

Book Review

Respectability, Race Neutrality, and Truth

Race, Crime, and the Law. By Randall Kennedy.* New York: Pantheon Books, 1997. Pp. xiv, 538. \$30.00.

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*Race, Crime, and the Law*¹ surveys a large number of issues at the intersection of race and the criminal law and is both informative and persuasive on many points. Because Professor Kennedy is an obviously talented African-American Harvard Law School professor and because the book is clearly the product of enormous and thorough research, *Race, Crime, and the Law* will be influential. Nevertheless, the book is disappointing. Professor Kennedy is indignant about the past, ranges from judiciously critical to sanguine about the present, and expresses outrage (in unwarranted terms, in my view) at the work of two African-American writers who propose race-conscious solutions to criminal justice dilemmas. The book comes close to being an apologia for colorblindness, the doctrinal darling of today's Supreme Court, and contains few if any painful truths for the typical white reader. Despite the author's impressive knowledge and abilities, his book is unlikely to challenge common erroneous presuppositions about race and the criminal law and may even leave the uninformed reader with the impression that black partisanship is the most serious racial issue now confronting the criminal justice system. The first time I read *Race, Crime, and the Law*, it made me angry.²

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† Professor of Law, Cornell Law School. B.A., University of Minnesota, 1975; J.D., Yale Law School, 1979. This Review owes its passion and many of its animating ideas to my clients, Tommie Smith, executed by the State of Indiana in 1996, and Ronnie Howard, now on death row in South Carolina. I am grateful to Kathryn Abrams, Mary Louise Fellows, Stephen Garvery, Barbara Holden-Smith, Fred Johnson, Michelle Johnson, and Angelica Matos for their comments.

1. RANDALL KENNEDY, *RACE, CRIME, AND THE LAW* (1997).

2. I did not expect this reaction. It occurred in spite of my prior interactions with Professor Kennedy, which have always been pleasant and have often been helpful to my own work.

Upon preparing to review the book, I read it a second time, and during the course of that second reading came to feel differently—although not to think differently—about it. This change was brought about by a seemingly unrelated event. Waiting outside my fifth-grade son's classroom, I saw a display of poems. From the titles of the poems it was clear that each child had been asked to choose a color as the subject of his or her poem. Just passing time, I started reading the poems, all pleasant homages to the chosen colors—until I reached the only poem entitled "Black," which read as follows:

Black—it's the shadow of the night,
when you don't separate wrong from right.

When you die, the color's black.
Like when your food is short, in lack.

Black is when you taste rotten bread,
It's also the color of the dead.

Black is when there is no light at all;
When you fall, and fall till there's no you at all.

When you are in the color black,
it's like you are trapped in a very tight sack.

Black is a cat, a raven, a crow,
a chandelier when it's lost its glow.

The color black is a mysterious thing;
a bird, a robin when it loses its wing.

I was suddenly sick and sad, the more so because this was written not by some angry white child from a bigoted family, but by a gentle boy I know—an Asian-American child with educated parents. I then went back and read the poems on the color "White," of which there were four, all joyous. Here is one of these four, also written by an Asian-American boy:

White is a peaceful dove. White is a cloud that
hovers above.

Winter brings snow, and snow brings white.
It is beautiful in a starry white light.

White is a doily and a tablecloth.

A lightbulb and a single star. A baseball, hit afar.

White is bleached leather, white can be a bird's

Feather.

White is cane sugar, bad for your teeth, white is
honey bread, soft and sweet.

The sound of white is chalk squeaking on a coal
blackboard.

White is the color of an airplane that soars.

White is the color of a tissue from a box,
white is a whisker from a fox.

Reading the "White" poems the second time, I lost all pleasure in them, though I am white. As I stood there, I was both sad and afraid for all the African Americans I love—my sister, my brother, my daughters, my best friend, her children, and one of my death row clients. Then sad and afraid for many more African Americans whom I like, know, and admire. And, finally, sad and afraid for all those African Americans I do not know, but who are nevertheless linked to me through those I do. As I walked away, I realized that I had been angry reading Professor Kennedy's book because it was less painful than being sad and afraid: sad for the lost opportunity this book represents, and afraid for the future if a person of Kennedy's ability and position believes in the mirage of colorblindness.

Already this introduction has deliberately violated, at least in spirit, the two animating principles of *Race, Crime, and the Law*. Politically, Professor Kennedy embraces what he calls "the politics of respectability."³ This approach, at least as practiced by Professor Kennedy throughout his book, is a strategic calculus for the advancement of minority groups that places great weight on anticipated white majority perceptions. It consequently urges the distancing of most African Americans from negative stereotypes. It would seem to counsel against both my written acknowledgement that a death row client is among the list of African Americans I hold dear, and the expression of my debt to two death-sentenced clients in my first footnote. Doctrinally, Professor Kennedy advocates race neutrality, or "responding to persons strictly on the basis of conduct not color."⁴ Obviously my references to Professor Kennedy's race, my own race, and the race of the poems' authors suggest that I think race is sometimes relevant in ascribing meaning to conduct; and, as I shall later explore, I also think race is sometimes useful in remedying or preventing wrongful ascriptions of meaning from race.

In its nine substantive chapters, *Race, Crime, and the Law* covers an enormous amount of territory; two chapters are devoted to the history of race's relationship to criminal law, two to jury selection, one to racial appeals that

3. KENNEDY, *supra* note 1, at 21.

4. *Id.* at 390.

occur in trials, one to the death penalty, and one to the enforcement of drug laws. Rather than addressing these subjects seriatim, I have organized this Review around the two animating principles described above. Part I attempts to show that Professor Kennedy's politics of respectability not only determines which "liberal" positions and measures he supports, but also shapes the way he chooses to write about them. It then proposes an alternative to Professor Kennedy's politics of respectability. This alternative draws on other, quite different traditions from minority communities, and counsels against strategic abandonment of the most stigmatized African Americans.

Part II first summarizes the "radical" remedial and prophylactic measures Professor Kennedy rejects based upon his doctrinal commitment to race neutrality. I then focus on one proposal of my own that Professor Kennedy criticizes, affirmative jury selection, and dispute Professor Kennedy's argument that race-neutral measures are sufficient safeguards against prejudiced determinations of guilt. With respect to two other scholars' proposals that Professor Kennedy deems irresponsible, I briefly note ways in which his criticism is unfair, given that the prevailing doctrine of race neutrality has cabined the search for solutions to issues of racial fairness by labeling them nonissues. I proceed to sketch what I see as the value—and limits—of race neutrality in the criminal justice system.

Finally, Part III turns to some of the most despised African Americans, death-sentenced defendants, for some harsh truth about colorblindness. I recount the blatant racial issues that arose in the trials of two of my clients and the dismissive treatment those issues have received in the courts. I hope my reader will conclude that fighting such racism with race neutrality is like pouring water on a kitchen fire: It seems like a good idea only if you know nothing about oil.

I. THE POLITICS OF RESPECTABILITY

In his first paragraph, Professor Kennedy says that he wants to speak to "contending ideological camps about the race question in criminal law and clear space for a shared discussion that will uncover common grounds for action."⁵ As I explore in Part II, the common ground that he proposes to uncover is race neutrality, and he identifies four target groups for this consensus-building discussion: the law-and-order camp, libertarian conservatives, proponents of a colorblind Constitution, and "those dedicated specifically to advancing the interests of blacks."⁶ It is intuitively obvious, and Kennedy makes short work of explaining, how he will appeal to the first three groups. From the law-and-order camp, he asks protection for African-American

5. *Id.* at 3.

6. *Id.* at 7.

as well as white victims, and he seeks understanding that racist public officials must be made to obey the law lest African Americans resist all cooperation with law enforcement officials.⁷ From libertarian conservatives, he asks that their “intolerance for governmental tyranny” include sensitivity to “racial misconduct.”⁸ From the colorblindness camp, he quite modestly asks for consistent application of colorblind principles in the criminal justice sphere.⁹

A. *Professor Kennedy’s Argument for a Politics of Respectability*

The more difficult question is why “those dedicated specifically to advancing the interests of blacks” should be attracted to race neutrality in the criminal justice sphere. It is not entirely clear whom this camp is intended to encompass, but Kennedy mentions Jesse Jackson, the NAACP, and the Congressional Black Caucus.¹⁰ By its literal definition, this group would certainly include me, and one might assume that it would include Professor Kennedy himself; but apparently it does not. Although Kennedy “embrace[s] this camp’s admirable labors on behalf of America’s paradigmatic social pariah, the Negro,”¹¹ he describes the group as “largely marooned on the left end of the American political spectrum,”¹² and feels the need to defend to his reader the decision to “allocate considerable space and energy to critical engagement”¹³ of this camp, a defense that he bases upon its “considerable influence within African-American communities.”¹⁴ In the introductory chapter alone he accuses this camp of “all too often mak[ing] formulaic allegations of racial misconduct without even bothering to grapple with evidence and arguments that challenge their conclusions,”¹⁵ of “intellectual sloppiness,”¹⁶ and of being “unduly hostile to officials charged with enforcing criminal laws, insufficiently attentive to victims and potential victims of crime, and overly protective of suspects and convicted felons.”¹⁷ It is hard to imagine with what he will woo a group he has so disparaged.

Perhaps Kennedy does not expect to win over those he would label as adherents of this camp, but only those in the African-American community who might otherwise be attracted to their message. In any event, the proffered carrot turns out to be the politics of respectability. As explained by Professor Kennedy:

7. *See id.* at 3-5.

8. *Id.* at 5-6.

9. *See id.* at 6-7.

10. *See id.* at 12.

11. *Id.* at 7.

12. *Id.* at 12.

13. *Id.*

14. *Id.*

15. *Id.* at 7.

16. *Id.* at 9.

17. *Id.* at 12.

The principal tenet of the politics of respectability is that, freed of crippling, invidious racial discriminations, blacks are capable of meeting the established moral standards of white middle-class Americans. . . . One of its strategies is to distance as many blacks as far as possible from negative stereotypes used to justify racial discrimination against all Negroes.¹⁸

After noting the historical roots and the excesses of the politics of respectability in African-American political culture, Kennedy specifically recommends two of its "core intuitions."¹⁹ The first is that "the principal injury suffered by African-Americans in relation to criminal matters is not overenforcement but underenforcement of the laws," because "blacks . . . suffer more from the criminal acts of their racial 'brothers' and 'sisters' than they do from the racist misconduct of white police officers."²⁰ The second is that

for a stigmatized racial minority, successful efforts to move upward in society must be accompanied at every step by a keen attentiveness to the morality of means, the reputation of the group, and the need to be extra-careful in order to avoid the derogatory charges lying in wait in a hostile environment.²¹

Within the introduction, Professor Kennedy gives only one example of the application of these principles:

The politics of respectability, for example, would have cautioned against the triumphalist celebrations that followed the acquittal of O.J. Simpson on the grounds, among others, that such displays would singe the sensibilities of many, particularly whites, who perceived the facts of the trial differently. Acting based on the notion that blacks need not be attuned to the way they are perceived by others has adversely affected the racial reputation of African-Americans, facilitating indifference to their plight.²²

Although in subsequent chapters Kennedy does not explicitly invoke the politics of respectability as governing the measures he chooses to support or the manner in which he discusses those measures, a review of his doctrinal and stylistic choices reveals a breathtakingly systematic adherence to the politics of respectability as he has defined it. Whether this is accident or brilliantly subtle execution of his avowed political choice, I cannot be sure, but it is so pervasive and nuanced that I am inclined to think it brilliance.

18. *Id.* at 17.

19. *Id.* at 18-19.

20. *Id.* at 19-20.

21. *Id.* at 20.

22. *Id.* at 21.

B. *Professor Kennedy's Respectable Book*

When I made a list for myself of all the positions that Professor Kennedy takes in *Race, Crime, and the Law*, I realized the remarkable degree to which he has shown himself to be "attuned to the way [African Americans] are perceived by others."²³ I am sure that there are white bigots in this society who would disagree with some of the positions he has taken, but the most conservative member of my faculty (who shall remain nameless), not to mention my Republican in-laws, would not take umbrage at any of them, at least not as Kennedy has expressed them; the book is not likely to provoke either soul searching or discomfort from white readers. Simultaneously, the minimization of discussion of the plight of the black *defendant* manages to "distance as many blacks as far as possible from negative stereotypes used to justify racial discrimination."²⁴

1. *Respectability and the Lessons from History*

Chapters 2 and 3 are devoted to the history of race and criminal justice. While they competently tell an ugly story, the horrific details of which may be new to the lay reader, Kennedy locates these horrors firmly in the past. Chapter 2 begins by declaring that racially selective underprotection is worse than unequal enforcement "because it has directly and adversely affected more people than have *episodic* misjudgments of guilt."²⁵ This proposition, which Kennedy had earlier described as one of the "core intuitions" of a politics of respectability, is a debatable one, depending on how one categorizes certain patterns of official action and how one measures harm from various kinds of official crimes and derelictions of duty.

