

Color-blind Justice?

RACE, CRIME, AND THE LAW.

By Randall Kennedy. Pantheon. 560 pp. \$30

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Between 1960 and 1990, violent crime in the United States surged to a level that most citizens found terrifying. During this same period, the phrase “law and order” became a political slogan for the middle class, and the integrationist thrust of the modern civil rights movement was displaced by doctrines of racial separatism and victimization. Together, these developments served to polarize debate concerning the connection between crime and race.

This book is a brave, honest, forceful intervention in that debate. Kennedy, a professor at Harvard Law School, believes that truth alone, however uncomfortable, can serve as the basis for sound public policy. Questioning the assumption that black-white differences in conviction and incarceration rates are *prima facie* evidence of discrimination, he acknowledges that a “notably large proportion of the crimes people fear most—aggravated assault, robbery, rape, murder—are committed by people who happen to be black.” And he rejects the facile argument that stiffer sentencing for using or trafficking crack (as opposed to powder) cocaine reflects racist intentions.

Yet Kennedy is no apologist for the get-tough status quo. With restrained passion, he documents the myriad ways in which our legal system has betrayed the principle of fair and equal treatment for African Americans. Every aspect of American life is beset by racial conflict. “The question,” he says, “is what to do about it.” His answer is an unapologetic return to the original aspiration of the civil rights movement: an American polity that is “overwhelmingly indifferent to racial differences.” To that end, he opposes every proposed change in the criminal justice system—especially mandatory proportional racial representation on juries and a conscious strategy of race-based jury nullification—that would

etch a new color line in American law.

But Kennedy is equally opposed to policies resting on the assumption that color-blindness is a reality rather than a distant aspiration. He warns of a “crisis of legitimacy” in which African Americans see law as a system of external oppression rather than inclusive protection. And, more striking, he insists that the discrimination experienced by black citizens at the hands of the criminal justice system is as much a matter of *neglect* as abuse. To be sure, black suspects and defendants have not received fair treatment. But even worse has been the failure of predominantly white police forces to protect law-abiding residents of black communities.

Too often, says Kennedy, black leaders show more concern for black perpetrators of crime than for their black victims. While some blacks are ambivalent toward criminals, seeing them in part as rebels against an unjust system, most want more stringent law enforcement: Kennedy cites a 1993 Gallup poll in which 82 percent of African Americans were found to believe that local courts do not treat criminals harshly enough; 75 percent favored putting more police on the street; 68 percent favored building more prisons to facilitate longer sentences.

In Kennedy’s view, the only morally acceptable response to the disparate treatment of blacks in the criminal justice system is a tenacious resolve to purge the use of race as a factor. In the case of jury selection, he calls for the elimination of peremptory challenges (those made without explanation), because they have been used to create racially exclusionary panels. If, as he expects, such challenges remain part of our legal system, then at least the Supreme Court’s strictures against their racially discriminatory use should be strictly enforced.

Kennedy is most impassioned in his rejection of race as a factor in police decision making. Most middle-class black men have tales to tell about their encounters with police. Kennedy quotes the writer Henry Louis Gates, Jr.'s, quip: "There's a moving violation that many African Americans know as D. W. B.: Driving While Black." From a statistical standpoint, police use of race-based criteria may be rational, but Kennedy insists that such criteria should nonetheless be reserved for extraordinary circumstances. Too often they provide cover for flat-out harassment, which "nourishes powerful feelings of racial grievance against law enforcement authorities." Race-based policing also contributes to the underprotection of black communities: law-abiding citizens decline to cooperate with police out of resentment, or out of fear that they themselves will become objects of suspicion.

In a bold stroke, Kennedy draws a close parallel between race-based police tactics and affirmative action as currently interpreted by the Supreme Court. If race is truly a suspect category warranting strict judicial scrutiny—if arguably beneficial affirmative action strategies are struck down because they inflict harm on innocent individuals—then why not apply the same yardstick to race-based policing? Race should play "no routine role in decision-making regarding whom to scrutinize for purposes of law enforcement," he writes.

Kennedy believes that the goal of a color-blind legal system is not unrealistic. Yet the history of discrimination, so powerfully documented in this book, may complicate efforts to attain that goal. If the disparate treatment of African Americans were primarily a matter of intentional bias, it might be effectively countered by a variety of race-neutral measures, from the careful screening of police recruits to aggressive attempts to detect prejudice in prospective jurors. But racial bias may have worked its way too deeply into perception and social organization to yield itself up to such straightforward measures.

Consider Kennedy's proposed remedy, a rule forbidding the police and judiciary to use race as an explicit justification for

a finding of reasonable suspicion or probable cause. Such a prohibition would ban only the conscious use of race, and ban it only in the judicial oversight of constitutionally regulated police interventions such as stops, frisks, searches, seizures, and arrests. Kennedy does not say how he would limit the implicit and often unconscious use of race in other areas, such as the interpretation of ambiguous behavior. A white man might be seen to be windowshopping, for example, while a black man doing the same thing might be seen as casing the store. Not even the most conscientious police officer, let alone reviewing magistrate, can precisely weigh the role played by race in resolving such ambiguity.

Moreover, Kennedy's proposed rule would have little effect on police actions that fall below the constitutional threshold for judicial review, such as the decisions to observe, monitor, or tail. It is hard to imagine how to prescribe, let alone enforce, race neutrality on this level. Yet the failure to do so virtually assures that law-abiding blacks will continue to suffer the humiliation of being objects of heightened police scrutiny—even when they are not stopped, questioned, or frisked. It may also be that racial bias in policing is most prevalent in settings where blacks are a conspicuous minority. Curtailing police discretion in those settings may well threaten an increase in crime, thereby straining the commitment of the majority to unbiased law enforcement.

Kennedy's ideal of a criminal justice system capable of going beyond race—"looking beyond looks"—is a two-edged sword. Against black pessimists, he argues that substantial progress has been made toward the ideal of color-blind justice. Against complacent whites, he argues that there is still a long way to go. His book compels readers to see that the reform of our criminal justice system involves not easy choices between good and evil but hard choices between cherished goods and values.

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