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The Burdens and Benefits of Race in America

Matthew O. Tobriner Memorial Lecture

By CHARLES J. OGLETREE, JR. *

Introduction

Judge Matthew O. Tobriner, in his memorable dissent in *Bakke*,¹ argued for an understanding of the importance of race in America which itself transcended race. He contended that the majority opinion was wrong to adopt a colorblind interpretation of the Fourteenth Amendment.² To do so was to fail to account for the manner in which minorities had been historically disadvantaged and excluded from full participation in American society.³ Instead, the challenge is to acknowledge the benefits and burdens of different racial identities while refusing to let those differences frustrate the struggle for social justice.⁴ Judge Tobriner recognized that U.C. Davis's "special admission program was implemented to serve the larger national interest of promoting an integrated society in which persons of all races are represented in all walks of life and at all income levels."⁵ The

* Professor of Law, Harvard Law School; Director, Harvard Law School Criminal Justice Institute. I would like to acknowledge the support of my colleagues for their constructive criticisms during the presentation of this article at the 1996 Harvard Law School Summer Research Luncheon Series. I would like to especially acknowledge the substantial research of two assistants, Ms. Erin Edmonds and Mr. Eric Miller. Of course, I accept full responsibility for all errors and shortcomings.

1. *Bakke v. Regents of the University of California*, 553 P.2d 1152, 1172 (1976) (Tobriner, J., dissenting), *aff'd in part, rev'd in part*, *Regents of the University of California v. Bakke*, 438 U.S. 265 (1978).

2. *See id.* at 1173.

3. *See id.* at 1174.

4. *See id.*

5. *Id.* at 1188.

problems of race are national in character, and not limited to one particular geographical community, or one specific race or ethnicity.⁶

The role of a court faced with the issue of racial discrimination is, according to Judge Tobriner, relatively straightforward. The court should protect the rights of minorities from being overridden by the will of the majority, wherever possible: heightened judicial scrutiny is accordingly appropriate when reviewing laws embodying invidious racial classifications, because the political process affords an inadequate check on discrimination *against* "discrete and insular minorities."⁷ By the same token, however, such stringent judicial review is not appropriate when, as here, racial classifications are utilized remedially to *benefit* such minorities, for under such circumstances the normal political process can be relied on to protect the majority who may be incidentally injured by the classification scheme.⁸

To this end, using arguments which are still at the forefront of the affirmative action debate, Judge Tobriner rejected a colorblind reading of the Fourteenth Amendment. Instead, he emphasized the importance of race-conscious remedial action in overcoming the disadvantages conferred upon minorities by virtue of their race.⁹ He further contended that the goal of creating a society tolerant of all racial groups ought not be frustrated by a misplaced and confusing emphasis on arbitrary measurements of merit, such as those embodied in standardized test scores.¹⁰ This viewpoint has recently been revived by Lani Guinier who asserts that we must move beyond the false opposition of merit and affirmative action to recast the debate in terms of what values we, as a community, wish to promote.¹¹

Judge Tobriner's dissent exemplifies the importance of attention to the problems of race in American society. Only by acknowledging these problems can they be overcome. It was a great privilege to be able to present my own examination of the benefits and burdens of race in a speech given in his honor. In this Essay based on that speech, I try to examine these benefits and burdens historically, philosophically, and politically by focusing, in particular, upon the issue of race in the criminal justice system.

6. *See id.* at 1180.

7. *Id.* at 1183.

8. *See id.* at 1182.

9. *See id.* at 1174-75.

10. *See id.* at 1186-87.

11. *See* LANI GUINIER ET AL., *BECOMING GENTLEMEN: WOMEN, LAW SCHOOL, AND INSTITUTIONAL CHANGE* 11 (1997).

I. Historical Analysis of Racial Awareness in the United States

A. A Race-Conscious Declaration?

The Declaration of Independence proclaims:

We hold these Truths to be self-evident, that all Men are created equal, that they are endowed by their Creator with certain unalienable Rights, that among these are Life, Liberty, and the Pursuit of Happiness—That to secure these Rights, Governments are instituted among Men, deriving their *just Powers* from the Consent of the Governed, that *whenever any Form of Government becomes destructive of these Ends, it is the Right of the People* to alter or abolish it, and to institute new Government, laying its Foundations on such Principles, and organizing its Powers in such Form, as to them shall seem most likely to effect their Safety and Happiness.¹²

These words, so sacred, so promising, have reigned as a liturgy of hope and aspiration for all United States citizens. Yet from the beginning these words have meant different things to different people in the context of history. As Judge A. Leon Higginbotham has stated, "From a predominantly white perspective, the Declaration of Independence is viewed as . . . 'the greatest achievement in the history of man.' We are the beneficiaries of that achievement. But who, until recently, did the 'we' describe?"¹³

The problem is that while the Declaration does *not* say all *white* men are created equal, history shows that it should have.¹⁴ Those Americans not in that favored class have traditionally been all too conscious of the ambiguity inherent in the words of the Declaration. We have recognized that in fact the words applied only to a privileged few, but understand that they ought to apply to all, regardless of race. We have shouldered the burden of imbuing the promises of the Declaration and Constitution with the moral force of a truly just and equal society.

People of color have had to continually insist on those rights and privileges of democratic participation granted to all by the Declaration of

12. THE DECLARATION OF INDEPENDENCE, para. 2 (U.S. 1776) (emphasis added).

13. A. LEON HIGGINBOTHAM, JR., IN THE MATTER OF COLOR: RACE & THE AMERICAN LEGAL PROCESS 5 (1978).

14. *See id.* Thomas Jefferson, who owned slaves, drafted a condemnation of the international slave trade. That clause was deleted from the Declaration during the debates between July 2 and July 4 of 1776, despite having been approved by the Committee of Five to the Continental Congress. *See id.* at 380. This single anti-slavery clause was deleted not only to assuage the South, but also because plenty of Northerners had been "pretty considerable carriers of [slaves]." *Id.* at 380-382. The omission of "white" probably stemmed from Jefferson's—perhaps many of the Continental Congressmen's—hypocrisy regarding the ideals of the Enlightenment versus the moral contradiction inherent in their owning African people. Higginbotham reports that Jefferson, five years later, wrote, "[i]ndeed I tremble for my country when I reflect that God is just; that [H]is justice cannot sleep forever." *Id.* at 383.

Independence. Sojourner Truth's cry, "Ain't I a woman?"¹⁵ was taken up and transformed by sanitation workers who, with Reverend Dr. Martin Luther King, Jr., declared "I am a man."¹⁶ It was championed by Reverend Jesse Jackson, Sr. when he proclaimed "I am somebody." Each of these statements: Ain't I a woman?; I am a man; I am somebody; contain the fierce and embattled announcement that, despite everything, the speakers were self-possessed and dignified human beings. This burden of proving ourselves worthy participants in American democracy, which is as old as American society itself, is still shouldered by African-Americans today.

I shall begin my discussion of the benefits and burdens of race in America by considering the works of three African-Americans whose lives span the period from slavery to the Civil Rights movement of the 1960's: Frederick Douglass, W.E.B. Du Bois, and Martin Luther King, Jr. Their response to the burdens of race in America will form the context in which I discuss the burdens of race presently afflicting the African-American community, most particularly in the sphere of criminal justice. I shall argue that the challenges faced by the African-American community are ones which are symptomatic of American society as a whole. They are challenges which can only be met by concerted action across racial lines. The benefit of race is that minorities are often in a position to see more clearly where America fails in its promise to protect the weak and powerless. The burden of race is that the responsibility often falls on minorities to hold America to that promise, often at considerable cost to ourselves.

15. Like Harriet Tubman, Sojourner Truth is among the most famous of Black female abolitionists. She delivered, in a "deep, resonant voice . . . with a strange, religious mysticism," JOHN HOPE FRANKLIN & ALFRED A. MOSS, JR., *FROM SLAVERY TO FREEDOM: A HISTORY OF NEGRO AMERICANS* 166 (6th ed. 1988), a speech before an assembly of white men and women at an anti-slavery rally in Indiana. See BELL HOOKS, *AIN'T I A WOMAN: BLACK WOMEN AND FEMINISM* 160 (1981). A white man yelled at Sojourner that he didn't believe she was really a woman. Sojourner bared her breasts. And then delivered the following:

Well, children, war dar is so much racket dar must be something out o' kilter. I tink dat 'twixt de niggers of de Souf and de women at de Norf all a talkin' 'bout rights, de white men will be in a fix pretty soon. But what's all dis here talkin' 'bout? Dat man ober dar say dat women needs to be helped into carriages, and lifted ober ditches, and to have de best places . . . and ain't I a woman? Look at me! Look at my arm! . . . I have plowed, and planted, and gathered into barns, and no man could head me—and ain't I a woman? I could work as much as any man (when I could get it), and bear de lash as well—and ain't I a woman? I have borne five children and I seen 'em mos all sold off into slavery, and when I cried out with a mother's grief, none but Jesus hear—and ain't I a woman?

Id. at 160.

16. STEPHEN OATES, *LET THE TRUMPET SOUND: THE LIFE OF MARTIN LUTHER KING, JR.*, n.469 (1982).

B. From Slavery to Freedom: Frederick Douglass

Frederick Douglass was born into slavery in Maryland, the offspring of an enslaved black woman and a white man, probably her master.¹⁷ His mother was taken from him when he was a baby. He saw her four or five times, when she risked her life by traveling twelve long miles and back in the dark of night to comfort her child to sleep.¹⁸ She died when he was seven.¹⁹

As a child on a plantation of over 300 slaves, Douglass had nothing to wear, even in winter, but two coarse cloth shirts.²⁰ He taught himself to read and was determined to run away, risking death, rather than be shackled and stunted by slavery.²¹ After his escape, he became acquainted with William Lloyd Garrison, abolitionist and publisher of *The Liberator*. Douglass soon became a central figure in the abolition movement, a trusted advisor of white abolitionists, and even of Abraham Lincoln.²² After the Civil War, he campaigned for the right of African-Americans and women to vote.²³

Douglass was one of the first Americans to examine the disparity between white and black understandings of the significance of the Declaration of Independence. He chose the Fourth of July to remind his mostly white audience that what was to them an emblem of freedom was not so for African-Americans. He called the signers of the Declaration of Independence brave and admirable men despite his clear denunciation of their qualified liberty for all,²⁴ then posed a number of pointed questions:

What have I, or those I represent, to do with your national independence? Are the great principles of political freedom and of natural justice, embodied in that Declaration of Independence, extended to us? . . . This Fourth of July is *yours*, not *mine*. . . . What, to the American slave, is your 4th of July? I answer: a day that reveals to him, more than all other days in the year, the gross injustice and cruelty to which he is the constant victim. To him, your celebration is a sham; your boasted liberty, an unholy license; your national great-

17. See Philip S. Foner, *Frederick Douglass*, in 1 THE LIFE AND WRITINGS OF FREDERICK DOUGLASS 15 (Philip Foner ed., 1950) [THE LIFE AND WRITINGS OF FREDERICK DOUGLASS, a three volume work, will hereinafter be referred to as THE LIFE AND WRITINGS OF FREDERICK DOUGLASS, preceded by the volume number.].

