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NO EQUAL JUSTICE: RACE AND CLASS IN THE AMERICAN CRIMINAL JUSTICE SYSTEM. By *David Cole*. New York: The New Press. 1999. Pp. ix, 218. $25.

> That justice is a blind goddess
> Is a thing to which we black are wise.
> Her bandage hides two festering sores
> That once perhaps were eyes.[1]
>
> It ain't no secret,
> Ain't no secret my friend,
> You can get killed just for living
> In your American skin.[2]

I. INTRODUCTION

Once again, issues of race, ethnicity, and class within our criminal justice system have been thrust into the public spotlight. On both sides of the country, in our nation's two largest cities, police are being called to account for acts of violence directed toward poor people of color.

In New York City, a West African immigrant named Amadou Diallo was killed by four white police officers, who fired forty-one bullets at the unarmed man as he stood in the vestibule of his apart-

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1. LANGSTON HUGHES, *Justice*, *in* THE COLLECTED POEMS OF LANGSTON HUGHES 31 (Arnold Rampersad & David Roessel eds., Alfred A. Knopf, Inc. 1994) (1923).

2. Bruce Springsteen, *American Skin (41 Shots)* (unreleased 2000) (recording on file with authors).

ment building in a poor section of the Bronx.[3] Did race influence the officers' decisions to fire the fatal shots? Did the social class of Mr. Diallo or of the jury in Albany, to which the officers' trials were transferred, influence the decision to acquit the officers?[4]

In Los Angeles, a former officer with the CRASH[5] Unit of the Los Angeles Police Department's Rampart Division has described, in excruciating detail, at least thirty police officers' repeated misuses of their authority in an impoverished area of predominantly Latino immigrants.[6] The scandal, which the Police Department itself conservatively estimates to implicate a staggering 120 cases, involved the shooting of unarmed people, conspiracies to put the innocent in jail, planting guns on suspects, and orchestrating the deportation of witnesses to police abuses.[7] Could such massive and flagrant abuses of police power have festered for so long if they had instead transpired in a white, middle-class neighborhood?

Even aside from their obvious political and social significance, these disturbing events raise questions of enormous constitutional moment. For if race, ethnicity, and class do in fact play a role in the enforcement of our criminal laws — if, for example, race-based stereotyping influenced the police officers' decision to fire on Mr. Diallo, or if the poverty and ethnicity of those victimized in Los Angeles contributed to the lawlessness of the CRASH Unit and the numerous dubious convictions obtained as a result[8] — then inquiry must also be directed at the criminal justice system as a whole. From police, to juries, to prosecutors, and perhaps even to legislative bodies, the system be-

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3. *See, e.g.*, Michael Cooper, *Officers in Bronx Fire 41 Shots, and an Unarmed Man Is Killed*, N.Y. TIMES, Feb. 5, 1999, at A1; Kevin Flynn, *Police Killing Draws National Notice*, N.Y. TIMES, Feb. 8, 1999, at B5.

4. *See, e.g.*, Jeffrey Abramson, *A Story the Jury Never Heard*, N.Y. TIMES, Feb. 26, 2000, at A15 (editorial) (noting that a Bronx jury might have had "a better, more informed basis for judging the reasonableness of the quick-draw strategy of the street crimes unit in the Bronx" than the Albany jury that acquitted the four officers).

5. "CRASH" is an acronym for "Community Resources Against Street Hoodlums." *See* Joe Domanick, *Too Close for Justice*, L.A. TIMES, Feb. 13, 2000, at M1 (editorial).

6. *See* Scott Glover & Matt Lait, *Police in Secret Group Broke Law Routinely, Transcripts Say*, L.A. TIMES, Feb. 10, 2000, at A1. The cases investigated so far stretch from 1995 to 1998. *See* Matt Lait & Scott Glover, *LAPD Chief Calls for Mass Dismissals of Tainted Cases*, L.A. TIMES, Jan. 27, 2000, at A1.

7. *See* Tina Daunt, *Rampart Settlements Could Hit $125 Million Scandal: The City Council is Stunned When Told to Brace for Lawsuits Stemming from 120 Cases, Sources Say*, L.A. TIMES, Feb. 3, 2000, at A1.

8. As of February 11, 2000, thirty-two convictions had been reversed as the result of the Rampart scandal, and twenty officers had been suspended, relieved of duty, fired, or had quit. *See* Tina Daunt & Henry Weinstein, *Officials Renew Call for Outside Probe of LAPD: Broader Corruption Allegations Fuel Outrage. Mayor Maintains That Department Can Investigate Itself*, L.A. TIMES, Feb. 11, 2000, at A1. One senior INS official has stated that LAPD officers "were targeting a whole race of people." Anne-Marie O'Connor, *Rampart Set Up Latinos to Be Deported, INS Says*, L.A. TIMES, Feb. 24, 2000, at A1.

gins to appear inimical to our core constitutional values. We would like to believe that our criminal justice system does more than pay lip service to the command of equality. We would like to believe that everyone, whether black, brown, or white, and whether rich or poor, will be treated fairly. We would like to believe that the administration of criminal justice lives up to the pledge carved into the frieze of the United States Supreme Court building for all to see: "EQUAL JUSTICE UNDER LAW." But does it?

The thesis that America's criminal justice system institutionally discriminates along race and class lines is scarcely new.[9] Yet, notwithstanding the weight of this claim as it bears on the proper functioning of a constitutional democracy, it has never been presented to the Supreme Court as such. However odd this may first appear, no decision of the Court has confronted head-on the staggering implications of such an unequal system in a society that aspires to egalitarianism. While the Court has, in the past, voided discriminatory school[10] and electoral systems,[11] the criminal justice system has largely escaped such scrutiny. The Court, of course, has considered challenges to specific procedures that disproportionately affect poor people and minorities, such as the failure to provide counsel to indigent defendants[12] and backroom interrogations without benefit of counsel.[13] It has also considered alleged racial discrimination in the administration of the death penalty.[14] But, as if granted immunity, the criminal justice system as a

9. *See, e.g.*, JOHN J. DONOHUE & STEVEN D. LEVITT, THE IMPACT OF RACE ON POLICING, ARREST PATTERNS, AND CRIME (1997); JEWELLE TAYLOR GIBBS, RACE AND JUSTICE: RODNEY KING AND O.J. SIMPSON IN A HOUSE DIVIDED (1996); CORAMAE RICHEY MANN, UNEQUAL JUSTICE: A QUESTION OF COLOR (1993); JEROME G. MILLER, SEARCH AND DESTROY: AFRICAN-AMERICAN MALES IN THE CRIMINAL JUSTICE SYSTEM (1996); GREGORY D. RUSSELL, THE DEATH PENALTY AND RACIAL BIAS: OVERTURNING SUPREME COURT ASSUMPTIONS (1994); MICHAEL H. TONRY, MALIGN NEGLECT — RACE, CRIME, AND PUNISHMENT IN AMERICA (1995); SAMUEL WALKER ET AL., THE COLOR OF JUSTICE: RACE, ETHNICITY, AND CRIME IN AMERICA (1996).

10. *See* Green v. County Sch. Bd., 391 U.S. 430, 438 (1968) (requiring school boards operating a dual school system to "convert to a unitary system in which racial discrimination would be eliminated root and branch"); Brown v. Board of Educ., 347 U.S. 483, 495 (1954) (holding that racial segregation of schools is "inherently unequal").

11. *See* Harper v. Virginia State Bd. of Elections, 383 U.S. 663 (1966) (holding that requiring payment of poll tax as precondition for voting violates Equal Protection Clause); Gray v. Sanders, 372 U.S. 368, 379 (1963) (invalidating Georgia's system of selecting representatives on the ground that "all who participate in the election are to have an equal vote — whatever their race, whatever their sex, whatever their occupation, whatever their income, and whatever their home may be in that geographic unit").

12. *See* Gideon v. Wainwright, 372 U.S. 335 (1963).

13. *See* Miranda v. Arizona, 384 U.S. 436 (1966).

14. *See* McCleskey v. Kemp, 481 U.S. 279 (1987).

whole appears to be the component of government that the Fourteenth Amendment's commandment of equality left behind.[15]

Constitutional litigation is often expressive of a sense of moral urgency, alerting both the judiciary and society at large to government's failure to live up to the Constitution's promise.[16] The question, then, is why this sense of moral urgency has generally *not* attended judicial consideration of the criminal justice system? Does ingrained discrimination within the criminal justice system fall outside the limits of constitutional jurisprudence? If so, are those limits inherent or by craft? And should we not consider whether, instead of being exempt from constitutional scrutiny, racial inequalities within the criminal justice system should actually receive especially careful attention?[17]

II. COLE'S PORTRAIT OF THE BLIND GODDESS

David Cole's *No Equal Justice: Race and Class in the American Criminal Justice System*[18] argues that the criminal justice "system's legitimacy turns on equality before the law, but the system's reality could not be further from that ideal" (p. 3). As Cole sees it:

> [T]he administration of criminal law — whether by the officer on the beat, the legislature, or the Supreme Court — is in fact predicated on the exploitation of inequality .... Absent race and class disparities, the privileged among us could not enjoy as much constitutional protection of our liberties as we do; and without those disparities, we could not afford the policy of mass incarceration that we have pursued over the past two decades. [p. 5]

As this theme dictates, *No Equal Justice* amasses an impressive set of statistics and case studies to expose the fiction that police departments, prosecutors, juries, courts, and legislatures operate in race- and class-neutral fashion.[19] No facet of the criminal justice system goes

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15. This seems even more strange when one considers that the fair administration of criminal justice is a prominent concern of the Constitution generally and the Bill of Rights in particular, specifically the Fourth, Fifth, Sixth, and Eighth Amendments. We discuss this point *infra* Section IV.B.

16. *See, e.g.*, OWEN M. FISS, THE CIVIL RIGHTS INJUNCTION (1978); Abram Chayes, *How Does the Constitution Establish Justice?* 101 HARV. L. REV. 1026, 1041 (1988); Abram Chayes, *The Role of the Judge in Public Law Litigation*, 89 HARV. L. REV. 1281 (1976); Owen M. Fiss, *The Supreme Court, 1998 Term — Foreword: The Forms of Justice*, 93 HARV. L. REV. 1 (1979).

17. Although the book reviewed here addresses both race- and class-based inequalities in the administration of criminal justice, our focus in this Review is principally upon the question of race.

