U.S. CONST. amend. XIII, § 1. Compare Kennedy's comment: "After the abolition of slavery, incarceration became a 'legal' way to subject blacks to servitude" (p. 130).

⁶ See U.S. CONST. amend. XIV, § 2 ("[W]hen the right to vote at any election . . . is denied . . . or in any way abridged, except for participation in rebellion, or other crime, the basis of representation . . . shall be reduced . . .").

of liberty via imprisonment is not much of a deprivation if a person has little bodily liberty to begin with. Capital punishment might deter, but it would also have killed the proverbial golden-egg-laying goose — and unlike geese, slaves understood all this, which reduced the credibility of the death threat for a broad range of minor misconduct and shirking. Ironically, for some black offenders, the regime that took shape in the South after the Civil War was even worse. A system of prison chain gangs and leased labor “often bore a striking similarity to the most lurid abolitionist stereotypes of slavery” (p. 92),⁷ and “[i]n 1877-1880, of 285 convicts sent to build a railroad in South Carolina, 128, or 44.9 percent, died” (p. 92). Kennedy grimly quotes the South Carolina warden responsible for these convict laborers: “casualties would have been less if the convicts were property having a value to preserve” (p. 92).⁸

Where does all this history leave us today? On one view, things have not fundamentally changed. On two occasions, Kennedy presents the following sobering statistic: “In 1990, for every 100,000 whites, about 289 were in jail or in prison. For every 100,000 blacks, about 1,860 were in jail or prison” (pp. 23, 134). The decision to use the criminal justice system to pursue a highly punitive war on drugs — a decision that Kennedy suggests may well be a “mistaken” approach in comparison with noncriminal models of drug regulation (p. 386) — has had a particularly devastating effect on black incarceration rates in recent years (p. 351). And so have specific choices made within the broader war. Under the federal Anti-Drug Abuse Act of 1986,⁹ a person possessing a mere fifty grams (less than two ounces) of crack cocaine with an intent to distribute must be sentenced to at least ten years in prison.¹⁰ In contrast, a person possessing powder cocaine with intent to distribute must have at least 5000 grams — 100 times more, by weight — before being hit with the same draconian mandatory minimum sentence.¹¹ Culturally, it appears that crack is the drug of choice for many blacks, while powder is preferred by many whites: “In 1992, 92.6 percent of the defendants convicted for crack cocaine offenses nationally were black and only 4.7 percent white. In comparison, 45.2 percent of defendants sentenced for powder cocaine offenses were white, and only 20.7 percent black” (pp. 364-65). And when we look beyond crime definition and prison incarceration to the ultimate bodily punishment — death — Kennedy points to considerable evidence that the modern system of capital punishment is not

⁷ Kennedy is quoting William Cohen, *Negro Involuntary Servitude in the South, 1865-1940: A Preliminary Analysis*, 42 J.S. HIST. 31, 56 (1976).

⁸ Kennedy draws this quote from Cohen, cited above in note 7, at 56.

⁹ Pub. L. No. 99-570, 100 Stat. 3207 (codified as amended in scattered sections of 18 U.S.C., 21 U.S.C., and 31 U.S.C.).

¹⁰ See 21 U.S.C. § 841(b)(1)(A)(iii) (West Supp. 1997).

¹¹ See *id.* § 841(b)(1)(A)(ii).

color-blind in its effects: all other things being equal, those who kill white victims are far more likely to be sent to death than those who kill blacks (pp. 328–33 & n.51).

But this is only half of the picture, Kennedy argues. In antebellum America, even free blacks were typically ineligible to vote, to hold legislative office, to serve on a jury, and to sit on the bench. The Fifteenth Amendment (formally) changed all of that, and over the last thirty years, America has begun to make good on the true promise of that Amendment. As a result of Congress's transformative Voting Rights Act of 1965¹² (made possible in part by earlier decades of Southern black migration to Northern states where black citizens wielded more political clout), blacks now vote and hold elective office everywhere in America. At the federal level, the Jury Selection and Service Act of 1968¹³ ensures that blacks are part of federal jury pools; at the state level, Supreme Court doctrine has helped spur states to abandon the "key-man" system, in which local jury commissioners had vast discretion to tap the "best" citizens for jury service and to keep blacks off venires.¹⁴ As a result of Supreme Court decisions rendered in the last dozen years, neither a prosecutor nor a defendant is legally entitled to use peremptory challenges to exclude black jurors because of their race.¹⁵ African-American judges now sit on most courts in the country. Urban police departments, long viewed in minority communities as "colonial" and "occupying" forces (pp. 27, 115), are beginning to change their complexion:

By the end of the 1980s, the number of African-American police chiefs had increased to 130, and they served in six of the nation's largest cities (Baltimore, New York, Detroit, Chicago, Philadelphia, and Houston). This unprecedented phenomenon in American history represented a 180-degree change from the second-class status that African-Americans had traditionally held in American law enforcement (p. 301 n.*).¹⁶

In short, the key institutions driving the criminal justice system are no longer white-dominated in the same way that they have been for most of American history. Indeed, many black citizens today believe in getting tough on crime and (if necessary) in building more prisons to permit longer sentences; many black lawmakers have supported and even spearheaded the war on drugs and the special criminal crusade on crack; many black jurors have been participants in the system that has

¹² 42 U.S.C. §§ 1973–1973bb (1994).

¹³ 28 U.S.C. §§ 1861–1869, 1871 (1994).

¹⁴ See, e.g., *Castaneda v. Partida*, 430 U.S. 482, 501 (1977) (holding that racially underrepresentative grand juries generated by a key-man system violate equal protection); *Carter v. Jury Comm'n*, 396 U.S. 320, 339–40 (1970) (affirming an injunction that required jury clerks to stop excluding African-Americans from jury rolls).

¹⁵ See *Batson v. Kentucky*, 476 U.S. 79, 96–98 (1986); *Georgia v. McCollum*, 505 U.S. 42, 57–59 (1992).

¹⁶ Kennedy is quoting W. MARVIN DULANEY, *BLACK POLICE IN AMERICA* 102 (1996).

led to high black incarceration rates; the most prominent black jurist in America, Justice Clarence Thomas, is hardly soft on crime, and it appears that his stance is in line with that of many, many African-Americans today.

All of these facts lead to what is perhaps Kennedy's biggest point: [B]lacks have suffered more from being left unprotected or underprotected by law enforcement authorities than from being mistreated as suspects or defendants, although it is allegations of the latter that now typically receive the most attention.

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... In deciding whether rights have been infringed, ... courts should be careful to avoid conflating the interests of a subdivision of blacks — black suspects, defendants, or convicts — with the interests of blacks as a whole.

Like many social disasters, crime afflicts African-Americans with a special vengeance; at most income levels, they are more likely to be raped, robbed, assaulted, and murdered than their white counterparts. ... More striking is that whereas white victimization rates *declined* as income increased, black victimization rates *rose* at the higher income levels. ... Thus, at the center of all discussions about racial justice and criminal law should be a recognition that black Americans are in dire need of protection against criminality. A sensible strategy of protection should include efforts to ameliorate the social ills that contribute to criminality, including poverty, child abuse, and the deterioration of civic agencies of social support. A sensible strategy of protection should also include, however, efforts aimed toward apprehending, incapacitating, deterring, and punishing criminals.

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... [T]he principal injury suffered by African-Americans in relation to criminal matters is not overenforcement but underenforcement of the laws (pp. x, 11–12 & n.*, 19).

Once again, Kennedy traces the origins of the problem (in this case, underprotection rather than overenforcement) to slave days:

The racial policy of withholding protection from blacks has its roots in slavery. ... Part of the strategy for denigrating all blacks involved depriving them of legal protections against conduct that was deemed criminal when visited upon whites. Hence, in the slave South (the locus of the great mass of the black population in antebellum America), officials decriminalized violence inflicted upon blacks to the extent thought necessary to assert and preserve white supremacy (p. 30).

A core purpose of the 1866 Equal *Protection* Clause was to affirm the rights of black victims of crime; the central idea was not merely to prevent the states from treating black criminal suspects, defendants, and convicts worse than white ones, but also (and perhaps even more

emphatically) to guarantee that black victims of crime receive the same *protection* as white victims.¹⁷ Of course, things didn't quite work out that way, and for the next hundred years, white-dominated police forces, grand juries, and petit juries often contrived to look the other way when blacks were victimized by crime — especially in the South, where racist whites terrorized blacks in a regime marked by lynchings and nooses and burning crosses (pp. 41–69).

But here too, Kennedy suggests that the current landscape is far more complicated. As already noted, central institutions of the criminal justice system — legislatures, police departments, courts, juries — now often include black voices and views. And blacks today are hardly of one mind on these issues. (Nor are whites, or other racial groups, for that matter.) Blacks are disproportionately criminal suspects, defendants, and convicts on the one hand and criminal victims on the other. Much of today's crime is intraracial — white-on-white and black-on-black. Indeed, "four-fifths of violent crimes are committed by persons of the same race as their victims" (p. 19). And more striking still: "In terms of misery inflicted by direct criminal violence, blacks (and other people of color) suffer more from the criminal acts of their racial 'brothers' and 'sisters' than they do from the racist misconduct of white police officers" (p. 20). In support of this perspective, Kennedy invokes Gunnar Myrdal's 1944 classic, *An American Dilemma*, and the influential 1968 Kerner Report:

Law-abiding Negroes point out that [criminal Negroes] . . . are a danger to the Negro community. Leniency toward Negro defendants in cases involving crimes against other Negroes is thus actually a form of discrimination (p. 70 (omission in original)).¹⁸

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The strength of ghetto feelings about hostile police conduct may even be exceeded by the conviction that ghetto neighborhoods are not given adequate police protection.

. . . [S]urveys have reported that Negroes in Harlem and South Central Los Angeles mention inadequate protection more often than brutality and harassment as a reason for their resentment toward the police (p. 71 (omission in original)).¹⁹

Kennedy also points to more recent poll data:

[Professor Paul] Butler exudes keen sympathy for nonviolent drug offenders and similar criminals. By contrast, Butler is inattentive to the aspirations, frustrations, and fears of law-abiding people compelled by cir-

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¹⁷ See generally JACOBUS TENBROEK, *EQUAL UNDER LAW passim* (1965) (documenting this historical purpose).

¹⁸ Kennedy is quoting 1 GUNNAR MYRDAL, *AN AMERICAN DILEMMA: THE NEGRO PROBLEM AND MODERN DEMOCRACY* 551 (1944).

¹⁹ Kennedy is quoting the 1988 version of THE KERNER REPORT: *THE 1968 REPORT OF THE NATIONAL ADVISORY COMMISSION ON CIVIL DISORDERS* 307 (1988).

cumstances to live in close proximity to the criminals for whom he is willing to urge subversion of the legal system. Butler simply overlooks the sector of the black law-abiding population that desires *more* rather than *less* prosecution and punishment for *all* types of criminals. According to data collected by a 1993 Gallup Poll, 82 percent of the blacks surveyed believed that the courts in their area do not treat criminals harshly enough; 75 percent favored putting more police on the streets to combat crime; and 68 percent favored building more prisons so that longer sentences could be given. One would never know from Butler's analysis that a large number of ordinary, grass-roots blacks embrace such views (pp. 305-06 (citation omitted)).

What follows from all this? First, Kennedy suggests that we should hesitate to label a policy "racist" merely because it hurts some blacks, because such a policy may simultaneously help other blacks, who (along with nonblacks) may well have supported the law for legitimate, nonracist reasons. A crackdown on crack hurts (largely black) crack users but may help their (largely black) law-abiding neighbors and may help save a (perhaps largely black) group of youngsters from falling prey to dealers of this devastating drug. Thus, Professor Kennedy rebukes Professor Butler for describing the crack-powder sentencing disparity as an example of "racism":

[O]ne would never suspect from [Butler's] account that when the federal law that [Butler] criticizes was enacted, Charles Rangel, the African-American representative from Harlem, chaired the House Select Committee on Narcotics Abuse and Control and voted in favor of this law as did about half of the members of the Congressional Black Caucus (p. 301).

Another example of the racial complexity of our current condition comes from the debate about racial justice in the administration of the death penalty. Because much murder is black-on-black, to insist that the death penalty be imposed on those who murder blacks with the same statistical likelihood as on those who murder whites could well mean that more black defendants are doomed to die at the hand of the state.

Second, Kennedy's narrative shows special sympathy for the innocent. On this point, the tradeoff between (disproportionately black) criminal defendants and victims dissolves — neither group is well served by a criminal justice machine that devours the innocent. Kennedy reminds readers that, initially, the NAACP under Thurgood Marshall represented only defendants whom the organization believed to be innocent (p. 20). Kennedy narrates with special passion the stories of the Scottsboro Boys and other black defendants convicted and punished despite their evident innocence (ch. 3). And although he spends less time on the matter, he hints at the need for strong measures to protect the rights of innocent citizens victimized by police racism, as exemplified by the infamous chokehold policy of the Los Angeles Police Department between 1975 and 1982 (pp. 113-25).

II. TWO QUIBBLES

I suppose no review — even a rave — would be complete without a quibble or two, so here goes. First, I wish that Professor Kennedy had joined Justice Thurgood Marshall (and many others) in calling upon the judiciary to eliminate the inherently invidious institution of the peremptory challenge. Kennedy strides forcefully toward this conclusion and then, at the very last moment, pulls up short. He powerfully narrates the history of racial exclusion and discrimination in the American jury system. In antebellum America, most states formally barred blacks from the ballot box and the jury box. After Reconstruction, blacks won formal political rights, and thus informal mechanisms of exclusion took over. Many states vested local officials with vast discretion to put together lists of suitable jurors from those citizens whom they deemed sufficiently “upright,” “intelligent,” and of “good character.” Under this key-man system, few blacks were chosen. However, in recent years, the key-man system has withered away — abolished at the federal level by congressional statute in 1968 and largely abandoned by the states (with a little help from Supreme Court doctrine stressing that juries should be drawn from a fair cross-section of the community²⁰). With jury lists now drawn randomly from voting rolls, motor vehicle registration lists, and the like, the main locus of exclusion has shifted to the courtroom itself. And here, as late as 1986 and with the explicit blessing of the Supreme Court, both prosecutors and defendants were allowed to veto, to blackball, an otherwise eligible and proper juror simply because of the juror’s skin color.²¹ Kennedy rightly skewers the hypocritical reasoning offered in support of admittedly race-based peremptory challenges:

The Reagan administration attacked race-based affirmative action on color-blind grounds but supported permitting race-based peremptory challenges as a tool of litigation.

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[Justice] Rehnquist argued that [race-based peremptories] did not invidiously discriminate against blacks because, after all, any person from any group was subject to racially discriminatory strikes — whites, yellows, reds, and browns as well as blacks. Rehnquist’s argument is hauntingly reminiscent of segregationist logic which reasoned that governmental bans on interracial fornication, marriage, or transportation did not invidiously discriminate against blacks because whites, too, were burdened by the same laws (pp. 6–7, 207–08).²²

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²⁰ See, e.g., *Castaneda v. Partida*, 430 U.S. 482, 495–96 (1977); *Taylor v. Louisiana*, 419 U.S. 522, 526–33 (1975).

²¹ See *Swain v. Alabama*, 380 U.S. 202, 221 (1965).

²² For a similar critique of Justice Rehnquist’s argument, see Akhil Reed Amar & Jonathan L. Marcus, *Double Jeopardy Law After Rodney King*, 95 COLUM. L. REV. 1, 50 n.246 (1995).

Kennedy thus applauds the 1986 *Batson v. Kentucky*²³ and the 1992 *Georgia v. McCollum*²⁴ decisions, which forbid the prosecution and the defense, respectively, from keeping a citizen off of a jury simply because of her pigmentation (pp. 227–28).²⁵

Having gone this far, Kennedy confronts the obvious next question: won't many clever lawyers who want to win continue to use race as a factor (perhaps the overwhelming factor) in their exercise of peremptories but claim that their decisions are utterly color-blind? Kennedy seems to admit that this will happen frequently but that it will be very hard to prove in any given case. Thus, Kennedy casts his lot with commentators who favor the total abolition of the peremptory challenge system — a system that, by its nature, invites arbitrariness, stereotypes, and prejudice (p. 229). But then, at the end of the road, Kennedy suddenly stops short and announces that judges "should not . . . take it upon themselves to abolish the peremptory challenge" (p. 230). Why not? Formally and facially, the peremptory challenge system per se is color-blind — but so was the key-man system. Kennedy himself argues forcefully that judges should have abolished the key-man system, and every one of his points seems to apply equally to the peremptory challenge system:

I conclude that, as a prophylactic measure, the Supreme Court should have invalidated the key-man system. First, the key-man system has a baleful history in many locales. It has often been used as a device to exclude people illicitly from the jury box. Second, the subjectivity of the criteria used by the arbiters of the key-man system invites abuse. Third, the legitimate aims of a key-man system can be obtained by procedures less vulnerable to invidious manipulation. For example, if a state wants knowledgeable jurors it can impose an objective test to screen for the knowledge desired. At a certain point, a procedure becomes so subject to corruption and so expensive to monitor that it should be adjudged incompatible with federal constitutional requirements (p. 184).

Elsewhere, I have tried to make the constitutional case against peremptories on grounds ranging far beyond the racial issues at the heart of Kennedy's book,²⁶ but here I am content to quibble with Kennedy

²³ 476 U.S. 79 (1986).

²⁴ 505 U.S. 42 (1992).

²⁵ See *Batson*, 476 U.S. at 89; *McCollum*, 505 U.S. at 59.

²⁶ See AKHIL REED AMAR, *THE CONSTITUTION AND CRIMINAL PROCEDURE: FIRST PRINCIPLES* 170–71 (1997); AKHIL REED AMAR & ALAN HIRSCH, *FOR THE PEOPLE: WHAT THE CONSTITUTION REALLY SAYS ABOUT YOUR RIGHTS* 64–78 (1998). The argument in these pages sweeps beyond race and equal protection principles to encompass broader issues of democratic representation, popular sovereignty, and constitutional structure. In my view, juries should represent the people, not the parties; the jury should function as the democratic lower house of a bicameral judiciary in which judges sit as the upper house. The parties do not handpick the legislature that fashions laws, the grand jury that approves indictments, or the appellate bench that pronounces the law; neither should the parties handpick the petit jury that sits in judgment. All who vote should serve on juries, and each jury should strive to bring together diverse citizens —

on his own terms. He suggests that peremptories can serve a useful purpose in excluding truly oddball jurors — “three-dollar bills,” in his words (p. 230) — who might otherwise escape detection. But the same could be said about the key-man system, and in principle, the for-cause challenge is a much more carefully tailored and less invidious and arbitrary device to deal with the problem. To illustrate, I turn a few more of Kennedy’s sentences (with my brackets) against Kennedy: “After all, jury selection in the context of the adversary process is part of a competition. The opposing attorneys do not simply want impartial [nonoddball] jurors. They each want jurors who will give their side an edge [and thus want to blackball other jurors, oddball or not]” (p. 219). Kennedy also suggests that, after *Batson*, peremptories are not utterly “unconstrained” (p. 230), but surely this cannot be Kennedy’s test. The key-man system was never utterly “unconstrained” either — it was subject to Court rules forbidding explicit racial discrimination. Yet Kennedy himself rejects the idea that this formal (and hard-to-enforce) constraint was constitutionally sufficient to save an inherently vicious and invidious key-man system. Once again, why is the peremptory challenge system any different?

At a couple of points, Kennedy uses language that suggests that he may be especially sympathetic to peremptories in the hands of criminal defendants rather than prosecutors (pp. 207, 228),²⁷ but if so, this sympathy seems at war with his own insights elsewhere in the book. Giving defendants peremptories (many of which will predictably be used in race-based or other invidious but hard-to-detect ways) will no doubt help some innocent defendants, but so would a rule that mandated acquittals for defendants chosen in weekly lotteries. What we need is an argument that peremptories are especially helpful to innocent as opposed to guilty defendants, but Kennedy offers no such argument. In the absence of this argument, peremptories in the hands of defendants, but not prosecutors, might indeed help (disproportionately black) defendants — as would my hypothetical lottery. But what about the (disproportionately black) victims of crime that Kennedy so insistently urges us to remember?²⁸

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rich and poor, black and white, male and female, urban and rural — into a common conversation affirming and nurturing a deliberative democracy.