18. See *id.*

19. See *id.*

20. See 2 THE LIFE AND WRITINGS OF FREDERICK DOUGLASS, *supra* note 17, at 255-60.

21. See *id.* at 276-306.

22. See 1 THE LIFE AND WRITINGS OF FREDERICK DOUGLASS, *supra* note 17, at 26.

23. See 3 THE LIFE AND WRITINGS OF FREDERICK DOUGLASS, *supra* note 17, at 42.

24. 2 THE LIFE AND WRITINGS OF FREDERICK DOUGLASS, *supra* note 17, at 188-92 (a speech entitled, *The Meaning of the Fourth of July for the Negro* given on the Fourth of July at Rochester, New York, in 1852).

ness, swelling vanity . . . your sermons and thanksgivings, with all your religious parade and solemnity are, to [God], mere bombast, fraud, deception, impiety, and hypocrisy—a thin veil to cover up crimes which would disgrace a nation of savages . . . [F]or revolting barbarity and shameless hypocrisy, America reigns without a rival.²⁵

Douglass's greatness lies in the fact that he did not release America from its promise of democracy for all. He demanded that this promise be honored. He did not cave in to the vision of American society put forward by Justice Taney in *Dred Scott v. Sanford*.²⁶ Taney argued that the Constitution never intended that African-Americans be citizens of the United States.²⁷ In so doing, Taney adopted the flaws of the Constitution as intentional and irredeemable. Douglass rejected this vision. He declared that the Constitution, a much more conservative document than the Declaration of Independence, was not, in and of itself, pro-slavery.²⁸ Instead, he sought to perfect the promise of the Constitution, to make an America that embraced citizens of all races.

C. The Voice of a Race: W.E.B. Du Bois

W.E.B. Du Bois was born on February 23, 1868 in Great Barrington, Massachusetts.²⁹ His brilliance shone early: he excelled in most subjects, and advanced through grades more quickly than the other students. At twelve years old, Du Bois entered high school; at fifteen, he took up journalism and began to report on the black community for the *New York Globe*. In 1885, with help from the local church, Du Bois, entered Fisk University in Tennessee with advanced sophomore standing. There he

25. *Id.*

26. 60 U.S. 393, 403-07 (1857).

27. *See id.* at 404.

28. *See* William Bradford Reynolds, *Another View: Our Magnificent Constitution*, 40 VAND. L. REV. 1343, 1347 (1987). Taney's view regarding whether the Constitution was pro-slavery in and of itself incited a raging battle among historians that continues to this day.

29. *See* W.E.B. DU BOIS, *THE AUTOBIOGRAPHY OF W.E.B. DU BOIS: A SOLILOQUY ON VIEWING MY LIFE FROM THE LAST DECADE OF ITS CENTURY* 61 (1968) [hereinafter, DU BOIS, *AUTOBIOGRAPHY*]. His great-grandfather was a doctor descended from French Huguenot immigrants who, living in Haiti, owned slaves and, with a bi-racial woman, bore Du Bois's grandfather in 1803. *See id.* at 65. Du Bois's father, Alfred Du Bois was born in Haiti in 1825 and eventually settled in Massachusetts. *See id.* at 66. Du Bois's maternal great-great grandfather, Tom Burghardt, was kidnapped from West Africa, enslaved, and brought to Massachusetts. *See id.* at 62. He was freed during the Revolutionary War. *See id.* He then settled just outside Great Barrington, and his descendants farmed and worked as hired labor and servants throughout the area. *See id.* at 63. Du Bois's mother, Mary Burghardt was born in 1831 of African and Dutch ancestry. *See id.* at 64. She married Alfred Du Bois in 1867, and W.E.B. was born one year later. *See id.* at 72. Du Bois' father moved to Connecticut with the expectation that his wife and their child would eventually join him; Du Bois's mother decided against the move, and W.E.B. never saw his father again. *See id.* at 72-73.

studied German, Greek, Latin, classical literature, philosophy, ethics, chemistry, and physics. In 1888, at twenty, Du Bois was admitted to Harvard College where he studied philosophy with the great philosophers William James and George Santayana. He studied in Germany for two years, visiting all of Europe, was denied a Ph.D. from the Germans because of his short tenure there,³⁰ and returned to the U.S. to accept a chair in classics at Wilberforce University.³¹ In 1895, Du Bois became the first African-American to receive his Ph.D. from Harvard.³²

Du Bois' greatest achievements, however, are probably the publication in 1903 of *The Souls of Black Folk*³³ and his involvement in the founding and running of the NAACP. While both had a profound impact on the history of race relations in this country, his book immortalized the burdens of race in declaring that the great problem of the twentieth century was to be the problem of the color line.³⁴ Du Bois wrote:

[T]he Negro is a sort of seventh son, born with a veil, and gifted with second-sight in this American world,—a world which yields him no true self-consciousness, but only lets him see himself through the revelation of the other world. It is a peculiar sensation, this double-consciousness, this sense of always looking at one's self through the eyes of others, of measuring one's soul by the tape of a world that looks on in amused contempt and pity. One ever feels his twofoldness,—an American, a Negro; two souls, two thoughts, two unreconciled strivings; two warring ideals in one dark body, whose dogged strength alone keeps it from being torn asunder.³⁵

The description of the African-American condition as "double consciousness" is the lineal descendent of Douglass's critique of the Constitution.³⁶ Douglass essentially argued that black understanding of the Declaration of Independence or the Constitution is ironic.³⁷ The Declaration, while purportedly a document embodying liberation, is actually an instrument of oppression. Only by perceiving the Declaration (or the Constitution) in both capacities can we understand how it is viewed by black people. Du Bois appropriated this argument when he suggested that, as a general matter, the African-American condition is similarly ironic.³⁸ Ac-

30. See DU BOIS, AUTOBIOGRAPHY, *supra* note 29, at 175.

31. See *id.* at 185.

32. See *id.*

33. W.E.B. DU BOIS, THE SOULS OF BLACK FOLK (Dodd, Mead & Company ed., 1979) (1903) [hereinafter, DU BOIS, SOULS OF BLACK FOLK].

34. See *id.* at 3.

35. *Id.*

36. See *supra* notes 24-28.

37. See 2 THE LIFE AND WRITINGS OF FREDERICK DOUGLASS, *supra* note 17, at 118, 119, 181-204.

38. See DU BOIS, SOULS OF BLACK FOLK, *supra* note 33, at 3.

knowledging one's blackness depends upon seeing oneself as a subject, a human being endowed with those rights and qualities possessed by all other human beings. However, it also depends upon seeing oneself, through white people's eyes, as an object. Such a dual-perspective is the only explanation for the way in which the races are separated from each other and assigned superior or inferior status. Unlike white people, who exist comfortably within their subjectivity,

[the black man has the burden of struggling to] attain self-conscious manhood, to merge his double self into a better and truer self. In this merging he wishes neither of the older selves to be lost. He would not Africanize America, for America has too much to teach the world and Africa. He would not bleach his Negro soul in a flood of white Americanism, for he knows that Negro blood has a message for the world. He simply wishes to make it possible for a man to be both a Negro and an American, without being cursed and spit upon by his fellows, without having the doors of Opportunity closed roughly in his face.³⁹

This description of the black condition, as much as anything else, has cemented Du Bois's position as one of this century's most influential American philosophers of race. The idea that African-Americans see the world from two different perspectives, that of the oppressor and the oppressed, embodies both the benefits and burdens of race.

D. Reconstituting the American Dream: Martin Luther King

W.E.B. Du Bois died on the eve of Martin Luther King's March on Washington.⁴⁰ Taylor Branch, remarking on King's struggle to reach the top of the steps of the Lincoln Monument through a crowd of at least 300,000 and his final ascension there, wrote:

An ancient man reached halfway around the world to fix the historical moment: W.E.B. Du Bois had died in Ghana. In making the announcement over the huge loudspeakers at the march, Roy Wilkins . . . [announced], "[I]t is incontrovertible that at the dawn of the twentieth century [Du Bois's voice] was the voice that was calling to you to gather here today in this cause."⁴¹

King got up to the podium, spoke for awhile from prepared text and then did what he did best: preached extemporaneously, moved by wisdom, hope, and grief. In what is now known as the "I have a dream" speech,

39. *Id.*

40. TAYLOR BRANCH, PARTING THE WATERS: AMERICA IN THE KING YEARS, 1954-1963, 878 (1988).

41. *Id.*

King reiterated the criticism of American democracy made by Douglass and Du Bois.⁴² He said:

We cannot be satisfied as long as the Negro's basic mobility is from a smaller ghetto to a larger one. . . .

...

We cannot be satisfied as long as a Negro in Mississippi cannot vote and a Negro in New York believes he has nothing for which to vote. No, we are not satisfied, and we will not be satisfied until justice rolls down like waters and righteousness like a mighty stream. . . .

...

I . . . have a dream. It is a dream deeply rooted in the American dream that one day this nation will rise up and live out the true meaning of its creed—we hold these truths to be self-evident, that all men are created equal.⁴³

King's invocation of the American dream is, I believe, an attempt to reconstitute the dream on a new and more just basis. He extended the debate on racial justice pursued by Douglass and Du Bois beyond the Declaration of Independence or the Constitution, and beyond the condition of blackness as a philosophical concept. Instead, King sought to reinvent the American Dream itself along racially inclusive lines. He demanded that the opportunities for achievement and advancement be extended to all citizens regardless of race.⁴⁴

The burden of race in America is the extent to which this vision has been denied to people of color. The benefit of race is that African-Americans are in a position to understand the tremendous impact race has on our society. We acknowledge that impact as we seek to overcome it.

II. Shifting Discrimination Paradigms in the Criminal Justice System

A. Color-Blind Anti-Discrimination: Randall Kennedy

This author argued that a consistent thread of criticism runs through African-American discussions of American democracy. Such a critique focuses upon the manner in which people of color experience the world and the law, as both Americans and, quite differently, as African-Americans. Nowhere is this more true than in the criminal justice system.

42. See *supra* notes 24-28, 34-39 and accompanying text.

43. Martin Luther King, Jr., *I Have A Dream*, in WRITINGS AND SPEECHES THAT CHANGED THE WORLD 104 (James M. Washington ed., 1992).

44. See *id.*

African-Americans are grossly over-represented in the criminal justice system.⁴⁵ In part, this is due to the fact that, per capita, black people do commit more crimes than whites.⁴⁶ However this fact alone does not account for the disparities in the crime statistics. In fact, since the 1970s, rates of black crime have been stable, even though the rates of prosecution have increased exponentially.⁴⁷ Furthermore, once inside the criminal justice system, African-Americans are more likely to suffer violence at the hands of the police,⁴⁸ less likely to receive an equitable plea bargain,⁴⁹ and

45. See CARL T. ROWAN, *THE COMING RACE WAR IN AMERICA: A WAKE-UP CALL* 193-94 (1996). Blacks now comprise 50.8 percent of the inmates in our prisons and jails. See *id.* at 193. One out of every eleven black adults is in prison or jail, or on probation or parole. See *id.* At any one time, 6 to 7 percent of black males twenty-five to thirty-four years old is in state or federal prisons. See *id.* While blacks comprise 12.5 percent of the U.S. population, they make up 55 percent of the new incarcerations. See *id.* According to Bureau of Justice statistics, the proportion of black male adults behind bars in 1994 was almost eight times higher than the proportion of white males. See *id.* at 193-94. If present trends continue, an absolute majority of black males aged eighteen to forty will be incarcerated in one form or another by the year 2010. See *id.* at 194. African-Americans are incarcerated at a rate of 1,947 per 100,000 African-American citizens compared to a rate of 306 per 100,000 for white citizens. See *id.* African-American males make up less than 7 percent of the U.S. population, yet they comprise almost half of the prison and jail population. See *id.* In 1992, 56 percent of all African-American men aged 18 to 35 in Baltimore were under some form of criminal justice supervision on any given day. See *id.* In the District of Columbia, the figure was 42 percent. See *id.* One out of every three African-American men between the ages of 20 and 29 in the entire country-including suburban and rural areas-was under some form of criminal justice supervision in 1994. See *id.*

46. See STEVE R. DONZIGER, *THE NATIONAL CRIMINAL JUSTICE COMM'N, THE REAL WAR ON CRIME: THE REPORT OF THE NATIONAL CRIMINAL JUSTICE COMM'N 99* (1996).