18. David Cole is a Professor of Law at Georgetown University, and an attorney with the Center for Constitutional Rights.

19. One might quibble with Cole for talking about race- and class-based inequalities in the same breath, as though they were constitutionally indistinguishable. After all, it might be argued, the Court has long subjected racial discrimination to heightened scrutiny, *see, e.g.*, Korematsu v. United States, 323 U.S. 214 (1944), but has not afforded the same scrutiny to

unexamined or untarnished. The pervasiveness of race and class bias produces, for example, spurious consent searches (pp. 27-34); pretextual motorist stops based upon race-stereotyped profiling (pp. 34-41); woefully incompetent, overburdened, and underpaid defense counsel, even in capital cases (pp. 76-89); drug laws with markedly disparate racial impacts (pp. 141-46); and all-white juries resulting from selection practices that exclude minorities (pp. 115-23). Cole subjects all of these practices to unrelenting scrutiny. According to Cole, when they are challenged separately in litigation, the Supreme Court either looks the other way or acknowledges the mandate of equality with a wink and a nod while ultimately failing to enforce that mandate.[20]

Cole offers several insights into how the Supreme Court's criminal decisions, especially those of the Rehnquist Court, have solidified the inequalities he identifies. He charges that "[b]y exploiting society's 'background' inequality, the Court sidesteps the difficult question of how much constitutional protection we could afford if we were willing to ensure that it was enjoyed equally by all people" (p. 7). As an illustration of this background inequality, Cole cites "a predominantly white Congress [that] has mandated prison sentences for the possession and distribution of crack cocaine one hundred times more severe than the penalties for powder cocaine" (p. 8). This mandate has had a disparate racial impact, since blacks constitute 90% of crack convictions but only 20% of powder convictions (p. 8). Cole demonstrates that the sentencing law's impact on African-American defendants is

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discrimination based on wealth or class, *see, e.g.*, Maher v. Roe, 432 U.S. 464, 471 (1977) ("[T]his Court has never held that financial need alone identifies a suspect class for purposes of equal protection analysis."); San Antonio Indep. Sch. Dist. v. Rodriguez, 411 U.S. 1, 24 (1973) ("[A]t least where wealth is involved, the Equal Protection Clause does not require absolute equality or precisely equal advantages."). While some of the inequalities on which Cole focuses concern race-based discrimination (like traffic stops of black motorists), others are inequalities that affect people of limited means (such as the inadequate representation generally afforded to indigent criminal defendants). In defense of Cole's approach, however, it might be pointed out that the Court has insisted that class-based discrimination is every bit as noxious as race-based discrimination. *See, e.g.*, Griffin v. Illinois, 351 U.S. 12, 17 (1956) (plurality opinion of Black, J.) ("In criminal trials a State can no more discriminate on account of poverty than on account of religion, race, or color."). Whether it has actually enforced this principle is, of course, another story — and Cole's book does a nice job of demonstrating that the Court has not done a particularly good job of policing either race- or class-based inequality in the administration of criminal justice. While Cole could perhaps have been clearer in separating out race-based and class-based inequalities, one of *No Equal Justice*'s principal themes is that these inequalities are so closely linked as to make it almost meaningless to draw an analytic distinction between the two. In any event, as stated above, our focus in this Review is principally upon racial rather than class inequities.

20. *See, e.g.*, pp. 41-42, 73-76, 76-81, 158-61, 161-65; Whren v. United States, 517 U.S. 806 (1996) (upholding traffic stop of two black men despite officers' admission that they had no interest in enforcing traffic law) (discussed at pp. 39-40); McCleskey v. Kemp, 481 U.S. 279 (1987) (upholding Georgia's imposition of death penalty despite statistical evidence that defendants charged with killing white victims received death penalty eleven times more often than defendants charged with killing black victims) (pp. 132-41); City of Los Angeles v. Lyons, 461 U.S. 95 (1983) (holding that black man seeking to challenge LAPD's use of chokehold lacks standing) (pp. 161-63).

magnified by prosecutors' decisions of whom to charge. According to U.S. Sentencing Commission data, 65% of crack cocaine users are white;[21] yet in 1992, 92.6% of those convicted for crack-related crimes were African American and only 4.1% were white (p. 142). Cole also discusses the alarmingly high rate of black incarceration, showing that, if the nationwide incarceration rate for whites were the same as the rate for blacks, "more than 3.5 million white people would be incarcerated today, instead of 570,000, and we would need more than three times the prison capacity (and prosecution and court capacity) that we currently have" (pp. 151-52).

Such disparities in prosecution and incarceration have evaded constitutional challenge under the Equal Protection Clause, because challengers must prove that prosecutors, legislators, or jurors intended to discriminate, an almost insuperable obstacle.[22] Cole argues that these disparities — regardless of whether invidious intent can be proven — threaten the very legitimacy of our criminal justice system. He therefore takes issue with those who, in Cole's words, "argue that as long as we can rid the criminal justice system of *explicit* and *intentional* considerations of race, we will have solved the problem of inequality in criminal justice."[23]

The statistics and anecdotes that Cole collects paint a startling portrait of a criminal justice system that — whether by design or not — metes out disproportionately harsh treatment to racial minorities, especially those who are also disadvantaged by poverty. This evidence makes it difficult to argue with Cole's thesis that racial justice cannot be obtained simply by "banning intentional racism from the system" (p. 10), at least as the Supreme Court has generally conceived of "intentional racism." But what *would* be required for our system to achieve this equality ideal, or at least to move closer to it? Although Cole's book, as we shall explain, does not provide as clear an answer to this overarching question as one might like, his portrait of the criminal justice system strongly suggests that wholesale reevaluation of the Supreme Court's jurisprudence with respect to criminal justice is in order.

The most compelling part of *No Equal Justice* is Cole's sharp-eyed analysis of how the federal judiciary, and especially the Supreme Court, has facilitated and reinforced racial inequality that occurs at the

21. U.S. SENTENCING COMM'N, SPECIAL REPORT TO CONGRESS: COCAINE AND FEDERAL SENTENCING POLICY 39, 161 (1995).

22. *See infra*, Sections III.B-C.

23. Cole cites Randall Kennedy as exemplifying this view. P. 9. *See, e.g.*, RANDALL KENNEDY, RACE, CRIME AND THE LAW 11 (1997) ("in the absence of persuasive proof that a law was enacted for the *purpose* of treating one racial group differently than another . . . courts should permit elected policymakers to determine what is in the best interests of their constituents.").

street level. Cole's thorough discussion of the jurisprudence around profile-driven stops and arrests is particularly troubling. Here, he provides a shocking list of traits judicially upheld as part of a drug-courier profile: for example, the suspect "acted too nervous," he "acted too calm"; the suspect "arrived late at night," he "arrived early in the morning," he "arrived in afternoon"; the suspect "made eye contact with officer," he "avoided eye contact with officer"; the suspect was "one of first to deplane," he was "one of last to deplane," he "deplaned in the middle"; the suspect "traveled alone," he "traveled with a companion," and so on (pp. 48-49). Cole convincingly argues that, because "unguided discretion invites stereotyped judgments," such wildly expansive criteria are perfectly set up to "be used disproportionately against minorities" (pp. 51-52). He even points to cases in which courts have expressly held or suggested that stops will survive equal protection scrutiny even where race is a factor, so long as it is not the *sole* factor (p. 51). But the alternative to using race as a ground for suspicion, routinely stopping "well-to-do white people" in the same way that minorities are stopped, would result in "community pressure on the police to regulate themselves" (p. 54). The ultimate consequence, Cole persuasively argues, would be too few stops and, necessarily, too few arrests for the satisfaction of either law enforcement or the majority (p. 52).

Even Gideon's trumpet has been muted. What the Supreme Court once gave indigent defendants by holding that the Sixth and Fourteenth Amendments required appointment of defense counsel for the poor[24] has since been covertly taken away by judicial countenancing of grossly understaffed, underresourced, and overburdened public defender offices.[25] To the same end, Cole cites a 1986 study finding that, in the State of New York, 75% of appointed counsel in homicide cases, and 82% in nonhomicide cases, failed to interview their clients or to conduct serious investigations (p. 86). States cap per-case spending by appointed lawyers at levels precluding competent representation without fear of court reproval: for example, $350 for felonies in Virginia, $750 in South Carolina, and $1000 in Tennessee and Kentucky (pp. 83-84). Despite the fact that prosecutors are not subject to per-case spending limits and are generally funded much more generously, courts have mostly upheld these caps (pp. 82-88). And because black and Hispanic defendants bear a disproportionate share of

24. *See* Gideon v. Wainwright, 372 U.S. 335 (1963).

25. As examples, Cole cites the public defenders' office in Albuquerque, New Mexico, wherein public defenders are individually responsible for 1000 to 1200 misdemeanor cases per year, and the office in Fulton County, Georgia, in which public defenders handle over 500 felonies annually along with other cases. *See* p. 83.

the burden (pp. 94-95), there is little public pressure to raise or abolish these caps.[26]

To make matters worse, Cole explains, the Supreme Court has constructed a test for proving ineffective assistance of counsel so demanding that it is "virtually impossible to meet."[27] Cole catalogs appellate rulings upholding convictions of indigent defendants against claims of inadequate defense where counsel fell asleep, were intoxicated, used cocaine, and even were absent during critical testimony at their clients' trials (pp. 78-81). Though the rich would not put up with such lawyering, the Court's decisions leave the poor with no alternative. As Cole concludes, "[f]or all practical purposes, [the poor person facing criminal charges] has only the right to be represented by an individual admitted to the bar" (p. 76). Perhaps the greatest irony is that, while Supreme Court precedent nominally requires appointment of a competent attorney, "when an attorney demonstrates competence and dedication to his clients, he can find it difficult to get appointed for precisely that reason" (p. 88). Cole describes cases in which experienced capital defense lawyers prevail in federal habeas proceedings, only to have state judges deny them the opportunity to represent their clients when the cases return for retrial (p. 88).[28]

Taken as a whole, Cole's book presents a vivid and unsettling picture of a criminal system that is failing to live up to its promise of equal justice, especially for racial minorities. He makes a convincing case that Supreme Court decisions have perpetuated these inequalities, and that the public's lack of trust in our criminal justice system — particularly in minority communities — can be traced to the Court's unwillingness to take on responsibility for policing racial discrimination in the administration of criminal justice.

