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Janai S. Nelson

St. John's University School of Law

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Disparate Effects in the Criminal Justice System: A Response to Randall Kennedy's Comment and Its Legacy

Janai S. Nelson*

I. INTRODUCTION

For many African Americans, the criminal justice system symbolizes an oppressive force, and yet, is a necessary institution in an increasingly lawless society. We¹ are at the same time its victims and beneficiaries, although various sentiments exist regarding the extent to which we are either. It is precisely this paradox, coupled with the promulgation of certain criminal legislation and legal precedent which directly and, potentially, adversely affect the African-American community,² that inspired me to address the issues and arguments raised in Randall Kennedy's *The State, Criminal Law, and Racial Discrimination: A Comment*³ and their resounding implications.⁴

In particular, this Essay focuses on two timely and controversial law enforcement issues facing the courts and the African-American community: the crack/powder cocaine distinction in criminal statutes and selective prosecution claims based on the disparity between federal and state sentencing schemes. I examine the experiences of our community that shape our response to these issues by addressing the constitutional claims raised by African-American defendants in two portentous criminal cases—one state and one federal—and confronting important arguments made by Kennedy in the areas of law enforcement and constitutional analysis. In

* Articles Editor, UCLA Law Review; Consulting Editor, National Black Law Journal. J.D., 1996, UCLA School of Law; B.A., 1993, New York University. I would like to thank the National Black Law Journal for its quality editorship. In addition, I am grateful to the UCLA externship program for providing me the opportunity to extern in the chambers of the Honorable Judge Stephen Reinhardt where I was encouraged to explore issues of criminal justice.

1. Throughout this Essay I have chosen to part with the convention among authors of legal scholarship of not identifying themselves as a member of a group about which they write for in certain contexts, like this one, self-identification clarifies the author's perspective for her audience. It should be noted that (since its inception) narrative legal scholarship has been a refreshing exception to this norm.

2. For an intriguing definition of "the Black community," see generally Regina Austin, "The Black Community," *Its Lawbreakers, and a Politics of Identification*, 65 S. Cal. L. Rev. 1769, 1769-70 (1989).

3. 107 HARV. L. REV. 1255, 1261-70 (1994) [hereinafter Kennedy, *Comment*].

Randall Kennedy is a professor at Harvard Law School and a well-noted legal scholar who happens to be African American. My description of Randall Kennedy as a legal scholar "who happens to be African American" is meant to convey that legal scholars are not intrinsically of any particular race or ethnicity, e.g., white, as the term "African-American legal scholar" might suggest by its obvious distinction.

4. Kennedy's comment already has helped to persuade a circuit court to uphold the crack/cocaine distinction in sentencing against an equal protection challenge. See *United States v. Thompson*, 27 F.3d 671, 678 n.3 (1994) ("The severe penalties for crack offenses actually help rather than hurt law-abiding African-Americans.") (quoting Kennedy, *Comment*, *supra* note 3).

addition, I explore briefly the implications of Kennedy's arguments in these and other like cases.⁵

The first case, *State v. Russell*,⁶ involves the infamous crack/powder cocaine distinction in a Minnesota criminal statute. Kennedy's Comment characterizes this case as an example of a state court's erroneous decision to equalize sentencing among crack and powder cocaine offenders in response to "misguided" claims of racial discrimination from African-American criminal defendants and, presumably, a segment of the African-American community.⁷ In the second case, *United States v. Armstrong*,⁸ the Supreme Court elucidated the threshold requirements for establishing a selective prosecution claim based on allegations that African-American defendants are prosecuted more frequently in federal rather than state courts for cocaine-related offenses and are, consequently, subject to harsher penalties. In addition, the Court articulated the evidentiary showing necessary to entitle such defendants to discovery. *Armstrong* offers an opportunity to examine the implications of Kennedy's arguments in shaping rules that affect the discovery of evidence, and, by consequence, a defend-

5. In a perceptive analysis published after this Essay was written, Professor David Cole has set forth arguments similar to many of those raised here. See David Cole, *The Paradox of Race and Crime: A Comment on Randall Kennedy's "Politics of Distinction"*, 83 GEO. L.J. 2547 (1995). This Essay has since been edited to include case developments and additional citations.

Professor Kennedy has responded thoughtfully to Cole's arguments. See Randall Kennedy, *A Response to Professor Cole's "Paradox of Race and Crime"*, 83 GEO. L.J. 2573 (1995) [hereinafter Kennedy, *A Response*]. However, Professor Kennedy's response fails to address the flaws in his critique of the *Russell* court's rationality review analysis. See *infra* pp. 8-13. Furthermore, Kennedy argued that more consideration should be given to the viewpoints of Black congresspersons and the opinions expressed in the Black and Latino caucuses on issues of law enforcement, which he contends, might support the idea of increased law enforcement. Kennedy, *A Response*, *supra*, at 2574-75.