47. See *id.* at 99-100. Since the mid-1970s, African-Americans have consistently accounted for about 45 percent of those arrested for murder, rape, robbery, and aggravated assault. See *id.* at 100. These numbers tell us that the *proportion* of overall crime committed by African-Americans has not increased for several years. See *id.* Yet since 1980, the African-American prison population has increased dramatically while the white prison population has increased far less. See *id.*

48. See THE NAACP AND THE CRIMINAL JUSTICE INSTITUTE AT HARVARD LAW SCHOOL, *BEYOND THE RODNEY KING STORY: AN INVESTIGATION OF POLICE CONDUCT IN MINORITY COMMUNITIES* 29-45 (1995) [hereinafter NAACP]. The investigation lists a number of findings, including: excessive force has become a standard part of the arrest procedure; physical abuse by police officers is not unusual or aberrational; verbal abuse and harassment are the most common forms of police abuse and are standard police behavior in minority communities; and false charges and retaliatory actions against abused citizens sometimes follow incidents of abuse. See *id.* See also Charles J. Ogletree, *Does Race Matter in Criminal Prosecutions?*, *THE CHAMPION*, July 1991, at 7, 10 [hereinafter, Ogletree, *Race*]. A number of studies have documented the unusually high arrest rates for blacks suspected of crime compared to other groups. See *id.* Additionally, there have been studies showing the excessive use of deadly force by police officers in pursuing both armed and unarmed black suspects. See *id.* In one study, it was learned that blacks were ten times more likely than whites to have been shot at by police officers, eighteen times more likely to be wounded, and five times more likely to be killed. See *id.* This pattern of conduct by the police is born out by other data revealing police propensity to focus on minorities in criminal investigations. See *id.*

49. See DONZIGER, *supra* note 46, at 112.

up to seven times more likely to be sentenced to death than their white counterparts.⁵⁰ The mandatory minimum sentences which were intended to rid our streets of drugs have instead stolen minority youth from their communities; they penalize blacks, who use crack cocaine, up to 100 times more harshly than their white counterparts who use powder cocaine.⁵¹ These sentencing guidelines send conflicting messages to young people: our supposedly fair and equal justice system treats them differently on the basis of their choice of the same drug.

Randall Kennedy, arguing for a race-blind society, has written eloquently and powerfully about the role of race, most notably on the effect of capital punishment on the African-American community.⁵² Like many Americans, Kennedy does not believe that capital punishment is wrong in theory; instead, he argues that capital punishment is acceptable only when it is enforced in a colorblind manner.⁵³ He characterizes this point of view as a victim-centered approach which shifts attention from African-American criminals and toward those predominantly black individuals who suffer as a result of black crime.⁵⁴ He discusses *McClesky v. Kemp*,⁵⁵ in which an African-American, sentenced to death in Georgia for the murder of a white policeman, appealed to the Supreme Court on the grounds that in Georgia an individual who murdered a white person was four times more likely to receive a death sentence than an individual who murdered a black person.⁵⁶ According to Kennedy, *McClesky* was wrongly decided not because it failed to value the life of the black criminal, but because it failed to value the lives of black victims.⁵⁷ Also according to Kennedy, however, more black murderers should be sentenced for the killing of African-Americans, not fewer.⁵⁸

This line of thought colors Kennedy's discussion of the appropriate response to the use of crack cocaine as the drug of choice in the black community. He contends that the courts may be doing the black community a favor, and certainly are not doing anything unconstitutional, by pun-

50. See *id.* at 114.

51. See ROWAN, *supra* note 45, at 194. If you are caught with five grams of crack cocaine (about two pennies in weight, \$500 in street value), a judge must impose a mandatory minimum sentence of five years even in the absence of intent to sell. See *id.* With powdered cocaine, however, you need to have 500 grams of the substance (more than a pound, worth about \$50,000) before the same five-year mandatory minimum sentence is imposed. See *id.*

52. See Randall L. Kennedy, *McClesky v. Kemp: Race, Capital Punishment, and the Supreme Court*, 101 HARV. L. REV. 1388 (1988) [hereinafter, Kennedy, *McClesky*].

53. See *id.* at 1436-40.

54. See *id.* at 1391-94.

55. 481 U.S. 279 (1987).

56. See *id.* at 355 (Blackmun, J., Dissenting).

57. See Kennedy, *McClesky*, *supra* note 52, at 1394.

58. See *id.* at 1436.

ishing African-Americans more severely than whites for the use of crack rather than powder cocaine.⁵⁹ As with his discussion of capital punishment, he suggests that the harsher punishment actually empowers the black community.⁶⁰ He advocates that more punishment will lead to more equality. I reject that notion and think that it is not at all a solution to the problem of race in America.

It is instructive to compare Kennedy's position with those held by minority conservative critics Glenn C. Loury and Dinesh D'Souza. Loury assumes that the consequences of policing on minority communities are fairly straightforward: the streets are made secure and the criminals are punished.⁶¹ The effects of the criminal justice system are, so far as the non-criminal segment of the community is concerned, benign—even beneficial. However, this analysis fails to explain why African-American leaders would refuse to authorize increases in police activity in their communities.⁶² Loury's explanation is that the black community identifies with the criminals who suffer as a result of police activity and thus seeks to protect them from the full force of the law.⁶³ Now, while there may be some truth in the argument that black people feel a bond of 'kinship' to one another along racial lines, it is naïve in the extreme to believe that this kinship is the only barrier between the black community and safe, peaceful neighborhoods. Loury's argument rests upon both an unjustified belief in black tolerance of black crime⁶⁴ and an uncritical acceptance (or an unbelievable ignorance) of the impact of the criminal justice system on the African-American community.

D'Souza, on the other hand, does not believe that the policing of the African-American community is free from racial bias. Instead he argues that the racial stereotypes employed by the police may be justified because they are "rational" or "efficient." He argues that

[s]ince policemen know from experience that blacks—especially young African American males—are more likely to commit street crimes than whites, they . . . may practice a kind of rational discrimination. This would not mean, of course, that they arrest young blacks simply for being black, but rather that they are more disposed

59. See Randall Kennedy, *The State, Criminal Law, and Racial Discrimination: A Comment*, 107 HARV. L. REV. 1255, 1256 (1994) [hereinafter, Kennedy, *Criminal Law*].

60. See *id.* at 1267.

61. See GLENN C. LOURY, ONE BY ONE FROM THE INSIDE OUT: ESSAYS AND REVIEWS ON RACE AND RESPONSIBILITY IN AMERICA 298-99 (1995) (endorsing John DiIulio's suggestion that "[p]ublic policy should aim at securing the streets, schools, and housing projects of inner-city communities[,] and the bad guys should be kept behind bars for longer periods of time." *Id.*)

62. See *id.* at 299.

63. See *id.* at 300-01.

64. See ROWAN, *supra* note 45, at 185.

to see young blacks as potential criminals and thus show some bias in the way that they pursue some criminals and not others.⁶⁵

D'Souza's approach is fatally flawed in two ways. First, it is unconstitutional. Drug courier profiles, search and seizure laws, and all the rest are used to invade the freedoms of the black community far more than the white community,⁶⁶ and many observers do believe these laws are employed in a racially discriminatory manner.⁶⁷ However, such tactics are never *justified* on the basis of race because such justification would be unconstitutional.⁶⁸ If the Constitution is not reason enough for D'Souza (the Constitution does not, after all, provide an efficient blueprint for running society), strong moral reasons exist for not prejudging an individual's criminality on the basis of his race alone. Individuals should be permitted to enjoy liberty unfettered by the threat of arbitrary police intervention. That is, remember, one of the basic freedoms that the American Republic was constituted to promote. Rational or not, an individual's freedoms ought not to be limited by his or her race.

As it happens, the point is precisely that much of the enforcement of criminal law is irrational; it is not reason but racial animus which motivates many of the practices adopted by the criminal justice system.⁶⁹ According to D'Souza, racial bias does not help catch more criminals (how could it? one either is, or is not, a criminal regardless of race); it merely channels police action toward catching a certain, racially specific, group of criminals.⁷⁰

Kennedy, while not adopting either of these ill-considered positions, adopts an ill-considered position of his own. Kennedy's virtue is that, unlike Loury, he acknowledges and criticizes racism in the operation of criminal justice system. In his discussion of *McClesky*, Kennedy analyzes, in great detail, the lack of racial sensitivity which underpinned much of the Supreme Court's reasoning.⁷¹ He accuses a "Court . . . confronted by the most extensive study of capital sentencing in American history, a study that presented patterns of racial disparity that are undeniably suspicious, regardless of one's eventual judgment as to the legal status of McClesky's claim [(i.e. the Baldus study), of becoming] [p]analyzed by [the] fear that

65. DINESH D'SOUZA, *THE END OF RACISM* 284 (1995).

66. See Ogletree, *Race*, *supra* note 48, at 4-5.

67. See, e.g., DONZIGER, *supra* note 46, at 109-10.

68. See generally *Terry v. Ohio*, 392 U.S. 1, 15 (1968) (commenting on wholesale harassment of minorities, particularly "Negroes," by certain elements of the police community as overbearing, harassing and trenching upon personal security without the objective evidentiary justification required by the Constitution).

69. NAACP, *supra* note 48, at 9-12.

70. See D'SOUZA, *supra* note 65, at 284.

71. See *id.* at 1408-21.

seeing would entail doing."⁷² "[T]he justices inflicted upon themselves a myopia reminiscent of the one that afflicted the Court during the reign of *Plessy v. Ferguson*."⁷³

This insensitivity to race is apparent in "the manner in which the *McClesky* majority articulated and defended its decision [which] shows an egregious disregard for the sensibilities of black Americans."⁷⁴ The decision itself contends that the Baldus study, "the most comprehensive analysis to date of racial influences in capital sentencing in a single state,"⁷⁵ "[a]t most indicates a discrepancy that appears to correlate with race."⁷⁶ Justice Brennan, in his dissent, points out that *McClesky* himself "could not fail to grasp [the study's] essential narrative line: there was a significant chance that race would play a prominent role in determining if he lived or died."⁷⁷ But the rhetoric of a Court which has often bent over backwards to avoid alienating white racists "made no attempt to assuage the inevitable anger and anxiety that the decision would generate within the black community."⁷⁸

Although Kennedy criticizes the justices, he nevertheless accepts the notion that there may be no conscious discrimination on the part of the jurors in Georgia who sentence black murderers of whites to death at four times the rate of blacks who murder other African-Americans.⁷⁹ Instead, he suggests, "race-of-the-victim disparities in sentencing probably reflect racially selective empathy more than racially selective hostility."⁸⁰ He believes that the jurors "relate more fully to the suffering of white victims: black victims remain strangers while white victims can be imagined as family or friends."⁸¹ His solution, though, is not to quash the death penalty for those African-Americans who have murdered whites, but to demand that white jurors impose the same sentence for African-Americans who kill other African-Americans as for African-Americans who kill whites.⁸²

Kennedy applies this "victim centered" argument to the problem of drug abuse in the black community.⁸³ Unlike D'Souza, he does believe

72. *Id.* at 1415.

