

Michigan Law Review

Volume 96 | Issue 6

1998

The Color Line of Punishment

Jerome H. Skolnick

University of California, Berkeley

Follow this and additional works at: <https://repository.law.umich.edu/mlr>



Part of the [Civil Rights and Discrimination Commons](#), [Criminal Law Commons](#), and the [Law and Race Commons](#)

Recommended Citation

Jerome H. Skolnick, *The Color Line of Punishment*, 96 MICH. L. REV. 1474 (1998).

Available at: <https://repository.law.umich.edu/mlr/vol96/iss6/7>

This Review is brought to you for free and open access by the Michigan Law Review at University of Michigan Law School Scholarship Repository. It has been accepted for inclusion in Michigan Law Review by an authorized editor of University of Michigan Law School Scholarship Repository. For more information, please contact mlaw.repository@umich.edu.

THE COLOR LINE OF PUNISHMENT

Jerome H. Skolnick*

RACE, CRIME, AND THE LAW. By *Randall Kennedy*. New York: Pantheon Books. 1997. Pp. 538. \$30.

If “the color line,” (in W.E.B. Du Bois’s 1903 phrase and prophecy)¹ was to be the twentieth century’s greatest challenge for the domestic life and public policy of the United States, the law has had much to do with drawing its shape. No surprise, this. By now, legal theorists accept that law does not advance in preordained fashion, immune from the sway of political interest, belief systems and social structure. Still, it is hard to exaggerate how powerfully the law has shaped the life chances of Americans of African heritage, for good or ill, and in ways that we scarcely think of today.

The act of interracial marrying, for example, does not today evoke visions of criminality, although it once did. Thirty-nine states — including states in the North and West — had at one time passed laws forbidding intermarriage between persons of different race.² Many of these laws were still in effect following World War II.³ If a black man had married a white woman in Virginia in 1966 the marriage would have been void *ab initio*, and they would each have been guilty of a felony. *Loving v. Virginia*,⁴ the 1967 case that freed interracial couples to marry, is only a footnote in Randall Kennedy’s *Race, Crime and the Law*, but that is understandable.

The anti-miscegenation laws arose out of racial theories asserting that the children of “mixed” marriages would be defective. In one respect, these laws were often breached in practice. Black women were taken or raped regularly by white men who were rarely, if ever, punished (p. 35). Such children were sired in uncounted numbers, and then denoted as “Negro.” The laws criminalizing intermarriage thus delegitimized the offspring of relations between white men and black women so that they could not

* Claire Clements Dean’s Professor Emeritus, University of California, Berkeley. B.B.A. 1952, City College of New York; M.A. 1953, Ph.D. 1957, Yale. — Ed. A version of this book review also appears in *THE AMERICAN PROSPECT*, July–Aug. 1998, at 90-95.

1. W.E.B. DU BOIS, *THE SOULS OF BLACK FOLK* 35 (First Vintage Books 1990) (1903).

2. See FOWLER V. HARPER & JEROME H. SKOLNICK, *PROBLEMS OF THE FAMILY* 96-99 (rev. ed. 1962).

3. For example, California’s law forbidding most interracial marriage was in effect until 1948, when it was invalidated by the Supreme Court of California. See *Perez v. Lippold*, 198 P.2d 17 (Cal. 1948).

4. 388 U.S. 1 (1967).

inherit their father's property. In another respect, the laws were rigorously enforced to prevent black men from having consensual sex with white women under any circumstances, including marriage. These laws implied that no rational, adult, white woman would agree to have sex with a black man. Any breaking of the sex-color line taboo between a black man and a white woman could be — and in the peculiar logic of the deep South should be — considered the moral equivalent of rape, even if blessed by the sacrament of marriage.