Lynching provides one example of different ways in which the underenforcement and unequal enforcement issues may be viewed. Clearly drawing on the work of Barbara Holden-Smith,²⁶ Kennedy recounts Congress's repeated failure to pass anti-lynching legislation and argues that this failure was attributable, not to a concern for federalism, but to racial animosity.²⁷ Kennedy casts this failure as an underenforcement problem and a forerunner of the modern phenomenon whereby murder defendants are more likely to receive the death penalty if the victim was white.²⁸ The history of lynching in this country, however, also may be seen as the most extreme end

23. *Id.*

24. *Id.* at 17.

25. *Id.* at 29 (emphasis added).

26. See Barbara Holden-Smith, *Lynching, Federalism, and the Intersection of Race and Gender in the Progressive Era*, 8 *YALE J.L. & FEMINISM* 31 (1996).

27. See KENNEDY, *supra* note 1, at 56-58.

28. See *id.* at 74.

of the *unequal* enforcement continuum; when black people were accused of crimes, “enforcement” was immediate, unreliable, barbaric, and without any legal process. If one looks at lynching in this light, it looks more like the historical antecedent of the modern phenomena of wrongful conviction and harsher sentencing of black defendants.

I do not mean to suggest that the history of lynching does not foreshadow lesser valuation of black victims’ lives in capital sentencing decisions, but only that it foreshadows *both* underenforcement and unequal enforcement issues. Historically, underenforcement and “overenforcement” were inextricably linked in that they both stemmed from intense racial animosity and extreme power differentials. Thus, to take another example, the separation of the underenforcement chapter’s discussion of the failure to protect slaves from murder and assault from the unequal enforcement chapter’s discussion of the separate criminal laws and punishments that were applied to slaves seems artificial. Although they are separate wrongs, both flowed from the powerless and stigmatized status of African Americans as slaves. Moreover, slave status itself is easily seen as ubiquitous unequal enforcement; if slaves had not been property, it would not have been a crime for them to run away.

Creating a sharp distinction between underenforcement and unequal enforcement and deeming underenforcement the more important evil allows Professor Kennedy to focus on the black victim and to abandon the black defendant. Not coincidentally, a focus on the black victim dovetails with the needs of the politics of respectability. While talking about black victims suggests that “freed of crippling, invidious racial discriminations, blacks are capable of meeting the established moral standards of white middle-class Americans,” talking about black defendants does not, and fails therefore to “distance as many blacks as far as possible from negative stereotypes used to justify racial discrimination against all Negroes.”²⁹ Accordingly, after the chapters on the history of race and criminal justice, Professor Kennedy ceases to champion the interests of black defendants and often fails to mention them at all, even when such a discussion would seem required by the topic. For example, Kennedy mentions exactly *one* wrongful post-civil rights era racially motivated conviction in the text³⁰ and refers to two more in a footnote;³¹ even these are in a chapter on history. Whatever Kennedy’s intentions, his omissions risk leaving many white readers with the comfortable impression that wrongful conviction of black defendants is almost entirely a thing of the past.³²

29. *Id.* at 17.

30. *See id.* at 125-27 (describing the 1980 wrongful conviction of Clarence Bradley in Texas).

31. *See id.* at 127 n.* (describing erroneous convictions reversed in 1996 in Illinois and in 1993 in Alabama).

32. Kennedy does note that cases like his example “are not simply a part of the past. They are also part of the present and the future.” *Id.* at 127. His emphasis, however, implies that cases like Bradley’s are a very *small* part of the present and future.

2. *Respectable Criticisms of Present Law*

Two chapters are devoted to criticism of present law, one addressing the Supreme Court's decision in *McCleskey v. Kemp*³³ and one considering the use of race in detention decisions. Neither chapter considers the black defendant. Each contains peculiarities, both in what is said and what is not said, that I suspect can be attributed to the politics of respectability.

The first peculiarity occurs in Kennedy's discussion of *McCleskey* in his chapter on the death penalty. In *McCleskey*, the Supreme Court held that a statistical showing of racial discrimination in the imposition of capital punishment in Georgia did not create an inference that race had influenced Warren McCleskey's sentence, and that, absent individualized proof of racial discrimination, his death sentence did not violate either the Equal Protection Clause or the Cruel and Unusual Punishments Clause.³⁴ Kennedy describes the underlying statistical study designed and carried out by David Baldus, who investigated more than 2000 Georgia homicides and some 230 variables that might cause spurious correlations between race and death sentences.³⁵ That study, as Kennedy recounts, concluded that the race of the victim strongly and significantly predicts the incidence of death sentences;³⁶ indeed, the study found that the odds of receiving a death sentence were 4.3 times greater for defendants who killed whites than for defendants who killed African Americans.³⁷

What seems strange is that Kennedy goes out of his way to dismiss—wrongly—McCleskey's second claim: that the administration of the death penalty discriminated on the basis of race of the defendant as well as race of the victim, albeit to a lesser extent. Kennedy writes, "[V]iewing the evidence on a statewide basis, Baldus found 'neither strong nor consistent' evidence of discrimination directed against black defendants because of their race."³⁸ Yet even Justice Powell's majority opinion reports Baldus's finding that a black defendant, by virtue of his race, faced a ten percent increase in the likelihood of a death sentence.³⁹ Baldus does use the language quoted by Kennedy, but this is only part of the story; Baldus also reports that in Georgia, as in other jurisdictions, there was some race-of-defendant discrimination in some counties at some stages of the proceedings.⁴⁰ Indeed, in the same

33. 481 U.S. 279 (1987).

34. *See id.* at 313, 319.

35. *See* David C. Baldus et al., *Arbitrariness and Discrimination in the Administration of the Death Penalty: A Challenge to State Supreme Courts*, 15 STETSON L. REV. 133 (1986).

36. *See* KENNEDY, *supra* note 1, at 328-30.

37. *See McCleskey*, 481 U.S. at 287.

38. KENNEDY, *supra* note 1, at 329 (quoting Baldus et al., *supra* note 35, at 158).

39. *See McCleskey*, 481 U.S. at 287 ("[B]lack defendants were 1.1 times as likely to receive a death sentence as other defendants.").

40. *See* Baldus et al., *supra* note 35, at 158.

paragraph, Baldus suggests an explanation for why some studies may find no race-of-defendant effects: Discrimination against African-American defendants in rural areas with predominantly white juries is offset by discrimination in favor of them in urban areas with predominantly black juries.⁴¹ The race-of-victim and race-of-defendant findings would then seem to be corroborating and complementary: There is a large group of white people who subconsciously value black victims less than white victims, and a smaller group of white people who feel more punitive toward black defendants than toward white defendants regardless of the race of their victims.⁴² So why this odd and misleading characterization of *McCleskey* and the Baldus study—unless it is to justify an exclusive focus on the respectable black victim?

The next peculiarity lies in Kennedy's indecision about how the Court should have decided the case. First, he states that none of the Justices' opinions in *McCleskey* is "altogether satisfactory."⁴³ He criticizes Justice Powell's majority opinion for its "minimization of the facts behind *McCleskey's* claim"⁴⁴ and its refusal to acknowledge that certain distinctive aspects of the case—the irrevocability of death and the "especially toxic demarcation"⁴⁵ of race—should mitigate the Court's fear of opening the door to endless litigation and disruption in the criminal justice system. Then Kennedy criticizes the dissents for engaging in "sentimentality"⁴⁶ and explains the difficulties inherent in their remedies: Brennan and Marshall would remedy racial discrimination by abolishing the death penalty altogether,⁴⁷ but that would entail significant costs for those who support capital punishment;⁴⁸ Stevens's and Blackmun's remedy, to restrict capital punishment to the category of "extremely serious crimes," where evidence of race-of-victim discrimination is weakest,⁴⁹ is less drastic, but it is still unsatisfactory because it would preclude imposition of the death penalty for some defendants whom many would see as deserving death.⁵⁰

These criticisms seem fair enough; but what does Kennedy propose? He considers—without ever actually endorsing—the "level-up" solution, that is, using race-conscious measures to secure more death sentences against the murderers of black victims.⁵¹ Kennedy notes that this would not be race-

41. See *id.* at 158-61.

42. Preliminary results from Professor Baldus's new study of capital convictions in Philadelphia find both race-of-victim and race-of-defendant effects. See David C. Baldus, Address at Cornell Law School "How the Death Penalty Works" Symposium (Mar. 28, 1998). Baldus will publish his findings in an article in the *Cornell Law Review* later this year.

43. KENNEDY, *supra* note 1, at 335.

44. *Id.* at 336.

45. *Id.* at 337.

46. *Id.* at 339.

47. See *McCleskey*, 481 U.S. at 320 (Brennan, J., dissenting, joined by Marshall, J.).

48. See KENNEDY, *supra* note 1, at 341.

49. *McCleskey*, 481 U.S. at 367 (Stevens, J., dissenting, joined by Blackmun, J.).

50. See KENNEDY, *supra* note 1, at 341-42.

51. See *id.* at 344-45.

neutral, but he speculates that, in this instance, the abandonment of race neutrality might be seen as

a danger worth risking in order to encourage officials to take more seriously the security and suffering of black communities and in order to symbolize the affirmative constitutional obligation to insure some rough measure of substantive racial equality in every sphere of American life—including the provision of law enforcement resources.⁵²

How could Kennedy, with his otherwise steadfast devotion to race neutrality, seriously contemplate seeking *death sentences* based on racial criteria? If ever there were a place for race neutrality, surely this is it. The *McCleskey* problem is that death sentences have in fact been tainted by racial considerations, as Baldus demonstrated. But the remedy for this can hardly be to taint more death sentences with racial considerations. Moreover, under the “level-up” solution, most of the defendants who will be subjected to greater likelihood of death on account of the victim’s race will themselves be black, because the vast majority of black victim homicides are committed by black defendants. Kennedy does not endorse the “level-up” solution, but neither does he reject it. How can he find this such a close question? I can only hypothesize that Kennedy finds the question close because he does not look at the effects on black defendants, but focuses solely on (respectable) black victims.

Kennedy’s treatment of the proposed Racial Justice Act (RJA) is similarly disconcerting. Under this proposal, which twice passed the House of Representatives but floundered in the Senate,⁵³ a defendant sentenced to death would not have to show the individualized purposeful discrimination that *McCleskey* required and found lacking. Instead, a showing of statistical disparity would give rise to a rebuttable presumption that racial discrimination had tainted any given death sentence. The government would then have the burden of showing either that nonracial factors created the apparent disparities or, alternatively, that the crime involved was so aggravated that the defendant would have been sentenced to death absent racial disparities.⁵⁴ Kennedy criticizes members of Congress who opposed the RJA for failing to acknowledge “racial distortions in [capital punishment’s] administration”⁵⁵—

52. *Id.* at 345.

53. *See id.* at 346; *see also For the Record*, WASH. POST, June 7, 1990, at V07 (noting the demise of the 1990 Racial Justice Act); Carl Upchurch, *Crime Bill Debacle*, BALTIMORE SUN, Aug. 12, 1994, at 21A (lamenting the similar fate of the 1994 Racial Justice Act).

54. *See* KENNEDY, *supra* note 1, at 346; *see also* Vada Berger et al., Comment, *Too Much Justice. A Legislative Response to McCleskey v. Kemp*, 24 HARV. C.R.-C.L. L. REV. 437, 467 (1989) (noting that a state would likely be able to rebut a prima facie showing with respect to identifiable subgroups for which there were no significant racial disparities).

55. KENNEDY, *supra* note 1, at 348.

much the same criticism as the one he levied against Justice Powell's opinion in *McCleskey*.

At this point, one might begin to hypothesize that Kennedy postponed a conclusion on *McCleskey* in order to set up a distinction between constitutional and statutory reform. This is not Kennedy's agenda, however, as demonstrated by his subsequent statement that one could reasonably oppose the RJA based on a view that the value of capital punishment outweighs the costs of racially discriminatory administration.⁵⁶ Once more, he abjures any conclusion. Why? Is it possible he has no ultimate opinion on the desirability of the RJA? Or is it that the politics of respectability compels against a strong statement on an issue that many whites feel very strongly about?

Most peculiar of all is the last section of the capital punishment chapter, entitled "Race, Parochialism, and the Marketplace of Emotion."⁵⁷ Race-of-victim effects, Professor Kennedy writes, reflect a "race-conscious society which continually reproduces a racially stratified marketplace of emotion" stemming from our "tragic history of race relations."⁵⁸ Becoming philosophical, he then notes that the race-of-victim data also reflect the larger problem that "we all devalue the rest of the world in relation to our own small circle of loved ones; hence Jean Jacques Rousseau's charge that the preferences of friendship are 'thefts' against humanity."⁵⁹ He concludes the chapter with the thought that if people would recognize that *McCleskey* reflects "a universal dilemma in human relations," they might more candidly "acknowledge, reflect upon, and change the realities of racial sentiment in American life."⁶⁰ If this is the respectable bottom line on racial disparities in the administration of capital punishment—no judgment on the constitutional issue, no judgment on the legislative issue, and a reassurance that racial discrepancies are probably deeply normal—I for one cannot be wooed by the politics of respectability; nor can I imagine that I share common ground, except accidentally, with its adherents.