73. *Id.* at 1415-16 (citing *Plessy v. Ferguson*, 163 U.S. 537 (1896)).

74. *Id.* at 1417.

75. *Id.* at 1396.

76. *McClesky v. Kemp*, 481 U.S. at 312. See also Kennedy, *McClesky*, *supra* note 52, at 1415.

77. *McClesky v. Kemp*, 481 U.S. at 321 (Brennan, J., dissenting).

78. Kennedy, *McClesky*, *supra* note 52, at 1418.

79. See *id.* at 1388, 1419-20.

80. *Id.* at 1420.

81. *Id.*

82. See *id.* at 1425.

83. See *id.* at 1388.

that minorities have a right to (discrimination-free) police protection.⁸⁴ However, he asserts that the increased threat from crime faced by minority communities requires a proportionately greater rate of police intervention than that experienced by majority communities.⁸⁵ He contends that

the principal problem facing African-Americans in the context of criminal justice today is not over-enforcement but *under-enforcement* of laws. The most lethal danger facing African-Americans in their day-to-day lives is not white, racist officials of the state, but private, violent criminals (typically black) who attack those most vulnerable to them without regard to racial identity.⁸⁶

The victim-based argument of his *McClesky* article takes on a new turn when applied to other aspects of the criminal justice system. In the same way that black murderers of other blacks ought to be sentenced as harshly as black murderers of whites, the extra attention that the black community receives from law enforcement officials is characterized as the achievement of racial equality, a gain in civil rights.⁸⁷ As Kennedy argues, it eliminates the "racially invidious under-enforcement [of criminal laws which] purposefully denies African-American victims of violence the things that all persons legitimately expect from the state: civil order and, in the event that crimes are committed, best efforts to apprehend and punish offenders."⁸⁸ Black victims of crime finally are able to receive that equality of effort from the criminal justice system that all citizens are entitled to expect.

Kennedy's analysis proposes that the present policing of crack cocaine use grants more than mere equality to the black community; it favors it. The criminal justice system has graciously targeted black communities in order to rid them of drug abuse by instituting harsher penalties for those drug-related crimes which predominantly affect the black community. Kennedy quotes with approval Kate Stith's contention that "the legislature's action [in imposing harsher penalties for crack use] might also . . . [be] viewed as a laudatory attempt to provide enhanced protection to those communities—largely black . . .—who are ravaged by abuse of this potent drug."⁸⁹

All this suggests that Kennedy is willing to address the problem of racism when it is confined to the *operation* of various measures which impact upon the black community in a racially invidious manner. That is,

84. *See id.* at 1424.

85. *See* Kennedy, *Criminal Law*, *supra* note 59, at 1259.

86. *Id.*

87. *See id.* at 1267.

88. *Id.*

89. *Id.* (quoting Kate Stith, *The Government Interest in Criminal Law: Whose Interest Is It Anyway?*, in *PUBLIC VALUES IN CONSTITUTIONAL LAW* 137, 158 (Stephen Gottlieb ed., 1993)).

where two individuals are tried for the same offense, Kennedy is as critical as anyone of disparities in treatment based on race. That was the issue facing the Court in *McClesky*. Kennedy's solution was to recommend not just the killing of more white criminals but more black ones as well.⁹⁰ However, he does not consider that the possibility that the measures themselves could be directed at particular (racial) communities in a racially discriminatory manner. As long as all criminals who are punished for the same crime are punished equally, Kennedy's argument supposes, the law does not discriminate on basis of race when it chooses to criminalize more harshly, or more comprehensively, the activities of a racially distinct subset of the American populace.⁹¹ Tailoring certain offenses to a particular community—in this case the black community—is, as far as Kennedy is concerned, perfectly justifiable.⁹² That means that it is all right for the legislature to specify a 'black' crime—crack—as the special concern of the 'war on drugs' so long as those white criminals who are caught using or peddling crack are punished as severely as the black ones. It is thus perfectly defensible to disproportionately arrest and punish black drug users while virtually ignoring white users.

Two presumptions, upon which this conservative response to charges of racism in the operation of the criminal justice system is based, must be addressed with urgency. First, Kennedy's argument depends upon discounting the criminal as an important element in the measurement of racism. He makes this clear from his discussion of *McClesky*.⁹³ Adopting a community-oriented approach,⁹⁴ Kennedy represents black criminality as inimicable to the well-being of the community and contends it should be ignored in any measurement of the impact of the criminal justice system on African-Americans.⁹⁵ He employs a 'benefits and burdens' measurement⁹⁶ of racial harm which assumes that only criminals are burdened by the measures imposed by the criminal justice system, while the African-American community as a whole is benefited. Kennedy's methodological

90. The upshot of Kennedy's arguments would be that fewer white killers of African-Americans would escape the death penalty. See Kennedy, *McClesky*, *supra* note 52, at 1425. However, because black murderers predominantly choose black victims, death sentences for African-Americans would increase quite alarmingly.

91. See Kennedy, *Criminal Law*, *supra* note 59, at 1273.

92. See *id.* at 1269.

93. See Kennedy, *McClesky*, *supra* note 52, at 1394. ("I am more concerned with the plight of black communities whose welfare is slighted by criminal justice systems that respond more forcefully to the killing of whites than the killing of blacks than I am concerned with the plight of convicted murderers, black or white." *Id.*)

94. See *id.*

95. See Kennedy, *Criminal Law*, *supra* note 59, at 1266.

96. See *id.*

presupposition is that criminals don't matter: whatever burdens they suffer can be discounted in calculating the disparate racial impact of law enforcement policies on the black community. For Kennedy, there is no adverse impact on the black community because there is no racially inimicable impact that matters or that could be subject to criticism. On the contrary, the effects of law enforcement are all positive because the African-American community is singled out for special treatment which vigorously tackles the problem of black criminality.⁹⁷ Kennedy may hope to justify the 'disparate' part of disparate impact (as, for instance, D'Souza does). However, Kennedy concentrates on the 'impact' side to deny that there is any negative impact at all. Crack users are removed from society, murderers permanently so.

Some courts have not been quite so sanguine about the increased criminalization of African-Americans along racial lines as a result of the disparate treatment for crack and powder cocaine use.⁹⁸ Judges Heany and Bright, both of the Eighth Circuit, have separately questioned the distinction between powdered and crack cocaine.⁹⁹ In *United States v. Walls*,¹⁰⁰ the D.C. district court held that the minimum sentence for crack cocaine offenses constituted cruel and unusual punishment under the Eighth Amendment.¹⁰¹ In *United States v. Clary*,¹⁰² Judge Clyde Cahill observed that:

this one provision, the crack statute, has been directly responsible for incarcerating nearly an entire generation of young black American men for very long periods, usually during the most productive time of their lives. Inasmuch as crack and powder cocaine are really the

97. See *supra* notes 59-60 and accompanying text.

98. See DOUGLAS McDONALD & KENNETH CARLSON, BUREAU OF JUSTICE STATISTICS SENTENCING IN THE FEDERAL COURTS: DOES RACE MATTER? (THE TRANSITION TO SENTENCING GUIDELINES 1986-1990) (1994). McDonald and Carlson conclude that as a result of the implementation of the sentencing guidelines which the United States Sentencing Commission submitted to Congress in 1987 large disparities have appeared between the sentences of white offenders in contrast to black and Hispanic ones. See *id.* "During 1986-88, before full implementation of sentencing guidelines, white, black and Hispanic offenders received similar sentences, on average, in Federal district courts." *Id.* Since the guidelines were introduced, black offenders received prison sentences that were, on average, 41 percent longer than for whites. See *id.* McDonald and Carlson attribute this disparity to different sentences for trafficking in crack or powder cocaine. See *id.* See also Charles J. Ogletree, *Race and Sentencing: The Significance of Race in Federal Sentencing*, 6 FEDERAL SENTENCING REPORTER 229, 230 (1994) [hereinafter, Ogletree, *Sentencing*].

99. See *United States v. Willis*, 967 F.2d 1220, 1225 (8th Cir. 1992) (Heany, J., concurring); *United States v. Lattimore*, 974 F.2d 971, 977 (8th Cir. 1992) (Bright, J., dissenting).

100. 841 F.Supp. 24, 25 (D.D.C. 1994).

101. See *id.* at 31.

102. 846 F. Supp. 768 (E.D. Mo. 1994).

same drug . . . it appears likely that race rather than conduct was the determining factor.¹⁰³

He held that penalizing blacks more harshly than whites for their choice of drug constituted an assault on black communities in violation of the Equal Protection Clause.¹⁰⁴

The case Kennedy is most keen on rebutting, however, is *State v. Russell*¹⁰⁵ which graphically used the data illustrating the disparities in sentencing to conclude that minorities were sentenced to much longer periods of incarceration than whites, simply on the basis of the drug used. Kennedy argues that the *Russell* court was "insufficiently attentive to the difference between a law that burdens a racial minority community as a whole as distinct from a law that burdens a mere subset of that community."¹⁰⁶ Furthermore, he claims that the "conventional racial critiques of the state [which] maintain that the criminal justice system is infected with a pervasive, systematic racial bias," "obscure analysis of a wide range of problems" and "stifl[e] intelligent debate over drug policy."¹⁰⁷ That is (in part) because they manifest an unsophisticated understanding of the diversity and heterogeneity of the African-American community.¹⁰⁸

Kennedy's argument might be more acceptable if policy decisions on how to conduct the 'war on drugs' were bias-free. This is, after all, what is guaranteed under the rubric of 'due process of the law.'¹⁰⁹ The problem is that the decision-making process at every stage of the 'war on drugs' is

103. *Id.* at 770.

104. *See id.* at 797. *See also* Ogletree, *Sentencing*, *supra* note 98, at 230.

105. 477 N.W.2d 886 (Minn. 1991) (In *Russell*, the Minnesota Supreme Court affirmed the lower court's decision which held that a statutory distinction drawn between quantity of crack cocaine possessed and quantity of powder cocaine possessed for purposes of charging and sentencing violated the equal protection guarantees of Federal and State Constitutions. *See id.* at 887, 889. Statistical evidence at trial provided that of all persons charged with possession of cocaine base, 96.6% were black; of all persons charged with possession of powder cocaine, 79.6% were white. *See id.* at 887 n.1. Under the State Statute, possession of three grams of crack cocaine carried a maximum sentence of 20 years imprisonment while possession of an equal amount of powder cocaine carried a maximum sentence of five years. *See id.* Under the sentencing guidelines, the presumptive sentence for possession of three grams of cocaine was an executed 48 months imprisonment; the presumptive sentence for possession of an equal amount of powder cocaine was a stayed 12 months imprisonment and probation. *See id.*)

106. Kennedy, *Criminal Law*, *supra* note 59, at 1256.

107. *Id.* at 1257, 1260.

