CONFRONTING UNEQUAL PROTECTION OF THE LAW

Race, Crime, and the Law. By Randall Kennedy. New York, New York: Pantheon Books, 1997. Pp. xiv, 539.

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In *Race, Crime, and the Law*, Professor Randall Kennedy confronts the complex and volatile subject of the impact of race on the administration of criminal justice. The promised reach of the book, to explore the "bitterly contested crossroads where race relations intersect with the rules that govern the apprehension, trial, and punishment of criminals,"[1] exceeds in important respects the author's grasp. Still, Kennedy's effort serves to broaden the terms of the debate on the extent of racism in the criminal process and provides a valuable source of ideas for grappling with this complex and pressing problem.

I.

Kennedy's thesis is that there is a need for a new approach to the debate, one which will move us from the extreme positions of two types of "deniers:" those on one side who refuse to recognize the existence of the problem of racism in the administration of criminal justice; and those on the other who see racism as the essential cause of the present plight of blacks caught up in the criminal justice system.[2] In response to the former, Kennedy reviews this country's shameful history, both of legally-sanctioned racism in the time of slavery, and of the equally corrupt "unofficial" condonation of it after the Civil War, and continuing to the present.[3] Kennedy develops these ideas in the two chapters that chronicle the legal system's failure to punish crimes against blacks[4] and its failure to protect the rights of blacks accused of crimes.[5] These moving chapters will give the reader greater understanding for the anger and mistrust of the criminal justice system pervasive in large segments of the black community. Kennedy argues persuasively that this history of racism in the enforcement of the criminal

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1. RANDALL KENNEDY, RACE, CRIME, AND THE LAW IX (1997).
2. *Id.* at 3-28.
3. *Id.* at 29-135.
4. *Id.* at 29-75 (Chapter 2, History: Unequal Protection).
5. *Id.* at 76-135 (Chapter 3, History: Unequal Enforcement).

law has exacerbated the crime problem in the very communities most afflicted by it.[6] This system excused persons who killed slaves for such "offenses" as failing to yield a sidewalk to a white person, and, after such abominations were erased from the law, uniformly failed to prosecute or convict those who lynched blacks.[7] This system excluded blacks from jury service by law, and, when the courts struck down such laws, used every imaginable subterfuge to keep them from serving.[8] Kennedy suggests to those who refuse to face either the history of racial discrimination or its present, subtler vestiges, that some perpetrators of crimes may see the inequities of the process as another sign of the hopelessness of their situation.[9] At the same time, the principal victims, the law-abiding members of the most-affected communities, are both less likely to provide crucial assistance to the authorities who have produced these abuses, or at least tolerated them, and less likely to receive whatever protection the criminal law provides.

Kennedy confronts the "deniers" on the other side with statistics showing that young black men are prosecuted for and convicted of a disproportionate percentage of street crime because they commit a disproportionate percentage of it.[10] According to Kennedy, many allegations of overt racism within the white power structure are unsubstantiated.[11] He thus effectively counters assertions that racism explains the "war on drugs," even though blacks have borne the brunt of that war.[12] Kennedy addresses two of these assertions in detail: that pregnant black women have been singled out for prosecution for transmission of cocaine to their fetuses;[13] and that the enormous disparity in penalties for crimes involving crack cocaine and powder cocaine can be explained by the fact that crack cocaine is

6. *Id.* at 113-135.
7. *Id.* at 39, 47.
8. *Id.* at 168-180.
9. *Id.* at 135.
10. *Id.* at 19-28.
11. *Id.*
12. *Id.* at 351-386 (Chapter 10, Race, Law, and Punishment: The War on Drugs).
13. *Id.* at 352-364. Kennedy here rebuts Professor Dorothy Roberts, who asserts that women of color have been targeted for prosecution for having transmitted crack to their babies. Kennedy suggests that rates of crack use and addiction are higher among black women and that the severity of the symptoms displayed by babies exposed to crack exceed those of babies exposed to other drugs. He also remarks that, if laws were enforced only against white mothers who expose their babies to crack, critical race theorists might claim that black babies were being deprived of equal protection.

by and large used by blacks.[14] Similarly, he decimates the recently proposed idea that black jurors should have the right to nullify the law to overcome society's racism.[15] Warning against legitimizing the tendency people have to privilege members of their own racial group, Kennedy concludes that black jury nullification would "demolish the moral framework" upon which a better American justice system could be built.[16] He reminds those who espouse these views that there is a distinction between a policy that is ill-advised and one that is racist.[17]

Kennedy advocates a strictly racially-neutral body of law.[18] He focuses on the role of the judiciary in creating that law, and calls upon judges not only to eliminate racist practices in the administration of the criminal process but also to reject proposals to right the scales through the imposition of race-conscious requirements.[19] He presents the idea of racial neutrality intelligently. However, while his position is persuasive when applied to some of the issues he addresses, it loses force to the extent that he assigns to the courts a role in dealing with problems over which the judiciary has little or no control. At the same time, Kennedy fails to apply his prescription for judicial action in areas where such action, sorely lacking at present, might well be useful in combating racism in the criminal justice system.