As it turns out, the other chapter that criticizes current law does describe a coincidental common ground that I share with Kennedy. In Chapter 4, Kennedy argues that police should not be permitted to take race into account in determining when to stop a person on suspicion that he or she has committed a crime.⁶¹ Fifteen years ago in the pages of this very same law journal, I argued that consideration of race in any decision to detain a suspect

56. *See id.*

57. *Id.* at 349.

58. *Id.*

59. *Id.* at 350 & n.107 ("All the preferences of friendship are thefts committed against the human race and the fatherland. Men are all our brothers, they should all be our friends." (quoting 4 J.-J. ROUSSEAU, CORRESPONDENCE GENERALE 82 (Théophile Dufour ed., 1925))).

60. *Id.*

61. *See id.* at 151.

should be subjected to strict scrutiny.⁶² I concluded that none of the prevalent uses of racial classifications in detention decisions—including inferences of general propensity to commit crime from race, drug courier profiles that contain racial elements, inferences about immigration status based upon race, and inferences of criminal activity from racial incongruity in a neighborhood—could meet that standard.⁶³

While Kennedy and I share much common ground here, his emphases and omissions are determined by the politics of respectability and serve as sharp reminders of our differences. For example, I found Kennedy's articulation of the rationale for his position to be particularly disturbing. He gives three reasons: First, police may overestimate the relevance of race in determining the likelihood of criminal activity;⁶⁴ second, permitting reliance on race would "nourish powerful feelings of racial grievance," causing people who might otherwise assist the police to withhold their cooperation;⁶⁵ and third, such reliance might promote racial segregation.⁶⁶ These reasons are fine, but where is the *right* of the person of color not to be disadvantaged based upon a generalization about his racial group? Certainly this would seem to be a time to invoke the mandate of race neutrality.

Even more serious—and more surprising—is that nowhere in this chapter does Professor Kennedy discuss African-American defendants. Although he articulates a rule for determining whether an arrest is "legally justified,"⁶⁷ he neglects to mention whether suppression of evidence should follow in cases where an illegal arrest results in the police obtaining either physical evidence or statements from the defendant. Kennedy mentions "administrative and legal penalties" and the possibility of civil suits,⁶⁸ ignoring the specter of the *guilty* suspect who is improperly detained on the basis of race. Does Kennedy avoid discussing the guilty black suspect because the politics of respectability counsels against such a discussion? Or is it that he envisions this rule being applied only in those civil suits that challenge wrongful detention of innocent African Americans, leaving the African-American defendant exactly where he was before this chapter was written? Can we really fix this problem for the innocent, but not for the guilty?

This chapter also avoids the related questions raised by Tracey Maclin's insightful consideration of the ways in which race influences the "consent" of suspects who are approached by the police,⁶⁹ even though Kennedy notes that

62. See Sheri Lynn Johnson, *Race and the Decision To Detain a Suspect*, 93 YALE L.J. 214 (1983).

63. See *id.* at 246-50.

64. See KENNEDY, *supra* note 1, at 151.

65. *Id.* at 151-52.

66. See *id.* at 153.

67. *Id.* at 162.

68. *Id.*

69. See Tracey Maclin, "Black and Blue Encounters"—Some Preliminary Thoughts About Fourth Amendment Seizures: Should Race Matter?, 26 VAL. U. L. REV. 243, 272 (1991).

he "benefited enormously" from Maclin's work.⁷⁰ The issue would seem to be a natural outgrowth of Kennedy's discussion of the frequency with which black men are stopped by the police: If a person knows that members of his group are frequently stopped without justification, his sense of free choice in a police encounter is likely to be diminished. To endorse Maclin's position that race should be a factor in assessing consent, however, would not only depart from race neutrality, but would almost require a reference to whether the contraband fruits of "consent" generated by race-based fear should be suppressed, and thus would require Kennedy to mention guilty black defendants. So perhaps it is not surprising that this related topic was bypassed; both race neutrality and the politics of respectability would seem to counsel against its inclusion.

The two chapters just discussed focus on criticisms of present law, but there are several other points at which Professor Kennedy mildly chastises the racial bias of existing law in passing. In each case, as in his criticisms of capital punishment's administration and of the detention of black suspects, he ultimately subordinates the interests of the black defendant to the politics of respectability. For example, in Chapter 8, entitled "Playing the Race Card," Kennedy notes the insensitivity of some courts to racially offensive remarks, but he is sanguine in his conclusion that, with the exception of capital cases, "judges are typically balancing reasonably the competing values that are in tension with one another."⁷¹ This view is radically different from the conclusion I reached after reviewing post-civil rights era cases involving racially inflammatory arguments.⁷² It does, however, allow Kennedy to reassure the reader that an automatic reversal rule is unnecessary and that harmless error doctrine will usually preclude reversals even if more cases of misconduct are acknowledged. Moreover, far more of this chapter's vehemence is directed at another, more comfortable target: defense attorneys (and academics) who attempt to help their African-American clients by playing the "race card."⁷³

Kennedy's treatment of the Supreme Court's decision in *United States v. Armstrong*⁷⁴ provides yet another example of mild criticism of existing law embedded in a larger position that offers no real relief from racism for black

70. KENNEDY, *supra* note 1, at 420 n.2.

71. *Id.* at 276. Kennedy rejects an automatic reversal rule for cases of racial bias except in the sentencing stage of capital cases. *See id.*

72. *See* Sheri Lynn Johnson, *Racial Imagery in Criminal Cases*, 67 TUL. L. REV. 1739 (1993) (concluding that egregious uses of race are still common and largely unchecked by reviewing courts, and proposing legislation that specifically defines racial imagery and provides for automatic reversal when it is used in a criminal case); *see also infra* Section III.A (describing the case of Tommie Smith, in which the prosecutor used racially inflammatory language to depict the defendant to the jury).

73. KENNEDY, *supra* note 1, at 286-310. In that section, as I discuss *infra* Section II.C, Kennedy castigates Professor Paul Butler in harsher terms than any he uses to describe demagogic prosecutors or indifferent judges.

74. 116 S. Ct. 1480 (1996).

defendants. In *Armstrong*, the Court reversed a trial court's order for discovery relating to the defendant's selective prosecution claim, holding that discovery was unwarranted given the defendant's failure to produce evidence that similarly situated defendants of other races were not prosecuted.⁷⁵ Professor Kennedy disapproves of the Court's reversal of the trial judge's order, but he does so without endorsing the trial judge's determination; he concludes only that the decision was within the broad discretion ordinarily allowed trial judges.⁷⁶ Even this half-hearted criticism is almost a procedural aside. Kennedy hurries on to assure the reader that substantive relief for defendants claiming racial discrimination in the prosecution of drug offenses should not and will not be forthcoming.⁷⁷

Thus, at no step does Kennedy's book offer the African-American defendant the prospect of significant relief beyond that offered by current law, and at every step he attempts to draw attention away from African-American defendants and the race-based harms they suffer. As I believe my examples demonstrate, this tally is not merely an accidental by-product of his doctrinal commitment to race neutrality, but the result of scrupulous adherence to the politics of respectability that he advocates in his introductory chapter. Indeed, the sole situation in which he does not reject a color-conscious solution suggests that the politics of respectability might trump the doctrine of race neutrality when they are played against each other: Race conscious "leveling up" in capital sentencing subordinates the black defendant's interest in life to the black victim's interest in revenge.

C. *Rejecting Respectability*

My own positions on the issues outlined above are drawn largely from minority group political traditions, albeit ones quite different from those that foreshadow Kennedy's positions. I therefore sketch my alternative to Kennedy's politics of respectability, not because my own position should be particularly credited, but as a reminder that a quite different strategy has equally authentic roots in minority communities. As Regina Austin so beautifully demonstrates, the African-American community has, both over time and across individuals, displayed widely heterogeneous attitudes toward lawbreakers.⁷⁸ Among those stances is the one that animates my own work, which I shall call "seeing the bottom" politics by amending Mari Matusda's

75. See *id.* at 1487.

76. See KENNEDY, *supra* note 1, at 358.

77. See *id.* at 359-86.

78. See Regina Austin, "The Black Community," *Its Lawbreakers, and a Politics of Identification*, 65 S. CAL. L. REV. 1769, 1770-75 (1992).

phrase.⁷⁹ As the reader may guess, "seeing the bottom" politics unequivocally counsels against burying the black defendant, either literally or figuratively.

I could choose any number of places to begin describing this approach, but I shall begin with the Gospel according to Saint Matthew. Given the dominant position of Christians in America, this might seem a strange place to start. It bears remembering, however, that when this passage was written, Christians were a despised minority within a despised and powerless people. Moreover, the influence of Christian teaching on the politics of African Americans has been enormous, both because prominent leaders such as Martin Luther King, Jr., and Jesse Jackson have been Christian clergymen and because local black churches have often been involved in the civil rights struggle at the grass roots level. It is hard to imagine a statement more contrary to the politics of respectability than the following:

Then the King will say to those on his right hand, "Come, you blessed of My Father, inherit the kingdom prepared for you from the foundation of the world: for I was hungry and you gave Me food; I was thirsty and you gave Me drink; I was a stranger and you took Me in; I was naked and you clothed Me; I was sick and you visited Me; I was in prison and you came to Me." Then the righteous will answer Him, saying, "Lord, when did we see You hungry and feed You, or thirsty and give You drink? When did we see You a stranger and take You in, or naked and clothe You? Or when did we see You sick, or in prison, and come to You?" And the King will answer and say to them, "Assuredly, I say to you, inasmuch as you did *it* to one of the least of these My brethren, you did *it* to Me."⁸⁰

The counsel of this passage clearly calls for a radically inclusionary politics: The leader identifies himself *personally* ("I was . . .") with the least favored and the most despised, and he instructs his disciples that their very salvation depends upon how they treat these hungry, thirsty, naked, sick, unknown prisoners.

This lesson has not been lost on black churches. In my personal experience, black Christian churches have been much better than their white counterparts at "Hate the sin, love the sinner." Nor do I think my personal experience is idiosyncratic: Historically, black churches have not abandoned poor pregnant girls, made them wear scarlet letters,⁸¹ or burned witches.⁸² They have also, to use another biblical metaphor, rejoiced when the prodigal

79. See Mari J. Matsuda, *Looking to the Bottom: Critical Legal Studies and Reparations*, 22 HARV. C.R.-C.L. L. REV. 323, 324 (1987).

80. *Matthew* 25:34-40.

81. Cf. NATHANIEL HAWTHORNE, *THE SCARLET LETTER* (Sculley Bradley et al. eds., W.W. Norton & Co. 1962) (1850).

82. See KAI T. ERICKSON, *WAYWARD PURITANS: A STUDY IN THE SOCIOLOGY OF DEVIANCE* 137-59 (1966).

son came home, even when his return was from a prison. Moreover, Black Muslim churches have had a similar attitude toward the least respectable members of the black community. Indeed, they have often aggressively recruited members from among the down and out, offering them both material assistance and hope. Proselytizing efforts have been particularly vigorous and successful in prisons;⁸³ this is as true today as it was in Malcolm X's time.⁸⁴

In part, the black community has embraced convicted felons because some African Americans were convicted for acts that the community did not see as morally blameworthy. As Kennedy notes, at various times it has been a crime for African Americans to flee slavery, defend themselves or other African Americans from physical violence, learn to read, or disobey segregationist laws.⁸⁵ Moreover, some of the solicitude for black felons convicted of *mal in se* offenses has stemmed from a belief that they were wrongly convicted. Kennedy appears to identify one prominent member of the African-American community who did *not* embrace the guilty defendant when, in support of the lineage of his politics of respectability, he writes that Thurgood Marshall at one time refused to represent black defendants he believed to be guilty.⁸⁶ But this is the less probative part of the story, for as resources became less scarce, Marshall represented any defendant who had been denied a fair trial, regardless of his guilt or innocence.⁸⁷ Moreover, as a Supreme Court Justice, Marshall tirelessly championed the right of black criminal defendants to a fair trial, and the right of white criminal defendants as well. The circle of his compassion grew ever wider, and his steadfast opposition to the death penalty⁸⁸—even in cases Kennedy characterizes as “horrible crimes”—makes clear that he would have had no part in the subordination of black defendants' interests to those of “respectable” African Americans.

Another source of minority community support for “seeing the bottom” politics is the narrative tradition, both in legal scholarship and in African-American culture. Matsuda, Richard Delgado, Patricia Williams, and many others in both the critical race and critical feminist communities have advocated listening to the excluded and the degraded for stories that illuminate the way in which legal doctrine departs from reality.⁸⁹ The title of Derrick

83. See David Gibson, *Chavis Only Latest To Find Refuge as Black Muslim*, REC. N.N.J., Mar. 2, 1997, at 1 (reporting the estimate that of the 300,000 Muslims in U.S. prisons today, 90% are black, with 35,000 new converts each year); see also Cecile S. Holmes, *Ramadan: Heightening Awareness*, HOUS. CHRON., Jan. 25, 1997, at 1 (describing Black Muslim-sponsored programs for ex-convicts).