²⁷ Kennedy seems moderately sympathetic to a proposal to “strongly privilege[] the [criminal] defendant’s choice of venue” (p. 251). Would he support the choice of Klansmen to be tried in all-white areas or the choice of white cops to be tried in Simi Valley? I wonder whether Kennedy’s tentative leanings on this point are fully consistent with his overall analytic argument and historical narrative.

²⁸ To be sure, abolition of peremptories might require rethinking the rule of jury unanimity, but once again, the same could be said about abolition of the key-man system. At one point, Kennedy uses language that seems to link the issue of peremptories to unanimity (p. 228); elsewhere, he chides Professor Butler for not considering how certain changes in jury practice might lead to a rethinking of unanimity (p. 302). The unanimity issue is too large to be addressed in this Review; my own views are set out in *AMAR*, cited above in note 26, at 175–77.

A second quibble. Professor Kennedy endorses the result of the 1986 case *Vasquez v. Hillery*.²⁹ I wonder. In 1962, a California grand jury indicted Booker T. Hillery for what the Supreme Court itself described as the "brutal murder" of a fifteen-year-old girl.³⁰ At the time, grand juries in this California county were handpicked by the sole superior court judge — a kind of key-man system — and these grand juries invariably contained no blacks. Hillery was convicted in a jury trial.³¹ More than twenty years later, his case reached the Supreme Court on a writ of habeas corpus.³² Hillery made no argument that the trial itself was in any way racially improper or otherwise unfair or unreliable.³³ Instead, he argued that, because the grand jury was racially stacked in an unconstitutional manner, it necessarily followed that his conviction must be set aside.³⁴ The Supreme Court agreed in an opinion authored by Justice Marshall.³⁵

Assume for a moment, as does Kennedy, that the California key-man system of grand jury selection in place in 1962 was unconstitutional. Must the result be a rule of automatic reversal? Kennedy says yes but admits that he is troubled by the idea of "offering to guilty defendants the windfall of a new trial" (p. 187). He explains: "This policy does impose a heavy cost; the public pays dearly when persons who have committed crimes delay, minimize, or evade punishment for reasons having nothing to do with their culpability" (p. 188). We might ask why a new trial would be such a "windfall" for "guilty defendants" like Hillery, considering that they can be adjudged guilty again upon retrial, but elsewhere Kennedy explains why retrials held many years later often fail to convict the guilty "because of the accidents that afflict litigation: the dimming of memories, the death of witnesses, the disappearance of physical evidence, and so on" (p. 276).

Why, then, does Kennedy support the *Vasquez* rule of automatic reversal and retrial? He supports it because such a rule will "deter future constitutional violations, the same goal that primarily animates the famous exclusionary rule" (p. 187). On other occasions, I have set out my own critique of the exclusionary rule and the particular brand of (in my view, often shoddy) deterrence logic associated with that rule.³⁶ But here, let me try to bracket as much of that as possible and

²⁹ 474 U.S. 254 (1986).

³⁰ *Id.* at 255.

³¹ *See id.* at 256.

³² *See id.* at 256-57.

³³ *See id.* at 256. Perhaps such an argument could have been made, but the Justices and Professor Kennedy all proceed on the assumption that the trial itself was fair and constitutionally flawless, and I do the same.

³⁴ *See id.*

³⁵ *See id.* at 264.

³⁶ *See* Akhil Reed Amar, *Fourth Amendment First Principles*, 107 HARV. L. REV. 757, 785-800, 811-16 (1994); AMAR, *supra* note 26, at 150-60; Akhil Reed Amar, *Against Exclusion (Except To Protect Truth or Prevent Privacy Violations)*, 20 HARV. J.L. & PUB. POL'Y 457, 457-66 (1997);

quibble with Kennedy on his own terms, as measured by his own observations. A scholar with such deep and heartfelt empathy for victims of crime, who is skeptical of "windfalls" for "guilty defendants" who walk free, grinning, "for reasons having nothing to do with their culpability," should think long and hard before embracing the "famous" exclusionary rule and seeking to extend its logic to other domains. Other remedial approaches exist that lack some of the vicious features of exclusion,³⁷ but Kennedy does not pay them sufficient heed. Thus, he ends up endorsing an approach that fails to do justice to some of his own deepest commitments and most penetrating insights.

Kennedy's "deterrence" one-liner has many other problems as applied to *Vasquez*. By the time the case reached the Supreme Court, the key-man system was ancient history in California — what exactly would springing Hillery deter? Deterrence logic is future-oriented rather than backward-looking; thus, it seems rather inapt on the facts of *Vasquez*. Contrary to Kennedy's framing of the issue, perhaps Hillery's best argument sounded in backward-looking corrective justice: he was entitled to an indictment process free from racial discrimination and was denied this process. I return to this point momentarily, but it is also worth noting that the unconstitutionality at issue in *Vasquez* occurred at the hands of a judge, acting in good faith. If we take seriously legal doctrine under the exclusionary rule that Kennedy himself invokes, the logic of deterrence should only be deployed against police officers and the like, not against judges themselves. This is the explicit teaching of *United States v. Leon*³⁸: when judges err, they should simply be told of their error by appellate courts, and the law presumes that they will then go forth and sin no more.³⁹

This doctrinal difference between wrongs committed outside the judicial system (say, by cops) and wrongs committed inside the system (say, by judges) leads to another difference with important remedial consequences. When a wrong has occurred outside the courtroom, judges acting after the fact ordinarily cannot turn back the clock of

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Akhil Reed Amar, *The Fourth Amendment, Boston, and the Writs of Assistance*, 30 SUFFOLK U. L. REV. 53, 64, 71–72 (1996). Among my many arguments, I assert that the exclusionary rule does violence to constitutional text, history, and structure; is in no way compelled by (and in fact offends) general legal principles; has been conceptually undermined by the logic of important recent cases; deters much less well than suitably crafted alternative remedies; fails to fit the analytic scope of the constitutional violation; is "upside-down" in rewarding the guilty while doing nothing for (or making worse off) the innocent; encourages erroneous "upside-down" thinking elsewhere in constitutional criminal procedure; breeds popular contempt for the Fourth Amendment; inclines judges to deny that the Fourth Amendment was violated in close (and not so close) cases; is insufficiently supple to address problems of over- and underdeterrence; and imposes savage demoralization costs on identifiable victims of crime when they see grinning criminals walk free. (But apart from all that, it is just fine.)

³⁷ See AMAR, *supra* note 26, at 40–43, 150–60.

³⁸ 468 U.S. 897 (1984).

³⁹ See *id.* at 916–17.

time and “rerun” the world (say, by decreeing that cops “unsearch” a wrongly searched house). But when a wrong has occurred within the courtroom, judges can often “rerun” the judicial proceeding, this time without the judicial mistake.

Now look one last time at Hillery’s claim. His trial was (by hypothesis) fair and proper, but his indictment was improper. Why wouldn’t an apt remedy — doing corrective justice to Hillery, “undoing” the wrong, and emphatically affirming the constitutional unacceptability of race discrimination — be to allow California to uphold Hillery’s conviction as long as the state simply reindicted Hillery (in 1986!) by a fairly selected grand jury? In this new grand jury proceeding, missing witnesses, stale evidence, and the like would probably not be major problems, because the proceeding would not need to establish guilt beyond reasonable doubt, but only probable cause; and the proceeding would not need to be constrained by hearsay rules and other technical rules of evidence.⁴⁰ The new grand jury could probably reach a fair verdict merely by reading the transcript of Hillery’s (fair) trial. Professor Kennedy never considers the possibility of reindictment without retrial as an apt remedy in *Vasquez*, but such a remedy seems to fit well with many of the other things that he says in his book.⁴¹

Of course all this is, as advertised, mere quibbling. Thus, I would like to end as I began, with sincere words of praise and admiration. Professor Kennedy has written a great and wise book.

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⁴⁰ See *Costello v. United States*, 350 U.S. 359, 361–63 (1956).

⁴¹ Professor Kennedy does discuss an article by Professor Meltzer that analyzes the remedial and deterrence issues raised by *Vasquez* and other cases (p. 188). In a footnote, Professor Meltzer floats the notion of reindictment without retrial as a possible remedy, see Daniel J. Meltzer, *Detering Constitutional Violations by Law Enforcement Officials: Plaintiffs and Defendants as Private Attorneys General*, 88 COLUM. L. REV. 247, 257 n.43 (1988); however, Meltzer does not pursue the idea, and Kennedy does not mention it.

(COLOR) BLIND FAITH: THE TRAGEDY OF RACE, CRIME, AND THE LAW

Paul Butler*

When you don't know when you have been spit on, it does not matter too much what else you think you know.

RUTH SHAYS¹

I. INTRODUCTION: RANDALL KENNEDY — BETTER AND WORSE

Half of the young black men residing in Washington, D.C. — the capital of the freest nation in the world — are in prison or under the supervision of the criminal courts.² This ugly fact was reported a few months after Randall Kennedy published *Race, Crime, and the Law*.³ The timing would occasion no regret from Professor Kennedy, however — he all but ignored the equally bleak statistics that were available to him at the time he was writing. As far as Kennedy is concerned, the extraordinary rate of incarceration of African-Americans is not a racial issue.

Reading *Race, Crime, and the Law*, which the white legal establishment has hailed as the seminal work on race and crime,⁴ it would be hard to understand why many African-Americans believe they live in a police state. Even upon careful examination of the book's 538 pages, one finds no citation to the extraordinary evidence: half of prison inmates are black;⁵ almost half of the women in state prison are black;⁶ nationally, nearly one-third of young black men are either in

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¹ Ruth Shays, *Ruth Shays*, in DRYLONGSO: A SELF-PORTRAIT OF BLACK AMERICA 27, 27 (John Langston Gwaltney ed., 1980).

² See ERIC R. LOTKE, NATIONAL CTR. ON INSTS. AND ALTERNATIVES, HOBBLING A GENERATION: YOUNG AFRICAN AMERICAN MALES IN WASHINGTON D.C.'S CRIMINAL JUSTICE SYSTEM: FIVE YEARS LATER I (1997).

³ See Cheryl W. Thompson, *Young Blacks Entangled in Legal System*, WASH. POST, Aug. 26, 1997, at B1.

⁴ See Stuart Taylor Jr., *Common Sense on Race and Crime*, LEGAL TIMES, May 26, 1997, at 29 (praising *Race, Crime, and the Law* as a "wise and penetrating new book" with lessons for both liberals and conservatives); see also Chris Klein, *Summertime Snooze: A Peek at Professors' (Serious) Reading Lists*, NAT'L L.J., June 9, 1997, at A14 (noting that the book was at the top of many law professors' summer reading lists).

⁵ See Fox Butterfield, *More in U.S. Are in Prisons, Report Says*, N.Y. TIMES, Aug. 10, 1995, at A14.

⁶ See TRACY L. SNELL, U.S. DEP'T OF JUSTICE, WOMEN IN PRISON: SURVEY OF STATE PRISON INMATES, 1991, at 2 (1994) (stating that, as of 1991, 46% of women in state prison systems were African-American).

prison, on probation or parole, or awaiting trial;⁷ more young black men are in prison than in college.⁸ One might think that those facts would command substantial attention in a treatise that purports to "recount, make vivid, and explain" the circumstances that cause African-Americans to "perceive the criminal justice system with suspicion, if not antagonism" (p. x).⁹ The book's author, however, seems to believe that they are irrelevant.

Kennedy claims, instead, that African-Americans who are convicted of crimes are "bad" blacks who should be carefully distinguished from "good Negroes" so that whites will not impute their malfeasance to the entire African-American community (p. 17).¹⁰ According to Kennedy, the more that law enforcement is directed at African-Americans, the better off the African-American community is. He cautions blacks seeking reform of the criminal justice system to employ only those tactics that have whites' approval.

In this Review, space constraints force me to slight *Race, Crime, and the Law's* praiseworthy historical exegesis in order to focus on some substantial flaws in its analysis of present-day circumstances. Kennedy's enthusiasm for the punishment of African-Americans is misguided, as is his embrace of the value of color-blindness in the criminal law.

The problem with Kennedy's analysis is that it insufficiently weighs both the utility and the cost of the radical law enforcement that African-

⁷ See MARC MAUER & TRACY HULING, *YOUNG BLACK AMERICANS AND THE CRIMINAL JUSTICE SYSTEM: FIVE YEARS LATER* 3 (1995).

⁸ In 1994, approximately 678,300 black males were incarcerated in state and federal prisons and locals jails. See *Black Males in College or Behind Bars in the United States, 1980 to 1994*, POSTSECONDARY EDUC. OPPORTUNITY (Postsecondary Educ. Opportunity, Oskaloosa, Iowa), Mar. 1996, at 9. In the same year, 549,600 black males were enrolled in post-secondary educational institutions. See *id.*; see also MARC MAUER, *THE SENTENCING PROJECT, YOUNG BLACK MEN AND THE CRIMINAL JUSTICE SYSTEM: A GROWING NATIONAL PROBLEM* 8 (1990) (showing that, in 1989, there were more young black men under criminal justice supervision than there were men of all ages enrolled in higher education).

⁹ Indeed, Kennedy believes that he must explain why critics of racial bias in the criminal justice system, who are "relatively weak politically" and "marooned on the left end of the American political spectrum" are worthy of his allocation of "considerable space and energy" (p.12). Kennedy's conclusion is that his largess is warranted because these "marginal" people, who include "the likes of Jesse Jackson, the National Association for the Advancement of Colored People, and the Congressional Black Caucus," do "exert considerable influence within African-American communities" (p. 12).

¹⁰ I use "bad" black and "good Negro" after Kennedy, who notes that the "urge to differentiate between 'good' and 'bad' Negroes is an important feature of . . . 'the politics of respectability'" (p. 17), which he advocates. See *infra* Part II. Kennedy's differentiation is reminiscent of African-American comedian Chris Rock's distinction between "black people" and "niggas." Rock professes his "love" for black people, whom he characterizes as hard-working and self-sufficient, and his "hate" for niggas, whom he suggests are welfare-dependent, irresponsible, and prone to crime. CHRIS ROCK, *Niggas vs. Black People, on ROLL WITH THE NEW* (Dreamworks Records 1997); see also Farai Chideya, *Left out on the Right*, VIBE, Nov. 1997, at 69, 69 (describing Rock as a "black conservative").

Americans experience. *Race, Crime, and the Law* rehearses, persuasively, one part of the racial critique of criminal justice: the criminal law historically has not been administered in a color-blind fashion. Kennedy, however, fails to comprehend the next point: embracing race neutrality now would come at the expense of black people. Ostensibly color-blind selection of whom to punish will perpetuate segregated prisons as surely as ostensibly color-blind selection of whom to educate will return us to segregated universities. I argue that no more compelling argument for color-blindness exists in the former case than in the latter one.

As part of my methodology, I compare Randall Kennedy to Randall Kennedy. Professor Kennedy has written persuasively about the folly of color-blindness in the law. He has also warned of the danger of the "celebratory tradition" of evaluating America's progress toward racial justice.¹¹ He published two important articles on these issues in 1986.¹² Two years later, Professor Kennedy reviewed a Supreme Court case in which the Court refused to find that a Georgia criminal statute violated the Equal Protection Clause absent proof of purposeful discrimination.¹³ Kennedy's criticism of the purposeful discrimination standard was harsh: he complained of the requirement's "hopeless inadequacy as a tool for responding to racial oppression in its subtle modern guises."¹⁴ But what a difference a decade makes. Now, writing about criminal law, Kennedy embraces the same color-blindness that he earlier believed would doom African-Americans.

We therefore uncover substantial disagreement between the two Randalls on such matters as the necessity of government race-consciousness, the importance of examining racial consequences, and the role that white backlash should play in moderating the legal and political strategies of African-Americans.¹⁵ I identify the Kennedy

¹¹ Randall Kennedy, *Race Relations Law and the Tradition of Celebration: The Case of Professor Schmidt*, 86 COLUM. L. REV. 1622, 1622 (1986).

¹² Randall Kennedy, *Persuasion and Distrust: A Comment on the Affirmative Action Debate*, 99 HARV. L. REV. 1327 (1986); Kennedy, *supra* note 11.

¹³ See Randall L. Kennedy, *McCleskey v. Kemp: Race, Capital Punishment, and the Supreme Court*, 101 HARV. L. REV. 1388 (1988).

¹⁴ *Id.* at 1419.

¹⁵ Professor David Cole also has noticed a dichotomy between Kennedy's recent writing about crime and some of his earlier scholarship. See David Cole, *The Paradox of Race and Crime: A Comment on Randall Kennedy's "Politics of Distinction"*, 83 GEO. L.J. 2547, 2550 (1995) (stating that "Kennedy has previously advanced sharp and persuasive critiques of the intent requirement" but that he "now [in Randall Kennedy, *The State, Criminal Law, and Racial Discrimination: A Comment*, 107 HARV. L. REV. 1255 (1995)] abandons that critique and defends the intent requirement"). Kennedy's response to Cole was that "[his] thinking ha[d] indeed evolved since [he] wrote those earlier pieces." Randall Kennedy, *A Response to Professor Cole's "Paradox of Race and Crime"*, 83 GEO. L.J. 2573, 2578 (1995). Other writings by Kennedy further evidence this "evolution." See, e.g., Randall Kennedy, *Racial Critiques of Legal Academia*, 102 HARV. L. REV. 1745 (1989) (criticizing critical race theory). The right to change one's mind is the prerogative of any scholar. Should I deviate from strong views that I have published, I hope that I, like Kennedy, will have the courage to admit it. In this Review, I contrast Kennedy's earlier articles with his

whose scholarship supports the racial critiques as "Randall the Race Man."¹⁶ I refer to *Race, Crime, and the Law*'s Kennedy, who admits to valuing specially the esteem of white people, as "Respectable Randall."¹⁷

Part II of this Review asserts that many of *Race, Crime, and the Law*'s flaws rest in Kennedy's faith in the "politics of respectability." I argue that, contrary to Respectable Randall's belief, this politics fails — both as a mode of analysis of racial injustice and as a means for achieving racial justice. Part III concludes this Review with a lamentation about the loss of an important opportunity. Kennedy is probably the most influential African-American legal scholar. People in a position to make a difference in the fate of half of the young black men in the District of Columbia would surely listen to his prescription. Kennedy's response — "just don't confuse them with me" — is worse than irresponsible.

II. TWO PRINCIPLES OF HIGHLY RESPECTABLE NEGROES

In the first chapter of *Race, Crime, and the Law*, Kennedy explains that his analysis is informed by the "New Politics of Respectability" (pp. 12–28). The basic tenet of this politics is that it is important for blacks to prove that they "are capable of meeting the established moral standards of white middle-class Americans" (p. 17). Kennedy posits that two "core intuitions" of this tenet are important to the study of race and crime. First, "the principle injury suffered by African-Americans in relation to criminal matters is not overenforcement but underenforcement of the laws" (p. 19). According to this intuition, "more burdensome [than the racist administration of criminal justice] now in the day-to-day lives of African-Americans are private, violent criminals (typically black) who attack those most vulnerable without regard to racial identity" (p. 19). Second, in improving criminal justice, blacks should choose tactics that elicit "respect and sympathy rather than fear and anger" (p. 21). When blacks have been inconsiderate of white sensibilities — when, for example, they publicly displayed approval of the acquittal of a

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current work not to expose him as a hypocrite, but rather to demonstrate that, on the merits, he should not have changed his mind. The earlier writings help make my case, because in addition to their superior analysis, they are eloquent and passionate.

¹⁶ "Race man" is a term of art in the African-American community. It refers to those who are "zealots about what we must do to uplift the Negro race." Leon Forrest, *Ralph Ellison Remembered*, CHI. TRIB., Apr. 24, 1994, § 14, at 3 (describing Ellison as a race man whose vision was to "[a]ttack racism and build [both] within the race [and] within the individual"); see also Breana Clarke & Susan Tifft, *A "Race Man" Argues for a Broader Curriculum*, TIME, Apr. 22, 1991, at 16, 16 (containing an interview with self-proclaimed race man Henry Louis Gates, Jr., who defines the title as a "person of letters who writes about African-American culture"). Today, Kennedy certainly would reject the title "Race Man." In a recent essay, Kennedy states that "[n]either racial pride nor racial kinship offers guidance that is intellectually, morally, or politically satisfactory." Randall Kennedy, *My Race Problem — And Ours*, ATLANTIC MONTHLY, May 1997, at 55, 55.