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26. There exists a rich body of social science literature documenting that, despite the decline of overt and conscious racism, there is still a vast racial divide on a variety of public policy issues. *See, e.g.*, DONALD R. KINDER & LYNN M. SANDERS, DIVIDED BY COLOR: RACIAL POLITICS AND DEMOCRATIC IDEALS 12-34 (1996); Lawrence Bobo, *Race Public Opinion and the Social Sphere*, 61 PUB. OPINION Q. 1 (1997). For one study of the extent to which white stereotypes about African Americans influence public opinion on criminal justice, see Jon Hurwitz & Mark Peffley, *Public Perceptions of Race and Crime: The Role of Racial Stereotypes*, 41 AM. J. POL. SCI. 375 (1997) (finding that "much of public opinion . . . is influenced by racial concerns"); *see also* Mary Beth Oliver, *Caucasian Viewers' Memory of Black and White Criminal Suspects in the News*, 49 J. COMM. 46 (1999) (finding that in newscasts, Caucasian viewers were likely to misidentify Caucasian suspects as African-American).

27. P. 78. Cole is referring to the standard articulated in *Strickland v. Washington*, 466 U.S. 668 (1984), which requires that the defendant show a "reasonable probability that the result would have been different" but for the attorney's deficient performance.

28. In one such case, an attorney from the NAACP Legal Defense and Educational Fund prevailed in a federal habeas proceeding, but was denied the opportunity to represent his client on retrial, when the case was sent back to a local judge in Fayette County, Georgia. P. 88 (citing Roberts v. State, 438 S.E.2d 905, 906 (Ga. 1994)). The explanation Cole provides for such alarming rulings is that "capable defense attorneys can make a trial judge's life difficult," p. 89, especially in capital cases.

III. THE LARGER PICTURE

Drawing such a strong connection between racial inequalities and Supreme Court jurisprudence is obviously a very serious matter, one that commands attention. Cole relies on a combination of statistical and anecdotal evidence in bringing to light the savage inequalities that pervade our criminal justice system. By juxtaposing street-level descriptions of how criminal laws are enforced with Supreme Court decisions involving various aspects of the criminal justice system (e.g., detentions, arrests, adequacy of counsel, prosecutorial discretion, juror selection), Cole argues that the rulings of the Burger and Rehnquist Courts have locked in the impact of existing inequities. Thus, central to his story are such cases as *City of Los Angeles v. Lyons*,[29] *McCleskey v. Kemp*,[30] *Whren v. United States*,[31] and *United States v. Armstrong*,[32] all of which insulate the criminal justice system from claims of race-based discrimination.

While these cases help explain some of the persistent inequalities in the judicial system, there exists a larger and more dominant story. The principal opinions clearing the way for systemic discrimination are not found in prosecutors' or defense attorneys' briefs. They are not bedrock law upon which the criminal justice system is built. The decisions that Cole so critically describes, from *McCleskey* to *Armstrong*, are instead the consequence of the misguided paradigm to which the Court has adhered — since at least the mid-1970s — in assessing claims asserting the denial of equal protection. Rather than examining whether a government entity as a whole has discriminated, the Court has insisted upon an inquiry that requires equal protection plaintiffs to ferret out individual, intentional discriminators. Put another way, the Court has insisted upon a "bad apple" paradigm instead of examining, to borrow a term from criminal procedure, whether the tree itself is poisoned.[33]

A. *Uprooting the Poisonous Tree:* Brown *and* Green

Perhaps the most telling way to begin an examination of how we have reached the point where the criminal justice system could systemically discriminate on the basis of race, yet remain impervious to Fourteenth Amendment challenge, is to ask this question: Why does

29. 461 U.S. 95 (1983).

30. 481 U.S. 279 (1987).

31. 517 U.S. 806 (1996).

32. 517 U.S. 456 (1996).

33. The term "fruit of the poisonous tree" was coined in *Nardone v. United States*, 308 U.S. 338, 341 (1939), and refers to the doctrine that evidence obtained as the result of illegal government action is "tainted" and should therefore be excluded.

Brown v. Board of Education[34] seem so utterly irrelevant to a discussion of racial discrimination in the criminal justice system? Or why, close to fifty years after that decision, does the question itself sound off-kilter?

The Court in *Brown* stated that it "must look . . . to the effect of segregation itself on public education"[35] to determine whether school systems were denying equal protection of law. The *Brown* Court, of course, did not rest its analysis on whether there were individual bad actors on school boards who intended to disadvantage blacks — although it certainly could have chosen to rely on the intent of many segregationists to deny equality to blacks.[36] Instead, the *Brown* Court focused on the fact that a system of separate public schools for blacks and whites "generates a feeling of inferiority" among black children "as to their status in the community that may affect their hearts and minds in a way unlikely ever to be undone."[37] The Court thereafter insisted, in *Green v. County School Board*, that school segregation fostered by government must be eliminated "root and branch."[38]

On the surface at least, it would seem a short step to transport the precepts of *Brown* and *Green* to the criminal justice system, where the elimination of racial inequality would surely be no less essential. If the evidence contained in Cole's book is any indication, many aspects of our criminal justice system would arguably flunk the test applied by the *Brown* Court. Take, for example, Cole's description of Maryland state police detaining a disproportionate number of African-American motorists — a phenomenon increasingly referred to as "Driving While Black or Brown."[39] According to one survey that Cole cites, 70% of those stopped on Interstate 95 were black, although only 17.5% of speeders on that highway were black (p. 36). It might well be difficult to show that any individual trooper had the conscious intent to stop motorists simply because of their skin color. But assuming that these statistics are accurate, a *Brown*-type analysis would seem to support the conclusion that Maryland's system of policing its highways violates Equal Protection regardless of whether a particular motorist can show that a particular trooper was motivated by discriminatory intent. To borrow *Brown*'s terms, a policing system that confers the "sanction of

34. 347 U.S. 463 (1954).

35. *Id.* at 492.

36. *See* RICHARD KLUGER, SIMPLE JUSTICE 367-95 (1996).

37. *Brown*, 347 U.S. at 494.

38. 391 U.S. 430, 438 (1968).

39. *See, e.g.*, Yancey Roy, *Recent Cases Put Racial Profiling in Spotlight*, Gannett News Serv., Feb. 28, 2000, at ARC, *available in* LEXIS, News Library, GNS File ("Racial profiling is old news in the black community where it's often referred to as 'DWB,' driving while black."). A Lexis search of news stories found hundreds that have used the term "Driving While Black" over the past two years.

the law" upon policing practices that disproportionately target African Americans can only create a "sense of inferiority" among the group that is so targeted.[40] And, following *Green*, the duty of law enforcement agencies under these circumstances would be to eliminate the discriminatory practices "root and branch."

B. *The Paradigm Shifts:* Keyes, Davis, *and* Arlington Heights

One can perhaps argue with the conclusion that the social meaning of police stops that disproportionately target blacks is to stamp them as inferior. But what is surprising, at least at first blush, is that we have not even seen challenges following this line of argument. To understand why that is the case, it is necessary to look beyond the Court's decisions in the area of criminal justice. Doing so reveals that the Court's blindness to race- and class-based injustice within the criminal justice system is a product of the paradigm that the Court has relied upon in assessing equal protection claims in noncriminal cases. Explaining why the criminal justice system has not proven susceptible to such challenges thus requires inquiry outside the criminal justice system.

Again, the Court's school desegregation cases offer the most fruitful point of departure. *Brown* and its immediate progeny[41] represent the zenith of the "poisonous tree" paradigm — the recognition that, irrespective of evidence regarding the motives of individual malefactors, a governmental system may deny equality to a particular group through the sum of its operations. In these cases, the Court refused to accept formal equal treatment and absence of the intent to discriminate as proof that equal protection had been accorded; these opinions instead examined whether, on the whole, the effect of the school system was to "deprive the children of the minority group of equal educational opportunities."[42]

In the 1970s, however, the paradigm shifted. Even as the Court continued to require school boards to remedy their own intentional segregation, it retreated from its earlier emphasis on investigating the systemic effects of governmental action. In *Keyes v. School District No. 1*,[43] the Court announced its intent to examine "intentionally segregative school board actions" as the litmus test for compliance with the Equal Protection Clause. Four years later, in *Dayton Board of Education v. Brinkman*,[44] the Court firmly established that "[t]he

40. *Brown*, 347 U.S. at 494 (quoting finding in the Kansas case).

41. *See, e.g.*, Griffin v. County Sch. Bd., 377 U.S. 218 (1964); Goss v. Board of Educ., 373 U.S. 683 (1963).

42. *Brown*, 347 U.S. at 493.

43. 413 U.S. 189, 208 (1973).

44. 433 U.S. 406 (1977).

finding that the pupil population in the various Dayton schools is not homogeneous, standing by itself, is not a violation of the Fourteenth Amendment in the absence of a showing that this condition resulted from intentional segregative action on the part of the Board."[45]

The Court thereby refused to allow the federal judiciary to take responsibility for systems that produce or reproduce inequality, absent some intentional bad actor. To be sure, the Court's subsequent decisions continue to echo *Green*'s admonition that, where discrimination has been found to exist, government must eliminate it "root and branch."[46] By the mid-1970s, however, this seemingly awesome obligation had been stripped of its original meaning. The Court had by then abandoned *Brown*'s insistence on looking to systemic discrimination — assessing whether the tree had been poisoned so badly as to require its elimination root and branch. This denied the *Green* mandate much of its force since, in the Court's view, there was no longer any tree to uproot, but simply "bad apples" to be picked off.

This doctrinal shift actually is best evinced by the Court's decision in *Washington v. Davis*.[47] In *Davis*, the Court upheld Washington, D.C.'s hiring practices for its police force. To get on the force, applicants were required to take a qualifying test, which blacks failed much more often than whites. The Court rejected the argument that such a disparate impact on blacks was sufficient to show an equal protection violation. The Court stated that "[t]he central purpose of [equal protection is] the prevention of official conduct discriminating on the basis of race."[48] Taking this statement on its face, it might seem that a system riddled with racial discrimination — like the criminal justice system that Cole depicts — ought to be an easy mark for a Fourteenth Amendment challenge. But the *Davis* Court followed this sweeping statement with a narrow definition of what would be considered "official conduct discriminating on the basis of race."[49]

Much has already been written on both sides regarding *Davis*'s holding that it is a "basic equal protection principle that the invidious quality of a law claimed to be racially discriminatory must ultimately be traced to a racially discriminatory purpose."[50] Whether or not one

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45. *Id.* at 413.