However, as I argue in Part II, the underlying premise of Kennedy's suggestion that only legislation that is facially discriminatory or proven to be discriminatory by direct evidence of discriminatory intent should be subject to Equal Protection challenge because certain members of the African-American community, including our elected representatives, might favor increased law enforcement legislation is entirely inconsistent with the constitutional fundament that the Equal Protection Clause applies to classes in their entireties and not particular segments of a class. Indeed, the alleged benefit that increased law enforcement via harsher sentencing of African-American drug offenders confers upon law-abiding African-Americans is insufficient to outweigh the burden. Moreover, it is incapable of withstanding constitutional challenge on that rationale that it benefits a subgroup of a protected class constitutionally. Thus, this Essay seeks to invite discussion on how to meld interests in law enforcement and equal protection as they have been juxtaposed in Kennedy's Comment. In addition, this Essay explores Kennedy's arguments in an equally controversial area of criminal law—selective prosecution based on the federal/state sentencing disparity.

6. 477 N.W.2d 886 (Minn. 1991).

7. See Kennedy, *Comment*, *supra* note 3, at 1261-70.

8. 116 S. Ct. 1480 (1996).

ant's ability to prove discriminatory intent,⁹—a crucial element in establishing a prima facie case of racial discrimination.¹⁰

Accordingly, Part II sets forth Kennedy's arguments regarding race and law enforcement presented in his Comment.¹¹ I critique and examine several weaknesses in Kennedy's theories in Part III and highlight important counterarguments that he either failed to address or addressed insufficiently. Finally, in Part IV, I test the consistency and application of Kennedy's arguments in cases such as *Armstrong* and conclude by developing Kennedy's community-oriented approach into a paradigm that is not so fundamentally hostile to racial discrimination claims based solely upon disparate impact.

II. THE STATE, CRIMINAL LAW, AND RACIAL DISCRIMINATION: KENNEDY'S COMMENT

In a provocative comment on criminal law, law enforcement, and racial discrimination, Randall Kennedy challenges contenders on both sides of the debate with his refutation of discrimination claims that is paired with a condemnation of the criminal justice system for denying African Americans equal protection in the area of criminal law.¹² Kennedy bases his arguments in the context of the crack/powder cocaine distinction. He asserts that disparate sentencing for possession of these different substances is, if not appropriate,¹³ certainly nondiscriminatory.

This assertion has serious implications not only in respect of the crack/powder cocaine distinction, but in most other instances where African Americans are disparately and adversely impacted by criminal law enforcement. The state/federal prosecution distinction is another example that illustrates the difficulty of proving racial discrimination in disparate impact contexts and offers an opportunity to explore what rules will provide disparately impacted communities the next best available recourse aside from per se invalidation of suspect laws or practices. In this light, this section examines Kennedy's general arguments and their implications in the crack/powder cocaine and state/federal prosecution contexts.

9. In stating that discriminatory intent is necessary to invalidate legislation on federal equal protection grounds, Kennedy echoes the holding of the Supreme Court in *Washington v. Davis*, 426 U.S. 229 (1976).

Washington v. Davis and its progeny defined the roles of disparate impact and discriminatory intent in federal equal protection doctrine. In short, courts cannot invalidate legislation that is not "traced to a discriminatory purpose." 426 U.S. at 240. In *Personnel Administrator v. Feeney*, 442 U.S. 256 (1979), the Court interpreted discriminatory purpose as legislative action that is "at least in part 'because of,' not merely 'in spite of,' its adverse effects upon an identifiable group," emphasizing the necessity of discriminatory intent. *Id.* at 279.

10. See *infra* note 13 and accompanying text.

11. Kennedy, *Comment*, *supra* note 3.

12. See generally *id.*

13. See *id.* at 1259 & n.19 (arguing that the African American community benefits as a whole from increased law enforcement that results in the conviction of African-American lawbreakers, especially in light of statistical evidence that African Americans constitute an overwhelming majority of crime victims of African-American offenders).

A. Kennedy's Arguments

Kennedy frames the debate on the disparate effects of criminal law enforcement in the African-American community in terms of two specific contentions. First, he characterizes allegations of pervasive racial discrimination in the criminal justice system as "overblown and counterproductive" and implies that such allegations "detract attention from other problems of law enforcement that warrant more consideration."¹⁴ Although he never disproves these allegations, and even offers proof of racial discrimination within the criminal justice system,¹⁵ Kennedy strongly denounces reliance on such allegations unless there is proof of discriminatory intent.¹⁶ Furthermore, Kennedy disregards conspiracy theories or any charges of institutionalized racial oppression absent self-incriminating avowals of racism or some other just-as-unlikely-to-happen showing of discriminatory intent.¹⁷

Second, Kennedy identifies the state's failure to "provide black communities with the equal protection of the laws" and "under-enforcement of the laws" as "the main problems" facing the African-American community today.¹⁸ Kennedy links this deprivation of law enforcement to a phenomenon that he has previously labeled race-of-the-victim discrimination¹⁹ and to "a misguided antagonism toward efforts to preserve public safety."²⁰ Moreover, Kennedy purports that it is in the African-American community's best interest to grant law enforcement agencies more power despite the fact that doing so might narrow individual liberties.²¹

To elucidate these points, Kennedy focuses on *State v. Russell*,²² a Minnesota Supreme Court case which invalidated a state statute that imposed

14. *Id.* at 1255-56.