¹⁷ See my discussion of the "politics of respectability" below in Part II.

black criminal defendant, even though they knew the verdict would be unpopular among whites — they have “adversely affected the racial reputation of African-Americans, facilitating indifference to their plight” (p. 21).

Kennedy uses the politics of respectability as the primary instrument in his examination of race, crime, and the law. He believes that this instrument helps him diagnose when there is disease and when there is only hypochondria. He thinks that it helps him recommend the appropriate medicine. Unfortunately, the instrument does not work — it facilitates misdiagnosis, and its prescriptions do not improve the health of the patient. Respectable Randall is, alas, a quack.

In this Part, I describe two arguments about race and crime that Kennedy makes from the politics of respectability, and explain why these arguments fail. The arguments — which I term “two principles of highly respectable Negroes” — are that punishment directed at “bad Negroes” is good for the black community and that African-American strategies for advancement should be circumscribed by the threat of white backlash. I hope to demonstrate that the racial critics to whom these arguments are addressed are more thoughtful — and more persuasive — than Kennedy allows. Their analysis helps us to see race more clearly in the criminal law and to recommend more effective cures.

A. Principle I: The Respectable Negro Is Uplifted When the Bad Black Is Punished

One of the strategies of the politics of respectability “is to distance as many blacks as far as possible from negative stereotypes used to justify racial discrimination against all Negroes” (p. 17). Kennedy claims that there exists a “deeply rooted impulse in African-American culture to distinguish sharply between ‘good’ and ‘bad’ Negroes.” (p. 17).¹⁸ In the criminal context, Kennedy is happy to make this distinction, because no one — not lynch mobs or brutal police officers or false accusers or white supremacist jurors or hanging judges — enrages Kennedy as much as “private, violent criminals (typically black)” (p. 17). Time and again, *Race, Crime, and the Law* proclaims that blacks “suffer more from the

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¹⁸ Kennedy does not provide any citation to support his broad assertion about black culture. The well-known Negro colloquial usage of the word “bad” to denote “good” might cast some doubt on Kennedy’s claim. Indeed, Kennedy himself seems of two minds on the issue: only a few pages after noting the “deeply rooted impulse” to isolate bad blacks (p. 17), Kennedy suggests that many African-Americans embrace the “bad black” criminal (pp. 26–27). He states that “a substantial number” of blacks identify with or admire black outlaws: “Precisely how many is difficult to say. That the numbers are significant, however, is clear” (pp. 26–27). He also quotes with approval Gunnar Myrdal’s observation that solidarity among African-Americans “develops easily in the Negro group, a solidarity against the law and the police,” and that the “arrested Negro often acquires the prestige of a victim, a martyr, or a hero, even when he is simply a criminal” (p. 24). Kennedy notes that, although Myrdal wrote several decades ago, “[n]ow, at the close of the twentieth century, despite notable reforms, this dynamic is still at work” (p. 25).

criminal acts of their racial 'brothers' and 'sisters' than they do from [official racism]" (p. 20). Indeed, "[r]acist white cops, however vicious," are only "minor irritants" when compared to "the black gangs" (p. 20).¹⁹

Accept, for the purpose of analysis, Kennedy's bizarre perception that it is important to compare the injury that African-Americans experience from white racists with the injury that they experience from black criminals. For the same purpose, assume that his calibration is correct: that African-Americans suffer more from the latter injury than from the former. Even with these premises, the case cannot be made for Kennedy's wholesale enthusiasm for the punishment of all those blacks whom the law calls "bad."

One problem is Kennedy's fallacious assumption of a positive correlation between law enforcement and public safety. The vast majority of punishment in the United States is not directed at people who are guilty of the violent crime that is Kennedy's primary concern. Indeed, only three in one hundred arrests in the United States are for serious violent crimes.²⁰ Approximately eighty-nine percent of federal prisoners, and the majority of state prisoners, are incarcerated for nonviolent offenses.²¹ In California, more people have been imprisoned under the "three strikes law" for marijuana possession than for murder, rape, and kidnapping combined.²²

A lack of correlation between most law enforcement and public safety does not prove, however, the charge of the racial critics: that criminal justice is infected with racism. To support this charge, racial critics begin, as *Race, Crime, and the Law* does, with the past. The most informative chapters of *Race, Crime, and the Law* are the two that begin with the word "History." In Chapter 2, "History: Unequal Protection," Kennedy recounts several episodes in which the American criminal justice system has been, in the familiar pun, "just-us" — apartheid justice for white people (pp. 29–75). His thesis is that, historically, African-Americans have lacked the "protection" of criminal law because violence against them — by whites or other blacks — has not been punished (p. 29).²³ In Chapter 3, "History: Unequal En-

¹⁹ Kennedy is quoting Jerry G. Watts, *Reflections on the Rodney King Verdict and the Paradoxes of the Black Response*, in *READING RODNEY KING: READING URBAN UPRISING* 244 (Robert Gooding-Williams ed., 1993).

²⁰ See *THE REAL WAR ON CRIME: THE REPORT OF THE NATIONAL CRIMINAL JUSTICE COMMISSION* 9 (Steven R. Donziger ed., 1996) [hereinafter *REAL WAR ON CRIME*]. The term "serious violent crimes" refers to crimes of violence causing injury. See *id.*

²¹ See *id.* at 17.

²² See Greg Krikorian, *Wilson Hails Results of "3 Strikes,"* L.A. TIMES, Mar. 7, 1996, at B1, B3 (describing a 1996 study that found 192 second or third strikes for possession of marijuana, compared with 40 for murder, 25 for rape, and 24 for kidnapping).

²³ Because Kennedy relies upon utilitarian justifications for punishment, it would have been helpful for him at least to acknowledge the academic debate about whether law can deter violence. See Sanford H. Kadish & Stephen J. Schulhofer, *CRIMINAL LAW AND ITS PROCESSES* 115–19 (6th ed. 1995).

forcement," Kennedy tells stories of discrimination against Negroes involved in the criminal justice process (pp. 76-135). The cumulative teaching of these chapters is that American criminal justice is rooted in white supremacy.

The past, however, is not prologue for Respectable Randall. Kennedy and contemporary racial critics part ways over Kennedy's belief that racism in the criminal justice system is largely a thing of the past. Racial critics argue vehemently that white supremacy still taints the administration of criminal justice in this country. Currently, their most frequently cited example is the disparity, in federal criminal law, between the punishment of crack cocaine offenders and the punishment of powder cocaine offenders. (Crack cocaine is created by cooking powder cocaine with baking soda.) Debate exists over which, if either, form of cocaine is more harmful.

In Chapter 10, "Race, Law, and Punishment: The War on Drugs," Kennedy explores and disputes the charge that the sentencing disparity is racist (pp. 351-86). He describes the legal basis of the disparity:

Under the federal Anti-Drug Abuse Act of 1986, a person convicted of possession with intent to distribute fifty grams or more of crack cocaine must be sentenced to no less than ten years in prison. By contrast, only if a person is convicted of possession with intent to distribute at least 5,000 grams of powder cocaine is he subject to a mandatory minimum [sentence] of ten years — a 100:1 ratio in terms of intensity of punishment. Moreover, under the federal Anti-Drug Abuse Act of 1988, a person caught merely possessing one to five grams of crack cocaine is subject to a mandatory minimum sentence of five years in prison. Crack cocaine is the only drug for which there exists a mandatory minimum penalty for a first offense of simple possession (p. 364 (citations omitted)).

Racial critics would argue that this punishment scheme belongs in Kennedy's chapter on the unequal enforcement of laws against African-Americans. Their primary evidence is, again, statistical and is focused on the skewed effect of the crack laws. In 1993, for example, blacks were 88.3% of federal crack distribution convictions, and whites were only 4.1%.²⁴ In that same year, 32% of federal powder distribution defendants were white, and 27.4% were black.²⁵ Analysts for the U.S. Department of Justice Bureau of Justice Statistics offered some explanation:

Because the imprisonment rate for crack was 99%, the overall imprisonment rates for blacks convicted of trafficking in all kinds of cocaine was higher than for whites. And because the sentences for crack were so much longer than for powdered cocaine (approximately twice as long), the aver-

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²⁴ See U.S. SENTENCING COMM'N, COCAINE AND FEDERAL SENTENCING POLICY xi (1995).

²⁵ See *id.*

age sentences given to all black traffickers were longer than those given to whites.²⁶

Kennedy does not necessarily support the sentencing disparity, but he is exercised by the idea that it is racist. He does not necessarily believe that the law is good — indeed, it might even be “silly” — but he steadfastly holds that the law is racially benign.²⁷ Given the history of white supremacist criminal law that Kennedy details in Chapters 2 and 3, we must question the sense of his color-blind faith in a law that has extraordinarily different consequences for white people and black people.

“[W]hat is racially discriminatory about the crack-powder distinction?” Kennedy wonders (p. 375). His argument is twofold: first, no evidence demonstrates that Congress intended to discriminate against African-Americans in creating the distinction;²⁸ second, locking up black crack dealers probably helps, not harms, the black community.²⁹ The only person burdened by the law is the bad black (pp. 11, 375–76).³⁰

First consider why we should care about the sentencing disparity even though Kennedy finds no evidence of purposeful discrimination. From a moral perspective — as opposed to a legal one — lack of evidence of discriminatory intent is not dispositive proof that a law is racially just. Randall the Race Man reminded us that “[r]acial subordination . . . can be maintained without discrete, episodic, affirmative actions of purposeful discrimination.”³¹ He noted: “Indeed it can be more securely entrenched by habitual patterns of actions and inaction that inflict harms upon blacks without any intentional design whatsoever.”³² In other words, victims are injured by the effect of law, not the purpose of

²⁶ DOUGLAS C. McDONALD & KENNETH E. CARLSON, U.S. DEP'T OF JUSTICE, SENTENCING IN THE FEDERAL COURTS: DOES RACE MATTER? 93 (1993).

²⁷ “There is an important difference between saying that a policy is wrong, or misguided, or mistaken, or imprudent, or even silly and saying that a policy is ‘racist’” (p. 352).

²⁸ Kennedy writes that racial critics have problems with “the proper interpretation of statistics” and that they “seem unaware that a racial disparity is not necessarily indicative of a racial discrimination” (p. 9).

²⁹ Early in the book, Kennedy asks whether “the black population [is] hurt when traffickers in crack cocaine suffer longer prison sentences than those who deal in powdered cocaine” or whether “[it is] helped by incarcerating for longer periods those who use and sell a drug that has had an especially devastating effect on African-American communities” (p. 10). Later, he answers these questions with the assertion that prison is “a burden for those imprisoned and a good for those whose lives are bettered by the confinement of criminals who might otherwise prey upon them” (p. 375).

³⁰ “To the extent that the enhanced punishment for crack offenses falls upon blacks, it falls not upon blacks as a class but only upon a distinct subset of the black population — those in violation of the crack law” (p. 376).

³¹ Kennedy, *supra* note 13, at 1424.

³² *Id.*

law.³³ Therefore, victims ought to care more about eradicating the effect than about comprehending the purpose. If there is a monkey on my back — but not on my neighbor's back — I seek to remove the monkey. I do not need to know why the monkey has attacked me, and not my neighbor, in order to assess the wisdom of removing it (although I might have a clue if, historically, monkeys have attacked people like me and not people like my neighbor). I do not need to prove the monkey's intention to understand that I am freer without the monkey than with it.

Alas, for the legal challenge, if not the moral one, I must prove purposeful discrimination. Randall the Race Man harshly criticized this requirement — its “great failing . . . is its hopeless inadequacy as a tool for responding to racial oppression in its subtle modern guises”³⁴ — but it is the law. Sometimes the Supreme Court has found the moral analysis I describe above — the focus on effect — to be dispositive on the issue of purpose. In these cases, such as *Yick Wo v. Hopkins*,³⁵ *Gomillion v. Lightfoot*,³⁶ and *Shaw v. Reno*,³⁷ the Court divines purpose through an examination of consequence. Indeed, this principle, at least as a starting point for analysis, has the authority of the Equal Protection Clause in the law of jury selection.³⁸

In the case of the federal cocaine law, however, the Court has been unwilling to correlate intent with effect.³⁹ How, then, can one prove discriminatory purpose, especially considering the Race Man's insightful teaching on “the chameleonlike ability of prejudice to adapt unobtrusively to new surroundings and, further, to hide itself even from those firmly within its grip”?⁴⁰

Michael Tonry suggests that we may infer malign purpose from the fact that Congress was aware of the disparate effect that the harsh drug sentences would have on African-Americans, and enacted them nonetheless.⁴¹ Tonry analogizes to the law's concept of “knowledge” for the purposes of criminal responsibility.⁴² In many jurisdictions and, notably, under the Model Penal Code, a person is as culpable for a mind state of knowledge as she is if her mental element is purpose. *Race, Crime, and the Law* does not directly confront this argument, despite Kennedy's ac-

³³ But cf. Richard H. Pildes, *Principled Limitations on Racial and Partisan Redistricting*, 106 YALE L.J. 2505, 2536 (1997) (arguing that majority-minority electoral districts cause “expressive harms” to whites).

³⁴ Kennedy, *supra* note 13, at 1419.

³⁵ 118 U.S. 356 (1886).

³⁶ 364 U.S. 339 (1960).

³⁷ 509 U.S. 630 (1993).

³⁸ See, e.g., *Batson v. Kentucky*, 476 U.S. 79, 94 (1986) (“Proof of systematic exclusion from the venire raises an inference of purposeful discrimination because the ‘result bespeaks discrimination.’”).

³⁹ See *United States v. Armstrong*, 116 S. Ct. 1480, 1487 (1996).

⁴⁰ Kennedy, *supra* note 13, at 1419.

⁴¹ See MICHAEL TONRY, *MALIGN NEGLECT — RACE, CRIME, AND PUNISHMENT IN AMERICA* 4 (1995).

⁴² See *id.* at 4–5.

knowledge of Tonry as a "leading liberal expert on sentencing" (p. 23). Respectable Randall surely would dissent, however, given his reluctance to see discrimination absent the smoking gun. He would argue that the failure to remediate the effect on the black person is different from the intent to hurt her. The Race Man, though, was not so obtuse: "racially oppressive official action" occurs at "deeper layers" not when "decision makers have designs against blacks," but when "decisionmakers leave blacks out of their designs."⁴³ Would Congress establish a law, or the President enforce a policy, that would result in the criminal supervision of one out of every three young white men? The answer is no. The costs — political, economic, social — would be too high.

The Race Man offered another method of proof of purposeful discrimination that is relevant to the cocaine sentencing scheme. In a 1986 article about whether opposition to affirmative action is racist, Randall Kennedy recommended the epistemology of considering the source of the opposition.⁴⁴ Kennedy was critical of the view that the debate about affirmative action occurs "in the context of an overriding commitment to racial fairness and equality shared by *all* the important participants in the debate."⁴⁵ The problem with this approach, according to Kennedy, was that, although "[i]t concedes the presence of prejudice 'out there' in the workaday world of ordinary citizens," it "assumes that 'in here' — in the realm of scholarly discourse and the creation of public policy — prejudice plays no role."⁴⁶

To demonstrate this point, Kennedy examined the motives of the Reagan administration in opposing affirmative action. This is the same Reagan administration that created the war on drugs that has produced the grossly disproportionate incarceration of African-Americans and the crack-powder distinction. Randall the Race Man noted that skepticism about Reagan's goodwill toward blacks was justified:

[Reagan had a] long history of suspect views on racial issues. His active opposition to racial distinctions *benefitting* Negroes is not matched by analogous opposition to racial distinctions *harming* Negroes. Indeed, a

⁴³ Kennedy, *supra* note 13, at 1419.

⁴⁴ See Kennedy, *supra* note 12, at 1341. Kennedy's analysis of the source of the crack-powder distinction emphasizes the role of African-American legislators in supporting the Anti-Drug Abuse Act, which mandated the 100:1 disparity (p. 370). But almost as many black legislators voted against the law as for it (p. 370). Even focusing on the black congressmen quoted by Kennedy, none argued for a distinction between crack and powder, but rather that cocaine offenses be punished more severely (pp. 371-72). Most of these black legislators now disavow support for the harsh disparity. See, e.g., Charles B. Rangel, *Letters to the Editor: Crack Law Is Biased and Flawed*, WALL ST. J., May 13, 1997, at A23 ("Despite the fact that I originally supported the crack sentencing legislation, I now recognize that its application has revealed a strongly biased and flawed statute. My strong advocacy against drug trafficking and abuse does not blind me from my responsibility to correct failed policy, no matter the author.").

⁴⁵ Kennedy, *supra* note 12, at 1337.

⁴⁶ *Id.* at 1338-39.

strikingly consistent feature of President Reagan's long political career is his resistance to practically every major political effort to eradicate racism or to contain its effects.⁴⁷

Strikingly consistent, indeed — and the war on drugs is part and parcel of the consistency. Alternative explanations exist, but those explanations disregard “the political milieu in which debate over affirmative action *and other racial policies* has been waged over the past decade — a period during which there has been a discernible attenuation of public commitment to racial justice and, even more troubling, a startling reemergence of overt racial animosity.”⁴⁸

Respectable Randall defends the criminal justice system against the charge that it unfairly burdens African-Americans by claiming that it only encumbers the bad blacks who commit crime and not the good Negroes who constitute the majority of the African-American community. Unfortunately, even if we accept Kennedy's criteria for good and bad, it is getting harder and harder to know which group is larger. In the young male population of some urban communities, “bad” blacks seem to be more numerous than good ones.⁴⁹ Moreover, if the incarceration of black men continues to increase at the current rate, the majority of African-American men between the ages of eighteen and forty will be incarcerated by the year 2010.⁵⁰ Kennedy's view is that a particular law burdens a group only when the law burdens the majority of that group. Presumably, he would advise racial critics to delay their complaints for another twelve years, until most African-American men are incarcerated.

But in the meantime, the cost of so much law enforcement — particularly incarceration — is severe. It contributes to the growing legal disenfranchisement of African-Americans, to the poverty of children, and to the breakup of the family. One in seven black men of voting age is disenfranchised because of a criminal record.⁵¹ Their incarceration significantly decreases their earning potential.⁵² Incarceration, by making a large number of black males unavailable or undesirable, contributes to the relatively low male-to-female ratio among African-Americans. This

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⁴⁷ *Id.* at 1342.

⁴⁸ *Id.* at 1344 (emphasis added).

⁴⁹ One study found that, in Baltimore, Maryland, 56% of the African-American males between the ages of 18 and 35 were “under criminal justice supervision on any given day in 1991.” See NATIONAL CTR. ON INSTS. AND ALTERNATIVES, *HOBBLING A GENERATION: YOUNG AFRICAN AMERICAN MALES IN THE CRIMINAL JUSTICE SYSTEM OF AMERICA'S CITIES: BALTIMORE, MARYLAND 1* (1992). In Washington, D.C., half of all young black males are under government supervision. See *supra* p. 1270.

⁵⁰ See Butterfield, *supra* note 5.

⁵¹ See THE SENTENCING PROJECT, *INTENDED AND UNINTENDED CONSEQUENCES: STATE RACIAL DISPARITIES IN IMPRISONMENT 12* (1997).

⁵² See *id.* at 13 (citing studies that show significant decreases in wage earning after imprisonment).

community has the lowest such ratio of all American ethnic groups,⁵³ a factor correlated with its higher rate of unwed births.⁵⁴ Families are significantly disrupted when a parent is incarcerated. Sixty percent of male inmates have children, mostly under the age of eighteen.⁵⁵ Children of incarcerated parents perform worse in school and are much more likely to be incarcerated later in life.⁵⁶

Kennedy undervalues the role that race plays in creating the bad black and in selecting him for punishment. He believes that the best explanation for disproportionate black incarceration is disproportionate black criminality. For him, that seems to be the beginning and the end of the debate about the racial consequences of criminal justice. This way of thinking is flawed in two important respects. First, Kennedy ignores significant evidence about the selective enforcement of drug laws in African-American communities.⁵⁷ Second, even if blacks are disproportionately criminal, that fact is not racially neutral. Blacks do not commit crimes because they are black. Indeed, the best explanation of disproportionate black criminality is white racism.⁵⁸ Kennedy fails to comprehend that the same environmental factors that the civil law recognizes as the cause of substandard black achievement deserve recognition in the criminal law. In an article making the case for affirmative action in criminal law, I note that "[t]he exhortation to 'obey the law' should not end the legal and moral response to the black criminal any more than 'study harder' should end the response to the minority college applicant with lower standardized test scores."⁵⁹

Randall the Race Man knew about the folly of color-blind analysis of low achievement by African-Americans. I think that he would recognize about "demerit" in criminal law what he recognized about "merit" in civil law: "it is a malleable concept, determined not by immanent, pre-

⁵³ See David T. Courtwright, *The Drug War's Hidden Toll*, ISSUES IN SCI. & TECH., Winter 1996-1997, at 71, 73.

