Chicago-Kent Law Review

Volume 73
Issue 2 *Symposium on Race and Criminal Law*

Article 2

April 1998

Introduction

Richard H. McAdams

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RICHARD H. MCADAMS*

Criminal law plays an integral role in the history of American race relations; race is a constant theme in American criminal procedure. The literature on the intersection of race and criminal justice is now so vast and the issues so numerous,[1] that I do not think a truly brief introduction is possible or necessary. I will instead provide a practical overview of the articles in this symposium and then discuss some common themes the articles illustrate. The authors are (other than myself) distinguished scholars in criminal law or procedure; each was offered the opportunity to write on any subject of his or her choosing within the symposium topic. Together, the papers provide an excellent commentary on many of the current issues concerning race and criminal law.

In Batson *Ethics for Prosecutors and Trial Judges*,[2] Sheri Lynn Johnson explains how conscientious prosecutors and trial judges may effectively implement the ban on race-based peremptory challenges.

* Professor, Boston University School of Law.

1. Recent books within the general topic include DAVID C. ANDERSON, CRIME AND THE POLITICS OF HYSTERIA: HOW THE WILLIE HORTON STORY CHANGED AMERICAN JUSTICE (1995); E.M. BECK AND STEWART E. TOLNAY, A FESTIVAL OF VIOLENCE: AN ANALYSIS OF SOUTHERN LYNCHINGS, 1882-1930 (1995); MARVIN W. DULANEY, BLACK POLICE IN AMERICA (1996); ETHNICITY, RACE, AND CRIME: PERSPECTIVES ACROSS TIME AND PLACE (Darnell F. Hawkins ed. 1996); RANDALL KENNEDY, RACE, CRIME, AND THE LAW (1997); JEROME G. MILLER, SEARCH AND DESTROY: AFRICAN-AMERICAN MALES IN THE CRIMINAL JUSTICE SYSTEM (1996); ERIC W. RISE, THE MARTINSVILLE SEVEN: RACE, RAPE, AND CAPITAL PUNISHMENT (1995); MICHAEL TONRY, MALIGN NEGLECT—RACE, CRIME, AND PUNISHMENT IN AMERICA (1995); MARYANNE VOLLERS, GHOSTS OF MISSISSIPPI: THE MURDER OF MEDGAR EVERS, THE TRIALS OF BYRON DE LA BECKWITH, AND THE HAUNTING OF THE NEW SOUTH (1995).

Obviously, journal articles are even more abundant. Here is a small sampling of recent unpublished empirical papers: John M. Conley, et. al., The Impact of Race and Class of the Accused on Jury Decision-Making (1997) (reporting that mock juries were more likely to convict *white* defendants); John J. Donohue III & Steven D. Levitt, The Impact of Race on Policing, Arrest Patterns, and Crime (1997) (studying how the racial composition of a police force affects the racial pattern of arrests and crime); Franklin Gilliam Jr. & Shanto Iyengar, Prime Suspects: Script-Based Reasoning About Race and Crime (1997) (reporting that 42% of subjects who viewed a staged news report of a crime recalled the suspect's race when none was provided; 90% of the false recollections were of African-American or Hispanic perpetrators); David B. Mustard, Racial, Ethnic and Gender Disparities in Sentencing: Evidence from the U.S. Federal Courts (1998) (finding that, on average and controlling for criminological factors, federal judges give blacks sentences that are six months longer than whites, due mostly to departures from the guidelines).