15. *Id.*

16. *Id.* at 1269, 1259.

17. *Id.*

18. *Id.* at 1256, 1259.

19. *See id.* at 1255-56. In an earlier article, Kennedy articulated his theory of race-of-the-victim discrimination in the context of capital sentencing as the denial of "the right of black victims or potential victims of murder to a response on the part of the state that is equally vigorous as that which follows the murder of whites." Randall Kennedy, *McClesky v. Kemp: Race, Capital Punishment, and the Supreme Court*, 101 HARV. L. REV. 1388, 1390 (1988) [hereinafter Kennedy, *McClesky*]. Kennedy engages in a thorough discussion of the notorious Supreme Court death penalty, of *McClesky v. Kemp*, 107 U.S. 1756, 1763 (1987), which many have likened to such nefarious cases as *Plessy v. Ferguson*, *Korematsu v. United States*, and *Dred Scott v. Sandford*. *See* Hugo Bedau, *Someday McClesky Will Be Death Penalty's Dred Scott*, L.A. TIMES, May 1, 1987, § 2, at 5; *see also* Kennedy, *McClesky*, *supra*, at 1389. In essence race-of-the-victim discrimination, as it is represented by the *McClesky* case "involves racial inequality in the provision of a peculiar sort of public good—capital sentencing." Kennedy, *McClesky*, *supra*, at 1394. Kennedy's *McClesky* article is a good source for understanding the general arguments and assumptions that undergird some of his positions critiqued in this Comment.

20. Kennedy, *Comment*, *supra* note 3, at 1256. By this characterization, Kennedy is presumably referring to opposition by minority communities to laws that disparately affect minority criminal offenders despite the arguable benefit that such enforcement can confer by eliminating crime in those same communities. However, Kennedy does not address this as a specific cause of unequal protection in his Comment.

21. *Id.* at 1260. But see Cole, *supra* note 5, at 2555-62 for a thoughtful discussion of the effects of law enforcement in the African-American community, which challenges Kennedy's position.

22. *Supra* note 6, at 891 (Minn. 1991). *Russell* is the only case to date holding that the crack/powder cocaine distinction in sentencing is unconstitutional. A federal district court in Missouri

an asymmetrical sentencing scheme for crack and powder cocaine offenses. Specifically, the *Russell* court held that the prosecution had not provided a "rational basis" for the distinction in punishment in light of the disparate impact of the statute on African Americans.²³

The defendants in *Russell*, all of whom are African-American, were charged with the unlawful possession of a minimum of three grams of crack cocaine, a charge which carries a maximum penalty of twenty years imprisonment under the challenged statute.²⁴ By contrast, possession of an equal amount of powder cocaine carries a maximum penalty of five years imprisonment.²⁵ Considered another way, to be eligible for a twenty-year term of imprisonment one must possess ten times the amount of powder cocaine than crack cocaine.²⁶ What this means in actuality under the sentencing guidelines is that defendants are presumptively sentenced to 48 months of imprisonment for possession of three grams of crack cocaine and only to 12 months for possession of an equal amount of powder cocaine.²⁷

In support of their claim that the statute violated the equal protection clauses of the Fourteenth Amendment, the defendants presented, *inter alia*, evidence that 96.6% of those persons charged with crack cocaine possession are African-American while nearly eighty percent of those charged with powder cocaine possession are white.²⁸ This disparity, they argued, has a discriminatory impact on African Americans because African Americans are more likely to be subject to longer periods of incarceration for cocaine²⁹ possession than are whites. Minnesota's highest court agreed. Kennedy, however, does not.

Kennedy charges that the *Russell* court erred in the following ways: (1) The Court improperly based its decision on the racial discrimination aspect of the claim and (2) it failed to give proper weight to evidence that tended to show a rational basis for the crack/powder distinction.³⁰ Kennedy points to several instances in the court's opinion where the issue of racial injustice appeared to animate the court and contends that these emotionally charged sentiments inappropriately clouded the court's judgment to the detriment of the very class of persons it aimed to protect.³¹ However, a careful reading of the opinion reveals that the element of racial injustice prompted the court's constitutional inquiry but did not form the basis of its decision.³²

held similarly in a decision rendered three years after *Russell* and was overturned on appeal. See *United States v. Clary*, 846 F. Supp. 768 (E.D. Mo. 1994), *rev'd*, 34 F.3d 709 (8th Cir. 1994), *cert. denied*, 115 S. Ct. 1172 (1995).

23. *Id.*

24. *Id.* at 887.

25. *Id.* at 887.

26. *Id.*

27. *Id.*

28. *Id.* at 887 n.1.

29. In this Essay, the unmodified term "cocaine" refers to powder cocaine and its chemical derivatives, including crack cocaine. I use the terms "crack cocaine" and "powder cocaine" to differentiate the substances at issue in this Essay.