⁵⁴ See *id.*

⁵⁵ See *id.* at 74.

⁵⁶ See Justin Brooks & Kimberly Bahna, "It's a Family Affair" — *The Incarceration of the American Family: Confronting Legal and Social Issues*, 28 U.S.F. L. REV. 271, 281-82 (1994).

⁵⁷ According to government statistics, African-Americans, who comprise 12% of the population, account for only 13% of drug users, yet make up 74% of those incarcerated for drug use. See Pierre Thomas, 1 in 3 *Young Black Men in Justice System: Criminal Sentencing Policies Cited in Study*, WASH. POST, Oct. 5, 1995, at A1 (describing this study). The drug statistics provide an interesting proof of one of the tenets of the politics of respectability — that blacks are as capable as whites of meeting white middle-class standards of morality. But these statistics also indicate that blacks who fail to meet these standards are more likely than whites to be punished.

⁵⁸ Kennedy does not propose that blacks are genetically prone to crime, but rather states that, "[g]iven the deprivations blacks have faced, it should come as no surprise that, relative to their proportion of the population, blacks are more likely than whites to commit street crimes" (pp. 23-24).

⁵⁹ Paul Butler, *Affirmative Action and the Criminal Law*, 68 U. COLO. L. REV. 841, 862 n.85 (1997).

existing standards but rather by the perceived needs of society."⁶⁰ I think he would cite the argument for a "principle of antisubjugation rather than antidiscrimination."⁶¹ The great civil rights cases, he stated, "forged by the gritty particularities of the struggle against white racism, stand for the proposition that the Constitution prohibits any arrangements imposing racial subjugation — whether such arrangements are ostensibly race-neutral or even ostensibly race-blind."⁶² Now, unfortunately, Respectable Randall reminds me of those whom the Race Man condemned because they "insist on deference [to color-blindness] no matter what its effects upon the very group the fourteenth amendment was created to protect."⁶³

B. Principle II: The Respectable Negro Is "Extra-Careful" Not To Upset Whites

Respectable Randall is greatly concerned with the racial critics' lack of concern for white people's feelings. From the politics of respectability, he cautions:

[F]or a stigmatized racial minority, successful efforts to move upward in society must be accompanied at every step by a keen attentiveness to the morality of means, the reputation of the group, and the need to be extra-careful in order to avoid the derogatory charges lying in wait in a hostile environment (p. 20).

For example, after O.J. Simpson's acquittal, blacks should not have engaged in "triumphalist celebrations," because "such displays would singe the sensibilities of many, particularly whites" (p. 21). Kennedy's concern is that "[a]cting based on the notion that blacks need not be attuned to the way they are perceived by others has adversely affected the racial reputation of African-Americans, facilitating indifference to their plight" (p. 21).

Fear of white backlash guides some of Respectable Randall's opposition to black power in the form of jury nullification. I have proposed that African-American jurors consider acquitting blacks who are guilty of nonviolent, victimless crimes, such as drug possession.⁶⁴ The pro-

⁶⁰ Kennedy, *supra* note 12, at 1333.

⁶¹ *Id.* at 1336.

⁶² *Id.* (footnote omitted).

⁶³ *Id.* at 1335-36.

⁶⁴ See Paul Butler, *Racially Based Jury Nullification: Black Power in the Criminal Justice System*, 105 YALE L.J. 677, 679 (1995) [hereinafter Butler, *Racially Based Jury Nullification*]. Kennedy has other concerns about jury nullification: that it will not improve conditions in the black community and that it is premised on an unduly pessimistic view of American criminal justice (pp. 295-310). Kennedy states that "one-dimensional condemnations of the racial situation in America render[] attractive certain subversive proposals [such as racially selective jury nullification] that are, given actual conditions, foolish, counterproductive, and immoral" (p. 389). I have addressed elsewhere concerns about the effectiveness of nullification as self-help and political protest, including the concerns raised by Kennedy. See Paul Butler, *The Evil of American Criminal Justice: A Reply*, 44 UCLA L. REV. 143, 149 (1996) [hereinafter Butler, *The Evil of American Criminal Justice*]. I believe

posals has two purposes. The most important is self-help — preventing the punishment (especially incarceration) of African-Americans unless a utilitarian justification, such as public safety, exists. The second purpose is political — protesting selective law enforcement in the black community.⁶⁵ Selective nullification makes the point that, as far as law enforcement is concerned, what is good enough for white people is good enough for African-Americans.⁶⁶

Kennedy's apprehension of how whites would react to widespread black jury nullification leads him to urge blacks to choose tactics that, unlike nullification, do not offend the white majority. He has practical concerns: "Already, though, the perception that nullification sentiment is increasing has prompted calls for reaction. An example is the effort to replace the requirement that juries be unanimous in order to convict with a less demanding standard under which convictions could be obtained with several jurors voting for acquittal" (p. 302). He points to the O.J. Simpson case as an example of this phenomenon.

The Simpson case is indeed instructive, but not for the reason Kennedy thinks it is. Months before the Simpson verdict, the fear of a hung jury had sparked calls for nonunanimous verdicts in criminal cases;⁶⁷ doubtless, some of these calls were based on the fear of racially based jury nullification by the black majority. The problem is that the jury verdict — not guilty — was unanimous, and according to the jurors, it was not nullification.⁶⁸ The jurors simply followed their oath to

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that the racial critics' pessimism is warranted by the facts. Since the mid-1970s, serious violent crime in the United States has decreased. See *REAL WAR ON CRIME*, *supra* note 20, at 3. The share of violent crime attributable to African-Americans has remained constant, at approximately 45%. See *id.* at 99–100. But the incarceration of black people has exploded. See *id.* at 103. I do not doubt that at some point American criminal justice will avert its mad enthusiasm for the punishment of blacks — if only because imprisoning so many will prove too expensive — but I do not know if black people can afford to wait that long. Considering the law's historically glacial evolution in the creation of justice for black people, any right-thinking person ought to be wary.

⁶⁵ See *supra* note 57 (describing incarceration rates for African-Americans).

⁶⁶ See Butler, *supra* note 59, at 866 & n.94; Butler, *The Evil of American Criminal Justice*, *supra* note 64, at 148–52.

⁶⁷ See, e.g., *For Sake of Fairness, Stick with Unanimous Verdicts*, USA TODAY, June 12, 1995, at 10A. This editorial, published four months prior to the Simpson verdict, views such calls wryly:

Tonight, the family of Nicole Brown Simpson hopes the nation will remember the first anniversary of Nicole's and Ron Goldman's murders with a candlelight vigil for all victims of violence. Some California lawmakers, though, plan a less laudatory commemoration of the slayings. Prodded by some prosecutors, they aim to make the state the third to allow less-than-unanimous verdicts in jury trials of non-death penalty cases.

Id.

⁶⁸ See, e.g., Edward J. Boyer & Elaine Woo, *Case Had Many Holes, Juror Says*, L.A. TIMES, Oct. 4, 1995, at A1 ("It was garbage in, garbage out . . . There was a problem with what was being given to [prosecutors] for testing from LAPD. We felt there were a lot of opportunities for either contamination of evidence, samples being mixed or stored together." (alteration in original) (quoting juror Lionel Cryer) (internal quotation marks omitted)); Bob Pool & Amy Pyle, *Case Was Weak, Race Not Factor, Two Jurors Say*, L.A. TIMES, Oct. 5, 1995, at A1 ("Mr. Simpson was not guilty. It was not proven. I didn't have enough evidence to convince me." (quoting juror Brenda

acquit unless they were persuaded beyond a reasonable doubt that Simpson was guilty. Nonetheless, many whites responded to the verdict with great hostility. In other words, it was not subversion of the law that sparked white backlash in the Simpson case — it was faithfulness to the law. To the extent that the politics of respectability reifies the respect of white people, it called for the jurors to convict Simpson without regard for the evidence. The African-American prosecutor in the Simpson case apparently is another advocate of these politics. He suggested that the jurors, in acquitting Simpson, should have considered the possibility that white hostility to the verdict would threaten affirmative action.⁶⁹

The Simpson case demonstrates that white backlash is not as rational, and therefore not as amenable to black manipulation, as Kennedy seems to think. Although a nonunanimity requirement would not have prevented Simpson's acquittal, even after the unanimous verdict, the backlash — including the calls for nonunanimous verdicts — has persisted.⁷⁰

The point is that some white hostility to African-Americans' exercise of civil and political power exists, regardless of how they exercise that power. There is no reason, then, for African-Americans to tiptoe around the sensibilities of whites.⁷¹

Kennedy's analysis makes it seem as though the unanimity requirement is a special right that African-Americans have and one that they will lose if they do not act properly. It is safe to say that unanimous juries are required in most states not because they are helpful to blacks, but rather because they are in the interest of the dominant group — whites. As long as this remains the case, unanimous verdicts

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Moran) (internal quotation marks omitted)); *id.* ("[There] wasn't enough evidence or proof." (quoting juror Gloria Rhodes Rossborough) (internal quotation marks omitted)).

⁶⁹ See *Darden Criticizes System, O.J. Jury*, REUTERS, Mar. 14, 1996, available in LEXIS, News Library, U.S. File ("I think that by making this case into a race case and that because of the injustice most people perceive as a result of the verdict, I think they're going to lose affirmative action," said Darden, the only black member of the prosecution team."). Kennedy quotes, with apparent approval, this warning from an anonymous white letter-writer before the Simpson verdict: "When O.J. gets off the whites will riot the way we whites do: leave the cities, go to Idaho or Oregon or Arizona, vote for Gingrich . . . and punish the blacks by closing their day-care centers and cutting off their Medicaid" (p. 302).

⁷⁰ See, e.g., *The O.J. Simpson Case: A Legal Aberration*, S.F. CHRON., Oct. 7, 1995, at A18 ("The Simpson trial and verdict has given rise to a host of quick-fix proposals to reform the courts, including one particularly misguided notion to replace unanimous jury verdicts with 10-to-2 decisions.").

⁷¹ Kennedy warns that black juror nullification would be fodder for prosecutors to exclude blacks from their juries (pp. 302-03); however, many prosecutors already seek such exclusion, not because of concern about black nullification, but rather because of concern about black reasonable doubt, which is of course the legal standard required for conviction. See, e.g., *Batson v. Kentucky*, 476 U.S. 79, 103 (1986) (Marshall, J., concurring) (citing several jurisdictions in which prosecutors peremptorily challenge most black jurors).

will be required. When it is no longer the case, such verdicts will not be required, regardless of what African-Americans want.⁷²

The politics of respectability fails because it is blind to this central point: if African-Americans adapted their political and self-help strategies in order to avert white backlash, they would scarcely achieve any progress at all. No one has argued this point more persuasively than Randall the Race Man. Discussing criticism of affirmative action, he made the following observation:

The most weighty claim is that preferential treatment exacerbates racial resentments, entrenches racial divisiveness, and thereby undermines the consensus necessary for effective reform. The problem with this view is that intense white resentment has accompanied every effort to undo racial subordination no matter how careful the attempt to anticipate and mollify the reaction.⁷³

Because racially based jury nullification is necessary self-help for African-Americans, I share the Race Man's resignation to white anger: "Given the apparent inevitability of white resistance and the uncertain efficacy of containment, proponents of racial justice should be wary of allowing fear of white backlash to limit the range of reforms pursued."⁷⁴

Principle II illustrates the poverty of imagination inherent in the politics of responsibility. The politics limits even the aspirations of minorities. Why should African-American ideals of justice be constrained by what the white market will bear? To paraphrase the feminist maxim, blacks who seek to be equal to whites lack ambition. The Race Man was not nearly so compliant when he urged consideration of the tactic of subversion of law to correct racial injustice. His invitation was not to black jurors, but "most radically" to Supreme Court Justices.⁷⁵ Kennedy boldly claimed that the threat of "complete dissolution of the legal order" is one that "should never be absent from the spectrum of possibilities we implicitly use in evaluating . . . political morality," for "[t]here are regimes that do not warrant continued existence."⁷⁶

The Race Man's courage — his speaking truth to power — encouraged me, his former student, to advocate jury nullification. Though not so radical as urging judges to "explicitly def[y] existing law,"⁷⁷ racially based jury nullification, I hope, will "dismantle the master's house with

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⁷² Cf. Derrick A. Bell, Jr., *Brown v. Board of Education and the Interest-Convergence Dilemma*, 93 HARV. L. REV. 518, 524-27 (1980) (arguing that *Brown* was in part a product of an "interest-convergence" between whites and blacks, a convergence the gradual disappearance of which helps explain waning judicial enthusiasm for enforcing school desegregation).

⁷³ Kennedy, *supra* note 12, at 1330. Indeed, the most vicious white backlash in recent history has occurred not in response to the Simpson case, but rather in response to African-American children seeking to attend integrated schools.

⁷⁴ *Id.*

⁷⁵ Kennedy, *supra* note 11, at 1655-56.

⁷⁶ *Id.* at 1656.

⁷⁷ *Id.* at 1655.

the master's tools."⁷⁸ The master's house, a place where he punishes "bad" blacks and ignores equally bad whites, does "not warrant continued existence."⁷⁹

III. SCHOLARSHIP AND POWER: RESPECTABLE RANDALL'S DERELICTION OF DUTY

This Review begins with one description of criminal justice in the nation's capital. I conclude it with another description. I live in the District of Columbia, in a middle-class, racially integrated neighborhood. Recently, as I walked near my home, I was stopped by the police and questioned about where I lived. After protesting the interrogation — one does not have to reside in a place to walk on public streets — I reluctantly showed the police my home. My word, alas, was not good enough; the police requested proof that I lived there. I refused to display such proof. The police — five officers — refused to leave me until I did. The encounter lasted approximately one hour. It ended when one officer interviewed my neighbor, who confirmed my residence.⁸⁰

The police claimed that they stopped me because they do not often see people walking in my neighborhood. I believe that I was stopped because I am black. I have no way of proving this; the officers also are African-American, a fact that perhaps weakens the racist explanation. If, however, I am right — if my blackness was the reason the officers found me suspicious — the police acted lawfully. Most courts allow the police to use race-dependent assessments of suspicion. Recently, the most vehement racial critic of this law has been Respectable Randall. For him, it is the most significant racial discrimination in criminal justice (p. 387).

Here my difference with Kennedy is one of degree, not kind. I am gratified by Kennedy's embrace of one of the racial critiques but disappointed by his failure to understand its relationship to other concerns of larger consequence. Kennedy believes that, when police use race as a proxy for suspicion, they offend the Equal Protection Clause, which requires color-blindness (pp. 146–50). "This racially disparate treatment is wrong" (p. 387), Respectable Randall opines, and should be changed for two reasons. First, eliminating it would lessen police harassment of blacks, and second, the present practice "nourishes powerful feelings of racial grievance against law enforcement . . . that are prevalent in every strata of black communities," including "elite blacks" (p. 151). As it stands, the law "generates large pools of distrust, anger, and discord" (p. 387).

⁷⁸ Butler, *Racially Based Jury Nullification*, *supra* note 64, at 680.

⁷⁹ Kennedy, *supra* note 11, at 1656.

⁸⁰ The incident occurred, ironically, one evening after I worked late on this Book Review. For a more complete description, see Paul Butler, "Walking While Black": *Encounters with the Police on My Street*, *LEGAL TIMES*, Nov. 10, 1997, at 23.

Race-based suspicion also generates large pools of black criminals. People tend to find the things for which they look. If the police concentrated their enforcement of the drug laws at Harvard Law School (on the theory, say, that law enforcement is a public good and that those students should enjoy much of it), the percentage of Harvard law students under criminal justice supervision would rise appreciably. Special enforcement of these same laws among African-Americans accounts for a large number of those blacks whom Kennedy, and the law, call "bad."⁸¹

This — the most substantial injury of race-based suspicion — escapes the notice of Respectable Randall, as I suppose it must, for this fact exposes the fallacy of his politics. It turns out that respectability, insofar as it requires that one not be a criminal, is a raced concept. It attaches to whites, because they are white, and eludes African-Americans, because they are black. Particularly for drug offenses, whites are not respectable on the ground that they obey the law. African-Americans obey the law just as much, or just as little. Whites are respectable because they do not get caught. Blacks are bad because they get caught more often. In the case of race-based suspicion, which gives the police legal authority to stop and question, the law explicitly aids the maintenance of white supremacist criminal justice. It would be naive to think that the criminal justice system's relationship to white supremacy began and ended with law authorizing the police to make stops based on race.

Kennedy's tunnel vision is particularly vexing because of his status as the nation's preeminent African-American legal scholar. There is an underwhelming number of black authors whose writing is first on law professors' reading lists. The *Race Man* noted that the "inescapable linkage of scholarship and power is especially important when the subject is race relations law," because "whether intended or not, every work . . . educates our moral and political intuitions."⁸²

Publication, then, of Randall Kennedy's *Race, Crime, and the Law* represented an important opportunity for all African-Americans, including the approximately half of all young black men in Washington, D.C., who are in prison or under criminal supervision. Yet publication revealed that Kennedy's main concern with these young men is that he not be confused with them — not by the police and not by white people. Kennedy's book responds to white supremacy by hoping that some blacks can achieve the status of honorary whites. If the strategy were successful on its own terms — if it eliminated the "black elite" victims of white supremacy — it would still be irresponsible, because it would not address the most severe consequence of white supremacy in criminal justice: the gross and disparate punishment of African-Americans. Because

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⁸¹ See Angela J. Davis, *Benign Neglect of Racism in the Criminal Justice System*, 94 MICH. L. REV. 1660, 1675–77 (1996) (describing the relationship between discriminatory law enforcement practices and disproportionate arrest and incarceration of African-Americans).

⁸² Kennedy, *supra* note 11, at 1630–31.

the strategy probably will not succeed — even on its own, unambitious terms — it is tragic.

We need not speculate what the Race Man would say about Respectable Randall, his lost brother. We are blessed by the Race Man's words to another esteemed law professor who did not see white supremacy when it all but knocked him over. In 1986, Professor Kennedy advised that scholarship that "adequately assimilates the feelings and interests of black victims will require the cultivation of new sources of information, the revision of established views, and perhaps most daunting, an empathetic imagination of the suffering inflicted by racial offense."⁸³

This is the project for which Kennedy's community requires his help. We understand his present frustration, for the Race Man counseled that "creating and preserving a memory of suffering . . . is especially crucial but particularly vulnerable . . . to moral fatigue, to the blandishments of 'victor's' history, to specious arguments that defuse outrage by reference to the ubiquity of human injustice."⁸⁴ The Race Man's last words, however, embolden us, the way counsel toward freedom always does: "[w]hatever the difficulties, few things pose more of a moral and intellectual imperative."⁸⁵

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⁸³ *Id.* at 1661.

⁸⁴ *Id.*

⁸⁵ *Id.*

RACES, CRIME, AND THE LAW

Viet D. Dinh*

Randall Kennedy has written an impressive book, one worthy of a scholar "doing the smartest work in the area of race."¹ But because "the racial conflict upon which it mainly focuses is the white-black confrontation" (p. xii), the book misses a golden opportunity to expand the conversation about race to its proper contemporary sphere. Although Kennedy acknowledges the existence of other racial fault lines in American society, he adopts a bichromatic focus on race relations because "it is the racial frontier separating whites from blacks where the difficulties have proven hardest to overcome" (p. xii).

Kennedy's reason for limiting his thorough work to black-white relations is largely historical:

This is the conflict that has served as *the* great object lesson for American law, the conflict that has given birth to much of the federal constitutional law of criminal procedure, and the conflict that remains the most pervasive and volatile point of racial friction within federal and state court-houses (p. xii).

The historical dominance of the bichromatic vision of race relations is incontrovertible.² The shameful specter of slavery still haunts many conversations about race,³ and the civil rights movement centered on black struggles against white oppression.

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¹ Chris Klein, *Summertime Snooze: A Peek at Professors' (Serious) Reading Lists*, NAT'L L.J., June 9, 1997, at A14 (quoting Paul Brest) (internal quotation marks omitted).

