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Race, the Police, and "Reasonable Suspicion"

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Race, the Police, and “Reasonable Suspicion”

Should police be allowed to use race—typically, color of any sort—as a proxy [Q: Use “marker” instead? Webster’s does not support the use of “proxy” in this context.] in determining whether someone has committed or is about to commit a crime?

State and Federal police officials routinely use race as a marker for crime. For example, the U.S. Border Patrol has acknowledged that its agents in the Southwest scrutinize motorists who appear to be Mexican more closely than others [Q: Citation needed?]. Officials of the Drug Enforcement Administration (DEA) have acknowledged that blackness is a factor that prompts them to question certain passengers deplaning from airliners [Q: Citation needed?]. Throughout the United States, local law enforcement officials use race as a [Q: marker?] for an increased risk of criminal misconduct [Q: Citation needed?]. In many of these cases, police suspect people who seem out of place, or incongruous, as when a black person is in a predominantly white neighborhood late at night.

Allow me to make the precise target of my inquiry more clear. First, I am not focusing primarily on instances in which police officers question, detain, or arrest someone *solely* on the basis of race. To be sure, such conduct occurs and merits attention; indeed, it figures into my analysis. That such conduct ought to be condemned, however, is uncontroversial. The great majority of police officers, lawyers, and judges would agree that acting solely on the basis of race would be wrong and should be [Q: is?] illegal. The controversial issue is whether police ought to be allowed

to use race *at all* in determining suspicion.

Second, I am not focusing on instances in which race is an identifying feature of a suspect. I do not object, for example, if a robbery victim states the race of the perpetrator and the police use that information to hunt the criminal. Mentioning race as part of a detailed description of a robber is no different and no more objectionable than mentioning that the perpetrator had purple hair or a prominent scar.

The focus of my attention is the police's routine use of racial generalizations to create a "profile" of likely suspects. Police do not have a specific suspect in mind; rather, they use race as part of an array of factors threaded together to create a net with which police go trawling for criminals.

Most courts have broadly affirmed the constitutional legitimacy of this practice. Consider the case of *United States v. Weaver*, 966 F. 2d 391 (CA 8 1992) [Q: Is this the full citation? If not, please provide it.]. A DEA officer stopped and questioned Arthur Weaver, who had just exited an airliner at the Kansas City, Kansas, airport. The officer said he questioned Weaver because he was "roughly dressed," young, black, and on a direct flight from Los Angeles, a source city for drugs. In addition, the DEA officer said he suspected Weaver because he walked rapidly from the airplane toward a cab, had two carryon bags and no checked luggage, and appeared nervous. Although the young man, as it turned out, was carrying illicit drugs, he challenged the legality of the officer's intervention. The Eighth Circuit Court of Appeals upheld the officer's conduct and expressed no misgivings about it despite the fact that he admitted having taken race into account.

Although the Eighth Circuit Court admitted that "large groups of our citizens should not be regarded by law enforcement officers as presumptively criminal based upon their race," the court explained its position in this way:

Facts are not to be ignored simply because they may be unpleasant—and the unpleasant fact in this case is that the [DEA agent] had knowledge, based upon his own experience and upon the intelligence reports he had received from Los Angeles authorities, that young male members of the African-American Los Angeles gangs were flooding the Kansas City area with cocaine. To that extent then, race, when coupled with the other factors [the agent] relied upon, was a factor in the decision to approach and ultimately detain [the suspect]. We wish it were otherwise, but we take the facts as they are presented to us, not as we would wish them to be.

Realism is the central theme of the court's response: "We take the facts as they are presented to us." Because the facts indicated that black gangs were exporting drugs to Kansas City, it seemed reasonable for officers to direct their attention to airline passengers fitting the profile of such gang members, a profile that included blackness among other factors. Judges and others who permit or champion the approach taken by the agent in *Weaver* emphasize its effectiveness. They assert that using race as a marker of a greater likelihood of criminal wrongdoing by an individual or group allows authorities to apprehend criminals and allocate resources more efficiently than would otherwise be

possible. Proponents of this view might note that the man targeted in *Weaver* was a drug courier, just as the agent suspected.

The court also decided that the use of race in *Weaver* was not invidious or malicious because race was only one of several factors in the officer's calculation. It would have been wrong, the judges declared, had the officer cited only race as a basis for questioning Weaver. In the court's words, "We would not hesitate to hold that a solely race-based suspicion of drug courier status would not pass constitutional muster." But that is not what occurred; race was only one of several factors on which the officer relied.

In my view, however, as a matter of law and policy, it is wrong for officials to use race—even as only one of several factors arousing their suspicion, as in *Weaver*.

First, the officer engaged in racial discrimination when he used race as a factor in his suspicion of Weaver. Racial discrimination occurs whenever race is taken into account—even when it is taken into account only to a small degree and alongside other factors. Just because race was not the only factor considered by the officer, does that mean that racial discrimination was justified? [Q. Correct as edited?]

Second, use of racial distinctions in policing should be handled by policymakers and courts in the same way that racial distinctions are handled in other arenas of our society; officials should not use racial distinctions to reinforce their suspicions unless they can offer an

extraordinary justification.

Use of race in the
criminal context
- reasonableness
of use.
In other contexts,
strict scrutiny

Unfortunately, many courts have demanded only good-faith reasonableness as a justification for race discrimination in policing [Q: Citation needed?]. They argue it is a fact that people fitting certain profiles in which race is a factor are more likely to commit (or to have committed) certain crimes. They might point, for example, to jurisdictions where [Q: pp. 1997?] 90 percent of the drug couriers were African-American men between the ages of 18 and 40 [Q: Citation needed?]. They contend that in such settings it makes good sense to use markers, including race, to direct attention to those people most likely to be drug traffickers. Proponents of this view might well quote my colleague Cornell West and declare that "race matters" [Q: Citation needed?]. [Q: Mr. Kennedy, can you elaborate for those who may not have read West's work?]

Frequently, however, police officials and courts lack a factual basis for concluding that race (in addition to other factors) correlates with a higher risk of criminal misconduct [Q: Citation needed?]. Great care should be taken before reaching such a conclusion. But even if such a correlation can be decisively established, officials should be more attentive to the special historical significance of racial distinctions in American life. Racial discrimination is different from other discrimination. Because of America's history of racial discord, we ought to finally understand that drawing racial lines is wrong, if not illegal [Q: Correct as edited?] That is why courts typically insist, under the equal protection clause of the 14th amendment, that reasonableness is an insufficient justification for officials to discriminate

by race. When officials discriminate on racial grounds, courts have increasingly demanded that such discrimination be subject to "strict scrutiny"—the most intense level of judicial review [Q: Citation needed?]. Under strict scrutiny, a racially discriminatory governmental action is upheld only if it can be supported by a compelling justification and if the government's racial distinction is narrowly tailored to advance the project at hand. In the context of affirmative action, courts and public opinion have become impatient with racial distinctions, i.e., employers should be color blind and not take race into consideration when making hiring decisions. [Q: Okay to add?]. The legality of racial distinctions in policing, however, has received conspicuously less attention, which is remarkable and troubling.

I do not want my objection to race discrimination in policing to stand or fall, however, on a point of constitutional law. Even if courts conclude that a practice is constitutional, it does not mean that the practice is wise. Routine police use of race as a marker of criminal behavior is profoundly unwise. Such a policy opens the door for officers to use racial discrimination as a means of racial harassment. My primary focus has been on good-faith efforts by Officer Friendly (as opposed to Officer Bigot) to use racial distinctions to make policing more efficient by narrowing the number of suspects. [Q: Mr. Kennedy, okay to add?]. An appreciable number of Officer Bigots, however, populate police forces. Because current policies allow officers too much leeway in making racial distinctions, these policies invite abuse. Bigoted officers can easily camouflage racial harassment with claims that race was only one of several factors causing them to act against a black or Hispanic suspect.

For preventive reasons policymakers ought to insist that officers have not only a reason—but an extraordinary reason—for using racial distinctions in policing.

In an emergency police could properly take race into account when the situation is weighty, immediate, and cannot be addressed sensibly by other means. For example, police receive a credible tip that a black man armed with a bomb is somewhere in an office building. Upon entering the building, police examine black men more closely than those [Qxmen?] who are not black. Under such circumstances, no one can rightly feel aggrieved. After all, freedom from racial discrimination is sometimes in tension with other freedoms. Care must be taken to ensure that the definition of exceptional emergency circumstances under which police are acting is clear and limited. When these precautions are taken in an emergency, the use of race should be viewed as an unpleasant necessity and not racial injustice. Police officials today use racial distinctions routinely and casually under circumstances that cannot plausibly be described as emergencies; this is a racial injustice.

This situation nourishes the mistrust, resentment, and anger that many Americans of color feel toward police. Nothing contributes more to these poisonous feelings than the knowledge that, as a matter of policy in many circumstances, police view black or brown skin as a mark or signal that someone is suspicious and act accordingly. This is why journalist Don Wycliff speaks for many people when he asserts that, notwithstanding his middle-class status, he feels “an ambivalence tilting toward antipathy for the police.” He

feels that way, he explains, because "a dangerous, humiliating, sometimes fatal encounter with the police is almost a rite of passage for a black man in the United States" [Q: Citation needed?]

If the police may properly view race as a marker of suspicion, people of color are more vulnerable to routine questioning, traffic stops, and other unwanted attention from the police. It follows that people of color will have more reason than whites to fear the police, regardless of their compliance with the law. Racial minorities are on average more likely to be victimized by crime than whites, which only compounds the problem [Q: Citation needed?]. The residents and communities most in need of police protection view the police with the most ambivalence [Q: Citation needed?]. People who otherwise might be of assistance to police avoid them, decline to cooperate with police investigations, assume bad faith or dishonesty on the part of police officers, and teach others that such reactions are prudent lessons of survival. Enhancing the effectiveness of the police in many locales requires the creation of better police-community relations. But in many places, better police-community relations are possible only if people of color are confident that the police deal with them on the same basis as whites. That confidence cannot be created as long as police routinely view color as a signal that someone is suspicious.

I will now address some anticipated criticisms of my position. First, some critics resist reform on the grounds that good-faith race discrimination in policing is too beneficial to give up. [Q: Mr. Kennedy, "good-faith race discrimination" sounds to some people like an

~~exemption - the only phrase I've come up with as a substitute, though, is this: "good faith use of race as a marker of suspicion" and I think it's too long and cumbersome. Do you have any other suggestions?~~

The rebuttal to this claim takes two forms. One involves its cost. Proponents of good-faith race discrimination in policing often greatly minimize the costs imposed by this practice and point only to the instances in which such practices lead to capture of criminals. They often neglect to consider the cost (burden) to innocent people. They emphasize the brevity of the police intrusion and contend that that is a small price to pay for enhanced police protection. But the man who is pulled over for questioning in the Southwest by the Border Patrol in part because he appears to be Mexican will be vulnerable not only to one stop but a lifetime of such stops. Nor do proponents of this type of policing sufficiently weigh the cumulative negative effects of this practice on policing itself. The resentment generated by race discrimination in policing, even in good faith, impedes law enforcement by eroding the cooperation and trust the police need to carry out their difficult tasks.

Second, proponents of good-faith race discrimination in policing often talk as if no sensible alternatives exist. But that is not so. Instead of placing a special burden on people of color, authorities could decide to hire more police officers to investigate the resulting larger pool of suspects. Or they could impose upon everyone nonracial schemes for dealing with criminality, such as random stopping or stopping everyone engaged in certain modes of transportation. Facts alone do not determine how we proceed; the way we proceed is a matter of choice. The fact that race is a marker of crime in many cases does

not mean that it is a marker in every case. To presume so is perhaps logical, but unfair. [O

Add this sentence or one like it to clarify.] The choice is whether to continue to place an extra burden on groups that historically have been oppressed or to burden everyone equally, regardless of race, paying the costs that a full and authentic embrace of racial justice sometimes exacts.

Third, some people respond to this argument with a shrug, saying that regardless of its merits, police do what they think works best despite the formal rules that govern them. Further, these people argue further that implementing this proposed reform to prohibit police use of race as a marker of suspicion will simply cause officers to lie. Instead of an agent saying candidly that race was one of several factors that prompted him to question someone like Arthur Weaver, the agent will continue to use race as a marker of suspicion but omit any reference to race when called upon to justify his conduct. The fear that officers will not stop using race as a marker of suspicion, however, is an insufficient basis for rejecting this argument. It is fair to assume that a substantial number of officers would use the new rules even if they disagree with them. Moreover, even if these rules drive race discrimination in policing underground, that is better than the current situation in which police are authorized and expected to use race to as a marker of suspicion. I admit that there is a danger in constructing a norm that likely will be underenforced to a substantial degree. Underenforcement will nourish further the cynicism of people of color who believe, understandably, that the criminal justice system habitually breaks its promises. The correct response to this danger, however, is not to promise less but to work harder to

bring the actual conduct of officials in line with appropriate goals. Even when rightful rules are underenforced, they are worth fighting for because they set the standard for legitimacy, exerting moral force that affects peoples' conduct and expectations.

In conclusion, political leaders and police authorities ought to declare clearly that, except in extraordinary circumstances, officers in the field should not take race into account in determining whether individuals appear suspicious. Courts ought to prohibit nonemergency good-faith police use of race discrimination. Even if courts decline to invalidate such conduct, however, police should reject it on the grounds that it is counterproductive.

4.

Race, Law, and Suspicion:

*Using Color as a Proxy
for Dangerousness**Fear covers the streets like a sheet of ice.*

—Bill Bradley

TWO POWERFUL ANTAGONISTIC attitudes have shaped the decisions that have largely determined the course of American race relations. One, whose influence has been stressed in the two preceding chapters, is marked by an insistence that, at bottom, the United States of America is, and should remain, a white man's country. A second attitude, less influential historically than the first, though strong in its own right, rejects the legitimacy of an official pigmentocracy. It insists that all persons and all groups be accorded equality before the law with no privileged or subordinated castes.

The question whether, or under what circumstances, people should be able to view and act upon race as a mark of increased risk of criminality frames a context in which the struggle between these competing attitudes is intense. But the matter is more complicated than this. For debate over the proper response to that question rages not only between white supremacists and racial egalitarians; it rages as well within the ranks of racial egalitarians, indicating the existence of differing conceptions of racial equality.

Whether the legal system ought to authorize people to take race into account in making calculations about the criminal propensity of others

is a vexing question. Attuned to the reported demographics of crime, fearful people of all hues engage in race-dependent strategies either to apprehend criminals or to avoid them. Consider the police officer who detains the young black man disembarking from an airplane because the officer believes that the young man's race is one of the signals indicating that he is probably engaged in drug trafficking. Consider, too, the lone pedestrian who perceives the blackness of an oncoming teenager as part of a reason to cross the street, shift the position of a handbag, or touch the grip of a hidden handgun.

The hypothesized police officer and lone pedestrian each use race as a proxy for an increased risk of criminality. By proxy I mean a trait—in this case blackness—which is (or is believed to be) correlated with some other trait—in this case crime. All of us use proxies a great deal of the time. As Professor Larry Alexander writes, "Day in and day out . . . we react to people based on traits they possess which, though immaterial in themselves, we believe to be highly correlated with those traits in which we are primarily interested."¹ We look to traits, such as having a law degree, as indicators of other traits, such as having expertise in legal matters.

Why do we proceed in this way? Why don't we dispense with proxies and simply look for the qualities with which we are ultimately concerned? One reason is expense. Obtaining information is expensive, so we depend upon various sorts of proxies, such as educational credentials, to lessen the costs entailed in gathering the information we need to make sensible decisions. It would be very expensive to examine for ourselves directly the handiwork of doctors, lawyers, accountants, and so on, so we look to less expensive proxies for competence—degrees, licenses, recommendations. Similarly, it is expensive for a person to determine with his own eyes whether another individual actually has criminal intentions. Doing that might require waiting until the individual pulls a gun and demands what he wants. So we look to proxies to help us calculate at less expense the risk that a given individual is likely to make such a demand—proxies such as gender, age, clothing, posture, accent, and, yes, race.

But is it proper to use a person's race as a proxy for an increased likelihood of criminal misconduct?^{*} Let's begin with the police.²

^{*}I am not talking about the case in which police act against a person based on a detailed description that includes the suspect's race. In such a case, the person's skin

Police and the Problem of "Reasonable" Racial Discrimination

Public authorities in the United States have long used race as a signal of an increased risk of criminality. Many jurisdictions that permitted slaveholding institutionalized the linkage of blackness with suspiciousness by empowering all whites to demand proof of a black's status as a slave or free person. Since blacks were presumed to be slaves, any black person lacking obvious supervision by a white person was deemed to be suspect, a possible fugitive from bondage. North Carolina attempted to lessen the burden of supervision by requiring that all urban nonslave blacks wear shoulder patches on the outside of their clothing inscribed with the word "free."³

Blacks are not the only racial minority to confront racially selective policing. The most dramatic and extensive single episode in which authorities used race as an indicia of potential criminality involved the wholesale detention of persons of Japanese ancestry during World War II. After the Japanese attack on Pearl Harbor brought the United States fully into the war, federal authorities placed all persons of Japanese ancestry who lived on or near the West Coast under military orders, pursuant to which they were subjected to curfew, removed from their homes, and detained in camps. The U.S. Supreme Court upheld the constitutionality of most of these measures against charges that they denied equality before the law to persons of Japanese ancestry.* Speaking for the Court, Justice Hugo L. Black wrote:

color is being used no differently than information about the pants or jacket or shoes that the suspect was said to be wearing. When used as part of a detailed description to identify a given individual, the person's race is not so much a category that embraces a large number of people as a distinguishing fact about the identity of a designated person. My concern in this chapter is with the use of racial categories as a probabilistic sorting device used by police and others to demarcate groups of persons who, because of their race, are viewed as more risky than other persons.

*In *Hirabayashi v. United States*, 320 U.S. 81 (1943) the Supreme Court upheld a curfew imposed on people of Japanese ancestry. In *Korematsu v. United States*, 323 U.S. 214 (1944) the Court upheld the exclusion of people of Japanese ancestry from designated areas. In *Ex Parte Endo*, 323 U.S. 283 (1944), the Court ruled that the Constitution prohibited government authorities from continuing to detain a concededly loyal American citizen of Japanese ancestry.

All legal restrictions which curtail the civil rights of a single racial group are immediately suspect. That is not to say that all such restrictions are unconstitutional. It is to say that courts must subject them to the most rigid scrutiny. Pressing public necessity may sometimes justify the existence of such restrictions; racial antagonism never can.⁴

The Court upheld the restrictions on the ground that public necessity justified them. In the midst of war, there was simply no time to pursue the investigation that would have been required to distinguish between those persons of Japanese ancestry who represented a real risk of subversion and those who could presumably be trusted. "We are not unmindful of the hardships imposed by [the military orders] upon a large group of American citizens," Black declared, but "citizenship has its responsibilities as well as its privileges, and in time of war the burden is always heavier."⁵

Korematsu has been widely criticized as a judicial capitulation to racial prejudice.⁶ There was no substantial evidence of subversion by persons of Japanese ancestry. No similarly broad or burdensome restrictions were imposed upon whites whose lineage was German or Italian (though the United States went to war against Germany and Italy as well as Japan).⁷ Moreover, it was well known that racial hatred was one of the important motivations behind the restrictions. The general whose

*In dissent, Justice Robert H. Jackson presses this point eloquently:

Had *Korematsu* been one of four—the others being, say, a German alien enemy, an Italian alien enemy, and a citizen of American-born ancestors, convicted of treason but out on parole—only *Korematsu's* presence would have violated the order. The difference between their innocence and his crime would result, not from anything he did, said, or thought, different than they, but only in that he was born of different racial stock.