In the context of such racial theorizing, accusations of rape against black men made by white women were rarely disbelieved. Such accusations were likely to draw the unbridled viciousness of white vigilantes, who remained unpunished for the crimes they committed while carrying out lynchings — which often included whipping, torturing, burning, and eventually hanging the victim — the “strange fruit” of Lillian Smith's acclaimed novel.⁵ Southern court records show that when a black man was accused of murdering a white man, he was usually not lynched, but was given a trial and, if found guilty, capitally punished.⁶ The accusation of rape, by contrast, was more likely to evoke the hot-blooded savagery of a lynching.

The institutions of southern justice — police and courts — typically ignored the crimes committed by those participating in the lynching. Southern blacks passed around stories, which became legends, about sex, terror, and the meaninglessness of the official legal order. Lynching maintained the caste superiority of whites and the bloody etiquette of cross-racial sex, and it undermined any trust Americans of African descent might have had in the legal order. “Nothing has more nourished dreams of racial revenge,” Randall Kennedy, a former law clerk to Justice Thurgood Marshall and a Professor at Harvard Law School, writes, “than the knowledge that buried in American history are scores of black victims of lynching whose murderers, though known, escaped punishment” (p. 49).

NO RACE-BASED LAW ENFORCEMENT

This ignominious history of legal theory and practice is a necessary preamble to any understanding of race and crime in America today. For this reason, one has to wonder whether America is now ready for the message throughout Randall Kennedy's recent book *Race, Crime, and the Law* — that in enforcing the criminal laws, the courts and the police should never base their judgments and actions on race.

5. LILLIAN SMITH, *STRANGE FRUIT* (Harcourt Brace Jovanovich 1992) (1944).

6. See E.M. Beck et al., *The Gallows, the Mob, and the Vote: Lethal Sanctioning of Blacks in North Carolina and Georgia, 1882 to 1930*, 23 L. & Socy. Rev. 317, 329 (1989).

Kennedy's position is scarcely that of a reflexive radical on the complex and polarizing issue of contemporary race and crime. He discusses and deplors how African Americans are doubly victimized by crime and argues that "the principal injury suffered by African Americans in relation to criminal matters is not overenforcement but underenforcement of the laws."⁷ Randall Kennedy, like Jesse Jackson, recognizes that disproportionate black criminality leads to understandable fears among potential victims, whether black or white. And like his mentor, Justice Marshall, he does not excuse "thuggery" when perpetrated by blacks. Kennedy's fair-mindedness concerning race and crime is further illustrated when, in discussing the now-mythic beating of Rodney King, a black victim of white police, Kennedy points out that the case was more complicated than is generally acknowledged by those familiar only with the portion of the videotape shown on television. At the Simi Valley trial, defense attorneys focussed the jury's attention on King's behavior leading to the beating. He was, after all, drunk, driving at high speed, and resisting arrest. Some use of escalated force was probably justified against him, although not the fifty-six powerful blows that were actually inflicted. At the Simi Valley trial, Kennedy reminds us, defense attorneys were able to point to subtleties that clouded the issue of whether the police harbored racist intent.

Kennedy unfolds his thesis — that the courts and the police should never base their judgments and actions on race — in discussions of five major issues: (1) the use of race as an indicator of suspiciousness; (2) the use of race-based peremptory challenges; (3)

7. P. 19. Homicide victimization rates for black males and females continue to be higher than for other segments of the population. Black males were 8 to 9 times more likely than white males to have committed a homicide during 1996; most of these homicides were intraracial. In 1996, about 9 out of every 10 murders involved victims and offenders of the same race when the race of the offender was known. See James Alan Fox, Trends in Juvenile Violence: 1997 Update (November 1997) (available at <<http://www.ojp.usdoj.gov/bjs/abstract/tjrfox.htm>>). Thus, as overall crime rates decline, so does crime committed by and against blacks.