84. See MALCOLM X & ALEX HALEY, *THE AUTOBIOGRAPHY OF MALCOLM X* 182-83 (1966).

85. See KENNEDY, *supra* note 1, at 76-77.

86. See *id.* at 20-21.

87. See *id.* at 21.

88. See, e.g., *Gregg v. Georgia*, 428 U.S. 153, 241 (1976) (Marshall, J., dissenting) (arguing that the death penalty is unconstitutional in all its applications).

89. See, e.g., Richard Delgado, *Storytelling for Oppositonists and Others: A Plea for Narrative*, 87 MICH. L. REV. 2411 (1989); Matsuda, *supra* note 79; Patricia Williams, *Spirit-Murdering the Messenger: The Discourse of Fingerprinting as the Law's Response to Racism*, 42 U. MIAMI L. REV. 127 (1987).

Bell's painfully perceptive book, *Faces at the Bottom of the Well*,⁹⁰ is another evocation of the politics of looking to—or at least *seeing*—the bottom. There are many more examples of minority community politics that have included protection of disreputable members, but I will mention only one: Mahatma Gandhi's inclusion of the untouchables in his moral campaign against British colonial rule.⁹¹

Undoubtedly I am influenced by my own preferences in deeming these historical and contemporary examples of "seeing the bottom" politics more morally defensible than Kennedy's "respectability" politics. But I hope to convince the reader that "seeing the bottom" politics is also the more practical approach, given the nature of racial prejudice and discrimination. This is because "seeing the bottom" reveals the prevalence of race behind the facade of colorblindness, and therefore the fatuousness of rigid adherence to the race neutrality doctrine. First, however, I must consider Professor Kennedy's defense and application of race neutrality doctrine.

II. RACE NEUTRALITY

Just as the politics of respectability appears to determine the modest reforms Professor Kennedy advocates and the way in which he presents them, the doctrinal principle of race neutrality both explains and justifies his rejection of more ambitious proposals. Most notably, Kennedy rejects "imposing diversity" in jury composition,⁹² claims of racial discrimination in the prosecution of pregnant women for exposing their fetuses to harmful drugs,⁹³ claims that the disparity in sentencing between crack and powder cocaine offenses is racially discriminatory,⁹⁴ and claims that race-conscious jury nullification by African-American jurors can be justified in some situations.⁹⁵ I will focus first on the issue of "imposing diversity" on juries, both because I am most familiar with it (the work Kennedy criticizes here includes my own) and because the underlying empirical research provides a good vehicle for discussing the broad assumptions of the race neutrality doctrine. Without purporting to speak for the other scholars whose work Kennedy criticizes, I will then briefly note how the facile assumptions and artificial constraints of race neutrality render Kennedy's harsh criticism of them easily leveled but inapt.

90. DERRICK BELL, *FACES AT THE BOTTOM OF THE WELL: THE PERMANENCE OF RACISM* (1992).

91. See MOHANDAS K. GANDHI, *AUTOBIOGRAPHY: THE STORY OF MY EXPERIMENTS WITH TRUTH* 354-58, 452 (Mahadev Desai trans., Dover Publications, Inc. 1983) (1948) (describing Gandhi's inclusion of untouchables in his religious community and the Indian Congress's elimination of untouchability).

92. KENNEDY, *supra* note 1, at 231-32.

93. See *id.* at 359-64.

94. See *id.* at 364-76.

95. See *id.* at 295-310.

A. *Jury Composition*

Professor Kennedy recounts with approval the Supreme Court's long history of attempting to eliminate racial discrimination in the selection of the jury pool, and praises *Batson v. Kentucky*,⁹⁶ in which the Supreme Court held that a prosecutor may not exercise her peremptory challenges based upon racial generalizations. He acknowledges, however, that African Americans remain underrepresented in jury venires under present law.⁹⁷ He also acknowledges that even if venire underrepresentation were cured and the proportion of African Americans did not decline between the venire and the jury, jurisdictions with fifteen percent African-American populations and twelve-person juries would still have all-white juries in about fourteen percent of cases.⁹⁸ Moreover, though he does not discuss this, the proportion *will* decline between the venire and the jury, both because of "neutral" challenge-for-cause rules and because of race-based exercises of the peremptory challenge, notwithstanding *Batson*, a matter to which I shall return in Part III.

Kennedy, however, is not concerned about the number of black defendants facing all-white juries in the same way that he is concerned about race neutrality.⁹⁹ He concludes, "We should seek to require not that juries contain certain numbers of people who are white, brown, yellow, red, or black but simply that juries contain conscientious people committed to doing all that they can to bring about that mysterious quality we know as justice."¹⁰⁰ The questions that this statement raises, of course, are (1) whether we can discern conscientious from indifferent or malevolent juries, and (2) whether conscientious all-white juries will judge guilt as fairly as integrated juries. Kennedy can conclude that "a morally good and politically realistic way to help [overcome racial conflict] is to decline to formalize race-mindedness in jury selection"¹⁰¹ only because he focuses on discrimination that "diminish[es] the number of black jurors,"¹⁰² while ignoring discriminatory ascription of guilt and discriminatory sentencing.

Given his politics of respectability, it is not surprising that Kennedy once again chooses to focus on discrimination against the most presentable African American in the picture, in this case the potential juror. Here, however, this

96. 476 U.S. 79 (1986).

97. See KENNEDY, *supra* note 1, at 232.

98. See *id.* at 242. With six-person juries, the proportion of all-white juries would rise.

99. For instance, Kennedy writes:

[Race-dependent jury proposals] should . . . be invalidated . . . because courts should permit public racial discrimination only if officials make a clear case that the discrimination in question is needed on an emergency basis to further a compelling societal interest. Fortunately, no such case can be made for race-dependent jury selection.

Id. at 255.

100. *Id.* at 252.

101. *Id.*

102. *Id.*

focus has a particular irony and, indeed, inconsistency. Why would discrimination against black jurors persist? The obvious answer is that racial discrimination, whether overt, covert, or unconscious, persists in the decisionmaking of jurors. In general, though of course not in every case, white jurors will tend to listen less carefully to black witnesses, will be less skeptical of police officer testimony, and will have a greater predisposition toward assuming the guilt of a black defendant. Prosecutors, court officials, and defense attorneys all know this, which is why they attempt to discriminate in jury selection. Reporters and the person on the street know this as well, which is why the phrase "by an all-white jury" appears so frequently in high-profile black defendant news stories—and why Los Angeles erupted after news stories about the verdict in the Rodney King beating case first aired.

Kennedy might respond that although these discriminating lawyers, court officials, newspaper reporters, and people on the street all *believe* race influences decisionmaking, they are wrong. It would be odd, however, if both popular opinion and the opinion of those with the most relevant experience—trial attorneys¹⁰³—coincided on a fallacy. Actually, it would be more than odd; for if everyone believed that there were racial differences in decisionmaking despite colorblind decisionmaking, such a belief itself would be evidence of widespread racial bias in the ascription of meaning to conduct.

Kennedy, calling me "one of legal academia's most outspoken critics of the all-white jury," criticizes as "overstate[d]" my conclusion that there is strong evidence that racial bias frequently affects criminal trials, particularly those in which there are no (or only a few) black jurors.¹⁰⁴ The label honors me, but I don't think I am at all isolated or extreme in my criticism of all-white juries, though the *remedy* I propose may be on the left end of the political continuum.¹⁰⁵ Not only do the professional and lay opinions described above comport with my assessment of the problem, but the empirical evidence that race influences guilt attribution is indeed very strong. Kennedy does not review that literature at all, but merely alludes to it, wrongly asserting that I relied principally upon mock jury experiments for my conclusions.¹⁰⁶ Although the mock jury studies are the most *specific* evidence that white jurors will more often convict black defendants than white defendants, those studies are persuasive because they are consistent with anecdotal evidence, conviction

103. That this is the overwhelming opinion of trial attorneys cannot reasonably be disputed. The practice of racially discriminatory use of the peremptory challenge in criminal cases prior to *Batson* was ubiquitous, see *Batson v. Kentucky*, 476 U.S. 79, 103-04 (1985) (Marshall, J., concurring), and the practice after *Batson* has remained intransigent, see Sheri Lynn Johnson, *Batson Ethics for Prosecutors and Trial Court Judges*, 73 CHI.-KENT L. REV. 101, 118-26 (1998).

104. KENNEDY, *supra* note 1, at 242.

105. See Sheri Lynn Johnson, *Black Innocence and the White Jury*, 83 MICH. L. REV. 1611 (1985) (arguing that the Equal Protection Clause requires the inclusion of at least three racially similar jurors).

106. See KENNEDY, *supra* note 1, at 242.

and sentencing data, and the vast body of empirical work that explores the nature and pervasiveness of racial prejudice.

I will not detail here the findings upon which I then relied, but I will briefly note the conclusions from the relevant literature on prejudice that I surveyed. General research on racial prejudice against African Americans shows a persistence of overwhelmingly negative stereotypes about African Americans. These stereotypes encompass a wide range of perceived characteristics, most notably a propensity to commit crime.¹⁰⁷ They are conveyed and reinforced by the overreporting of crimes with black perpetrators as well as by everyday phrases and imagery that associate black with evil,¹⁰⁸ such as those found in the poem quoted in the introduction to this Review. When white people were informed that a person was black, they tended to be inattentive to other traits that the person possessed and were thus less influenced by those other traits when judging the person.¹⁰⁹ When white subjects were supplied with some negative information about a black person, they judged that person more harshly than an otherwise identically described white person. Indeed, even white subjects rated "unprejudiced" were twice as likely to use negative stereotypes in describing an African American pictured in a stereotypical situation than in describing the same person pictured in a nonstereotypical situation.¹¹⁰ This suggests that subjects who might not rely upon stereotypes in judging coworkers would be likely to do so upon seeing an African American in the stereotyped role of a defendant in a criminal trial. Moreover, while many white Americans at one time were openly and aggressively racist, "aversive" manifestations of racism are now more common.¹¹¹ Aversive racists, who share a desire to avoid associating with African Americans, often do not express their feelings of prejudice. They may agree in principle with the general goal of racial equality, but resist specific changes and believe that African Americans are largely responsible for their own inferior status. Finally, even persons who are not prejudiced may cooperate in discrimination against others, either because they fear social disapproval or because they fail to recognize that discrimination is taking place.¹¹²

Research on racial prejudice since 1985 both confirms this data¹¹³ and adds new insights into the nature of "aversive" racists¹¹⁴ and the

107. See Johnson, *supra* note 105, at 1644-45 and sources cited therein.

108. See *id.* at 1645-46 and sources cited therein.

109. See *id.* at 1646 and sources cited therein.

110. See *id.*

111. Cf. JAMES M. JONES, PREJUDICE AND RACISM 121-22 (1972) (contrasting Northern "aversive" racism with Southern "dominative" racism).

112. See Johnson, *supra* note 105, at 1650.

113. For an easily accessible summary of the primary literature, see T. Alexander Aleinikoff, *The Constitution in Context: The Continuing Significance of Racism*, 63 U. COLO. L. REV. 325 (1992).

114. Jody Armour has argued that these new findings suggest that we should reserve the word "prejudice" for the more traditional, straightforward form of racism and instead speak of "racial

subconscious influence of race on white Americans generally. For example, we now know that stereotypes are so powerful that a person's memory of an event is often organized around them; moreover, when stereotypes are triggered, a person gives greater attention to stereotype-consistent information and discounts information that is inconsistent with the stereotype.¹¹⁵ One especially evocative study showed that subconsciously creating images of African Americans by using words stereotypically associated with African Americans¹¹⁶ increased a subject's likelihood of interpreting another actor's actions as violent in a subsequent, purportedly unrelated task, *even when the subsequent task made no reference to the race of the actor*.¹¹⁷

This evidence, old and new, along with the perceptions of the vast majority of lay and professional observers, renders specious Kennedy's statement that "it is simply impossible to say with confidence how frequently illicit racial concerns presently intrude on jury deliberations."¹¹⁸ I am inclined to think that "illicit racial concern" or stereotyping *almost always* is part of the jury deliberation process, though it may seldom be voiced explicitly. Exactly how often this alters the outcome, no one can say, but the lack of a precise number hardly means that the number is not significant. The discussion above strongly suggests that outcomes as well as deliberations are affected, most often in close cases, but sometimes even in not-so-close ones.¹¹⁹

stereotyping" practiced by persons who do not feel animosity toward people of color. See Jody Armour, *Stereotypes and Prejudice: Helping Legal Decisionmakers Break the Prejudice Habit*, 83 CAL. L. REV. 733 (1995).