Now, if any fundamental assumption underlies our system, it is that guilt is personal and not inheritable. Even if all of one's antecedents had been convicted of treason, the Constitution forbids its penalties to be visited upon him, for it provides that "no attainder of treason shall work corruption of blood, or forfeiture except during the life of the person attainted." But here is an attempt to make an otherwise innocent act a crime merely because this prisoner is the son of parents as to whom he had no choice, and belongs to a race from which there is no way to resign.

323 U.S. 243 (1944) (Jackson, J., dissenting).

orders the Supreme Court upheld openly declared that in his view all persons of Japanese descent belong to "an enemy race."⁷ Justice Frank Murphy rightly observed in dissent that the government had fallen "into the ugly abyss of racism,"⁸ a judgment the United States subsequently embraced by passing legislation that formally apologized for its conduct and that paid reparations to many of those who suffered on account of the forced relocations.⁹

Nowadays the question of whether, or in what circumstances, officials may legitimately take race into account in determining the suspiciousness of a person arises in situations such as these:

EPISODE ONE. Police officers in Phoenix, Arizona, stop and question a person because he is sitting in a car outside of an apartment complex, appears to be nervous, moves his car when a marked police car approaches his vehicle, and also because, in an officer's words, "he was a Mexican male in a predominantly white neighborhood."¹⁰

EPISODE TWO. A drug enforcement agent at the Kansas City, Kansas, airport stops and questions a person because he is "roughly dressed," young, got off a direct flight from Los Angeles, a source city for drugs, walks rapidly from the airplane toward a taxi cab, has two carry-on bags and no checked luggage, and appears to be very nervous. That the person is black is another factor which, along with the others, prompted the agent's action.¹¹

EPISODE THREE. In California, at a highway checkpoint thirty miles north of the Mexico-U.S. border, officers of the U.S. Border Patrol subject the driver of an automobile to questioning and search. Their suspicions are triggered, in part, by his apparent Mexican ancestry.¹²

EPISODE FOUR. Police randomly stop, question, and search young black men in a neighborhood in Boston for several weeks. The provocation is a report by a (white) man that his (white) pregnant wife was shot and killed in that neighborhood by a young black man.¹³

EPISODE FIVE. Police in New York City detain and search a clean-shaven, 6 foot 4 inch, 225 pound young black man carrying a briefcase immediately after he alights from a commuter train. They are

acting on the basis of an anonymous letter which warned that a 5 foot, 10 inch, trim, mustachioed, black man riding the train routinely carries a gun.¹⁴

EPISODE SIX. Police receive a credible tip that a white man armed with a bomb is somewhere in an office building. They surround the building and then enter it. The police examine white men more closely than those who are non-white.

Most courts that have confronted the issue have authorized police to use race in making decisions to question, stop, or detain persons so long as doing so is reasonably related to efficient law enforcement and not deployed for purposes of racial harassment. An example is the decision by the Supreme Court of Arizona in *State v. Dean*, which stemmed from the incident described above in episode one. In this incident, police acted in part on the basis of a perception that the suspect was "out of place" given his race and the racial composition of the neighborhood in which he was sighted. The Arizona court saw the officers' use of race not as a dubious practice but rather as a "practical aspect of good law enforcement."¹⁵ The court conceded that it would be impermissible for officers to act on the basis of racial or ethnic background *alone*. That, however, was not the case here, where the racial incongruity between the person observed and the area in which he was stopped was only one factor of several that prompted police to act.* The court could have added that the racial incongruity that supplemented police suspicions was presum-

*The Arizona Supreme Court stated:

[The suspect's] ethnic background was only one of several factors which caused the officers to believe that further investigation was necessary. That a person is observed in a neighborhood not frequented by persons of his ethnic background is quite often a basis for an officer's initial suspicion. To attempt by judicial fiat to say he may not do this ignores the practical aspects of good law enforcement. While detention and investigation based on ethnic background alone would be arbitrary and capricious and therefore impermissible, the fact that a person is obviously out of place in a particular neighborhood is one of several factors that may be considered by an officer and the court in determining whether an investigation and detention is reasonable and therefore lawful.

State v. Dean, 543 P.2d 425, 427 (Arizona 1975).

RACE, CRIME, AND THE LAW

ably evenhanded, applying to whites who are "out of place" as well as to people of color who appear to be where they "do not belong."^{*}

Another example of judicial toleration of race-dependent police decisionmaking is the judgment of the U.S. Court of Appeals in *United States v. Weaver*, which upheld the validity of the airport stop described above in episode two. "Large groups of our citizens," the Court declared, "should not be regarded by law enforcement officers as presumptively criminal based upon their race."¹⁶ However, the Court went on to say:

Facts are not to be ignored simply because they may be unpleasant—and the unpleasant fact in this case is that [the DEA agent] had knowledge, based upon his own experience and upon the intelligence reports he had received from the Los Angeles authorities, that young male members of the black Los Angeles gangs were flooding the Kansas City area with cocaine. To that extent, then, race, when coupled with the other factors [the agent] relied upon, was a factor in the decision to approach and ultimately detain [the suspect]. We wish it were otherwise, but we take the facts as they are presented to us, not as we would like them to be.¹⁷

Another example of judicial deference to racially discriminatory police conduct is *United States v. Martinez-Fuerte*,¹⁸ a U.S. Supreme Court decision that upheld the stop described above in episode three. First, the Court concluded that stopping motorists at a permanent checkpoint for brief questioning is of such a minimally intrusive character that it can appropriately be done in the absence of an individualized suspicion that a particular vehicle contains illegal aliens. Second, the Court reasoned that "as the intrusion here is sufficiently minimal that no particularized reason need exist to justify it . . . it follows that the Border Patrol officers must have wide discretion in selecting the motorists to be diverted for [brief questioning]," including the discretion to use apparent Mexican

^{*}Police sometimes view whites who are "out of place" with increased suspiciousness. They also sometimes view such people with solicitude, perceiving they must be lost and thus face an increased risk of being harmed.

ancestry as an indicia of suspicion.¹⁹ Third, the Court pointed to results: Of the 820 drivers selected for questioning by the Border Patrol during the eight days surrounding the incident in question, roughly 20 percent were engaged in transporting illegal aliens. What the Court inferred was that "to the extent that the Border Patrol relies on apparent Mexican ancestry . . . that reliance clearly is relevant to the law enforcement need to be served."²⁰

In permitting race to be used on a routine basis as a negative signal of increased risk of criminality, *Dean*, *Weaver*, and *Martinez-Fuerte* represent an influential, indeed dominant, view within the judiciary. There is an alternative perspective that has been voiced by some judges. The Court of Appeals of Virginia, for example, has ruled that in the absence of a compelling (as opposed to a merely reasonable) justification, police use of race as a factor in calculating suspiciousness violates the Virginia and federal constitutions.²¹ Several federal judges voice a similar view.²² Most courts that have confronted the issue, however, have concluded that race can appropriately be used as a factor of suspicion in determining the likelihood that a person is engaging in, or has already committed, criminal activity, so long as this use of race is *reasonably* related to law enforcement aims and not a mere pretext for racial harassment.

Some commentators dispute that it is reasonable for police (or anyone else) to use racial indicia—or, more precisely, blackness—in evaluating risks of criminal mischief.²³ They castigate as bigots police officers who see blackness as a signal of a higher probability that an otherwise undifferentiated person has engaged in or will pursue criminal behavior. They mistrust statistics which uniformly indicate that blacks, especially men, are more likely than whites to commit street crimes. They resist the idea that racial discrimination (at least discrimination that adversely affects blacks) can properly be termed "reasonable." They contend that theories of reasonable racial discrimination are mere rationalizations for the mistreatment of vulnerable minorities. When confronting the fact that some blacks, too, are among the defenders of the concept of reasonable racial discrimination, these commentators respond by saying, as did Professor Patricia Williams, that such blacks have "learned too well the lessons of privatized self-hatred and rationalized away the fullness of [their] public, participatory selves."²⁴

There is both virtue and vice in this response. Its virtue consists in its

resistance to a seductive theory to which many have acquiesced all too easily. Some defenders of so-called "reasonable" racial discrimination neglect to consider certain difficulties embedded in the implementation of it. One difficulty has to do with the fact that misinformation may mar the calculations pursuant to which determinations of suspiciousness are made. If news reports, rumor, and folklore exaggerate the danger that crime poses and misportray blacks' contribution to that danger, then officers acting in reliance on these impressions may react reasonably to the *perceived* situation but unreasonably to the *actual* situation. Hence, before conceding that a given act of racial discrimination is "reasonable," careful attention must be paid to the accuracy of the information used in making such an assessment—an attentiveness that is now often absent.*

A more fundamental difficulty has to do with the values people bring to bear in deciding what is "reasonable." The judgment that a racial discrimination is reasonable depends not only on an evaluation of the discrimination's assistance in apprehending criminals. It also depends on an evaluation of the danger posed by given suspects and assessments of the costs imposed upon innocent people by using the racial criterion in dispute. The more one empathizes with the innocent blacks erroneously detained by racially discriminatory investigation, the smaller will be the range of decisions one views as "reasonable." By the same token, the more distant one feels from those erroneously detained, the larger will be the range of decisions one views as "reasonable." Rea-

sonableness, then, is not a definite, arithmetic, objective quality that is independent of aims and values. It is a concept that is considerably more subtle, complex, malleable, and mysterious than the simplistic model of human decisionmaking relied upon by those who accept at face value the "reasonableness" or "rationality" of conduct that not only expresses controversial moral and political judgments but that also expresses deep-seated, perhaps unconscious, affections, fears, and aversions.²⁵

Although critics of reasonable racial discrimination usefully discourage a complacent acceptance of it, some of them also obscure important matters about which clarity is needed. People seeking solutions to America's massive racial problems must resolutely eschew the temptation to prettify ugly realities. Crime and its racial demographics are part of those realities. It does no good to pretend that blacks and whites are similarly situated with respect to either rates of perpetration or rates of victimization. They are not. A dramatic crime gap separates them. In relation to their percentage of the population, blacks on average both commit more crimes and are more often victimized by criminality. The familiar dismal statistics and the countless tragedies behind them are not figments of some Negrophobe's imagination. The country would be better off if that were so. Instead, the statistics confirm what most careful criminologists (regardless of ideological perspective) conclude: In fact (and not only in media portrayal or as a function of police bias) blacks, particularly young black men, commit a percentage of the nation's street crime that is strikingly disproportionate to their percentage in the nation's population.²⁶

That is why there are circumstances in which, as a statistical matter, a police officer would be correct in estimating that a man's blackness identifies him as more likely than a similarly situated white person to be involved in criminal wrongdoing. Just as race can signal a heightened risk that a black person will die younger, earn less money, reside farther away from employment opportunities, experience more unpleasant encounters with police, and possess less education than a white person, so, too, can race signal a heightened risk that a black person will commit or has committed certain criminal offenses. This sociological fact does not mean that the legal system ought to permit police to engage routinely in racial discrimination. No sociological fact dictates the proper response

*Dissenting from the Courts' affirmation of the police conduct that served as the basis for Episode Two noted above, Judge Richard Arnold complained about the absence of information needed to gauge whether, or the extent to which, blackness actually correlated with a higher risk of drug trafficking. "If we had evidence," Judge Arnold maintained, "that young blacks in Los Angeles were more prone to drug offenses than young whites, the fact that a young person is black might be of some significance." *United States v. Weaver* 966 F.2d 391, 397 (CA 8 1992) Judge Arnold noted, however, that the government had presented no evidence on this point but had simply depended on the judges to resort to their own casual impressions as a basis for decision. Insisting upon a showing of concrete and precise evidence before using race as a proxy, Judge Arnold appropriately scolded his colleagues: "Use of race as a factor simply reinforces the kind of stereotyping that lies behind drug-carrier profiles. When public officials begin to regard large groups of citizens as presumptively criminal, this country is in a perilous situation indeed. Ibid at 397.

to it. At the same time, we need to know what the facts are, whether we like them or not.

Many of those who refuse to concede the instrumental rationality of using race as a proxy for an increased risk of criminality are gripped by a sense that racial discriminations must be stripped of any and all positive features and absolutely demonized. They fear that if they concede that racial discrimination may be rational in certain circumstances, many persons will seize the concession, wrongly generalize from it, and in the process weaken antidiscrimination norms. That fear largely explains the strong tendency to brand *all* racial discriminations that adversely affect blacks and other people of color as the product of irrational bigotry or prejudice.* Like many strategies based on simplification, however, this one incurs a considerable cost, namely, a lessened appreciation of the depth of the difficulties facing American society. One of those difficulties is that irrationality and bigotry are not all that supports racial discrimination. Many decent, enlightened, well-intentioned people engage in racial discrimination because it is often an understandable (albeit wrong) adaptation to a deformed social structure that diminishes blacks and pushes them toward their own anti-social adaptations. Tragically, in other words, from a short-term self-interested perspective, it makes sense for many people to engage in racial discrimination given the many racially correlated stratifications that mark American society. As Cornel West says, race matters.²⁷

If taking race into account in making determinations of suspicion is a rational adaptation to the racial demographics of criminality, why not permit police to engage in racial discrimination routinely, as many courts have? The heart of the answer resides in the special significance of racial distinctions in American life and law. *Race is different*. In

*Although some jurists (including Justice Clarence Thomas) insist that there exists no difference between affirmative action and segregation, others insist that there exists no difference between rational racial discrimination and bigoted racial discrimination. In both instances, and perhaps for similar reasons, proponents of these positions neglect important distinctions. For a good argument to the effect that champions of racial minorities have erred self-destructively by refusing to acknowledge the phenomenon of rational racial discrimination, see Cass R. Sunstein, "Three Civil Rights Fallacies," 79 *California Law Review* 751 (1991). This same issue re-emerges in the struggle over the use of peremptory challenges in jury selection. (See chapter 6.)

America, the making of racial distinctions has proven to be more destructive and more popularly distasteful than other lines of social stratification.* That is why, at least since the civil rights revolution of the 1950s and 1960s, judges have ruled, pursuant to the Equal Protection Clause of the Fourteenth Amendment, that mere reasonableness is an insufficient justification for officials to discriminate on racial grounds.²⁸ When officials discriminate on racial grounds, judges have typically demanded "strict scrutiny"—the most intense level of judicial review. Under strict scrutiny, a racially discriminatory governmental action should be upheld only if it can be supported by reference to a *compelling* justification and only if the government's racial distinction is narrowly tailored to advance the project at hand.²⁹ When a court administers strict scrutiny, it shines an intense spotlight on the governmental decision-making at issue in order to uncover any covert or unconscious racial biases at work. Strict scrutiny embodies a recognition, born of long and terrible experience, that the presence of a racial factor in decisionmaking should raise anxiety and signal that the government is likely to be doing something wrong. As Professor Paul Brest observes:

Even a glance at history indicates [that] race-dependent decisions that are rational and purport to be based solely on legitimate considerations [such as "good law enforcement"] are likely in fact to rest on assumptions of the differential worth of racial groups or the related phenomenon of racially selective sympathy and indifference.³⁰

In short, under U.S. constitutional law, governmental use of racial distinctions is typically strongly discouraged. It is presumed to be invalid.

*For example, the law permits insurance companies to use a wide variety of traits to guide them in selecting customers and setting rates. Yet state and federal laws uniformly prohibit race from being used as a factor in making actuarial calculations, despite the fact that, from the insurance industry's perspective, it would be a useful predictive criterion. See Jill Goulding, "Race, Sex, and Genetic Discrimination in Insurance: What's Fair," 80 *Cornell Law Review* 1646 (1995).

American law widely discourages gender discrimination. Federal constitutional and statutory law, however, give more leeway to gender discrimination than race discrimination. See, e.g., *Rostker v. Goldberg*, 453 U.S. 57 (1981) (upholding male-only draft); 42 U.S.C. 2000e-2(c) (1) (permitting gender discrimination in employment when gender "is a bona fide occupational qualification").

Yet many courts, including the U.S. Supreme Court, have failed to apply strict scrutiny—or a heightened scrutiny of any sort—to police using race as a factor of suspicion. Instead, courts have broadly *defended* police use of racial proxies by asserting, among other things, that such strategies are “realistic.” In *Weaver*, the U.S. Court of Appeals articulated this view, declaring that “facts are not to be ignored simply because they may be unpleasant,” by which the court referred to the supposed fact that the suspect’s race represented an increased likelihood that he was a courier for crack.³¹ Assuming the accuracy of the court’s facts—an unwarranted assumption given this court’s complacency toward fact-finding³²—its reasoning remains objectionable. The court seems to believe that facts dictate the way in which the legal order should respond. This is erroneous. The legal order always *chooses* how it shall respond to a given set of facts.* Although U.S. constitutional law is inconsistent, it has now typically and rightly chosen to subject to strict scrutiny racial classifications used by public officials. The court of appeals in *Weaver*, however, not only declines to follow the normal path, but declines as well to articulate why it withholds applying heightened scrutiny to racially selective policing. It says that “facts are not to be ignored simply because they are unpleasant.” Subjecting racial policing to strict scrutiny, however, would not entail ignoring facts. It would require courts to determine whether, in light of the society’s presumptive disapproval of race-dependent decisionmaking, the facts in a given instance are such that drawing a racial line is permissible.

Some courts argue that there is nothing to be concerned about if race is only one of several factors taken into account by police in determining suspiciousness. Indeed, some courts are suggesting that decisions which distinguish between persons on a racial basis do not even constitute racial discrimination when race is not the *sole* or dominant consideration prompting disparate treatment.³³ This is a profoundly wrong view. Even if race is only one of several factors behind a decision, tolerating it at all means tolerating it as potentially the *decisive* factor. In a close case, it is a person’s race which might make the difference between

*When whites violently resisted desegregation of public schools, some believed that the fact of that resistance dictated suspending desegregation. Fortunately, the Supreme Court *chose* a different response—ordering that officials comply with the Court’s interpretation of the Constitution. See *Cooper v. Aaron*, 358 U.S. 1 (1958).

being stopped by the police or being permitted to go on about one’s business free from governmental intrusion. In a case involving two people engaged in ambiguous behavior, the white person may be left alone while the black person may be intruded upon because her race, perceived as a signal of heightened risk, tipped the balance against her. Few racially discriminatory decisions are animated by only one motivation; they typically stem from mixed motives.³⁴ There are, of course, differing degrees of discrimination. For some discriminators, race may be a small consideration; for others, large. The degree of discrimination may have a bearing on its justifiability. But the degree of the discrimination cannot logically have a bearing on the *existence* of the discrimination itself. Taking race into account in a small, marginal, even infinitesimal amount still constitutes racial discrimination.