Overall, violent crime dropped in 1996 in the United States to levels not seen since 1973. BUREAU OF JUSTICE STATISTICS, U.S. DEPT. OF JUSTICE, *Criminal Victimization, 1996: Changes 1995-96 With Trends*, available at <<http://www.ojp.usdoj.gov/bjs/abstract/cv1996.htm>>. New York City's remarkable crime decline has received the most publicity, and deservedly so. In 1990, New York City experienced 2,245 homicides. That figure dropped remarkably in 1996 to 983 homicides. The year 1997 saw yet another drop to 770. In the first three months of 1997, 281 homicides occurred. In the first three months of 1998, only 141 homicides have been reported. Interview with Michael Farrell, Deputy Commissioner for Policy and Planning, New York City Police Department (April 2, 1998). In fact, crime is dropping all over the United States, from Los Angeles to Cleveland, to Boston, even to Washington, D.C. The F.B.I. reported that the homicide rate fell 9 percent in 1996. Federal Bureau of Investigation Press Release, October 4, 1997. As crime declines generally, so does the level of black criminality. This may help to undermine fears of crime committed by young black males, who are responsible for most of the crime by blacks.

the death penalty; (4) race-based jury nullification; and (5) race-based disparity in punishment.

THE PROPRIETY OF RACE AS AN INDICATION OF SUSPICIOUSNESS

Kennedy devotes a significant portion of his book to a related issue, but one more subtle than police brutality. "By too easily permitting the police to use race as an indicia of suspiciousness," he writes, "courts also derogate from the idea that individuals should be judged on the basis of their own, particular conduct and not on the basis — not even *partly* on the basis — of racial generalizations" (p. 157). He asserts that it is never appropriate for police to use color as a proxy for criminality. Kennedy does, however, distinguish between cases where police act on the basis of a detailed description as opposed to "the use of racial categories as a probabilistic sorting device . . . to demarcate groups of persons who, because of their race, are viewed as more risky than other persons" (p. 137 n.*).

He recognizes that race can signal heightened criminality, just as it can indicate other "sociological facts," for instance, greater risk of early mortality, fewer employment opportunities, lower income and substandard housing. But such "sociological facts" do not, he says, "mean that the legal system ought to permit police to engage routinely in racial discrimination" (p. 145).

Kennedy points to a number of state and federal cases where courts have permitted police to stop and question someone who is "out of place": in a white neighborhood, as part of a drug courier profile, or in border checkpoints to subject the driver to questioning or search.⁸ Kennedy deplores the legal doctrines permitting police to equate blackness with increased risk of criminality because of the distrust, anger and discord they generate.

What are the probabilities of black violence? "It is beyond foolishness to regard American violence as solely, or mainly, or even distinctively a black problem," write Franklin Zimring and Gordon Hawkins.⁹ In part, they say, this is because American blacks tend to reside in places where social conditions precipitate the greatest violence by all races and partly because tendencies to lethal violence seem to be endemic to the United States.¹⁰ Nevertheless, in statistics generated by the Bureau of Justice Statistics in connection

8. See *State v. Dean*, 543 P.2d 425, 427 (Ariz. 1975); *United States v. Weaver*, 966 F.2d 391 (8th Cir. 1992), *cert. denied*, 506 U.S. 1040 (1992); *United States v. Martinez-Fuerte*, 428 U.S. 543, 563-64 (1976).

9. FRANKLIN E. ZIMRING & GORDON HAWKINS, *CRIME IS NOT THE PROBLEM* 79 (1997).

10. See *id.*

with the President's Initiative on Race¹¹ we find that crime is *disproportionately* a black problem. Although most victims of violent crime are white (seventy-five percent in 1995), blacks are victimized at higher rates than whites. Blacks have higher arrest rates for violent crime than other segments of the population, although most persons (fifty-four percent) arrested for violent crime in 1995 were white. Moreover, despite recent declines, both homicide victimization and commission rates continue to be higher for blacks than for other segments of the population. At each age, black males are about eight to nine times more likely than white males to have committed a homicide during 1996.¹²

If that is so, it raises a troublesome question: Is it necessarily wrong for police to be color conscious? We rely on police to be sensitive to subtle cues in their visual world. In my observations of police in the early 1960's, I developed the concept of the "symbolic assailant," that is, "persons who use gesture, language, and attire that the policeman has come to recognize as a prelude to violence."¹³ More generally, police who are patrolling an area are supposed to develop a conception of the normal. They are supposed to understand who belongs there and which buildings generally have lights on in the darkest hours of the early morning. They are supposed to notice an older man parked in front of an elementary school. Is he a grandfather picking up a grandchild or a sexual predator? Kennedy would argue that such observations are legitimate. But suppose a police officer sees two black teenagers walking in a white neighborhood at two o'clock in the morning? In a society where the residential color line has so often been drawn, should we ask police to ignore the race of the teenagers? And if we did, would they?