II.

Kennedy's chapters treating jury selection present the best arguments in favor of strict racial neutrality and against ameliorating the problem of racial discrimination through affirmative action.[20] Kennedy begins by recounting the sorry history of racism that has resulted in the underrepresentation and, in many instances, the nonrepresentation of blacks on juries.[21] He applauds judicial condemnation of explicit laws and practices

14. *Id.* at 364-380. Kennedy here points to Congressional debates in which black, liberal Congressmen pushed for severe punishment of cocaine- and crack-related offenses. Kennedy suggests that the distinction between crack and powder cocaine is legitimate and that stiffer penalties for the distribution of crack are justified because crack, the cheaper, more widely available narcotic, poses a threat to larger groups of people. As he does in the case of mothers who expose their babies to crack, Kennedy points out that, while blacks are primarily burdened with imprisonment for the distribution of crack, blacks also enjoy the primary benefit from the confinement of criminals who commit their (often violent) crimes in predominantly black neighborhoods.

15. *Id.* at 295-310 (Chapter 8, Playing the Race Card in a Criminal Trial).

16. *Id.* at 310.

17. *Id.* at 352, 386.

18. Kennedy thus concludes his book by calling for a justice system based on "the uncompromisable ideal" of treating all persons equally regardless of race, an aspiration best sought by responding to persons strictly on the basis of conduct not color. *Id.* at 390.

19. *Id.* at 271-284.

20. *Id.* at 168-230 (Chapter 5, Race and the Composition of Juries: Setting the Ground Rules; Chapter 6, Race and the Composition of Juries: The Peremptory Challenge).

21. *Id.* at 169-180 (Chapter 5, Race and the Composition of Juries: Setting the Ground Rules).

aimed at denying blacks the right to serve on juries. He also rejects subtler techniques such as the "key man" system which, though not racist on its face, has long served to assure that blacks do not enter the jury venire.[22] He then attacks another subterfuge, the peremptory challenge, which has been used to assure that blacks will not serve on juries even if they manage to pass through the initial selection scheme.[23] He is certainly correct that the Supreme Court's attempt to preclude racially prejudicial use of the peremptory challenge[24] has largely failed, since attorneys are clearly able—and apparently quite willing—to articulate non-race-based explanations for their actions while still excluding blacks from juries.[25] Because there is no way to enforce the Court's ruling, he concludes—as did Justice Thurgood Marshall[26]—that abolition of the peremptory challenge is the only viable solution.[27]

Kennedy next addresses proposals to increase minority representation on juries by affirmative steps, such as requiring that members of minority groups be guaranteed representation on every jury.[28] Kennedy points out that such a Balkanized jury system is likely to increase Americans' distrust

22. *Id.* at 181-186. Under the "key man" system of jury selection, leading citizens of the community such as aldermen, bankers, and ministers submit lists of prospective jurors to the jury commissioner, who then generates the source list.

23. *Id.* at 193-230 (Chapter 6, Race and the Composition of Juries: The Peremptory Challenge).

24. *See* Batson v. Kentucky, 476 U.S. 79 (1986) (holding that prosecutors may not use peremptory challenges to strike jurors based on race); McCollum v. Georgia, 55 U.S. 42 (1992) (holding that defendants also cannot racially discriminate in the exercise of peremptory challenges).

25. *See* Purkett v. Elem, 514 U.S. 765, 769 (1995) (holding that the race-neutral explanation tendered by attorney making use of the peremptory challenge need not be persuasive, or even plausible, and finding that prosecutor's peremptory challenge of a black male on the grounds that he had long, unkempt hair, a moustache and a beard was race-neutral and satisfied the prosecution's burden of articulating a nondiscriminatory reason for the strike); U.S. v. Chen, 131 F.3d 375, 379 (4th Cir. 1997) (holding that the Government's reasons for striking the three black prospective jurors which included demeanor, prior jury service, and lack of experience, were race-neutral); U.S. v. Lewis, 117 F.3d 980 (7th Cir. 1997) (holding unemployed status is a valid, race-neutral reason for a peremptory strike).