² Kennedy is not alone in focusing on the black-white conflict; almost every major book on race in recent years has done so. See, e.g., JONATHAN COLEMAN, *LONG WAY TO GO: BLACK AND WHITE IN AMERICA* (1997); DAVID K. SHIPLER, *A COUNTRY OF STRANGERS: BLACKS AND WHITES IN AMERICA* (1997); STEPHAN THERNSTROM & ABIGAIL THERNSTROM, *AMERICA IN BLACK AND WHITE: ONE NATION, INDIVISIBLE* (1997). Some notable attempts to expand the conversation include Jim Chen, *Unloving*, 80 IOWA L. REV. 145 (1994); Viet D. Dinh, *Multiracial Affirmative Action*, in *DEBATING AFFIRMATIVE ACTION: RACE, GENDER, ETHNICITY, AND THE POLITICS OF INCLUSION* 280-89 (Nicolaus Mills ed., 1994); Cynthia Kwei Yung Lee, *Race and Self-Defense: Toward a Normative Conception of Reasonableness*, 81 MINN. L. REV. 367 (1996); Alexandra Natapoff, *Madisonian Multiculturalism*, 45 AM. U. L. REV. 751 (1995); Symposium, *Race and Remedy in a Multicultural Society*, 47 STAN. L. REV. 819 (1995); and Eric K. Yamamoto, *Critical Race Praxis: Race Theory and Political Lawyering Practice in Post-Civil Rights America*, 95 MICH. L. REV. 821 (1997). The second of these attempts is admittedly notable only to its author. See generally Louis Michael Seidman, *This Article Is Brilliant/This Article Is Stupid: Positive and Negative Self-Reference in Constitutional Practice and Theory* (Dec. 1, 1997) (unpublished manuscript, on file with the Harvard Law School Library).

³ For example, when Justice Stevens dissented from the Supreme Court's validation of a hiring practice that had a disparate impact on minority workers in *Wards Cove Packing Co. v.*

To say that the black-white conflict has dominated the history of race relations, however, does not mean that it is the only dynamic that matters. Other racial divisions have shaped the current racial climate.⁴ Our present society is multiracial, and it will likely be increasingly so in the future.⁵ To acknowledge the importance of a past of racial discrimination, conflict, and progress, as I do, is not to contend that present conditions and concern for the future should be neglected in formulating race policy. Kennedy limits his analysis to the historical past, but his policy prescriptions operate prospectively in the future, which admits of no such limitations. Conversations about race, while recognizing the history of biracial conflict and dialogue, should also acknowledge the multiracial reality of today and tomorrow.

This Review expands Kennedy's work beyond the black-white paradigm and evaluates his analysis in a multiracial context. Part I examines the historical assumption that ours was a biracial society and explores the complications created when persons who were neither black nor white tried to ally themselves with the dominant white class. Part II defends, based on the recognition that ours is a multiracial society, the principle of racial neutrality that underlies much of Kennedy's policy prescriptions. Part III explores how a multiracial focus informs the meaning of "reasonableness" in criminal law and procedure. In the end, this Review is much less a critique than an affirmation of Kennedy's central theses. But it affirms for different (or at least additional) reasons and analyzes without restriction, with the hope that Kennedy's core contributions will be recognized in the broader context of our multiracial society.

I. THE BIRACIAL SIMPLIFICATION

Kennedy aptly begins his history of race and crime by observing that, in order to maintain slavery, the legal system licensed white slave owners to subjugate their black slaves, even when the mechanisms of control included murder, battery, and rape (pp. 30-36). Of course, even in this early period, things were not so clearly black and white; Native Americans also occupied the land. Conveniently, the justifications for dominating the conquered natives paralleled those needed to validate slavery. In *Johnson v. McIntosh*,⁶ the first Native American

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Atonio, 490 U.S. 642 (1989), he summoned the image of a "plantation economy" of slaves, *id.* at 664 n.4 (Stevens, J., dissenting), even though the affected nonwhite workers were of Samoan, Chinese, Filipino, Japanese, and Alaska Native descent, *see id.* at 663 n.4.

⁴ Kennedy recognizes this fact (p. xii) and discusses some incidents and cases that did not involve blacks (e.g., pp. 37 n.*, 138-40, 355). Except for one instance (pp. 244-45), however, he does not relax his bichromatic assumption or explore the implications of his observations in a multiracial context.

⁵ See Deborah Ramirez, *Multicultural Empowerment: It's Not Just Black and White Anymore*, 47 STAN. L. REV. 957, 960-62 (1995).

⁶ 21 U.S. (8 Wheat.) 543 (1823).

land claims case, Chief Justice John Marshall stated plainly that "title by conquest is acquired and maintained by force."⁷ According to Chief Justice Marshall, the bellicose nature of the natives rendered the general norms governing the conqueror and conquered "incapable of application," and new laws had to be developed to protect the white inhabitants, however these laws might have been "opposed to natural right, and to the usages of civilized nations."⁸ The white colonists' attitudes toward Native Americans thus converged with their policies toward African slaves, and some laws of racial exclusion expressly grouped Indians in the same class as blacks.⁹

The peopling of America with other nonwhites complicated the mechanics of racial exclusion, and the law adapted by adopting the bi-racial simplification. Efforts by nonblack minorities to be on the winning side of the black-white divide, either to escape the burdens of being black or to reap the benefits of being white, were generally unsuccessful.¹⁰ Even in the few circumstances in which blacks were accorded a legal benefit, such advantages did not extend to nonblack minorities. For example, in *Ozawa v. United States*,¹¹ a Japanese man living in the United States sought citizenship under a statute that granted naturalization rights to "aliens, being free white persons, and to aliens of African nativity and to persons of African descent."¹² The Supreme Court rejected the petitioner's argument that he was a "free white person,"¹³ holding that "the words 'white person' are synonymous with the words 'a person of the Caucasian race.'"¹⁴ Less than two months later, Bhagat Singh Thind, a "high caste Hindu, of full Indian blood,"¹⁵ argued that, because he was a Caucasian, he was entitled to naturalization under the same statute at issue in *Ozawa*.¹⁶ The Court also rejected Thind's argument, holding that the phrase "free white person" is "synonymous with the word 'Caucasian' only as that word is popularly understood," an understanding that did not include

⁷ *Id.* at 589.

⁸ *Id.* at 591; see also *Cherokee Nation v. Georgia*, 30 U.S. (5 Pet.) 1, 18 (1831) ("[T]he idea of appealing to an American court of justice for an assertion of right or a redress of wrong, had perhaps never entered the mind of an Indian or of his tribe. Their appeal was to the tomahawk . . .").

⁹ See, e.g., *infra* p. 1292. Indeed, prior to the Civil War, Native Americans and blacks were generally grouped together in both common parlance and census classifications as "colored." See JACK D. FORBES, *AFRICANS AND NATIVE AMERICANS: THE LANGUAGE OF RACE AND THE EVOLUTION OF RED-BLACK PEOPLES* 263 (2d ed., Univ. of Ill. Press 1993) (1988).

¹⁰ See *infra* pp. 1292-93.

¹¹ 260 U.S. 178 (1922).

¹² *Id.* at 190.

¹³ *Id.* at 198. Counsel argued: "The Japanese are 'free.' They, or at least the dominant strains, are 'white persons,' speaking an Aryan tongue and having Caucasian root stocks; a superior class, fit for citizenship." *Id.* at 185.

¹⁴ *Id.* at 198.

¹⁵ *United States v. Thind*, 261 U.S. 204, 204 (1923).

¹⁶ See *id.* at 205-06.

East Indians.¹⁷ These and other consistent rejections suggest that the law's historical underprotection of blacks, so amply recounted by Kennedy, also resonates for other racial minorities.

But something else was also going on. Nonblack minorities, in seeking to exploit the black-white paradigm to their advantage, often distinguished themselves from and at times expressly denigrated blacks. Nascent racial fault lines emerged when the biracial assumption confronted a multiracial reality. Consider *People v. Hall*.¹⁸ In 1853, based on the testimony of one Caucasian and three Chinese witnesses, a jury convicted George Hall of murder and sentenced him to death.¹⁹ Hall argued to the California Supreme Court that the testimony of the Chinese witnesses was barred by the following statutory provision:²⁰ "No black or mulatto person, or Indian, shall be permitted to give evidence in favor of, or against, any white person."²¹ The court agreed and invalidated Hall's conviction.²² First, the court held that the Chinese were included in the category of "Indian."²³ But even if the definition of "Indian" did not encompass Chinese persons, the meaning of black "must, by every sound rule of construction, exclude every one who [was] not of white blood."²⁴ The reason for banning the testimony of blacks and Indians (that a white person should not be condemned by the words of an inferior) applied equally to Asians, who were simply "the more degraded tribes of the same species" of colored people.²⁵

The vehement Chinese response to *Hall* signaled the complications of grafting a biracial simplification onto a multiracial reality. An open letter from a Chinese merchant to the governor of California was no-

¹⁷ *Id.* at 214-15.

¹⁸ 4 Cal. 399 (1854). Kennedy briefly discusses this case in the context of Civil War-era statutes prohibiting blacks from testifying against whites (p. 37 n.*).

¹⁹ See Charles J. McClain, Jr., *The Chinese Struggle for Civil Rights in Nineteenth Century America: The First Phase, 1850-1870*, 72 CAL. L. REV. 529, 548-50 (1984). For a complete history of the case, see CHARLES J. MCCLAIN, *IN SEARCH OF EQUALITY: THE CHINESE STRUGGLE AGAINST DISCRIMINATION IN NINETEENTH-CENTURY AMERICA* 20-24 (1994).

²⁰ See *Hall*, 4 Cal. at 399.

²¹ Act of Apr. 16, 1850, ch. 99, § 14, 1850 Cal. Stat. 229, 230, amended by Act of Mar. 18, 1863, ch. 70, 1863 Cal. Stat. 69, repealed by omission from codification CAL. PENAL CODE § 1321 (1872) (officially repealed by Act of Mar. 30, 1955, ch. 48, § 1, 1955 Cal. Stat. 488, 489).

²² See *Hall*, 4 Cal. at 404-05.

²³ See *id.* at 402. Chief Justice Murray recalled that, when Christopher Columbus landed, he mistakenly thought that he had reached Asia, and had dubbed the native inhabitants "Indian." See *id.* at 400. He assumed that, when the legislature enacted the law, it was disposed to this meaning of the word, which included all peoples of Asia. See *id.* He further noted that, because "[a]lmost every tribe has some tradition of coming from the North," it was reasonable for the legislators to assume that the ancestors of Native Americans were Asiatics who crossed Behring's Straits. *Id.* at 401. Chinese witnesses, therefore, should be included in the statute's prohibition against Indian testimony. See *id.* at 402.

²⁴ *Id.* at 403.

²⁵ *Id.*

table not only for its anger, but also for its own racial stratification theory:

[O]f late days, your honorable people have established a new practice. They have come to the conclusion that we Chinese are the same as Indians and Negroes, and your courts will not allow us to bear witness. And yet these Indians know nothing about the relations of society; they know no mutual respect; they wear neither clothes nor shoes; they live in wild places and [in] caves.²⁶

This argument was echoed by the plaintiff in *Gong Lum v. Rice*.²⁷ Gong Lum, a Mississippi resident of Chinese descent, sued the local school district to obtain permission for his American-born daughter to attend the white school instead of the colored one.²⁸ Lum's argument was simple: "'Colored' describes only one race, and that is the negro."²⁹ Mississippi's system of segregation protected the white race from the danger of mixing with blacks. According to Lum, then, equal protection required that "[t]he white race . . . not legally expose the yellow race to a danger that the dominant race recognize[d] and, by the same laws, guard[ed] itself against."³⁰ The Court rejected this argument, holding that the creation and definition of segregated school systems were within the power of the state legislature, without constitutional implications.³¹

The history of these cases complicates the biracial paradigm and suggests that other, more subtle fault lines divided the various racial minorities. The common strand running through these cases is a nascent conflict among members of the minority races; each was attempting to align itself with the winning side, to be counted as white by distinguishing itself from other minorities and at times even explicitly denigrating them. The intuition behind this strategy is easy to understand: when the law takes account of race and many races exist, each race will attempt to use the racial classifications to its advantage. The next Part generalizes this intuition into a defense of racial neutrality in a multiracial society.

²⁶ LAI CHUN-CHUEN, REMARKS OF THE CHINESE MERCHANTS OF SAN FRANCISCO UPON GOVERNOR BIGLER'S MESSAGE 5 (W. Speer trans., 1855), *quoted in* McClain, *supra* note 19, at 550 (alterations in McClain).

²⁷ 275 U.S. 78 (1927).

²⁸ *See id.* at 78.

²⁹ *Id.* at 79.

³⁰ *Id.* In the first California Supreme Court case to test the exclusion of Chinese testimony under the Fourteenth Amendment, a partially black person successfully argued that he would be denied equal protection if Chinese witnesses were permitted at his trial but not at the trial of white defendants. *See People v. Washington*, 36 Cal. 658, 666-67 (1869).

³¹ *See Gong Lum*, 275 U.S. at 85-86.

II. MULTIRACIAL NEUTRALITY

Infusing Kennedy's careful analysis of criminal law and procedure is a deep respect for a vision of racial neutrality that his parting words make explicit: "the uncompromisable ideal of treating all persons equally regardless of race, an aspiration best sought by responding to persons strictly on the basis of conduct not color" (p. 390). Embracing the attitude that "all persons and all groups [should] be accorded equality before the law with no privileged or subordinated castes" (p. 136), Kennedy devotes much of his analysis to overcoming this vision's historical antagonist — "an insistence that, at bottom, the United States of America is, and should remain, a white man's country" (p. 136).

However, his vision of racial neutrality faces a challenge not only from those who seek to assert white supremacy, but also from those who advocate color consciousness to ensure adequate racial representation. Kennedy's historical analysis justifies racial neutrality as a defense against white supremacy but does not answer the challenge posed by the new color consciousness. At various points, Kennedy does look beyond history and defend racial neutrality as a prophylactic against the dangers of discrimination (p. 151) and of "producing or reinforcing resentments, feelings of superiority and inferiority, and incentives favoring sentiments of racial kinship and solidarity" (pp. 231-32). This Part bolsters Kennedy's analysis and offers an additional defense of racial neutrality against the alternative of racial pluralism, a defense predicated upon the recognition that ours is a multiracial society.

The Equal Protection Clause of the Fourteenth Amendment, as interpreted by the Supreme Court, guarantees an individual the right to be free from governmental discrimination on the basis of race, except when racial classifications are narrowly tailored to further a compelling governmental interest.³² The Court has offered little guidance regarding which governmental interests are sufficiently compelling to justify abrogation of the equal protection norm.³³ However, if we take seriously the premise that racial equal protection is an individual

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³² See, e.g., *Adarand Constructors, Inc. v. Peña*, 515 U.S. 200, 228-30, 237 (1995).

³³ See Stephen E. Gottlieb, *Compelling Governmental Interests: An Essential but Unanalyzed Term in Constitutional Adjudication*, 68 B.U. L. REV. 917, 932-37 (1988). See generally *Conference on Compelling Government Interests: The Mystery of Constitutional Analysis*, 55 ALB. L. REV. 535 (1992) (containing comments by leading scholars and practitioners on governmental interests analysis).

right,³⁴ then at the very least, governmental action cannot, without further justification, burden one racial group. The question thus becomes what justification is sufficient to validate racially discriminatory governmental action.

Here the analysis shifts from the nature of the right — group versus individual — to the strength of the right. Although the right to racial equal protection is not absolute (otherwise a compelling interest analysis would be unnecessary), it is at least of some constitutional stature. Arguments about the necessity and wisdom of some governmental policy, however strong they may be, are not enough to abrogate a constitutional right. The justification for such abrogation must derive from a governmental policy that seeks to affirm or advance other important constitutional rights and values.³⁵

The classic example of such a justification is one that seeks to remedy past violations of other individuals' right to equal protection. In evaluating this kind of action, we need not even assess the relative stature of the rights at issue; they are the same right. Because the norm of equal protection has been abrogated in the past, any but the most formalistic conception of equality would justify a deviation from the norm of equal treatment to restore the victims to their rightful position.

But here we encounter the problem of victim specificity. Group remedies could be thought to contradict the premise that the Equal Protection Clause guarantees *individual* protection against group-based distinctions.³⁶ This is a powerful, but ultimately unavailing, argument. The remedial goal is to place the individual in the position she would have occupied absent the constitutional violation — that is, absent the unjustified group classification. Because the wrong was group-based, the remedy must reverse the group classification and work backwards toward the point of individual parity. Moreover, the group burdened by the proposed racial classification must be the same group that benefited from the earlier equal protection violation.

In a biracial society, defining the relevant groups is simply a matter of drawing lines at different levels of generality. At one extreme, all past actions of the dominant group could be understood to violate the norm of equal protection, and thus all governmental actions seeking to benefit the minority group could be viewed as remedial ones.³⁷ At the

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³⁴ See generally Charles Fried, *The Supreme Court, 1989 Term—Comment: Metro Broadcasting, Inc. v. FCC: Two Concepts of Equality*, 104 HARV. L. REV. 107, 107–12 (1990) (discussing the merits of equal protection as an individual, as opposed to group, right).

³⁵ See, e.g., Kate Stith, *Government Interests in Criminal Law*, 55 ALB. L. REV. 679, 680–83 (1992).

³⁶ See, e.g., *Adarand*, 515 U.S. at 239 (Scalia, J., concurring in part and concurring in the judgment); *Missouri v. Jenkins*, 515 U.S. 70, 137 (1995) (Thomas, J., concurring).

³⁷ See *Regents of the Univ. of Cal. v. Bakke*, 438 U.S. 265, 369 (1978) (Brennan, White, Marshall, and Blackmun, JJ., concurring in the judgment in part and dissenting in part).

other extreme, one could insist on particularized showings of individual violations and direct harms.³⁸ In the middle is the entire range of governmental actions, and the Court's jurisprudence on the procedural aspects of strict scrutiny attempts to draw the line at the appropriate level of generality.³⁹

In a multiracial society, however, the use of racial criteria suffers from jurisprudential and practical infirmities that may be insurmountable. First, the allocation of relative fault and compensatory desert among the various racial groups may be impossibly complicated. Second, imprecisions in the identification and definition of racial groups raise a host of hard questions that may take away any practical value of racial classifications. Finally, the use of racial criteria engenders resentment and conflict among minority racial groups that may exacerbate rather than salve the wounds of racial injustice in our society. I discuss each point in turn.

Relaxing the assumption that only two relevant groups exist complicates the justifications for racial classifications. The existence of nonblack victims of past discrimination requires some differentiation of the relative scope and extent of each racial group's claim to compensatory justice. Even if such calibration is possible, we must assess the culpability of the groups that the proposed racial classification disadvantages. In a multiracial society with limited resources for government assistance, law enforcement, and legislative action — in short, for protection of the law — classifications that benefit one group necessarily burden the others. Proponents of such racial classifications must justify to the people who are burdened why their individual rights to equal protection are being abrogated. This justification requires both vertical line-drawing as to the level of generality of fault and harm and a horizontal calculation of relative fault and compensatory entitlements among various racial groups.

Any group classification also raises problems of indeterminacy with respect to the definition and composition of the group. The problem exists even in a biracial society, because the ethnic and cultural diversity within each race highlights the artificiality of racial groupings. The problem becomes intractable, however, in a society in which there exists a multitude of different racial groups, each with its own ethnic and cultural subgroups. Kennedy highlights this indeterminacy in his discussion of the racial composition of juries, an instance in which he departs from the biracial paradigm:

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³⁸ See *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469, 526 (1989) (Scalia, J., concurring in the judgment).

³⁹ See, e.g., *J.A. Croson Co.*, 488 U.S. at 500 (requiring a "strong basis in evidence" of a violation (quoting *Wygant v. Jackson Bd. of Educ.*, 476 U.S. 267, 277 (1986)) (internal quotation marks omitted)); see also *Wygant*, 476 U.S. at 286 (O'Connor, J., concurring in part and concurring in the judgment) (demanding a "firm basis for believing that remedial action is required").