Even if courts were to forbid police from noticing race, can courts actually affect police conduct in this delicate area? Will police simply not list race when it actually was a factor in stopping and questioning someone who fits a profile or appears suspicious to the police even if legal doctrine says they may not? Consider the following case. A police detective sees two men, Chilton and Terry, "casing" a jewelry store. Lawyers familiar with the landmark 1968 case of *Terry v. Ohio*¹⁴ know the rest of the story. The officer questions the men, decides that a crime is afoot, proceeds to pat them down, discovers guns and arrests them, along with a third man.

11. Bureau of Justice Statistics, U.S. Dept. of Justice, "Question and Answer" document specially prepared for the President's Initiative on Race (November 17, 1997).

12. *Id.*

13. JEROME H. SKOLNICK, *JUSTICE WITHOUT TRIAL* 44 (3rd ed. Macmillan Press 1994) (1966).

14. 392 U.S. 1 (1968).

Detective Martin McFadden testifies that he had been patrolling in plainclothes at two-thirty in the afternoon, in an area of downtown Cleveland that he had been patrolling for thirty years. He says he saw something odd about these men. "Now, in this case when I looked over they didn't look right to me at the time."¹⁵

The Warren court, while understanding that McFadden had less than probable cause to conduct his search, deferred to the practical needs of policing and permitted the limited pat-down search of Chilton and Terry and the seizure of their weapons, a major doctrinal shift in the law governing when police can lawfully stop and frisk suspects. Not mentioned in the Supreme Court decision is that the suspects were in fact black teenagers, as the N.A.A.C.P. Legal Defense Fund brief¹⁶ pointed out at the time. But was McFadden necessarily a racist? After all, Terry and Chilton *were* behaving suspiciously, they turned out to be armed and evidently were about to commit a crime. Yet is it credible that McFadden took no notice of their skin color but simply their behavior as part of what made them not "look right" to him at the time? More troubling, is it possible for a police officer not to factor skin color into his or her perceptions of not "looking right" in a society where skin color is so salient?

These are unsettling questions, especially for those like Kennedy — and me — who would prefer to erase skin color as a legitimate indicator of anything. As normative aspirations go, Kennedy's desire to eliminate race as an indicator of suspiciousness is commendable. It is a standard to which we and the courts should aspire. But I expect that in the real world of social and color stratification, disproportionate black criminality, and racism, it is inevitable that police will continue to use race as an indicator, as McFadden must surely have done. And like McFadden, especially if courts say that police cannot use race as an indicator, they won't report that they did, and will testify that what they saw was solely odd behavior.

RACE AND THE JURY

Kennedy's insistence that skin color be irrelevant in the processing of those accused of crime extends as well to jury selection. Not until 1986 did the Supreme Court hold that the Equal Protection Clause prohibits prosecutors from using peremptory challenges to exclude blacks from juries. Since then it has outlawed racially-based peremptory challenges for the defense as well.¹⁷ Judges can

15. *Terry*, 392 U.S. at 5.

16. Brief for the NAACP Legal Defense and Education Fund, Inc., as Amicus Curiae in *Terry v. Ohio*, 392 U.S. 1 (1968) (Nos. 63, 74, & 67).

17. See *Georgia v. McCollum*, 505 U.S. 42 (1992).

exercise more authority over attorneys in a courtroom than they can over police on the street. Kennedy is skeptical that courts can actually prevent prosecutors or defense attorneys from using peremptory challenges to shape the racial composition of the jury. Like Justice Marshall, he favors eliminating these challenges altogether, arguing that it is probably the only way to restrain attorneys who use race as a criterion in jury selection (p. 229).