30. Kennedy, *Comment*, *supra* note 3, at 1262-66.

31. See *id.* at 1262-63.

32. *Russell*, 477 N.W.2d at 888 n.2 (emphasis added) ("While we are ordinarily loathe to intrude or even inquire into the legislative process on matters of criminal punishment, the correlation between race and the use of cocaine base or powder and the gross disparity in resulting punishment cries out for *closer scrutiny* of the challenged laws.")

Rather, it was the court's findings as a result of its rational basis analysis that supported its holding.³³

Furthermore, Kennedy rejects the court's rational basis analysis on the ground that the court erroneously conducted a strict scrutiny analysis and, as a result, discounted the evidence presented by the prosecution which established a rational basis for the distinction in punishment. Of the three pieces of evidence presented by the prosecution,³⁴ Kennedy seems most distressed by the court's handling of evidence that crack is more potent than powder cocaine, which the court seemed to accept as probative.³⁵ However, the court found that this potency differential did not provide a rational basis for disparate punishment because it relies on the manner in which the cocaine is ingested since powder cocaine can produce the same physiological results as crack cocaine if ingested intravenously.³⁶ Kennedy criticizes this analysis because it relies on the hypothetical that powder cocaine users actually ingest the substance intravenously rather than by snorting it—a method which has been proven to produce a less potent effect—and ignores the actual effects of crack versus powder cocaine use.³⁷ Ironically, Kennedy argues that the court should focus on actual real world occurrences rather than ruling on legal fiction.³⁸

Admittedly, the court's argument that the punishment distinction should not exist because powder cocaine *could* produce effects similar to crack cocaine if ingested intravenously was its least cogent in support of its holding. However, this rationale is at least consistent with other statutory schemes governing drug offenses.³⁹ Furthermore, the court provided ample analysis to justify its holding under rationality review. For example, in response to the prosecution's primary justification for the crack/powder cocaine punishment distinction, the court found that the testimony of a county attorney whose knowledge that possession of three grams of crack cocaine indicated drug dealing whereas possession of an equal amount of cocaine did not, was derived from informal discourse "from the streets" constituted "an arbitrary rather than a genuine and substantial distinction."⁴⁰ Kennedy strongly criticizes the court for dismissing this testimony as "purely anecdotal."⁴¹ However, evidence that nine grams of powder cocaine can yield a nearly equal amount of crack cocaine cuts against the notion that possession of a smaller amount of crack cocaine than powder cocaine indicates dealing, and thus substantiates the court's finding.⁴²

33. See *infra* notes 30-39 and accompanying text.

34. The prosecution offered a variety of evidence to prove that (1) crack is more potent than powder cocaine, (2) each substance has different sociologies of distribution, and (3) higher levels of violence are associated with the use and distribution of crack. See *Russell*, 477 N.W.2d, at 889-91.

35. Kennedy, *Comment, supra* note 3, 1264-65.

36. *Russell*, 477 N.W. 2d 886, 890.

37. Kennedy, *Comment, supra* note 3, at 1265.

38. This argument is ironic because, as I argue in Part IV, by requiring a showing of discriminatory intent in order to challenge legislation and law enforcement practice, and ignoring the realities of historical and contemporary racism, Kennedy subscribes to the same sort of legal surrealism upon which he alleges the *Russell* court based its opinion.

39. See *infra* pp. 13-14.

40. *Russell*, 447 N.W. 2d at 889.

41. Kennedy, *Comment, supra* note 3, at 1264 (quoting *Russell*, 447 N.W.2d at 889).

42. See *id.* at 891 & n.7.

In addition, Kennedy took exception to the court's finding that the legislative record failed to prove that the alleged higher level of violence associated with crack cocaine was directly related to the pharmacological composition of crack cocaine and not simply a byproduct of the urban environment in which it is used and distributed. Finally, Kennedy maintains that the court failed to acknowledge *any* of the substantially distinguishing factors between crack and powder cocaine.⁴³ However, it might not be that the court believes that nothing substantially differentiates the two substances as much as it is a reluctance to devise such a distinction since the legislature has not done so in other contexts.

For example, marijuana can be rolled into a cigarette and smoked like tobacco. It can also be boiled in chemical apparatus made of glass commonly known as a "bong" and its vapor inhaled to produce a more potent effect. Under the Minnesota statute possession of marijuana in different forms carries the same penalty.⁴⁴ Similarly, cocaine powder can be, and most often is, ingested through the nasal passages by snorting. It can also be smoked in a rock form, or its vapor inhaled, once the hydrochloride is removed through a heating process. Although the drastic effects of cocaine use are admittedly not analogous to marijuana, the same principle of legislative intent should apply to all illegal drugs: Substance over form; not form over substance.

However, Kennedy's dissension with the *Russell* decision lay deeper than a mere objection to the analysis. Kennedy denounces the court's belief that the disparate impact of the statute is harmful to African-Americans.⁴⁵ He contends that the court's characterization of the crack/powder cocaine punishment disparity as a burden to African-Americans as a class is "simplistic."⁴⁶ Citing Professor Kate Smith, Kennedy argues that the conviction of crack cocaine offenders benefits law-abiding citizens and should be perceived as a "laudatory attempt to provide enhanced protection to [African-American] communities."⁴⁷ What Kennedy fails to realize is that when "enhanced protection" violates equal protection, law enforcement should be challenged no matter how laudatory the efforts. The following section challenges Kennedy's arguments from this premise.