2. Sheri Lynn Johnson, Batson *Ethics for Prosecutors and Trial Court Judges*, 73 CHI.-KENT L. REV. 475 (1998).

She begins by observing a disturbing anomaly: prosecutors do not seem to treat their *Batson*[3] obligations as seriously as they treat other constitutional obligations favoring defendants. Professor Johnson traces this problem to a failure in Supreme Court opinion writing: by only condemning the previously accepted practice of racial strikes, *Batson* and its progeny provide no practical guide to what kind of strikes are legitimate.[4] Worse, later cases blur the rationale of *Batson* by shifting the focus from the defendant's right at trial to a citizen's right to jury service. As a result, she contends, even well-motivated prosecutors and trial judges treat the *Batson* obligation as a narrow and technical rule requiring only a *plausible* non-race reason for exercising a strike.[5] Courts therefore permit prosecutors to justify strikes by factors that are highly correlated with and barely distinguishable from race. Addressing herself to conscientious prosecutors and trial judges, Professor Johnson articulates a broader vision of the *Batson* obligation and provides a concrete ethical standard for assessing when a strike violates that obligation.[6]

Nancy King raises the *Batson* issue in an entirely different context in Batson *for the Bench? Regulating the Peremptory Challenges of Judges*.[7] Over a dozen states grant prosecutors and defendants a right to strike one judge assigned to their case without providing a specific reason.[8] Other jurisdictions routinely debate whether to create such a right. Professor King doubts the wisdom of the judicial peremptory challenge and raises, in particular, the danger that parties will exercise the right based on the judge's race.[9] She evaluates this danger in light of existing empirical data and considers how *Batson* might apply to limit race-based judicial strikes, including the issue of who would have standing in this context to raise such a *Batson* claim.[10]

In *Race and the Victim: An Examination of Capital Sentencing and Guilt-Attribution Studies*,[11] Cynthia Lee discusses studies finding that a crime victim's race affects the prosecutor's decision to seek, and the jury's decision to recommend, the death penalty. The most well

3. *Batson v. Kentucky*, 476 U.S. 79 (1986).
4. *See id.* at 482-85.
5. *See id.* at 485-88.
6. *See id.* at 500-07.
7. Nancy J. King, Batson *for the Bench? Regulating the Peremptory Challenge of Judges*, 73 CHI.-KENT L. REV. 509 (1998).
8. *See* RICHARD E. FLAMM, JUDICIAL DISQUALIFICATION 765-839 (1996).
9. *See* King, *supra* note 7, at 511.
10. *See id.* at 511-18, 524-32.
11. Cynthia K.Y. Lee, *Race and the Victim: An Examination of Capital Sentencing and Guilt Attribution Studies*, 73 CHI.-KENT L. REV. 533 (1998).

known of these is undoubtedly the Baldus study,[12] which provided the data underlying the defendant's challenge to the Georgia death penalty regime in *McCleskey v. Kemp*.[13] Less well known are empirical analyses conducted since the Supreme Court rejected McCleskey's challenge. Professor Lee reviews these studies, virtually all of which find that the victim's race continues to matter in death penalty sentencing.[14] She also reviews experiments on jury decisionmaking in non-capital cases, which reach conflicting results on the significance of juror-victim racial similarity and guilt attribution. Although an experimental design allows researchers to hold constant every variable other than race, Professor Lee notes that the juries in these experiments often differ significantly from real world juries, thereby limiting the confidence one may have in the applicability of those results outside the laboratory.[15] She concludes by noting where additional study would be useful.

In *Objective Tests and Subjective Bias: Some Problems of Discriminatory Intent in the Criminal Law*,[16] Andrew Leipold comprehensively surveys criminal procedure doctrines for their effect on efforts to eradicate race discrimination in the criminal system. He observes an interesting anomaly: objective tests predominate except in the case of equal protection doctrine. Professor Leipold discusses, for example, the recent Supreme Court holding that the subjective motive of a police officer is irrelevant to determining the reasonableness of his actions for Fourth Amendment purposes,[17] as well as the long-standing rule preventing the use of juror testimony to impeach the deliberations of a jury.[18] Professor Leipold explains how such rules, though advancing judicial economy, make it more difficult to detect and eradicate impermissible race-based decisionmaking in criminal law. Contrary rules in a variety of areas could either facilitate or obviate the difficult proof of purposeful discrimination required by equal protection doctrine. Given these limitations, Professor Leipold proposes

12. *See* David C. Baldus, Georgia Woodworth & Charles A. Pulaski, Jr., *Comparative Review of Death Sentences: An Empirical Study of the George Experience*, 74 J. CRIM. L. & CRIMINOLOGY 661 (1983).