108. *See id.* at 1258-60.

109. *See generally* *State v. Russell*, 477 N.W.2d at 889 (noting that constitutional guarantees of equal protection would challenge a classification which "[a]ppears to impose a substantially disproportionate burden on the very class of people whose history inspired the principles of equal protection"). Kennedy critiques the idea that racial discrimination pervades definitions of criminality and the administration of law enforcement but acknowledges that "[t]he administration of criminal justice has . . . [b]een used as an instrument of racial oppression." Kennedy, *Criminal Law*, *supra* note 59, at 1258, 1259.

discretionary and thus subject to bias (racial or otherwise) in its application. Indeed, many of the discretionary decisions have been tainted by racial bias. In drafting the legislation, Congress was warned, and knew or should have known, that the differential sentences for crack and powder cocaine would disproportionately affect the African-American community.¹¹⁰ In enforcing the legislation, police have chosen to target the black community while substantially ignoring the white community.¹¹¹ The mandatory minimum sentence for crack cocaine practically forces the judiciary to sentence African-Americans more harshly than whites for similar offenses.¹¹² Disturbing evidence also exists that undercover police officers have responded to the difference in sentences by sending away black dealers who provide the more expensive powder cocaine and demanding that they produce the more harshly criminalized crack cocaine.¹¹³ None of this is considered by Kennedy, but it has significantly contributed to the "explosion" of African-Americans in prison since 1980.¹¹⁴

This brings us to the second presupposition of Kennedy's argument: that it is up to the legislature to set whatever policy goals it wishes and to determine what initiatives are needed to fight crime.¹¹⁵ However, when Congress enacts a law that discriminates against minorities on the basis of race, such a law violates the Fourteenth Amendment and is unconstitutional.¹¹⁶ It is a basic tenet of the equal protection clause that the legislature ought not rely upon racial criteria in drafting laws, and the criminal justice system ought not rely upon racial criteria in enforcing

110. See DONZIGER, *supra* note 46, at 121. New York Senator Daniel Patrick Moynihan warned that "[b]y choosing prohibition, we are choosing to have an intense crime problem concentrated among minorities." *Id.* See also MICHAEL TONRY, *MALIGN NEGLECT: RACE, CRIME AND PUNISHMENT* (1995) (Tonry alleged that it was "easily foreseeable" that the war on drugs would disproportionately discriminate against minority communities. See *id.* at 32.)

111. See *id.* at 119 ("African-Americans make up 12 percent of the U.S. population and constitute 13 percent of all monthly drug users, but represent 35 percent of those arrested for drug possession, 55 percent of those convicted of drug possession, and 74 percent of those sentenced to prison for drug possession.").

112. See *id.* Some judges, however, are resisting the application of the harsher sentences.

113. See *United States v. Walls*, 841 F. Supp. 24, 26 (D.D.C. 1994) cited in Ogletree, *Sentencing*, *supra* note 98, at 231.

114. See DONZIGER, *supra* note 46, at 117. In 1979, only 6 percent of state inmates and 25 percent of federal inmates had been convicted of drug offenses. In 1991, the proportion of state inmates convicted of drug offenses had nearly quadrupled to 21%, while the proportion of federal inmates so convicted had more than doubled to 58%. The overwhelming majority of these new prison admissions for drug offenses were minority men. See *id.*

115. See Kennedy, *Criminal Law*, *supra* note 59, at 1278.

116. See *Strauder v. West Virginia*, 100 U.S. 303, 305-06 (1879) (citing with approval the Fourteenth Amendment mandate that no laws denying due process to citizens of the United States or any state be passed or enforced). It is noteworthy that even with such a recognition the Court did not disabuse itself of the notion of inherent racial inequality.

those laws.¹¹⁷ It is not the capacity of a particular law or initiative to include the whole African-American community, rather than merely a subset of that community, which renders that law or initiative unconstitutional or immoral. Rather, it is the illegitimate use of racial criteria to unduly punish or harass a minority racial group that renders the law or initiative unconstitutional.¹¹⁸ Kennedy's discussion of the sentencing guidelines for crack and powder cocaine misses or minimizes this simple but important fact.

The criminal justice system is, at all levels of its operation, highly discretionary. The police have discretion to decide whom to stop and frisk. State prosecutors have discretion to determine whom to prosecute, and what charges to bring. And judges have a great deal of discretion, before the trial, when the jury is selected, throughout the trial itself, and after the trial during sentencing.¹¹⁹ The existence of such discretion makes possible the pervasive and cumulative discrimination faced by many African-Americans who come into contact with the criminal justice system.¹²⁰

B. Color-Conscious Criminal Justice: Paul Butler

A strikingly different analysis of the intersection of race and crime is proposed by Professor Paul Butler, who argues that the abuse of discretion along racial lines which occurs in the criminal justice system should be combated by 'black power': self-help strategies which enable African-Americans to exert whatever influence they have to balance the scales of justice.¹²¹ Butler rejects Kennedy's argument that all black criminals deserve to be punished. Instead, he writes:

Criminal conduct among African-Americans is often a predictable reaction to oppression. Sometimes black crime is a symptom of internalized white supremacy; . . . other times it is a reasonable response to the racial and economic subordination every African-American faces every day. Punishing black people for the fruits of

117. See A. LEON HIGGINBOTHAM, JR., *SHADES OF FREEDOM: RACIAL POLITICS AND PRESUMPTIONS OF THE AMERICAN LEGAL PROCESS* 129 (1996). Judge A. Leon Higginbotham has argued that when racism exists in some branches of the criminal justice system it has a cumulative effect on other parts of that system, and extends into society at large. See also DONZIGER, *supra* note 46, at 114.

118. See, e.g., *State v. Russell*, 477 N.W. 2d 886, 892 (Minn. 1991) (Yetka, J., concurring) (noting that any legislation that allows "distinctions that have a harsher impact on minority groups, . . . effectively penaliz[ing] a suspect group" violated the State and Federal Constitutions).

119. See HIGGINBOTHAM, *supra* note 117, at ch. 11.

120. See DONZIGER, *supra* note 46, at 114.

121. See Paul Butler, *Racially Based Jury Nullification: Black Power in the Criminal Justice System*, 105 *YALE L. J.* 677 (1995) [hereinafter, Butler, *Nullification*].

racism is wrong if that punishment is premised on the idea that it is the black criminal's "just desserts."¹²²

He proposes a new paradigm of justice which rejects punishment for the sake of retribution and endorses it for the ends of deterrence and incapacitation.¹²³ He considers that this model is the standard for justice in the white community. However, if the criminal justice system will *not* provide that same justice for minority communities then, Butler argues, black people should help themselves to it:

For pragmatic and political reasons the black community is better off when some non-violent law breakers remain in the community rather than go to prison. The decision as to what kind of conduct by African-Americans ought to be punished is better made by African-Americans themselves, based on the cost and benefits to their community, than by the traditional criminal justice process' which is controlled by white lawmakers and white law enforcers. Legally, the doctrine of jury nullification gives the power to make this decision to African-American jurors who sit in judgement [sic] of African-American defendants. Considering the costs of law enforcement to the black community and the failure of white lawmakers to devise significant non-incarcerative responses to black antisocial conduct, it is the moral responsibility of black jurors to emancipate some guilty black outlaws.¹²⁴

Butler offers two major justifications for his proposal that black jurors ought to acquit black criminals. Both stem from his contention that "the idea of 'the rule of law' is more mythological than real, and . . . 'democracy' as practiced in the United States, has betrayed African-Americans far more than they could ever betray it."¹²⁵ He first asserts that:

[T]here still is no moral obligation to follow an unjust law Radical critics believe that the criminal law is unjust when applied to some antisocial conduct by African-Americans: The law uses punishment to treat social problems that are the result of racism and that should be addressed by other means such as medical care or the redistribution of wealth.¹²⁶

The contention that individuals ought not to obey an unjust law has a long and illustrious history¹²⁷ and may be said to occupy a central place in early American political thought.¹²⁸ However, the issue is far more complex than revealed by Butler's cursory examination of the problem. First, a

122. *Id.* at 680.

123. *See id.*

124. *Id.* at 679.

125. *Id.* at 706.

126. *Id.* at 708-09.

127. *See, e.g.,* St. Thomas Aquinas, *Summa Theologiae*, I-II, q. 92, a. 1 ad 4.

128. *See, e.g.,* HENRY DAVID THOREAU, *CIVIL DISOBEDIENCE AND READING* ch.1 (Penguin Books 1995) (1854).

legitimate question exists as to whether there is a general obligation to obey the law,¹²⁹ or whether the obligatory force of the law stems from the justice of individual law.¹³⁰ On the former view, if a country's legal system is, on balance, good (however that is to be established), then its citizens ought to obey its laws. On this approach, civil disobedience would constitute a rejection, not of one law, but of the whole legal system. On the latter analysis, citizens ought only to obey those laws which are in fact morally justified, whether the legal system as a whole is, on balance, good or not. Disobeying an unjust law, although liable to legal sanction, is not just morally permissible, but a became moral imperative.

Butler might seem to endorse the second of these approaches by limiting the number of cases in which he would, in fact, propose jury nullification.¹³¹ He does not agree that a jury ought to acquit every black defendant no matter what crime has been committed.¹³² Instead, he provides a three-stage test which limits the majority of nullifications to crimes involving drug offenses.¹³³ He suggests that:

In cases involving violent *malum in se* crimes like murder, rape, and assault, jurors should consider the case strictly on the evidence presented, and, if they have no reasonable doubt that the defendant is guilty, they should convict. For nonviolent *malum in se* crimes such as theft or perjury, nullification is an option that the jury should consider, although there should be no presumption in favor of it. . . . Finally, in cases involving nonviolent, *malum prohibitum* offenses, including 'victimless' crimes like narcotics offenses, there should be a presumption in favor of nullification.¹³⁴

Even so, it is not clear whether, having established that a law is unjust, a citizen ought to disobey that law whenever the opportunity presents itself. If we do accept that there is a moral duty to disobey an unjust law, that duty cannot permit just any act of disobedience, but only those acts which are in fact morally justified. Therefore, if Butler's claim that an Af-

129. See generally JOHN FINNIS, *NATURAL LAW AND NATURAL RIGHTS* (1980).

130. See JOSEPH RAZ, *THE AUTHORITY OF LAW*, ch. 12 (1979).

131. See Butler, *Nullification*, *supra* note 121, at 715.

132. See *id.* at 715-16.

133. See *id.* at 715.

134. *Id.* at 715. In a later article, he further limits his prescription of legitimate candidates for nullification. He contends:

I do not advocate universal emancipation: For example, people who sell drugs (including, perhaps, tobacco and alcohol) to children should be isolated from the community... I recognize the argument that drug selling is not victimless, but on libertarian grounds, I am not persuaded that this means it should be a crime. I note, however, that even if my proposal was adopted only with regard to drug users, a great number of black people would be returned to the community.