26. "The inherent potential of peremptory challenges to distort the jury process by permitting the exclusion of jurors on racial grounds should ideally lead the Court to ban them entirely from the criminal justice system." *Batson*, 476 U.S. at 107 (Marshall, J., concurring). *See also* Martha Minow, *Not Only for Myself: Identity, Politics and the Law*, 75 ORE. L. REV. 647, 688-91 (1996) (arguing for the elimination of peremptory challenges, in order to restrict the use of governmentally-imposed, group-based categories). Minow reproduces the argument in MARTHA MINOW, NOT ONLY FOR MYSELF: IDENTITY, POLITICS, AND THE LAW 98-100 (1997).

27. KENNEDY, *supra* note 1, at 229. It might have strengthened his proposal had Kennedy explained the need which would arise to replace the peremptory challenge with a liberalized challenge for cause, in order to assure that attorneys have an adequate opportunity to address bias and prejudice in the jury selection process.

28. *Id.* at 231-255 (Chapter 7, Race and the Composition of Juries: From Antidiscrimination to Imposing Diversity). See, e.g., Deborah A. Ramirez, *The Jury and the Ancient Custom of Trial by Jury De Medietate Linguae: A History and a Proposal for Change*, 74 B.U. L. REV. 777, 806-807 (1994) (arguing that public racial sorting will breed resentment and offering in the alternative the idea of "affirmative peremptories," which would allow

of each other and is an extremely impractical means of solving the under-representation problem.[29] He offers the more palatable alternative that courts should insist on measures that will assure that jury venires are inclusive of all segments of society.[30]

Thus Kennedy's chapters on jury selection effectively make the case for a court-imposed, racially-neutral approach to the discrimination problem, and do so in an area of great symbolic importance. The exclusion of blacks from jury service represents one of the most glaring and revolting examples of racism in the criminal justice system. The *practical* significance of his proposals is, however, less clear. Even if the jury selection process were operating ideally, it would hardly be noticed by most defendants, victims and witnesses, especially among the urban poor, a large percentage of whom are persons of color.[31] In the system to which these people are exposed, the trial itself and, with it, the jury has been all but eliminated. In many jurisdictions, 90% or more of felony arrests are disposed of by plea, as are a similar or higher number of non-dismissed misdemeanors.[32] Kennedy devotes nearly one-quarter of his book to the jury[33]—there are even seven pages dealing with racial discrimination in the selection of grand juries—but he barely acknowledges its almost vestigial status in the system.[34]

III.

To the extent that the formal process matters, however, Kennedy's argument in favor of a judicially imposed rule of racial neutrality is compelling. His attempt to extend this approach beyond the jury-selection process is much less so. This is best illustrated in Chapter 4, in which he proposes that courts mandate racial neutrality in police decision-making.[35]

The chapter focuses on the volatile and complex problem of police interaction with blacks and other minorities. Kennedy exposes the potency of this issue for blacks, who have suffered painfully from the use of race as

litigants to select individuals to be part of the pool of applicants from whom the jury would be chosen, thereby enhancing the litigants' chances of getting a jury of their peers).

29. KENNEDY, *supra* note 1, at 237-245.

30. *Id.* at 232-237.

31. In 1994 the "criminal justice control rate" for African American and Hispanic men (measuring the percentage of those groups in state or federal prison, in jail, or on probation or parole) was 42.5%. *See* MARC MAUER & TRACY HULING, YOUNG BLACK AMERICANS AND THE CRIMINAL JUSTICE SYSTEM: FIVE YEARS LATER 3 (1995).

32. WAYNE LAFAVE & JEROLD ISRAEL, CRIMINAL PROCEDURE 30-31 (8th ed. 1994). LaFave and Israel give an overall figure of 60-90% for felony arrests, but the rate of disposal by plea is higher in urban areas, which is where most blacks are prosecuted.

33. KENNEDY, *supra* note 1, at 65-66, 168-255, 277-282, 295-310.

34. The grand jury has evolved from its historic role of making independent decisions about which cases should proceed to trial into a tool of the prosecutor. *See* LEROY CLARK, THE GRAND JURY (1975).

