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Book Review: Randall Kennedy, Race, Crime and the Law

***1256 THREE CHEERS (AND TWO QUIBBLES) FOR PROFESSOR KENNEDY**

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LIT -- Literature Reviews & Analyses

Professor Kennedy has written a great and wise book. Surveying "the bitterly contested crossroads" where race and the criminal justice system intersect (p. ix), Kennedy places himself roughly equidistant from Justice Thurgood Marshall, for whom he clerked, and Marshall's successor, Justice Clarence Thomas. Rhetorically and politically, Kennedy's middle position renders him vulnerable to potshots from both left and right. But Kennedy defends his ground superbly with a wonderfully rich and eminently readable blend of historical narrative, doctrinal analysis, empirical survey, and commonsense argument.

At every turn, Kennedy strives to steer between overstatement and understatement. Today's political right often suffers from amnesia about America's racist past and from complacency about its racial present, while today's academic left often refuses to acknowledge the real progress that we have made over the last two generations and the resulting complexity of our current situation. In response to both, Kennedy presents a third view--grim but not hopeless, passionate but not paranoid. Precisely because racism has been so real in our history and still exists today, we must take care not to trivialize the "r-word" by calling everything we don't like "racist." Precisely because blacks have suffered--and are continuing to suffer--as criminal suspects, defendants, and convicts on the one hand, and as victims of crime on the other, racial justice issues are complicated. Precisely because blacks disagree among themselves (as do whites and other racial groups) about the criminal justice system, many issues are not, well, black-and-white. [\[FNI\]](#) In such a world, factual punctiliousness and fairminded treatment of counterarguments are not merely scholarly virtues suitable for a Harvard professor publishing his first

book, but democratic virtues appropriate for a public intellectual writing to help fellow citizens make sense of some of the most difficult and divisive issues of our day.

It is impossible to do justice to such a grand and rich book in such a small space, but in what follows I first sketch a few of Kennedy's most important points and then turn to a couple of places in the book at which he does not persuade me. With a book that aims for fairness and balance, it might seem somewhat unfair and imbalanced to highlight ***1257** two of the spots where I disagree with Kennedy rather than the many places where I find myself persuaded. In defense, I try to show that even when I disagree with Kennedy, I agree with him. That is, on the two topics at issue--the constitutionality of peremptory challenges and the proper remedial response to racially skewed grand juries--I hope to show that Kennedy errs by ignoring the implications of other arguments that he advances elsewhere in his book. And in the spirit of ideological balance, I have chosen one topic (peremptories) on which my position tracks Justice Marshall's views and a second topic (remedies) on which my position might place me closer to the views of Justice Thomas.

I. Three Cheers

The American legal system has historically targeted blacks for special disadvantage as "suspects, defendants, and convicts" (p. 76). Kennedy traces the roots of this inequality to black slavery and proceeds to follow the story line up to the present. Even today, judges allow race to be used as a proxy for criminal suspiciousness in various cases. The Supreme Court, for example, has suggested that Border Patrol agents may subject motorists of "apparent Mexican ancestry" to more extensive delay and more intrusive questioning, on the ground that race in this context "clearly is relevant to the law enforcement need to be served." [\[FN2\]](#) But if our Constitution is supposed to be color-blind, Kennedy asks, why is this kind of "racial tax" permissible (p. 161)? If race cannot or should not be used as a factor to advantage persons of color in affirmative action scenarios, as many Justices and judges seem to believe, [\[FN3\]](#) why can it be used as a factor to disadvantage persons of color in the border patrol scenario (p. 160)? In posing such provocative questions, Kennedy aims "to facilitate the emergence of a polity that is overwhelmingly indifferent to racial differences, a polity that looks beyond looks" (p. 167). [\[FN4\]](#)

Kennedy makes similarly provocative points when he turns from suspects to defendants and convicts. Under slavery, blacks as a class ***1258** were stripped of their liberty and, even if free, were denied the right to vote (and the right to serve on juries) in most states. In response to Emancipation and Reconstruction, racist laws mutated in form. Under the infamous Southern Black Codes of the 1860s, various forms of behavior were legal for whites but criminal for blacks, and even when the criminal code laid down color-blind rules of conduct, black skin formally triggered harsher (and often savage) punishment. When these laws were invalidated by courts and by Congress, they were ultimately replaced in many jurisdictions by laws that were facially color-blind but racist in both purpose and effect: white-dominated legislatures intentionally targeted behavior thought to be more common among black folk and punished such behavior with prison slavery and disenfranchisement. White-dominated police forces, judges, juries, and prison officials helped administer this scheme with a racially uneven hand and unequal eye. Ironically, even the Reconstruction Amendments could be invoked in support of

the new Southern solution. The text of the Thirteenth Amendment, after all, seemed explicitly to countenance prison slavery in its prohibition of slavery and involuntary servitude "except as a punishment for a crime whereof the party shall have been duly convicted," [FN5] and Section 2 of the Fourteenth Amendment seemed explicitly to embrace disenfranchisement as an appropriate criminal punishment. [FN6] Once disenfranchised, black convicts were forever barred from voting for legislators and serving on juries, punishments that fed a vicious cycle of white domination of these institutions of criminal justice.