Paul Butler, *The Evil of American Criminal Justice: A Reply*, 44 *UCLA L. REV.* 143, 148-49 (1996) [hereinafter, Butler, *The Evil of American Criminal Justice*].

rican-American ought always to acquit an African-American drug user had moral force (and it does not), it would still be unjustified because it is over-inclusive and insensitive to the facts of particular situations. Butler would have to demonstrate that on every occasion upon which the option of jury nullification arises its use is morally justified. This cannot be shown by some general argument alone (although that general argument may, if justified, serve as a premise from which a more fact-sensitive argument can flow).

In fact, Butler does not rely upon this version of the 'no obligation to obey an unjust law' thesis. Instead, he endorses the version which entails a rejection of the general obligation to obey the law, by encouraging African-Americans to 'opt out' of the American system of criminal justice. The problem with this approach is its generality: you cannot, on this model, choose which laws you wish to disobey. In rejecting the general obligation to obey the law you reject the legitimacy of the whole legal system to govern you (and others like you). You cannot, with integrity, reject the operation of the law as it impacts upon drug enforcement in minority communities and then call upon the law to prevent or prosecute crime, enforce contracts, and transfer property.

Butler's rationale for prescribing the use of racially-motivated nullification denies the legitimacy of the criminal justice system. Butler does not, however, anticipate the consequences of this denial. His argument is that the presence of black jurors in criminal trials serves the symbolic function-Butler calls it the "legitimization function"¹³⁵—of conveying the message that the criminal justice system is fair and does not discriminate against minorities on the basis of their race.¹³⁶ Black participation legitimizes the operation of the criminal justice system. Therefore, African-Americans should refuse to let the law legitimize the racist criminalization of minorities and should use the system to engage in (essentially small-scale) acts of acquittal.

However, if the Black community adopted the tactic of jury nullification for even the small portion of offenses which Butler identifies, *this* would have the symbolic function of sending the message that the African-American community had opted out of the (illegitimate) criminal justice system. Opting out would not prevent the criminal justice system from

135. Butler, *Nullification*, *supra* note 121, at 712-14.

136. See, e.g., *Batson v. Kentucky*, 476 U.S. 79, 87 (1986) ("[t]he harm from discriminatory jury selection extends beyond that inflicted on the defendant and the excluded juror to touch the entire community," and allowing black people to serve on the jury strengthens "public respect for our criminal justice system and the rule of law." *Id.*). See also *Georgia v. McCollum*, 505 U.S. 42, 49 (1992) (the exclusion of blacks from juries "undermine[s] . . . public confidence—as well [it] should.").

continuing to operate: policemen would still arrest black suspects, and courts would still convict them. However, if Butler's proposal worked, it is difficult to imagine why courts would allow black jurors to sit in judgment over their peers. If Butler's view prevailed, a prosecutor might have a compelling argument that he or she is justified in using race as a criterion to strike jurors. With today's increasingly conservative judiciary, the gains instituted by *Batson v. Kentucky*, which prohibits race-based considerations in the use of peremptory strikes for the purposes of jury selection¹³⁷ might be done away with or might be lost.

C. A Moderately Radical Alternative

Kennedy and Butler approach the issue of the criminal justice system and the African-American community from different poles. Kennedy takes a stand which favors government intervention to redress the harms that black criminals inflict upon the black community,¹³⁸ whereas Butler believes that black criminality ought to be dealt with by resisting government intervention—in the form of the operation of the criminal justice system—where at all possible and morally warranted.¹³⁹ Kennedy justifies the differential treatment meted out to the mostly black users of crack cocaine by suggesting that external intervention by law enforcement agencies is necessary to discipline a subset of a non-homogeneous community.¹⁴⁰ Butler, on the other hand, presents a vision of the black community as self-regulating and tight-knit, with both the criminal and his community sharing an interest in his rehabilitation.¹⁴¹ Finally, the aim of both Kennedy's and

137. See *id.* at 79-80.

138. See Kennedy, *Criminal Law*, *supra* note 59, at 1259-60. Kennedy's stand is based upon:

[A] perception of criminal law enforcement as a public good, a sympathetic identification with the actual and potential victims of crime, and a commitment to policies that offer greater physical security to minority communities, even if that means ceding greater powers to law enforcement agencies and thus concomitantly narrowing the formal liberties that individuals currently enjoy.

Id.

139. See Butler, *Nullification*, *supra* note 121, at 679.

140. See Kennedy, *Criminal Law*, *supra* note 59, at 1266-67 ("Assuming that one believes in criminalizing the distribution of crack cocaine, punishing this conduct is a public good. It is a 'burden' on those who are convicted of engaging in this conduct. But it is presumably a benefit for the great mass of law-abiding people." *Id.*).

141. Butler states the following:

[W]hen people involved with drugs injure—if anyone—only themselves or other consenting adults, the African-American juror has a choice. She can vote to stick the person in a box for five or ten years and watch what happens when he leaves the box. The better decision, however, would be to allow that person to remain in the community and try to help him, if he needs help . . . Many African-Americans are engaged in those efforts right now. Perhaps their concern stems less from altruism than from necessity: They cannot afford to write off the large number of black people who, unlike many

Butler's proposed solution is to secure for the black community the same level of treatment as is accorded to whites. Kennedy argues that this can only be achieved through greater law enforcement, which, he contends, would demonstrate that the state shares the same interest in providing security for the black community as for the white.¹⁴² Butler, on the contrary, contends that it is decreased prosecution which applies white standards of criminality to the black community.¹⁴³

Butler and Kennedy come to opposing conclusions over the best means of securing equal standards of criminality because they each limit their consideration of the harms suffered by the black community, ignoring damaging counter-arguments. Butler ignores the effects of drugs on the community at large by regarding drug abuse as a 'victimless crime.' He asks:

[W]hat about when locking up a black man has no or little net effect on public safety, when, for example, the crime with which he was charged is victimless? Putting aside for a moment the legal implications, couldn't an analysis of the costs and benefits to the African-American community present an argument against incarceration? I argue yes in light of the substantial costs to the community of law enforcement.¹⁴⁴

Such an approach enables Butler to concentrate solely on the individual using the drugs as the 'victim,' without considering the criminal acts which may be perpetrated on the larger community in order to support the drug user's habit.¹⁴⁵

whites, have come under the purview of criminal justice for using or selling illegal drugs.

Butler, *The Evil of American Criminal Justice*, *supra* note 134, at 153-54.

142. See Kennedy, *Criminal Law*, *supra* note 59, at 1267-68.

143. Butler suggests that:

If de facto decriminalization is the result of nullification, police would be according African Americans honorary white status, since officers already have abandoned excessive enforcement of drug laws in white neighborhoods . . . [T]he white community does not appear to suffer dire consequences from this relaxation of prosecution of victimless crime. As far as law enforcement is concerned, what is good enough for white people is good enough for African Americans.

Butler, *The Evil of American Criminal Justice*, *supra* note 134, at 154.

144. Butler, *Nullification*, *supra* note 121, at 698.

145. For example, FBI statistics in Iowa show that there were 7,562 bank robberies in 1996, up nearly 10% from the previous year. See THE DES MOINES REGISTER, June 22, 1997, available in LEXIS, News Library, Bglobe File. This increase has been associated with crime committed to support drug habits. See *id.* Similar reports have been documented in Washington D.C. See, e.g., Thomas, *Statistics Show Increase in Bank Robberies*, THE WASHINGTON POST, Apr. 4, 1997, at A2, available in LEXIS, News Library, Bglobe File. In Savannah, Georgia, the police found that over the 15 weeks immediately preceding October 1987, all persons arrested for bank robberies had a drug habit. See *Savannah Police Create Task Force to Root Out Housing Project Pushers*, UPI, Oct. 1, 1987, available in LEXIS, News Library, Bglobe File.

Kennedy, on the other hand, manages to ignore the evil effects of increased criminalization on the black community, and especially the differential styles of policing and prosecuting the black drug user, as opposed to the white. He fails to recognize the full impact of the burdens imposed upon the black community because he refuses to aggregate them, or consider that they are not equally imposed upon the white community:

Although black youngsters who wish to stay out late are burdened by a curfew, blacks who feel more secure because of the curfew are benefited. Although black members of violent gangs are burdened by police crackdowns on such gangs, blacks terrorized by gangs are aided. Although some black women who use illicit drugs harmful to unborn babies are burdened by prosecutions that punish them for this conduct, it is at least plausible to suppose that the deterrent effect of such prosecutions will help other black unborn children.¹⁴⁶

A community which suffers increased criminalization of its drug-users, curfews for its youth, a 'stop and frisk' policy directed at its young men, and increased surveillance and prosecution of its mothers for fetal endangerment does not suffer a lack of policing in comparison with the white community, and certainly does not require any more than it is already getting.

In fact, I argue that:

[T]he day-to-day experience of residents of many urban centers shows that the power to stop and frisk is still applied discriminatorily against people of color. Studies reveal that African-Americans are more likely than whites in similar situations to be stopped by the police. While courts have never condoned the use of race or ethnicity as the sole basis for an investigatory stop, "[t]here is substantial evidence that many police officers believe minority race indicates a general propensity to commit crime."¹⁴⁷

Furthermore,

Hospitals, many of which now screen newborns for evidence of drugs in their urine and report positive results to child welfare authorities, disproportionately report African-American patients. Often, hospitals do not rely upon formal screening protocols, but depend solely upon the suspicions of health care professionals. These suspicions often derive from stereotypes and assumptions regarding the characteristics of drug addicts. Doctors are more likely to report African-American women to the government than their wealthy white patients. Roberts notes a study in the *New England Journal of Medicine* reveals little difference in the prevalence of substance abuse by pregnant women by race or by class. . . . The prosecution theory reflected in the disproportionate number of African-American women prosecuted for fetal endangerment should be challenged.

146. Kennedy, *Criminal Law*, *supra* note 59, at 1273-74.

147. Ogletree, *Race*, *supra* note 48, at 10.

These cases are built upon every degrading stereotype of black women: that black women are irresponsible, welfare dependent, drug-addicted, and finally, unfit mothers.¹⁴⁸

Kennedy thinks that such policies benefit the black community. The correct view, however, is that they impose an extreme burden on our youth motivated solely by considerations of race.

Both Butler and Kennedy select a particular vision of the structure and good of the black *community*, and consequently leave out black individuals who comprise that community. I do not wish to suggest that the antidote to their arguments is an individual-centered response to the issue of black criminality. What is required is a response which takes into account the needs of both the individual and the community, and remains open-minded about who and what comprises the community.

Our relation, as African-Americans, to our own community is not as straightforward as either Kennedy or Butler would have us believe. Kennedy's sense of that relationship depends upon a radical disconnection between the criminal and non-criminal classes in the black community. This is not the experience of many African-Americans today.¹⁴⁹ It is certainly not my experience. I have seen family and close friends suffer the indignities of racially motivated abusive treatment at the hands of law enforcement agencies. Too many times I return home to hear what Sara Lawrence-Lightfoot described as "stories of human tragedy and defeat—the people who have been murdered or imprisoned, the old folks who have died, the children who have had babies or gotten hooked on drugs."¹⁵⁰ It is essential not to forget our indebtedness to those upon whose shoulders we stand, the people I call my "home folks."¹⁵¹

Equally, I have never been tempted by Butler's commitment to undermining the judicial process. Not only is such commitment political suicide, it is immoral. I have said that "'our generation of professionals' needs to assume a greater responsibility for the civil rights organizations' . . . ' We need to find a way to reengage in the work of these organizations . . . We need to become recommitted, reenergized.'"¹⁵² Essentially, the task is to provide equality of opportunity for those African-Americans who are brought under the ambit of the criminal justice system by affirma-

148. *Id.* at 9.