Judicial precedent largely favors the position I advocate. The Supreme Court has declared, for instance, that the Equal Protection Clause of the federal constitution “does not require a plaintiff to prove that the challenged action rested solely on racially discriminatory purposes.”³⁵ Noting that “racial discrimination is not just another competing consideration,” the Court averred that, “when there is proof that a discriminatory purpose has been a motivating factor in the decision” [emphasis added], strict scrutiny is imperative.

*Although it is unusual for police to use race as the *only* signal of increased risk, there are many instances in which race is used as the overwhelming indicia of suspiciousness. An especially chilling instance involves the Pennsylvania State Police. In 1974, this police department sent to banks a directive which read as follows:

BANK INFORMATION

Take photos of any black males or females coming into bank who may look suspicious:

- A. Come in to ask directions
- B. Exchange large bill for small money
- C. Come in for no apparent reason

NOTIFY LOCAL OR STATE
POLICE

A black man who was photographed pursuant to this policy sued the bank and the police. See *Hall v. Pennsylvania State Police*, 570 F.2d 86 (CA 3 1978) (allegation states cause of action under federal civil rights laws). See also *United States v. Nicholas*, 448 F.2d 622, 624 (CA 8 1971) (black person driving car with out-of-state license plates does not properly create inference of criminality).

Precedent, however, is not entirely on my side. After all, I am criticizing courts, including the Supreme Court, for failing to handle racial policing according to the rules generally applicable under federal constitutional law. Recently, moreover, in the context of disputes over electoral districting, the Supreme Court (mainly pursuant to the thinking of Justice Sandra Day O'Connor) has held that strict scrutiny applies when race is a "predominant" consideration in drawing district lines.³⁶ The judges I am criticizing might say that this "predominant" consideration idea is essentially the same as that which they have articulated: The use of racial criteria should only trigger strict scrutiny when race is the predominant proxy looked to for purposes of identifying a heightened risk that a person has committed or is about to commit a crime. In short, there already exists some judicial precedent supporting the emergence of new expectations that are more tolerant of formal racial distinctions than alternative understandings of what racial equality demands.

In 1966, in *Justice without Trial*, Jerome Skolnick wrote:

"In principle . . . police departments . . . are racially unbiased. That is, one would not find in a training manual the idea that blacks should be treated differently in the criminal process than whites, nor even that blacks are apt to exhibit greater criminality than whites. The explicit principle is racial equality.³⁷

The principle to which Skolnick referred is now under siege. In 1966, many police officers undoubtedly ignored that principle in their day-to-day activities, but at least their actions were wrong according to the norm Skolnick describes. The great danger posed by the judicial trend I am criticizing here is that it threatens to turn police conduct that should be understood to be legally and morally wrong into conduct that is understood to be legally and morally right.*

Of what, however, am I afraid? Given that as a matter of fact a person's race may signal a statistically higher risk of criminality, why not

*American constitutional law is remarkably uneven. At the same time that it has shown increasing tolerance for police using race in making determinations of suspicion, it has shown increasing intolerance for lawyers using race to exclude prospective jurors pursuant to racially discriminatory peremptory challenges. (See chapter 6.)

permit police to take race into account in making determinations of suspicion so long as they do so for purposes of law enforcement and not racial harassment? Several reasons justify prohibiting the police from using racial proxies in their decisionmaking, except in the most extraordinary of circumstances. The first is prophylactic: such a prohibition will diminish the occasions on which police officers will engage in racial harassment under the guise of using racial criteria "reasonably." Exertion of police power for purposes of racial harassment is a social evil that the legal system should attempt to eradicate. A racially prejudiced decision can survive undisturbed all too easily when an officer is pressed only to give a reasonable justification for that decision. Consider, for example, the Border Patrol officer who is prejudiced against *all* people of discernible Mexican ancestry. He could easily give vent to his prejudice by acting in the same manner as the officers whose conduct was upheld by the Supreme Court in *Martinez-Fuerte*. Prejudiced against all Mexican-looking people, such an officer might express his sentiments by using apparent Mexican ancestry as a criterion for selecting those whom he questions. Under the Supreme Court's ruling, however, such an officer need not worry about judicial interference as long as he catches a sufficient number of illegal aliens to make his racially prejudiced strategy apparently efficient and as long as he refrains from openly stating that he targets Mexican-Americans because he dislikes them. A reasonableness standard provides some protection against stupid, candid, or inefficient bigots but virtually none against the depredations of bigots who are savvy, duplicitous, and efficient.

A second, closely related reason for more tightly circumscribing police use of race-dependent criteria is that the current permissive regime nourishes powerful feelings of racial grievance against law enforcement authorities that are prevalent in every strata of black communities. Examining responses of elite blacks to the furor surrounding O.J. Simpson's acquittal, Henry Louis Gates, Jr., relates:

Blacks—in particular, black men—swap their experiences of police encounters like war stories, and there are few who don't have more than one story to tell. Erroll McDonald, one of the few prominent blacks in publishing, tells of renting a Jaguar in New Orleans and being stopped by the police—simply "to show cause why I shouldn't

be deemed a problematic Negro in a possibly stolen car." Wynton Marsalis says, "Shit, the police slapped me upside the head when I was in high school. I wasn't Wynton Marsalis then. I was just another nigger standing out somewhere on the street whose head could be slapped and did get slapped." The crime novelist Walter Mosley recalls, "When I was a kid in Los Angeles, they used to spot me all the time, beat on me, follow me around, tell me that I was stealing things." Nor does William Julius Wilson wonder why he was stopped near a small New England town by a policeman who wanted to know what he was doing in those parts. There's a moving violation that many African-Americans know as D.W.B.: Driving While Black.³⁸

Similar testimony is offered by Don Jackson. After serving as a police officer for several years, during which time he became the victim himself of racially selective police mistreatment, Don Jackson penned a remarkable essay arrestingly titled "Police Embody Racism to My People."³⁹ Jackson recounts that upon hearing numerous reports of racial harassment of blacks by police in Long Beach, California, he began to ride through that community at night without the protection of his police uniform. To document what he encountered, Jackson arranged for a hidden television camera crew to trail him in a van. While riding along, breaking no laws, Jackson was pulled over for questioning by two white police officers who appear to have acted, at least in part, on the basis of Jackson's race. Upon questioning the legitimacy of the officers' demand, Jackson was beaten and thrown through a plate-glass window—all of which was filmed. This incident and the controversy surrounding it prompted Jackson to remark that "police have long been the greatest nemesis of blacks, irrespective of whether we are complying with the law or not. We have learned," he continued, "that there are cars we are not supposed to drive, streets we are not supposed to walk. We may still be stopped and asked 'Where are you going, boy?' whether we're in a Mercedes or a Volkswagen." The black American, he concluded, "finds that the most prominent reminder of his second-class citizenship are the police."⁴⁰

Similar experiences and feelings are related by journalist Don Wycliff, who asserts that notwithstanding his middle-class status, and law-abiding character, he feels "an ambivalence tilting toward antipathy

for the police." He feels that way, he explains, because "a dangerous, humiliating, sometimes fatal encounter with the police is almost a rite of passage for a black man in the United States."⁴¹

If the police may properly view race as an indicia of suspicion, thereby making people of color more vulnerable to stops and questioning and all that stems from unwanted attention from the police, then it follows that people of color will have more reason than white persons to fear the police, regardless of their compliance with law. That racial minorities are, on average, more likely to be victimized by crime than whites only compounds the problem. The communities most in need of police protection are also those in which many residents view police with the most ambivalence, much of which stems from a recognition that color counts as a mark of suspicion relied upon as a predicate for action—stopping, questioning, patting down, arresting, beating, and so forth. This causes people who might otherwise be of assistance to police to avoid them, to decline to cooperate with police investigations, to assume bad faith or dishonesty on the part of police officers, and to teach others that such reactions are prudent lessons of survival on the streets.⁴²

Permitting color to count, albeit only in conjunction with other considerations, as an indicia of suspiciousness also contributes to residential racial separation, one of the most intractable and consequential problems in America.⁴³ Racially selective policing will help to dissuade blacks from venturing into neighborhoods where they are viewed as being "out of place," "not belonging." Recall the words of Don Jackson: "We have learned . . . that there are . . . streets [on which] we are not supposed to walk."⁴⁴

It is important to distinguish between the brutish officer who uses race as a guide in decisionmaking and the polite officer who uses race as a guide in decisionmaking. Racially selective policing need not entail the malevolent treatment Don Jackson suffered. One can imagine a police officer who, depending on the circumstances, sometimes views whiteness as an indicia of suspiciousness just as he sometimes views blackness as an indicia of suspiciousness and who, in any event, treats all people with as much courteousness as the rigors of law enforcement permit. This policeman, let's call him Officer Friendly, engages in courteous racial discrimination.⁴⁵ One can much more easily imagine, however, that racially discriminatory conduct which starts off as courteous will degenerate, that disciplined racial selectivity will give way to undisci-

plined racial selectivity, and that the emotions that always seem to coalesce around racial distinctions will lead to the sort of conflicts which have often vexed relations between police departments and black communities.

Even many of the Officer Friendlys will unintentionally *exaggerate* the criminality or potential for criminality of African-Americans. They will do so honestly, but they will do so nonetheless. This exaggeration flows from age-old, derogatory images of the Negro as criminal, images that have been revived and deployed in all manner of contexts, from popular entertainment, to scholarship, to political campaigns. The exaggeration is reinforced by the very real fact that a disproportionately large share of the nation's street crimes—robberies, rapes, murders, aggravated assaults—are perpetrated by certain blacks, more specifically, certain young black men. Whatever the source, inflated anxieties about the risks posed by African-Americans (and others, like Mexican-Americans, about whom these comments are relevant) make it likely that, even when police officers are sincerely attempting to use race solely for the purpose of advancing efficient law enforcement, they will err in a disturbingly large number of instances because of exaggerated fears.

Judges should be more skeptical than many have been of the ability of police officers to use race as an indicia of suspicion without making an unacceptably large number of errors whose consequences fall predictably upon innocent black people. Again consider *Martinez-Fuerte*. Rebuffing claims that the Border Patrol's use of apparent Mexican ancestry was impermissible, the Supreme Court stated:

Less than 1% of the motorists passing the checkpoint are stopped for questioning, whereas American citizens of Mexican ancestry and legally resident Mexican citizens constitute [roughly 16%] of the population of southern California. . . . If the statewide population ratio is applied to the approximately 146,000 vehicles passing through the checkpoint during the eight days surrounding the arrests [at issue], roughly 23,400 would be expected to contain persons of Spanish or Mexican ancestry, yet only 820 were referred to the secondary area. This appears to refute any suggestion that the Border Patrol relies extensively on apparent Mexican ancestry standing alone in referring motorists to the secondary area.⁴⁶

One footnote later, the Court observes, "Of the 820 vehicles referred to the secondary inspection area during the eight days surrounding the arrests [in question], roughly 20% contained illegal aliens."⁴⁷ Despite the justificatory aim behind the Court's presentation of these facts, they hardly provide a secure vindication. As Justice William J. Brennan, Jr., noted in dissent, the Court provides no indication of the ancestral makeup of the 1 percent stopped by the Border Patrol for secondary questioning. If, as is likely, this group was made up overwhelmingly of people of discernible Mexican ancestry, this means that an overwhelmingly large number of the innocent people who were questioned were also persons of apparent Mexican ancestry who found themselves placed in the position of proving their legality because of how persons of their racial makeup are widely perceived.

Criticizing the thinking exemplified by *Martinez-Fuerte*, Judge Harry T. Edwards rightly complains, "The real harm done [by permitting police to use race as a proxy for increased risk of criminality] is not fully apparent because we usually do not hear of the cases of the innocent people who are stopped by the police."⁴⁸ There are cases in which innocent parties have successfully sued the police for civil rights violations associated with racially discriminatory stops. These usually arise, however, from incidents in which police have behaved violently or with aggravated coarseness.⁴⁹ More illuminating are the cases in which innocent parties have not been roughed up but "merely" subjected to the "normal" mistakes that attend the use of racial proxies. Some examples are revealed in an admirably conscientious opinion by U.S. District Court Judge Jim R. Carrigan.

In *United States v. Laymon*,⁵⁰ Judge Carrigan suppressed incriminating evidence found in the car of a twenty-one-year-old black man from California who was stopped and searched in Eagle County, Colorado, by a police officer who used race as a factor in determining whom to investigate on suspicion of trafficking in narcotics.

Officer James Perry denied that race had played a role in his decision to stop the defendant. Indeed, officer Perry claimed that color blindness prevented him from perceiving the race of the defendant. Based on the officer's record as well as inconsistencies in his testimony, Judge Carrigan disbelieved Perry's assertion.⁵¹ In doing so, Judge Carrigan displayed a fidelity to truthseeking that all too many judges forsake by showing undue deference to police, even when they are clearly

lying.⁵² Judge Carrigan ruled that officer Perry had insufficient reason to search the defendant's automobile and that the defendant had not given the policeman permission to conduct the search.⁵³ Revealing the effects of the officer's policy, Judge Carrigan noted what happened when the racial criteria proved to be misleading:

Jhenita and Janice Whitfield, two young Black women, testified that they were stopped, while driving a car with California plates, for the alleged offense of failing to signal a sufficient distance prior to changing lanes on I-70, a four-lane highway. . . . [T]hey testified that they were forced to stand alongside the highway [with their four infant children] in cold mountain weather for more than forty-five minutes while Perry searched their car, unpacking their luggage and rummaging through all their personal clothing and belongings. No contraband was found, and the only product of this exercise was the anger of these citizens who felt they had been pressured to submit to a search because of their race. Perhaps ironically, one of them had served for years in the military service of the United States and had elected that service as her career.

Byron Boudreaux, a young black male, testified that he was stopped by Perry while driving a car with Oklahoma plates through Eagle County on I-70. Perry and two other officers informed him that they had received an anonymous tip that a man fitting his description was carrying drugs. Boudreaux testified he was detained for approximately forty-five minutes while Perry and other officers searched his car.

Aguinaldo Ferreria, a young Black male, was stopped by Perry while driving a car with California plates through Eagle County on I-70. Perry told him that he fit a description of someone suspected of carrying drugs. Ferreria was detained for about forty-five minutes while Perry conducted his search.

These Black drivers indicated that Perry gave them the impression that the searches would be of the vehicle and would delay them only a few minutes, but the actual searches involved going through all their luggage and personal effects and took far longer.⁵⁴

Judge Carrigan's opinion in *Laymon* usefully highlights the extent to which other judges have typically underestimated the cumulative costs

imposed by police use of race as a proxy for suspiciousness. In *Martinez-Fuerte*, for instance, the Supreme Court maintained that the Border Patrol's intrusion on those selected for questioning is "quite limited," involving "only a brief detention of travelers during which all that is required of the vehicle's occupants is a response to a brief question or two and possibly the production of a document."⁵⁵ The stories recounted in *Laymon*, however, should prompt skepticism toward Justice Lewis F. Powell's portrayal of quick, courteous, nonthreatening, nonburdensome police interventions. First, at stake for many individuals will be more than simply one stop; at stake will be a lifetime of numerous stops. A person will not cease to be of apparent Mexican ancestry after the first instance of being pulled aside for questioning. In the eyes of the Border Patrol, his looks will continuously mark him as more suspicious than his similarly situated white Anglo counterpart.⁵⁶

Second, the quality of the interaction between officials and at least some of those stopped for questioning is likely to be degraded by everyone's knowledge that race played a role in the decision to question. Officers who begin by seeking to discharge their duties with courteousness will confront people who will resent being stopped in part because of their racial heritage. The people stopped will vent their resentment. The officer—and recall that we are here talking about the initially good, nonracist, courteous officer—will respond in some defensive manner, which will in turn provoke further negative responses from those who feel aggrieved. That, in turn, will further aggravate the officer, leading to a deteriorating relationship that will often create bruised feelings, sometimes generate needless arrests, and occasionally spark violence.⁵⁷

By too easily permitting the police to use race as an indicia of suspiciousness, courts also derogate from the idea that individuals should be judged on the basis of their own, particular conduct and not on the basis—not even *partly* on the basis—of racial generalizations. Race-dependent policing erodes the difficult-to-maintain habit of individualizing persons and strengthens the reflex of lumping people together according to gross racial categories. This reflex has had many disastrous consequences. One is the extra burden it puts upon blacks who want very much to assert responsibility for themselves but confront social impediments that mock their efforts. This burden and a common reaction to it is memorably described in an essay by Anthony Walton entitled "Willie Horton & Me."⁵⁸ Walton objects to being treated by police offi-

cers and others as a high-risk person because, in part, of his blackness. He relates how he has conscientiously and self-consciously stayed out of trouble and done everything else that should entitle him to the same degree of dignity accorded to his white counterparts. He notes, too, however, that despite his efforts he is "often treated the same as a thug."⁵⁹ He concludes that no amount of conformity to accepted standards "will make [him] the trusted American individual," that nothing he does will enable him to escape the automatic negative responses triggered by blackness, that no matter what he does to improve himself, people encountering him on the streets "won't see a mild-mannered English major," but will see instead Willie Horton.⁶⁰

Walton responds with rage to his perception that his efforts to distinguish himself are futile. After admitting that he feels "suckered" for having ever believed that he could escape the reputation of his racial group by dint of his own personal efforts, Walton confesses to feeling a bitterness and a thirst for revenge that should alarm all Americans. "My black Ivy League friends and I," he writes, feel a disgust for mainstream values and institutions that is "infinitely" more contemptuous than the alienation expressed by youth of the black underclass. He and his friends, he claims, are "cynically biding [their] time, waiting for some as-yet-unidentified apocalypse that will enable [them] to slay the white dragon, even as [they] work for it, live next to it, and sleep with it."^{*}

Walton's testimony reflects the sentiments of many who feel deeply insulted because they are targeted for scrutiny at least partly on the basis of their race. Are these people *right*, however, in feeling aggrieved? Should the legal system modify its practices in light of the feelings articulated by Walton and others?

When a Mexican-American motorist is selected for questioning in

part on the basis of his perceived ancestry, he is undoubtedly being burdened more heavily at that moment on account of his race than his white Anglo counterpart. He is being made to pay a type of racial tax for the campaign against illegal immigration that whites, blacks, and Asians escape. Similarly, a young black man selected for questioning by police as he alights from an airplane or drives a car is being made to pay a type of racial tax for the war against drugs that whites and other groups escape. That tax is the cost of being subjected to greater scrutiny than others. But is that tax illegitimate?

