1.

The Race Question in Criminal Law: *Changing the Politics of the Conflict*

Creating Common Ground

ANYONE SEEKING TO influence the administration of criminal law must reckon with the complex and ferocious racial politics that surround the subject. I want, therefore, to speak immediately to contending ideological camps about the race question in criminal law and clear space for a shared discussion that will uncover common grounds for action.

The first of the four camps to which I address myself has made the control of street crime primarily through punitive measures a high priority on its political agenda. Demanding that attention be paid to the misery inflicted by crime, devotees of this camp have insistently raised the banner of "law and order." At the national level, this camp was, for three decades, dominated by the Republican Party. Presidents Richard Nixon, Ronald Reagan, and George Bush each used to great effect the claim that they would be tougher on crime than their opponents.[1] Their electoral success prompted imitation. Bill Clinton is only the most prominent of many Democrats who have gone to considerable lengths

to prove themselves capable of being as tough as Republicans on crime.[2] As a result, this first camp—the law and order camp—has become thoroughly bipartisan.[3]

Various aims, beliefs, and sentiments have played a role in animating the law and order camp. For some politicians, the law and order slogan has served as a thinly veiled code with which to signal sympathy for and solidarity with whites upset by the social, political, and cultural changes brought about by the upheavals of the 1960s, particularly the Civil Rights Revolution.[4] I have little hope of communicating my message to those for whom law and order are code words designed primarily to appeal covertly to anti-Negro prejudice. I do believe it possible, however, to reach those drawn to law and order rhetoric because they are afraid of being victimized, seek reassurance that the government will do its utmost to protect them, and desire to express outrage at street criminals, especially those who repeatedly commit violent offenses. I share that fear, anxiety, and anger and therefore want to remove impediments to the enforcement of decent law and order. One major impediment is the conviction of many people that the law enforcement system is overwhelmingly racist. Although the precise dimensions of this attitude are unclear, within African-American communities it is certainly appreciable. This attitude causes some black attorneys to eschew joining prosecutors' offices because they feel that doing so will entail "selling out" and working for "the Man."[5] It causes some black citizens to decline to cooperate with police investigations. Even more alarmingly, it prompts some black jurors to be unreasonably skeptical of police testimony from law enforcement authorities or even to refuse to vote for convictions despite proof beyond reasonable doubt of defendants' guilt.[6]

To change this attitude and the conduct it generates, action will have to be taken to rectify injustices that nourish feelings of racial aggrievement. To improve the effectiveness of police and prosecutors, high priority should be given to correcting and deterring illegitimate racial practices that diminish the reputation of the law enforcement establishment. Proponents of law and order, then, should be in the forefront of those who insist that officials respect authoritative rules prohibiting racial misconduct and who demand that the legal regime effectively discipline officials who fail to comply. Proponents of law and order should acknowledge what cannot sensibly be denied: that to an

extent that is significant, albeit hard to identify, declining but nonetheless regrettable, illicit racial discriminations continue to adversely affect the administration of criminal law. Remarkably, some devotees of law and order occasionally deny the obvious, as did Professor John J. DiIulio, Jr., when he asserted that data on the administration of capital punishment "disclose no trace of racism"*—a matter about which I shall have much to say below. (See pp. 311–350.) For a campaign of law and order to succeed, it must apply not only to ordinary persons but to the guardians of law and order as well.

A second important camp in American politics is populated by people passionately dedicated to limiting governmental power. This camp is convinced that, if left unchecked, officials will virtually always tend to overstep their authority. Insistence upon checking governmental power is deeply rooted in American political culture and embraced in different forms by an array of ideological types. While one faction in this camp insists mainly upon checking governmental power with respect to taxation and the regulation of business enterprise, another insists mainly upon checking governmental power with respect to freedom of expression, governmental intrusion on life-style, police investigations, and criminal punishments. My message here is aimed primarily at the former faction, libertarian conservatives,[7] as opposed to libertarian liberals.

I accept the premise that citizens need always be alert to the danger of governmental abuse and corruption. I simply urge libertarian conservatives to apply more generally their intolerance for governmental tyranny.† That intolerance should make them especially sensitive to

*See John J. DiIulio, Jr., "My Black Crime Problem and Ours," *City Journal* (Spring 1996).

†It is noteworthy that members of Congress who recently harshly criticized federal law enforcement officials accused of overreacting to paramilitary organizations, many of which openly espouse white supremacist views of the most extreme sort, mobilized sufficient political backing to bring about changes in FBI personnel and practices and also to stymie the Clinton administration's efforts to enact broad antiterrorism laws. See, e.g., Steve Daley, "House Rivals Unite to Soften Anti-Terror Bill," *Chicago Tribune*, March 14, 1996; Charles V. Zehren, "A Year After Oklahoma City—Unkept Promises—Still No Pact on Anti-Terror Bill," *Newsday*, April 15, 1996.

One is entitled to wonder whether the response of right-wing members of Con-

racial misconduct. After all, in the United States, the epitome of governmental arrogance and undisciplined power is the police officer, prosecutor, juror, or judge who mistreats people on racial grounds, confident that his or her conduct will remain unchecked because of the racial status of the abused. Bitter experience has repeatedly shown, moreover, that where bigotry flourishes, corruption is also likely to prosper. Since federal and state constitutional and statutory provisions outlaw many types of invidious racial discrimination, those who disregard these restrictions become practiced in the art of lying. Lying, once loosed, is hard to cabin. Officials who deceitfully disregard laws prohibiting racial discrimination will tend also to disregard other boundaries. The classic example, of course, is the former Los Angeles police officer Mark Fuhrman, whose deceitful coverup of his racist language, actions, and attitudes played such a large and notorious role in the murder prosecution of O. J. Simpson.[8]

A third camp is that constituted by people who claim to disavow *all* types of racial discrimination. This camp marches under the banner of the color-blind constitution. Its primary target of late has been that form of racial discrimination known as "affirmative action," race-targeted policies expressly designed to help racial minorities.[9] Opponents of affirmative action reject the argument that racial discrimination favoring minorities should be treated differently than racial discrimination favoring whites. They insist instead upon formal symmetry, treating whites and blacks precisely the same, on the grounds that, as Justice Clarence Thomas puts it, "government-sponsored racial discrimination based on benign prejudice is just as noxious as discrimination inspired by malicious prejudice. In each instance, it is racial discrimination, plain and simple."[10]

One might think that those who attack affirmative action because of their commitment to the idea of a color-blind Constitution would also oppose policies that permit racial discrimination by law enforcement officers. This, however, has not been so. The Reagan administration attacked race-based affirmative action on color-blind grounds but supported permitting race-based peremptory challenges as a tool of litigation.[11] Subsequently, critics of affirmative action have written voluminously about the dangers posed by racially-weighted means to advance the interests of blacks in employment and electoral politics. Most of these same critics are silent about the pervasive use of race by police in making determinations of suspiciousness.

gress would have been different had the paramilitary groups in question been mainly black instead of mainly white. (On repression of black political organizations, see pp. 107–113.)