THE DEATH PENALTY

Other components of the criminal justice system are more amenable to doctrinal authority. The Supreme Court could, if it chose, abolish the death penalty, but the present conservative court is not about to do so. Kennedy is masterful in describing the doctrinal zigs and zags of death penalty jurisprudence, and offers an especially careful and knowledgeable analysis of the statistical data on race and execution.

In the most recent major Supreme Court case, *McCleskey v. Kemp*,¹⁸ the defense introduced a study showing that when victims were white in Georgia, perpetrators were four times more likely to be condemned to death than when victims were black. The Court conceded that the system was skewed against blacks who murdered whites, and against black victims, but held that the question was whether officials had discriminated against McCleskey in this case, not systemically. The Court ruled that they had not. As Kennedy recognizes, it would be a gruesome kind of affirmative action that sought to reduce racial discrepancies in capital punishment by "leveling up" and executing more blacks who murder black victims (p. 344).

Kennedy's discussion of racial fairness in the administration of the death penalty is careful, knowledgeable and nuanced, but his own position on the larger question — support or opposition to the death penalty — is relegated to a footnote (p. 345 n.*). I thought this a mistake, since what he says makes much sense, and deserves the kind of careful elaboration he gives to the question of racial fairness. Kennedy doesn't regard capital punishment as "unconstitutional per se," but opposes it partly because he fears mistakes and partly because he deplors "the lethal, collective, bureaucratic anger that the state displays when it puts a person to death" (p. 345).

But something else is hinted at in the footnote, a change of heart from fervent abolitionist to mild opponent. Kennedy writes that when he clerked for Justice Marshall he was forced into "[c]onstantly reading about the horrible crimes perpetrated by murderers sentenced to death" (p. 345). Evidently, the brutality of the

18. 481 U.S. 279 (1987).

murderers and the pain of the victims cooled his abolitionist fervor. It is not easy to develop a purely rational position on capital punishment, although Justice Blackmun's argument — that the death penalty cannot be administered fairly — comes closest.

JURY NULLIFICATION

Punishment is altogether a difficult issue, especially when one can predict that a particular race or class will be disproportionately represented in the punishment apparatus. Some African-American legal scholars, notably Paul Butler in the *Yale Law Journal*, have advocated that black jurors nullify the evidence in cases where the black defendants are charged with what he describes as "nonviolent, *malum prohibitum* offenses, including victimless crimes like narcotics offenses."¹⁹

Kennedy will have none of this. Agreeing that African Americans have often been treated unjustly in the system of criminal justice, he rebuts Butler point by point, arguing that Butler bases his position on a one-dimensional vision. Yes, Kennedy acknowledges, the prosecution of the Scottsboro boys²⁰ was "horrible, [and] racially motivated," but both state and federal authorities intervened "in an extraordinary fashion" ultimately preventing their execution (p. 300). Similarly, Rodney King's victimization was later followed by the imprisonment of the perpetrators of the brutality after a federal civil rights prosecution. That aside, Kennedy avers, jury nullification will scarcely advance the cause of broad social reform that Butler advocates. Those who engage in nullification will have to say that they ignored the evidence for a larger cause, and few jurors are willing to do that. The jurors in the O.J. Simpson case, for example, did not admit to nullification of the evidence although one of the black members of the jury reportedly stated after the verdict, "We've got to protect our own" (p. 310 n.†).

DRUG PENALTIES

Nevertheless, major scholars have argued that the criminal justice system, particularly the Draconian sentences given to black drug offenders, are needlessly and unfairly harsh.²¹ Part of the difficulty may arise from our lack of a traditional moral sense about the dangers of drug use and sale. We commonly share an aversion to murder, armed robbery and burglary, and regard these as serious

19. Paul Butler, *Racially Based Jury Nullification: Black Power in the Criminal Justice System*, 105 *YALE L.J.* 677, 715 (1995); p. 296 (quoting Butler).