115. See Galen V. Bodenhausen, *Stereotypic Biases in Social Decision Making and Memory: Testing Process Models of Stereotype Use*, 55 J. PERSONALITY & SOC. PSYCHOL. 726 (1988); Dale T. Miller & William Turnbull, *Expectancies and Interpersonal Processes*, 37 ANN. REV. PSYCHOL. 233 (1986).

116. The words, such as "basketball" and "watermelon," were not themselves associated with violence, but referred to other stereotypical traits or associations.

117. See Patricia G. Devine, *Stereotypes and Prejudice: Their Automatic and Controlled Components*, 56 J. PERSONALITY & SOC. PSYCHOL. 5, 8-12 (1989).

118. KENNEDY, *supra* note 1, at 242.

119. Kennedy argues that because I "hypothesize" that it is in marginal evidence cases that race alters outcome, and since we do not know how many cases are "marginal," we cannot know how often outcomes are altered. *Id.* at 242-43. In fact, I am not hypothesizing so much as reporting the finding of the mock jury studies, a finding that Kennedy notes is consistent with "the Baldus hypothesis" as well as with James Fyfe's "hypothesis" that race affects police shootings of suspects in ambiguous circumstances. *Id.* at 242 (citing James J. Fyfe, *Blind Justice: Police Shootings in Memphis*, 73 J. CRIM. L. & CRIMINOLOGY 707 (1982)). Baldus and Fyfe, however, are also reporting findings, not "hypothesizing." These three findings are consistent not only with one other, but also with current understandings of how stereotyping—as opposed to rank racial animosity—operates.

Furthermore, to say that we do not know how many marginal cases there are, and to imply that this number could be insignificant, misunderstands the concept of marginal cases as I was using it. A case is marginal as compared to other cases, not to some absolute standard. There will thus always be marginal cases, and to the extent that criteria for decisionmaking are unclear, there will be more of them. It is hard to describe most criminal cases as bound by a clear set of rules, for example, or uninfluenced by amorphous considerations such as witnesses' credibility. Moreover, it is surely true that of the cases that go to trial, one would expect a high proportion to be "marginal," because it is usually the unpredictability of a case that leads parties to trial.

Kennedy also questions whether “the cost of the reforms in question will be worth the promised benefits.”¹²⁰ He lists as one example of the reforms’ costs the risk that affirmatively selected jurors will perceive themselves and be perceived by others as representing the defendant’s racial group.¹²¹ But even jurors who have not been affirmatively selected may be subject to this perception; indeed, it is a common problem for people of color in predominantly white environments, regardless of the means by which they entered them, to be perceived as representing their racial group.¹²² This is the reality of race in America, and it gives little credit to black jurors to expect that they will change their views in response to the perception that they represent blacks generally, whatever the source of that perception. Moreover, an obvious way to minimize both the white juror’s impression that the black juror represents her race and the pressure felt by the black juror to do so is to require the presence of more than one token black juror. As in other contexts, the job of an affirmatively selected juror will be much easier and much less subject to essentialist interpretation if more than one minority race juror is present. My proposal for a minimum number of racially similar jurors eases whatever burden would be created by diffusing it; jury dynamics suggest that at least three minority jurors are necessary (even assuming agreement among themselves) in order to “hold out” against the pressure of the majority.¹²³

Kennedy also lists administrative costs as a factor weighing against proposed reforms.¹²⁴ He criticizes the proposal for a minimum number of racially similar jurors as unmanageable given the complexities of racial identity; in the next paragraph, he deems Albert Alschuler’s alternative of self-identified minority persons¹²⁵ as reflecting a simplistic understanding of racial dynamics.¹²⁶ These are both real concerns, but with regard to racial fairness in deliberations and outcomes, courts and legislatures simply have not reached the point of considering such secondary details as the minimization of administrative burdens.¹²⁷ Moreover, what is dispositive for Kennedy in the end is not administrative burdens, but the acknowledgement of race’s

120. KENNEDY, *supra* note 1, at 243.

121. *See id.*

122. In *State v. Manning*, 495 S.E.2d 191 (S.C. 1997), the South Carolina Supreme Court reversed a black defendant’s conviction where the trial court’s venue change had been based upon the prosecutor’s argument that a fair trial was impossible because the county was 40% black. Clearly, the prosecutor believed that African Americans would not convict an African-American defendant.

123. *See Johnson, supra* note 105, at 1698-700.

124. *See KENNEDY, supra* note 1, at 243.

125. *See Albert W. Alschuler, Racial Quotas and the Jury*, 44 DUKE L.J. 704, 710-11 (1995) (discussing a proposal in which jurors would voluntarily identify themselves as minorities on a questionnaire and at least two of the 23 grand jurors would be self-identified minorities).

126. *See KENNEDY, supra* note 1, at 244.

127. *Cf. Johnson, supra* note 105, at 1696 (“I am not wedded to any of the details that follow, for they are not crucial. What is crucial is commitment to some realistic plan for eliminating the effects of racial bias on the determination of guilt.”).

significance that is inherent in the reform proposals he criticizes. He thus concludes this section with the statement that,

insofar as the jury quota functions as a sort of insurance policy against whites' prejudice, it validates the charge that Americans of different hues cannot hope to entrust themselves to the fair judgments of one another [and] would therefore likely deepen racial distrust at the very moment it attempts to establish a hedge against racial misconduct.¹²⁸

But if African Americans cannot *in fact* entrust themselves to the fair judgments of others (at least in the criminal sphere) and therefore need such an insurance policy, why worry about creating an *impression* of distrust? Only when we have fixed the *fact* should we focus on the impression. The lie of colorblindness is that the fact is already fixed.

B. *Racial Disparities in Drug Prosecutions*

Professor Dorothy Roberts opposes criminal prosecution of drug-addicted mothers who give birth to infants who test positive for drugs.¹²⁹ One source of her opposition lies in the racially disparate impact of these prosecutions, an impact that she claims both stems from and perpetuates black subordination. Professor Kennedy addresses this equal protection thesis by claiming that Roberts fails to prove intentional discrimination and does not distinguish unintentional perpetuation of past oppression from intentional discrimination.¹³⁰ Moreover, he indirectly attacks Roberts herself by asserting that the possible explanations for commentators' failing to make this distinction are "sloppiness," "deliberate obfuscation," or "a tactic of stigmatization pursuant to which accusers attempt to mold public opinion by making allegations that sectors of the public are predisposed to believe whether or not the accusations are true."¹³¹ All three possibilities are harsh criticism; few academics would want to face the choice of being labeled lazy, sneaky, or demagogic. With respect to Roberts, all three charges are inapt.

Kennedy begins by pointing to Roberts's statement that "poor Black women . . . are the primary targets of prosecutors . . . because they are Black and poor."¹³² He argues that Roberts ignores the possibility that the statistical disparities in prosecution rates may be attributable to black women's preference for cocaine over alcohol and marijuana, coupled with officials'

128. KENNEDY, *supra* note 1, at 245.

129. See Dorothy E. Roberts, *Punishing Drug Addicts Who Have Babies: Women of Color, Equality, and the Right of Privacy*, 104 HARV. L. REV. 1419 (1991).

130. See KENNEDY, *supra* note 1, at 359-62.

131. *Id.* at 362.

132. *Id.* at 361 (quoting Roberts, *supra* note 129, at 1432).

beliefs that cocaine is more harmful to fetuses.¹³³ Roberts has not, however, been either careless or deliberately obfuscatory here. On the contrary, it is *her* footnotes that provide the information on drug preferences of different racial groups that Kennedy cites.¹³⁴ Nor has she been sloppy: She shows that black women are more than ten times as likely as white women to be turned over to public health officials despite similar rates of substance abuse, and that differences in choice of drugs could explain *less than half* of that difference.¹³⁵

Kennedy then claims that “[a]nother difficulty with Roberts’s theory is that she abandons it herself,” and accuses her of playing “bait-and-switch.”¹³⁶ Evidence for this bait-and-switch, according to Kennedy, lies in two supposedly contradictory statements: Roberts first asserts that “prosecutors have either consciously or unconsciously treated black pregnant women differently than similarly situated white pregnant women,”¹³⁷ and then states:

It is unlikely that any of these individual actors intentionally singled out Black women for punishment based on a conscious devaluation of their motherhood. The disproportionate impact of prosecutions on poor Black women does not result from such isolated, individualized decisions. Rather, it is a result of two centuries of systematic exclusion of Black women from tangible and intangible benefits enjoyed by white society.¹³⁸

The paragraph that Kennedy is quoting continues:

Their exclusion is reflected in Black women’s reliance on public hospitals and public drug treatment centers, in their failure to obtain adequate prenatal care, in the more frequent reporting of Black drug-users by health care professionals, and in society’s acquiescence in the government’s punitive response to the problem of crack-addicted babies.¹³⁹

These statements are by no means contradictory. Roberts never accuses the system’s actors of consciously attempting to harm black women. Rather, as the second part of the passage demonstrates, she believes that the disproportionate prosecution of black women is the product of several factors, including unconsciously different responses by health care professionals, economic disparities, and the perpetuation of past discrimination.

133. *See id.* at 360-61.

134. *See Roberts, supra* note 129, at 1435 n.85, *cited in KENNEDY, supra* note 1, at 360 n.27.

135. *See id.* at 1434.

136. KENNEDY, *supra* note 1, at 361.

137. *Id.*

138. Roberts, *supra* note 129, at 1454, *quoted in KENNEDY, supra* note 1, at 361

139. *Id.* at 1454-55.

Indeed, immediately following the passage Kennedy quotes, Roberts argues that the phenomenon of the prosecution of drug-addicted mothers demonstrates how far “a view of equality [that] perceives racism as disconnected acts by individuals who operate outside of the social fabric” departs from reality.¹⁴⁰ In her view, the purposeful discrimination standard is to blame for this misimpression: An exclusive focus on whether or not an individual actor possessed an illicit motive allows society to ignore the disparate impact of the prosecutions and to overlook the different conception of racism that disparate impact represents.¹⁴¹ She thus embraces the antistatutory principle, which can take account of the myriad “ways in which government policy perpetuates the inferior status of Black women,” as superior to the purposeful discrimination principle.¹⁴² In short, Kennedy’s charge to the contrary, Roberts has a consistent, unified view of racial bias that is both careful and scholarly. Moreover, far from employing “stigmatization,” as Kennedy further charges,¹⁴³ Roberts’s focus on racial subordination allows her to avoid the divisive name-calling inherent in a purposeful discrimination analysis.

I believe the real source of Kennedy’s objection to Roberts’s thesis is that he simply disagrees with her description of the problem and her consequent doctrinal choice. In other words, we are back to the race neutrality principle. Should we ignore the race of a person in judging her conduct, trusting that, absent proof to the contrary, no one else has noticed or responded to her race? If it is to achieve its purported goal of eliminating racism, the race neutrality principle must assume that stereotyping is rare and easily identified; it must assume that our common past as a racist country rarely affects material or psychological realities.¹⁴⁴ For if stereotyping and the perpetuation of past discrimination are not relatively rare and discretely identifiable, how could the colorblindness advocate imagine that the purposeful discrimination standard would uncover most discrimination—or that race neutrality would be a sufficient tool for eradicating disadvantage based upon race? In my view,

140. *Id.* at 1455.

141. *See id.*

142. *Id.*

143. KENNEDY, *supra* note 1, at 362.

144. Professor Kennedy does not state that racial stereotyping is rare or that it rarely affects outcomes, and he never specifically estimates the prevalence of prejudice. However, because he deems wrongful judgments about guilt “episodic,” *id.* at 29, mentions only one modern wrongful conviction in the text, *see id.* at 125-27, and emphasizes his doubts about the frequency with which jury composition makes a difference, *see id.* at 242, I conclude that he must believe that racial bias affects outcomes only in exceptional, easily detected cases. In any event, this is the more generous inference. The alternative would seem to be that he thinks adverse outcomes often occur as a result of stereotyping that falls short of purposeful discrimination, but that he proposes that the criminal justice system do nothing about it because of his belief that colorblindness today will eliminate racial bias at some point in the future. Whatever one might think of this approach in other contexts, such as employment, privileging an uncertain long-term ideal of colorblindness in a context where the short-term costs are wrongful imprisonment or even death would, in my view, be morally indefensible. I doubt that Kennedy would advocate such a choice; therefore, I presume that he should be read as assuming racial bias to be rare and generally detectable, and therefore amenable to remedy without resort to race-conscious measures.

Roberts sees racial bias as both more common and more complicated than does Kennedy, and so she finds both the purposeful discrimination model and race-neutral remedies inadequate. This difference in perception does not make her guilty of "sloppiness," deliberate "obfuscation," or "a tactic of stigmatization pursuant to which the accusers attempt to mold public opinion by making allegations that sectors of the public are predisposed to believe whether or not the accusations are true."¹⁴⁵ Moreover, as I explore in Part III, "seeing the bottom" suggests that her perception, rather than his, is the more accurate one.