This inconsistency suggests that some in the color-blindness camp tend to act opportunistically with respect to the matter of racial discrimination, complaining seriously about it only when racial distinctions hurt, or are perceived to hurt, whites. One way that this camp could begin to dispel this skepticism would be to apply rigorously in the context of criminal law their asserted commitment to antidiscrimination. This would entail supporting efforts aimed at uprooting racial discriminations that are already prohibited but still widely practiced, for example, the racially discriminatory peremptory challenge (see pp. 193–230). It would also entail backing reforms aimed at outlawing wrongful racial discriminations that are presently permitted by law, for example, police acting on the belief that black skin signals a higher risk of criminality (see pp. 136–167).

The fourth camp to which I address myself is that peopled by those dedicated specifically to advancing the interests of blacks. I embrace this camp's admirable labors on behalf of America's paradigmatic racial pariah, the Negro. I suggest, though, that many of those within this camp ought to be more careful in making allegations of racial discrimination. Clearly there exists racial unfairness in the administration of criminal law; considerable space in this book is allocated to detailing and criticizing this deplorable reality. It is important, though, to define the problem carefully. Whereas others all too often ignore or minimize racial injustices, some activists in this fourth camp all too often make formulaic allegations of racial misconduct without even bothering to grapple with evidence and arguments that challenge their conclusions.[12] Those who do this not only damage their own credibility; worse, they undermine the credibility of all who protest against racial wrongs.

I have in mind, for instance, the controversy over Tawana Brawley, a black teenager who alleged in November 1987 that she had been abducted and raped by six white men (several of whom were, she claimed,

police officers).[13] A New York State grand jury concluded, on the basis of overwhelming evidence, that Brawley's allegations were groundless. Yet some people within the fourth camp, evincing an almost religious desire to believe Brawley, continue to credit her story despite compelling evidence that she lied. Others conclude that, in Barbara Omolade's words, "No matter what the actual facts were in the Tawana Brawley case, in a society which believes a black woman cannot be raped because of her 'nature,' it is impossible to sort out the truth or the lie of her story."[14] Still others concur with William Kunstler who declared that "It makes no difference anymore whether the attack on Tawana really happened" because "it doesn't disguise the fact that a lot of young black women are treated the way she said she was treated. [Her lawyers, Alton Maddox and Vernon Mason] now have an issue with which they can grab the headlines and launch a vigorous attack on the criminal justice system."[15] Such disregard for facts and exploitation of antiracist sentiment reduce the stature of those who sink to such tactics as well as the credibility of future allegations of racial injustice.

Loose, inaccurate, demagogic allegations of racial misconduct backfire in other ways as well. Because wrongful racial discrimination has been widely stigmatized, converting charges of such behavior into serious threats to reputation, many people will fight harder against such charges than other complaints, for instance complaints that the person is mistaken or even foolish. Thus, allegations of racial discrimination sometimes have the unintended consequence of stiffening the resolve of opponents to continue policies that they might otherwise consent to discontinue. Inaccurate or false allegations undoubtedly accentuate this response.

Poorly conceived allegations of racial misconduct also spread harmful confusion.* Consider, for example, how racial paranoia has contributed to stifling intelligent debate over drug policy. Some commentators and activists condemn the war on drugs as "genocide" because blacks constitute a disproportionate number of those subjected to arrest, prosecution, and incarceration for illicit drug trafficking.[16] Others condemn proposals for decriminalizing drug use on the grounds that decriminalization would amount to "genocide" because racial minorities would constitute a disproportionate number of those allowed to pursue their drug habits without deterrent intervention by the state.[17] This is sheer demagoguery that causes discussions over drug policy to degenerate into contests over who can shout "genocide" more quickly or loudly. No one has come forward with credible evidence to suggest that American drug policy is *really* genocidal,[18] that is, designed to eradicate a people. But that does not restrain the use of this rhetoric even by people of substantial public standing such as Lee Brown, the former "drug czar" of the Clinton administration. Dismissing Surgeon General Joycelyn Elders' suggestion that decriminalization ought at least to be studied, Brown retorted that legalization would be "the moral equivalent of genocide,"[19] a statement that offers a dismal example of a broad tendency to misuse key words—"racism," "lynching," "holocaust"—that warrant special care in order to preserve their meaning and impact.

A proper appreciation for words is not the only casualty of the intellectual sloppiness that has impeded analysis of racial issues in the administration of criminal law. Another is the proper interpretation of statistics. Statistics can be a powerful tool for uncovering racial misconduct.[20] Too often, however, activists in the fourth camp (along with journalistic and scholarly supporters) automatically insist, simply on the basis of observable racial disparities, that officials are engaged in making invidious racial discriminations.[21] They seem unaware that a racial disparity is not necessarily indicative of a racial discrimination.[22] A disparity is often evidence of discrimination. But one must keep in mind that a racial disparity may stem from causes other than disparate treatment. A disproportionate number of blacks in a jail *might* signal that police are racially discriminating in making arrests. On the other hand, the racial demographics of the inmate population may reflect that more blacks than whites are engaging in prohibited conduct which leads them to be arrested. If that is so, the racial disparity stems not from biased decision-making on the part of the police but from some other cause. Often that

*Edward Banfield once noted that a serious danger of overemphasizing prejudice as a direct cause of blacks' troubles is that doing so "may lead to the adoption of futile and even destructive policies and the non-adoption of others that might do great good." He went on to say that "the other, perhaps more serious danger . . . is that it raises still higher the psychic cost of being Negro. . . . It is bad enough to have to suffer real prejudice . . . without having to suffer imaginary prejudice as well." See *The Unheavenly City: The Nature and Future of Our Urban Crisis*, 86 (1970).

cause will be related to racial wrongdoing. Real differences in behavior may stem, to some extent, from deprivations imposed upon individuals who live in the depressed, isolated, criminogetic settings in which large numbers of blacks reside as a consequence of historic racial oppression.[23] It is important, however, to distinguish between racial discrimination engaged in by police and real differences in behavior caused by conditions partially shaped by racial oppression. It is important to avoid wrongly stigmatizing police officers; their work is too essential to be hobbled by mistaken charges. It is also important insofar as the specificity which comes from making distinctions will facilitate efforts to reach a comprehensive understanding of what accounts for the remarkable prevalence of blacks in jails and prisons.