In an increasingly multiracial society, controversies over racial classifications will become even more complex, frequent, and vexing. What does the judge do about the person who is part Asian and part black? Is such a defendant entitled to a minimum quota of Asian-Americans or a minimum quota of African-Americans? Is an Afro-Asian juror racially similar to a "plain" African-American? Is a Latino who traces his heritage back to Mexico "racially similar" to a Latino who traces his heritage back to Puerto Rico? Is a person who traces his heritage back to China "racially similar" to an individual who traces his heritage back to Vietnam (p. 244)?

The appeal of group criteria is that they are easier and less costly to administer than individualized determinations. In a multiracial society, however, the multiplicity and complexity of racial identifications raise serious questions as to the continuing viability of this rationale.

Finally, the use of racial criteria in a multiracial society has the potential to ignite and fuel tension and conflict among various racial groups.⁴⁰ Such tension arises in part from the complications outlined above: the difficulty of providing sufficient justification for deviations from the norm of equal protection and the practical problems of defining relevant racial groupings. More fundamentally, tension results simply from the competition among racial groups for benefits conferred by color-conscious governmental policies. To highlight the existence of interethnic conflict is not, of course, to deny that white discrimination remains the major problem in race relations or that there is great potential for racial harmony.⁴¹ Whatever the latent causes of racial prejudice in our multiracial society, the task is to minimize the effects of such racist attitudes in order to prevent them from igniting racial conflict. Those effects are exacerbated, not minimized, when racial competition is encouraged by state action without adequate justification and with ill-defined parameters.

In the end, I think the governmental use of racial criteria in a multiracial society poses questions that are intractable and obstacles that are insurmountable. The most practical solution to the multiracial dilemma is simply to refrain from using race as a basis for state action. Indeed, the Supreme Court has explicitly acknowledged the multiracial complexities of our society and has endorsed a principle of racial neutrality in an attempt to ward off the danger of interethnic conflict.⁴² Racial neutrality, of course, is not the only answer, but I think that it is the best of the available alternatives.

⁴⁰ See Ramirez, *supra* note 5, at 969-74; J. Harvie Wilkinson III, *The Law of Civil Rights and the Dangers of Separatism in Multicultural America*, 47 STAN. L. REV. 993, 1016-18 (1995); Alexandra Natapoff, Note, *Trouble in Paradise: Equal Protection and the Dilemma of Interminority Group Conflict*, 47 STAN. L. REV. 1059, 1063 (1995).

⁴¹ See Charles R. Lawrence III, *Foreword: Race, Multiculturalism, and the Jurisprudence of Transformation*, 47 STAN. L. REV. 819, 829-35 (1995).

⁴² See *Adarand Constructors, Inc. v. Peña*, 515 U.S. 200, 227-29, 235-36 (1995); *Shaw v. Reno*, 509 U.S. 630, 647-49, 657 (1993). By racial neutrality, I mean that race is not used except as a narrowly tailored means to advance a compelling government interest. See *supra* pp. 1294-96.

One alternative to racial neutrality is to take full account of race to achieve racial justice. Eric Yamamoto criticizes the Supreme Court's antidiscrimination jurisprudence precisely because it does not "interrogate racial identities or the history of racial subordination."⁴³ For Yamamoto, the Court's emphasis on multiracial conflict, combined with its insistence on racial neutrality, points to an inherent contradiction borne of complacency: "Implicit in this contradictory recognition-nonrecognition of interracial dynamics is the decision not to develop a meaningful interracial jurisprudence."⁴⁴ This criticism, however, misses the point. Racial neutrality *is* an interracial jurisprudence. One solution to racial conflict is perhaps the most obvious: stop taking race into account. The contradiction in this position arises only if one insists on the proposition, itself fraught with internal tension, that one can only solve racial problems by resorting to racial classifications.⁴⁵

Yamamoto proposes the antithesis to racial neutrality in the law, "a view of courts as sites of, and participants in, 'cultural performances' concerning outsider challenges to existing social and legal arrangements."⁴⁶ According to Yamamoto, the players in these cultural performances should adopt a critical race praxis, which "combines critical pragmatic socio-legal analysis with political lawyering and community organizing for justice practice[d] by and for racialized communities."⁴⁷ These are worthy goals indeed, but they do not address the fundamental problems posed by race consciousness in a multiracial society. The analysis necessary to justify the use of race, as outlined above, involves indeterminate and perhaps indeterminable allocations of rights and responsibilities along multiple axes. What Yamamoto terms "more or less an ordinary investigation of a legal claim"⁴⁸ is in fact quite an extraordinary jurisprudential, historical, and sociological undertaking. And the call to action on behalf of the racialized communities ignores the possibility that such action may be directed at or operate against other racial groups, thereby exacerbating rather than alleviating the problem. The institutionalization of race in the legal structure promises to engender a perpetual conflict, with little hope for moving beyond race to the ideal of equality and accommodation.

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⁴³ Yamamoto, *supra* note 2, at 861.

⁴⁴ *Id.*

⁴⁵ To be sure, the Court is susceptible to the criticism that its application of the principle of racial neutrality is inconsistent. As Kennedy points out, the Court has insisted on racial neutrality in affirmative action and voting rights cases but still permits police stops and searches based on racial criteria (p. 160). I think this criticism is well-founded, and as I discuss in Part III, racial neutrality must be consistently applied across the board.

⁴⁶ Yamamoto, *supra* note 2, at 871 (citing Eric K. Yamamoto, Moses Haia & Donna Kalama, *Courts and the Cultural Performance: Native Hawaiians' Uncertain Federal and State Law Rights to Sue*, 16 U. HAW. L. REV. 1 (1994)).

⁴⁷ *Id.* at 875.

⁴⁸ *Id.* at 878.

Among the most interesting and candid answers to the multiracial dilemma is that of "Madisonian multiculturalism."⁴⁹ Heeding the admonition of *The Federalist No. 10* that "[t]he latent causes of faction are . . . sown in the nature of man,"⁵⁰ Alexandra Natapoff argues that it is futile to ignore race, "one of the great causes of faction in American history."⁵¹ Instead, she contends, the race debate should be recognized as an exercise in interest group politics; so viewed, the task of governance is not to eliminate racial competition but to minimize its effects.⁵² The dangers of factional competition are realized only when a faction constitutes a majority, because "concerted political action by the majority is more fearsome than that of minority groups which, by virtue of the structure of the political system itself, can wreak only limited havoc on the rights of others."⁵³ This recognition counsels in favor of letting racial competition flourish among minority groups and, at the same time, justifies differential treatment of the white majority.⁵⁴

This approach has much superficial appeal but, in the end, is fundamentally flawed. The insistence on racial neutrality for governmental actions is not an attempt to root out race as a cause of factions. Race matters, racial factions exist, and racial interest groups exert influence in any number of ways and for any number of purposes, including to attain electoral and legislative advantage. What equal protection eschews is the imprimatur of government sanction of racial distinctions. By the same token, monarchists are free to organize and advocate their cause, but they cannot, without constitutional amendment, displace our republican government⁵⁵ or seek acknowledgment of nobility status from the government.⁵⁶ Race is indeed one of the great causes of factions in our history, and it would be futile and foolish to deny the relevance of race in everyday life. Racial interest groups can form and flourish; equal protection only limits the ability of these groups to enact into law distinctions based on race.

Underlying the ideal of racial neutrality is precisely a recognition that race is very relevant in American life and has the potential to divide our community into competing enclaves of racial identities. History teaches that legal structures can be marshaled into the service of racial injustice, and the continued use of race in official actions may lead to a very real danger of such abuse. More fundamentally, the powerful relevance of race and its tendency toward divisiveness coun-

⁴⁹ Natapoff, *supra* note 2, at 751.

⁵⁰ THE FEDERALIST NO. 10, at 58 (James Madison) (Jacob E. Cooke ed., 1961).

⁵¹ Natapoff, *supra* note 2, at 753.

⁵² See *id.* at 752-53.

⁵³ *Id.* at 755.

⁵⁴ See *id.* at 755-56.

⁵⁵ See U.S. CONST. art. IV, § 4.

⁵⁶ See *id.* art. I, § 9, cl. 8; *id.* art. I, § 10, cl. 1.

sel caution before granting racial classifications official sanction. When the use of race can be sufficiently circumscribed and adequately justified, such use may well be appropriate, indeed required, to advance the cause of racial justice. However, when, as in a complex multiracial society, the difficulties inherent in justifying and monitoring the official use of race are all but impossible to overcome, such use actually threatens the cause of racial justice. Racial neutrality, under those circumstances, becomes the only durable safeguard against the institutionalization and perpetuation of racial conflict.

III. NEUTRALITY IN CRIMINAL LAW

This Part explores how racial neutrality should operate in criminal law and procedure by focusing on one particular application — the concept of reasonableness. The determination of what is reasonable calls for generalized judgments of what is typical and proper conduct in our society and thus necessarily implicates racial considerations.⁵⁷ Kennedy discusses the concept of reasonableness but, without elucidation, dismisses the relevance of race in ascertaining its meaning:

Giving legal recognition to racially differentiated concepts of proper conduct — the black reasonable person, the white reasonable person, and so on — will encourage the creation of racially distinct mores, reactions, beliefs, and intuitions. I oppose that project. As I argue throughout this book, I aim to facilitate the emergence of a polity that is overwhelmingly indifferent to racial differences, a polity that looks beyond looks (p. 167).

This Part takes up the challenge of considering whether race should ever be a factor in the meaning of reasonableness. I conclude that the fact that America is a multiracial society further strengthens Kennedy's argument that it is neither justifiable nor practicable to recognize any racial contingencies to reasonable conduct.

Reasonableness can have two quite separate meanings. The first is a descriptive notion of typicality, a prediction about what people would generally do if faced with a particular situation.⁵⁸ The second is a normative definition that asks what the decisionmaker would want people to do under the circumstances.⁵⁹ These two distinct meanings often are fused together in practice; the hard cases arise when the normative component of reasonableness conflicts with the descriptive one. Consider the impact of race on a person's behavior.

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⁵⁷ See, e.g., Akhil Reed Amar, *Fourth Amendment First Principles*, 107 HARV. L. REV. 757, 808–09 (1994); Carol S. Steiker, *Second Thoughts About First Principles*, 107 HARV. L. REV. 820, 838–44 (1994).

⁵⁸ See Lee, *supra* note 2, at 495.

⁵⁹ See Jody D. Armour, *Race Ipsa Loquitur: Of Reasonable Racists, Intelligent Bayesians, and Involuntary Negrophobes*, 46 STAN. L. REV. 781, 789–90 (1994); Lee, *supra* note 2, at 495–98; see also Anthony J. Sebok, *Does an Objective Theory of Self-Defense Demand Too Much?*, 57 U. PITT. L. REV. 725, 725–35 (1996) (discussing the concept of reasonableness in terms of self-defense).

Even if it were stipulated that, as a descriptive matter, all persons would respond similarly to the fact of a person's race in a particular situation, should the law countenance that response as reasonable?

If it is agreed that persons *should* not adopt a response based on race, then I think the answer must be no, the response is not reasonable; the normative must trump the descriptive. Although the descriptive is but a reflection of private reactions, the imprimatur of the state is granted when such private biases are given legal effect in a criminal proceeding. The official nature of the message is evident because the normative and descriptive components are inextricably intertwined in the definition of reasonableness; it is simply impossible to bear witness to the descriptive validity of the racial reaction without also imprinting it with normative validation. A judgment of reasonableness connotes both that the reaction is typical and that it is proper.

Turning now to the content of the normative judgment, should the law contextualize the concept of reasonableness in racial terms? I do not think so. First, such contextualization institutionalizes racial divisions in our society. It not only acknowledges that different races exist, but also assumes that members of each race all think alike and that each race collectively thinks and acts differently from others. In addition to being plainly false, these assumptions constitute exactly the exclusionary racial stereotypes that history has taught us to guard against. Second, the contextualizations would be numerous. In a multiracial society, there are by definition a number of different races. If the meaning of reasonableness is contextualized for one race, equality requires that it be similarly contextualized for all other races. In addition, because of the inherent advantage of particularizing any objective determination, a hydraulic pressure pushes racial contextualizations down to their lowest tenable units. The multiplicity and complexity of different racial contexts make racially particularized judgments of reasonableness impracticable in a multiracial society.

Quite apart from these intrinsic reasons to question the recognition of racial contingencies to reasonableness, the judicial process does not possess the institutional competence to determine what is reasonable (either descriptively or normatively) within a particular race. Even assuming that there exists a unitary concept of reasonableness for each race, it is not at all clear how that concept can be established or challenged in a judicial proceeding. Absent similarity of experience or very deep empathy, judges and jurors must resort to self-fulfilling racial stereotypes and biases in order to determine what is reasonable within a particular race.⁶⁰

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⁶⁰ One solution to this problem is to match the race of the decisionmakers to that of the defendant. Leaving aside the circularity of such an answer, independent reasons exist, as discussed in Part II, to object to race matching on its own terms.

Take, for example, the law of self-defense.⁶¹ In order to prevail, the defendant must establish, among other things, that he had an *honest* and *reasonable* belief that the victim would inflict imminent bodily harm.⁶² What should we make of a defendant who claims that he feared for his safety because he assumed that the victim, an Asian male, knew martial arts and therefore was capable of inflicting serious bodily harm,⁶³ or that the victim, a black male, would likely rob and assault him when he approached? On the one hand, the defendant's reaction to the race of the victim(s) should be considered in determining whether he had an honest subjective belief that he was in danger.⁶⁴ That he was ignorant, wrong, or even racist does not detract from the fact that he honestly believed that the victim was going to harm him. Recognition of this descriptive fact in no way makes the court complicit in the defendant's views. The question whether his belief was objectively reasonable, however, is a different matter. A decision that the belief was reasonable must rest on the tenuous determination that most people would make the same ignorant, wrong, or racist calculation and would react similarly, and on the objectionable judgment that such racially motivated reactions are proper in our society. In making such a judgment, the court would be actively validating the defendant's racism.

Racial neutrality, it should be remembered, works both ways. In *Ha v. State*,⁶⁵ for example, the Vietnamese decedent threatened the defendant, also Vietnamese, during a drunken fight.⁶⁶ Twelve hours later, the defendant shot the unwitting decedent.⁶⁷ Challenging his conviction for second-degree murder, Ha argued that he was entitled to a self-defense jury instruction despite the twelve-hour cool down period.⁶⁸ Ha claimed that he had no reasonable alternatives to killing the decedent because "Vietnamese culture teaches that all police are corrupt, that one can expect no help from the authorities, and that people must take the law into their own hands to resolve personal disputes."⁶⁹ The court, rightly in my view, rejected Ha's argument.⁷⁰ First, the jury could not have assessed the accuracy of Ha's cultural claims. Ha did not offer any "evidence" of such cultural norms beyond bare assertions by counsel, and one wonders what such evidence

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⁶¹ For a thorough and insightful discussion of the interaction between race and the doctrine of self-defense, see Armour, cited above in note 59.

⁶² See WAYNE R. LAFAVE & AUSTIN W. SCOTT, JR., *SUBSTANTIVE CRIMINAL LAW* § 5.7, at 653-57 (1986).

⁶³ See *State v. Simon*, 646 P.2d 1119, 1121 (Kan. 1982).

⁶⁴ See Lee, *supra* note 2, at 473.

⁶⁵ 892 P.2d 184 (Alaska Ct. App. 1995).

⁶⁶ See *id.* at 186.

⁶⁷ See *id.* at 187.

⁶⁸ See *id.* at 188-90.

⁶⁹ *Id.* at 195.

⁷⁰ See *id.*

would consist of and how the factfinder would assess its accuracy. Lacking an evidentiary basis, Ha's argument is simply an appeal to the jury's preconceptions or stereotypes (suggested by Ha himself) about Vietnamese cultural traits. Second, even if Ha's cultural claims were verifiably true, they should not be countenanced normatively and given legal effect. To validate Ha's conduct as reasonable behavior would carve a racial exception to the law, and Ha offered no reason why that would be a desirable or even tenable result.

The law of search and seizure presents another application of the reasonableness standard. Kennedy discusses this issue briefly and argues that race should not be a permissible factor in determining whether law enforcement officers had a reasonable suspicion that criminal activity was afoot. This conclusion is only strengthened by the recognition that our society is multiracial. As the number of racial groups increases, the possibility for error likewise increases, simply because the diversity of groups and of individuals within each group makes extrapolations from group characteristics to individual conduct more tenuous. But even if racial criteria are "rational" in the sense that the group proxy is a statistically significant predictor of individual conduct, there is a deeper, normative reason why use of the racial proxy by law enforcement officials should not be countenanced. Behind the multiracial defense of racial neutrality is the recognition that governmental use of racial criteria carries with it the secondary costs of validating and perpetuating racial divisions in our society. Even if racial suspicions are statistically rational as a descriptive matter, their use should not be normatively sanctioned through application of the reasonableness standard.

In particular cases, whether a police officer has impermissibly relied upon race as a basis for his decision raises serious evidentiary issues. In this regard, Kennedy rightly praises *United States v. Laymon*,⁷¹ in which the arresting officer claimed that his physical color-blindness precluded the possibility that his decision to search the car of two black youths was racially motivated.⁷² The judge carefully considered the officer's treatment of other minority motorists, concluded that it was racially motivated, and correctly ruled that the officer had insufficient justification to conduct the search.⁷³

But there is another aspect to *Laymon* that, curiously, Kennedy does not mention. The officer also claimed that the defendants consented to the search.⁷⁴ The judge rejected this claim:

I further find as a fact that, under the circumstances existing at the time of his stop, any reasonable traveller, and especially two out-of-state young

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⁷¹ 730 F. Supp. 332 (D. Colo. 1990).

⁷² See *id.* at 335.

⁷³ See *id.* at 339.

⁷⁴ See *id.* at 334.

Black men in the company of two uniformed and armed white law officers on a roadside in rural Colorado, would not have felt that he could do anything other than sign the consent to search.⁷⁵

This same sentiment was echoed in *In re J.M.*⁷⁶ by a dissenting judge who recounted the history of racism in law enforcement and observed that "race is a factor that has for many years engendered distrust between black males and law enforcement personnel."⁷⁷ Therefore, he concluded, "no reasonable innocent black male (with any knowledge of American history) would feel free to ignore or walk away from a drug interdicting team."⁷⁸

What are we to make of these references to racial identity? First, with respect to consent, the individual defendants must have subjectively felt, based on history or surrounding circumstances or whatever, intimidated in this racial confrontation. Second, assuming such subjective beliefs existed, there remained a further determination whether, as a descriptive matter, the defendants' responses were typical for members of their race over a range of similar circumstances. Finally, assuming the above, we face the question whether the law should countenance such racial responses as reasonable from a normative perspective. Just as the police should not be able to use race as a sword for selective enforcement, defendants should not be permitted to use race as a shield against responsibility. I do not deny the history or relevance of race in these situations — indeed, I assume it. But to sanction normatively the use of race in such situations is a different matter, and inserting race into the question of what is reasonable, proper conduct, apart from other jurisprudential difficulties, inevitably leads to chicken-or-egg questions about what causes and perpetuates the uneasy relationship between law enforcement and racial minorities. If we are serious about breaking the cycle of racial distrust, neutrality must work both ways.

* * *

In the end, my call to expand the debate by accounting for a multi-racial reality is a commentary much less on Kennedy's book than on the general conversation about race. *Race, Crime, and the Law* does not intend to speak to broader questions of multiracialism in our society. But even in his circumscribed discussion of black-white issues, Kennedy at times recognizes our multicultural reality and addresses the implications of that recognition. Indeed, Kennedy has elsewhere called for a broader conversation about the future of multiracial relations:

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⁷⁵ *Id.* at 342.

⁷⁶ 619 A.2d 497 (D.C. 1992).

⁷⁷ *Id.* at 512 (Mack, J., dissenting, but concurring in the order to remand).

⁷⁸ *Id.* at 513.

We need to hear about and from those who view Asians as the model minority. Are they implicitly labeling blacks as the non-model minority?