46. *See, e.g.*, Freeman v. Pitts, 503 U.S. 467, 486 (1992) (quoting Green v. County School Bd., 391 U.S. 430, 438 (1968)) (internal quotation marks omitted).

47. 426 U.S. 229 (1976).

48. *Id.* at 239.

49. *Id.*

50. *Id.* at 240; *accord, e.g.*, Robert W. Bennett, *"Mere" Rationality in Constitutional Law: Judicial Review and Democratic Theory*, 67 CAL. L. REV. 1049, 1076 (1979) (arguing that not requiring discriminatory intent would be "neither workable nor desirable"); Charles R. Lawrence III, *The Id, the Ego, and Equal Protection: Reckoning with Unconscious Racism*, 39 STAN. L. REV. 317, 320-21 (1987) (criticizing discriminatory purpose doctrine articulated in *Davis*).

agrees that discriminatory purpose should really be considered a basic equal protection principle, what is noteworthy about *Davis* is the absence of any consideration of the actual dynamics by which discrimination takes place in connection with the workings of government. Questions about the nature of discrimination are not even raised. Instead, the Court in effect assumes the answers, citing as examples of official discrimination Jim Crow segregation in public schools or facilities, the acts of individual government officers like prosecutors or jury commissioners in relation to particular cases, or a pattern of conduct by the same official. Neither identified nor acknowledged is the possibility that official discrimination could also be revealed in the aggregate of an entire system's functioning, through the conduct of a multitude of government actors, operating in separate and distinct cases and very likely not even aware of each other's actions. Can there exist, for example, an ethos of pervasive racial discrimination throughout a governmental system, perhaps owing to the same sorts of underlying discriminatory attitudes among individuals, but undetectable if the inquiry is focused upon a single actor or incident?[51]

One year after *Davis*, the Court, in *Village of Arlington Heights v. Metropolitan Housing Development Corp.*,[52] even more conclusively ruled out, as a matter of constitutional doctrine, a thoroughgoing investigation into pervasive racial discrimination. There, the Court set out as probative sources of discriminatory intent a set of criteria inconsistent with a systemwide model of official discriminatory behavior. The Court abandoned any pretense of inquiring into the overall impact of a system's functioning upon people of a particular race. Instead, the Court focused on criteria like "[t]he specific sequence of events leading up to the challenged decision," "[d]epartures from the normal procedural sequence," "[s]ubstantive departures . . . if the factors usually considered important by the decisionmaker strongly favor a decision contrary to the one reached," or the "legislative or administrative history behind a particular official action"[53] — criteria that sharply limited the field to a single event and to decisionmakers directly responsible for that unitary conduct.

The Court's skepticism toward race-conscious affirmative action, starting with *Regents of the University of California v. Bakke*,[54] graphically illustrates this paradigm shift. By 1978, the Court had come full circle from suggesting that government has a responsibility to root out racial segregation, to *forbidding it* from attempting to desegregate its

51. *See, e.g.*, Lawrence, *supra* note 50, at 327 ("[A] legal theory that seeks to remove racial prejudice from governmental decisionmaking must acknowledge and incorporate what is known about unconscious motivation.").

52. 429 U.S. 252 (1977).

53. *Id.* at 267-68.

54. 438 U.S. 265 (1978).

universities, absent a compelling justification. In *Bakke*, five Justices rejected a set-aside for minority applicants to U.C. Davis Medical School.[55] They did so over the objection of four dissenters who argued that the goal of "remedying the effects of past societal discrimination" sufficed to justify race-conscious admissions benefiting minorities.[56] Rejecting this view, Justice Powell, the swing vote, stated that race-conscious university admissions could only be upheld if they satisfied "the most exacting judicial examination."[57]

By the late 1970s, then, the Court had not simply abandoned its enterprise of rooting out systemic discrimination, but had actually turned its attention to eliminating voluntary programs designed to uproot systemic discrimination. Absent an explicit racial distinction or an intentional bad actor, no equal protection violation would be found. So restructured, the Court's test for what counts as racial discrimination can rarely get past individual cases to be treated on their individual facts.

C. *The Bad Apple Paradigm Applied to Criminal Cases*

Dayton, *Davis*, *Arlington Heights*, and *Bakke* paved the way for *McCleskey v. Kemp*.[58] Cole correctly states that *McCleskey* "may be the single most important decision the Court has ever issued on the subject of race and crime" (p. 137). In fact, Cole need not have inserted the qualifying "may" since *McCleskey*, more so than any other case, exemplifies Cole's view of what is wrong with the Court's criminal jurisprudence and is appropriately the centerpiece of *No Equal Justice*. But as important a decision as *McCleskey* is in the area of criminal justice, it would be wrong to view this case as a striking departure from precedent. In fact, *McCleskey*'s holding and rationale are the logical consequence of the Court's abandonment of the "poisonous tree" paradigm it had adopted in *Brown*, in favor of the "bad apple" paradigm that the Court had embraced by the time of *Davis*.

McCleskey's counsel, the NAACP Legal Defense Fund, mounted a sophisticated statistical challenge by demonstrating the disparity in the imposition of the death sentence in Georgia based on the murder victim's race and, secondarily, on the defendant's race. Iowa Law Professor David Baldus supervised the examination of more than 2400

55. *Id.* at 319-20 (Powell, J.), 421 (Stevens, J., joined by Burger, C.J. and Stewart & Rehnquist, JJ.).

56. *Id.* at 362 (joint opinion of Brennan, White, Marshall & Blackmun, JJ.).

57. *Id.* at 291 (Powell, J.); *see also id.* at 310 (Powell, J.) ("[T]he purpose of helping certain groups whom the faculty ... perceived as victims of 'societal discrimination' does not justify a classification that imposes disadvantages upon persons like respondent, who bear no responsibility for whatever harm the beneficiaries of the special admissions program are thought to have suffered.").

58. 481 U.S. 279 (1987).

criminal homicide cases in Georgia from 1973 to 1980. His investigators, using questionnaires sometimes as long as 120 pages, scrutinized police reports, parole board records, and prison files, ultimately categorizing more than 400 features of each case. Relying upon rigorous statistical analysis, Baldus and his colleagues sought to sequester those variables that accounted for which homicide defendants were receiving death sentences and, specifically, to determine the significance of race in the decisionmaking process of capital cases in Georgia. The study concluded that murderers of white victims were 4.3 times as likely to receive the death penalty as murderers of blacks, even after controlling for more than 230 variables arguably responsible for the disparity.[59] What distinguished McCleskey's case from the typical case, therefore, was that it was not readily distinguishable. His fate was the fate of others convicted of murdering white individuals, and, instead of the result of one decisionmaker, it was the outcome of conscious and unconscious attitudes held perhaps by police, prosecutors, and even jurors in a multitude of separate cases. His story could not be seen in isolation; it was part of how the Georgia criminal justice system regularly functioned.

The Court rejected the challenge, holding that "[a]t most, the Baldus study indicates a discrepancy that appears to correlate with race."[60] It noted that "[a]pparent disparities in sentencing are an inevitable part of our criminal justice system,"[61] finding that

> [i]n light of the safeguards designed to minimize racial bias in the [criminal] process, the fundamental value of jury trial in our criminal justice system, and the benefits that discretion provides to criminal defendants ... the Baldus study does not demonstrate a constitutionally significant risk of racial bias affecting the Georgia capital sentencing process.[62]

In a footnote, the only safeguards mentioned were constitutional bans against "prosecutorial discretion ... exercised on the basis of race," "prosecutor[ial] exercise [of] peremptory challenges on the basis of race," and "efforts to exclude blacks from grand and petit juries."[63]

While the Court devoted serious effort to this explanation, the concluding section of the majority opinion elucidated the Court's real problem with McCleskey's argument. Correctly pointing out that, "if we accepted McCleskey's claim that racial bias has impermissibly tainted the capital sentencing decision, we would soon be faced with

59. *See id.* at 287.

60. *Id.* at 312.

61. *Id.* (footnote omitted).

62. *Id.* at 313 (footnote omitted).

63. *Id.* at 309 n.30.

similar claims as to other types of penalty,"[64] it held that "[t]he Constitution does not require that a State eliminate any demonstrable disparity that correlates with a potentially irrelevant factor [such as race] in order to operate a criminal justice system that includes capital punishment."[65] In other words, a statistical showing that a state's system operated *as an entity* to disadvantage minorities would always fail to prove a constitutional violation in a particular case. Though never admitted, systemic discrimination was treated as either nonexistent or outside the boundaries of the Constitution. As the Court summed up, "[d]espite McCleskey's wide-ranging arguments that basically challenge the validity of capital punishment in our multi-racial society, the only question before us is whether in his case, the law of Georgia was properly applied."[66] If McCleskey's arguments regarding capital punishment are deemed too "wide-ranging" to be taking seriously by the Court, then the workings of the whole system can scarcely be considered a fit subject for serious constitutional review.

While the latter part of the *McCleskey* opinion exposed the Court's underlying concerns, a recent disclosure of an internal memorandum authored by Justice Scalia is even more starkly revealing.[67] Although Justice Scalia joined the majority, this memorandum reveals that he was just as aware as the dissenters of the staggering implications of the Baldus study — though, unlike the dissenters, he was unwilling to have the federal courts to take on the weighty responsibility of rooting out racial prejudice from the criminal justice system. As related by Edward Lazarus, a law clerk to Justice Blackmun during the term the case was decided, Justice Scalia stated in a January 6, 1987 memorandum following oral argument that "[s]ince it is my view . . . that the unconscious operation of irrational sympathies and antipathies, including racial, upon jury decisions and (hence) prosecutorial decisions is real, acknowledged in the decisions of this court, and ineradicable, I cannot honestly say that all I need is more proof."[68] These sentiments never explicitly made it into the majority opinion. But the message surely did: Even if systemic discrimination within our criminal justice processes exists, the Court must leave it untouched — as though the Constitution itself demanded that such

64. *Id.* at 315 (citation omitted). The Court in fact cited "[s]tudies [that] already exist that allegedly demonstrate a racial disparity in the length of prison sentences." *Id.* at 315 n.38.

65. *Id.* at 319.

66. *Id.* (citation omitted).