A closely associated problem is determining whether, or for whom, a given disparity is harmful. Some critics attack as "racist" the policy under which people who traffic in crack cocaine are more harshly sentenced than people who traffic in powder cocaine, since crack's clientele is overwhelmingly black and powder's clientele includes more whites. But is the black population *hurt* when traffickers in crack cocaine suffer longer prison sentences than those who deal in powdered cocaine or *helped* by incarcerating for longer periods those who use and sell a drug that has had an especially devastating effect on African-American communities? (For more on this issue, see pp. 364–386.) Some critics attack as racist urban curfews that regulate youngsters on the grounds that such curfews will disproportionately fall upon minority youngsters. But are black communities *hurt* by curfews which limit the late-night activities of minors or *helped* insofar as some of their residents feel more secure because of the curfews? Some critics attack as racist police crackdowns on violent gangs because such actions will disproportionately affect black members of gangs. But are black communities *hurt* by police crackdowns on violent gangs or *helped* by the destabilization of gangs that terrorize those who live in their midst? Some critics attack as racist prosecutions of pregnant drug addicts on the grounds that such prosecutions disproportionately burden blacks. But, on balance, are black communities *hurt* by prosecutions of pregnant women for using illicit drugs harmful to their unborn babies or *helped* by interventions which may at least plausibly deter conduct that will put black unborn children at risk? (For more on this issue, see pp. 352–364.) How can

"hurt" and "help" be measured and distinguished? And what branch and level of government is best positioned to make and respond to such measurements? Often ignored or even repressed by leading figures in the fourth camp, these questions need to be raised and answered.

In my view, it is often unclear whether a social policy that is silent as to race and devoid of a covert racial purpose is harmful or helpful to blacks as a whole since, typically, such a policy will burden some blacks and benefit others. This makes it difficult to determine whether the policy represents a net plus or minus for African-Americans as a group. That is one (often overlooked) reason why, in the absence of persuasive proof that a law was enacted for the *purpose* of treating one racial group differently than another (or some other clear constitutional violation), courts should permit elected policymakers to determine what is in the best interest of their constituents. Courts must demand that officials respect the rights of all persons, regardless of race. In deciding whether rights have been infringed, however, courts should be careful to avoid conflating the interests of a subdivision of blacks—black suspects, defendants, or convicts—with the interests of blacks as a whole.

Like many social disasters, crime afflicts African-Americans with a special vengeance; at most income levels, they are more likely to be raped, robbed, assaulted, and murdered than their white counterparts.* Thus, at the center of all discussions about racial justice and criminal law should be a recognition that black Americans are in dire need of

*According to the U.S. Justice Department's 1993 National Crime Victimization Survey report, blacks were more victimized by crimes of violence than whites at every income level except for the poorest income bracket (annual household income less than $7500). More striking is that whereas white victimization rates *declined* as income increased, black victimization rates *rose* at the higher income levels. According to the survey, whites in the highest income bracket ($75,000 or more) were the least victimized by crimes of violence (with a rate of 36.3 crimes per 1000 persons). By contrast, blacks in the highest income bracket were the most victimized group (with a rate of 104 crimes per 1000 persons). See U.S. Department of Justice, Criminal Victimization in the United States, *1993—A National Crime Victimization Survey Report* 23, 26–27 (May 1996). See also Andrew Hacker, *Two Nations: Black and White, Separate, Hostile, and Unequal*, 179–98 (1992); Harold M. Rose and Paula D. McClain, *Race, Place, and Risk: Black Homicide in Urban America* (1990); John J. DiIulio, Jr., "The Question of Black Crime," 117 *The Public Interest* 3 (1994).

protection against criminality. A sensible strategy of protection should include efforts to ameliorate the social ills that contribute to criminality, including poverty, child abuse, and the deterioration of civic agencies of social support. A sensible strategy of protection should also include, however, efforts aimed toward apprehending, incapacitating, deterring, and punishing criminals. To accomplish those essential tasks requires a well-functioning system of law enforcement. Yet, too often, those in the fourth camp are unduly hostile to officials charged with enforcing criminal laws, insufficiently attentive to victims and potential victims of crime, and overly protective of suspects and convicted felons.

Some will question my decision to allocate considerable space and energy to a critical engagement with the fourth camp. After all, it is relatively weak politically. Represented at its best by the likes of Jesse Jackson, the National Association for the Advancement of Colored People, and the Congressional Black Caucus, the fourth camp is largely marooned on the left end of the American political spectrum. Although marginal within American political culture at large, this camp's dominant views regarding race relations and the administration of criminal law exert considerable influence within African-American communities.[24] To understand those views one must consider the association of crime with blackness and African-Americans' reactions to this debilitating linkage.