20. See *Weems v. Alabama*, 141 So. 215 (Ala. 1932) for the Scottsboro Boys' appeal to the Alabama Supreme Court for their rape conviction. In *Powell v. Alabama*, 287 U.S. 45 (1932), the Supreme Court held that the defendants had been denied effective assistance of counsel.

21. See MICHAEL TONRY, *MALIGN NEGLECT* 188-90 (1995).

crimes deserving punishment. Moreover, one doesn't have to be a law professor steeped in penal codes to understand — and approve — that intentional murder deserves the highest punishment the law can inflict, with armed robbery and burglary following in an ordinal sequence.

Our intuitions with respect to drug penalties are much less clear. What is the just desert for selling a few marihuana cigarettes? How about five or five hundred grams of cocaine? Should sale of crack be penalized differentially? Criminologists, including yours truly, have written and testified against the mammoth penalties for sale and use of drugs spurred by the war on drugs, and especially against its Draconian consequences for black youth who sell small amounts on the street.²²

The most extreme example of a law discriminating against African-American males is the federal law which penalizes those who sell 500 grams of cocaine powder, an amount larger than what most street dealers possess, with a minimum of five years imprisonment. Yet a person selling five grams of crack cocaine, a relatively trifling amount, is also subject to a five-year minimum penalty.²³ The color line is drawn sharply here. In 1993, the Bureau of Justice Statistics issued a report showing that the average sentence served by black prisoners in Federal prison (seventy-one months) was forty-one percent longer than the average served by whites (fifty months), while in the early 1980s the average time served by blacks was comparable to that of whites.²⁴ This did not happen because federal judges had turned into racists. The overriding reason was the 100:1 rule in the federal sentencing statute enacted by Congress in 1986, along with stiffer mandatory minimums for violent and gun crimes.²⁵

This is not to say there is no difference between crack and powder cocaine; crack cocaine is powder cocaine dissolved in water, with baking soda added, then heated, then dried into hard, smokable pellets. In effect, if someone has cocaine, with little knowledge or effort they can easily create crack. Street samples of crack, for example, range from ten percent to forty percent cocaine by weight. Although cocaine and crack are not identical, they are not so different pharmacologically as to justify vast differences in punishment. So the structure of the current guidelines is equivalent, if eggs were

22. No one has been more critical or effective than Michael Tonry. *See id.*

23. *See* U.S. SENTENCING GUIDELINES MANUAL § 2D1.1 (1995) (discussing the 100:1 rule).

24. DOUGLAS C. McDONALD & KENNETH E. CARLSON, U.S. DEPT. OF JUSTICE, SENTENCING IN THE FEDERAL COURTS: DOES RACE MATTER? 38, 42 tbl.3.4 (1993).

25. *See, e.g.*, Anti-Drug Abuse Act of 1988, Pub. L. No. 100-690, 102 Stat. 4181 § 6371 (1988).

illegal, to punishing the possession of omelets at 100 times the possession of raw eggs.

Two other big differences distinguish powder from crack cocaine. Powder cocaine is more likely to be sold in larger, more expensive amounts behind tightly closed doors. It is consequently harder to catch those who sell it than those who sell crack, sold mostly in crack houses or apartments known to neighbors and the police, or in the streets. Powder cocaine is the drug of the affluent, while crack is the drug of the poor. And because it is sold more openly, it is more threatening to community safety and cohesion. It is this feature of crack that has led many African-American politicians, and Randall Kennedy, to be more sympathetic to the distinction in penalties. "Surely," Kennedy writes, "it would be just and sensible for a government to punish more severely a person knowingly distributing a poison in a low-priced (say five-dollar) container as opposed to a high-priced (say fifty-dollar) container even if the poison in the two containers was otherwise identical" (p. 383).