C. Jury Nullification

Kennedy criticizes Professor Paul Butler's proposal for selective nullification by black jurors in nonviolent victimless crime cases¹⁴⁶ even more harshly. Not only are aspects of Butler's proposal "profoundly misleading"¹⁴⁷ and "delusionary,"¹⁴⁸ but Butler's sentiments are "morally repugnant and politically dangerous."¹⁴⁹ Interestingly enough, Kennedy violates his own colorblindness code by identifying Butler as black.¹⁵⁰ (At no point in the text does Kennedy refer to himself as black or use anything but the third person plural when talking about African Americans, and he never alludes to the race of other commentators.) Kennedy also expresses fears that Butler's position "will be deemed by many as the authentically 'black' position . . . leading to the further isolation and stigmatization of Negroes in the eyes of many Americans."¹⁵¹

Kennedy's use of hyperbole in discussing this proposal¹⁵² would be humorous were it not so unfair to Butler.¹⁵³ I think Kennedy's rhetoric

145. *Id.* at 362.

146. See Paul Butler, *Racially Based Jury Nullification: Black Power in the Criminal Justice System*, 102 YALE L.J. 677 (1995).

147. KENNEDY, *supra* note 1, at 299.

148. *Id.* at 305.

149. *Id.* at 309.

150. See *id.* at 298.

151. *Id.* at 306-07.

152. A particularly remarkable statement is Kennedy's claim that [Butler's] conception of the irresponsibility of blacks would impose upon African-Americans a disability from which they were free even during the era of slavery: the disability of being perceived as people wholly devoid of moral choice and thus blameless for purposes of retribution, the same way that infants, the insane, and animals are typically viewed as morally blameless.

Id. at 304.

153. Particularly unfair is the charge that Butler's sentiments about the O.J. Simpson verdict were "morally repugnant." *Id.* at 309. Butler's essay does not imply that he condones murder or rejoices at the escape of guilty black defendants. Kennedy quotes from one of Butler's editorials in which Butler states that, after the Simpson verdict, "I danced my freedom dance along with my sisters and brothers all over the world." *Id.* at 308 (quoting Paul Butler, *O.J. Reckoning: Rage for a New Justice*, WASH. POST, Oct. 8, 1995, at C1). What Kennedy does not mention is Butler's unambiguous statement from the same editorial: "We were not applauding the release of a criminal, but rather that at last the system could work for an African-American man." Butler, *supra*. Kennedy also states that Butler's views are likely to "benefit some violent offenders through racially motivated exertions of black power in the jury box." KENNEDY,

here is so extreme, however, not out of any animosity toward Professor Butler, but because Butler so completely rejects both the politics of respectability and the prescription of race neutrality, the twin undergirdings of Kennedy's book. I would not myself advocate Butler's proposal. In the long run, I believe that urging mandatory inclusion of racially similar jurors because of the greater fairness of juries thus composed is more desirable than urging black jurors to forsake the law. Similarly, in the long run, calling for recognition that facially neutral laws (e.g., drug laws) have disparate and indefensible effects upon African Americans is more desirable than calling for nullification of all victimless crimes. Nevertheless, in at least one respect I react more positively to Butler's proposal than I do to Kennedy's critique: I suspect Butler and I largely agree about the inefficacy of race neutrality.

Among Kennedy's criticisms of Butler is that his proposal may entail devastating consequences. Perhaps non-unanimous jury verdicts will be instituted; perhaps "limiting the rights of blacks to sit on juries might be part of a reaction to his scheme."¹⁵⁴ But a legitimate verdict that whites did not like or see the same way—the O.J. Simpson verdict¹⁵⁵—has already led to non-unanimous jury proposals,¹⁵⁶ and African Americans are already sharply limited in their right to be judged by same-race jurors. If we were concerned less about race neutrality than about racial justice, we might do something about the harsh situations in which black defendants find themselves. Yet Kennedy rejects analyses that find gross disparities in sentencing between crack and powder cocaine to be unconstitutional, based upon an absence of proof of purposeful, conscious discrimination. Ironically, it is race neutrality itself, with its inability to rectify the bias faced by black defendants, that makes proposals like Butler's attractive. Butler's is the voice of desperation,¹⁵⁷ but instead of addressing or even acknowledging the sources of that desperation, Kennedy castigates the desperate.

supra note 1, at 308. Butler's proposal, however, simply does not apply to murder and other violent crimes. See Butler, *supra* note 146, at 723.

154. KENNEDY, *supra* note 1, at 303. Kennedy also raises the specter of white retaliation through the cutting of social programs, though he cautions that "[w]hether [such prophecies] will be borne out is unclear." *Id.* at 302.

155. Certainly, perceptions of the verdict vary widely. Based on the evidence before the jury, however, I categorize the verdict as a legitimate one. See Christo Lassiter, *The O.J. Simpson Verdict: A Lesson in Black and White*, 1 MICH. J. RACE & L. 69 (1996) (exploring the media's role in the misperceptions of many whites about the case, and defending the verdict).

156. See Harriet Chiang, *Jury Overhaul Urged—Plan Would Permit 11-to-1 Verdicts*, S.F. CHRON., May 1, 1996, at A1; Mark Katches, *Simpson-Inspired Judicial Reforms Wilt in Legislature*, L.A. DAILY NEWS, May 6, 1996, at N1.

157. Cf. Paul Butler, *The Evil of American Criminal Justice: A Reply*, 44 UCLA L. REV. 143, 156 (1996) ("[N]ullification is not so much an agent of disorder as a partial cure. The complete cure would be a fairer system of criminal justice, one that protects the interests of people other than privileged white males.").

D. *Moderating Race Neutrality*

Race neutrality is not a bad thing in and of itself. Most of the time, in fact, it is a good thing. For example, as everyone seems to agree, there is no substitute for race neutrality in the decision to prosecute.¹⁵⁸ Like Kennedy, but unlike many courts, I also think race neutrality is constitutionally commanded in arrest decisions. Moreover, in my prior work, I have critiqued the many injustices that result from a lack of serious enforcement of a purported commitment to race neutrality; in particular, it is outrageous that *Batson's* preclusion of a prosecutor's race-based exercises of the peremptory challenge requires nothing more than a formal gesture in many jurisdictions,¹⁵⁹ and that ostensible prohibitions against racially inflammatory arguments are largely unenforced.¹⁶⁰

The question, however, is not whether race neutrality is a good thing or a bad thing, but rather whether it is the only thing. We can ask this question about either goals or means. Is the sole purpose of the Equal Protection Clause the prevention of governmental action based on race? It is beyond the scope of this Review to attempt to persuade the reader that the Equal Protection Clause promises more than formal equality. I will say here only that I think an interpretation of the Equal Protection Clause that focuses narrowly on formal equality is neither rooted in history nor sufficient for the racial issues that beset us today.¹⁶¹ As Alan Freeman pointed out twenty years ago, "Black Americans can be without jobs, have their children in all-black, poorly funded schools, have no opportunities for decent housing, and have very little political power, without any violation [of the antidiscrimination norm]."¹⁶² Although I would not want to be wedded to *any* single purpose of the Equal Protection Clause, if I had to choose, I would opt, with Roberts, for the antisubordination principle and not for formal equality.

The question I want to answer here is narrower: What purpose should the Equal Protection Clause serve *in the criminal justice sphere*? It seems to me there is a simple answer: At the least, it must ensure racially just outcomes and avoid proceedings that degrade on the basis of race.¹⁶³

158. There is heated disagreement, however, over what constitutes sufficient proof of race-based decisionmaking to justify reversal, see *McCleskey v. Kemp*, 481 U.S. 279 (1987), or even a discovery order, see *United States v. Armstrong*, 116 S. Ct. 1480 (1996).

159. See Johnson, *supra* note 103; Sheri Lynn Johnson, *The Language and Culture (Not to Say Race) of Peremptory Challenges*, 35 WM. & MARY L. REV. 21 (1993); see also *infra* Section III.B.

160. See Johnson, *supra* note 72, at 1794-97; see also *infra* Section III.A.

161. For writings that outline these issues, see Alan Freeman, *Legitimizing Racial Discrimination Through Anti-Discrimination Law: A Critical Review of Supreme Court Doctrine*, 62 MINN. L. REV. 1049 (1978); Charles R. Lawrence III, *The Id, the Ego and Equal Protection: Reckoning with Unconscious Racism*, 39 STAN. L. REV. 317 (1978); and Roberts, *supra* note 129.

162. Freeman, *supra* note 161, at 1050.

163. Often racial degradation of the defendant and racially biased outcomes coincide. The occurrence of either on its own, however, would violate the Equal Protection Clause. Regardless of whether racially biased determinations of guilt or sentence are consciously intended, they must be set aside; regardless of

The remaining issue is whether race neutrality best serves these goals. I hope the day will come when government can promote racial justice and protect the dignity of African Americans in the criminal process by practicing a pure race neutrality, but I do not expect to live to see it. I am convinced that dogged insistence on colorblindness often obscures unjust outcomes and degrading proceedings, thus impeding the pursuit of racial justice and human dignity. These convictions about the inefficacy of race neutrality stem from three sources: social science research on the nature, prevalence, and expression of racial bias; the ubiquity of color consciousness in the experience of the African Americans I know; and lessons from the stories of death-sentenced inmates, to which I now turn.

III. TRUTH

I fear that the politics of respectability looks to remedy inequality only when whites recognize a victim. The purposeful discrimination standard cooperates, hiding the true number and identity of victims of race discrimination by claiming that there can be no victim without a malevolent perpetrator. When we accordingly see very few victims, it is easier to believe that race neutrality is a sufficient remedy.

This is the wrong approach; the way to see the right one is by starting at the bottom. This is what Roberts does when she asks us to look at black women prosecuted for giving birth to drug-affected babies.¹⁶⁴ She shows us subordination stemming from a variety of sources, the least of which is intentional racial discrimination; because the primary problem is not conscious discrimination, rooting out the deliberately discriminating official cannot provide an adequate solution. We see the need for a remedy because Roberts's portrayal allows us to see these women as victims as well as perpetrators. And we also see that these forms of subordination are likely to affect "respectable" black women too, though not in such harsh ways.

The same truth is present in the stories of the people at the very bottom—death-sentenced inmates. The shocking discovery I have made in representing black death row inmates is that the phenomena of race consciousness and racial subordination, while they find many different expressions, are always present. I will tell only two men's stories here (and only a part of their stories at that), and then I will explain what I think those stories tell us about race neutrality.

outcome, black defendants must be treated with the same respect that is accorded white defendants.

164. See Roberts, *supra* note 129; *supra* Section II.B.

A. *Tommie Smith*

Tommie Smith was black. It was undisputed that plainclothes Indianapolis police officers burst into Tommie Smith's home before dawn and that Tommie Smith shot and killed one of them. The police officers shot Smith, wounding him so severely that he was unconscious by the time they reached him. All other facts, including the order of the shootings and whether the police announced their identity prior to their forcible entry, were disputed. After Smith's trial, forensic experts discovered that the police account of the victim's shooting was physically impossible. The victim, the prosecutor, the judge, and the entire jury were white.

The prosecutor in Tommie Smith's trial made a string of racial comments, some more brazen than others, but all of which threatened the unbiased adjudication of Smith's guilt and determination of his sentence. Most egregious was the prosecutor's deliberate invocation of an inflammatory racial stereotype. In discussing the disputed claim that Smith shot the victim twice after he was down, the prosecutor said:

Now, what about Tommie. Tommie signed his name for us and we owe him a debt of gratitude. Because Tommie couldn't be satisfied with tearing Jack's guts apart [with] that first shot. Oh, no. He's got to play *super-fly* and come out here and blow holes in a man who is lying dying on the sidewalk.¹⁶⁵

"Superfly" is the title character in a 1972 film.¹⁶⁶ The film, which uses racial epithets dozens of times, portrays a black cocaine dealer who succeeds in ensuring his final 30-kilo deal by taking out a hit contract on the corrupt white police commissioner's "faggot son and fat-legged daughter."¹⁶⁷

The prosecutor made a second blatantly racial remark when he characterized the testimony of a black witness hostile to the prosecution as "shucking and jiving."¹⁶⁸ In addition to the "Superfly" and "shucking and jiving" comments, the prosecutor reminded the jury of the victim's majority race by referring to him as "that Dutch hardhead."¹⁶⁹ He described the black adult male defendants as "boys" in the same sentence in which he referred to their white victims as "men."¹⁷⁰ He gratuitously stereotyped and degraded

165. *Smith v. Farley*, 873 F. Supp. 1199, 1213 (N.D. Ind. 1994), *aff'd*, 59 F.3d 659 (7th Cir. 1995), *cert. denied*, 516 U.S. 1123 (1996).

166. See *SUPERFLY* (Warner Bros. 1972).

167. *Id.*, quoted in *Smith*, 59 F.3d at 664.

168. *Smith*, 59 F.3d at 664.