67. *See* EDWARD LAZARUS, CLOSED CHAMBERS: THE FIRST EYEWITNESS ACCOUNT OF THE EPIC STRUGGLE INSIDE THE SUPREME COURT 211 (1998) (quoting untitled Scalia memorandum).

68. *Id.* (internal quotation marks omitted).

discrimination remain invisible or, at the very least, be defined as something other than discrimination.

D. *Racial Justice Through Darkened Glasses*

Cole's illustrations serve to emphasize that the problem with existing constitutional doctrine, as constructed by the Court since the 1970s, is that it is structurally incapable of reaching racial discrimination where it is most pernicious, penetrating throughout the entirety of a system. As Justice Brennan observed in his *McCleskey* dissent, the Court's fear was precisely that ruling in McCleskey's favor would lead to "too much justice"[69] — or, more accurately, that it would impose on the federal courts the awesome responsibility of uprooting too much injustice, a burden that the Burger and Rehnquist Courts have been unwilling to take on, and perhaps believe the federal judiciary to be incapable of handling.[70]

What Cole does not say, but what his portrait of the criminal justice system reveals, is that the Court's equal protection methodology is the direct result of the paradigm constructed through *Davis*, *Arlington Heights*, and post-*Brown* school desegregation cases. The "too much justice" concern that Justice Brennan decried was not born in *McCleskey*. It is, rather, the product of the Court's decisions of the mid-1970s — particularly in the area of desegregation — that eschew a search for systemic discrimination and instead force equal protection claimants to identify with specificity the individual discriminators. As we have explained, the narrow approach that the Court has adopted in examining claims of inequality within the criminal justice system followed from a doctrinal structure developed in noncriminal cases, which shielded bureaucratic processes that systematically disadvantage minorities from careful review.

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69. *McCleskey*, 481 U.S. at 339 (Brennan, J., dissenting).

70. Chief Justice Rehnquist, for example, has frequently expressed his view that the federal judiciary is already far too overburdened, especially by criminal cases. *See, e.g.*, Chief Justice William H. Rehnquist, *Seen in a Glass Darkly: The Future of the Federal Courts*, 1993 WIS. L. REV. 1; William H. Rehnquist, *The 1998 Year-End Report on the Federal Judiciary*, THE THIRD BRANCH, Jan. 1999, at 1, 2 ("The number of cases brought to the federal courts is one of the most serious problems facing them today."). He has expressed approval of measures that limit access to courts by criminal defendants and prisoners, while at the same time decrying Congress's expansion of the federal courts' criminal docket by federalizing more and more crimes. In his *1997 Year-End Report on the Judiciary*, for example, the Chief Justice spoke of the Antiterrorism and Effective Death Penalty Act and the Prison Litigation Reform Act, which limited habeas procedures and prisoner civil rights actions, as "promising examples of how Congress can reduce the disparity between the resources and workload in the federal Judiciary without endangering its distinctive character." William H. Rehnquist, *The 1997 Year-End Report on the Federal Judiciary*, THE THIRD BRANCH, Jan. 1998, at 1, 2. In the same report, the Chief Justice chastised Congress for its repeated "desire to federalize new crimes." *Id.*

Viewed in this light, several other cases on which Cole focuses appear less remarkable than the cases that precede them. Take, for example, *Whren v. United States*,[71] in which a unanimous Court upheld the District of Columbia police officers' stop of two black men in a vehicle, based on violations of the traffic code, even though the officers in question were barred from enforcing traffic laws unless they observed an immediate safety threat.[72] The men stopped had argued that the Court should construct a test that allows for inquiry into whether the stops were actually made based upon some ulterior motive. The Court, however, held that the officers' intent could not be used to establish a Fourth Amendment violation — even when the ostensible reason for the stop is "actual and admitted pretext."[73] It proceeded to hold that the deviation from usual police practices cannot be used to show a Fourth Amendment violation.[74] Instead, the Court articulated a bright-line "objective" test — namely, whether there is probable cause for believing there to be a violation of any vehicle code section.[75]

Cole is certainly correct to argue that the subtext to *Whren*, mentioned only briefly by the Court, is race-motivated stops. Whren had argued for a subjective intent test, in order to prevent those stops in which race is really what is motivating the stop. As Cole describes *Whren*, it stands for the proposition that even "a racially motivated pretextual stop is 'reasonable' under the Fourth Amendment" (p. 39).

While this characterization of *Whren* is technically accurate, the real story here is the two-part "divide-and-conquer" approach that the Court has generally adopted for issues of equality and liberty in the criminal justice system. First, as previously discussed, the Court has adhered to a constricting paradigm under the Equal Protection Clause that makes it almost impossible to show race- or ethnicity-based discrimination, much less class-based discrimination.[76] Except in that rare (and practically unheard of) case in which an officer admits that she or he made a traffic stop because of the driver's skin color, proving an equal protection violation is an almost unattainable task. Second, the standard that the Court has erected to determine whether liberty has been denied — in this case, the requirement that there have been no traffic infraction, even in cases in which this infraction was an "actual and admitted pretext" for the stop[77] — makes it practically impossible to prove a violation. As *Whren* illustrates, traffic stops will survive

71. 517 U.S. 806 (1996).

72. *See id.* at 808-10, 816-17.

73. *Id.* at 814 (emphasis omitted).

74. *See id.* at 814-15.

75. *See id.* at 819.

76. *See supra* Section III.B.

77. *Whren*, 517 U.S. at 814 (emphasis omitted).

Fourth Amendment scrutiny, no matter how clear the evidence that the stop is pretextual, so long as there was a broken taillight, an unfastened seat belt, or any other reason for stopping the vehicle.

Whren, therefore, is less significant than the Court's more general insistence on looking separately at claimed Equal Protection Clause and Fourth Amendment violations, instead of inquiring how these clauses might work together. The same is true of many of the other areas of the criminal justice system that Cole describes. For instance, in examining the composition of juries, the Court has separated out the equal protection and "fair cross section" requirements, rather than examining how these requirements might work together. As Cole points out, "prosecutors should always be able to proffer some race-neutral reasons for their [peremptory] strikes" (p. 122). It does not require an unusually savvy prosecutor to come up with such a rationale and thereby to rebut a claim that equal protection has been denied. So, too, in the area of punishment, the Court separates out the "cruel and unusual punishment" requirement from the command of equal protection, thereby allowing punishment systems in which the race of the victim — and sometimes the perpetrator — bears profoundly on the punishment meted out.

Cole probably would not disagree with this assessment of the Supreme Court's view of race in the area of criminal law — in particular, that the federal courts' failure to address the race- and class-based injustices documented in *No Equal Justice* are the consequence of the constricting paradigm that the Burger and Rehnquist Courts have generally embraced in considering matters of race. The next question, then, is what can be done to remedy this situation. Can the Court's blindness to race- and class-based injustices in the criminal system be cured, without wholesale reconstruction of the Court's equal protection methodology?

IV. A Restorative Vision

Cole does an admirable job of poring over statistical and anecdotal data showing persistent race and class disparities, and of connecting those disparities to individual decisions of the Supreme Court. While he makes a persuasive argument that several of these cases ought to have come out differently, and that our criminal justice system might look significantly different if they had, Cole does not endeavor to connect decisions such as *McCleskey* to the constricting paradigm that the Court has adopted more generally with regard to matters of race. His decision not to do so is certainly understandable — after all, he already has bitten off quite a large topic as it is. But the consequence is that Cole's book fails to propose remedies that are up to the task of eliminating the race- and class-based inequities that his book so thoroughly catalogues.

A. *Cole's Prescription*

The least satisfying part of Cole's book is the concluding chapter, entitled "Remedies" (pp. 181-212). Instead of suggesting a reformation of the way that we think about constitutional rights in the area of criminal justice, *No Equal Justice* ends with a series of modest measures. The recommendations proffered in this section tend to emphasize communitarian instead of libertarian values. They include, for example, avoiding exclusion of jurors by "requiring much more persuasive explanations for peremptory strikes" (p. 188), "reinforcing the community ties that deter crimes in the first place" (p. 190), "strengthen[ing] measures to keep children in school" (p. 192), and imposing "reintegrative shaming" penalties (pp. 195-201).

This laundry list of potential changes that can feasibly be accomplished is discomfiting not so much because it contains bad ideas — indeed, most of Cole's suggestions would surely improve our present system — but rather because they appear wholly inadequate to address the systemic race- and class-based inequities to which Cole devotes the first 180 pages of his book. Cole's recommendations are, moreover, strikingly disconsonant with the portrait of the criminal justice system that he so meticulously paints. Simply put, the remedies Cole proposes offer little hope of eliminating race- and class-based discrimination within the criminal justice system.

Cole argues that the "racial divide fostered and furthered by inequality in criminal justice has contributed to a spiral of crime and decay in the inner city, corroding the sense of belonging that encourages compliance with the criminal law" (p. 13). The factual predicate for this statement seems somewhat dated. Recent statistics show crime to be on the decline nationwide,[78] even as the as the zeal to impose stiffer penalties on offenders continues unabated.[79] But even assuming the truth of Cole's statement, the remedies that Cole offers at best deal

78. *See* Fox Butterfield, *Cities Reduce Crime and Conflict Without New York-Style Hardball*, N.Y. TIMES, Mar. 4, 2000, at A1 (noting pronounced decrease in crime rate nationwide and in numerous major cities between 1991 and 1998); *see also* FEDERAL BUREAU OF INVESTIGATION, UNIFORM CRIME REPORTS JANUARY-JUNE 1999 (1999), <http://www.fbi.gov/ucr/ucr0699.pdf> (noting 10% decrease in serious crime reported by nation's law enforcement agencies in the first six months of 1999 compared to the first six months of previous year) (visited June 13, 2000).

79. In California, for example, voters in the March, 2000 elections approved three tough-on-crime initiatives by wide margins. Two of the measures (Propositions 18 and 19) expand the circumstances under which the death penalty can be imposed. *See* CALIFORNIA SEC'Y OF STATE, CALIFORNIA VOTER INFORMATION GUIDE 32-33, 36-37 (2000). The other (Proposition 21) requires more juvenile offenders to be tried in adult courts, requires that certain juvenile offenders be held in adult correctional facilities, and increases penalties for "gang-related" crime, including the imposition of the death penalty for "gang-related" murders. *See id.* at 44-47. Propositions 18 and 19 both garnered over 70% of the popular vote, while Proposition 21 garnered 62.1%. *See* California Secretary of State, Election Returns, March 2000 Primary, <http://vote2000.ss.ca.gov/returns/prop/00.htm> (visited June 13, 2000).

with the manifestation of the illness, which Cole describes as a breakdown in our sense of community. The solutions do not, for the most part, deal with the underlying malady in a criminal justice system that fosters and furthers racial inequality.