35. KENNEDY, *supra* note 1, at 136-167 (Chapter 4, Race, Law and Suspicion: Using Color as a Proxy for Dangerousness).

a "proxy," a stereotype employed by the police to justify street confrontations of an embarrassing, and at times lethal, nature.[36] He acknowledges, however, that police often have a rational basis for the presumption behind the use of the proxy: the race of a person may, in certain situations, enhance the reliability of a prediction that criminality is afoot.[37] Kennedy concludes that, although the police response might be reasonable—not simply the act of a bigoted officer—the use of race as a factor in police decision-making should be prohibited.[38] He analogizes to other areas of the law in which the doctrine of strict scrutiny has led courts to declare that any consideration of race is illegitimate.[39] The same rule, he argues, should be applied to the police.[40]

Kennedy's thesis, when applied to police-citizen confrontations, is analytically dubious and is unlikely to effect a meaningful change in policing in black communities. The analytical problem stems from the fact that the Fourth Amendment, by its terms, prohibits only "unreasonable" searches,[41] and it is therefore difficult to imagine that a court would rule it impermissible for a police officer to consider race when it is reasonable to do so—and that is the scenario that Kennedy imagines.[42] The analogy to racially neutral policies in other areas, such as housing and employment,[43] in which no rational basis for consideration of race can be imagined, is therefore flawed. On a practical level, as repeated inquiries into the enforcement of

36. *Id.* at 136-163. Kennedy defines proxy as "a trait — in this case blackness — which is (or is believed to be) correlated with some other trait — in this case crime." *Id.* at 137.

37. *Id.* at 145.

38. *Id.* at 146, 150-163.

39. *Id.* at 146-150

40. *Id.* at 148-150.

41. U.S. CONST. amend. IV ("The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated . . . .").

42. KENNEDY, *supra* note 1, at 161-163.

43. The Civil Rights Act of 1964 made it unlawful for an employer —

(1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin; or

(2) to limit, segregate, or classify his employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's race, color, religion, sex, or national origin.

42 U.S.C. § 2002(e)(2) (1994);

The Fair Housing Act of 1968 made it unlawful

(a) To refuse to sell or rent after the making of a bona fide offer, or to refuse to negotiate for the sale or rental of, or otherwise make unavailable or deny, a dwelling to any person because of race, color, religion, sex, familial status, or national origin.

(b) To discriminate against any person in the terms, conditions, or privileges of sale or rental of a dwelling, or in the provision of services or facilities in connection therewith because of race, color, religion, sex, familial status, or national origin.

42 U.S.C. § 3604 (1994).

Fourth and Fifth Amendment rights demonstrate,[44] the fact that the courts have instructed the police to act in a certain manner does not mean that they will do so, nor does it mean that prosecutors or courts will serve as a meaningful check on unlawful police activities.[45] Even more importantly, a great deal of the police conduct with which Kennedy is concerned never reaches the stage where a court could condemn it, either because no arrest is made, because no incriminating evidence is found, or because the case is disposed of summarily, obviating a motion to suppress. Kennedy acknowledges in a summary fashion the danger that his proposal for race-neutral policing would be underenforced, but he concludes that the proposal is nonetheless justified because it sends the message that there will be zero tolerance for race-based decision-making.[46] There is a point to this argument, but Kennedy is here inadequately mindful of the likely reaction to such a policy among members of minority communities. They will see that nothing has changed as a result of judicial intervention and their despair, cynicism, and mistrust of government—the very ills which present police conduct produces—will simply be heightened.

One of the examples of race-based police actions which Kennedy condemns illustrates all that is wrong with his argument.[47] Plainclothes police in an unmarked truck observed a person sitting at the wheel of a car outside of an apartment complex. The person was in their opinion acting very nervously, moving his head rapidly as if watching for something. According to the officer, he was "a Mexican male in a predominantly white neighborhood."[48] The car was stationary when the plainclothes officers passed by in the truck, but its driver pulled away when a patrol car appeared. The police stopped the car and observed incriminating evidence.[49] Kennedy argues that a court should order such evidence suppressed because the police considered the defendant's race in justifying their stop of the car.[50] As we have noted, such a ruling would be inconsistent with the plain language of the Fourth Amendment. As regrettable as it may be, and, as Kennedy concedes,[51] *actual* race and class divisions in this society make it reasonable for police suspicion to be heightened with respect to

44. "Police perjury occurs most often when officers are testifying about searches and seizures." Morgan Cloud, *Judges, 'Testifying,' and the Constitution*, 69 S. CAL. L. REV. 1341, 1352 (1996) (discussing numerous investigations into police corruption and citing THE CITY OF NEW YORK COMMISSION TO INVESTIGATE ALLEGATIONS OF POLICE CORRUPTION AND THE ANTI-CORRUPTION PROCEDURES OF THE POLICE DEPARTMENT, COMMISSION REPORT: ANATOMY OF FAILURE: A PATH FOR SUCCESS (1994) [hereinafter NEW YORK COMMISSION REPORT]).

45. *See, e.g.*, NEW YORK COMMISSION REPORT 36-43 (reporting routine police perjury to justify unconstitutional searches and evidence of prosecutorial tolerance thereof).