One defense of it is that, under the circumstances, people of other races are simply not in a position to pay the tax effectively. In contrast to apparent Mexican ancestry, neither apparent white nor black nor Asian ancestry appreciably raises the risk that a person near the Mexican border is illegally resident in the United States. Similarly, the argument would run that in contrast to the young black man, the young white man is not as likely to be a courier of illicit drugs. The defense could go on to say that, in this context, race is *not* being used invidiously. It is not being used as a marker to identify people to harm through enslavement, or exclusion, or segregation. Rather, race is being used merely as a signal that facilitates efficient law enforcement. In this context, apparent Mexican ancestry or blackness is being used for unobjectionable ends in the same way that whiteness is used in the affirmative action context: as a marker that has the effect, though not the purpose, of burdening a given racial group. Whereas whites are made to pay a racial tax for the purpose of opening up opportunities for people of color in education and employment, Mexican-Americans and blacks are made to pay a racial tax for the purpose of more efficient law enforcement.^{*}

We need to pause here to consider the tremendous controversy that has surrounded affirmative action policies aimed at helping racial minorities.⁶¹ Many of the same arguments against race-based affirmative

^{*}Describing her reaction to a salesman who refused, for what she perceived as racial reasons, to open the door to a store from which she desired to purchase a gift, Professor Patricia Williams writes: "I was enraged. At that moment I literally wanted to break all of the windows in the store and *take* lots of sweaters. . . . There was almost nothing I could do, short of physically intruding upon him, that would humiliate him the way he humiliated me." See "Spirit Murdering the Messenger: The Discourse of Fingerprinting as the Law's Response to Racism," 42 *University of Miami Law Review* 127, 128 (1987).

^{*}Moreover, while some proponents of affirmative action maintain that, overall, it helps whites as well as blacks by creating a more harmonious society for everyone, so, too, do some proponents of responsible racial discrimination in policing assert that, overall, it helps people of color as well as whites by creating a more secure society. They point out also that enhanced security may well disproportionately help blacks since they are often disproportionately victimized by criminality.

action are applicable as well in the context of race-based police stops. With affirmative action, many whites claim that they are victims of racial discrimination. With race-based police stops, many people of color complain that they are victims of racial discrimination. With affirmative action, many adversely affected whites claim that they are *innocent* victims of a policy that penalizes them for the misconduct of others who also happened to have been white. With race-based police stops, many adversely affected people of color maintain that they are *innocent* victims of a policy that penalizes them for the misconduct of others who also happen to be colored. Many whites claim that a major drawback of affirmative action which makes it more costly than valuable is the fact of their intense resentment against such programs. Many people of color claim that one of the drawbacks of race-based police stops that makes it more costly than valuable is their resentment against such policies.

There exist, however, a remarkable difference in reactions to these racial policies, both of which involve race-dependent decisionmaking. While affirmative action is under tremendous pressure politically and legally, racial policing is not. The Supreme Court has carefully hedged affirmative action by decreeing that such programs must meet the exacting requirements of strict scrutiny. By contrast, in *Martinez-Fuerte* and similar cases, the Supreme Court and other tribunals have barely mentioned the antidiscrimination norms within the Fifth and Fourteenth amendments to the federal Constitution.⁶²

Another important dissimilarity between the Court's handling of affirmative action and its handling of race-dependent policing relates to burdening innocent parties. The Supreme Court has been exquisitely sensitive to charges that affirmative action unfairly burdens innocent whites. When it has upheld affirmative action programs it has done so only in situations in which it was convinced that the interests of innocent whites would not be unduly trammled. More recently, it has typically invalidated affirmative action programs, in part because of a belief that such programs are unfair to whites who themselves played no role in establishing the racial injustices that affirmative action seeks to remedy.⁶³ By contrast, as we have seen, the Court pays little attention to the burdens imposed on innocent people of color by race-dependent policing.

Whatever one thinks of the conclusions drawn by the Court with re-

spect to affirmative action, at least it begins at the correct starting point for analysis—that race-dependent decisions by officials call for more than ordinary justifications. With respect to race-dependent policing, however, the Court, mirroring public opinion, has made the terrible error of permitting race-dependent decisionmaking to become a normal part of police practice.

Many of those who defend the current regime of race-dependent policing speak as if there existed no sensible alternative. But there is an alternative: spending more on other means of enforcement to make up for any diminution in crime control caused by the reform I seek: prohibiting officers (except in absolutely extraordinary circumstances) from using race as a proxy for increased risk of criminality. Instead of placing a racial tax on blacks, Mexican-Americans, and other colored people, governments should, if necessary, increase taxes across the board. More specifically, rather than authorizing police to count apparent Mexican ancestry or apparent blackness as negative proxies, states and the federal government should be forced either to hire more officers or to inconvenience everyone at checkpoints by subjecting all motorists and passengers to questioning (or to the same chance at random questioning). The reform I support, in other words, does not entail lessened policing. It only insists that the costs of policing be allocated on a nonracial basis.

The law should authorize police to engage in racially discriminatory investigative conduct only on atypical, indeed extraordinary, occasions in which the social need is absolutely compelling: weighty, immediate, and incapable of being addressed sensibly by any other means. I have in mind a real emergency, a situation, like that noted above, in episode six, in which there is clear reason to believe that a violent crime has been or is about to be committed and that the reported characteristics of the perpetrator are such that using racial criteria to narrow the pool of potential suspects clearly increases the ability of the police to apprehend the criminal quickly. This formulation is by no means foolproof. Recall *Korematsu*. Implemented properly, however, this proposal would prohibit officers from using racial criteria as a *routine* element of patrolling. It would prohibit officers from *regularly* placing a race-based question mark over the heads of colored people. It would substantially change the current situation under which there exist separate and unequal rules of privacy for people of color. My proposal still permits race to be taken

into account in some narrow circumstances. Under such circumstances, however, no person can rightly feel aggrieved even if he is the suspect of racial discrimination. After all, freedom from official racial discrimination, although dear, is but one of other weighty freedoms that are in tension with one another. Care must be taken to insure that the category of exceptional circumstances remains tightly circumscribed, but if that is done, this species of racial discrimination should be viewed as an unpleasant necessity and not a racial injustice.

Everyone—ordinary citizens, legislators, police officials, judges, and so on—should demand that race play no routine role in decision-making regarding whom to scrutinize for purposes of law enforcement. For judges, this typically would entail declining to count race as a proxy for increased risk of criminality, except in cases in which the government offers a compelling justification to decide differently. It would entail judges typically subtracting race from the array of considerations that can properly be viewed as contributing to the suspiciousness of a person. Thus, in a case in which police would not be legally justified in detaining an individual in the absence of the race factor, a judge should conclude that the detention is illegal. If police would be legally justified in detaining an individual in the absence of the race factor, but the police nonetheless used race in their calculation, the detention would be ruled legal—but the police would also be subject to administrative and legal penalties for having utilized a prohibited criterion. One hopes that the higher circles in the police hierarchy would discipline their underlings for illegal conduct. One also hopes that citizens subjected to wrongful use of racial criteria by police would succeed in suing wrongdoing police officers under federal and state laws enacted to protect the civil rights of citizens.

I am under no illusion that a general prohibition against taking race into account in making determinations of suspicion will provide a cure-all, if only because this reform would likely be underenforced to a large extent. After all, it would often be very difficult to determine whether an officer made a given decision on a racial basis if the officer keeps silent as to the racial aspect of his selectivity and mentions only the non-racial cues that prompted him to act. Some officers would be sufficiently candid to reveal the real bases of their decisionmaking regardless of the legal consequences. Others, upon learning of the applicability of the le-

gal reforms advanced here, would adapt by covering up the real—racial—aspect of their decisionmaking. Courts might be able and willing to identify some cases in which an officer acted against someone in circumstances that permitted no other plausible explanation than that the officer used race as a cue for intervention.⁶⁴ Such instances, however, would be rare. In the usual case involving ambiguous circumstances, courts would be unlikely to rule against police officers. Such a ruling would amount not only to holding that an official acted on an unlawful basis. It would also amount to holding that the official lied in explaining the basis for his action. This helps to explain why many judges make such rulings only when they are absolutely sure of their conclusions—a protective posture that enables a considerable amount of illegal discrimination to pass undisturbed.*

Even so, the reform I suggest is worth pursuing. If it became the norm, it would dissuade conscientious law-abiding officials from using criteria they ought not use. It would provide a basis for resourceful attorneys to uncover wrongful racial discrimination even in some cases in which officers attempt to conceal their misconduct. And it would at least compel non-law-abiding officials to use racial criteria covertly, a far cry from the situation today, in which the courts permit the police openly and unapologetically to use a race line for purposes of calculating suspiciousness. There is, I grant, a danger in constructing a constitutional norm that will likely be underenforced to a substantial degree. Underenforcement will further nourish the corrosive cynicism of those who believe that, when it comes to blacks, the system habitually breaks its own promises. The correct response, however, is not to promise less but to work harder to bring the actual conduct of officials into line with appropriate goals. Even when rightful rules are underenforced, they are still worth fighting for because they set the standards for legitimacy, standards which, like magnets, exert a pull that affects the order of things.[†]

*For an analogous problem in the context of policing the prohibition against racially discriminatory peremptory challenges, see pp. 208–14.

[†]Here I follow the great nineteenth-century reformer Frederick Douglass. Speaking in favor of an antidiscrimination provision in the Civil Rights Act of 1875, Douglass observed that even if the provision could not be enforced, it would still be useful as “a

The Private Person and Self-protective Racial Discrimination

What about private actors who are not engaged in commercial activities presently regulated by the state—the person walking home at night who uses racial cues as a guide to conduct: when to be on guard, cross the street, shift the position of a handbag, run for the nearest open door? The issue here is not whether to extend governmental regulation to embrace these activities. The political backing for such an effort would be virtually nonexistent because of a widely shared intuition that there ought to exist certain zones of privacy that are left undisturbed by the state and also because of a concomitant fear of overweening state power. Regulation backed by state power, however, is not the only form of regulation. Another important regulatory force is reputation—the evaluation of a person by his or her peers and the general public.

Many black men complain bitterly about people fearfully avoiding them.* Rivaling the prevalence of angry stories about being stopped by police for “driving while black” are angry tales told by black men who recount the numerous times they have been unable to obtain service from cabbies.† Some describe the experience as if it were the 1990s

banner on the wall of American liberty, a noble moral standard, uplifted for the education of the American people. . . . This law though dead, did speak.” See Philip S. Foner, *The Life and Writings of Frederick Douglass*, IV: 401 (1955). See also “Note, Judicial Right Declaration and Entrenched Discrimination,” 94 *Yale Law Journal* 1741 (1985); “Note, Making the Violation Fit the Remedy: The Intent Standard and Equal Protection Law,” 92 *Yale Law Journal* 328 (1982).

*Phillip Martin’s observation is representative:

As I was leaving my Cambridge, Massachusetts apartment in a running suit . . . a white couple walking by glanced at me [and] abruptly crossed the street. When I looked back, I noticed that they had recrossed the street a block away. I know both working class and college educated men who have experienced similar disrespectful fear, regardless of what they were doing at the time.

Phillip O. Martin, “Understanding Black Rage,” 2 *Reconstruction*, no. 1, 12 (1992). See also Ellis Cose, *The Rage of a Privileged Class*, 93–100 (1993).

†For a useful collection of anecdotes as well as a helpful description of the federal law that is arguably applicable to racial discrimination in taxi service, see Loren Page Ambinder, “Dispelling the Myth of Rationality: Racial Discrimination in Taxicab

equivalent of being excluded from a lunch counter. Jake Lamar recounts a particularly poignant anecdote. On a rainy night in Manhattan, he twice tried hailing cabs for himself and his date, only to be disregarded by cabbies who stopped for whites nearby. Only when Lamar’s date, a white woman, sought alone to hail a cab did a driver stop.⁶⁵

Should we criticize these drivers for taking self-protective albeit racially discriminatory action? Racially discriminatory self-protective action by private persons reinforces existing mistrusts and resentments and circulates them throughout the various spheres of society, public as well as private. After all, an individual does not become an altogether different person when he dons the uniform of a police officer; reflexes that he develops and exhibits in his private life are likely to reemerge, particularly under conditions of stress, in his public, professional pursuits. On the other hand, in comparison to other contexts, the injury done by racially discriminating *private* individuals is likely to be less than that inflicted by *public* officials. A private person walking down the street is not an agent of the state, much less a guardian of law and order. This is not to say that the actions of private pedestrians and entrepreneurs are inconsequential; as mentioned above, many blacks are painfully aware that other citizens avoid them on a racial basis out of fear. That conduct, though, has far less public backing than the legally authorized conduct of police officers. Furthermore, private parties are typically in a far more precarious situation than the police officer who is linked to a bureaucracy able to call upon significant resources for the protection of their agents. Often facing danger alone, private parties warrant the solicitude due to persons who find themselves severely restricted in terms of choice. For these reasons, we should certainly admire private parties who refrain from using racial proxies for self-protection. For the same reasons, though, we should sympathize with, and thus qualify our criticisms of, those who do resort to racially discriminatory

Service and the Efficacy of Litigation Under 42 U.S.C. § 1981,” by George Washington *Law Review* 342 (1996).

See also West, *Race Matters* at xv (“After the ninth taxi refused me, my blood began to boil.”); Kevin M. Brown, “The Shades of Racism,” *Washington Post*, May 7, 1993 (“Whenever the moment comes to hail a cab, I’m ridden with anxiety. My stomach knots and my blood boils.”)

RACE, CRIME, AND THE LAW

cues as a stratagem of self-defense. They, like everyone, are caught up in a large tragedy that will require more than individual good will and bravery to resolve.*

What, however, about the pistol-packing lone pedestrian who, encountering persons he considers dangerous, shoots his gun at them in part because their race increased his fear, triggering a lethal response? This question calls to mind the prosecution of Bernhard Hugo Goetz, a much-celebrated and much-reviled figure in late twentieth-century America.⁶⁶

On December 22, 1984, in New York City, a group of four black youths were riding a subway train. Goetz, a white man, entered the train and soon after doing so was approached by one, or perhaps two, of the youths. They asked him for five dollars. After the request was repeated—or perhaps because it was a demand—Goetz pulled a pistol and emptied it into the youths. Charged with a variety of crimes, including attempted murder, Goetz asserted that he had acted in self-defense.

The prosecution did not allege that Goetz's actions were racially motivated. It simply charged that he had committed an assault without

justification. Likewise, the defense did not assert that Goetz had properly taken race into account in deciding how to respond to the youths' demand. Without referring to race at all, it argued that given the defendant's past—several years earlier he had been robbed by youngsters and permanently injured—and given the totality of the particular situation—a lone rider surrounded by four young men demanding money on a New York City subway—Goetz reasonably believed himself to be in danger and responded in an excusable manner. Race, however, lurked beneath the formal arguments. The prosecution sought to insinuate that Goetz acted at least in part due to racial bias against blacks. The defense sought to insinuate that, under the circumstances, taking race into account in making a split-second determination of the danger at hand was excusable.

Because the racial aspect of the case was never permitted to become a formal part of it, no ruling was ever made on whether race could properly be included as part of a claim of self-defense. By acquitting Goetz of attempted murder (although he was convicted of a gun possession offense), the jury, some believe, answered that question in the affirmative (at least if the shooter is white and those shot are black).⁶⁷ Whatever *that* jury's answer, however, the answer should be that the race of the shooter and the shot is legally irrelevant to a proper judgment as to whether or not a person acted properly in defending himself. Giving legal recognition to racially differentiated concepts of proper conduct—the black reasonable person, the white reasonable person, and so on—will encourage the creation of racially distinct mores, reactions, beliefs, and intuitions. I oppose that project. As I argue throughout this book, I aim to facilitate the emergence of a polity that is overwhelmingly indifferent to racial differences, a polity that looks beyond looks. Bringing to bear that long-range goal on the immediate racial question posed by the Goetz case means excluding race as a proper element in a person's calculation of danger when that person unleashes violence and seeks an excuse for doing so from the legal system on the ground of self-defense.⁶⁸

*My sympathy for nonbigoted private persons who resort to racially discriminatory conduct for purposes of self-defense does not stretch so far as to exempt them from applicable antidiscrimination laws. If cabbies are given a personal safety excuse for failing to abide by antidiscrimination laws, why not employers or landlords?

Some commentators urge repealing many, if not all, antidiscrimination laws that regulate private parties. See, e.g., Dinesh D'Souza, "The 'Rational' Discrimination of Cab Drivers," *Washington Times*, Oct. 21, 1996; Richard Epstein, *Forbidden Grounds: The Case Against Employment Discrimination Laws* (1992). Down their proposed road lay moral and political disaster.

One way to deal with the problem of physical danger faced by cabbies and other entrepreneurs has already been suggested: spread the costs of security on a non-racial basis. As Reginald J. Brown observes, "if taxi drivers are especially attractive targets for criminals, the morally just response is to pursue solutions that make taxi drivers less attractive targets while spreading the costs of doing so broadly among the entire taxi-riding population." Taxis could, for example, be outfitted with debit card readers or other methods of payment that would eliminate the need for cabbies to carry large amounts of cash. Letter to the Editor, *Washington Times*, Oct. 27, 1996. One potential benefit of cost-spreading is that it might educate the white majority about problems disproportionately faced currently by people of color.

DRAFT (as of May 14, 1998 (2:26pm))

**The President's Initiative on Race
Advisory Board Meeting**

**George Washington University
Dorothy Betts Marvin Theater
Washington, D.C.**

**May 19, 1998
10:00 a.m. - 1:00 p.m.**

AGENDA

"Race, Crime and the Administration of Justice"

This May Advisory Board meeting provides an opportunity to explore several questions related to race, crime, and the administration of justice: What are the facts? How do different perceptions of crime and the administration of justice affect efforts to build One America? What strategies can help promote a criminal justice system that serves and treats Americans of all races fully and equally?

- | | | |
|------|---|---|
| I. | Opening/Review of Agenda
~~10:00 am - 10:05 am~~ | Dr. John Hope Franklin, Chairman
Advisory Board on Race |
| II. | Welcoming Remarks
~~10:05 am - 10:08 am~~ | Dr. Stephen Trachtenberg, President
George Washington University |
| III. | Introductory Remarks
~~10:08 am - 10:23 am~~ | Attorney General Janet Reno
U.S. Department of Justice |
| III. | Factual Overview
~~10:23 am - 10:43 am~~ | Christopher Stone, President/Director
Vera Institute of Justice |
| IV. | Roundtable Discussion: Race, Crime, and the Administration of Justice
~~10:43 am - 12:43 pm~~ <i>and Q & A</i> | |

Moderator: Professor Charles Ogletree, Harvard University School of Law
Panelists:

William Bratton, Former Chief of Police, New York Police Department
Zack Carter, U.S. Attorney, Eastern District of New York [tentative]
John DiIulio, Professor, Princeton University, Woodrow Wilson School [tentative]
Maria Jimenez, Director, Immigration Law Enforcement Monitoring Project [tentative]

Randall Kennedy, Professor, Harvard University School of Law
Deborah Ramirez, Professor, Northeastern University School of Law
Charles Ramsey, Chief of Police, District of Columbia Police Department
Kim Taylor-Thompson, Professor, New York University School of Law
Michael Yamamoto, Partner, Horikawa, Ono & Yamamoto
Robert Yazzie, Chief Justice, Navajo Nation

V. **Questions and Answers**
~~12:43 pm - 12:58 pm~~

~~Members of the Audience~~

VI. **Closing Remarks/Adjournment**
12:58 pm - 1:00 pm

Dr. John Hope Franklin

Possible Participants

Advisory Board Meeting on Race, Crime, and the Administration of Justice (May 1998): Realities, Perceptions, and Strategies

I. Opening Address: U. S. Attorney General Janet Reno¹

II. Factual Overview:

Christopher Stone, President and Director, Vera Institute of Justice (founding director of the Center for Alternative Sentencing and Employment Services and the Neighborhood Defender Service of Harlem. Member of the Board of Directors of the New York State's Capital Defender Office. Has authored a number of articles on this topic.)