B. *Some Stronger Medicine*

How might our criminal justice system be reformed so as to honor the constitutional commandment of equality in the area of criminal justice? While Cole describes at great length various inequities in our criminal justice system as presently constructed, he does not provide an overarching theory of what our ideal should be.

To borrow the title from a recent book on the Constitution and criminal procedure, one written from a very different perspective, it would benefit us to return to constitutional "first principles" in constructing this ideal.[80] It is instructive to view Cole's approach to the criminal justice alongside the approach advocated by Akhil Amar in *The Constitution and Criminal Procedure: First Principles.* While Cole approaches the criminal justice system from the street-level up, Amar urges an approach that might be deemed its polar opposite. A constitutional theorist rather than a civil rights lawyer, Amar is less interested in what actually happens in our criminal justice system than he is in the Constitution's text and history. Amar thus urges that we read the Constitution as "rooted in enduring values that Americans can recognize as *our* values," including "[t]ruth and the protection of innocence."[81] Amar might have added to his list equality in the eyes of the law regardless of race or wealth, for this is surely one of the values that Americans recognize as their own, at least since the time of the Civil War Amendments.[82]

Consistent with this approach, Amar has argued elsewhere that the "very meaning" of the rights embedded in the original Constitution was "subtly redefined" by the Civil War Amendments.[83] As an example, Amar describes how the First Amendment's guarantee of freedom of speech was refined by the Fourteenth Amendment's concern with racial equality: "The 1866 redefinition changed the central purpose and optimal 'due process' implementation of freedom of speech,

80. *See* AKHIL REED AMAR, THE CONSTITUTION AND CRIMINAL PROCEDURE: FIRST PRINCIPLES (1997).

81. *Id.* at 155.

82. *See* Plessy v. Ferguson, 163 U.S. 537, 559 (1896) (Harlan, J., dissenting) ("[I]n view of the Constitution, in the eye of the law, there is in this country no superior, dominant, ruling class of citizens. There is no caste here. Our Constitution is color-blind, and neither knows nor tolerates classes among citizens. In respect of civil rights, all citizens are equal before the law.").

83. Akhil Reed Amar, *The Bill of Rights and the Fourteenth Amendment*, 101 YALE L.J. 1193, 1277 (1992).

making central certain types of speech that had previously been far more peripheral: religious speech, artistic speech and, most importantly, minority speech."[84]

As Carol Steiker has argued, Amar may be faulted for valuing "first principles" a bit too much, overemphasizing the text and history of constitutional provisions while ignoring the sort of street-level inequalities on which Cole focuses.[85] But if Amar is guilty of focusing on first principles too much, then Cole might justifiably be accused of focusing on them too little. Put another way, Cole's analysis might benefit from a bit more constitutional theory.

To envision how our jurisprudence might be reconstructed to alleviate the inequalities that Cole describes, we should embrace Amar's suggestion that the Fourteenth Amendment breathed new meaning into the rights guaranteed by the original Constitution.[86] How else, after all, can we understand cases like *Bolling v. Sharpe*,[87] which apply the requirement of equal protection to the federal government by way of the Fifth Amendment's Due Process Clause, despite the fact that the Equal Protection Clause by its terms applies only to the states?[88] Therefore, we should read the Fourteenth Amendment's guarantee of racial equality alongside the liberty-protecting provisions of the Bill of Rights. For example, instead of engaging in a Fourth Amendment inquiry that is wholly separate from an Equal Protection Clause inquiry, as the Court does in *Whren*, we should inquire how these provisions complement and reinforce each other.

Such a failure to combine "first principles" of the Bill of Rights and the Equal Protection Clause contributes to the Supreme Court's failure to recognize inequality in the criminal justice system. That failure can, as we have explained, be traced to the narrow approach it has generally taken in assessing equal protection claims. But whatever the faults of this approach, taking the command of equality seriously in the area of criminal justice would *not* necessarily require a wholesale

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84. *Id.* at 1282.

85. Carol Steiker, *"First Principles" of Constitutional Criminal Procedure: A Mistake?*, 112 HARV. L. REV. 680, 690 (1999) (reviewing AMAR, *supra* note 80). Steiker also persuasively argues that Amar fails to apply the principles he preaches. For example, she points out that, in *First Principles*, Amar "underplays the extent to which constitutional criminal procedure really is and should be about race, class, and equality." *Id.* at 693. Although Amar's earlier article, *The Bill of Rights and the Fourteenth Amendment*, *see* Amar, *supra* note 83, argues in favor of an approach to the Bill of Rights that focuses on racial equality, *First Principles* generally eschews such an approach.

86. *See* Amar, *The Bill of Rights and the Fourteenth Amendment*, *supra* note 83, at 1282 (arguing that " 'freedom of speech' was subtly redefined in 1866").

87. 347 U.S. 497 (1954) (holding that equal protection principle applies to federal government by way of the Due Process Clause of the Fifth Amendment).

88. *See* Amar, *The Bill of Rights and the Fourteenth Amendment*, *supra* note 83, at 1281-84 (arguing that Fourteenth Amendment alters the meaning of the First Amendment as to the federal government as well as the states).

revision of the Court's Equal Protection Clause methodology. Instead, it would require a recognition that the command of equality has special weight in cases in which rights protected by the Bill of Rights, including those that apply to the criminal justice system, are implicated.

In addition to the practical realities on which Cole focuses, there is textual, historical, and theoretical support for an approach that gives special attention to the command of equality in the area of criminal procedure. The rights of criminal defendants were, of course, a dominant concern of the Framers of the Constitution, provisions protecting these rights being embedded in the Fourth, Fifth, Sixth, and Eighth Amendments, not to mention the Bill of Attainder, Ex Post Facto, and Habeas Corpus Clauses. Even more important, concerns regarding the equal implementation of state criminal laws were a dominant concern at the time of the Civil War Amendments. The Framers of the Fourteenth Amendment were especially wary of southern states denying newly freed blacks through unequal administration of the criminal laws.[89]

Even aside from constitutional text and history, there are compelling theoretical reasons for the approach we urge. To the extent one views the purpose of constitutional law as correcting deficiencies in majoritarian democracy,[90] claims of race- and class-based inequality in the criminal justice system have special force, for two complementary reasons. First, as Cole points out, if there is any group that is specially disadvantaged in the political process, it is criminal suspects and defendants (p. 139). Given the "widespread societal hostility" toward those accused of criminal activity, the legislature can hardly be counted on to eliminate discriminatory practices in the criminal justice system.[91] Second, even apart from the Constitution's special sensitivity to the rights of criminal defendants, Cole's book makes a convincing case that the rights of racial minorities *generally*, and not just actual defendants, are implicated by the practices he documents. It is communities perceived by law enforcement to be criminal in character that bear the brunt of these practices — from the numerous African-

89. As Justice Blackmun observed in his *McCleskey* dissent: "[T]he legislative history of the Fourteenth Amendment reminds us that discriminatory enforcement of States' criminal laws was a matter of great concern for the drafters." 481 U.S. at 346; *see also id.* at 346-47 & n.2 (quoting statements from legislative history of Fourteenth Amendment); LEON LITWACK, BEEN IN THE STORM SO LONG: THE AFTERMATH OF SLAVERY 285-86 (1979) ("The double standard of white justice was nowhere clearer . . . than in the disparate punishments meted out to whites and blacks convicted of similar crimes"); Randall L. Kennedy, McCleskey v. Kemp*: Race, Capital Punishment and the Supreme Court*, 101 HARV. L. REV. 1388, 1411 (1988) ("In the aftermath of slavery, Southern officials continued to administer the death penalty, and indeed the entire apparatus of the criminal law, in a patently racist fashion").

90. *See generally* JOHN HART ELY, DEMOCRACY AND DISTRUST (1980).

91. *See id.* at 154.

American motorists stopped by Maryland state police who may never meet one another, to the innocent Latino immigrants wrongly convicted and imprisoned as the result of the LAPD's pattern and practice of misconduct in the Rampart Division. Minorities in the criminal justice system are thus disadvantaged in their ability to protect their interests in the political process, further supporting the conclusion that courts should exercise especially searching review of practices that disproportionately burden minorities accused or suspected of violating criminal laws.[92]

Of course, we need not all agree as a matter of constitutional theory to reach the same conclusion. As Steiker points out, we can disagree on how to interpret the Constitution — as, say, between historical and representation-reinforcement models — and still arrive at the same place: namely, that the provisions of the Constitution that protect criminal defendants should be construed, in light of the Fourteenth Amendment, in a way that is particularly sensitive to racial injustice.

Seen in this light, Cole's focus on communitarian remedies (pp. 189-209) seems misplaced. Our real focus should be on reconciling egalitarianism and libertarianism — and, in particular, on how the liberty-protecting provisions of the Bill of Rights should be read so as to reinforce the Fourteenth Amendment's mandate of equality.

C. *Envisioning Justice: The Case of Race-Based Traffic Stops*

Simply described, the approach we advocate is that, where substantive rights protected by the Bill of Rights are at issue, courts should be especially attentive to racial discrimination. Taking this approach would be no small matter. It would require that the federal judiciary consider claims of those who have heretofore been denied standing, to reevaluate the evidentiary burden that those challenging discriminatory practices must bear, and to absorb much greater responsibility for remedying inequality. As daunting as this might seem, we believe that the federal judiciary could take on greater responsibilities for securing equality in the area of criminal justice, without wholesale abandonment of the equal protection methodology it has generally embraced in areas such as school desegregation.

92. This partly explains why Cole's suggestions for political action in response to the inequalities he mentions, *see* pp. 188-201, seem somewhat quixotic. As Cole recognizes, "[l]egislators have little interest in protecting the rights of accused criminals. So if the judiciary doesn't protect them, nobody will." P. 139. If there is any area in which majoritarian bodies cannot be trusted to remedy inequality, it is in the area of criminal justice. For this reason, we argue, it is ultimately the federal courts, the institution of democracy charged with protecting the basic rights of the unpopular and powerless, that must take responsibility in this area.