But John P. Morgan and Lynne Zimmer, who carefully examined the evidence on the supposedly different effects of crack and powder cocaine, conclude that data from the National Institute of Drug Abuse show "that relatively few cocaine users actually become 'dependent' — whatever their route of administration — but that smoking cocaine by itself does not increase markedly the likelihood of dependence."²⁶ They recognize that smoking cocaine produces a shorter and more intense high than nasal insufflation of cocaine in powder form. They argue further that crack has been made available to those parts of the population who are most vulnerable to the abuse of drugs.

But why should we legislate more severe punishment for persons selling the five-dollar containers to low-income street buyers if we learned that the sellers were themselves young, black, and poor, while the more affluent fifty-dollar sellers could afford to deal behind closed doors where they can cut up the powder into five-dollar containers to be sold to the street sellers? Why should we punish retailers more than wholesalers? After all, we demand capital punishment for large-scale cocaine traffickers. Moreover, one could argue, as Tonry does, that "the architects of the War on Drugs should be held morally accountable for the havoc they have wrought among disadvantaged members of minority groups."²⁷

26. John P. Morgan & Lynne Zimmer, *The Social Pharmacology of Smokable Cocaine, in CRACK IN AMERICA: DEMON DRUGS AND SOCIAL JUSTICE* 144 (Craig Reinerman & Harry G. Levine eds., 1997).

27. TONRY, *supra* note 21, at 104.

At the conclusion of the book, in the very last paragraph, Kennedy backs off. He says he doesn't endorse the crack-powder differential. "Even if these policies are misguided," he concludes, "being mistaken is different from being racist, and the difference is one that greatly matters" (p. 386). Does Kennedy mean to suggest that we should censure only the explicit attention to race in law enforcement, but excuse disparate and punitive impacts so long as they result from good intentions? In other contexts, he finds that disparity in sentencing is an important measure of racism.²⁸

CONCLUSION

Race, Crime and the Law is a work of high legal scholarship and a cry for constitutional justice. But for me, Kennedy's key chapter is "Race, Law, and Suspicion" where he deplores a judicial trend that he says threatens to turn legally and morally wrong police conduct into something that is acceptable. As a matter of principle, I agree with Kennedy, but believe that he underestimates the capacity of police to work around legal doctrine; especially where police are in the position of justifying their conduct in a procedural setting. More importantly, I have trouble reconciling Kennedy's powerful censure of the use of race in articulating suspicion of crime with his wishy-washy defense of the crack and powder cocaine distinction in Federal sentencing. In the real world of criminal law, of police, and of the courts, enforcement and sentencing policies around drugs loom far more significantly in the lives of young Hispanic and African-American males than the doctrine Kennedy properly criticizes. Kennedy might well argue that the disparity of punishment for rape, for example, is clearly footprinted in a history of racism, while the crack-powder sentencing disparity was not grounded in racial motives. That may be true. But in a society with a history of slavery and racial discrimination and with disproportionate criminality according to race and color that is likely traceable to that history, can we ignore disparate racial impacts when we are considering fairness? Perhaps someday, when equality is more of a reality. But, at present, race remains such a conspicuous factor in crime and crime policy that we cannot fail to notice sharp differences in the

28. In a Virginia case discussed by Kennedy, *Hampton v. Commonwealth*, 58 S.E.2d 288 (Va. 1950), the defendant's attorneys showed that between 1908 and 1949, 45 black men, but not a single white man, had been put to death for rape. P. 312. In *Coker v. Georgia*, the Supreme Court prohibited imposing the death penalty for rape on grounds that the punishment was disproportionate to the crime. The death penalty, it held, is so "excessive" for rape that it violates the Eighth Amendment's "cruel and unusual punishments" prohibition. *Coker v. Georgia*, 433 U.S. 584 (1977). Kennedy notes, however, that racial disparity in rape sentencing still exists in many places, strongly suggesting that disparity is an important measure of racism. Pp. 72-74.

fate of blacks and whites. As we approach the millennium, the color line of punishment — especially in the war on drugs — is all too evident.