III. Roundtable Discussion

A. Moderator: Professor Charles Ogletree, Harvard Law School (renowned expert on this issue.)

B. Panelists

Community Justice
working group

Possible Panelists	
1.	Randall Kennedy, Professor, Harvard Law School (well-known on these issues, particularly for his views on racial profiling)
2.	John DiIulio, Professor, Princeton University -- Woodrow Wilson School, has written a number of books on government institutions and suggestions for reform (suggested by Ogletree, Kennedy, Sonia)
3.	Professor Jeffrey Rosen, George Washington University, prolific writer on race and crime, often in publications such as The New Republic. (Suggested by Sonia)
4.	Roy Innis, Executive Director, Congress for Racial Equality (suggested by Mike W.)
5.	Professor Joan Petersilia, U.C. Irvine, written with James Q. Wilson, focused primarily on policing, sentencing, career criminality, corrections, and racial discrimination.
6.	Professor Sandra Guerra, University of Houston, 713-743-2134 (suggested by Maria E.)
7.	Professor Miguel Mendez, Stanford, expert on criminal justice, 650-723-0613 (suggested by Maria E.)
8.	Alfredo Garcia, author, wrote a book on the 6th Amend., 305-623-2372 (suggested by Maria E.)

Public Defender?

BW — Kim Taylor-Thompson

BM — Ron Noble

LM — Miguel Mendez

• Robert Gansie — NAM

• Randall Kennedy — BM

• John DiIulio — WM

• Charles Ramsey — ~~BM~~ BM

• Michael Yamamoto — AM

• Marie Timoney — ~~AM~~ LW

¹ Italics indicate that participant is confirmed.

9	Charles Ramsey, District of Columbia Chief of Police, formerly with the Chicago Police Department (suggested by Jose)
10.	Beverly Harvard, Atlanta Chief of Police, COP since 1994 and patrol office since 1973, involved in community policing, first African American woman to run a major police department, named "CBS Morning Show woman of the Year." (Suggested by Ogletree)
11	William Bratton, former NYC Chief of Police (suggested by Richard)
12.	Reuben Greenberg, Charleston Chief of Police (suggested by Jose)
13.	Kim Taylor-Thompson, Professor, NYU School of Law, specializing in race and crime, formerly the Director of the Public Defender Service for D.C. (Suggested by Ogletree, Sonia)
14.	Michael Judge, Public Defender, Los Angeles, CA (suggested by Angela Oh)
15	Michael Yamamoto, Board of California Attorneys for Criminal Justice (suggested by Angela Oh)
16.	Vibiana Andrade, National Immigration Law Center, Los Angeles, CA formerly with MALDEF (suggested by NCLR, Angela Oh)
17.	Maria Jimenez, Director, Immigration Law Enforcement Monitoring Project, Houston, TX, project of the American Friends Service Committee, established to engage local communities along the U.S.-Mexico border to strengthen the capacity of border communities to participate in decisions relating to border control policies and practices and seek changes in key policies that foster abuse, human suffering and a militarized border (suggested by NCLR)
18.	Mary Kenney or Cynthia Cano, Lawyer's Committee on Civil Rights Under Law, San Antonio, TX (suggested by NCLR)
19.	Professor Deborah Martinez, Northeastern, former U.S. Attorney (suggested by Ogletree)
~~20.~~	~~Each Carter - Eastern Dist NY~~ Michael Yamaguchi, U.S. Attorney for the Northern District of California
21.	Betsy Watson, former Houston Chief of Police, consultant to the Department of Justice COPS office (suggested by Tom Perez)
22.	Jimmy Gurule, former Bush appointee at DOJ, 219-631-5917 (suggested by Maria E.)
~~23.~~	~~Professor Larry Echohawk, Brigham Young University, former Attorney General for Idaho (suggested by Lynn)~~
24	Robert Yazzie, Chief Justice of the Navajo Nation, Window Rock, AZ
25.	Cheryl Dmeert Fairbanks, (Tlingit/Timpshian) attorney and tribal Court Justice, Sante Fe, NM
26.	James Zogby, President, Arab American Institute (suggested by Richard)

Norm Earley - ~~of Amer.~~ (Denver)
 Ralph Martin - ~~of Amer.~~ (Suffolk Co.)

Chiefs
or
Police

Public
defenders

Lang.
barriers
challenges

DRAFT (*as of May 14, 1998 (9:41am)*)

**The President's Initiative on Race
Advisory Board Meeting**

**George Washington University
Dorothy Betts Marvin Theater
Washington, D.C.**

**May 19, 1998
10:00 a.m. - 1:00 p.m.**

AGENDA

"Race, Crime and the Administration of Justice"

This May Advisory Board meeting provides an opportunity to explore several questions related to race, crime, and the administration of justice: What are the facts? How do different perceptions of crime and the administration of justice affect efforts to build One America? What strategies can help promote a criminal justice system that serves and treats Americans of all races fully and equally?

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Moderator: Professor Charles Ogletree, Harvard University School of Law
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Michael Yamamoto, Partner, Horikawa, Ono & Yamamoto
Robert Yazzie, Chief Justice, Navajo Nation

- | | | |
|-----|--|-------------------------|
| V. | Questions and Answers
12:43 pm - 12:58 pm | Members of the Audience |
| VI. | Closing Remarks/Adjournment
12:58 pm - 1:00 pm | Dr. John Hope Franklin |

DRAFT (*as of May 12, 1998 (10:18am)*)

**The President's Initiative on Race
Advisory Board Meeting**

**George Washington University
Dorothy Betts Marvin Theater
Washington, D.C.**

**May 19, 1998
10:00 a.m. - 1:00 p.m.**

AGENDA

"Race, Crime and the Administration of Justice"

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|------|---|--|
| I. | Opening/Review of Agenda
10:00 am - 10:05 am | Dr. John Hope Franklin |
| II. | Welcoming Remarks
10:05 am - 10:08 am | Dr. Stephen Trachtenberg,
President of GW [invited] |
| III. | Introductory Remarks
10:08 am - 10:23 am | Attorney General Janet Reno
[confirmed] |
| III. | Factual Overview
10:23 am - 10:43 am | Christopher Stone, President/Director
Vera Institute of Justice [confirmed] |
| IV. | Roundtable Discussion
10:43 am - 12:43 pm | |
| | Moderator: Professor Charles Ogletree [confirmed] | |
| | Panelists: | |
| | Professor Randall Kennedy, Harvard University [confirmed] | |
| | [See attached potential participants list] | |
| V. | Questions and Answers
12:43 pm - 12:58 pm | Members of the Audience |
| VI. | Closing Remarks/Adjournment
12:58 pm - 1:00 pm | Dr. John Hope Franklin |

Outline

Advisory Board Meeting on Race, Crime, and the Administration of Justice (May 1998): Realities, Perceptions, and Strategies

- I. Purpose: The May Advisory Board meeting provides an opportunity to explore several questions related to race, crime, and the administration of justice: What are the facts? How do different perceptions of crime and the administration of justice affect efforts to build One America? What strategies can help promote a criminal justice system that serves and treats Americans of all races fully and equally? The meeting is not intended to address all issues of race in crime and the administration of justice; rather, it is intended to lay a public foundation for the prior and future work of the Advisory Board in this area. The meeting will include an overview of the facts and a moderated discussion in the "PBS roundtable" format with experts and leaders from various sectors.
- II. Substance of the Meeting:¹
 - A. Realities of Race, Crime, and the Administration of Justice: Data on race, crime, and the administration of justice are complex and are limited for some racial groups. Nonetheless, the May Advisory Board meeting provides an important opportunity to educate people about the available facts: Who is committing crime? Who are the victims of crime? Who is being arrested, charged, convicted, incarcerated? The facts will show a number of disparities in crime and the administration of justice that are caused by complex social, economic, and legal factors.
 - B. Perceptions of Race, Crime, and the Administration of Justice: The facts concerning race, crime, and the administration of justice fuel different perceptions of the criminal justice system and place substantial pressure on our efforts to build One America. Data show that some minority communities often absorb a disproportionate amount of the social, economic, and personal costs of crime. These communities want strong law enforcement. However, there often exist different perceptions between persons of color and larger society about the fairness of the criminal justice system, which hinder law enforcement. Two factors influencing these different perceptions of the criminal justice system are negative interactions between persons of color and law enforcement personnel and racial disparities in the administration of justice. The May Advisory Board meeting provides an opportunity to explore these factors and other challenges of race in crime and the administration of justice.

¹ In order to facilitate discussion, we will provide the Advisory Board with background materials on race, crime, and the administration of justice.

- C. Strategies to Promote a Criminal Justice System that Serves and Treats Americans of All Races Fully and Equally: The May Advisory Board meeting provides an opportunity to explore strategies that can strengthen relations between persons of color and the criminal justice system while reducing crime.
 - D. Focus on Youth: In discussing the realities, perceptions, and strategies related to race, crime, and the administration of justice, we should focus specifically on youth, because racial divides in the administration of justice that impact youth are likely to be especially destructive of our efforts to build One America and because the juvenile justice system differs from the adult system in important ways (e.g., the juvenile system allows for more discretion, the juvenile system is more concerned with rehabilitation). We should also discuss strategies to reduce youth interaction with the criminal justice system.
- III. Format of the Meeting and Identification of Issues: (See attached agenda for additional information.)
- A. Welcoming Address: Attorney General Janet Reno will deliver an opening address on the importance of addressing issues of race in crime and the administration of justice.
 - B. Factual Overview: The meeting will then begin with an overview of the facts concerning race, crime, and the administration of justice presented by an expert on these issues.
 - C. Roundtable Discussion: The meeting will consist primarily of a roundtable discussion on the realities, perceptions, and strategies related to race, crime, and the administration of justice. The discussion will follow the "PBS format," which brings together experts and leaders to participate in a Socratic discussion. Professor Charles Ogletree of Harvard Law School will moderate the discussion. The panel will include a fully diverse group of 8-10 scholars and practitioners (including persons with backgrounds as district attorneys, public defenders, judges, state attorneys general, chiefs of police, community advocates, etc.).

The first approximately 90 minutes of the discussion will primarily involve the panelists. It will be a Socratic discussion based on evolving hypotheticals. The final hour or so of discussion will engage the Advisory Board more directly and seek to extrapolate general principles from the prior Socratic dialogue. The last hour or so will also likely include some form of audience participation.

The following four issues should comprise the main topics for the 90-minute, Socratic panel discussion:

1. Racial Profiling and Confrontations with Law Enforcement:

- a. Purpose: The purpose of exploring this topic is to get at the issue of negative interactions between persons of color and the criminal justice system and how those interactions lead to different perception of the criminal justice system, which hinder efforts to build One America.
- b. Possible Questions and "Evolving Hypothetical": The obvious starting point would seem to be a situation in which youth of color (e.g., Hispanic youth)² wearing certain clothes (e.g., jeans and bandanas that stereotypically suggest gang membership) are stopped by the police while driving. Why might they have been stopped? Who has the discretion? How would the youth of color perceive the stop? What is the likelihood that race was a factor, conscious or unconscious, in the stop? How would different people defend/attack the use of race as a factor? How does the use of race as a factor contribute to differing perceptions of the criminal justice system? We are now in a potentially confrontational situation. The youth end up arrested or worse. What could have happened to have led to that scenario (e.g., frustrations, differing perceptions, language barriers, cultural differences)? What are the triggers that can cause an escalation during a routine stop? How are those triggers differently perceived? How common are such occurrences?

2. Disparities in Sentencing and Incarceration Rates:

- a. Purpose: The purpose of exploring this topic is to get at the issue of racial disparities in crime and the administration of justice and how they likely contribute to different perception of the criminal justice system, which hinder efforts to build One America.
- b. Possible Questions and "Evolving Hypothetical": This hypothetical can evolve from the prior discussion of racial profiling, etc. One possibility is that the youth who were stopped are found to be in possession of contraband (perhaps a switchblade at first and drugs later). How are they treated by the system all the way through the process? Who has discretion to arrest? to charge? to set bail? to accept a plea? to sentence? What constitutes a representative jury? How is a minority youth likely to perceive and experience the

² Throughout the discussion, it would be good to continuously change the race of the persons in the hypotheticals. It would also be good to begin with Hispanic, Asian American, or Native American youth to break out of the "black-white paradigm."

criminal justice process? What if the youth is arrested for possession of crack versus powder cocaine? In sum, how are disparities likely to manifest themselves? Are they justified? How are they likely to be perceived? What costs are the disparities placing on minority communities (relative to the costs of crime)? (You could also get at some interesting conflict of law issues concerning Native Americans by having an American Indian youth arrested just off a reservation. Who has jurisdiction? How would the case be handled differently in different justice systems?)

3. Challenges to Full Service and Equal Treatment:

- a. Purpose: The purpose here is to explore more directly some of the challenges of race facing our criminal justice system today -- from police, to courts, to prisons -- and to provide a bridge from the prior discussion to a discussion about strategies.
- b. Possible Questions and "Evolving Hypothetical": This hypothetical will likely overlap with the next concerning strategies. One possibility is to propose that one of the panelists is appointed the new chief of police (and/or chief public defender, district attorney, trial court judge, etc.) in a community with predominantly white law enforcement personnel and an increasingly diverse citizenry. What challenges does he/she face (e.g., language barriers, lack of diversity, etc.) Imagine a meeting between various community advocates and this new official(s). What issues are raised? What are the priorities? (In particular, we would like to get at the issue of limitations imposed on religious practices of American Indians in detention.)

4. Community Policing and Other Strategies:

- a. Purpose: The purpose here is to explore some of the strategies that can address the challenges identified above and improve relations between minority communities and law enforcement (i.e., strategies that can promote full confidence in our criminal justice system).
- b. Possible Questions and "Evolving Hypothetical": This hypothetical can build on the one concerning challenges. One possibility is that there are a series of meetings (e.g., between community leaders and the new chief of police, between community leaders and the new chief prosecutor, etc.) to discuss programs and policies that can address the challenges stated above. How do these strategies operate? Who must be "at the table" in order to fully promote these strategies?

Proposal

Advisory Board Meeting on Race, Crime, and the Administration of Justice (May 1998): Realities, Perceptions, and Strategies

- I. Purpose: The May Advisory Board meeting provides an opportunity to explore several questions related to race, crime, and the administration of justice: What are the facts? How do different perceptions of crime and the administration of justice affect efforts to build One America? What strategies can help promote a criminal justice system that serves and treats Americans of all races fully and equally? The meeting should include an overview of the facts and a moderated discussion in the "PBS roundtable" format with experts and leaders from various sectors.
- II. Substance of the Meeting:¹
 - A. Realities of Race, Crime, and the Administration of Justice: Data on race, crime, and the administration of justice are complex and are limited for some racial groups. Nonetheless, the May Advisory Board meeting provides an important opportunity to educate people about the available facts: Who is committing crime? Who are the victims of crime? Who is being arrested, charged, convicted, incarcerated? The facts will show a number of disparities in crime and the administration of justice that are caused by complex social, economic, and legal factors.
 - B. Perceptions of Race, Crime, and the Administration of Justice: The facts concerning race, crime, and the administration of justice fuel different perceptions of the criminal justice system and place substantial pressure on our efforts to build One America. Data show that some minority communities often absorb a disproportionate amount of the social, economic, and personal costs of crime. These communities want strong law enforcement. However, there often exist different perceptions between persons of color and larger society about the fairness of the criminal justice system, which hinder law enforcement. Two factors influencing these different perceptions of the criminal justice system are negative interactions between persons of color and law enforcement personnel and racial disparities in the administration of justice. The May Advisory Board meeting provides an opportunity to explore the realities and perceptions of race, crime, and the administration of justice by examining more discrete topics under this heading, including the following:

¹ In order to facilitate discussion, we will provide the Advisory Board with background materials on race, crime, and the administration of justice.

1. Racial Profiling and Confrontations with Law Enforcement.
 2. Incarceration Rates and Sentencing.
 3. Challenges to Full Service and Equal Treatment.
- C. Strategies to Promote a Criminal Justice System that Serves and Treats Americans of All Races Fully and Equally: The May Advisory Board meeting provides an opportunity to explore strategies that can strengthen relations between persons of color and the criminal justice system while reducing crime by examining more discrete topics under this heading, including the following:
1. Community Policing and Other Strategies: Strategies that fall under the rubric of community policing have, most would agree, dramatically reduced crime rates and have the potential to improve relations between law enforcement personnel and the communities they serve. But there are civil rights issues as well that must be addressed as we empower law enforcement officers to proactively enforce social norms. How can we balance these interests and strengthen interactions between communities and law enforcement to both improve relations and decrease crime? What other strategies can also help reduce racial divides and improve law enforcement (e.g., diversity training, community prosecution)?
- D. Focus on Youth: In discussing the realities, perceptions, and strategies related to race, crime, and the administration of justice, we should focus specifically on youth, because racial divides in the administration of justice that impact youth are likely to be especially destructive of our efforts to build One America and because the juvenile justice system differs from the adult system in important ways (e.g., the juvenile system allows for more discretion, the juvenile system is more concerned with rehabilitation). We should also discuss strategies to reduce youth interaction with the criminal justice system.

III. Format of the Meeting

- A. Factual Overview: The meeting will begin with an overview of the facts concerning race, crime, and the administration of justice presented by an expert on these issues.
- B. Roundtable Discussion: The meeting will consist primarily of a roundtable discussion on the realities, perceptions, and strategies related to race, crime, and the administration of justice. The discussion should follow the "PBS format," which brings together experts and leaders to participate in a Socratic discussion. Professor Charles Ogletree of Harvard Law School has agreed to moderate the discussion. The panel should include a diverse group of 6-10 experts and leaders.

Possible Participants

Advisory Board Meeting on Race, Crime, and the Administration of Justice (May 1998): Realities, Perceptions, and Strategies

I. Opening Address: *U. S. Attorney General Janet Reno*¹

II. Factual Overview:

Possible Presenters:

Jeremy Travis, Director, Department of Justice National Institute of Justice

Alfred Blumstein, Professor, Carnegie Mellon University (served on President's Commission on Law Enforcement and Administration of Justice in 1966-67, researched many aspects of the criminal justice system particularly prison populations and sentencing -- suggested by Kennedy)

Christopher Stone, President and Director, Vera Institute of Justice (founding director of the Center for Alternative Sentencing and Employment Services and the Neighborhood Defender Service of Harlem. Member of the Board of Directors of the New York State's Capital Defender Office. Has authored a number of articles most recently "Crime and Justice in Black America.")