African-American Responses to the Association of Crime with Blackness: Toward a New Politics of Respectability

Many groups in America have been vilified by allegations that they harbor "racial instincts" for certain types of criminality.[25] Commentators and politicians have long stigmatized Italian-Americans, for instance, by associating them with the Mafia.[26] Jews, too, have been stigmatized as peculiarly susceptible, on account of their "race," to certain forms of criminality. Early in this century, officials and commentators drew attention to "Jewish crime" in the predominantly Jewish Lower East Side of Manhattan, wielding statistics of social pathology in a fashion calculated to smear Jews with an innuendo of racial debility.[27]

The racial reputation of blacks, however, has been uniquely be-

sieged.* Some defenders of slavery pointed to blacks' alleged racial propensity to engage in crime as a justification for enslaving them. A century ago, belief in the racial tendency of Negroes to commit horrendous crimes was so strong that respected intellectuals defended lynching as a necessary mode of discipline. "Have American Negroes Too Much Liberty?" Charles Henry Smith asked in 1893. Yes, he replied, because of their *racial* penchant for scurrilous crimes, especially rape.[28] The idea that blacks are racially predisposed toward criminality, or at least certain sorts of crime, continues to shadow discussions of race relations and crime. It helps to explain the common use of the term "black crime" long after the disappearance of references to "Jewish crime" or "Italian crime."[29]

The historically besmirched reputation of blacks, however, is not the only force that encourages a perceived association of Negroes with criminality. Influential as well are two other phenomena. One is a popular fixation on crime. Although crime is undoubtedly a "real" menace, sellers of news and politicians who stand to benefit from increasing the anxieties of voters have often exaggerated the scope of that menace.[30] The other phenomenon is that a notably large proportion of the crimes that people fear most—aggravated assault, robbery, rape, murder—are committed by persons who happen to be black.†

*As Gunnar Myrdal observed, "[The Negro's] name is the antonym of white. As the color white is associated with everything good, with Christ and the angels, with heaven, fairness, cleanliness, virtue, intelligence, courage, and progress, so black has, through the ages, carried associations with all that is bad and low . . . the Negro is believed to be stupid, immoral, diseased, lazy, incompetent, and *dangerous*—dangerous to the white man's virtue and social order." *An American Dilemma: The Negro Problem and Modern Democracy*, vol. 2 (Twentieth Anniversary Edition), 98, 100 (1944 [1964]).

†Some observers suspect that racial prejudice plays a role in selecting which types of crime become the targets of public outrage and disgust. Why, they ask, do politicians attack street crime—murder, rape, robbery, burglary, and the like—so much more ferociously than white-collar crime—insider trading, bank fraud, anti-trust offenses, and so forth. See, e.g., Richard Delgado, "Rodrigo's Eighth Chronicle: Black Crime, White Fears—On the Social Construction of Threat," 80 *Virginia Law Review* 503 (1994). Racial prejudice in its many guises is a sufficiently powerful presence in American life that this hypothesis cannot be immediately discounted as wholly im-

These phenomena reinforce one another. Racist perceptions of blacks have given energy to policies and practices (such as racial exclusion in housing, impoverished schooling, and stingy social welfare programs) that have facilitated the growth of egregious, crime-spawning conditions that millions of Americans face in urban slums and rural backwaters across the nation.[31] A substantial number of voters both fear and resent the so-called "undeserving" poor, particularly those among them who are colored, a sector of the population that many perceive as especially dangerous and unworthy.[32] When voters, politicians, judges, and other shapers of public policy perform the rough calculations of costs and benefits that structure their decisions, undervaluation of the worth and promise of people with dark skins explains, to some degree,

plausible. I doubt, though, that racial prejudice accounts for much, if any, of the priority that most people give to street crime over white-collar crime. Differences in public response are most likely attributable to differences in the nature of the offenses in question as opposed to differences in the racial demographics of perpetrators. The racial discrimination thesis would be stronger if it revealed a sizable population (of any hue) that was more fearful of white-collar crime than street crime. Absent that showing, it seems to me likely that differentiation between street and white-collar crime is rooted in a sensible perception that the harm wrought by the former is more personally threatening than harms wrought by the latter. Explaining why most Americans are less concerned about tax fraud than robbery, Christopher Jencks notes that "[u]nlike robbery, tax evasion has no individual victims. It forces the rest of us to pay higher taxes than we otherwise would, but it does not create . . . the same sense of personal violation. . . . Given a choice, almost everyone would rather be robbed by computer than at gunpoint." Jencks, *Rethinking Social Policy: Race, Poverty and the Underclass* 93 (1992).

Furthermore, while there is a deeply and widely held impression—one that I share—that the judicial system treats white-collar offenders with discriminatory and wrongful leniency because of their status, important scholarship challenges that belief. See David Weisburd, Stanton Wheeler, Elin Waring, and Nancy Bode, *Crimes of the Middle Class: White-Collar Offenders in the Federal Courts* (1991); Stanton Wheeler, Kenneth Minn, Austin Sarat, *Sitting in Judgment: The Sentencing of White-Collar Criminals* (1988); David Weisburd, Elin Waring, and Stanton Wheeler, "Clan, Status, and the Punishment of White-Collar Criminals," 15 *Law and Social Inquiry* 223 (1990); Stanton Wheeler, David Weisburd, and Nancy Bode, "Sentencing the White-Collar Offender: Rhetoric and Reality," 47 *American Sociological Review* 641 (1982).

why it is that in so many areas the interests of colored people receive unequal attention.

On the other hand, the disproportionate prevalence of African-Americans in the population of street criminals functions to create or exacerbate racial prejudice by providing grounds for viewing blacks in general with heightened suspicion. As Thomas and Mary Edsall observe, "For many white voters living in major cities, no issue is more divisive than crime, and no issue more undermines the prospects for lessening the racial stereotyping that forms the basis of prejudice.[33] Consider, for example, the person who, responding to racial cues, avoids young black men while walking alone in urban areas at night. This person may resort to this self-protective maneuver without racial hostility and knowing that his strategy is overly inclusive, causing him to avoid many virtuous people who mean him no harm. He may do this knowing that his action, in conjunction with similar actions by others, will harm young black men by stigmatizing and isolating them. But he may pursue his policy nonetheless, mainly for two reasons. One is that, if he has calculated accurately, his policy will indeed provide him with greater security. The second is that his policy costs him less than plausible alternatives. One alternative might be to purchase a car. But perhaps he has no money for that. Another alternative would be to pay no mind to race and seek self-protection only when the actual (as opposed to the feared) conduct of others warrants such a response. But the cost of waiting and individualizing one's judgment may be diminished security; sometimes it is too late to avoid a person when he finally gives you concrete reasons for doing so.