46. KENNEDY, *supra* note 1, at 162.

47. *Id.* at 140.

48. *Id.* (quoting State v. Dean, 543 P.2d 425, 427 (Ariz. 1975)).

49. *Dean*, 543 P.2d at 426.

50. KENNEDY, *supra* note 1, at 161.

51. *Id.* at 145.

people who are in the "wrong" place. This is not to say, of course, that race *alone* should ever justify any police action, let alone the kind of offensive behavior often exhibited toward minority group members. In *Dean*, however, race was part of the "totality of the circumstances"[52] which justified the police action.

Consider, moreover, the practical effect of a rule requiring the suppression of evidence if the police included race as one of the factors justifying their actions. Had the police found nothing incriminating when they stopped the car, the person would have suffered the same race-based intrusion as did the defendant in *Dean*, but the rule would be irrelevant. The rule would also have no effect if, as is likely, the cases were disposed of by a guilty plea. The "crime control model" of the criminal process, at work in most criminal cases, attempts to keep the "cost" of administering cases to a minimum by pushing pleas through the system without the delays caused by pretrial motions.[53] Additionally, in situations like this, the police could simply omit mention of race as a factor in their actions—they clearly could justify a stop without relying on race.[54]

In sum, Kennedy attempts to use the square peg of judge-made rules to plug the round hole of improper police behavior toward minorities. To the extent that there is a solution to the problem, it is likely to lie in progressive leadership from those who are responsible for the administration of law enforcement; in the slower, messier and localized process of bringing more minority group members into police work; and in better sensitizing all police officers to the need to treat minority group members with the kind of dignity now often reserved for middle class whites. Adding yet another to the list of futile judicial pronouncements on police conduct might well be counterproductive.

IV.

Finally, we turn to our criticisms of Kennedy's approach for its failure to consider the potential of judicial action in vital areas in which such action might help us achieve the goal he proclaims. One such omission occurs with respect to capital punishment.[55] The other relates to the guilty

52. *See generally,* Illinois v. Gates, 462 U.S. 213 (1983) (holding that, in considering whether an informant's tip was sufficient to establish probable cause, a court should look to the totality of the circumstances surrounding the actions of the police).

53. Herbert Packer, *Two Models of the Criminal Process*, 113 U. PA. L. REV. 1, 9-13 (1964). The crime-control system is characterized not by formal adversarial proceedings, but by the summary processing of masses of defendants from arrest to conviction or dismissal. It pays only lip service to the requirements of due process.

54. *See* Terry v. Ohio, 392 U.S. 1 (1968) (holding that the police do not need probable cause to justify a "stop" of short duration; the reasonable suspicion of an experienced officer is enough).

55. *See* KENNEDY, *supra* note 1, at 311-350 (Chapter 9, Race, Law and Punishment: The Death Penalty).

plea system, a subject he hardly addresses but which is central to the experience of most of the minority defendants and victims with whom he is concerned.

Capital sentencing is an area where closer judicial supervision of the legal processes might play a decisive role in reversing patterns of racial discrimination. Indeed, by moving against invidious racial disparities in the administration of the death penalty the courts might, given the visibility of the issue, contribute significantly to a national resolve to eliminate racism in the administration of the criminal law. But Kennedy cannot bring himself to urge that the death penalty be legally restricted, much less eliminated, because of the racist way in which it has been implemented.

"It should come as no surprise," he writes of the Supreme Court's rejection of the famous Baldus study in *McCleskey v. Kemp*,[56] ". . . that the enforcement of criminal law in jurisdictions dominated politically by whites would generate statistics suggesting that, in these locales, officials respond more empathetically to white than black victims of crime. That response is simply a reflection of a race-conscious society which continually reproduces a racially stratified marketplace of emotion."[57] Kennedy goes on to assert that critics must "face the fact" that, "as far as reported cases disclose," defendants in capital cases rarely if ever succeed by using statistics.[58] Kennedy's analysis here suffers from capture by the "is," which is peculiar in a book characterized by so many sensible, well-reasoned, "oughts." As a digest of case law this statement is, of course, hard to dispute; but Kennedy's response to his own premises is Hamlet-like indecision rather than the candid admission that, in his view, the Constitution permits race to enter the judicial process in capital cases as a product of juror empathy. Kennedy criticizes Justice Powell's majority opinion in *McCleskey* as providing only evasive and vacuous reasons for rejecting evidence that people who kill whites in Georgia are four times more likely to be sentenced to death,[59] and he clearly deplores this outcome.[60] However, Kennedy apparently does not believe that capital sentencing must be stopped until the problem is solved or that the Constitution requires that prophylactic devices like increased appellate court scrutiny of racial sentencing patterns be adopted in an effort to protect black victims equally.