Of course, there may well be good reasons for *generally* abandoning the bad-apple model — both in criminal and in noncriminal cases — in favor of an approach that considers the disparate impact of an entire system on racial minorities.[93] But one need not accept such a far-reaching argument to believe that the Court should change the way it looks at claims of racial inequality in the criminal arena. As we have argued, a higher standard in this arena is justifiable, based upon the principle that race discrimination is especially noxious where constitutionally protected liberties are at issue. How would this principle play out in practice? As an initial matter, it would surely prescribe a different result in several of the Supreme Court decisions that Cole discusses. For instance, in *McCleskey v. Kemp*, it would have required that the Court consider the interplay between McCleskey's Eighth Amendment and Fourteenth Amendment claims. Confronted with compelling evidence of systemwide racial disparities in the application of the most severe penalty possible, the Court might have shifted the burden to the state to come up with a race-neutral explanation for this disparity. In *United States v. Armstrong*, our approach would have required the Court to consider the interplay between the Fifth Amendment right to "due process," the Sixth Amendment right to "compulsory process for obtaining witnesses in [the accused's] favor," and the Fourteenth Amendment right to "equal protection." What Armstrong was demanding, after all, was simply that the prosecutor be required to provide a nondiscriminatory explanation of the basis for the statistical disparity in crack prosecutions. Reading the liberty- and equality-protecting clauses of the Constitution together would have compelled the Court to give Armstrong the discovery needed to assess whether, consciously or unconsciously, the United States Attorney's office was in fact engaging in systemic race-based discrimination in deciding whom to prosecute.

But the principle we identify would not simply call for more searching review of practices having a disparate racial impact. Our approach would also require reevaluation of existing constitutional doctrine in at least three respects: (1) assessing who has *standing* to bring challenges demanding systemic reform, (2) determining the evidentiary *standards* applied to decide whether there is racial discrimination in the enforcement of criminal laws, and (3) crafting judicial *remedies* for systemic discrimination in the administration of criminal justice. Without revising each of the subjects that Cole's book covers, we shall attempt to illuminate this approach by focusing on race-based traffic stops by police.

93. As our discussion in Part III *supra* suggests, we would favor such a revision.

1. *Standing to Sue*

Ensuring nondiscrimination in traffic stops and other seizures requires, as an initial matter, reconsideration of the rules that the Court has adopted for determining who gets into court. One of the problems that frequently bedevils civil rights lawyers seeking to reform even the most egregious police misconduct is finding anyone who has standing to seek injunctive relief. As it has done in other areas of criminal law, the Court has set the bar for standing so high that it is often unreachable, making it practically impossible for private plaintiffs to obtain injunctive relief.

In *City of Los Angeles v. Lyons*,[94] for example, the Supreme Court held that an African-American man seeking an injunction against the LAPD's use of the chokehold lacked standing. Although Lyons had allegedly been subjected to a chokehold without provocation, the Court held that he could not show "any real or immediate threat that [he] would be wronged again,"[95] since he could not show an imminent threat that the LAPD would again use the chokehold on him personally. A recent *en banc* decision from the Ninth Circuit Court of Appeals applied *Lyons* to preclude plaintiffs from obtaining injunctive relief for alleged racial discrimination in traffic stops. More recently, in *Hodgers-Durgin v. Lopez*, Latino plaintiffs sued to stop the United States Border Patrol's alleged "systemic violations of the Fourth Amendment" resulting from its practice of stopping people of "Hispanic, Latin, or Mexican appearance."[96] The court held that the named plaintiffs could not show a "sufficient likelihood" that they personally would be stopped again, and that, absent "a likelihood of injury to the named plaintiffs," no equitable relief could be issued on behalf of the class they sought to represent.[97]

The Court's standing doctrine poses an awesome barrier to lawsuits challenging police practices, especially given *Lyons*'s statement that, to seek equitable relief against a government entity, one must show that "*all* police officers" in a jurisdiction "*always*" engage in the purportedly illegal practice with those they encounter *and* that the jurisdiction "ordered or authorized police officers to act in such manner."[98] Our approach would demand that courts treat claims of discriminatory traffic stops under the Fourth and Fourteenth Amendment with the same solicitude with which they have treated claims under the First Amendment. In the First Amendment context,

94. 461 U.S. 95 (1983).

95. *Id.* at 111.

96. 799 F.3d 1037, 1039-40 (9th Cir. 1999) (en banc).

97. *See id.* at 1044.

98. *Lyons*, 461 U.S. at 106.

the Court has broadened generally applicable standing rules, in recognition of the special problems posed by state action that has a chilling effect upon protected speech.[99] It has allowed First Amendment challenges to practices that burden protected speech, by those whose speech might itself be unprotected.[100] The Court has justified this exception to normal standing rules as "strong medicine" that is required because the "First Amendment needs breathing space."[101]

Giving the same breathing space to the Fourth Amendment rights of minority motorists warrants comparable expansion of standing doctrine. Even if ordinary standing rules would require motorists to demonstrate a likelihood of being stopped again, as *Hodgers-Durgin* held, motorists who have been stopped in the past should be granted standing to pursue injunctive relief, whether or not they can prove that they are likely to be stopped in the future. Crafting broader standing rules in this context would recognize the importance of protecting minority drivers who are not before the court, and who may refrain from driving into certain areas because of discriminatory police practices. At the very least, plaintiffs should be allowed into court where they allege a pattern and practice affecting a class of individuals whose interests they seek to represent.

In this regard, First Amendment doctrine provides another apt comparison. As Justice Brennan explained, lenient standing rules in the First Amendment area can be justified by concerns that "persons whose expression is constitutionally protected may well refrain from exercising their rights for fear of criminal sanctions."[102] By the same token, absent judicial intervention, black motorists not before the Court might be deterred from driving into areas where police are known for making race-based stops. Accordingly, as in the First Amendment context, unconstitutional practices might otherwise flourish, because, under ordinary standing rules, there are few if any people who can get into court to assert that their rights have actually been violated. Affected individuals may simply choose to avoid confrontation with authorities, rather than running afoul of the law and then taking their chances in court.

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99. *See, e.g.*, Secretary of State v. J.H. Munson Co., 467 U.S. 947, 954-59 (1984).

100. *See id.* at 957 ("[W]here the claim is that a statute is overly broad in violation of the First Amendment, the Court has allowed a party to assert the rights of another without regard to the ability of the other to assert his own claims and with no requirement that the person making the attack demonstrate that his own conduct could not be regulated by a statute drawn with the requisite narrow specificity.") (quoting Broadrick v. Oklahoma, 413 U.S. 601, 612 (1973) (quoting Dombrowski v. Pfister, 380 U.S. 479, 486 (1965)) (internal quotation marks omitted).

101. Broadrick v. Oklahoma, 413 U.S. 601, 611, 613 (1973).

102. Gooding v. Wilson, 405 U.S. 518, 521 (1972).

2. *Evidentiary Standards*

Recognizing the interplay between the liberty-protecting Fourth Amendment and the equality-protecting Fourteenth Amendment would also affect the standards applied in assessing whether the government has acted in a discriminatory fashion. As we have explained, equal protection doctrine has changed since the 1970s to require litigants to demonstrate intentional discrimination on the part of some bad actor. In *Whren*, of course, the Supreme Court reminded us that the high standard it was setting to prove a Fourth Amendment violation did not foreclose plaintiffs from attempting to show "intentionally discriminatory application of laws [under] the Equal Protection Clause."[103] But the limited evidence that Courts will consider in determining whether there has been intentional discrimination, exemplified in *Davis* and *Arlington Heights*, makes this a nearly impossible task in most traffic stop cases.

A recent Ninth Circuit decision demonstrates the difficulties faced by civil rights litigants and by well-meaning courts addressing race-based traffic stops, while at the same time suggesting how a revised jurisprudence of equality might look. In *Price v. Kramer*, the Ninth Circuit upheld a damages verdict on behalf of three young men (two black and one white) who were stopped by police officers in the City of Torrance, California.[104] As in *Whren*, the plaintiffs asserted violation of their rights under the Fourth Amendment, including that the stop of their vehicle was made without any reasonable suspicion or probable cause.[105] And as in *Whren*, the clear subtext is race. As the Ninth Circuit notes, only the two black men — and not the white man in the back seat — were visible to the officers at the time of the stop.[106] The stop, moreover, occurred just after the young men had crossed into the City of Torrance, which is only 1.5% black, from the City of Los Angeles, which is majority non-Caucasian and 15% black.[107] During the stop, one of the officers told one of the African-American young men: "You're not supposed to be here."[108] But notably, no race discrimination claim was made (or at least none made it to trial), presumably because proving intentional race discrimination in such a case is a near impossibility, absent an officer who admits that the stop was based upon race.

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103. *Whren*, 517 U.S. at 813.

104. 200 F.3d 1237 (9th Cir. 2000).

105. *Id.* at 1240. In addition to alleging an illegal stop, the young men raised two other Fourth Amendment claims: that the subsequent search of the vehicle was unlawful and that officers used excessive force during the stop. *See id.*

106. *See id.* at 1241.

107. *See id.* at 1240.

108. *See id.* at 1243.

The Ninth Circuit upheld the jury verdict on the illegal stop, concluding that, in contrast to *Whren*, the evidence supported the conclusion that there was no objectively reasonable basis for the stop.[109] What is most noteworthy about the case, however, is not simply the absence of a race discrimination claim, but that the officers actually argued for reversal on the ground that the introduction of evidence at trial suggesting a racial motivation for the stop "unfairly prejudiced" the jury.[110] Writing for the Ninth Circuit, Judge Reinhardt rejected the officers' argument, explaining that the evidence of racial bias was relevant, because it tended to support the young men's version of events — namely, that there was no objectively reasonable basis for the stop, and that the officers' race-neutral explanations for the stop (a seat belt violation and a broken taillight) were untruthful. The Ninth Circuit also found the evidence of racial bias relevant to the question for purposes of punitive damages.

Price v. Kramer is surely correct to conclude that evidence of racial bias is relevant to whether the plaintiffs' Fourth Amendment rights were violated. But it is not relevant merely because it tends to support the plaintiffs' version of events (namely that there was no objectively reasonable basis for stopping them) and their punitive damages. Courts should not have to apologize for allowing evidence of racial bias to come before a jury. Under the approach we advocate, the evidence cited by the Ninth Circuit — including the racial compositions of the City of Torrance compared to the City of Los Angeles, the fact that the white passenger was not visible at the time of the stop, and statements like "You're not supposed to be here" — would be more than enough to make out a racial discrimination claim against the individual officers, even in the absence of any explicit statement of racial animus.