III. CRITIQUING KENNEDY'S COMMENT

A. *General Critique*

The first flaw with Kennedy's thesis on race and law enforcement is that it embarks from the premise that allegations of racial discrimination often exaggerate and undermine admirable efforts to eliminate crime in African-American communities.⁴⁸ Essentially, Kennedy contends that we are our own worst enemies:⁴⁹ We are our own victims in crime and we deny

43. *Id.* at 1265.

44. See MINN. STAT. ANN. §§ 152.02, 152.09 (1996).

45. Kennedy, *Comment*, *supra* note 3, 1266-69.

46. *Id.* at 1266-67.

47. *Id.* at 1267.

48. See *supra* note 4 and accompanying text.

49. See Kennedy, *Comment*, *supra* note 3, at 1259 ("The most lethal danger facing African Americans in their day-to-day lives is not white, racist officials of the state, but private, violent

ourselves the protection of the criminal justice system by crying racism in the face of legitimate crime prevention efforts. However, what Kennedy glibly calls the "rhetoric of paranoia"⁵⁰ is a legitimate and well-founded fear of persecution by a people who have suffered a egregious history of racial oppression and continue to be plagued by its effects. Kennedy's claim that this "paranoia" "stifles intelligent debate over drug policy"⁵¹ is implicitly contradicted by his own claim that there are varying views within the African-American community regarding law enforcement—a strong indication that intelligent community dialogue exists.⁵²

In addition, Kennedy exhibits a sort of "selective suspicion" of the criminal justice system that is inconsistent with his general repudiation of racial discrimination claims based solely on disparate impact. Kennedy can fathom racial discrimination without proof of intent in order to fortify his race-of-the-victim discrimination theory, but in the same breath, he disregards as "paranoia" suspicions that increased law enforcement that yields disparate effects could be racist.⁵³ This point commands further examination.

Kennedy asserts that the criminal justice system devalues African-American victims due to racism or mere indifference derived from a propensity to identify with, and thus avenge the rights of, crime victims of one's own race.⁵⁴ If racism were the cause of this statistically supported claim,⁵⁵ would it not be at least plausible that similar racist sentiments might subconsciously motivate the legislature to enact laws that punish more severely members of that devalued group or, at least, provide a safe harbor for legislative indifference?⁵⁶ Apparently, such a notion would constitute mere "rhetoric" in Kennedy's school of thought despite Kennedy's acknowledgment that "for most of the nation's history, blacks were de-

criminals (typically black) who attack those most vulnerable to them without regard to racial identity.").

50. *Id.* at 1260 ("Such overheated allegations of racism obscure analysis of a wide range of problems in the criminal justice system. Consider, for example, the stifling of intelligent debate over drug policy by the rhetoric of paranoia.").

51. *See id.*

52. *See id.* at 1273-74 & nn.80-82.

53. *See supra* notes 14-17 and accompanying text.

54. *See Kennedy, McClesky, supra* note 19, at 1396, ("[R]ace-based devaluations of human life constitute simply one instance of a universal phenomenon: the propensity for persons to empathize more fully with those with whom they can identify."). Kennedy does not acknowledge that this seemingly innocuous human phenomenon might be the product of racism which impedes one's ability to identify with other persons based on the commonality of human-ness and, instead, focuses on race.

55. For example, in *McClesky v. Kemp*, the defendant presented evidence from the most comprehensive study on death sentencing in a single state which demonstrated that convicted killers of whites were 11 times as likely to get the death penalty than convicted killers of Blacks. 107 S.Ct. at 1763. For a more detailed discussion of this data and of discrimination in death sentencing generally, see, Baldus et al., *Arbitrariness and Discrimination in the Administration of the Death Penalty, A Challenge to the State Supreme Courts*, 15 STETSON L. REV. 133 (1986); Baldus et al., *Comparative Review of Death Sentences: An Empirical Study of the Georgia Experience*, 74 J. CRIM. L. & CRIMINOLOGY 661 (1983); Baldus et al., *Identifying Comparatively Excessive Sentences at Death: A Quantitative Approach*, 33 STAN. L. REV. 1 (1980).

56. One scholar has set forth what might constitute proof that the legislature was strongly motivated by race when enacting the Sentencing Guidelines. David A. Sklansky, *Cocaine, Race, and Equal Protection*, 47 STAN. L. REV. 1283, 1293-97 (1995) (discussing white America's perception of Blacks and their role in the crack epidemic).

nied" civil order and criminal protection.⁵⁷ Kennedy suggests that African Americans leave it up to this same, albeit slightly more integrated, justice system to provide them with criminal protection from each other without considering evidence of disparate impact absent proof of discriminatory intent.