56. McCleskey v. Kemp, 481 U.S. 279, 287 (1987). Professor Baldus's statistical analysis of the implementation of the death penalty in Georgia demonstrated that the death penalty was four times as likely to be imposed on killers of whites than on killers of blacks. It also demonstrated that, while racial differences were insignificant in the most aggravated killings, the death sentence was significantly more likely to be imposed on black defendants than whites in less aggravated killings.

57. KENNEDY, *supra* note 1, at 349.

58. *Id.* at 340.

59. *Id.* at 329 (citing *McCleskey*, 481 U.S. at 355 (Blackmun, J., dissenting)).

60. *Id.* at 336-338.

Kennedy's discussion of the impact of race on capital sentencing reveals his own evasiveness. He criticizes Powell's conclusion that "accepting *McCleskey's* claim would invite members of other groups—'even' women—to launch equal protection challenges" as demagogic and for deceptively proceeding as if the Baldus discrepancies were minor.[61] He charges Powell with ignoring Georgia's history of racial bigotry and with denying that death *is* in fact different from other punishments. Powell also ignores the fact that "capital punishment in Georgia was systematically meted out according to an especially toxic social demarcation, the race line."[62] These deficiencies seriously decrease the value of the Court's opinion, but given the movement of Kennedy's earlier chapters, it is quite startling that in this instance he fails to propose a different result. The racial element in the implementation of the death penalty stymies Kennedy's effort to provide common sense, non-ideological guidance to those who ponder what to do about the "toxic" race line in the administration of the death penalty.

Kennedy's tendency to challenge judicial opinions without connecting criticism to a practical shift in outcome is also evident in his treatment of Justice Blackmun's dissent in *McCleskey*. Kennedy accuses Blackmun of "sentimentality" for declaring the Court's action in *McCleskey* a "departure" from "well-developed constitutional jurisprudence,"[63] since Powell's opinion could have been "reasonably derived from prior rulings."[64] Rather than sentimentality, it was Justice Blackmun's exposure to the grisly details of death penalty cases that turned him against it. His dramatic shift to the view that "I no longer shall tinker with the machinery of death,"[65] came after a career of professional (if not personal) devotion to the legitimacy of the death penalty. While a circuit judge, Blackmun authored one of the first opinions rejecting a record of racial discrimination in an Arkansas rape case death sentencing.[66] In response to questions from the Senate Judiciary Committee at his confirmation hearing in 1970, Blackmun conceded only that a law imposing the death penalty on a pedestrian for crossing a street against a red light might well be unconstitutional.[67] In 1972,

61. *Id.* at 337 (citing *McCleskey,* 481 U.S. at 316-317, 312-313).

62. *Id.*

63. *Id.* at 339 (citing *McCleskey*, 481 U.S. at 344 (Blackmun, J., dissenting)).

64. *Id.* at 340.

65. Callins v. Collins, 510 U.S. 1141, 1145 (1994) (Blackmun, J., dissenting).

66. Maxwell v. Bishop, 398 F.2d 138 (8th Cir. 1968) (holding that statistical evidence of discrimination in the imposition of the death penalty against black defendants in the South did not establish discrimination in a particular defendant's trial), *rev'd on other grounds*, 398 U.S. 262 (1970).

67. *See* William G. Ross, *The Questioning of Supreme Court Nominees at Senate Confirmation Hearings*, 62 TULANE L. REV. 109, 154 (1987).

Blackmun dissented from *Furman v. Georgia's* bid to end capital punishment,[68] and in 1976 he voted to uphold "guided discretion" laws in *Gregg v. Georgia.*[69]

In the context of discussions of capital punishment, "sentimental" has only one meaning: overly reluctant to authorize execution. But while Blackmun is labeled sentimental, those who implement the death penalty are not labeled cold and unfeeling. Indeed, Kennedy begins his chapter on the death penalty with a quotation from Justice Scalia:

"[T]he 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."[70]

It is difficult to read this quotation, cited, as it is, in the context of a discussion of capital punishment, as anything but a justification of racial discrimination in the implementation of the death penalty on the ground that it is impossible for judges and jurors to be free of bias. Kennedy, who eagerly and persuasively demolished numerous judicial shibboleths when it suited his project,[71] thus comes close to arguing that because racial discrimination is inevitable, it is legal. Given the "eradicable" bias infecting capital punishment, the Constitution should require that the death penalty be put aside, at least until we can implement it fairly. Kennedy, however, merely suggests that a justification for its continued implementation may lie in the present popularity of the sanction.[72] His main response is to argue that preferring our own is not confined to race relations[73] and that recognizing "the extent to which the *McCleskey* problem is related to a universal dilemma in human relations," might lead to "a more candid" discussion of "the realities of racial sentiment."[74] Why such a watery soup from an analyst who elsewhere calls it scandalous that our courts still deny the racial selectivity employed in death cases?[75]

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68. 408 U.S. 238, 404-14 (1972) (Blackmun, J., dissenting).