169. *Smith v. State*, 516 N.E.2d 1055, 1064 (Ind. 1987), *cert. denied*, 488 U.S. 934 (1988); Record on Appeal at 2260-61, *Smith v. Farley*, 59 F.3d 659 (7th Cir. 1995) (No. 94-3818). The complete Record on Appeal is on file with Professor Thomas Schornhorst.

170. Record on Appeal at 2261.

them by calling them “privates” and “stupid.”¹⁷¹ With only slightly more subtlety, he set them apart as “these people” and “this one and that.”¹⁷²

The Indiana state court’s opinion is an amazing example of escalating denial and unproven assertion. The court began by dismissing the references to Smith as a “private[,]” to his “stupidity,” and to him as a “boy” as “general slang [and] not . . . racial comment[s].”¹⁷³ About “shucking and jiving” on the stand, the court complacently observed, “The term is clearly of black origin, used to mean to talk in a patently misleading or evasive manner. Its use reminds the jury of the untrustworthy appearance of this witness.”¹⁷⁴ Finally, it concluded without analysis that

[d]espite the racial content of the term ‘Superfly,’ it is not out of bounds to make such an allusion by saying Smith acted like ‘Superfly,’ either to characterize his actions by comparison with a known fictional figure, or to imply that [his] behavior is to some extent modeled on the fictional example.¹⁷⁵

The Seventh Circuit, on habeas corpus, issued an opinion that conducts a lengthier discussion, but ultimately dismisses Smith’s claims as well.¹⁷⁶ Smith’s due process claim fails, according to the opinion, because he did not show that the prosecutor’s repeated use of racially charged and derogatory imagery had any impact on the jury’s consideration of the case.¹⁷⁷ In reaching this conclusion, Judge Posner first questioned whether the “shucking and jiving” remark is racial in character, despite its application to a black witness. He acknowledged the disparaging nature of the term and its origins in “Negro dialect,” but wondered whether “shucking and jiving” is not a “crossover” term like *schnorrer* and *chutzpah*, which “have become absorbed into standard English and are now applied to members of all racial and ethnic groups.”¹⁷⁸ Apparently he believed that this possibility disposed of the claimed impropriety of the remark, for the opinion says nothing more about it. Judge Posner did acknowledge the racial character of the reference to “Superfly,” but only to chastise Smith’s lawyers for making “no effort to establish the likely meaning of the term to the members of the jury or to persons demographically similar to them.”¹⁷⁹ Because the movie was “intended for and marketed to black audiences,” Judge Posner claimed that it is unclear what “Superfly” would have meant to a *white* jury, and he deemed

171. *Id.*

172. *Id.*

173. *Id.*

174. *Id.*

175. *Id.*

176. *See Smith v. Farley*, 59 F.3d 659 (7th Cir. 1995).

177. *See id.* at 664-65.

178. *Id.* at 664.

179. *Id.*

“merely conjecture” the contention that the use of the term “Superfly” had any impact on the jury’s consideration of the case.¹⁸⁰

Posner’s analysis is surprising for a number of reasons. The analyses of both the Indiana Supreme Court and the federal district court assumed that the jury *did* understand the meaning of the allusion. Moreover, the prosecutor who made the remark was white and knew that the jury was white; one wouldn’t expect him to refer to “Superfly” if he thought the jury would be baffled by it. Finally, it is hard to imagine how Smith’s appointed lawyers would have conducted (and, for that matter, financed) a study of what the term “Superfly” means to white audiences; such a study would not necessarily have shown what it meant to Smith’s jury anyway. Perhaps to reassure the reader, the Seventh Circuit’s opinion notes that “one or two isolated references to race or ethnicity, wholly unlikely to sway a jury, do not compel a new trial” when overwhelming evidence of guilt is established.¹⁸¹ But this reassurance too is predicated on a false premise, for the opinion completely ignores the other racial remarks that would have taken this case out of the “isolated references” category, if such a category exists.¹⁸² Perhaps some of these remarks, taken in isolation, might appear random and harmless, but looking at the repetition of racially charged words and phrases makes clear that the prosecutor “so infected the trial with unfairness as to make the resulting conviction a denial of due process.”¹⁸³ Racial prejudice may be engendered by racial arguments that show a modest degree of sophistication; certainly the law must recognize that an argument based on racial stereotypes creates bias regardless of whether or not those stereotypes are expressed with animosity.

Nevertheless, the Seventh Circuit denied a petition for rehearing *en banc*¹⁸⁴ and the Supreme Court denied certiorari without dissent.¹⁸⁵ The clemency board spent less than an hour in deciding to recommend against clemency, and the State of Indiana executed Tommie Smith shortly thereafter.¹⁸⁶

Tommie Smith’s sad story provokes a number of observations, all of which have general implications for understanding the nature of racial bias and the remedy it requires. I will mention three here. First, Smith’s prosecutor would not have said the things he did in referring to a black colleague. It was Smith’s outcast status as a capital defendant that permitted the prosecutor to use

180. *Id.*

181. *Id.*

182. See TEUN A. VAN DIJK, COMMUNICATING RACISM: ETHNIC PREJUDICE IN THOUGHT AND TALK 104 (1987) (noting that prejudiced talk often uses pronouns of distance like “they,” “them,” or “those people” to emphasize separation while protecting the speaker from the risk of social disapproval that accompanies overt racial pronouncements).

183. *Darden v. Wainwright*, 477 U.S. 168, 181 (1986) (reiterating and applying the standard for due process reversals based on prosecutorial misconduct).

184. See *Smith v. Farley*, 1995 U.S. App. LEXIS 20627.

185. See *In re Smith*, 117 S. Ct. 1 (1996).

186. See John R. O’Neill, *Behind Closed Doors*, INDIANAPOLIS STAR, July 21, 1996, at C3 (describing Smith’s death by lethal injection).

inflammatory stereotypes so openly. But if he could think to say those things to a jury—and believe that a jury would respond favorably to those kinds of racial argument—don't we have to wonder whether he would not *think* the same things, or at least analogous things, about a black colleague? And if we allow a prosecutor to say such things in order to help him secure the death penalty for an African American, won't he learn something about whether it is acceptable to think about black people differently from how he thinks about other people? In short, Kennedy's politics of respectability is impractical; if we ignore or rationalize racial prejudice expressed toward capital defendants, we cannot expect to cabin its incursion into the lives of the respectable.

Second, I think Tommie Smith's prosecutor could and did say what he did because his audience was all white. It may be that one or more white jurors were in fact offended by his remarks, but the prosecutor apparently assumed that none of them would be. I doubt he would have made that assumption about an African-American juror. Thus, even with regard to conscious, egregious appeals to race, we need to look beyond race neutrality and attend to the race of the decisionmakers in seeking a cure. Indeed, the race of the decisionmakers is even more important when there are no explicit allusions to race but racial stereotypes have nevertheless been triggered.

Third and finally, the administration of "race neutrality" by the Seventh Circuit in this case can only be described as sophistry. It is ludicrous to assume we have come so far from segregation and subordination that no one would know black slang from white slang, or attach any racial connotations to it if they did. (Do we really believe that the prosecutor regularly used the words "shucking and jiving" when he was not speaking about African Americans?) Moreover, Judge Posner's swashbuckling approach to doctrine is appalling. While Judge Posner was blind in one eye to the color connotations of "shucking and jiving," his better eye had to recognize the potential racial shading of the "Superfly" comment; yet, in a leap of logic reminiscent of *Palmer v. Thompson*,¹⁸⁷ he found no constitutional violation in the "Superfly" remark because the racial animosity may have been *ineffective*. When this is the way in which the race neutrality line is policed against white people, it is hard to see why black people—or anyone committed to racial justice—should owe it any allegiance. Even if one were initially attracted to an absolutist race neutrality, its disingenuous administration is disenchanting.

B. *Ronnie Howard*

During Ronnie Howard's trial, the state prosecutor used eight of his twelve peremptory challenges to eliminate all but one black panel member. Of the

187. 403 U.S. 217 (1971) (upholding as constitutional the closing of city swimming pools to avoid integrating them, because the action did not affect black people differently from white people).

first forty-two qualified jurors, thirty-five of whom were white and seven of whom were black, the state struck six black jurors and four white jurors.¹⁸⁸ When the alternates were selected from an additional eight jurors, the state struck two more black jurors and no white jurors.¹⁸⁹ The prosecutor's initial response to Howard's *Batson* motion was to claim that *Batson* was not applicable because one black juror remained on the panel.¹⁹⁰ When the judge nevertheless found the existence of a *prima facie* case, the prosecutor claimed that race-neutral reasons, in particular the jurors' attitudes toward the death penalty, supported all the challenges. In assessing whether there was any validity to this claimed justification, I will go into some detail. This close examination is particularly important because attitude toward the death penalty is so frequently the proffered justification when black jurors are struck in capital cases.

As a justification for striking Edward Wood and Charles Copeland (two black jurors), the prosecutor cited only their views on the death penalty,¹⁹¹ even though several white jurors he had accepted expressed their views in remarkably similar terms. Wood had expressed some ambivalence about the death penalty, stating that, while he could vote for it, he was "really not for the death penalty"; he agreed with the prosecutor's characterization that he would "lean toward life . . . just about every time."¹⁹² When the prosecutor tried to get him to go further and say that he "would have to be talked out of life into death," he disagreed, stating, "I make my own decision."¹⁹³ The only reason the prosecutor gave for striking Wood was this ambivalence, yet Wood's sentiment was phrased in terms strikingly similar to those used by accepted white juror Richard Ashmore. Ashmore said he would "prefer life imprisonment with no chance of parole,"¹⁹⁴ and if the case were not "a very extreme case," he would "lean toward life imprisonment."¹⁹⁵ In fact, Ashmore appeared to reserve the death penalty for a more limited class of cases, describing an "extreme case" as one involving the rape and murder of a little child or "a crime involving several people or a group of people held hostage and murdered maliciously"¹⁹⁶—categories into which Ronnie Howard's case clearly did not fall.

Black juror Charles Copeland found it "hard to move for death for anybody" from a religious standpoint,¹⁹⁷ but he denied that he would lean

188. See Record on Appeal at 840-41, *Howard v. Moore*, 131 F.3d 399 (4th Cir. 1997) (No. 95-4017). The complete Record on Appeal is on file with the author.

189. See *id.* at 1016-18.

190. See *id.*

191. See *id.* at 843-44, 1020.

192. *Id.* at 566-68.

193. *Id.*

194. *Id.* at 718.

195. *Id.* at 719.

196. *Id.* at 716.

197. *Id.* at 681-82.

toward life from the outset of a case.¹⁹⁸ He said, "I don't believe that another man should take another man's life either legally or illegally,"¹⁹⁹ but he also said that as a former member of the armed services, he would be able to take life in a military posture, and that in the case of an extreme murder he could vote for the death penalty.²⁰⁰ Although he agreed with the prosecutor that taking a life would "give [him] concern," he also said that "I would make my final decision on whatever evidence was provided me."²⁰¹ Again, the prosecutor's only claimed basis for striking Copeland was his attitude toward the death penalty. Yet the prosecutor accepted white juror Sharon Lunny as first alternate, despite Lunny's similar—indeed, arguably greater—expressions of reluctance. Lunny did not specifically cite religious teachings as the grounds for her reluctance, but referred to precisely the same moral teaching as had Copeland, stating that she had "always been taught . . . that you don't take a life Because life cannot be replaced."²⁰² She went beyond Copeland's statement that it would be "hard" to vote for the death penalty, stating first that she "really didn't know" if she could, adding later, "I believe I could," if the circumstances involved in the murder were "so aggravated, so heinous."²⁰³ After further questioning, she reiterated that she found the death penalty appropriate in heinous murders, but gave only two examples of this category, "dismemberment" and something "brutal and premeditated,"²⁰⁴ thus suggesting that the set of cases in which she might consider the death penalty was narrower than the set of cases ("extreme murders") in which Copeland might do so.

While it is often difficult to compare viewpoints expressed in different ways, this is a case in which accepted white jurors and struck black jurors stated their views on the death penalty in almost identical language. It is hard to imagine how Wood's "lean towards life" could be considered materially different from Ashmore's "lean toward life imprisonment." Similarly, it is impossible to distinguish meaningfully between Copeland's and Lunny's statements of reluctance, both of which cited the moral principle that it is wrong to take a life. To claim a distinction between such similarly expressed views when the only apparent difference between the speakers is their race is racial discrimination.

Variations of this type of discrimination occurred throughout the jury selection process. I will mention just three more examples. First, with respect to struck black juror Amanda Fuller, the prosecutor cited a combination of her

198. *See id.* at 681.

199. *Id.*

200. *See id.* at 680, 682.

201. *Id.* at 682.

202. *Id.* at 813.