Jesse Jackson memorably exhibited the way in which such calculations can influence even those who are fervent champions of black advancement. "There is nothing more painful for me at this stage in my life," he stated in 1994, "than to walk down the street and hear footsteps and start to think about robbery and then look around and see it's somebody white and feel relieved."[34]* The reason he felt relief was not that

*Consider also the following comments. The first is by Theodore A. McKee, a black judge on the United States Court of Appeals for the Third Circuit:

> If I'm walking down a street in Center City Philadelphia at two in the morning and I hear some footsteps behind me and I turn around and there

he prefers whites or dislikes blacks. He felt relief because he estimated that he stood a marginally greater risk of being robbed by a black person than by someone white.

The calculation that prompted Jackson to feel relief is a large part of what makes the linkage between blackness and criminality so far-reaching in its destructive ramifications—from strategies of self-help by which individuals (blacks as well as whites) fearfully avoid African-Americans (particularly men) in public spaces,[35] to decisions to discriminate against African-Americans on the grounds that they are more likely than others either to scare off customers or to prey upon the businesses that hire them,[36] to refusals to sell houses to blacks for fear that crime will follow and destroy neighborhoods,[37] to legal doctrines which authorize law enforcement officials to view blackness itself as a predictor of wrongdoing (see pp. 136–163),[38] to appeals in political campaigns that are clearly designed to both incite and address anxieties that stem not simply from fear of criminality in general but fear of the criminality of blacks in particular.[39] The association of crime with blackness is

are a couple a young white dudes behind me, I am probably not going to get very uptight. I'm probably not going to have the same reaction if I turn around and there is the proverbial Black urban youth behind me. Now if I can have this reaction—and I'm a Black male who has studied martial arts for twenty some odd years and can defend myself—I can't help but think that the average white judge in the situation will have a reaction that is ten times more intense.

Quoted in Linn Washington, *Black Judges on Justice: Perspectives from the Bench*, 71 (1994).

The second story is recounted by Professor Jean Bethke Elshtain:

Several years ago, my daughter Heidi was a student at the Pratt Art Institute in a pretty tough Brooklyn neighborhood. She called me, very upset, and said she was afraid she was becoming a racist. She said that when she saw a cluster of young black men together on a street-corner, she crossed over and tried to avoid them. She also told me there had been some muggings and assaults—in fact, a few months after she called, a friend of hers at Pratt was murdered. I told her that I didn't think she was becoming a racist but rather dealing with the realities of the environment in which she lived where certain precautions have to be taken.

See "Race and Racism: American Dilemma Revisited," *Salmagundi*, nos. 104–105, 24 (1994–1995).

thus of great importance. As long as it exists, efforts to advance the fortunes of African-Americans will remain heavily encumbered.

Many blacks are aware of the burdens placed upon them because of the fears, resentments, and stereotypes generated in part by the misdeeds of black criminals. From this awareness stems a deeply rooted impulse in African-American culture to distinguish sharply between "good" and "bad" Negroes.* Every community erects boundaries demarcating acceptable from unacceptable conduct. What makes this commonplace activity distinctive among blacks is the keenly felt sense that it implicates not only the security of law-abiding blacks vis-à-vis criminals but also the reputation of blacks as a collectivity in the eyes of whites. This urge to differentiate between "good" and "bad" Negroes is an important feature of what Professor Evelyn Brooks Higginbotham has termed "the politics of respectability."[40]

The principal tenet of the politics of respectability is that, freed of crippling, invidious racial discriminations, blacks are capable of meeting the established moral standards of white middle-class Americans. Proponents of the politics of respectability exhort blacks to accept and meet these standards, even while they are being discriminated against wrongly (in hypocritical violation of these standards). They maintain that while some blacks succeed even in the teeth of discouraging racial oppression, many more would succeed in the absence of racial restrictions. Insistence that blacks are worthy of respect is the central belief animating the politics of respectability. One of its strategies is to distance as many blacks as far as possible from negative stereotypes used to justify racial discrimination against all Negroes.

*Factions within other minority groups have also promoted politics of respectability. This is certainly true of Jews. Early in this century, when the criminality of some Jews provided the occasion for anti-Semitic diatribes hurtful to all Jews, certain Jewish leaders responded by criticizing bigoted overgeneralizations and—more relevant to the immediate point—acting against Jewish criminals. In 1912, Jewish philanthropists in New York quietly established a Bureau of Social Morals, which collected incriminating evidence on Jewish criminals and criminal organizations and turned it over to local prosecuting authorities. See Howard M. Sachar, *A History of the Jews in America*, 171–172 (1992).

Blacks of a wide variety of ideological persuasions have assimilated into their programs the politics of respectability. Hence W.E.B. DuBois urged "the Best" blacks to "guide the Mass away from [the] contamination and death of the Worst."[41] S. Willie Layton, a leading figure of the women's movement in the black Baptist church, declared to her colleagues, "The misfortune not to be judged [on the same terms as whites] behooves us to become more careful until we have gained a controlling influence to contradict the verdict already gone forth."[42] More recently, the potency of the politics of respectability was dramatically illustrated by the organizers of the Million Man March who voiced a desire to uplift the racial reputation of African-American men.*

Deeply rooted in African-American political culture, the politics of respectability is also prone to excesses that have limited its attractiveness. First, some of its proponents have displayed an undue fear of antagonizing whites. Here I think of black opponents of the civil rights movement in the late 1950s and early 1960s. Among the most ruthless enemies of civil rights activists on some college campuses, for example, were anxious black administrators.[43]

Second, the desire of some blacks to be seen as respectable has been so overwhelming that it has impelled them, pathetically, to shun anything that might remotely be associated with "bad Negroes"—from dark skin, to political activism, to cultural artifacts such as jazz, soul music, and rap.[44] Third, concern for respectability has led some analysts to underestimate the power of the forces which push people subject to severe deprivation toward criminal conduct. Properly rejecting the notion that poverty strips people of all choice to avoid crime, these analysts unduly minimize the extent to which poverty and its vicious companions reduce the amount of choice available to black impoverished youngsters.

*Illustrative of this feature of the Million Man March was the Million Man March Pledge which declared, in part: "I, ———, pledge that from this day forward I will strive to improve myself spiritually, morally, mentally, socially, politically, and economically for the benefit of myself, my family and my people. . . . I, ———, pledge that from this day forward I will never raise my hand with a knife or a gun to beat, cut, or shoot any member of my family or any human being except in defense." *Million Man March/Day of Absence: A Commemorative Anthology*, 29 (Haki R. Madhubuti and Maulana Karenga, eds., 1996).