However, proof of discriminatory intent should not be the distinguishing factor between those laws that are constitutionally invalid and those that are not.⁵⁸ As constitutional law scholar Laurence Tribe poignantly noted,

This [focus on discriminatory intent] overlooks the fact that minorities can also be injured when the government is 'only' indifferent to their suffering or 'merely' blind to how prior official discrimination contributed to it and how current acts perpetuate it.

* * *

If a government is barred from enacting laws with an eye to invidious discrimination against a particular group, it should not be free to visit the same wrong whenever it happens to be looking the other way. If a state may not club a minority with its fist, surely it may not do so with the back of its hand.⁵⁹

Hence, intentional or not, discrimination is an evil that is forbidden under the Fourteenth Amendment. Furthermore, while direct proof of discriminatory intent sometimes exists, it often does not because it is either intangible or undetectable. Nonetheless, harmful and discriminatory legislation should not go unchallenged.

In addition, Kennedy seems to ignore the very obvious concerns that motivate the opposition to strong law enforcement measures in the African-American community. First, there is a rational and coherent desire to redirect law enforcement efforts at the root causes of criminal activity, for example the importation of illegal substances into the United States, and particularly, into the African-American community. Many African Americans feel that, although we might be responsible for the dissemination of narcotics within in our communities, we are not responsible for importing these substances into our communities, and therefore should not be the main targets of strong-arm drug policy.⁶⁰ Second, there is a belief that at least some African-Americans commit crime as a result of the societal ra-

57. Kennedy, *Comment*, *supra* note 3, at 1267. Kennedy squarely admits that "in many contexts, in comparison to the treatment accorded to whites, blacks have been denied quite literally the equal protection of the law." *Id.* at 1268. Nonetheless, Kennedy advocates an approach to invalidating discriminatory legislation that is contingent upon proof of discriminatory intent. *Id.* at 1270-76.

58. *But see id.* at 1257 ("The presence of a racially discriminatory purpose distinguishes those laws that are specifically racial, and therefore presumptively invalid, from those that merely give rise to racially disparate consequences that disadvantage some African-Americans while benefiting others.").

59. *McClesky*, 477 N.W.2d at n.2 (quoting Laurence Tribe, *AMERICAN CONSTITUTIONAL LAW* 1518-19 (2d. ed. 1988)).

60. *See, e.g., Black Leaders Call For Class-Action Lawsuit Over Crack Allegations*, THE ASSOCIATED PRESS, Sept. 30, 1996 (Attorney seeks plaintiffs for a class action lawsuit against the government following accusations that the CIA deliberately introduced the drug into black communities); Joe W. Straley, *Another Shocker*, THE NEWS & OBSERVER RALEIGH, Sept. 15, 1996 (Editorial/Opinion) ("[T]he CIA knew of but took no action against certain key drug lords who managed to deal a double whammy by first introducing crack cocaine to thousands of poor black youths in Los Angeles while siphoning off the profits to arm the FDN contras in Nicaragua.").

cism that exists outside the law enforcement context. This belief translates into a reluctance to prosecute these persons to the fullest extent of the law regardless of the safety that the incarceration of these offenders might offer.

Finally, Kennedy's proposed solution for defeating undesirable legislation is to challenge it through the legislative process as African Americans have successfully done in the past.⁶¹ Indeed, Kennedy asserts,

It is only the presence of [evidence of discriminatory purpose] that can justifiably give the judiciary confidence that the challenged policy fails to meet the minimal demands of constitutional decency. . . . [I]n the absence of findings of discriminatory purpose (or some such other violation of constitutional norms) legislatures are more fitting fora than courts for such calculations.

Although Kennedy is correct in pointing out that African-Americans have gained increased access to the legislature and have fought and won battles on this front, Kennedy ignores the appeal, not to mention the right, to confront legislation through the court system due to its expediency and accessibility. In addition, Kennedy's qualified statement that only "certain sectors *deemed* to be acting on behalf of the whole"⁶² have had success in pursuing claims through the legislature highlights an additional flaw with his proposal: Subset groups within the minority community, whether because of economic or educational disenfranchisement, have limited access to legislative fora in which to voice their views which form part of the intraracial conflict over law enforcement policy. Although underrepresentation is a problem that is inherent in the legislative process, it frustrates Kennedy's primary reason for seeking justice primarily through the legislature—the inability of the judiciary to give adequate attention to the intraracial conflict surrounding law enforcement policy.

Thus, Kennedy's arguments for increased law enforcement protection and against considering claims of discrimination absent proof of discriminatory intent suffer from the same flaw which he argues exists in the *Russell* court's analysis—a disregard of actual effects and of the reality of the status quo.

B. *Implications in the State/Federal Prosecution Context*

Taken to their logical conclusion, Kennedy's arguments raise rather interesting concerns in the context of selective prosecution.⁶³ Because Kennedy presumes benevolent legislative intent absent conclusive evidence of discriminatory intent, there must be laws to facilitate access to such proof for the doctrine of equal protection and its derivative claims to pro-

61. Kennedy, *Comment, supra* note 3 at 76-77 ("Over the past quarter-century when "condemned" to the electoral arena, blacks—or, more accurately, certain sectors of the black population deemed to be acting on behalf of the whole—have succeeded in obtaining through legislation political goods that the federal judiciary had declined to give them through federal constitutional legislation."); *see also id.* at 1277 & n.92 (noting that the affirmative action legislation, the Voting Rights Act Amendments, and the Civil Rights Act of 1991, were enacted by the legislature when efforts to confront these issues in the judiciary failed).