203. *Id.*

204. *Id.* at 815-16.

death penalty views, unstable work history, and age; similarly, with respect to black alternate Antonio Golden, he cited the combination of her death penalty views, erratic work history, and unemployed husband. These stated reasons are impeached by the prosecutor's acceptance of white jurors whose relevant attributes were extraordinarily similar.²⁰⁵ Second, the prosecutor's approach in questioning black juror Gladys McElrath about her death penalty views was much more likely to elicit an anti-death-penalty response than his very different approach in questioning white jurors.²⁰⁶ Third, the prosecutor

205. The prosecutor claimed to have struck black juror Fuller for a combination of three reasons: her allegedly unstable work history, her young age, and her statement that she was "indifferent" to the death penalty. *Id.* at 843.

The first reason is simply inaccurate: Fuller had been employed at Burger King for a year prior to trial, and before that she had worked for the same restaurant for six years, a job she left in order to attend night school. *See id.* at 451-52. This is hardly an unstable work history. When challenged by the defense attorney regarding his characterization, the prosecutor then claimed to rely on a purported discrepancy between her questionnaire, which stated that she had worked at Burger King for nine months, and her testimony that she had worked there one month. *See id.* at 847-48. This alleged discrepancy between her verbal testimony and her questionnaire simply did not exist: Fuller had stated in her testimony that she had been employed at Burger King for "about a year now." *Id.* at 451. This answer meshes perfectly with her questionnaire, which would have been filled out several months earlier.

The second stated reason, Fuller's age, adds nothing when considered by itself, given that the prosecutor accepted three white jurors who were the same age or younger. *See id.* at 1782-85. The question remains whether age, in combination with the third reason, could have justified the strike. But this third reason, her purported "indifference" to the death penalty, was directly traceable to the prosecutor's prompting. Fuller had said that her position on the death penalty "depends on what the situation is." *Id.* at 450. The prosecutor pursued this answer, asking whether she thought it was "good, bad or indifferent." *Id.* She had already said she wasn't "for" the death penalty in all cases. Nor was she "against" it in every case. That left "indifferent," which she chose. *Id.* Yet, when white juror Carroll Jones said that his view on the death penalty "depends on the circumstances," *id.* at 501, the prosecutor did not ask the follow up "good, bad or indifferent" question, but simply deemed him acceptable.

Even more to the point is the prosecutor's treatment of accepted white juror Emily Bagwell, who, like Fuller, was 22 years old. Bagwell's answers to the court's questioning made it clear that her views on the death penalty were—like Fuller's—dependent on the particular situation. *See id.* at 59. Yet the prosecutor's only question about Bagwell's death penalty views was whether she would be able to sign a verdict form if she felt death was the appropriate punishment. *See id.* at 62-63. The prosecutor asked Bagwell no follow-up question about whether she thought the death penalty was "good, bad or indifferent," despite the equivalence of her initial response to Fuller's. Instead, he deemed her acceptable—and she, unlike Fuller (whose "erratic work history" was cited by the prosecutor), was unemployed. *See id.* at 1782.

The treatment of black juror Antonio Golden was similarly disingenuous; I have the details on file for the interested reader.

206. McElrath had initially stated that she "didn't believe in capital punishment," but "might could" vote for it if the circumstances were "so bad," *id.* at 792, an expression of views similar to those of accepted white juror Lunny, who stated first that she "really didn't know" if she could vote for death, adding later "I believe I could," if the circumstances involving the murder were "so aggravated, so heinous," *id.* at 813. McElrath's initial hesitation also sounds similar to, if not less substantial than, the qualms expressed by accepted white juror Floyd Rohm, who twice stated that he was "really not certain" whether he could ever vote for the death penalty, *id.* at 157, saying later only "I believe I could," *id.* at 161.

Reasonable prosecutors could adopt a variety of approaches to such ambivalence. One approach might be to seek further negative statements from ambivalent jurors to support a challenge for cause; another approach would be to try to lead ambivalent jurors to a more favorable view of the death penalty. Either approach, if applied evenhandedly, would be permissible. What is not permissible is to adopt different approaches based on the race of the ambivalent juror. This is the approach the prosecutor took. He responded to McElrath's hesitation with a series of 10 leading questions, all of a sort that would tend to solicit anti-death-penalty views—e.g., "You just don't think you could vote to *electrocute* someone?" *Id.* at 793-94 (emphasis added). Follow-up questions of Rohm, however, focused first on his understanding

radically mischaracterized the death penalty views of struck black juror Jeffrey Dunbar.²⁰⁷ Despite these and other compelling indications of improper racial motivation, the trial judge ruled that such motivation had not been shown.

The Supreme Court has held that state court findings of fact are ordinarily entitled to a presumption of correctness and that, given a trial court's proximity to the case, deference must ordinarily be afforded its determination that a peremptory strike was made for race-neutral reasons.²⁰⁸ Here, however, there was *no* support in the record for the prosecutor's stated reasons for striking black jurors Wood, Copeland, Fuller, and Golden, and there was an extraordinary accumulation of evidence of racially discriminatory motivation. Nevertheless, on direct appeal, a majority of the South Carolina Supreme Court affirmed Howard's conviction over the dissenting judge's protest that "[a] prosecutor is required to show that he challenged similarly situated members of the majority group on identical or comparable grounds as members of the minority group."²⁰⁹

This is not a story of a renegade state court. The federal district court judge then denied Howard's petition for a writ of habeas corpus, and the Fourth Circuit affirmed.²¹⁰ Neither the panel nor the entire court sitting en banc was interested in hearing oral argument on the *Batson* issue. In the en banc court's written opinion, the majority stated that, as a general matter, the similarity of black and white jurors' expression of their views was not determinative, because other factors, like "tone, demeanor, [and] facial expression" may have been different.²¹¹ The prosecutor in Howard's case, however, had not made any claims about tone, demeanor, or facial expression. The court also stated that in this case the black jurors' "anti-death penalty

of the process and then (in non-leading form) on his feelings about the death penalty. *See id.* at 158-60. The prosecutor's response to Rohm's expression of "mixed feelings" was to ask in a neutral manner, "Could you give meaningful consideration to recommending death in this case?" *Id.* at 161 (emphasis added). Follow-up questioning of ambivalent white juror Lunny was similarly open-ended and devoid of explicit references to "electrocution." *Id.* at 814-16.

207. In striking Dunbar, the prosecutor cited his age, the fact that he had recently graduated from high school, and the fact that "he said on two occasions that he could not vote for the death penalty." *Id.* at 842. Dunbar's age did not distinguish him from a number of accepted white jurors, but no white jurors had just graduated from high school. The description of his death penalty views, however, was misleading and almost certainly specious.

Dunbar had in fact misunderstood the judge's question when he twice said "No" to the question of whether he could vote for the death penalty. *Id.* at 135. Upon rephrasing of the question, however, he immediately corrected himself, saying, "Oh, okay. I understand the question now. Yes, I could." *Id.* He twice more repeated that he could vote for the death penalty. *See id.* at 135-36. Moreover, it is not possible the prosecutor missed this correction, for one of these affirmations occurred in response to the prosecutor's own question, "You misunderstood when he asked if you could vote for the death penalty?" *Id.* at 136. The prosecutor clearly mischaracterized Dunbar's views (which included a statement that he was "generally for" the death penalty, *id.* at 140), apparently to support a challenge he feared would look weak.

208. *See Hernandez v. New York*, 500 U.S. 352, 364 (1991).

209. *State v. Howard*, 369 S.E.2d 132, 140 (S.C. 1988) (Finney, J., dissenting).

210. *See Howard v. Moore*, 131 F.3d 399, 403 (4th Cir. 1997) (en banc) (affirming the district court's denial of habeas corpus).

211. *Id.* at 408.

sentiments were much stronger."²¹² It did not, however, quote any language to support this assertion, and indeed there is no such language. With respect to Golden and Fuller, the court merely repeated the prosecutor's explanations²¹³ and did not address the facts described in the footnotes above²¹⁴ and recounted in Howard's brief. The court did not address the cumulative evidence of racial motivation either.

What truth emerges from this case? The first truth is that the prosecutor desperately wanted to eliminate African Americans from the jury and believed that a token, isolated African American would insulate his racially discriminatory actions from review. Why did he desperately want to limit African Americans from the jury? For the same reason so many other prosecutors wish to do so: Especially in a capital sentencing proceeding against an African American accused of an interracial crime, the race of the jurors is likely to make a difference. We are back to the one racial statistic Kennedy does accept: race-of-victim impact. But surely it is obvious why disparities based on the race of the victim are likely to disappear in the face of racially integrated juries.²¹⁵

The second truth is that the shield of race neutrality is flimsy, if not chimerical. There is no close review of proffered justifications because the appellate court defers to trial court findings. But the trial judge does not have to find racial motive even in the face of implausible justifications,²¹⁶ and if need be, appellate courts can hypothesize additional factors upon which the prosecutor might have relied. Surely this nominal enforcement of *Batson* is no substitute for an integrated jury. Why would a trial judge so disregard his duty? Perhaps part of the answer is that the purposeful discrimination standard forces a judge to choose between ignoring specious justifications (like those offered by Howard's prosecutor) or calling a fellow member of the bar a liar and a racist. Under prevailing doctrine, there is simply no middle ground. The only one who would benefit from the judge's choosing the harder of the two options is a criminal defendant accused of a capital crime.

Would Kennedy have wanted to see Howard's conviction reversed? I do not know; he so often avoids speaking of reversals because he does not want to speak of situations involving less respectable African Americans. But one last truth: Ronnie Howard may not be "respectable" in the eyes of many white Americans, but those eyes have always missed much of what matters. He does not have a college degree, a professional title, or even a clean record. But he is capable of shame, selflessness, courage, warmth, humanity, and decency, and

212. *Id.*

213. *See id.*

214. *See supra* notes 205-207.

215. Preliminary results from Professor Baldus's study of capital sentences in Philadelphia show that race-of-victim effect diminishes as the number of minority race jurors increases. *See supra* note 42.

216. *See Purkett v. Elem*, 514 U.S. 765, 767-68 (1995).

I am blessed to know him. I have to believe that if Professor Kennedy knew Ronnie Howard, he would not turn away; and I think that if his readers had seen the cases I have seen, they would not believe that race neutrality is the road to racial justice in the administration of the criminal law.

V. CONCLUSION

I said I would tell only two death row inmates' stories, but life happens between drafts, and so I will tell one more. Beau Gilbert and J.D. Gleaton are brothers who were convicted and sentenced to death for the robbery and murder of a Lexington County, South Carolina convenience store owner. The circumstances of the alleged murder were relatively unaggravated, but Gilbert and Gleaton are black, and their victim was white, and in Lexington County, there is a strong statistical race-of-victim component to the prosecutor's decision to seek the death penalty.²¹⁷ At their joint capital trial, the trial judge made a written finding that there was "systematic" removal of African Americans from the jury through discriminatory exercise of the peremptory challenge. Unfortunately for Gilbert and Gleaton, the Supreme Court decided *Batson* after their convictions had become final and has since held that *Batson* is not retroactive.²¹⁸

These losing issues are not, however, the only appearance race made in the case. The defendants' African-American trial attorney—who I assume would meet Kennedy's respectability standard—was concerned for his own personal safety in that county; he always parked his car for an expeditious exit to the city and insisted that he had to leave the courthouse before dark.²¹⁹ The victim's wife, a white woman, stood outside the prison years later and said to the press, "Just like Dr. Martin Luther King, I also have a dream. I have a dream that one day I am going to see J.D. and Beau go out of here in a hearse."²²⁰ What does it mean that thinking about Gilbert and Gleaton conjures up a famous civil rights leader? What does it mean that Judge Russell, a conservative white senior Fourth Circuit judge, was picketed as a "scalliwag" (the derogatory appellation for Southerners who cooperated with Northern carpetbaggers) because of his opinion affirming the district court's grant of writs of habeas corpus to Gilbert and Gleaton?²²¹

Can the purposeful discrimination standard ever sort out these interwoven racial stories? Can race-neutral measures ever reach this kind of pervasive race consciousness? Can Gilbert and Gleaton's racial disadvantage be neatly

217. Data on file with Professor Theodore Eisenberg, Cornell Law School.

218. See *Allen v. Hardy*, 478 U.S. 255, 259 (1986) (per curiam).

219. See Record on Appeal at 41,886-87, *Gilbert v. Moore*, 134 F.3d 642 (4th Cir. 1998) (No. 96-17).

220. Telephone Interview with John H. Blume, Attorney for J.D. Gilbert (Mar. 24, 1998).

221. See *Gilbert v. Moore*, 121 F.3d 144 (4th Cir. 1997). I personally observed picketing on November 2, 1997, outside the federal courthouse in Richmond, Virginia.

separated from that of their attorney? The answer is clear, and it is not the answer Kennedy gives.

Compassion in the end is wisdom.²²² Any man's death diminishes me.²²³

222. Compassion leads me, at least, to renounce the politics of respectability; wisdom, I think, precludes an undifferentiated adherence to colorblindness.

223. See JOHN DONNE, DEVOTIONS UPON EMERGENT OCCASIONS 98 (1923).