We need to hear about and from Latinos, Asian Americans and blacks, who view one another with racial resentment and distrust. What is the basis of their discord? What would satisfy the antagonists?⁷⁹

When Angela Oh, a member of the Presidential Commission on Race, suggested that the Commission's discussion should move beyond the black-white paradigm, the suggestion "brought a ton of bricks down on Oh as presumably suggesting that other minorities — though later arriving and often more readily accepted even so — should cut line on African-Americans."⁸⁰ The response to Oh's comments shed much light on the state of the current conversation about race. First, the response illustrates the continuing dominance of the bichromatic vision, even in the face of an increasingly obvious multiracial reality. Second, it highlights the importance of history in the debate, even at the expense of recognizing present conditions and future needs. Finally, and most significantly, the response presumes a racially contingent entitlement, not simply to a share of any eventual concrete solutions, but also to the terms of the conversation itself. Given this insistence on race, tension is to be expected among groups seeking to participate in the conversation. It is ironic that attempts to talk about race are hindered by an insistence on racial identities. But the irony is readily understandable given the history of cases like *Hall* and *Gong Lum*, in which different races were trying to distinguish themselves from others in order to gain advantage under the law. To recall these episodes is not to deny the primacy of the history of black-white conflict, but only to suggest that we should seek guidance from all the lessons of history and from present societal conditions in our attempt to discover a solution for the future.

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⁷⁹ Randall Kennedy, *Clinton Must Take Risks on Race Issue*, *NEWSDAY*, June 19, 1997, at A51.

⁸⁰ Tom Teepen, *Primary Colors in Talk on Race Still Black, White*, *ATLANTA J.-CONST.*, Aug. 17, 1997, at C2.

THE POLITICS OF COMMON GROUND

Kim Taylor-Thompson*

In an era in which scholars and popular writers all too often use celebrated cases to exemplify and explain the perils and problems of the criminal justice system, Professor Randall Kennedy offers a welcome antidote. *Race, Crime, and the Law* demonstrates that we can best understand the uneasy intersection of race, crime, and the law against the political and historical backdrop of race in this country. The book provides a necessary and important reminder: the racial dynamics currently at play in the criminal justice system have deep roots in the past.

Race, Crime, and the Law contributes to the nation's conversation about race by offering a comprehensive overview of the influence of race on the criminal justice system. The historical cases that Professor Kennedy selects tell vividly of disparate treatment based on race. Case after case impresses the reader with the weight and depth of this problem. Against this stark background, Kennedy observes that many of these instances of racially motivated mistreatment of blacks have provided the impetus for the basic protections that all Americans now take for granted: the right to be free of torture and the right to a lawyer in a serious case, to name just two. When Kennedy scrolls forward to today's criminal justice system, he skillfully attacks the status quo. He argues that courts remain inattentive to covert discrimination and inconsistently remedy those violations that they do recognize. Acknowledging that race routinely serves as a proxy for suspicion, he demands that law enforcement officials refrain from considering race as evidence of an increased likelihood of criminality. He then exposes the reader to a large body of social science research that reveals the continuing impact of race on decisionmakers. By consolidating this information in an accessible format, Kennedy creates a significant compendium about race, crime, and law that stands apart from other books in the field.

Nonetheless, *Race, Crime, and the Law* proves surprisingly disappointing in the end. In an effort to advocate a moderate course of analysis and action, Kennedy ultimately ducks the hard question of how to correct the problem that he has identified. He rarely offers more than the tacit assumptions about race that we typically find in

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centrist political speech. For the general public, he repackages the conventional division between victims and offenders by adding black victims to the equation. For readers who have had experience with the criminal justice system, he provides less. Although he has recently focused part of his scholarly agenda on the criminal justice system, Professor Kennedy's insights here seem removed from the system's complex workings. When he proposes recommendations, they appear rudimentary to those who experience daily the pervasive problems that plague the system. For all its potential, Professor Kennedy's book delivers little more than a familiar take on a complicated issue: race should play no role in the criminal justice system. This point has obvious merit and bears reiterating. Regrettably, though, this is where the book both begins and ends.

Perhaps what proves most troubling about the book is that Professor Kennedy's personal views about race infuse, and ultimately skew, his analysis. Of course, divorcing an examination of the impact of race from personal experience or perspective is difficult at best. I do not suggest that such a separation is desirable. My own experiences as an African American woman who grew up in Harlem and, before entering academia, practiced for ten years as a public defender in Washington, D.C., have informed my perception of this age-old question. But what both surprises and disappoints the reader is that Kennedy barely acknowledges the centrality of his own views as he discusses racial questions throughout the book. His politics do not simply serve as personal ideology. Instead, they frame his articulation and analysis of the problem of race in the criminal justice system.

From the outset, Kennedy advocates changing the nature of the politics involved in the country's conflict over race. He acknowledges that racial justice requires more than merely ending discrimination, but in the next breath questions the wisdom of race-conscious solutions. We learn that he personally embraces a "politics of respectability" that, at its core, seeks to neutralize differences between African American and white communities in order to encourage white citizens to respect and support more deeply the cause of racial justice (p. 21). When Kennedy turns his attention to proposals for race-based reforms, he worries aloud that they will "accentuate the significance of race in the minds of all," such that the cure will be worse than the disease (p. 245). However, a closer examination reveals that his rejection of race-conscious mechanisms flows directly, yet without acknowledgment, from his personal vision of racial politics. In the end, Kennedy chooses to discount the significance of racial and cultural differences, perhaps because it seems easier to imagine a world in which race does not matter than to grapple with the thorny problem at hand.

Obviously, it is impossible to probe Professor Kennedy's views thoroughly in a short book review. Still, it seems useful to examine more closely the degree to which his politics divorce him from the in-

tricate realities of discrimination and ultimately drive him to conclude that the path to social justice requires minimizing racial differences. Part I of this Review discusses Kennedy's embrace of a politics of respectability and explores its influence on the assumptions that he makes about the ways in which communities of color should behave. Part II adopts a narrower focus, examining the manner in which the prism of his politics distorts his observations and conclusions about the implications of race in the context of jury composition and decision-making.

I. TRAPPED IN HIS OWN UNEXAMINED ASSUMPTIONS

Kennedy begins by alerting the reader that he intends to create a space between competing ideologies (p. 3). Taking aim at groups all along the political spectrum, he reproaches both those who pretend that race does not much matter and those who accord it undue significance (pp. 3-7). He complains that many white Americans have been less than frank about their reactions to race. Although they tend to decry the use of race in the context of affirmative action, they often tolerate its role in decisions to arrest and detain (pp. 6-7). Kennedy admonishes white Americans to be more honest in their claims and more rigorous in their commitment to antidiscrimination goals (p. 7). At the same time, he castigates those individuals of color who claim that every issue involves race and who "all too often make formulaic allegations of racial misconduct without even bothering to grapple with evidence and arguments that challenge their conclusions" (p. 7). Instead of looking for neutral ground, insists Kennedy, these groups hyperbolize difference by fomenting racial paranoia and feelings of grievement (p. 8).

So, into the middle steps Professor Kennedy. He promises practical guidance for moving beyond dogmatic exaggerations toward a more conciliatory common ground (pp. ix-x). Attributing the lack of sympathy among whites for racial justice to the negative reactions that they have to distinctive behavioral choices made by African Americans, he recommends that African American communities change white attitudes by amending their own behavior and outlook. Borrowing from Professor Evelyn Brooks Higginbotham, Kennedy urges African Americans to adopt a "politics of respectability" (p. 17). This concept establishes white middle-class normative behavior as the fulcrum around which African Americans should define their conduct. To the extent that "blacks are capable of meeting the established moral standards of white middle-class Americans" (p. 17), he argues, black communities can elicit respect from white Americans and can begin to reduce whites' indifference to the cause of racial justice (p. 21).

Kennedy concedes that the politics of respectability can lead to unattractive and unacceptable excesses (p. 18). He criticizes, for example,

those black individuals who opposed the civil rights movement in the 1950s and 1960s out of an undue fear of antagonizing whites (p. 18). He also condemns others who, wrongly perceiving the need to divorce themselves from anything associated with "bad Negroes," express undisguised contempt for individuals with dark complexions or for rap music or jazz (p. 18). Still, he champions the core intuitions of the politics of respectability, finding two aspects of this political theory particularly pertinent. The first intuition suggests that underenforcement of criminal laws injures African Americans more than overenforcement does (p. 19). The second suggests that the social advancement of a stigmatized racial group depends in part on a keen awareness of the perceptions of those outside the group (p. 20).

Armed with these assumptions, Kennedy directs his attention to African American communities. He declares that underenforcement of the criminal law in African American communities poses greater problems than the "episodic" miscarriage of justice suffered by wrongly accused African Americans (p. 29). "In terms of misery inflicted by direct criminal violence, blacks (and other people of color) suffer more from the criminal acts of their racial 'brothers' and 'sisters' than they do from the racist misconduct of white police officers," he argues (p. 20). Yet Kennedy's evaluation of the relative harms appears to depend significantly on his politics. In particular, he criticizes African American communities for "canoniz[ing]" criminals who happen to be African American (p. 21) and for ignoring important distinctions between law-abiding people of color and lawbreakers (pp. 25-26).

Careful examination of Kennedy's argument reveals a pervasive underlying assumption that a dichotomy exists between those who promote the rights of accused persons of color and those who seek to protect the interests of victims of color.¹ His observation that people of color tend to be the victims of crimes committed by other members of their communities contains obvious truth (p. 19). Indeed, many African Americans have mounted anti-crime crusades in response to the devastating impact of unchecked violence.² But this recognition leads to more complicated attitudes than Kennedy seems willing to accept. Certainly, some members of communities of color attempt to distinguish and distance themselves from lawbreakers.³ Yet individuals re-

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¹ This assumption echoes a prevailing theme in most popular discussions of crime today. See, e.g., GEORGE P. FLETCHER, *WITH JUSTICE FOR SOME: VICTIMS' RIGHTS IN CRIMINAL TRIALS* 1-7 (1995) (expressing the concern that the criminal justice system inappropriately protects criminals and ignores victims).

² See, e.g., Yawu Miller, *Muslims Play Key Role in Hub's Fight Against Drugs, Crime*, BAY ST. BANNER, Feb. 27, 1997, at 1 (noting the anti-crime efforts of Muslims and grass roots groups in Boston).

³ See Regina Austin, *"The Black Community," Its Lawbreakers, and a Politics of Identification*, 65 S. CAL. L. REV. 1769, 1772 (1992) ("At times, 'the black community' or an element thereof

acting to high victimization rates often simultaneously identify with lawbreakers, viewing them as members of their own community and extensions of their own families. Rather than drawing lines that cast out offenders, communities of color often conceive of their collective future as one that is linked to the fates of their individual members, including lawbreakers.⁴

Kennedy initially observes that we should not overlook these “webs of commonality” that connect lawbreakers to law-abiding members of the community (p. 19). But when he analyzes behavior within communities of color, he falls prey to the same oversight. He fails to appreciate that what he reflexively considers an impenetrable boundary between victim and accused often becomes blurred within subordinated communities. Individuals of color may be more likely than white Americans to be victims, but they are also more likely stopped, questioned, and accused, in part because of race and in part because of the increased presence of law enforcement in communities of color. Without ever denying the truth of this counterstory, Kennedy simply expects communities of color to ignore the fluidity of these roles and to suppress the tendency to embrace the lawbreakers among them. More importantly, his politics seem to prevent him from acknowledging that having seemingly contradictory reactions to crime in one’s neighborhood may be a sensible and morally acceptable response.⁵

In the end, what drives Kennedy’s conclusions is the second core intuition of the politics of respectability: that African Americans should avoid engaging in conduct that might offend white Americans. He recommends that African Americans become better attuned to the impact of such conduct on white citizens’ attitudes and willingness to be generous toward the causes and interests of the black community (p. 21). Instrumentally, many would defend this position. The history of African American struggle demonstrates that both members and leaders of communities of color have repeatedly confronted this dilemma. Some have surreptitiously placated whites to avoid the reper-

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repudiates those who break the laws and proclaims the distinctiveness and worthiness of those who do not.”).

⁴ See *id.*; see also MICHAEL C. DAWSON, *BEHIND THE MULE: RACE AND CLASS IN AMERICAN POLITICS* 10, 161 (1994) (noting that African Americans have tended to make policy choices according to a “black utility heuristic,” choosing those positions that they consider good for African Americans as a group); Tracey L. Meares, *Charting Race and Class Differences in Attitudes Toward Drug Legalization and Law Enforcement: Lessons for Federal Criminal Law*, 1 BUFF. CRIM. L. REV. 137, 143 (1997) (discussing empirical findings that, compared to whites, African Americans tend more uniformly to support a criminal response to drug usage while simultaneously rejecting harsher sentences for drug offenders).

⁵ Kennedy’s position here fits squarely with more complete discussions of his political views on race. See, e.g., Randall Kennedy, *My Race Problem — and Ours*, ATLANTIC MONTHLY, May 1, 1997, at 55, 55 (shunning notions of racial pride and racial kinship).

cussions of revealing their true feelings.⁶ Still others have recognized that, given the racial dynamics and disproportionate power relations in this country, keeping an eye on the reactions of those outside the community makes good political sense.⁷ Just how mindful people of color should be of negative reactions to their behavior or political choices has at times been a matter of historic debate.⁸

But Kennedy does not consider the question open to dispute. He instead recommends a special courteous attention — perhaps even deference — to the sensitivities of others, particularly white middle-class Americans. He offers a provocative example to emphasize his point: the celebration by some African Americans of the acquittal of O.J. Simpson. Of course, one might question this celebration for a variety of reasons. Should African Americans have embraced this acquittal as a “community” victory even though many African Americans considered the verdict horribly wrong? Should the celebration of an African American man’s vindication in the criminal justice system have occurred when Mr. Simpson had access to resources that other defendants of color rarely have? Kennedy does not much consider these competing questions reasons to reexamine the celebration.⁹ Instead, the reason that Kennedy advances for refraining from such jubilant expressions is that “such displays would singe the sensibilities of many, particularly whites, who perceived the facts of the trial differently” (p. 21).

So when Kennedy turns his attention to the embrace of lawbreakers in communities of color, the second intuition leads him to caution that such entanglements feed visions that many whites find distasteful. Unless African Americans transcend this behavior, he warns, they may harm the cause of those in the community who remain law-abiding and respectable (p. 17). Although many who live within communities

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⁶ Experiences in the South before the civil rights era suggested that dire consequences often awaited African Americans who openly expressed their opinions to whites. See, e.g., W.E.B. Du Bois, *THE SOULS OF BLACK FOLK* 166 (Penguin Books 1996) (1903) (noting that the young African American in the South could not be frank and outspoken, but instead often chose to flatter and “endure petty insults with a smile” to survive).

⁷ See Gary Peller, *Race Consciousness*, 1990 DUKE L.J. 758, 815–16 (noting how Martin Luther King, Jr.’s strategy of nonviolent protest helped force social change upon white America, while violent insurrection likely would have failed to break down an entrenched racist ideology).

⁸ One of the many historical examples involves the heated critique by W.E.B. Du Bois of Booker T. Washington’s racial politics. Washington’s “Atlanta Compromise” encouraged blacks not to contest the prevailing social structure that assumed separation of the races, but instead to accept and work within it. Du Bois argued that, by embracing politics that bowed to white social expectations, Washington was insisting that blacks adopt “the old attitude of adjustment and submission.” Du Bois, *supra* note 6, at 43. For this and other examples of the historical divide, see Peller, cited above in note 7.

⁹ To the extent that Kennedy does offer other explanations for this behavior, he notes that African Americans who celebrated the acquittal may have acted out of anger toward a system that they identify with oppression. But again, he criticizes the tendency to “martyrize[]” criminals as an inappropriate “inversion of values” (p. 26).

of color share Kennedy's belief that lawbreakers endanger the community and deserve punishment, their reactions to crime demonstrate that this concern does not lead inexorably to a call for shunning and permanently ostracizing lawbreakers.¹⁰ More importantly, many would question Kennedy's almost reflexive choice to look to white middle-class communities to determine the appropriate African American response.

Kennedy quickly anticipates that some may criticize his politics of respectability as one that "smells of Uncle Tomism" (p. 21). But by preemptively defending against the cheap shot, he sidesteps the more interesting questions that his choice of politics generates. He overlooks that principled people can disagree about what constitutes "respectability" and acceptable behavior. Kennedy simply assumes without question or amplification that white middle-class communities set the standard against which communities of color should measure their behavior. He never identifies what the "established" norms are, and he does not even question whether they actually exist in white middle-class communities. Finally, he never asks whether "one size fits all" standards make sense in a country of differently situated communities.

Although the connections between Kennedy's analysis and his politics do not necessarily throw his conclusions into question, these links invite a rigorous inspection that Kennedy himself consistently evades. Part II undertakes such an examination with regard to one of the issues Kennedy addresses in the book — the impact of race on jury composition and decisionmaking.

II. HIS POLITICS AS APPLIED

Professor Kennedy begins his examination of race's influence on the composition of modern juries by affirming his commitment to the view that "race can play no proper role" in drawing distinctions between individuals (p. 169). Considering the statistical evidence, Kennedy admits that people of color continue to represent a disproportionately low percentage of jurors (p. 232), even though they remain heavily represented as defendants (pp. 22–23). Although he attributes the racial disparities on juries to multiple factors (pp. 232–33), he acknowledges that one cause may be the vestiges of past racial discrimination (p. 236). Still, he rejects as a remedy those proposals requiring racially mixed juries (pp. 169, 231). Kennedy criticizes those who want to make juries "look like America," and calls instead for the creation of a system that "looks beyond looks" (p. xi). Though this lovely turn of

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¹⁰ See Meares, *supra* note 4, at 160–61 ("African American women in poor neighborhoods are torn. . . . [They] want better crime control and law enforcement. [But] they [also] understand that increased levels of law enforcement potentially saddle their children with a felony conviction . . .").

phrase seems appealing at first blush, it ultimately reveals a failure to appreciate fully the centrality of race in this country. As much as we might hope otherwise, "looks" still have meaning in our society.

Perhaps more than any other characteristic, a person's race carries with it a "socializing history."¹¹ Race defines and delineates experiences and perceptions in this country with resulting differences in opportunities¹² and world views.¹³ Indeed, mock jury studies suggest that jurors of color may bring distinctive experiences into deliberations and may actually prod an otherwise all-white jury into confronting commonly held assumptions and approaching evidence from a different analytical position. For example, studies and polls reveal that attitudes about police officers often diverge along racial lines. Despite jury instructions that admonish jurors to treat police officers like any other witnesses, white jurors generally tend to credit police officers' testimony,¹⁴ while jurors of color are more likely to approach their testimony with skepticism or even mistrust.¹⁵ Without this latter perspective on a jury, an officer's testimony might escape the depth of analysis that juries generally apply to the testimony of other witnesses.

Interestingly, Professor Kennedy does not seem overly concerned with the exclusion of these distinct perspectives. In his discussion — and condemnation — of jury nullification, he recognizes that African American jurors may assess evidence and resolve credibility questions differently from white jurors (p. 4 n.6). But Kennedy seems unwilling to abide the difference that African American jurors might bring to jury deliberations. For example, he worries that jurors of color may be "unreasonably skeptical" of police testimony (p. 4). At the same time, he seems quite comfortable tolerating the asymmetry inherent in permitting white jurors to bring unchecked biases into the deliberative process.

Significantly, neutralizing the behavior of African American jurors fits squarely within Kennedy's political vision. He imagines that, if stigmatized groups would simply adopt established norms of behavior, they could eliminate potentially alienating distinctions. Once this occurred, an all-white jury might be fully capable of sharing the perspec-

¹¹ MICHAEL J. SAKS & REID HASTIE, *SOCIAL PSYCHOLOGY IN COURT* 49 (1978).

¹² See, e.g., DOUGLAS S. MASSEY & NANCY A. DENTON, *AMERICAN APARTHEID: SEGREGATION AND THE MAKING OF THE UNDERCLASS* 2 (1993) (describing patterns of racial segregation as the principal organizing feature of American society).

¹³ See generally ANDREW HACKER, *TWO NATIONS: BLACK AND WHITE, SEPARATE, HOSTILE, UNEQUAL* (1992) (tracing the implications of race in America).

¹⁴ See Bryan A. Stevenson & Ruth E. Friedman, *Deliberate Indifference: Judicial Tolerance of Racial Bias in Criminal Justice*, 51 WASH. & LEE L. REV. 509, 525 n.68 (1994).

¹⁵ These results are perhaps due to the less than favorable experiences that black jurors have had with law enforcement. See GALLUP ORG., *BLACK/WHITE RELATIONS IN THE UNITED STATES, EXECUTIVE SUMMARY*, June 10, 1997 (finding that 60% of African Americans surveyed believe that police treat them less fairly than they treat whites).

tive of people of color.¹⁶ Although this position has some merit, experience suggests that the historic and contemporary divide between races in this country makes the attainment of this ideal uncertain at best.¹⁷ Given the patterns of residential segregation that occur with increasing frequency in America,¹⁸ white citizens and citizens of color tend not to share experiences with each other beyond limited contacts in school and in the workplace.¹⁹ This lack of meaningful interaction and shared concrete experiences — social, casual, and job-related — only reinforces the view that one group cannot simply generalize from its experience to account for absent or excluded perspectives.