149. See generally NAACP & THE CRIMINAL JUSTICE INSTITUTE AT HARVARD LAW SCHOOL, *BEYOND THE RODNEY KING STORY: AN INVESTIGATION OF POLICE CONDUCT IN MINORITY COMMUNITIES* 36-39 (1994) (citing numerous instances of minority harassment by police officers).

150. SARA LAWRENCE-LIGHTFOOT, *Charles Ogletree: Blow, Jazzman, Blow*, in *I HAVE KNOWN RIVERS: LIVES OF LOSS AND LIBERATION* 154 (1994).

151. *Id.* at 149.

152. *Id.* at 168.

tively ensuring that they have access to first-class criminal representation, and to teach our youth to escape that system's clutches by creating powerful role models for them to follow. Only by continually pressing for reform can we hope to achieve these goals which have marked my career as a student agitator, public defender, and Harvard Law Professor.¹⁵³

Where Kennedy's supposedly liberal desire to promote the good of the black community turns decidedly conservative is in his identification of crime as an *attack* on that community. It is the representation of the criminal as the enemy of society which justifies his "criminals don't matter" mentality described above.¹⁵⁴ This places no limit on what can be done to the criminal in the name of punishment or deterrence. Fairness ceases to be an issue. It no longer matters whether one group is more harshly punished than another for the same sort of crime, because the protection of the community justifies disparate sentences for substantially similar crimes. All that needs to be established is that one community is more susceptible to the threat of certain sorts of crime than another.

This justification conveniently ignores the problem of criminalization itself—what is to count as crime, and who is to count as a criminal. This criminalization may be motivated by the prevalence in the criminal justice system of race-based classifications which do not recognize black criminals as individuals but instead rely upon discriminatory social stereotypes.¹⁵⁵ It may also be premised upon the very failure to regard blacks with the same solicitude as whites which Kennedy so eagerly identifies.¹⁵⁶ In either event, the very community that is supposed to be protected is the one that is characterized as most prone to crime; and its members are criminalized deservedly or not.

Instead of constructively engaging in an effort to ameliorate the conditions of inner-city urban life, law-and-order advocates abdicate responsibility by characterizing criminality as an individual failing that can be combated using traditional forms of punishment.¹⁵⁷ This seems an especially inadequate response when confronted with the reality of crack cocaine. As David Cole suggests, "[I]ncarceration—especially on such a massive scale in a well-defined community—is far from an adequate solution, and may well exacerbate the problems associated with crack and crime."¹⁵⁸

153. See *id.* at 147-48, 139, 163-64.

154. See discussion *supra* pp. 227, 229-232.

155. See David Cole, *The Paradox of Race and Crime: A Comment On Randall Kennedy's "Politics of Distinction,"* 83 GEO. L. J. 2547, 2565-67 (1995).

156. See Kennedy, *McClesky*, *supra* note 52, at 1425.

157. See Cole, *supra* note 155, at 1267-70.

158. *Id.* at 2558.

The point is that if crack is as addictive and destructive a drug as legislators believe—and it is—then ordinary notions of criminal responsibility fail to apply. Crack works across generational and gender lines to include a whole new group of people within the ambit of drug prevention laws.¹⁵⁹ Increased criminalization of the African-American community and its crack cocaine users can only function as a short term quick fix, and a longer term means of avoiding the responsibility the American community has to those who cannot take care of themselves.

Instead of the law-and-order claim that criminality represents an attack on the community by some outside force, crime demonstrates a *failure of community* itself. The real question is not why there is so much crime, but why there is so little? One answer is that peer group pressure and internalized moral codes operate to keep most citizens law-abiding.¹⁶⁰ Community restraints keep most people in check, and crime occurs when those restraints fail. This failure should be seen, not just as the responsibility of the criminal, but also, on occasion, a failure on the part of society to engage the criminal's respect.¹⁶¹

The first issue is whether the present urban situation reflects that society. Next, what is achieved by sending people to jail, only to have them return to society, unchanged? A crack user may even have gained some "ghetto credibility" through incarceration.¹⁶² His or her economic and social situation also remains unaltered, making it likely that he or she will return to drugs and crime. What we need is an emphasis on rehabilitation, not just of the criminal, but of the community-society itself. That is the real challenge presented by urban crime.

Nowhere is the failed commitment to community more influential than on the criminal justice system. The power to police and to prosecute carries with it an enormous amount of discretion. Kennedy himself suggests, "the power to be lenient is [also] the power to discriminate."¹⁶³ His own argument—that there is an "economy of sympathy" by which indi-

159. See Regina Austin, "The Black Community," *Its Lawbreakers, and a Politics of Identification*, 65 S. CAL. L. REV. 1769, 1794 (1992).

160. See Cole, *supra* note 155, at 2559.

161. Now, I am *not* endorsing an outlook which regards the criminal as a victim who is unqualifiedly entitled to our help just by virtue of being black. This sort of "racial reasoning," CORNEL WEST, *RACE MATTERS* 24-25 (1993), is what is most problematic about Butler's call for jury nullification. He justifies acquitting drug pushers or users as an act of self-help on the basis that we are all, always, as black folks, victims of the criminal justice system. That is neither true nor enough. Rather, the justification for the approach proposed here is a longer-term focus on what sort of a society we would wish our citizens—*of all colors*—to live in, and judge the minorities suffering from crack cocaine—and its overcriminalization—on that basis.

162. See Austin, *supra* note 159, at 1776-80.

163. Kennedy, *McClesky*, *supra* note 52, at 312 (quoting KENNETH C. DAVIS, *DISCRETIONARY JUSTICE* 170 (1973)).

viduals of the same race are more likely to identify with each other than with individuals from other races—demonstrates how a failure to treat all Americans as part of the same community can result in the disproportionately punitive application of the criminal justice system to members of racial minorities.

III. THE AFFIRMATIVE ACTION DEBATE

A. The Politics of Racial Progress

The impact of a failure of community on minority citizens extends beyond issues of crime and punishment. The problems faced by African-Americans within the criminal justice system are a small part of a much larger issue: creating opportunities to participate in American society. The challenge is to recognize this as a problem which affects—and needs to be addressed by—both black and white communities. It is important to give new impetus to the old effort to forge a new American polity whereby both black and white can flourish together.

One of the modern architects of this vision was, ironically, a southern white President, Lyndon Baines Johnson. He recognized that an America fit for all its citizens must be created by all of its citizens, regardless of color.¹⁶⁴ In a speech at Howard University in 1965, Johnson talked about solving the problems presented by the burden of race. He said that:

In far too many ways American Negroes have been another nation, deprived of freedom, crippled by hatred, the doors of opportunity closed to them. In our time, change has come to this nation. The American Negro, acting with impressive restraint, has peacefully protested and marched, entered the courtrooms in the seats of government, and demanded a justice that has long been denied. The voice of the Negro was the call to action. However, it is a tribute to America that, once aroused, the courts and the Congress, the President and most of the people, have been allies of progress.¹⁶⁵

In arguing for providing benefits for past racial burdens, President Johnson argued, "You don't take a person who for years has been hobbled by change and liberate them, bring them up to the starting line of a race and then say 'you are free to compete with all the others' and still justly believe that you have been completely fair."¹⁶⁶ "To this end," he said:

[O]ppportunity is essential but not enough. Men and women of all races are born with the same range of abilities, but ability is not just

164. See Lyndon B. Johnson, *To Fulfill These Rights: Commencement Address at Howard Univ. (June 4, 1965)*, in 2 *PUBLIC PAPERS OF THE PRESIDENTS* 640 (1965).

165. *Id.* at 635.

166. *Id.* at 636.

the product of birth, ability is stretched or stunted by the family that you live with, in the neighborhood you live in, by the school you go to, and the poverty or the richness of your surroundings. It is the product of a hundred unseen forces playing upon the little infant, the child, and finally the man. For the task is to give 28 million Negroes the same chance as every other American to learn and grow, to work and share in society, to develop their abilities, physical, mental, and spiritual, and to pursue their individual happiness.¹⁶⁷

In this way, Johnson acknowledged that the fourth arm of government is the sovereign people, and their combined action is necessary to make and remake the American polity until it includes all citizens as equals.

Inclusion, commonly called "diversity," is one of the major justifications behind affirmative action programs, especially in education. I prefer the term "inclusion" to "diversity" because diversity seems to me to have the flavor of an instrumental good and is often justified as such.¹⁶⁸ For instance, diversity in education is sometimes commended because of the different points of view a racially diverse student body can bring to the study of a particular subject or the academic community as a whole. More compelling, however, is the fact that every individual has a right to participate in society and not to be excluded merely on account of his or her race. Christopher Edley argues that, along with the value of remediation of past wrongs, inclusiveness can be used to justify affirmative action policies at universities and in the workplace.¹⁶⁹

B. An Alternate Strategy for Racial Progress

The problem with the current affirmative action debate is its narrow focus.¹⁷⁰ Certainly, as President Johnson conceived it, affirmative action was intended to be part of a larger vision: the creation of a "Great Society." One way of demonstrating the emptiness of the current discussion is to remember that merit and affirmative action are not diametrically opposed to each other. Merit-based standards in the awarding of contracts or university places were supposed to replace "old boy" networks that had traditionally kept African-Americans from advancing in the workplace or getting into college. Merit was intended to coexist alongside affirmative action programs, which were to open the door to otherwise qualified applicants who had been denied a job or a place in school on the basis of discrimination.¹⁷¹

167. *Id.*

168. See CHRISTOPHER EDLEY, JR., NOT ALL BLACK AND WHITE 125-26 (1996).

169. See *id.* at 126, 131-39.

170. See Susan Sturm and Lani Guinier, *The Future of Affirmative Action: Reclaiming the Innovative Ideal*, 84 Cal. L. Rev. 953, 955 (1996).