Fourth, some proponents of the politics of respectability have neglected the webs of commonality that connect criminals to law-abiding members of communities. Crime war "hawks" sometimes forget, as Glenn Loury observes, "that the young black men wreaking havoc in the ghetto are still 'our youngsters' in the eyes of many of the decent poor and working class black people who are often their victims."[45] Fifth, obsession with racial reputation has, on occasion, prompted an egregious toleration of racist attacks which, by implication, threaten *all* black people and not simply the "bad Negroes." The most dramatic illustration of this tendency was the position taken by some black intellectuals and civic leaders around the turn of the century with respect to lynching, a subject to which I shall return later (see pp. 41–63). Many blacks condemned lynching unequivocally, but some, traduced by their yearning for respectability, endorsed the theory of lynching's apologists. In 1899, commenting on the rising toll of lynchings, the 71st Annual Conference of the African Methodist Episcopal Zion Church in Philadelphia unanimously condemned "those worthless negroes whose shiftlessness leads them into the commission of heinous crimes."[46] Alluding to the lynching of a black man accused of rape, the Reverend George Alexander McGuire stressed the horror of the alleged crime while offering no critique of the lawless reaction. Speaking to an audience of African-Americans at a high school graduation in 1903, McGuire declared that they must "ostracize such brutes in their own race."[47]

Despite the mistakes of some who have enthusiastically championed the politics of respectability, its core intuitions are sound, two of which are particularly pertinent currently. One is that the principal injury suffered by African-Americans in relation to criminal matters is not overenforcement but underenforcement of the laws. Whereas mistreatment of suspects, defendants, and criminals has often been used as an instrument of racial oppression, more burdensome now in the day-to-day lives of African-Americans are private, violent criminals (typically black) who attack those most vulnerable without regard to racial identity. Like many activities in America, crime tends to be racially segmented; four-fifths of violent crimes are committed by persons of the same race as their victims.[48] Hence, behind high rates of blacks perpetrating violent crimes are high rates of black victimization. Black teenagers are nine times more likely to be murdered than their white

counterparts. While young black men were murdered at the rate of about 45 per 100,000 in 1960, by 1990 the rate was 140 per 100,000. By contrast, in 1990 for young white men the rate was 20 murder victims per 100,000.[49] One out of every twenty-one black men can expect to be murdered, a death rate double that of American servicemen in World War II.[50] Such figures place the now-mythic beating of Rodney King in a somewhat different light than it is typically put. As Gerry G. Watts acidly comments, "Racist white cops, however vicious, are ultimately minor irritants when compared to the viciousness of the black gangs and wanton violence."[51]

Of course, even if violent, racially motivated wrongdoing by police is lesser in quantity than violent wrongdoing engaged in by criminals, the peculiar character of official wrongdoing—the fact that its authors are officers of the state sworn to uphold the law—accentuates its malevolent force and influence. Moreover, racist discrimination by law enforcement officers has often played a role in creating the conditions that make blacks more vulnerable than whites to destructive criminality. For one thing, throughout American history, white officials have tolerated black-on-black crime ("what do you expect of *those* people") while zealously punishing black-on-white transgressions. Still, the main point stands: In terms of misery inflicted by direct criminal violence, blacks (and other people of color) suffer more from the criminal acts of their racial "brothers" and "sisters" than they do from the racist misconduct of white police officers.

A second core intuition of the politics of respectability is that, for a stigmatized racial minority, successful efforts to move upward in society must be accompanied at every step by a keen attentiveness to the morality of means, the reputation of the group, and the need to be extra-careful in order to avoid the derogatory charges lying in wait in a hostile environment. These are among the reasons that Thurgood Marshall, working on behalf of the National Association for the Advancement of Colored People, carefully investigated the circumstances surrounding a case before he would represent a person charged with committing a crime. Initially, he allowed the NAACP to represent only defendants whom he believed to be innocent. In 1943, for example, Marshall declined to represent a black sixteen year old who had been sentenced to death for rape and who had participated in a jail break. In Marshall's view the youngster was "not the type of person to justify our intervention."[52] Later, Marshall loosened his policy and represented defendants even if he believed them to be guilty as long as he also believed that they had been denied a fair trial. At no point, however, did he take the position that racism excuses thuggery when perpetrated by blacks.[53] Marshall sought to right miscarriages of justice, not excuse, much less canonize, criminals who happen to be black.

It should be clear by now that I am recommending a politics of respectability, albeit a version that steers clear of the excesses noted above. Some readers will undoubtedly object on the grounds that, however modified, the politics of respectability smells of Uncle Tomism. It may have been a necessary concession earlier, they concede, but championing the politics of respectability today, they charge, is an anachronistic error. Obviously I disagree. In American political culture, the reputation of groups, be they religious denominations, labor unions, or racial groups, matters greatly.[54] For that reason alone, those dedicated to advancing the interests of African-Americans ought to urge them to conduct themselves in a fashion that, without sacrificing rights or dignity, elicits respect and sympathy rather than fear and anger from colleagues of other races. The politics of respectability, for example, would have cautioned against the triumphalist celebrations that followed the acquittal of O.J. Simpson on the grounds, among others, that such displays would singe the sensibilities of many, particularly whites, who perceived the facts of the trial differently. Acting based on the notion that blacks need not be attuned to the way they are perceived by others has adversely affected the racial reputation of African-Americans, facilitating indifference to their plight.

Racial bigotry has been and remains a significant pollutant within the administration of criminal justice. At the same time, bigotry also provokes protests that have prompted salutary reforms. Several of the most basic protections enjoyed by all Americans, for example, the right to an attorney when charged with a serious offense, the right to be free of torture, and the right to a trial absent mob intimidation, are protections that arose in response to the racially motivated mistreatment of black defendants (see pp. 92–107).

Not all reactions against racist misconduct have been so benign. The toxins of racism have also generated antibodies that are destructive. One

is a tendency to deny troublesome realities. This explains why some observers, even in the face of overwhelming evidence, deny claims that blacks commit a disproportionate percentage of street crimes.[55] Some deniers maintain that the apparent disproportionate prevalence of black street criminals is an illusion created by news and popular entertainment media. Others maintain that an exaggerated image of the black man as criminal stems from a racially discriminatory criminal justice apparatus that systematically disadvantages black men by watching them more closely than whites, by arresting them more frequently under circumstances in which whites are not arrested, and by treating them more harshly than similarly situated whites.