13. 481 U.S. 279 (1987).

14. See Lee, *supra* note 11, at 538-42.

15. *See id.* at 542-57.

16. Andrew D. Leipold, *Objective Tests and Subjective Bias: Some Problems of Discriminatory Intent in the Criminal Law*, 73 CHI.-KENT L. REV. 559 (1998).

17. *See* Whren v. United States, 517 U.S. 806 (1996).

18. *See, e.g.*, FED. R. EVID. 606(b); Leipold, *supra* note 16, at n.93.

and evaluates some alternative solutions including improved collection of relevant data and class action civil rights suits.[19]

My contribution is *Race and Selective Prosecution: Discovering the Pitfalls of* Armstrong.[20] In *United States v. Armstrong*,[21] the Supreme Court held that trial judges may not grant a defendant discovery on a selective prosecution claim unless the defendant first provides evidence that the government failed to prosecute similarly situated offenders of another race. I criticize this rule for several reasons. First, the Court overestimates the ability of defendants who are targeted on account of race to meet this standard. Defendants with meritorious claims will be unable to find unprosecuted offenders, for example, when the offense occurs in private and the selectivity takes the form of nonenforcement against members of other races.[22] Second, the Court fails to create an appropriate test because it does not discuss generally what facts are necessary to establish that race and the decision to prosecute are correlated. The Court seems unaware that the evidence it requires is not sufficient to demonstrate a correlation, yet extending the *Armstrong* standard to all evidence necessary for a correlation would prevent discovery in virtually any case. In contrast, I describe an alternative test that would be sensitive to all facts relevant to a correlation but would not prove insurmountable for defendants with meritorious claims.[23] Finally, I respond to two criticisms of selective prosecution doctrine that might justify *Armstrong*: one, that there is little or no racially selective prosecution and, two, that victims of selective prosecution do not actually deserve the remedy of dismissal.[24] Upon analysis, I find neither claim persuasive.

In *Place and Crime*,[25] Tracey Meares develops a sociology of crime and crime control based on social organization theory. She follows Clifford Shaw and Henry McKay[26] in emphasizing the importance of community structure—features of *place*—to crime. On this view, the strength of formal and informal social networks significantly

19. *See* Leipold, *supra* note 16, at Part IV.

20. Richard H. McAdams, *Race and Selective Prosecution: Discovering the Pitfalls of* Armstrong, 73 CHI.-KENT L. REV. 605 (1998).

21. 116 S. Ct. 1480 (1996).

22. *See* McAdams, *supra* note 20, at x.

23. *See id.* at 634-40.

24. *See id.* at 642-66.

25. Tracey L. Meares, *Place and Crime*, 73 CHI.-KENT L. REV. 669 (1998).

26. *See, e.g.*, CLIFFORD R. SHAW & HENRY D. MCKAY, JUVENILE DELINQUENCY AND URBAN AREAS (1969). More recent proponents include Robert Sampson and William Julius Wilson. *See, e.g.* Robert J. Sampson & William Julius Wilson, *Toward a Theory of Race, Crime, and Urban Inequality*, in CRIME AND INEQUALITY 46 (J. Hagan and R. Peterson eds., 1995).

affects the level of crime in a place independent of other factors such as state enforcement or poverty. Professor Meares uses this theory to examine the claims of two groups of criminal law scholars she terms the "Skeptics" and the "Cheerleaders."[27] Law and Order Cheerleaders emphasize the importance of individual incentives to commit criminal acts and the ability of government to affect those incentives through rigorous law enforcement. Law Enforcement Skeptics emphasize the racial discrimination present in law enforcement and question the legitimacy and effectiveness of enforcement as a solution to crime. Professor Meares critiques each view, arguing that Skeptics underestimate the importance of law enforcement but that Cheerleaders ignore the way that government enforcement, depending on its form, can either enhance or undermine the community structures that are crucial to crime control.[28] She uses social organization theory to evaluate particular enforcement strategies, rejecting, for example, severe sanctions for nonviolent offenders but defending "reverse stings" and juvenile curfews, in each case based on their effect on community structures.[29]

The authors were not confined to particular issues and the coverage is fairly broad. Most of the important criminal law institutions receive some treatment. Professors Leipold and Meares, for example, discuss the police; Professor Leipold and I discuss prosecutors; Professors Johnson and Lee focus on juries and jury selection; Professor King discusses the role of the judge and judicial selection. Despite these disparate topics and approaches, however, some common themes emerge. I will describe three.