171. See EDLEY, *supra* note 168, at 120-21.

Affirmative action remains an important means of alleviating the burdens on the black community but is being attacked on a number of fronts.¹⁷² Three claims are made by conservative critics in order to undermine it. First, critics claim that affirmative action stigmatizes its intended beneficiaries. Minorities who do get the job or go to college are assumed by their white co-workers or students to have got there on the basis of race alone.¹⁷³ Second, critics contend that those who do benefit from affirmative action are not the people who ought to benefit from affirmative action. It is predominantly middle-class African-Americans attending elite institutions who benefit from affirmative action. Poor, working-class African-Americans who need the most help remain untouched by it.¹⁷⁴ Third, detractors allege that affirmative action is used to undermine fair and meritocratic selection procedures by imposing race-based systems of preference. The argument is that white applicants who, on race-neutral criteria, ought to get the job or go to college are passed over in favor of less qualified minorities solely because of the color of their skin.¹⁷⁵

The first problem I wish to address is Stephen L. Carter's contention that the "best black syndrome" cripples intended beneficiaries of affirmative action.¹⁷⁶ "[E]very black professional, in our racially conscious times, is assumed to have earned his or her position not by being among the best available but by being among the best available blacks."¹⁷⁷ Affirmative action, thus, prevents African-Americans from being ranked against whites and perpetuates "the durable and demeaning stereotype of black people as unable to compete with white ones."¹⁷⁸

Affirmative action contributes to the stigma of "best black" by distinguishing merit from reward. The argument is that those who are rewarded with a college place or who are hired for a job are not necessarily those who "merit" it. In part, this argument depends upon identifying reward with the goal of remediation (making up for past discrimination) and merit with the goal of inclusion (ensuring that deserving individuals are not excluded on grounds of race alone). The principle, however, is that all those who merit a place ought to be awarded one. Those who do not merit a place ought not to have race taken into consideration as a factor. Only

172. See *id.* at 80-83.

173. See STEPHEN L. CARTER, REFLECTIONS OF AN AFFIRMATIVE ACTION BABY 11-27 (1991).

174. See Richard Kahlenberg, *Class, Not Race: An Affirmative Action that Works*, THE NEW REPUBLIC, Apr. 3, 1995, at 21.

175. See BOB ZELNICK, BACKFIRE, A REPORTER'S LOOK AT AFFIRMATIVE ACTION 18 (1996).

176. See CARTER, *supra* note 173, at 49.

177. *Id.* at 55.

178. *Id.* at 50.

when the two are conflated does the stigma of "best black" arise, insisting that not everyone who is rewarded with a place merits it, undermining the security of those minorities who did merit a place, regardless of race.

It might be possible to avoid such a stigma by sharply separating these two goals, and to thoroughly advertise who was awarded which place on which basis. The question is, would this be a price we are willing to pay? As Edley suggests, affirmative action involves hard choices; winners and losers emerge.¹⁷⁹ But if our commitment to an inclusive community is such that we are willing to accept students with lower grades, or employees with less qualifications—in part because to do so remedies past and present discrimination, but also because of the benefits of inclusiveness itself—then the burdens that affirmative action creates for the rest of us should be possible to bear.

The second problem I address is the rejection of race-conscious justifications of affirmative action. Both Richard Kahlenberg and Cornell West have argued against primarily race-based solutions to the problem of minority exclusion from the workplace and higher education.¹⁸⁰ They argue that while the justification for affirmative action is the provision of opportunity to economically and educationally disadvantaged African-Americans, those it actually does help are almost exclusively the black middle-class.¹⁸¹ Both propose a color-blind solution that targets the 'truly' disadvantaged: class-based affirmative action.¹⁸² Kahlenberg suggests that this approach would enable the President to build coalitions across the racial divide and re-establish some consensus on the need for affirmative action programs for all those at the bottom of the social heap, regardless of race.¹⁸³

Unfortunately, this argument gets the picture back to front. It sees affirmative action as the whole picture, and racial uplift as just a part of that whole. However, affirmative action was envisaged as one of a battery of techniques promoting racial uplift, not as something to be used in isolation. This is not to minimize the extent to which class-based solutions are necessary in achieving social justice. Christopher Edley, Jr., for example, in his discussion of the White House review of affirmative action, demonstrates that "[e]conomic and social disadvantages remain powerfully linked with

179. See EDLEY, *supra* note 168, at 83.

180. See Kahlenberg, *supra* note 174, at 21; WEST, *supra* note 161, at 64 (1993) (arguing in favor of class-based affirmative action and asserting that the prevailing racial discrimination measures in the sixties need an "enforceable race-based and later gender-based affirmative action") (emphasis in original).

181. See Kahlenberg, *supra* note 174, at 24.

182. See generally WEST, *supra* note 161, at 64.

183. See Kahlenberg, *supra* note 174, at 27.

color, and this linkage exacts an enormous toll on the perception and reality of opportunity in America."¹⁸⁴ To focus on poverty issues alone, however, would be to miss the special burdens suffered by African-Americans as a class.¹⁸⁵ Further, to regard affirmative action as some sort of "second class" civil rights strategy, born of compromise rather than defensible on its own,¹⁸⁶ would be to mistake the place of affirmative action in the civil rights argument. Worse, it would get the civil rights argument wrong.

As stated above, the major problem with the current affirmative action debate is that it is too narrowly focused. Focusing on discrete areas of social and racial injustice, does not address the wider racial problem: the destruction of black community and dearth of inter-community understanding. This myopia allows us to parcel off the different problems of crime, welfare dependency, unemployment, affirmative action, and political representation into discrete spheres without addressing them as part of a unified whole. As Sturm and Guinier point out, liberals are in thrall to a debate phrased in conservative terms.¹⁸⁷ We allow ourselves to forget, for example, that merit is not necessarily opposed to affirmative action, that the merit standard is, in fact, supposed to combat the same race- and class-based systems of preference as affirmative action, and that most preference schemes, official or unofficial, still benefit whites.¹⁸⁸ Consequently, we become obsessed with demonstrating that affirmative action is not just reverse racism, that African-Americans are offered jobs or a college education, because it is merited, rather than as an act of white beneficence. We become defensive when faced with people like ABC news correspondent Bob Zelnick, who advocates the view that affirmative action unfairly penalizes those white innocents who actually deserve the positions which go to minorities.¹⁸⁹

Recipients of affirmative action are, Zelnick claims, "all too often . . . *less qualified* than the victim of race discrimination."¹⁹⁰ He argues that the various tests used to assess aptitude in the areas of employment and education are not skewed against minorities. Rather, for Zelnick, African-Americans and Hispanics are just not as clever as whites and Asians, so these minorities have ensured that "[f]or much of the past generation one of the pillars of affirmative action establishment has been the assault

184. EDLEY, *supra* note 168, at 71.

185. *See id.* at 42-50.

186. *See* WEST, *supra* note 161, at 64-66.

187. *See* Sturm and Guinier, *supra* note 170, at 955 n.6 (citing Clint Bolick, *Discriminating Liberals*, N.Y. TIMES, May 6, 1996, at A15; Nicholas Lemann, *Taking Affirmative Action Apart*, N.Y. TIMES, June 11, 1995, at 35, 40).

188. *See* Sturm and Guinier, *supra* note 170, at 957-58; EDLEY, *supra* note 168, at 142-43.

189. *See generally* ZELNICK, *supra* note 175, at 18.

190. *Id.* at 9.

on objective standards of merit"¹⁹¹ resulting in "racial preferences enshrined into law [which] are the first cousins to black separatism and black supremacy."¹⁹²

Zelnick's position is an extreme form of a fairly common argument: that African-Americans are underachieving and over-demanding; that our demands are premised on an outdated notion of white racism (whites are no longer racist); that granting these demands will adversely affect whites; and that these demands are based on a form of reverse racism—a black solidarity which spells white disempowerment. What this argument fails to consider is that black under-achievement is often linked to material factors. For example, success in tests of all sorts is strongly correlated with class,¹⁹³ so the fact that more African-Americans than other racial groups are born below the poverty line is bound to affect how well African-Americans score.¹⁹⁴ In addition, the stability of an individual's family situation aids or impedes his or her academic and social achievement.¹⁹⁵ So the disintegration of the black urban family, in part due to the effects of the criminal justice system, takes its toll on youth aspiration and achievement.

The attempt to put the blame for black underachievement on the biological or cultural failure of the group as a whole feeds into a notion of individual responsibility and accountability which is very persuasive for many Americans. It places responsibility squarely on the struggling individual or group and minimizes outside factors. It allows the perpetuation of an image of African-Americans as lazy and ignorant: when we ask for some assistance to redress the impact that poverty, underemployment, poor education, and miserable living conditions have upon our lives, we are demanding more than we deserve.

The rejection of the "materialist" argument—that social conditions affect social achievement—depends in part upon what might be called the "structural racism" argument. It denies that African-Americans can point to any fact which demonstrates that whites are racist, and that this racism prevents white advancement.¹⁹⁶ Instead, African-Americans are anachronistically and self-destructively casting themselves in the role of victims.

191. *Id.*

192. *Id.* at 16. Zelnick approvingly quotes Lance Morrow's view that affirmative action is "a flirtation with the devil, a deepening reliance on the principle that formed the foundation of slavery, the Ku Klux Klan, and Jim Crow. This was the position at the center of apartheid and Hitler's Nuremberg Laws." *Id.*

193. See Sturm and Guinier, *supra* note 170, at 957.

194. See EDLEY, *supra* note 168, at 43.

195. See *id.* at 44.

196. See, e.g., Robert Weissberg, *White Racism: The Seductive Lure of an Unproven Theory*, THE WKLY. STANDARD, Mar. 24, 1997, at 19.

This denial of white racism, and the notion of responsibility which fosters it, denies the extent to which social opportunity depends upon where and to whom you are born. Beyond that, another important factor that affects African-Americans of all classes is the small acts of discretion—for example, the availability of mentors—to which “racial empathy may limit black access.”

The nature of this discretion makes it difficult to prove race is a factor—disparate impact, however, does not. This is essentially true when the continuing effect of a history of political and economic disenfranchisement, combined with the continued exclusion of minorities from social networks, is taken into account. Now, I am not proposing that African-Americans adopt a “victim mentality” and lay the blame for every failure to advance at the door of white racism. Instead, I favor calling for all sides in the racial debate to seriously discuss the benefits and burdens of race. Only in this way can we remake American society as a greater, inclusive whole. As my colleague, Professor Christopher Edley, Jr. has argued, this is a *difficult* task.¹⁹⁷ The problems associated with race have many sources, and the different solutions are justified by different values.

Conclusion

The problem presented by the color line in modern America is difficult but not intractable. However, race is attached to too many other issues—democracy and poverty most notably—for the problem of the color line to be resolved any time soon. But too often, and for too long, Americans have been willing to sacrifice the rights of minorities for short term gain. Since the country's inception, too many people have been prepared to tolerate dual Americas existing side by side, one for the majority, and one for the rest.

President Clinton recently talked about the complexity of race in America and offered us an observation and a solution. That solution is to see through the prism of race that we are all implicated in this problem whether we are members of a racial minority or the racial majority. The President said:

White America must understand and acknowledge the roots of black pain. It began with unequal treatment first in law and later in fact. African-Americans, indeed, have lived too long with the justice system that in too many cases has been, and continues to be, less than just. The record of abuses extends from lynchings and trumped up charges, to false arrests and police brutality. The tragedies of

197. See generally EDLEY, *supra* note 168.

Emmett Till and Rodney King are bloody markers on the very same road.¹⁹⁸

On the other hand he cautioned:

Blacks must understand and acknowledge the roots of white fear in America. There is a legitimate fear of the violence that is too prevalent in our urban areas. And often, by experience or at least what people see on the news at night, violence for those white people too often has a black face.¹⁹⁹

Finally, he concluded:

Both sides seem to fear deep down inside that they will never quite be able to see each other as more than enemy faces, all of whom carry at least a slither of bigotry in their hearts. Difference of opinion rooted in difference of experiences are healthy, and indeed essential for democracies. But differences so great and so rooted in race threaten to divide the house. . . . As Dr. King told us 'we must learn to live together as brothers or we will perish as fools'.²⁰⁰

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198. Bill Clinton, Address at the University of Texas for 10th Annual Liz Sutherland Carpenter Distinguished Visiting Lectureship, (Oct. 18, 1995), available in LEXIS.

199. *Id.*

200. *Id.*