III. Roundtable Discussion

A. Moderator: *Professor Charles Ogletree, Harvard Law School (renowned expert on this issue.)*

B. Panelists

Possible Panelists	
1.	<i>Randall Kennedy, Professor, Harvard Law School (well-known on these issues, particularly for his views on racial profiling)</i>
2.	James Q. Wilson, Professor, UCLA, authored a number of books on crime (suggested by Ogletree, Kennedy, Sonia)
3.	John DiIulio, Professor, Princeton University -- Woodrow Wilson School, has written a number of books on government institutions and suggestions for reform (suggested by Ogletree, Kennedy, Sonia)
X	Professor Jeffrey Rosen, George Washington University, prolific writer on race and crime, often in publications such as The New Republic. (Suggested by Sonia)

¹ Italics indicate that participant is confirmed.

5.	Professor Cynthia Lee, U.C. San Diego, written on race and crime, 619-260-2320 (suggested by Sonia)
6.	Professor Sandra Guerra, University of Houston, 713-743-2134 (suggested by Maria E.)
7.	Professor Miguel Mendez, Stanford, expert on criminal justice, 650-723-0613 (suggested by Maria E.)
8.	Alfredo Garcia, author, wrote a book on the 6th Amend., 305-623-2372 (suggested by Maria E.)
9.	Beverly Harvard, Atlanta Chief of Police, COP since 1994 and patrol office since 1973, involved in community policing, first African American woman to run a major police department, named "CBS Morning Show woman of the Year." (Suggested by Ogletree)
10.	Fred Lau, San Francisco Chief of Police, first Asian Pacific American COP in a major city
11.	William Bratton, former NYC Chief of Police (suggested by Richard)
12.	Reuben Greenberg, Charleston Chief of Police (suggested by Jose)
13.	Angela Jordan Davis, Professor, American University School of Law, specializes in race and crime, former Director of the Public Defender Service for D.C. (Suggested by Ogletree, Sonia)
14.	Kim Taylor-Thompson, Professor, NYU School of Law, specializing in race and crime, formerly the Director of the Public Defender Service for D.C. (Suggested by Ogletree, Sonia)
15.	Michael Judge, Public Defender, Los Angeles, CA (suggested by Angela Oh)
16.	Marc Mauer, Assistant Director, Sentencing Project, Washington, DC, promotes defense-based alternative sentencing programs and services nationwide, authored reports such as "Young Black Men and the Criminal Justice System." (Suggested by Olgetree, Rose Ochi)
17.	Maria Jimenez, Director, Immigration Law Enforcement Monitoring Project, Houston, TX, project of the American Friends Service Committee, established to engage local communities along the U.S.-Mexico border to strengthen the capacity of border communities to participate in decisions relating to border control policies and practices and seek changes in key policies that foster abuse, human suffering and a militarized border (suggested by NCLR)
18.	Vibiana Andrade, National Immigration Law Center, Los Angeles, CA (suggested by NCLR, Angela Oh)
19.	Michael Yamamoto, Board of California Attorneys for Criminal Justice (suggested by Angela Oh)
20.	Judge Ricardo Urbina, D.C. Federal District Court
21.	Michael Yamaguchi, U.S. Attorney for the Northern District of California
22.	Eric Holder? Rose Ochi? Bill Lann Lee? [DOJ official on strategies.]
23.	Jimmy Gurule, former Bush appointee at DOJ, 219-631-5917 (suggested by Maria E.)
24.	Robert Yazzie, Chief Justice of the Navajo Nation, Window Rock, AZ
25.	Cheryl Dmeert Fairbanks, (Tlingit/Timpshian) attorney and tribal Court Justice, Sante Fe, NM

26. Lenny Foster, (Navajo) National Native American Prisoner Rights Advocates' Coalition; former director of Navajo Nation Corrections Project, Fort Defiance, AZ
27. Ada Pecos Melton (Pueblo), former DOJ employee who worked in juvenile justice for Indian youth, Albuquerque, NM
28. James Zogby, President, Arab American Insitute (suggested by Richard)
29. Journalist? John Quinones, 20/20 (suggested by Ogletree)

Possible Participants

Advisory Board Meeting on Race, Crime, and the Administration of Justice (May 1998): Realities, Perceptions, and Strategies

I. Opening Address: *U. S. Attorney General Janet Reno*¹

II. Factual Overview:

Possible Presenters:

① **Christopher Stone**, President and Director, Vera Institute of Justice (founding director of the Center for Alternative Sentencing and Employment Services and the Neighborhood Defender Service of Harlem. Member of the Board of Directors of the New York State's Capital Defender Office. Has authored a number of articles most recently "Crime and Justice in Black America.")

Alfred Blumstein, Professor, Carnegie Mellon University (served on President's Commission on Law Enforcement and Administration of Justice in 1966-67, researched many aspects of the criminal justice system particularly prison populations and sentencing -- suggested by Kennedy)

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III. Roundtable Discussion

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2.	John DiIulio, Professor, Princeton University -- Woodrow Wilson School, has written a number of books on government institutions and suggestions for reform (suggested by Ogletree, Kennedy, Sonia)
3.	Professor Jeffrey Rosen, George Washington University, prolific writer on race and crime, often in publications such as The New Republic. (Suggested by Sonia)

¹ Italics indicate that participant is confirmed.

4.	Professor Joan Petersilia, U.C. Irvine, written with James Q. Wilson, focused primarily on policing, sentencing, career criminality, corrections, and racial discrimination.
5.	Roy Innis, Executive Director, Congress for Racial Equality (suggested by Mike W.)
6.	Professor Cynthia Lee, University of San Diego Law School, written on race and crime, 619-260-2320 (suggested by Sonia)
7.	Professor Sandra Guerra, University of Houston, 713-743-2134 (suggested by Maria E.)
8.	Professor Miguel Mendez, Stanford, expert on criminal justice, 650-723-0613 (suggested by Maria E.)
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12.	William Bratton, former NYC Chief of Police (suggested by Richard)
13.	Reuben Greenberg, Charleston Chief of Police (suggested by Jose)
14.	Angela Jordan Davis, Professor, American University School of Law, specializes in race and crime, former Director of the Public Defender Service for D.C. (Suggested by Ogletree, Sonia)
15.	Kim Taylor-Thompson, Professor, NYU School of Law, specializing in race and crime, formerly the Director of the Public Defender Service for D.C. (Suggested by Ogletree, Sonia)
16.	Michael Judge, Public Defender, Los Angeles, CA (suggested by Angela Oh)
17.	Professor Deborah Martinez, Northeastern, former U.S. Attorney (suggested by Ogletree)
18.	Marc Mauer, Assistant Director, Sentencing Project, Washington, DC, promotes defense-based alternative sentencing programs and services nationwide, authored reports such as "Young Black Men and the Criminal Justice System." (Suggested by Ogletree, Rose Ochi)
19.	Maria Jimenez, Director, Immigration Law Enforcement Monitoring Project, Houston, TX, project of the American Friends Service Committee, established to engage local communities along the U.S.-Mexico border to strengthen the capacity of border communities to participate in decisions relating to border control policies and practices and seek changes in key policies that foster abuse, human suffering and a militarized border (suggested by NCLR)
20.	Vibiana Andrade, National Immigration Law Center, Los Angeles, CA formerly with MALDEF (suggested by NCLR, Angela Oh)
21.	Mary Kenney or Cynthia Cano, Lawyer's Committee on Civil Rights Under Law, San Antonio, TX (suggested by NCLR)
22.	Michael Yamamoto, Board of California Attorneys for Criminal Justice (suggested by Angela Oh)

Professors

Police Chiefs

Public Defender

Prosecutors

Larry Echohawk
former AG of
Idaho

Professor @
BYU law
School

Sentencing

Community
advocates
language
challenges
to law
enforcement

23.	Michael Yamaguchi, U.S. Attorney for the Northern District of California
24.	Eric Holder? Rose Ochi? Bill Lann Lee? [DOJ official on strategies.]
25.	Jimmy Gurule, former Bush appointee at DOJ, 219-631-5917 (suggested by Maria E.)
26.	Robert Yazzie, Chief Justice of the Navajo Nation, Window Rock, AZ
27.	Cheryl Dmeert Fairbanks, (Tlingit/Timpshian) attorney and tribal Court Justice, Sante Fe, NM
28.	James Zogby, President, Arab American Insitute (suggested by Richard)
29.	Journalist? John Quinones, 20/20 (suggested by Ogletree)

tribal justice
 v.
 urban Indians
 Tom LeClaire
 from OTJ
 who can talk
 about both sets
 of issues

Larry
 Echohawk

DRAFT (as of May 8, 1998 (10:13am))

**The President's Initiative on Race
Advisory Board Meeting**

**George Washington University
Dorothy Betts Marvin Theater
Washington, D.C.**

May 19, 1998
10:00 a.m. - ~~1:00 p.m.~~ 1:30[?] p.m.

AGENDA

"Race, Crime and the Administration of Justice"

- | | | |
|------|--|--|
| I. | Opening/Review of Agenda
10:00 am - 10:05 am | Dr. John Hope Franklin |
| II. | Welcoming Remarks
10:05 am - 10:08 am | Dr. Stephen Trachtenberg,
President of GW [invited] |
| III. | Introductory Remarks
10:08 am - 10:23 am | Attorney General Janet Reno
[confirmed] |
| III. | Factual Overview
10:23 am - 10:38 am | [See attached potential speaker list] |
| IV. | Roundtable Discussion
10:38 am - 12:40 pm | |
| | Moderator: Professor Charles Ogletree [confirmed]
Panelists:

Professor Randall Kennedy, Harvard University [confirmed]

[See attached potential participants list] | |
| V. | Questions and Answers
12:40 pm - ~~12:58 pm~~ 1:30 pm | Members of the Audience
on cards |
| VI. | Closing Remarks/Adjournment
12:58 pm - 1:00 pm | Dr. John Hope Franklin |

Proposal

Advisory Board Meeting on Race, Crime, and the Administration of Justice (May 1998): Realities, Perceptions, and Strategies

- I. Purpose: The May Advisory Board meeting provides an opportunity to explore several questions related to race, crime, and the administration of justice: What are the facts? How do different perceptions of crime and the administration of justice affect efforts to build One America? What strategies can help promote a criminal justice system that serves and treats Americans of all races fully and equally? The meeting should include an overview of the facts and a moderated discussion in the "PBS roundtable" format with experts and leaders from various sectors.
- II. Substance of the Meeting:¹
 - A. Realities of Race, Crime, and the Administration of Justice: Data on race, crime, and the administration of justice are complex and are limited for some racial groups. Nonetheless, the May Advisory Board meeting provides an important opportunity to educate people about the available facts: Who is committing crime? Who are the victims of crime? Who is being arrested, charged, convicted, incarcerated? The facts will show a number of disparities in crime and the administration of justice that are caused by complex social, economic, and legal factors.
 - B. Perceptions of Race, Crime, and the Administration of Justice: The facts concerning race, crime, and the administration of justice fuel different perceptions of the criminal justice system and place substantial pressure on our efforts to build One America. Data show that some minority communities often absorb a disproportionate amount of the social, economic, and personal costs of crime. These communities want strong law enforcement. However, there often exist different perceptions between persons of color and larger society about the fairness of the criminal justice system, which hinder law enforcement. Two factors influencing these different perceptions of the criminal justice system are negative interactions between persons of color and law enforcement personnel and racial disparities in the administration of justice. The May Advisory Board meeting provides an opportunity to explore the realities and perceptions of race, crime, and the administration of justice by examining more discrete topics under this heading, including the following:

¹ In order to facilitate discussion, we will provide the Advisory Board with background materials on race, crime, and the administration of justice.

1. Racial Profiling and Confrontations with Law Enforcement.
 2. Incarceration Rates and Sentencing.
 3. Challenges to Full Service and Equal Treatment.
- C. Strategies to Promote a Criminal Justice System that Serves and Treats Americans of All Races Fully and Equally: The May Advisory Board meeting provides an opportunity to explore strategies that can strengthen relations between persons of color and the criminal justice system while reducing crime by examining more discrete topics under this heading, including the following:
1. Community Policing and Other Strategies: Strategies that fall under the rubric of community policing have, most would agree, dramatically reduced crime rates and have the potential to improve relations between law enforcement personnel and the communities they serve. But there are civil rights issues as well that must be addressed as we empower law enforcement officers to proactively enforce social norms. How can we balance these interests and strengthen interactions between communities and law enforcement to both improve relations and decrease crime? What other strategies can also help reduce racial divides and improve law enforcement (e.g., diversity training, community prosecution)?
- D. Focus on Youth: In discussing the realities, perceptions, and strategies related to race, crime, and the administration of justice, we should focus specifically on youth, because racial divides in the administration of justice that impact youth are likely to be especially destructive of our efforts to build One America and because the juvenile justice system differs from the adult system in important ways (e.g., the juvenile system allows for more discretion, the juvenile system is more concerned with rehabilitation). We should also discuss strategies to reduce youth interaction with the criminal justice system.

III. Format of the Meeting

- A. Factual Overview: The meeting will begin with an overview of the facts concerning race, crime, and the administration of justice presented by an expert on these issues.
- B. Roundtable Discussion: The meeting will consist primarily of a roundtable discussion on the realities, perceptions, and strategies related to race, crime, and the administration of justice. The discussion should follow the "PBS format," which brings together experts and leaders to participate in a Socratic discussion. Professor Charles Ogletree of Harvard Law School has agreed to moderate the discussion. The panel should include a diverse group of 6-10 experts and leaders.



ONE AMERICA IN THE 21ST CENTURY

The President's Initiative on Race

*The New Executive Office Building
Washington, DC 20503
202/395-1010*

May 8, 1998

Dear Friend:

I am writing to invite you to our May Advisory Board meeting which will be held in Washington, D.C. on May 19, 1998 from 10:00 am to 1:00 pm. The topic for the meeting will be "Race and Crime and the Administration of Justice."

The May Advisory Board meeting provides an opportunity for the President's Advisory Board on Race to study several questions in this area: What are the facts concerning race, crime, and the administration of justice? How do different perceptions of crime and the administration of justice affect efforts to build One America? What strategies can help promote a criminal justice system that serves and treats Americans of all races fully and equally? Specifically, we will examine issues such as racial profiling, sentencing disparities, and community policing.

The meeting will be held at George Washington University, the Dorothy Betts Marvin Theater in the Marvin Center at 800 21st Street, N.W. It will begin with opening remarks by Attorney General Janet Reno followed by an overview of the facts surrounding this topic and a two-hour roundtable discussion. The roundtable discussion will be moderated by Professor Charles Ogletree, renowned expert on these issues at Harvard University, and will include panelists from across the country.

I hope that you or a representative from your organization will be able to join us for what will be an informative and lively discussion on race, crime and the administration of justice. If you are able to attend, please fax back the enclosed RSVP form. If you have any questions, please feel free to contact Danielle Glosser, Outreach Associate, at 202-395-1010.

Sincerely,

Judith A. Winston
Executive Director



ONE AMERICA IN THE 21ST CENTURY

The President's Initiative on Race

*The New Executive Office Building
Washington, D.C. 20503
202/395-1010*

ADVISORY BOARD MEETING MAY 19, 1998 RSVP FORM

____ Yes, I will attend.

____ No, I am unable to attend.

NAME _____

For whom you are substituting, if anyone? _____

ORGANIZATION _____

ADDRESS _____

PHONE _____

FAX _____

E-MAIL _____

**PLEASE FAX TO 202-395-1006 AS SOON AS POSSIBLE.
ATTENTION GRACE GARCIA.**

Proposal

**Advisory Board Meeting on Race, Crime, and the Administration of Justice (May 1998):
Realities, Perceptions, and Strategies**

*June 1
Kys. One
latest draft.
JGH*

- I. Purpose: The May Advisory Board meeting provides an opportunity to explore several questions related to race, crime, and the administration of justice: What are the facts? How do different perceptions of crime and the administration of justice affect efforts to build One America? What strategies can help promote a criminal justice system that serves and treats Americans of all races fully and equally? The meeting should include an overview of the facts and a moderated discussion in the "PBS roundtable" format with experts and leaders from various sectors. It may also include community outreach of various kinds.
- II. Substance of the Meeting:¹
 - A. Realities of Race, Crime, and the Administration of Justice: Data on race, crime, and the administration of justice are complex and are limited for some racial groups. Nonetheless, the May Advisory Board meeting provides an important opportunity to educate people about the available facts: Who is committing crime? Who are the victims of crime? Who is being arrested, charged, convicted, incarcerated? The facts will show a number of disparities in crime and the administration of justice that are caused by complex social, economic, and legal factors.
 - B. Perceptions of Race, Crime, and the Administration of Justice: The facts concerning race, crime, and the administration of justice fuel different perceptions of the criminal justice system and place substantial pressure on our efforts to build One America. Data show that some minority communities often absorb a disproportionate amount of the social, economic, and personal costs of crime. These communities want strong law enforcement. However, there often exist different perceptions between persons of color and larger society about the fairness of the criminal justice system, which hinder law enforcement. Two factors influencing these different perceptions of the criminal justice system are negative interactions between persons of color and law enforcement personnel and racial disparities in the administration of justice. The May Advisory Board meeting provides an opportunity to explore the realities and perceptions of race, crime, and the administration of justice by examining more discrete topics under this heading, including the following:

¹ In order to facilitate discussion, we will provide the Advisory Board with background materials on race, crime, and the administration of justice.

1. Racial Profiling and Confrontations with Law Enforcement:
 2. Incarceration Rates and Sentencing:
 3. Challenges to Full Service and Equal Treatment:
- C. Strategies to Promote a Criminal Justice System that Serves and Treats Americans of All Races Fully and Equally: The May Advisory Board meeting provides an opportunity to explore strategies that can strengthen relations between persons of color and the criminal justice system while reducing crime by examining more discrete topics under this heading, including the following:
1. Community Policing: Strategies that fall under the rubric of community policing have, most would agree, dramatically reduced crime rates and have the potential to improve relations between law enforcement personnel and the communities they serve. But there are civil rights issues as well that must be addressed as we empower law enforcement officers to proactively enforce social norms. How can we balance these interests and strengthen interactions between communities and law enforcement to both improve relations and decrease crime?
 2. Other Strategies: Other strategies to reduce racial divides and improve law enforcement may include community prosecution, diversity training for law enforcement personnel, citizen advisory boards, etc.
- D. Focus on Youth: In discussing the realities, perceptions, and strategies related to race, crime, and the administration of justice, we should focus specifically on youth, because racial divides in the administration of justice that impact youth are likely to be especially destructive of our efforts to build One America and because the juvenile justice system differs from the adult system in important ways (e.g., the juvenile system allows for more discretion, the juvenile system is more concerned with rehabilitation). We should also discuss strategies to reduce youth interaction with the criminal justice system.

III. Format of the Meeting

- A. Factual Overview: The meeting will begin with an overview of the facts concerning race, crime, and the administration of justice presented by an expert on these issues, such as the Director of the Department of Justice's National Institute of Justice.