The geographic and social isolation of racial groups carries an additional consequence: it leads groups to resort to categorization in attempting to understand the behavior of other groups. Social cognition theory posits that human beings design strategies to simplify the complex world that we encounter. We all tend to divide the world into categories that help us "identify stimuli quickly, . . . fill in information . . . , and select a strategy for obtaining further information, solving a problem, or reaching a goal."²⁰ Social science research has confirmed that we similarly resort to categories or stereotypes in attempting to understand and predict the behavior of others.²¹ Studies of this phenomenon have found that stereotypes are so ingrained that an individual's memory of events tends to organize around them.²²

In the context of the jury system, this phenomenon raises great concern. Once a stereotype activates, individuals process events selectively, such that material corroborating the stereotype receives greater

¹⁶ Professor Kennedy suggests that, as long as the process of jury selection has been "kept free of racial selectivity . . . , there is nothing inherently wrong with an all-white jury deciding the fate of a black defendant or an all-black jury deciding the fate of a white defendant" (p. xi).

¹⁷ One obvious example of this divide involves the state and federal trials of the officers who beat an African American motorist, Rodney King. The state jury, which lacked the perspective of a single African American juror, acquitted the officers of all charges. See Laurie L. Levinson, *The Future of State and Federal Civil Rights Prosecutions: The Lessons of the Rodney King Trial*, 41 UCLA L. REV. 509, 525-27 (1994). In contrast, the federal trial jury, which was composed of nine whites, two African Americans, and one Latino, convicted the officers of civil rights violations arising out of the same incident. See *id.* at 530 n.16, 532.

¹⁸ See MASSEY & DENTON, *supra* note 12, at 165-81.

¹⁹ See HACKER, *supra* note 13, at 3-17.

²⁰ Shelley E. Taylor & Jennifer Crocker, *Schematic Bases of Social Information Processing*, in 1 SOCIAL COGNITION: THE ONTARIO SYMPOSIUM 89, 93-94; see also Linda Hamilton Krieger, *The Content of Our Categories: A Cognitive Bias Approach to Discrimination and Equal Employment Opportunity*, 47 STAN. L. REV. 1161, 1188-90 (1995) (discussing stereotypes as categorical structures).

²¹ See, e.g., Eleanor Rosch, *Human Categorization*, in 1 STUDIES IN CROSS-CULTURAL PSYCHOLOGY 1-49 (Neil Warren ed., 1977).

²² See, e.g., Galen V. Bodenhausen, *Stereotypic Biases in Social Decision Making and Memory: Testing Process Models of Stereotype Use*, 55 J. PERSONALITY & SOC. PSYCHOL. 726, 734 (1988).

attention.²³ Information that seems to contradict stereotypical expectations often will be overlooked.²⁴ These stereotypic biases may occur without conscious thought even in individuals who would not endorse racist beliefs.²⁵ To the extent that jurors belonging to the stereotyped group participate during deliberations, they can be expected to have processed information differently during the trial and to present the other members of the jury with competing stereotypes against which to make judgments. Indeed, the best foil to generalized views about out-groups may be the inclusion of a member of that group who can offer particularized experiences that call the stereotype into question.²⁶

Of course, adding people of color to a jury will not necessarily reduce reliance on stereotypes. For instance, black jurors themselves not only resort to stereotypes, but may even hold negative views about members of their own race.²⁷ Still, including African American jurors might expand the range of stereotypes in play and, in this way and others, enrich the conversation. Although we might be tempted to imagine that the addition of jurors of color would necessarily advantage an accused person of color, such inclusion might prove otherwise. At least one study has demonstrated that jurors of color often judge defendants of color more harshly than other jurors do.²⁸ Thus, even though race may not be predictive of outcome, it remains a rough, yet sufficiently reliable proxy for a difference in perspective.

Still, Kennedy seems unwilling to accept that race centrally affects perception. He compounds this error by framing his discussion of race-conscious remedies in loaded terms: he questions whether jurisdictions should be permitted to discriminate racially to promote or ensure the presence of people of color on juries (p. 232). By labeling as "discrimination" any affirmative use or consideration of race, Kennedy creates a paper tiger that he can then easily defeat. Kennedy acknowl-

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²³ See Dale T. Miller & William Turnbull, *Expectancies and Interpersonal Processes*, 37 ANN. REV. PSYCHOL. 233, 247 (1986) (finding that the activation of stereotypic concepts leads to an encoding bias that involves selective attention toward stereotypic-consistent information and an attributional bias that causes individuals to discount or reinterpret stereotypic-inconsistent information).

²⁴ See *id.*

²⁵ See Bodenhausen, *supra* note 22, at 735.

²⁶ Cf. Dolores A. Perez, Harmon M. Hosch, Bruce Ponder & Gloria Chanez Trejo, *Ethnicity of Defendants and Jurors as Influences on Jury Decisions*, 23 J. APPLIED SOC. PSYCHOL. 1249, 1260 (1993) (concluding based on empirical research that "the majority presence of a cognizable group on a jury can serve to counterbalance disparate treatment of a defendant who is a member of that same group").

²⁷ See, e.g., *Castaneda v. Partida*, 430 U.S. 482, 503 (1977) (Marshall, J., concurring) (noting that "members of minority groups frequently respond to discrimination and prejudice by attempting to disassociate themselves from the group, even to the point of adopting the majority's negative attitudes towards the minority").

²⁸ Cf. Carol J. Mills & Wayne E. Bohannon, *Juror Characteristics: To What Extent Are They Related to Jury Verdicts?*, 64 JUDICATURE 22, 27 (1980) (finding that black women are more inclined to convict defendants of color before deliberation than are whites).

edges that strategic use of peremptory challenges may effectively remove extremes of predilection from the jury panel, but he asserts that the benefits of "strategic racial discrimination" do not outweigh the costs (pp. 227-28). He cautions that the public will view any adoption of race-based decisionmaking as evidence of the justice system's unwillingness to disentangle itself from race (p. 228). More significantly, he worries that adoption of race-conscious proposals would be read as an endorsement not only of the view that race *does* matter, but also that it *should* matter in the adjudication of guilt or innocence (p. 228). What Kennedy overlooks in his cost-benefit analysis is the consequence of the public's perception that the criminal justice system principally involves white decisionmakers determining the fate of people of color. Even if he doubts that people of color bring sufficiently different views to an individual jury, he fails to appreciate the attendant cost of the loss of legitimacy suffered by a system that at best limits — and at worst excludes — their perspectives.

To ensure that a person of color has the opportunity to face a jury containing some members of her racial group, a number of scholars have proposed mechanisms to increase racial diversity on the jury panel. Propelled by the belief that underrepresentation is a social evil in that it increases the likelihood of all-white juries, one scholar has endorsed a proposal that accused persons of color be entitled to a given number of "self-identifying" people of color on their juries.²⁹ Arguing that racial diversity broadens the base of knowledge upon which the jury can base its determinations and ultimately dispense justice, others have suggested that accused persons of color are entitled to at least three "racially similar" individuals on the jury.³⁰ Although these suggestions may raise questions of their own, each offers a concrete mechanism for confronting the problem of race head on and, unlike Kennedy's suggestions, each provokes considerable thought about the question of race at the trial level.

Kennedy concedes that proponents of these proposals offer strong arguments in support of their respective positions (p. 245). Nonetheless, he concludes that such measures are undesirable, challenging them, in part, by questioning their administrative feasibility.³¹ He also

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²⁹ See Albert W. Alschuler, *Racial Quotas and the Jury*, 44 DUKE L.J. 704, 710-11 (1995).

³⁰ Sheri Lynn Johnson, *Black Innocence and the White Jury*, 83 MICH. L. REV. 1611, 1695-1700 (1985). See generally Charles J. Ogletree, *Just Say No! A Proposal To Eliminate Racially Discriminatory Uses of Peremptory Challenges*, 31 AM. CRIM. L. REV. 1099, 1113-16 (1994) (surveying race-conscious proposals for jury selection).

³¹ Kennedy questions the ability of a court to identify jurors who are "racially similar" to the accused; he asks, for example, whether "a Latino who traces his heritage back to Mexico [is] 'racially similar' to those of Puerto Rican descent (p. 244). Obviously, in a multicultural society, this question cannot be answered easily. Differences exist among and within races. However, similarities in treatment and experience often emerge in this country that transcend difference and create bonds that might not otherwise exist. Perhaps one way to address the administrative concern would be to attempt to include people of the same racial background. If that failed, the

expresses concern that such measures will encourage partisanship among jurors.³² But in the end, Kennedy's principal objection to these proposals stems from his adamant resistance to the concept that race poses a substantial obstacle for the accused person of color facing an all-white jury (pp. 242-43). True to the politics of respectability, which hopes to neutralize racial differences, he cannot afford to find that race matters much in jury decisionmaking.

When Kennedy informs us that racial distinctions that occur in the criminal justice system can be overcome (p. 252), he does so with a certainty that invites inquiry into the basis for his confidence. Obviously, the historical evidence of racism and the empirical studies of current manifestations of the problem of race that Kennedy has amassed provide him with useful data from which to make observations. However, such material permits us to know and understand the criminal justice system only to a limited degree. Kennedy does not indicate whether he has ever had direct contact with the criminal justice system or whether he has spoken extensively with people who have. The experience one gains as a prosecutor, judge, or defense lawyer — or, for that matter, as a juror, defendant, or complaining witness — could have offered an important source of analogy or counterpoint for his conclusions. Additionally, Kennedy does not base his beliefs on field observations, as an anthropologist or daily court observer would. On any given day, we find citizens watching trials. Although some may have nothing meaningful to say about their observations, it has been my experience, as a trial lawyer, that their daily attendance enables these untrained observers to notice trends and form insights that often escape seasoned lawyers. Remarkably, Kennedy does not acknowledge in the book the limits of his own experience.

Perhaps because he has never been in the position of a litigant who faces a jury that holds either his or his lawyer's race³³ against him, Kennedy can cling to the belief that race-conscious mechanisms are ultimately unnecessary. In a groundbreaking work published in 1985, Professor Sheri Lynn Johnson used statistical analyses of conviction and sentencing rates, mock jury studies, and social science research to show that race affects decisions to convict and choices of sentence.³⁴

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court could give the accused person of color the choice between including a given number of jurors of color who did not share his racial heritage or proceeding with an all-white jury.

³² Professor Kennedy cautions that, if the court adopts race-conscious measures, jurors will vote as representatives of their respective groups (p. 243). Kennedy's concerns about racial partisanship ignore the extent to which race already informs jurors' judgments. If jurors already bring predispositions along racial lines to the deliberation room, then Kennedy's acceptance of the status quo would allow partisanship to continue.

³³ See Nancy J. King, *Postconviction Review of Jury Discrimination: Measuring the Effects of Juror Race on Jury Decisions*, 92 MICH. L. REV. 63, 88-90 (1993) (discussing studies examining the impact of a lawyer's race on jury decisions).

³⁴ See Johnson, *supra* note 30, at 1616-51.

Although her work is one of the most frequently cited studies on the question of the effect of race on jury decisions, Kennedy remains unconvinced. Instead, he downplays the fear that race matters in jury decisionmaking. Although he agrees that the racial composition of juries may affect the outcome in certain trials, he contends that Professor Johnson overstates her point (p. 242) and fails to make a case for her position that race adversely affects accused persons of color (pp. 242-43).

Kennedy argues that the archival evidence and mock jury studies that Professor Johnson cited in 1985 inadequately support her ultimate conclusions. He notes that Professor Johnson herself posits that, when the evidence in a given case is strong one way or the other, racial makeup may not matter (p. 242). The studies that Professor Johnson cites indicate that race has the most significant impact in cases in which the evidence is "marginal" (p. 242). Thus, Kennedy argues that whether we consider the problem posed by an all-white jury as a substantial or a minor one will depend in part on the number of marginal evidence cases that are brought — "a figure no one really knows" (pp. 242-43).

Professor Johnson does note that, in the context of mock jury studies, researchers found race to be more influential when the fact patterns had been manipulated to be more ambiguous.³⁵ Obviously, in a laboratory experiment, researchers can develop fact patterns that will appear strong or weak, because researchers determine what evidence the jurors will hear. But how frequently can the evidence in an actual trial be considered so strong as to make the case open-and-shut? Some might argue that the evidence against O.J. Simpson presented such a case. Yet as those of us who have practiced know from experience — and as the rest of us know from hindsight — individual jurors view evidence differently and evaluate the strength or weakness of evidence through the lenses of their own perceptions and experiences. In other words, racial and gender differences may encourage different jurors to view the same evidence in divergent ways, thereby producing widely different perceptions of whether a case is strong, weak, or marginal.

Even more importantly, although we might not be able to supply a numerical answer to Professor Kennedy's question regarding the frequency with which marginal cases proceed to trial, it seems safe to posit that the cases that do proceed to trial tend not to be the overwhelmingly strong ones. The cases in which the evidence of guilt is strongest often result in guilty pleas.³⁶ Thus, race likely would play a role in a considerable number of cases.

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³⁵ See *id.* at 1627.

³⁶ Approximately 92% of all felony cases in state courts are resolved through guilty pleas. See PATRICK A. LANGAN & HELEN A. GRAZIADEI, U.S. DEP'T OF JUSTICE, FELONY SENTENCES IN STATE COURTS, 1992, at 9 (1995). In misdemeanor cases, the percentage of guilty pleas may be

If race does influence some cases, then it would seem imperative that — at least in those cases — people of color be included on the jury to counteract the biases of other players in the criminal justice system. Although Professor Kennedy expresses concern about the tendency of lawyers to make racial appeals to juries (pp. 256–57), he fails to see diversity on the jury as one possible response. The inclusion of people of color on the jury could have an impact on the types of arguments lawyers advance. To the extent that a jury is racially mixed, it seems less likely that either the prosecution or the defense will make direct racial appeals. Attempts to objectify the accused through the use of animal imagery,³⁷ for example, or through appeals to generalized racial fears,³⁸ might not be as persuasive to jurors who share the same racial heritage as the accused. It is less likely that members of a diverse jury will rely on such arguments to reach consensus during deliberations.

Given Professor Kennedy's concern for victims of color, we might expect him to embrace the affirmative selection of jurors of color as an opportunity to give voice to the victim's perspective in the deliberation room. But he does not. Mock jury studies and statistical analyses have examined whether the race of the victim impacts the determination of guilt and the assignment of punishment. The results indicate that a victim of color can often expect varying treatment depending on the racial makeup of the jury. For example, Gary D. LaFree conducted posttrial interviews of 360 actual jurors in rape trials in Indianapolis.³⁹ The jurors, who tended to be white,⁴⁰ made comments re-

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even higher. See Rodney J. Uphoff, *The Criminal Defense Lawyer as Effective Negotiator: A Systemic Approach*, 2 CLINICAL L. REV. 73, 74 n.6 (1995).

With the advent of mandatory minimum sentencing schemes, a defendant faced with a strong case may still opt for trial, because she perceives little benefit to pleading guilty. See, e.g., *A Return of Judgment to the Judging Process: "3 Strikes" Ruling Restores Courts' Rightful Authority*, L.A. TIMES, June 21, 1996, at B8 (discussing the fiscal problems that the "three strikes and you're out" law causes because "fewer defendants are pleading guilty"). Even factoring in those instances, however, cases that go to trial typically are not open-and-shut.

³⁷ For example, in the trial of Bernhard Goetz, defense lawyers referred to the four African American victims in the trial as "vultures," "predators," and "savages." See GEORGE P. FLETCHER, *A CRIME OF SELF-DEFENSE: BERNHARD GOETZ AND THE LAW ON TRIAL* 206 (1988).

³⁸ See, e.g., *Carter v. Rafferty*, 621 F. Supp. 533, 534, 540–43 (D.N.J. 1985) (overturning a murder conviction in part because the prosecution made an unsubstantiated argument to the jury that Mr. Carter, who is African American, murdered total strangers because they were white), *aff'd*, 826 F.2d 1299 (3d Cir. 1987); Elizabeth L. Earle, Note, *Banishing the Thirteenth Juror: An Approach to the Identification of Prosecutorial Racism*, 92 COLUM. L. REV. 1212, 1212 (1992) (recounting an argument in a death penalty case in which the prosecutors asked an all-white jury whether it could "imagine the fear that [the victim] went through . . . out with three blacks").

³⁹ See GARY D. LAFREE, *RAPE AND CRIMINAL JUSTICE: THE SOCIAL CONSTRUCTION OF SEXUAL ASSAULT* 154–55, 208–28 (1989). Professor Kennedy acknowledges the importance of this study; however, he only uses its findings to support his view that the criminal justice system "under-protects" victims of color (pp. 73–74). He does not then take the next step to suggest that a diversity of perspectives on the jury might give voice to the victim's views during deliberations.

vealing the influence of stereotypes about black women on their decisionmaking. One juror voted to acquit in a prosecution for the rape of a young African American because a girl "from 'that kind of neighborhood' probably wasn't a virgin anyway."⁴¹ The jurors viewed African American rape complainants as more likely to have consented to sex or as more sexually experienced and therefore less harmed by the assaults.⁴² Similarly, the comprehensive statistical analysis by David C. Baldus, which served as the basis for the defense's attack on the racist application of the death penalty in *McCleskey v. Kemp*,⁴³ reveals that, in the context of capital cases, jurors — as well as prosecutors — tend to devalue the harm inflicted on a victim of color.⁴⁴ Although Kennedy seems troubled by the statistics regarding the impact of race in the death penalty context (p. 336), he declines to transfer that concern to the impact of white jurors evaluating questions of credibility and harm in noncapital criminal cases.

Having rejected race-conscious proposals at the trial level, Professor Kennedy instead endorses largely ineffective race-neutral proposals at the administrative level. For example, he recommends that localities end their reliance on voter registration lists as a source of potential venire members, because this mechanism has been found to limit the number of eligible jurors of color. He also suggests that court officials supplement the list of registered voters with lists of citizens who have received drivers' licenses or paid local taxes (p. 241). Although these recommendations are useful steps for increasing the number of people of color in the jury pool, they are unlikely to effect real change in the makeup of the petit jury. As Kennedy himself acknowledges, a geographical region that institutes these reforms but continues to select jurors randomly from a population that is fifteen percent black will have all-white juries in fourteen percent of its cases (p. 242).⁴⁵ Kennedy's embrace of these recommendations suggests a naive faith that change can occur without fundamental reforms in the jury system.

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⁴⁰ See LAFREE, *supra* note 39, at 210.

⁴¹ *Id.* at 220.

⁴² See *id.* at 219–20. LaFree also noted that "[o]ther jurors were simply less willing to believe the testimony of black complainants." *Id.* at 220. One white juror told researchers: "Negroes have a way of not telling the truth. They've a knack for coloring the story. So you know you can't believe everything they say." *Id.*

⁴³ 481 U.S. 279 (1987).

⁴⁴ Baldus examined records involving the disposition of more than 2000 murder cases between 1973 and 1979 in Georgia and discovered that the odds of being condemned to death were 4.3 times greater for defendants who killed white victims than for defendants who killed black victims. See *id.* at 286–87; *id.* at 355 (Blackmun, J., dissenting).

⁴⁵ See Stephen J. Schulhofer, *The Trouble with Trials; the Trouble with Us*, 105 YALE L.J. 825, 836 (1995) (book review).

III. CONCLUSION

Ultimately, one comes away from Professor Kennedy's book feeling that it represents a lost opportunity. Kennedy's voice is a potentially important one. But when that voice preaches at the same time that it purports to analyze, it loses much of its power. And the more that Kennedy's politics circumscribe his analysis of a given issue, the more likely it is that the most interesting questions will be ignored or relegated to the margins. Although Kennedy embraces a popular vision of a race-neutral world, he cannot hope to advance that goal by discounting evidence that race figures prominently in our perceptions and in our application of justice. He also cannot sidestep real, cultural differences borne of experience simply by urging Americans toward neutral ground. Though heated debate often feels tumultuous, in the end it permits us to face our differences squarely. Perhaps then we may inch toward change.

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