First, the articles illustrate the importance of social science to understanding matters of race and criminal law. Empirical techniques are necessary to estimate the degree to which the system or its components are discriminatory, a starting point for most of the issues under discussion.[30] Two articles, however, deserve particular mention. Professor Lee provides what social science disciplines term a "literature review," a reflective analysis of a growing body of empirical work.

27. Meares, *supra* note 25, at 670-71.

28. *See id.* at 677-94.

29. *See id.* at 694-701.

30. *See* King, *supra* note 7, at 515-18 (discussing empirical study on the use of judicial peremptories); Leipold, *supra* note 16, at Part IV.B.1 (calling for more careful collection of data on the racial impact of various law enforcement decisions); McAdams, *supra* note 20, at 642-52 (relying on social science data concerning discriminatory attitudes, discrimination in private markets, and discrimination by prosecutors). My article also criticizes the Supreme Court's decision in *Armstrong* for failing to understand the rudiments of correlation. *See* McAdams, *supra* note 20, at 625-34.

Reviews seem particularly important for legal analysis because most lawyers are not trained in social science, though we routinely assert and rely upon empirical claims. In addition, Professor Meares' article is very ambitious in its use of social science, as it defends a sociological theory of crime and applies the theory to contemporary law enforcement issues. In this manner, she demonstrates how sociology is relevant not only to criminal behavior but to criminal law, as the constitutional analysis of various enforcement practices should include an understanding of their likely consequences.

Second, several papers struggle to bring to the surface the complex cost-benefit analysis that necessarily underlies decisions in this area. For example, I contend that the issue in *Armstrong*—the appropriate discovery standard in a selective prosecution case—should be explicitly viewed as a problem of minimizing the costs of false positives and false negatives, that is, of the costs of granting discovery to defendants asserting non-meritorious claims and the costs of denying discovery to defendants asserting meritorious claims. Professor Meares describes the benefits as well as costs of imprisonment in an article intended to complicate and enrich the cost-benefit analysis of law enforcement strategies. More generally, Professor Leipold concedes that a judiciary concerned with administrative costs may in good faith favor legal tests focusing on objective facts, even as he criticizes such rules for making discrimination harder to detect and uproot. The explicit inclusion of "costs" in the analysis might seem to favor the government's view of the doctrinal issues, but often it does not. Rather, scrutinizing matters of cost sometimes exposes weaknesses in the government's analysis.

Finally, the articles propose solutions through institutions other than appellate courts. More commonly, legal scholarship focuses on appellate courts, if not as the intended audience, then at least as the appropriate institution to implement reform. Some of the work in this symposium, including my own, falls into this mode. Several contributors, however, look elsewhere for solutions. Professor Meares advocates making law enforcement strategies sensitive to social organization and therefore focuses on institutions such as police and the church. She ends her article, for example, by describing informal community-police cooperation including one notable instance where Chicago police escorted prayer groups to street corners usually occupied by drug dealers.[31] Professor Johnson identifies a problem in ap-

31. *See* Meares, *supra* note 25, at 702-04.

pellate court analysis of *Batson*, but proposes as a solution an ethical standard for prosecutors and an enforcement test for trial courts. Professor King writes, in part, to diminish legislative enthusiasm for judicial peremptory strikes and Professor Leipold calls for legislation to improve data gathering on race and law enforcement.

In sum, the articles provide an interesting variety of scholarly perspectives on the difficult subject of race and criminal law.