- B. Roundtable Discussion: The meeting will consist primarily of a roundtable discussion on the realities, perceptions, and strategies related to race, crime, and the administration of justice. The discussion should follow the previously tested PBS format, which brings together experts and leaders to participate in a Socratic discussion facilitated by a moderator. (A tape illustrating this format is available.) The most appropriate moderator is Charles Ogletree of Harvard Law School, who has moderated these discussions before on issues related to race and crime and is interested in working with us on this project. The panel should include a fully diverse group of 6-10 experts and leaders.
- C. Community Outreach and Participation: [To be discussed.]

Proposal

Advisory Board Meeting on Race, Crime, and the Administration of Justice (May 1998): Facts, Divides, and Strategies

- I. Purpose: The May Advisory Board meeting should focus on issues of race in crime and the administration of justice. What are the facts? What are the racial divides? What strategies can help promote a criminal justice system that serves and treats Americans of all races fully and equally? The May Advisory Board meeting provides an opportunity to explore these questions. The meeting should include an overview of the facts and a moderated discussion in the "PBS roundtable" format with experts and leaders from various sectors. It may also include community outreach of various kinds.
- II. Substance of the Meeting:¹
 - A. Facts on Race, Crime, and the Administration of Justice: Data on race, crime, and the administration of justice are complex and are limited for some racial groups. Nonetheless, the May Advisory Board meeting provides an important opportunity to educate people about the available facts: Who is committing crime? Who are the victims of crime? Who is being arrested, charged, convicted, incarcerated? The facts will show a number of disparities in crime and the administration of justice that are caused by complex social, economic, and legal factors.
 - B. Racial Divides in Crime and the Administration of Justice: The facts on race and crime place substantial pressure on the criminal justice system. Data show that a disproportionately high number of crimes are committed by members of some minority groups. Data also show that minority communities often absorb a disproportionate amount of the social, economic, and personal costs of crime. These communities want strong law enforcement.

However, there often exist divides between persons of color and the criminal justice system that hinder law enforcement. Two causes of these divides are negative interactions between persons of color and law enforcement personnel and racial disparities in the administration of justice. The May Advisory Board meeting provides an opportunity to explore these divides, which are based on both reality and perception. More discrete topics under this heading include the following:

¹ In order to facilitate discussion, we will provide the Advisory Board with background materials on race, crime, and the administration of justice.

1. Racial Profiling and Confrontations with Law Enforcement:
 2. Incarceration Rates and Sentencing:
 3. Challenges to Full Service and Equal Treatment:
- C. Strategies to Promote a Criminal Justice System that Serves and Treats Americans of All Races Fully and Equally: The May Advisory Board meeting provides an opportunity to explore strategies that can strengthen relations between persons of color and the criminal justice system while reducing crime. More discrete topics under this heading include the following:
1. Community Policing: Strategies that fall under the rubric of community policing have, most would agree, dramatically reduced crime rates and have the potential to improve relations between law enforcement personnel and the communities they serve. But there are civil rights issues as well that must be addressed as we empower law enforcement officers to proactively enforce social norms. How can we balance these interests and strengthen interactions between communities and law enforcement to both improve relations and decrease crime?
 2. Other Strategies: Other strategies to reduce racial divides and improve law enforcement may include community prosecution, diversity training for law enforcement personnel, citizen advisory boards, etc.
- D. Focus on Youth: In discussing the facts, divides, and strategies concerning race, crime, and the administration of justice, we should focus specifically on youth, because racial divides in the administration of justice that impact youth are likely to be especially destructive of our efforts to build One America and because the juvenile justice system differs from the adult system in important ways (e.g., the juvenile system allows for more discretion, the juvenile system is more concerned with rehabilitation). We should also discuss strategies to reduce youth interaction with the criminal justice system.

III. Format of the Meeting

- A. Factual Overview: The meeting will begin with an overview of the facts concerning race, crime, and the administration of justice presented by an expert on these issues, such as the Director of the Department of Justice's National Institute of Justice.

- B. Roundtable Discussion: The meeting will consist primarily of a roundtable discussion on the facts, divides, and strategies concerning race, crime, and the administration of justice. The discussion should follow the previously tested PBS format, which brings together experts and leaders to participate in a Socratic discussion facilitated by a moderator. (A tape illustrating this format is available.) The most appropriate moderator is Charles Ogletree of Harvard Law School, who has moderated these discussions before on issues related to race and crime and is extremely interested in working with us on this project. The panel should include a fully diverse group of 8-10 experts and leaders.
- C. Community Outreach and Participation: [To be discussed.]

May PIR meeting

① Rates of victimization

Solutions

Race & Crim Justice
System

or

Crime & Race,
then Race & Crim
Justice System

RE:
not
complementary
programs(?)

Stats
What is the face of crime
Racism w/in law enf. /
Crim. Justice
System.

• Credibility of Race Initiative
(+)

Not wanting to undermine the Pres.'s work to
separate

① Reality in perspective stereotypes

Public Defender [FBI
crime guy.]
Commits
v. victimization

②
Both of people
and of system
(Community relations
persons?)

- Fairness of system
- Accountability (that system works)

§ 377

~~Provision in statute for registry (§ 249)~~

→ Provision in statute for registry (§ 249)
discretionary adjustment of status.

1986 Act moved date from 1948 to 1972

Registry date change — Jan 1, 1982

Standard ?

Leg. package to OMB

mandatory custody
discretion

52
65
86

Admin. solution (?)

~~300K~~

300K — those who applied for
recognition as class members.

Most were rejected.

How likely is it
that we would get
this change in the
registry date ?

Settlement of litigation as a vehicle for those
(beyond those who were deterred).

→ Cannot provide an admin. registry

INS office
not adversarial

> NACARA-like
provisions for those
who have been here
since 1982

instead
of EOAC

Crime and Justice
Comm

Proposal

**Advisory Board Meeting on Race and the Administration of Justice (May 1998):
How Can We Promote a Race-Neutral Criminal Justice System?**

- I. Purpose: The May Advisory Board meeting should focus on racial divides in the administration of justice and how we can promote a criminal justice system that serves and treats Americans of all races fully and equally. In particular, the meeting should focus on relations between persons of color and the criminal justice system. For several reasons, persons of color often view the criminal justice system as "us versus them" and feel alienated from the officers of the state assigned "to protect and to serve" them. The May Advisory Board meeting provides an opportunity to explore and educate people about the causes of these tensions and what can be done to overcome them. The meeting should include a moderated discussion in the "PBS roundtable" format with experts and leaders from various sectors. It may also include community outreach of various kinds.
- II. Substance of the Meeting:
 - A. Topics for Discussion: Racial divides in the administration of justice are particularly destructive of our efforts to create One America, and it is clear that such racial divides exist. In broad terms, the Advisory Board meeting should focus on two overlapping areas that contribute to tensions between persons of color and the criminal justice system -- negative interactions between persons of color and law enforcement personnel and racial disparities in the administration of justice:
 1. Negative Interactions and Experiences: Negative interactions and experiences of persons of color with law enforcement personnel contribute to tensions between persons of color and the criminal justice system. These experiences range from being targeted based on racial stereotypes to more extreme confrontations with law enforcement officers. The reality may be that those citizens most in need of law enforcement services feel the least served by the criminal justice system. How can we promote more positive relations between persons of color and the criminal justice system? More discrete topics under this heading include the following:
 - a. Racial Profiling and Confrontations with Law Enforcement: Race may be used consciously or unconsciously by law enforcement personnel as one factor in the administration of justice (e.g., race may be used as one factor in deciding which cars to search for drugs in traffic stops). This practice not only occurs, but has been endorsed by some courts. But what law enforcement may see as necessary practice imposes costs on minorities, perpetuates and reinforces stereotypes, and creates situations that can lead to more dramatic confrontations. These more dramatic confrontations can

include abuse of power and improper use of physical force, and while white people may see such incidents as extreme, isolated events, minorities may see them as the visible tip of a much larger problem. In what circumstances if any should race be used as a factor in the administration of justice? What can be done to eliminate abuse of power and promote full confidence in law enforcement?

- b. Challenges to Full Service and Equal Treatment: As our nation becomes more diverse, challenges associated with sustaining a criminal justice system that fully serves all Americans become more pronounced. These challenges and barriers exist throughout the criminal justice process, such as the lack of diversity in police forces, language barriers that limit access to police and courts, limitations imposed on religious practices of persons in detention, which is a particular issue within the American Indian community, etc. What can be done to overcome those barriers and promote a criminal justice system that fully and equally serves all Americans?
 - c. Community Policing and Other Strategies to Promote Positive Relations: Strategies that fall under the rubric of community policing have, most would agree, dramatically reduced crime rates and have the potential to improve relations between law enforcement personnel and the communities they serve. But there are civil rights issues as well that must be addressed as we empower law enforcement officers to proactively enforce social norms. How can we balance these interests and strengthen interactions between communities and law enforcement to both improve relations and decrease crime? What other strategies have shown evidence of success?
2. Racial Disparities: Racial disparities in crime (e.g., victimization, offending) and the administration of justice (e.g., arrests, convictions, sentencing, incarceration, application of the death penalty) contribute to tensions as well. How substantial are these disparities? What are the causes of these disparities? How can we promote a criminal justice system that serves all Americans equally and in which all Americans are confident of being treated equally? More discrete topics under this heading include the following:
- a. Incarceration Rates and Sentencing: Certain minority groups have incarceration rates greater than their proportion in society (e.g., one-third of young, black males are under the supervision of the criminal justice system), and these incarceration rates often have

dramatic affects on minority communities. This disparity is due in part to systemic choices in the administration of justice (e.g., focusing drug enforcement efforts in the inner cities) and to sentencing disparities (e.g., sentencing differences between offenses involving crack versus powder cocaine) that have a disparate impact on minorities. Should these practices be changed? What are the additional causes of these disparities? Should society focus less on incarceration and more on prevention, treatment, and rehabilitation?

- b. Strategies to Overcome Racial Disparities: Some programs and practices have shown promise in terms of reducing disparities in the administration of justice while still addressing concerns related to crime (e.g., reforms in drug control policy). What are these policies? Should they be implemented and/or expanded?

- B. Focus on Youth: In discussing both negative experiences between persons of color and the criminal justice system and racial disparities in the administration of justice, we should address specifically their impact on youth, because racial divides in the administration of justice that impact youth are likely to be especially destructive of our efforts to build One America and because the juvenile justice system differs from the adult system in important ways (e.g., the juvenile system allows for more discretion, the juvenile system is more concerned with rehabilitation). For example, we could discuss negative experiences such as racial profiling of minority youth in determining potential gang membership and racial disparities such as increased detention rates of minority youth that persist after controlling for case characteristics. We should also discuss strategies to reduce youth interaction with the criminal justice system and to overcome issues of race in the juvenile justice system.

III. Format of the Meeting

- A. PBS Roundtable: The roundtable discussion on these issues should follow the previously tested PBS format, which brings together experts and leaders to participate in a Socratic discussion facilitated by a moderator. (A tape illustrating this format is available.) The most appropriate moderator is Charles Ogletree of Harvard Law School, who has moderated these discussions before on issues related to race and crime and is extremely interested in working with us on this project. The panel should include a fully diverse group of 8-10 experts and leaders.
- B. Community Outreach and Participation: [To be discussed.]
- C. Advisory Board Discussion: [To be discussed.]

Proposal

Advisory Board Meeting on Race and the Administration of Justice: How Can We Promote a Race-Neutral Criminal Justice System?

- I. Purpose: The May Advisory Board meeting will focus on racial divides in the administration of justice and how to promote a criminal justice system that treats and serves all Americans fully and equally. In particular, the meeting should focus on relations between persons of color and the criminal justice system. For several reasons, persons of color often view the criminal justice system as “us versus them” and feel alienated from the officers of the state assigned “to protect and to serve” them. The May Advisory Board meeting provides an opportunity to explore and educate people about the causes of these tensions and what can be done to overcome them. The meeting will include a moderated discussion in the “PBS roundtable” format with experts and leaders from various sectors. It may also include community outreach of various kinds.
- II. Substance of the Meeting:¹ Racial divides in the administration of justice are particularly destructive of our efforts to create One America, and it is clear that such racial divides exist. In broad terms, the Advisory Board meeting should focus on two overlapping areas that contribute to tensions between persons of color and the criminal justice system -- negative interactions between persons of color and law enforcement officials and racial disparities in the administration of justice. In each area, we should focus particularly on issues affecting youth:
 - A. Negative Interactions and Experiences: Negative interactions between persons of color and law enforcement officials contribute to tensions between persons of color and the criminal justice system. These experiences range from being targeted based on racial stereotypes to more extreme confrontations with law enforcement officials. The reality may be that those citizens most in need of law enforcement services feel the least served by the criminal justice system. How can we promote more positive relations between persons of color and the criminal justice system? More discrete topics under this heading include the following:
 1. Racial Profiling and Confrontations with Law Enforcement: Race may be used consciously or unconsciously by law enforcement officials as one factor in the administration of justice (e.g., race may be used as one factor in deciding which cars to search for drugs in traffic stops). This practice

¹ In order to facilitate discussion, we will provide the Advisory Board with background information on race and the administration of justice, including an overview of the issues, data on racial disparities, and additional articles on key topics.

not only occurs, but has been endorsed by some courts. But what law enforcement officials may see as necessary practice imposes costs on minorities, perpetuates and reinforces stereotypes, and creates situations that can lead to more dramatic confrontations. These more dramatic confrontations can include abuse of power and improper use of physical force, and while white people may see such incidents as extreme, isolated events, minorities may see them as the visible tip of a much larger problem. In what circumstances if any should race be used as a factor in the administration of justice? What can be done to eliminate abuse of power and promote full confidence in law enforcement?

2. Barriers to Law Enforcement: As our nation becomes more diverse, challenges associated with sustaining a criminal justice system that fully serves all Americans become more pronounced, including language barriers, lack of diversity in police forces, etc. What can be done to overcome those barriers?
3. Community Policing and Other Strategies to Promote Positive Relations: Strategies that fall under the rubric of community policing have, most would agree, dramatically reduced crime rates and have the potential to improve relations between law enforcement officials and the communities they serve. But there are civil rights issues as well that must be addressed as we empower police to proactively enforce social norms. How can we balance these interests and strengthen interactions between communities and police to both improve relations and decrease crime? What other strategies have shown evidence of success?

B. Racial Disparities: Racial disparities in crime (e.g., victimization, offending) and the administration of justice (e.g., arrests, convictions, sentencing, incarceration) contribute to tensions as well. How substantial are these disparities? What are the causes of these disparities? How can we promote a criminal justice system that serves all Americans equally and in which all Americans are confident of being treated equally? More discrete topics under this heading include the following:

1. Incarceration Rates and Sentencing: Certain minority groups have incarceration rates greater than their proportion in society (e.g., one-third of young black males are under the supervision of the criminal justice system), and these incarceration rates often have dramatic affects on minority communities. This disparity is due in part to systemic choices in the administration of justice (e.g., focusing drug enforcement efforts in the inner cities) and to sentencing disparities (e.g., sentencing differences

between offenses involving crack versus powder cocaine) that have a disparate impact on minorities. Should these practices be changed? What are the additional causes of these disparities? Should society focus less on incarceration and more on prevention, treatment, and rehabilitation?

2. Death Penalty: Evidence shows that there are racial disparities in the application of the death penalty (e.g., if a person is convicted of killing a white person, he/she is much more likely to be sentenced to death than if he/she is convicted of killing a person of color). The Supreme Court has held that, absent evidence of racial discrimination in the specific case at issue, this disparity is constitutionally irrelevant. What can be done to ensure that justice is meted out fairly?
3. Strategies to Overcome Racial Disparities: Some programs and practices have shown promise in terms of reducing disparities in the administration of justice while still addressing concerns related to crime (e.g., reforms in drug control policy). What are these policies? Should they be implemented and/or expanded?

III. Format for Meeting

- A. PBS Roundtable: The roundtable discussion on these issues should follow the previously tested PBS format, which brings together experts and leaders to participate in a Socratic discussion facilitated by a moderator. (A tape illustrating this format is available.) The most appropriate moderator is Charles Ogletree of Harvard Law School, who has moderated these discussions before on issues related to race and crime and is extremely interested in working with us on this project. The panel should include a fully diverse group of 8-10 national experts and leaders. Local leaders could be included on the panel if the roundtable discussion is held in the field.
- B. Community Outreach and Participation: [To be discussed.]
- C. Advisory Board Discussion: [To be discussed.]

Proposal

*Justice,
#4. The latest
version, but still
a work in progress
Just*

**Advisory Board Meeting on Race and the Administration of Justice:
How Can We Promote a Criminal Justice System that Serves and Treats Americans of All Races Equally?**

or

How Can We Promote a Race-Neutral Criminal Justice System?

- I. Project Summary: The May Advisory Board meeting should focus on racial divides in the administration of justice and how we can promote a race-neutral criminal justice system. In particular, the meeting should focus on relations between persons of color and the criminal justice system -- Why do tensions exist? What can be done to promote more positive relations? The meeting should include a moderated discussion in the "PBS roundtable" format with experts and leaders from various sectors. It should also include community outreach of various kinds. (The roundtable discussion could be disaggregated from the community outreach if deemed appropriate.)
- II. Substance of Meeting:¹
 - A. Theme and Topics for Discussion: Racial divides in the administration of justice are particularly destructive of our efforts to create One America, and it is clear that such racial divides exist. For several reasons, persons of color often view the criminal justice system as "us versus them" and feel alienated from the officers of the state assigned "to protect and to serve" them. The May Advisory Board meeting provides an opportunity to explore and educate people about the causes of these tensions and what can be done to overcome them. In broad terms, discussion should focus on three areas. In each area, we should focus particularly on issues affecting youth:
 - Racial disparities in crime and the administration of justice;
 - Negative interactions and experiences of persons of color with law enforcement officials; and
 - Strategies to overcome those racial disparities and negative interactions and thereby create a criminal justice system that fully and equally serves Americans of all races.

¹ In order to facilitate discussion, we will provide the Advisory Board with background information on race and the administration of justice, including an overview of the issues, data on racial disparities, and additional articles on key topics.

More discrete topics that flow from one or more of these three areas are listed below:²

Topic/Issue	Description
1. Racial Profiling and Issues in Enforcement	• This topic refers to the conscious or unconscious use of race by law enforcement officials as one factor in the administration of justice (e.g., race may be used as one factor in deciding which cars to search for drugs in traffic stops). This practice not only occurs, but has been endorsed by some courts. But what law enforcement officials may see as necessary practice imposes costs on minorities, perpetuates and reinforces stereotypes, and creates situations that can lead to more dramatic confrontations. In what circumstances if any should race be used as a factor in the administration of justice? • This topic also refers to systemic choices made in the administration of justice that likely have a disparate impact on minorities (e.g., focusing drug enforcement efforts in the inner cities). Should these practices be changed? • This topic also refers to barriers that prevent law enforcement officials from fully serving minority communities (e.g., language barriers, lack of diversity in police forces). What can be done to overcome these barriers?
2. Police Brutality and Abuse of Power	• This topic refers to more extreme and overt police misconduct. Whites may see instances of police brutality or abuse of power as extreme, isolated events, while minorities may see them as the visible tip of a much larger problem. What is the reality? What can be done to punish and eliminate police brutality and abuse of power?
3. Incarceration Rates and Sentencing <i>cf. system judges</i>	• This topic refers to the fact that certain minority groups have incarceration rates greater than their proportion in society. The most dramatic example is young, black males, one-third of whom are under the supervision of the criminal justice system. This reality has dramatic social and other costs for minority communities. What are the causes of these disparities? Should society focus less on incarceration and more on prevention, treatment, rehabilitation, etc.? • This topic also refers to evidence showing that racial minorities may be sentenced more harshly for similar crimes (e.g., sentencing disparities between offenses involving crack versus powder cocaine). Should such sentencing schemes be changed?