The deniers have a point. First, racial discrimination by law enforcement officials does probably distort, at least to some extent, the racial demographics of arrests and imprisonment. Racially discriminatory arrests and investigations probably do play some small role in the racial demographics of crime statistics. Second, racists do and will use evidence of disproportionate rates of criminal activity by blacks to argue against racial egalitarianism. White supremacists, for example, have repeatedly used such evidence to attack desegregation.[56]

Derogatory attacks cannot be responded to effectively, however, by denying facts that cannot sensibly be denied. As Representative Barney Frank writes, "Whenever something is obvious and has a significant impact on people's lives, those who try to make believe it does not exist cede control of the debate to those who are willing to talk about it."[57] That relative to their percentage of the population, blacks commit more street crime than do whites is a fact and not a figment of a Negrophobe's imagination.* Although blacks constitute only around 12 percent of the national population, in 1992, 44.8 percent of all persons arrested for violent

*This proposition has ceased to be controversial among most careful students of crime in America. Compare Michael Tonry, *Malign Neglect: Race, Crime, and Punishment in America*, 3 (1995), and Elliott Currie, *Confronting Crime: An American Challenge*, 152–160 (1985), with James Q. Wilson and Richard J. Herrnstein, *Crime and Human Nature*, 461–468 (1985). This racial disproportionality is not new. It has been evident throughout much of this century. See, e.g., Roger Lane, *Roots of Violence in Black Philadelphia*, 1860–1900 (1986), and Charles E. Silberman, *Criminal Violence, Criminal Justice*, 159–167 (1978).

crimes were black. Blacks made up 55.1 percent of those arrested for homicide, 42.8 percent of those arrested for rape, and 60.9 percent of those arrested for robbery.[58] Even after one makes a reasonable discount to offset some degree of racial discrimination in law enforcement, a strikingly large disproportionality remains.

Incarceration rates are more probative of actual criminal activity than arrest rates since the processes that surround convictions and plea bargains, albeit far from perfect, are still more protective than those which surround mere arrest.[59] It is significant, then, that the statistics showing disproportionate arrests of blacks are mirrored by statistics showing disproportionate imprisonment. By the early 1990s, blacks outnumbered whites in American prisons. In 1990, for every 100,000 whites, about 289 were in jail or prison. For every 100,000 blacks, about 1,860 were in jail or prison.[60]

Reports by victims of crime describing those who robbed or attacked them corroborate these patterns. Here, too, of course, there is room for error, bias, and deceit to distort an accurate portrayal of reality. Susan Smith, the white woman who accused a black man of abducting her children (although she herself killed them), and Charles Stuart, the white man who accused a black man of killing his wife (although Stuart himself almost certainly committed the murder) are two well-known examples of false reports by purported victims of crime.[61] It is unlikely, however, that falsehoods account for the large racial disparities evident in the cumulative portrait produced by victimization reports. Such reports typically made by ordinary citizens with nothing to gain by lying confirm the pattern revealed by official reports of arrest and incarceration rates,[62] a pattern in which the percentage of street crimes perpetuated by blacks is considerably greater than the percentage of blacks in the population at large.[63] Posing the question, "Is racial bias in the criminal justice system the principal reason that proportionately so many more blacks than whites are in prison?," Professor Michael Tonry, a leading liberal expert on sentencing, answers rightly: "The main reason that black incarceration rates are substantially higher than those for whites is that black crime rates for imprisonable crimes are substantially higher than those for whites."[64]

Given the deprivations blacks have faced, it should come as no surprise that, relative to their proportion of the population, blacks are more

likely than whites to commit street crimes.[65] The legacy of legal racism, modern discrimination, and the failures of government to provide opportunities to the disadvantaged have combined to create criminogenic conditions in which too many black Americans are forced by circumstances to live. That is a reality indifferent to the embarrassment of those ashamed of the criminality that poor economic, social, cultural, and moral conditions spawn. Shame has more to do with denying the true extent of criminality perpetrated by blacks than has hitherto been recognized. Some deniers are simply embarrassed by the criminal conduct that plays such an obviously large role in many African-American communities. Acknowledging the prevalence of that misconduct and its consequences is essential, however, to educating and mobilizing the political will necessary to address the nation's criminogenic social problems.

In stressing the need to address the socioeconomic as well as the moral conditions that spawn criminality, I minimize neither personal responsibility for criminal acts nor the need to punish criminality. Rather, I posit the need to forswear either/or dichotomies that avoid the complications posed by complex realities. Society faces both real racism and real criminality, a long-term need to address socioeconomic inequities and a short-term need to provide for public safety *now,* a crisis in individual moralities and a crisis of social justice.

Some observers have been driven to doubt the very possibility of a racially just system of law within the United States. Suspicion and anger have pushed them to identify law enforcement completely with oppression and even to embrace vicious criminals as heroic rebels. In his classic *An American Dilemma*, Gunnar Myrdal glimpsed this dynamic at work at mid-century in the American South:

> The Negroes . . . are hurt in their trust that the law is impartial, that the court and the police are their protection, and, indeed, that they belong to an orderly society which has set up this machinery for common security and welfare. They will not feel confidence in, and loyalty toward, a legal order which is entirely out of their control and which they sense to be inequitable and merely part of the system of caste oppression. Solidarity then develops easily in the Negro group, a solidarity against the law and the police. The arrested Negro often acquires the prestige of a victim, a martyr, or a hero, even when he is simply a criminal.[66]