69. KENNEDY, *supra* note 1, at 327 (citing Gregg v. Georgia, 428 U.S. 153, 189 (1976)). "Guided discretion" means that capital punishment is constitutionally permissible so long as it is implemented according to procedures that suitably direct and limit the discretion of sentencers and preclude arbitrary or capricious punishments.

70. *Id.* at 311.

71. *See, e.g.,* KENNEDY, *supra* note 1, at 357-9, where the author criticizes the Supreme Court's refusal to allow discovery in a case in which the defendant alleged racial discrimination in prosecution (referring to United States v. Armstrong, 517 U.S. 456 (1995) (holding that, in order to be entitled to discovery, the defendant must provide evidence of racially discriminatory abuse of discretion in decisions to prosecute similarly situated suspects)).

72. KENNEDY, *supra* note 1, at 341.

73. *Id.* at 350.

74. *Id.*

75. Evidence that the death penalty presents him with a particular difficulty may be found in his Atlantic Monthly article, Randall Kennedy, *My Race Problem — and Ours,* ATLANTIC MONTHLY, May 1997, at 55, where he makes a strong case for basing loyalty and political judgment on experience and deeds not blood and race. Nothing defeats this kind of hopeful rationality quicker than our capacity to be engaged by hideous crimes and state-sanctioned murder. Our tendencies towards passion, superstition and the preservation of

In the context of capital punishment, Kennedy substitutes reports of arguments pro and con for his own clearly stated resolution. One suspects that he is simply conflicted. He knows that race plays a dramatic and distorting role in some capital sentencing. Perhaps he also believes that many of those convicted of capital crimes well deserve the ultimate penalty. A position accommodating these two poles eludes him.[76]

Kennedy's chapter on the death penalty does contain useful analysis of the difficult problem of remedy that the Court would have faced if it had decided that the Baldus study made out a case of unconstitutional discrimination. These options included limiting the death penalty to the most aggravated cases, where less evidence of racial disparity is found; permitting presently impermissible mandatory death sentences; and imposing guidelines on prosecutors, who at present have unreviewable discretion in selecting who will be subject to a sentence of death.[77] Kennedy concludes that none of these options will solve the problem.[78] While he is plainly correct that there is no easy solution to it, Kennedy here lapses into a descriptive mode in a book where he has so often aimed at conveying moral and spiritual force. The cross currents of capital punishment, race and politics that so often have clouded social policy and policy judgment in this area have taken their toll with him as well.[79]

Kennedy also fails to consider the role that the courts might play in reducing the likelihood of race-based decision-making in the day-to-day operations of the criminal justice system. In this system, cases are disposed of administratively: the police bring charges, prosecutors review them, decide whether to proceed, and then largely determine what the defendant will be convicted of and what sentence she will receive. The role of the judge (and jury) as a fact-finder is all but eliminated, and her power over sentencing is reduced substantially, lest independent judicial action interfere with the flow of guilty pleas which permit the calendar to be cleared.[80] The role of the defense attorney shifts from adversary warrior, challenging

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the status quo dominate efforts to bring about more measured reactions to government-imposed death and its procedures. Whether characterized by name-calling, shouting matches or merely fundamental miscommunication and misunderstanding, the debate over the death penalty almost never achieves agreement and rarely even movement. Differences stem from basic assumptions, group affiliations and individual identification (Kennedy would call this blood and race) rather than from policy analysis (what he might call experience and deed).

76. Kennedy candidly reveals that his opinion on the death penalty actually hardened during his time as Thurgood Marshall's law clerk. KENNEDY, *supra* note 1, at 345. Our experience reading the records of serious criminal cases (including hundreds of capital case records over the years) certainly confirms the authenticity of his reaction.

77. KENNEDY, *supra* note 1, at 340-343.

78. *Id.* at 343.

79. Compare the charges that as Governor of Arkansas and presidential candidate President Clinton allowed political advantage to determine execution dates. Marshall Frady, *Death in Arkansas,* THE NEW YORKER, Feb. 22, 1993, at 105, 124.