² One way to visualize issues of race in the administration of justice is to examine the three broad areas identified above (i.e., racial disparities, negative experiences, strategies to address those disparities and/or negative experiences) at each stage of the criminal justice process (e.g., criminality, victimization, arrest, indictment, conviction, sentencing, incarceration, parole).

Other cities

Draft/SRP/April 17, 1998

4. Death Penalty	This topic refers to racial disparities in the application of the death penalty. Evidence shows that if a person is convicted of killing a white person, he/she is much more likely to be sentenced to death than if he/she is convicted of killing a person of color. The Supreme Court has held that, absent evidence of racial discrimination in the specific case at issue, this disparity is constitutionally irrelevant. What can be done to ensure that justice is meted out fairly?
5. Community Policing and Other Strategies	- Strategies that fall under the rubric of community policing have, most would agree, dramatically reduced rates of crime and have the potential to improve relations between police and the communities they serve. But there are civil rights issues as well that must be addressed as we empower police to proactively enforce social norms. How can we balance these interests and strengthen interactions between communities and police to both improve relations and decrease crime? - Other strategies can help overcome racial disparities in the administration of justice, improve relations between persons of color and law enforcement officials, and improve access to the criminal justice system. What strategies have shown evidence of success?

Community Prosecutors.
(one - pager)

III. Format for Meeting

- A. PBS Roundtable: The roundtable discussion on these issues should follow the previously tested PBS format, which brings together experts and leaders to participate in a Socratic discussion facilitated by a moderator. (A tape illustrating this format is available.) The most appropriate candidate for moderator is Charles Ogletree, who has moderated these discussions before on issues related to race and crime and is extremely interested in working with us on this project. The panel should include a fully diverse group of 8-10 experts and leaders. Examples of possible panelists include Attorney General Janet Reno, Randall Kennedy, James Q. Wilson, William Bratton, Representative John Conyers. Local leaders could be included on the panel if the roundtable discussion is held in the field.
- B. Community Outreach: Local citizens could perhaps be included in the roundtable discussion as members of the audience that participate through questions from the floor. However, given the nature of the issues, different and additional community dialogue is necessary and would be most valuable. There are many options we could explore including the following, none of which are mutually exclusive:
 1. Prior to the PBS roundtable, each panelist, including Advisory Board members, could meet with and facilitate a discussion among a small group of citizens. These citizens would then comprise the audience for the

roundtable discussion with their views represented through the roundtable participants.

2. In a separate forum, have each Advisory Board member meet with a small breakout group of citizens, then have the Board come together with one citizen from each group reporting back to the full Advisory Board and audience on outcomes from the small group discussion.
 3. Have Advisory Board members go into the field and visit community meetings and organizations around the issue of race and the administration of justice.
 4. Have a separate community forum/town hall meeting at which issues of race and the administration of justice could be discussed.
- C. Advisory Board Discussion: Per the input of Angela Oh and the Advisory Board, at the end of the community outreach and roundtable discussion, Advisory Board members should have the opportunity to reflect on and discuss what they have learned, offer some general comments on race and the administration of justice, and discuss other work items. This session could perhaps include a discussion between Advisory Board members and Charles Ogletree on general lessons learned from the roundtable discussion.

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Seat Belt Push Raises Race Issue

Blacks Weigh Tolls Of Safety vs. Bias

By Warren Brown
 Washington Post Staff Writer
 Friday, April 3, 1998; Page A01

Black lawmakers are struggling with a painful dilemma.

Blacks suffer disproportionately from not wearing seat belts. But blacks are also likely to suffer disproportionately from a Clinton administration initiative to increase use of seat belts through state laws that permit police to stop motorists to check on whether they are wearing them.

The split in the black community over the issue has stymied efforts to pass tougher seat belt laws in states with large urban and minority populations, where many complaints about police harassment originate. Yet some federal and state lawmakers contend that fears of police harassment are overblown. Surveys show that blacks, especially black men, drive beltless more often than their white or Hispanic counterparts, thereby exposing themselves to greater risks of fatal or critical injuries in vehicle crashes.

While seat belt laws are essentially state and local matters, President Clinton last year directed the Transportation Department to seek ways to increase seat belt use from the current national average of 68 percent to 85 percent by 2000 and 90 percent by 2005, a rate the administration claims would save an estimated 10,000 lives a year. Fourteen states, including Maryland, and the District of Columbia permit police to stop motorists to check to see if they are wearing their seat belts, and the Clinton initiative seeks to make that the law in every state. At least 15 states are considering such a law.

"There are virtually no African American males -- including congressmen, actors, athletes and office workers -- who have not been stopped at one time or another for an alleged traffic violation, namely driving while black," said Rep. John Conyers Jr. (D-Mich.), who supports tougher seat belt laws but does not want to let police officers stop people at will.

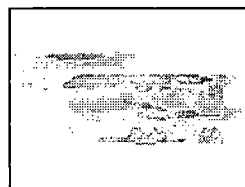
Last week, in response to concerns from Conyers and other lawmakers who say they are bombarded with complaints about unfair traffic stops, the House passed a bill that would require the Justice Department to conduct a two-year nationwide study to determine whether blacks are being harassed through routine vehicle checks.

There is limited data indicating a problem -- such as a 1995 Maryland state police study showing that 73 percent of the cars subjected to stops and searches on Interstate 95 in the state were driven by blacks, while only 14 percent of the people using the road were black. But the

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Justice study, estimated to cost \$500,000, would be the first comprehensive nationwide look at the issue. Congressional aides said the legislation is expected to pass the Senate.

Rep. Juanita Millender-McDonald (D-Calif.) also questions the new seat belt laws, saying complaints about unfair or harassing traffic stops are common in her heavily Hispanic and African American district in south-central Los Angeles. California has permitted police checks for seat belt use since 1993.

"We are getting a lot of these, and they are very disturbing," she said of the complaints. "The young black males are saying: 'Why me? Why are we always being stopped for no apparent reason? Why are our cars being searched?' It has become an issue that we must look at, because these traffic stops are putting people in positions of anger, where they feel they have to respond because they think they are being stopped unfairly."

But Rep. J.C. Watts of Oklahoma, Congress's lone black Republican and not a member of the Congressional Black Caucus, said he does not accept the notion that seat belt laws are being used to target minorities. "The good of wearing seat belts far outweighs the bad," he said. "We have many states that have seat belt laws, but those laws are weak. They have no enforcement mechanism, which makes those laws a sham."

Clinton administration officials are aware of the concerns. National Highway Traffic Safety Administration chief Ricardo Martinez has been working with black lawmakers on Capitol Hill and in statehouses nationwide to allay any fears that seat belt laws might be used to abuse citizens, agency officials said.

Blacks haven't been the only people concerned about the civil liberties issues raised by these laws. Efforts to pass tougher seat belt laws, in fact, failed in largely white states -- such as Washington, Minnesota and Colorado -- according to Janet Goss, spokeswoman for the Air Bag and Seat Belt Safety Campaign, a group funded by the nation's automakers and auto insurers.

"There is a strong feeling of individualism in those places, a strong feeling that government has no right to tell people what to do in their cars," Goss said. And the anti-government-meddling syndrome can often be more difficult to overcome than "the very real perceptions" of racism in law enforcement, she said.

The American Civil Liberties Union also opposes the national push for tougher seat belt laws. "There obviously is a legitimate need for highway safety laws, but too often they are discretionary laws and are used as a pretext for targeting certain groups, such as African Americans," said Reggie Shufford, a staff lawyer in New York.

The D.C. law, considered the toughest in the nation, took effect in October and has been credited by city officials with lifting the rate of seat belt use among drivers and passengers from 58 percent in April 1997 to 66 percent today, according to police reports; nationwide, the rate is 68 percent, according to state and local police surveys reviewed by NHTSA. The D.C. law covers all seating positions in cars and trucks, and it authorizes the assessment of two license

penalty points and a \$50 fine for each violation of the law.

Maryland passed a law last year making unbelted driving a primary driving offense, like running a red light. The law allows police to stop motorists but does not assign points. Virginia does not permit police to stop motorists solely because it appears they are not buckled up and does not assign penalty points to licenses for failure to wear seat belts.

D.C. traffic officials say the increase in seat belt use has been achieved with relatively few complaints about police harassment. But critics say the District's experience is an anomaly -- precisely because its population, government and police are mostly black.

"There is a comfort level," said a D.C. official who asked not to be named. "In a place like New York, where most of the police are white, things might be different."

D.C. Council member Harold Brazil, the only person on the 13-member council to vote against the tougher seat belt law, said he still has misgivings about the statute. "This is something I bring to the table from my childhood, when police viewed members of minority groups as suspicious and often stopped them in traffic based on that suspicion," he said.

Though there is no proof that such traffic stops are occurring under the District's belt law, "I figure, 'Why give the police more power?' I don't want to set up any minority groups, be they blacks or Europeans [in a predominantly black city], so that police can use another rule as a ruse to stop them," Brazil said.

David A. Harris, a law professor at the University of Toledo who has done several studies on the roles of race and ethnicity in police traffic stops, said there is compelling evidence that blacks are targeted by the police.

"Police for years have used traffic laws to stop people for reasons that really have nothing to do with traffic safety. The traffic codes are so voluminous, you can be pulled over for anything," Harris said.

"But as a policeman, you can't possibly stop everybody. You've got to be selective, and all of the available evidence we have is that police disproportionately use their power to stop blacks, Hispanics or other minorities whom they view as suspicious."

The Maryland study found that 70 percent of the searches of blacks' cars turned up nothing.

Experts offer a variety of reasons for why many young blacks tend not to wear seat belts -- that wearing belts is seen as unhip, that the high incidence of single-parent households leaves fewer role models, and that many poor families are forced to buy used cars in which seat belts may not be in good condition. The problem may not be solved with tougher seat belt laws, said Alvin Poussaint, a clinical professor of psychiatry at the Harvard Medical School.

"Just passing a seat belt law without an accompanying education program won't do much to increase belt use" in target populations,

said Poussaint, who is black. Current seat belt use campaigns seem aimed primarily at young couples with families, which exclude many 18- to-29-year-olds, regardless of race, he said.

Yet Centers for Disease Control research, in which people were questioned about their seat belt use, indicates that tougher seat belt laws can make a difference. In telephone polls conducted between 1987 and 1993, only 44.1 percent of the black men aged 18 to 29 said they used seat belts. That compared with 54.3 percent of white men in the same age group, 65.4 percent of Hispanic men and 65.2 percent of Asian men.

A similar poll, conducted in 1995, found that in states with the tougher laws, the overall rate of seat belt use for black men and women ages 18 to 29 was 62.2 percent, with men at 58 percent and women at 65.6 percent. In the 36 states that had weaker seat belt laws, use rates fell to 46.1 percent for black men and 60 percent for black women.

Roderick D. Gillum, a vice president at General Motors Corp. and an African American who grew up in the Detroit area, said he is working with the state legislature, police and civil rights leaders "to try to reach some common ground" on how to handle allegations of unfair traffic stops. But he said it is "equally important that we address a significant public health issue."

The Local Laws On Seat Belt Usage

D.C. and Maryland: Police are permitted to stop motorists if it appears that the driver or passengers are not buckled up.

In the District, each instance of noncompliance can result in two license penalty points and a \$50 fine.

In Maryland, noncompliance is a primary driving offense, akin to running a red light; however, no penalty points are incurred.

Virginia: Police are not permitted to stop motorists solely because it appears that the driver or passengers are not buckled up. However, if a driver is stopped for another violation, he or she can be cited for failure to buckle up.

Who's Buckled Up

Young blacks are less likely to wear seat belts than young people of other races, according to a report from the American Journal of Public Health published in February.

Safety belt use among persons ages 18 through 29

Asian/Pacific Islander females 77%

Hispanic females 72.5%

White females 70.1%

Hispanic males 65.4%

Asian/Pacific Islander males 65.2%

Black females 58.7%

White males 54.3%

Black males 44.1%

NOTE: Data is for 1987-93.

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nine campuses ▼

**Classes start
April 6th.**

Julie tasks

- ① Policies of DEA/FBI/DOJ
re: what on "profile" list.

To what extent is race used as a factor in law enforcement?

- ② Policy initiatives related to Race & Crime?

Concept Sketch:
Advisory Board Meeting on the Administration of Justice (May 1998)

- I. Overview: The May Advisory Board meeting on issues crime and the administration of justice could include discussions on numerous issues. However, the overarching theme I am pursuing is as follows:

- Race and the*
- A. ~~The Alienation of Minorities from the Criminal Justice System:~~ Racial divides in the administration of justice are particularly destructive of our efforts to create One America in large part because the administration of justice directly involves the raw power of the state and because the consequences are so dramatic. It is clear that substantial racial divides exist. In simple and real terms, when I as a white male see a police car driving behind me at night, I think to myself, "To protect and to serve." When a young, black male sees a police car driving behind him, he may think, "Am I going to be pulled over for DWB ("Driving While Black")? Am I going to have a life or death confrontation with the police?"

This division between minority citizens and the officers of the state assigned "to protect and to serve" them is built upon many issues of race in the administration of justice, several of which are listed below. I recommend that, whatever specific issues we and the Advisory Board choose to discuss (and I will make recommendations there as well), we should focus on the impact of those issues on the tensions between persons of color and the criminal justice system in America.

- II. Possible Topics for Discussion: The following matrix lists, in no particular order, possible topics for discussion at the May Advisory Board meeting. As I move forward, I will add columns indicating possible presenters, policy outcomes, etc. (I am already working with Julie Fernandes and others on this.) I have listed many possible topics, **even though I know that some are highly unlikely to and indeed should not be chosen**. While this is very preliminary, topics that I am presently exploring most seriously appear in italics.

Topic/Issue	Description
1. <i>Racial Profiling</i>	This refers to the conscious or unconscious use of race by the police (broadly defined) as one factor in the administration of justice. For example, race may be used as one factor in deciding which cars to search for drugs in traffic stops. This practice not only occurs, but has been endorsed by some courts. But what the police may see as necessary practice imposes costs on minorities and creates situations that can lead to further confrontation. In what circumstances if any should race be used as a factor in the administration of justice?

Juries

Very Preliminary Draft/March 12, 1998

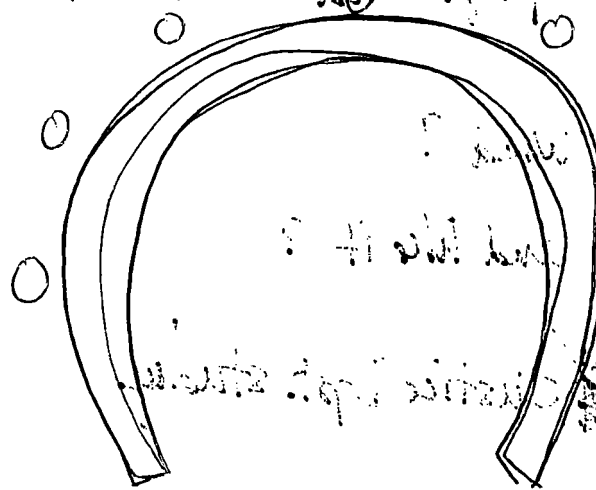
2. Racial Targeting <i>difficulty here with waiting increased police enforcement in depressed areas.</i>	This is related to the above topic but refers to a more systemic issue. There are choices made in the administration of justice that likely have a disparate impact on minorities. This may be true in policing (e.g., the choice to sweep for drug activity in urban neighborhoods where such activity more likely occurs in the open as opposed to suburban communities where it more likely happens in private homes), in prosecution, etc. Should these practices be changed?
3. Incarceration Rates	Certain minority groups have incarceration rates greater than their proportion in society. The most dramatic example is young, black males, one-third of whom are under the supervision of the criminal justice system. This reality has dramatic social and other costs for minority communities. (It is also important to note that evidence shows that the rates of criminality within certain minority groups are greater than their proportion in the population.) Is this focus on incarceration appropriate? Do the costs outweigh the benefits?
4. Criminal Sentencing (especially drug sentencing)	Evidence shows that racial minorities may be sentenced more harshly for similar crimes. The paradigmatic example of this is sentencing disparities between offenses involving crack versus powder cocaine. Should this sentencing scheme be changed?
5. Death Penalty	Evidence shows racial disparities in the application of the death penalty. Most dramatically, if a person is convicted of killing a white person, he/she is much more likely to be sentenced to death than if he/she is convicted of killing a person of color. The Supreme Court has held that, absent evidence of racial discrimination in the specific case at issue, this reality is constitutionally irrelevant. Given this reality, should the death penalty be abolished?
6. Police Brutality	Several real life cases, which I hardly need to recount, illustrate the importance of this issue. However, while many whites may see instances of police brutality as extreme, isolated events, many minorities see them as the visible tip of a much larger problem. What is the reality? What can be done to punish and eliminate police brutality?
7. Crime Rates	Evidence strongly indicates that rates of criminal behavior are higher among certain minority communities. Why is this so? What are the implications? What can be done?
8. Crime Victimization	Related to crime rates, rates of criminal victimization are also higher among certain minority communities. What can be done about these disparate costs placed on minority citizens?
9. Community Policing <i>Community Prosecutors</i>	This strategy has, most would agree, dramatically reduced rates of crime and has the potential to improve relations between police and the communities they serve. But there are civil rights issues as well that must be addressed as we empower police to proactively enforce social norms. How can we balance these interests?

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10. Youth Violence	While the situation is improving, youth violence, especially among certain minority groups, remains a staggering problem in America. What can be done to address it?
11. Hate Crimes	Criminal activity motivated by race remains a problem in America. How can we eliminate hate crimes?
12. Jury Nullification	In response to disparities in the administration of justice, some are advocating for juries to refuse to convict defendants of certain racial groups for certain offenses. Is this appropriate?

III

Format: My vision of the format for discussion of these issues (i.e., those which we choose to discuss) is the so-called PBS format. These are Socratic method discussions with leaders from various communities (here including civil rights, policing, citizen groups, academia, etc.) moderated by a leader in the field. Charles Ogletree of Harvard Law School, who focuses on issues of race in criminal justice, has moderated these sessions for PBS before. The best way to explain my vision is to show you and others a videotape, which I will do in the near future.



- Layout
- Assumptions
- Agree on goals
- Review competing interests and discuss them.

Policy outcomes (?)

Race as a factor in federal law enforcement

Drugs
Immigration
(on criminal side)

[POTUS exec. order
that race not a factor on profile list.]

Q Is race on DEA/FBI/DOJ profile list) What is their policy (?)

Q Was race ever used?

Q Do they use it and like it?

Q Intersection w/ Justice Dept. study.