Allowing such a claim to go forward would not require a drastic revision of current doctrine; it is in fact quite possible that, had the *Price* plaintiffs made an equal protection claim, they would have survived summary judgement as to the individual officers under current doctrine, based on the same evidence that was presented in support of their Fourth Amendment claims. But we would go further than this when claims of race-based stops are made. Plaintiffs should also be able to make out a prima facie race discrimination claim by showing a pattern of stops on the part of individual officers, or even of all officers in a Department. This evidence could be used to show that the Department has a "policy or custom" of discriminatory stops, pursuant to which individual officers were acting.[111] To make out such a claim,

109. *See id.* at 1246-48.

110. *See id.* at 1249.

111. Under *Monell v. Department of Social Services*, 436 U.S. 658, 694 (1978), a municipality may only be held liable under 42 U.S.C. § 1983 for the unconstitutional actions of its

plaintiffs should be allowed discovery into data regarding the race of drivers stopped by individual officers and by police departments generally. Even standing alone, a disproportionately high rate of traffic stops of African Americans in, for example, those parts of Torrance adjoining the Los Angeles border should suffice to survive summary judgment. In conjunction with the more lenient standing rule we advocate, this showing (if unrebutted) would make it possible for plaintiffs like those in *Price* to obtain injunctive relief against local police departments that systematically discriminate based on race.[112]

3. *Judicial Remedies*

Even if standing and evidentiary rules were revised to allow for enhanced judicial attention to race-based stops, one might well wonder about the judiciary's institutional capacity to craft adequate remedies.[113] After all, one might argue, forcing a school district to stop segregating its students based on race provides, at least, a definable mandate. Even in *McCleskey*, had the racial discrimination argument prevailed, there is a readily apparent, albeit quite broad, remedy that the Court could have ordered — namely, that the death penalty be stopped in those categories of capital cases where race could be shown generally to affect the outcome. But race-based traffic stops might appear to present a different circumstance. After all, a police department can hardly be enjoined from stopping all black motorists. How is a court to remedy, for example, a police department that, as a whole, is disproportionately stopping black drivers?

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employees if an official "policy or custom" can be shown. Thus, in an equal protection challenge, establishing municipal liability would require a showing that the officers' discriminatory actions were taken pursuant to a municipal policy or custom. *See, e.g.*, Judge v. City of Lowell, 160 F.3d 67, 78 (1st Cir. 1998) (to make out equal protection claim against municipality, plaintiff must show a custom or policy resulting in constitutional injury to her); National Association of Government Employees v. City Public Service Bd. of San Antonio, 40 F.3d 698, 714-15 (5th Cir. 1994) (to prove claim under § 1983 based on violation of equal protection, plaintiff must show that government agency "maintained an official policy or custom of discrimination"). In *Price v. Kramer*, the young men abandoned their claims against the City of Torrance. 200 F.3d at 1256. The opinion does not explain why these claims were abandoned or whether there had been any discovery regarding a policy or custom of race-based stops on the part of Torrance police officers.

112. The *Price* plaintiffs apparently did not make a claim for injunctive relief, and it is almost certain that they would have lacked standing to do so under current doctrine had they tried. There is no indication in the opinion that the young men had been stopped before in the City of Torrance or, for that matter, that they had ever driven in the City of Torrance before the night of the stop.

113. This concern is prompted by Professor Evan Caminker's suggestion, in response to an earlier draft of this Review, that the real reason that the Court has avoided the approach we advocate may be the difficulty in judicially constructing a viable remedy for some types of systemic discrimination in the area of criminal justice. This may well be correct, although, for the reasons explained in the remaining text of this Section, we believe these difficulties to be surmountable.

We believe that the remedial problems of the approach we advocate are actually less severe than they might at first appear. As an initial matter, the recommendation we have made with respect to standing partially answers the problem of remedy — namely, that where it can be shown that a class of people is affected by a police department's discriminatory practices, named plaintiffs should have standing to seek equitable relief on the class's behalf, whether or not the individual plaintiffs can demonstrate that they themselves would be subjected to that practice again.

But broadening the circumstances under which classwide relief can be obtained only addresses part of the problem. The more prominent difficulty is what relief a court can plausibly order to correct the classwide problem.

While perhaps superficially different, the difficulties in rooting out race-based stops from a police department bear some similarities to the difficulties in rooting out the vestiges of discrimination from a once-segregated school system. The ultimate goal in the latter case is to move from a dual system to a unitary system that treats all students the same regardless of their race; the ultimate goal in the former is to move to a system that treats all motorists the same. At least two forms of remedy are apparent, one relatively modest and the other somewhat more drastic.

The more modest remedy would be for a court to issue an order prohibiting a police department from making traffic stops based upon the drivers' race (except in situations where they are pursuing a specifically described suspect), while at the same time requiring the department to keep statistics regarding the race and ethnicity of all drivers who are stopped. This statistical data could, in turn, be used to demonstrate whether the pattern of race-based stops has in fact ended. This is the approach constructed in a recent consent decree, the first of its kind, reached between the United States and the State of New Jersey.[114] As one New Jersey official explained, the idea behind this approach is simple: "If discriminatory treatment is made difficult to conceal, it will be unlikely to occur."[115]

The more drastic remedy, perhaps appropriate in the case of pronounced or intransigent government discrimination, would be for the court not only to require the collection of data, but also to impose numerical benchmarks on how many minority motorists may be stopped. This borrows from the remedy upheld by the Supreme Court in *United States v. Paradise*, in which a federal district court had ordered that, for

114. *See* United States v. New Jersey, No. 99-5970 (MLC) (D.N.J. Dec. 30, 1999) (consent decree) *available at* <http://www.usdoj.gov/crt/split/documents/jerseysa.htm> (visited June 13, 2000).

115. David Kocieniewski, *U.S. Will Monitor New Jersey Police on Race Profiling*, N.Y. TIMES (late ed.) Dec. 23, 1999, at A1.

a period of time, the Alabama Department of Public Safety hire or promote a qualified black for every white hired or promoted, as a remedy for the department's recalcitrant pattern of discrimination.[116] Taking the Maryland trooper example used earlier, the benchmark for black drivers stopped for speeding might be tied to the proportion of speeders overall who are black. For a specified period of time, a court might require Maryland to stop no more black speeders than would be expected in the absence of discrimination — or, failing that, to demonstrate some nondiscriminatory reason for this continued disparity.

There can be no doubt that ending racial discrimination in traffic stops, not to mention other discriminatory law enforcement practices, would require the federal judiciary to shoulder a burden that it has so far been unwilling to take on. As in school desegregation litigation, federal courts would necessarily have to exercise ongoing supervisory responsibility to ensure that government entities eliminate discriminatory practices like race-based stops "root and branch." But Cole's book demonstrates that such practices tear at the very fabric of our democracy, and that ending them is essential to restoring the public's trust — and especially the trust of racial minorities — in law enforcement. The New Jersey consent decree provides at least some precedent for how federal courts might execute their responsibilities in this area. We believe that, with some modifications to existing constitutional jurisprudence, the federal judiciary is fully capable of bearing responsibility for uprooting systemic racial discrimination in the criminal justice system.

V. CONCLUSION

Constitutional law is the place where principles hit the pavement, where theories of justice must come to grips with rough-and-tumble reality. Cole is to be commended for reminding us that racial inequality in the administration of criminal justice strikes at the very foundation of our government's legitimacy, for assembling a wealth of evidence supporting the conclusion that people of color are not treated fairly, and for connecting street-level inequalities to the decisions of the United States Supreme Court. The evidence he collects and presents makes a compelling case that many of the Court's decisions in the area of criminal justice should have come out the other way — and that our society would be a great deal closer to the ideal of "EQUAL JUSTICE UNDER LAW" if they had.

Cole paints a vivid, if disturbing, portrait of a criminal justice system that is a long way from making the promise of the Fourteenth Amendment a reality. He is surely correct to suggest that the lingering

116. 480 U.S. 149, 167-71 (1987) (plurality opinion of Brennan, J.).

racial divide on matters of criminal justice, not to mention the widespread distrust of the system within minority communities, can be traced to our collective failure to address systemic race and class inequality. While the Court has generally turned a blind eye to such inequality, criminal justice is actually the area among all others where the most searching constitutional scrutiny is warranted.

The weakness in *No Equal Justice* is its failure to step back and reconsider overarching constitutional principles, including both those on which the Supreme Court has relied and those on which a reconstructed jurisprudence of equality might rely. To be sure, there are dangers in focusing too much on "first principles."[117] But while Cole's descriptions of both Supreme Court precedent and the evidence of race- and class-based inequalities are painstakingly presented, he does not diagnose the underlying malady in our constitutional jurisprudence that has resulted in the criminal justice system's failure to live up to its promise. Doing so would not only help tie his story together, but would likely improve Cole's prescribed remedies.

In developing a curative vision, our starting point is to remember that the promise of *Brown v. Board of Education*, and indeed of the Fourteenth Amendment itself, is not simply to end racial segregation. It is, rather, to take seriously our constitutional obligation to root out racial injustice within public institutions. This entails more than simply stopping individual malefactors who are too inept or indifferent to mask their discriminatory intent. Even more critically, it demands identification and reform of bureaucracies that systematically disadvantage racial minorities, through the actions of numerous, unidentifiable government actors who may or may not even be conscious of their own racial prejudices.

The obligation to eliminate such inequalities carries special force where interests protected by the Bill of Rights, including those provisions that protect the criminally accused, are implicated. *No Equal Justice* makes a compelling argument that fulfilling this obligation will require much stronger medicine than the Supreme Court has prescribed. It will require that the Court consider the interplay between the Fourteenth Amendment's mandate of equality and the liberties guaranteed by the original Constitution. It will require that the federal judiciary scrutinize and uproot practices that — whether or not the product of conscious discrimination — continue to deny equality to all people. And it will require all of us to recognize that public faith in the blind goddess of justice cannot be restored, as long as the sores that prevent her from seeing racial inequality are allowed to remain unhealed.

117. *See* Steiker, *supra* note 85, at 693.