80. Packer, *supra* note 53, at 13; see also Michael McConville & Chester Mirsky, *Guilty Plea Courts*, 42 SOC. PROBS. 216 (1995).

the state's case, to supplicant, attempting to obtain the greatest leniency possible for a client she barely knows, in a case that has not been investigated, and in a system in which a strong *de facto* presumption of actual guilt operates.[81] Once again, the person with whom the defense attorney must deal is the prosecutor, not without his or her own problems in confronting caseload demands, but unquestionably the dominant force in this system. The prosecutor, therefore, will be most responsible for assuring that defendants are treated fairly, and that responsibility includes assuring that inappropriate racial considerations do not affect the outcome of the case. Kennedy deals at some length with prosecutorial misconduct at trial,[82] but pays scant attention to the power of the prosecutor in the guilty plea system in which almost all cases are disposed. Prosecutorial power, moreover, is exercised with almost complete immunity from judicial scrutiny, whether of the decision to bring charges, not to bring charges, to dismiss cases or to accept guilty plea offers. Judging from his acceptance of the fact of unlimited prosecutorial discretion in the administration of the death penalty, however, Kennedy unnecessarily acquiesces in the standard view, which is that uncontrolled prosecutorial discretion is not only appropriate, but inevitable.[83]

We recognize that Kennedy's focus is on the problem of race in the system of criminal justice and not on the broader issue of reform of the process itself. It is also true, as he repeatedly points out, that not every ill of the system can be blamed on racism on the part of its officers. However, as he correctly observes,[84] the danger of racial discrimination exists even if the officials are not consciously bigoted—witness his proposals to bar the use of race by the police even as evidence of *reasonable* suspicion.[85] The same reasoning applies to the prosecutor. If that officer were required to explain his actions—whether they be in selecting those who will be subject to the death penalty, or those whose cases will be prosecuted, or what standards are to be used in determining what guilty plea to accept—if all of those decisions were subject to review, decisions based on race would be less likely to go undetected. Mandating accountabililty is a course of action that quite clearly is within the institutional competence of the judiciary, and

81. Packer, *supra* note 53, at 11-13.

82. KENNEDY, *supra* note 1, at 256-77.

83. In rejecting Justice Blackmun's suggestion in *McCleskey* that guidelines should be imposed on prosecutors in deciding whom to select for capital punishment, Kennedy states that since the guidelines do not appear to channel juror discretion, they would not work for prosecutors either. *Id.* at 343. It is curious that he sees no distinction between imposing guidelines on lay people whose decision-making process is cloaked in secrecy and governmental officials whose actions in most areas are uniformly subject to review.

84. KENNEDY, *supra* note 1, at 153-154.

85. *See supra* notes 36-54 and accompanying text.

since that is the branch to which Kennedy's proposals are directed, his failure to consider this vital area is disappointing.[86]

In all, *Race, Crime, and the Law* is extremely uneven. Its description of the racism which has and continues to infect the criminal justice system is compelling reading, and in itself makes the book an important one. Kennedy also presents his "general audience" with clearly-presented and informative legal analysis. Most of all, he undertakes to move the debate on race and criminal law beneath the rhetorical level by challenging us to undertake an honest dialogue about it. At the same time, Kennedy reveals a lack of familiarity with—or perhaps interest in—the realities of the criminal process, which in turn leads him to devote excessive attention to certain problems, particularly those that arise in connection with the formal stages of the process. Kennedy ignores the guilty plea system, despite the fertile territory it has provided for race-based decision-making. Additionally, Kennedy exhibits an unwarranted faith that the system will work to cure the problem—as in his proposal for judicial control of police action—and an equally unwarranted despair that courts can be effective, as in his treatment of the death penalty. These shortcomings aside, the book is a useful source of information and ideas about a subject which all of us, within the criminal justice system and outside of it, ignore at our peril.

86. Examples of both the feasibility of such a rule and the need for it occurred recently in New York, where District Attorney Robert Morgenthau made a detailed statement defending the failure of a grand jury — essentially controlled by his office — to indict a police officer in the killing of a young black man. *Morgenthau Comments on the Fatal Shooting*, N.Y.TIMES, July 2, 1997, at B2. This stands in sharp contrast to his refusal to explain his reasons for not seeking the death penalty in the Schneiderman case, involving the murder of a police officer. He justified his refusal on the curious — and revealing — grounds that to do so would "only be misleading and will create unnecessary trial and appellate issues in death penalty cases." John Sullivan, *Morgenthau Rejects the Death Penalty in Killing of Officer*, N.Y. TIMES, Oct. 8, 1997, at A1. As the grand jury statement reveals, it is not impossible for a prosecutor to explain himself. As the death penalty statement reveals, it is useful to have total discretion as to when one will do so.