62. *Id.* at 1277.

63. Selective Prosecution is a claim, raised by a defendant in a criminal trial, which alleges that the defendant was prosecuted on the basis of his race, sex, age, sexual orientation, or other suspect classifications under the Fourteenth Amendment.

vide meaningful relief. In other words, Kennedy's theory cannot exist in a vacuum; rather, it must provide for correlative discovery rules and additional claims based on the theory of equal protection, such as selective prosecution, to minimize the enormous burden placed on defendants to prove discriminatory intent. A recent Supreme Court case illustrates just this point.

In *United States v. Armstrong*,⁶⁴ the Supreme Court held that, in order for a defendant bringing a claim for selective prosecution based on racial discrimination to be entitled to discovery, she must present evidence that the government knew of, but failed to prosecute, similarly situated suspects of other races.⁶⁵ At trial, five African-American defendants filed a Motion for Discovery and/or Dismissal of Indictment for Selective Prosecution.⁶⁶ Each defendant was charged with conspiracy to distribute cocaine base under federal statutes, and some were charge with selling cocaine base under a federal statute which imposes a minimum of ten years and a maximum of life imprisonment for selling more than fifty grams of cocaine base.⁶⁷ By contrast, California's statutory analogue for selling crack cocaine carries a minimum of three years and maximum of five years for the exact same offense.⁶⁸

Unlike the *Russell* defendants, the defendants in *Armstrong* did not challenge the legislation under which they were indicted. Rather, they challenged the government's law enforcement practice. Specifically, these defendants brought a selective prosecution claim challenging the government's decision to prosecute them and every other defendant whose case was closed by the Federal Public Defender in 1991—all of whom are African-American—under federal rather than state law.⁶⁹ In light of this evidence and the gross disparity in punishment under federal and state law, the district held that the defendants had provided a "colorable basis" to compel discovery⁷⁰ for a claim of selective prosecution.⁷¹ Furthermore, the district court held that "a direct showing of discriminatory intent is not always necessary to make out a equal protection claim"⁷² and that circum-

64. 116 S. Ct. 1480 (1996).

65. *Id.* at 1480.

66. 48 F.3d 1508, 1511.

67. 21 U.S.C. § 846, 841(a)(1) (1996); *see also id.* at 2356.

68. CAL. HEALTH & SAFETY CODE § 11352.5 (Deering 1993); *see also Armstrong*, No. 93-50031, Adv. No 93-50037, at 2356.

69. *Id.* at 1511.

70. The Honorable Consuelo B. Marshall, District Judge, ordered the government to provide the following to the defense:

- (1) A list of all cases form the prior three years in which the government charged both cocaine base offenses and firearm offenses;
- (2) The race of the defendant(s) in each of those cases;
- (3) Whether each case was investigated by federal, state or joint law enforcement authorities; and,
- (4) An explanation of the criteria used by the United states Attorney's office for deciding whether to bring cocaine base cases federally.

Id. at 2382 (Rymer, J. dissenting). Judge Marshall imposed a penalty for non-compliance whereby the indictments against all five defendants would be dropped.

71. *Id.* at 1268-75.

72. *Id.* at 2361.

stantial evidence is sufficient to establish a colorable basis.⁷³ In its rationale, the court noted that “blanket denials of discrimination though often (but not always) made in good faith, are to be expected in cases such as these” however, “[t]he availability of discovery must not turn on the unlikely event that a federal prosecutor will confess to private biases.”⁷⁴

The district court issued an order dismissing indictments against the defendants because the prosecution failed to produce court-compelled evidence during the discovery proceedings of the defendants’ selective prosecution.⁷⁵ On appeal, the government claimed that the district judge abused her discretion in requiring discovery.⁷⁶ The Ninth Circuit sitting *en banc* held that compelling discovery did not constitute an abuse of discretion where the defendants presented sufficient evidence to establish a “colorable basis”⁷⁷ that the government engaged in discriminatory prosecution.⁷⁸

In reversing this decision, the Supreme Court imposed a “correspondingly rigorous” discovery standard to the already rigorous standards for proving a claim for selective prosecution.⁷⁹ Evidence that in every case closed by the Office of the Federal Public Defender the defendant was an African American accompanied by a study indicating whether such defendants were prosecuted for dealing powder or crack cocaine is insufficient to entitle a defendant to discovery.⁸⁰ Instead, the Court suggested that the *Armstrong* defendants could have obtained discovery by submitting evidence that similarly situated suspects of other races were known to the government and were prosecuted in state rather than federal court.⁸¹ Thus, in order to be entitled to discovery, a defendant must produce the very sort of evidence which the tool of discovery is most apt at disclosing.