Now, at the close of the twentieth century, despite notable reforms, this dynamic is still at work. It largely explains why many blacks rallied around the gang of boys who raped a white jogger in New York's Central Park,[67] around Marion Barry, the mayor of Washington, D.C., who was caught red-handed smoking cocaine,* around Alcee Hastings, the federal district court judge who, based on allegations of corruption, was ousted from office by the U.S. Senate (only to be subsequently elected to the House of Representatives),[68] around Damian Williams and the other hooligans who gained notoriety when they were filmed beating a hapless white truck driver (Reginald Denny) in the early hours of the Los Angeles riot of 1992,[69] and around Mike Tyson, the boxing champion, when he was imprisoned for rape.[70] This dynamic was also glaringly present in the response to the prosecution of O.J. Simpson, the football star tried for murdering two whites, including his former wife, in the most widely publicized trial in American history.[71] Before the murders, Simpson ignored, and was largely ignored by, most blacks. After Simpson was indicted, however, and even more after his attorneys claimed that he had been framed by at least one racially prejudiced police officer, many blacks perceived Simpson as the embodiment of all black men and accordingly rallied to his cause.[72] One black celebrant of Simpson's acquittal spoke for scores of others when, describing his understanding of the case, he stated bluntly:

> [A] black man was charged with killing a white woman—a blond white woman at that . . . —and the court said he didn't do it. Hell,

*Paul Butler, a former prosecutor, states that there were blacks, including himself, in the U.S. Attorney's Office in Washington, D.C., who privately hoped that Marion Barry would be acquitted because they believed that their office's prosecution of the mayor was racist. Butler has subsequently called upon black jurors to engage in jury nullification in cases involving black defendants charged with nonviolent crimes. See Paul Butler, "Racially Based Jury Nullification: Black Power in the Criminal Justice System," 105 *Yale Law Journal* 677 (1995). For my critique of Butler, see pp. 295–310.

> that's worth celebrating. We never win *anything*. I don't care if he did do it. This is a victory for all those brothers sitting in jail right now 'cause the system got its foot on their necks.[73]

The inversion of values which martyrizes criminals stems in part from the crisis of legitimacy that afflicts the administration of criminal law. For a long time, criminal law—not simply the biased administration of law but the law itself—was the enemy of African-Americans. In many places, for several generations, it was a crime for blacks to learn to read, to flee enslavement, or to defend themselves, their families, or their friends from physical abuse. It was a crime, in sum, for blacks to do all sorts of things deemed to be permissible or admirable when done by others. More recently, during the civil rights era, African-Americans violated criminal laws (although many of these "laws" were subsequently invalidated) to uproot the Jim Crow system. That is why so many African-Americans lionized in black communities have had "criminal" records. The list includes Martin Luther King, Jr., Robert Moses, Fannie Lou Hamer, Rosa Parks, and John Lewis. By using the criminal law against these and others involved in resisting racial oppression, officials have destabilized the moral meaning of conforming to law and violating it. That is why being a "good," law-abiding Negro came to be associated with acquiescence to oppression, why James Baldwin wrote in 1966 that "to respect the law in the context in which the Negro finds himself is simply to surrender... self-respect,"[74] and why being a "crazy," law-breaking "bad nigger" came to be associated with laudable rebelliousness.[75]

For many blacks, Professor Regina Austin observes, "there has historically been a subtle admiration of criminals who are bold and brazen in their defiance of the legal regime of the external enemy."[76] Robert Wideman, presently serving a life sentence for felony murder, vividly expresses this sentiment. Applauding black criminals, Wideman states:

> We can't help but feel some satisfaction, seeing a brother, a black man, get over on these people, on their system without playing by their rules. No matter how much we have incorporated these rules as our own, we know that they were forced on us by people who did not have our best interests at heart.... [We black people] look at [this gangster or player or whatever label you give these brothers] with some sense of pride and admiration.... We know they represent rebellion.[77]

His sentiments are shared by a substantial number of Americans. Precisely how many is difficult to say. That the numbers are significant, however, is clear. One sees reflections of this sentiment in such things as expressions of admiration for "the spook who sat by the door," the fictional black terrorist hero in a novel of racial revenge set in the 1960s, in the applause for the character "Super Fly," the black drug dealer who "stuck it to The Man" in one of the leading "blacksploitation" films of the 1970s, in the popularity of "gangsta rappers" who create groups like the Lenchmob Crew, companies like Death Row Records, and songs like "Cop Killer," the fashionableness of the "cool pose" by which many young men attempt to assert their masculinity by adopting a defiant, confrontational, "badman" style of conduct, and in expressions of popular support voiced for people like Larry Davis (an alleged murderer who wounded several police officers in a highly publicized shootout with police in New York City).[78]

Sympathetic to this perspective is a distinctive racial critique of the criminal justice system according to which the legal order is pervasively infected by a systematic racial bias that nullifies its legitimacy. Proponents of this argument portray the police as colonial forces of occupation, prisons as centers of racist oppression, and the law as merely the white man's law. As articulated by one proponent of this critique, the white power structure "constructs crime in terms of race and race in terms of crime" and thereby creates a "racial ideology of crime that sustains continued white domination of blacks in the guise of crime control."[79] Such claims reinforce hostility toward the agencies of crime control, sympathetic identification with convicts, and a commitment to policies aimed at constraining as much as possible the powers of law enforcement authorities. Proponents of this view point to the history of criminal law in the United States as justification for their position. They assert, rightly, that racial bigotry suffuses this history. That is why I devote much of this book to an exploration of the history of racial oppression in the administration of criminal law. The burden of the past weighs upon us.

Some commentators proceed, however, as if there has been *no*

progress in American race relations, as if there exists little difference between the laws, practices, and beliefs prevalent during the eras of slavery and *de jure* segregation and those prevalent today, as if African-Americans have completely failed in efforts to participate in shaping and implementing government policy, as if black legislators, mayors, attorneys, judges, jurors, and chiefs of police do not exist. But, of course, there has been substantial, beneficial change in race relations. One development in particular highlights this point. Until recently, playing the "race card" almost always meant whites exploiting racial power. Now, in enough circumstances to make the matter worth discussing, playing the race card also refers to blacks effectively exploiting racial power (see pp. 295–310). Now black attorneys face the question whether they should seek to elicit the racial loyalties of black jurors or judges on behalf of clients. Now black jurors and judges face the question whether they should respond to such appeals. These facts illustrate that, while racial animus against blacks still strongly grips American society, circumstances have indeed changed. My exploration of race relations in the administration of criminal law attempts to give due recognition to this ongoing transformation. Indeed, it is precisely because of the conflicting, ambiguous tendencies in American law and politics that a reconsideration of the race question in American criminal justice is especially urgent.