In apparent anticipation of the criticism that its opinion might elicit, the Court stated that “[t]he similarly situated requirement does not make a selective prosecution claim impossible to prove.” It is difficult to envision, however, how defendants bringing selective prosecution claims will succeed at making an evidentiary showing under *Armstrong* when they are denied the valuable tool of discovery which is afforded to most other claimants upon stating a claim upon which relief can be granted. Accordingly, if Kennedy insists on requiring proof of discriminatory intent to challenge law enforcement then he should simultaneously advocate for low-threshold discovery rules so that criminal defendants are afforded pragmatic and liberal means by which to defend their constitutional rights. Kennedy’s arguments standing alone cannot claim to be in the best interests of the

73. *Id.* at 2361 (“A circumstantial showing of intent may be based on evidence of discriminatory effects.”)

74. *Id.* at 2374.

75. *Id.* at 2355.

76. *Id.*

77. The colorable basis standard is met by ‘some evidence *tending* to show the essential elements of the claim.’ *United States v. Heidecke*, 900 F.2d 1155, 1159 (7th Cir. 1990). . . . ‘[To] obtain discovery on a selective prosecution claim, the defendant must present specific facts, not mere allegations, which establish a colorable basis for the existence of both discriminatory intent on the part of the government actors. *Id.* at 2360 (emphasis in original) (quoting *United States v. Bourgeois*, 964 F.2d 935, 939 (9th Cir. 1992)).

78. *Armstrong*, No. 93-50031, Adv. No 93-50037, at 2375-76.

79. *Armstrong III*, at 1488.

80. *See id.* at 1483, 1489.

81. *Id.* at 1489.

African-American community. However, coupled with procedural rules that are reasonably solicitous to discrimination claims, his alternative conception of criminal law and law enforcement might yield positive results.

IV. CONCLUSION

While I agree with the fundamental premise of Kennedy's argument that crime is an overwhelming problem in the African-American community that needs to be forcefully addressed I propose to develop Kennedy's good intention into a community-oriented approach that would better serve the interests of our community by recognizing and validating widespread misgivings toward the criminal justice system and law enforcement. My approach differs from Kennedy's in that it recognizes that, although African Americans have made successful strides toward achieving racial equality, the pervasive fear and suspicion of the criminal justice system among African Americans suggest that it is in our *collective* best interest to safeguard against perceived injustices by continuing to uphold the notion that disparate impact can prove discriminatory intent.⁸² If the effect is not present, then whether there is malevolent intent is, for the most part, inconsequential. It is the effect—the perceived, though debated, harm—that we must address.

Kennedy argues that harm to a subset of a minority group, specifically, criminal offenders, does not harm the minority as a class.⁸³ However, a true community-oriented approach would consider the best interests of a community as a whole and perfect a cost-benefit analysis that identified and weighed the concerns of all community members. Kennedy's approach is based on a non-existent distinction between the constitutional right to equal protection of law-abiding African-Americans and African-Americans who commit crimes. However, the right to equal protection is inalienable and thus must be protected by the entire community if one of its member's rights is being violated.

Kennedy might argue in response that African-Americans should not focus on whether or to what extent whites are punished for the same or similar crimes so long as the African-American community will benefit from having the evils of crack cocaine removed from its neighborhoods. However, in acting as a community, we are obligated to protect the rights of community members who commit criminal offenses as well as law-abiding citizens. Furthermore, the *Russell* decision demonstrates that by pointing out injustice and fighting discrimination, we do not necessarily undermine our own protection. Indeed, the Minnesota legislature's response to *Russell* is a prime example of how to achieve equality without curtailing protective enforcement.

After *Russell*, the Minnesota legislature equalized the punishment among cocaine offenders. Now powder cocaine offenders in Minnesota face the same penalties as crack cocaine offenders. Although Kennedy points out that this may have eviscerated the deterrent effect against crack

82. See, e.g., *Arlington Heights v. Metropolitan Hous. Dev. Corp.*, 429 U.S. 252, 265-66 (1977) (holding that racial disparities can be evidence of discriminatory purpose although prevailing solely on disparate impact is rare).

83. Kennedy, *Comment*, *supra* note 3, at 1257.

cocaine use and distribution, absent evidence that powder cocaine offenders were actually deterred from committing crack cocaine offenses because of the sentencing differential, this argument does not outweigh the justice that was created.

It is true that crime is a great foe of the African-American community. Consequently, many willingly defer to the legislature to determine punishment and few would advocate that the state play a disinterested role in enforcing laws in our community. However, in light of the invidious history of racial oppression in the United States, any law or law enforcement practice that has a demonstrable, disparate impact on African Americans as a whole, or a subset of their community, should undergo constitutional scrutiny to establish whether there is, at least, a rational basis for that legislation or enforcement practice. Ultimately, the issue is in whether punishment and enforcement are meted out equally among society's similarly-situated offenders. *Russell* and *Armstrong* represent just two contexts in which they are not and Kennedy's proposal represents just another way to ensure that they will not be.