Brutal bodily punishment of black offenders--a regime born in slavery-- also survived Emancipation and Reconstruction, albeit in mutated form. Under slavery, "[l]ong after maiming, branding, ear cropping, whipping, castration, and other sorts of physically injurious punishments had waned as an approved method of chastising whites, they remained available for the correction of slaves" (p. 77). Whipping was the punishment of choice, and Kennedy identifies both its ideological and its economic underpinnings. Ideologically, whites viewed blacks as "primitive, wild, inferior beings . . . fundamentally different from whites, and thus in need of more coercive social control" (p. 77). Economically, masters needed to spur slaves to work hard and obey the (masters') rules, but masters also needed to preserve slaves' productive capacities (p. 78). Punishment had to hurt and deter, but a slave's ordinary lot was so poor that the penal options were limited. Criminal fines don't work if a person has no money, and deprivation *1259 of liberty via imprisonment is not much of a deprivation if a person has little bodily liberty to begin with. Capital punishment might deter, but it would also have killed the proverbial golden-egg-laying goose--and unlike geese, slaves understood all this, which reduced the credibility of the death threat for a broad range of minor misconduct and shirking. Ironically, for some black offenders, the regime that took shape in the South after the Civil War was even worse. A system of prison chain gangs and leased labor "often bore a striking similarity to the most lurid abolitionist stereotypes of slavery" (p. 92), [FN7] and "[i]n 1877-1880, of 285 convicts sent to build a railroad in South Carolina, 128, or 44.9 percent, died" (p. 92). Kennedy grimly quotes the South Carolina warden responsible for these convict laborers: "casualties would have been less if the convicts were property having a value to preserve" (p. 92). [FN8]

Where does all this history leave us today? On one view, things have not fundamentally changed. On two occasions, Kennedy presents the following sobering statistic: "In 1990, for every 100,000 whites, about 289 were in jail or in prison. For every 100,000 blacks, about 1,860 were in jail or prison" (pp. 23, 134). The decision to use the criminal justice system to pursue a highly punitive war on drugs--a decision that Kennedy suggests may well be a "mistaken" approach in comparison with noncriminal models of drug regulation (p. 386)--has had a particularly devastating effect on black incarceration rates in recent years (p. 351). And so have specific choices made within the broader war. Under the federal Anti-Drug Abuse Act of 1986, [FN9] a person possessing a mere fifty grams (less than two ounces) of crack cocaine with an intent to distribute must be sentenced to at least ten years in prison. [FN10] In contrast, a person possessing powder cocaine with intent to distribute must have at least 5000 grams--100 times more, by weight--before being hit with the same draconian mandatory minimum sentence. [FN11] Culturally, it appears that crack is the drug of choice for many blacks, while powder is preferred by many whites: "In 1992, 92.6 percent of the defendants convicted for crack cocaine offenses nationally were black and only 4.7 percent white. In comparison, 45.2 percent of defendants sentenced for powder cocaine offenses were white, and only 20.7 percent black" (pp. 364-65). And when we look

beyond crime definition and prison incarceration to the ultimate bodily punishment--death--Kennedy points to considerable evidence that the modern system of capital punishment is not ***1260** color-blind in its effects: all other things being equal, those who kill white victims are far more likely to be sent to death than those who kill blacks (pp. 328-33 & n.51).

But this is only half of the picture, Kennedy argues. In antebellum America, even free blacks were typically ineligible to vote, to hold legislative office, to serve on a jury, and to sit on the bench. The Fifteenth Amendment (formally) changed all of that, and over the last thirty years, America has begun to make good on the true promise of that Amendment. As a result of Congress's transformative Voting Rights Act of 1965 [\[FN12\]](#) (made possible in part by earlier decades of Southern black migration to Northern states where black citizens wielded more political clout), blacks now vote and hold elective office everywhere in America. At the federal level, the Jury Selection and Service Act of 1968 [\[FN13\]](#) ensures that blacks are part of federal jury pools; at the state level, Supreme Court doctrine has helped spur states to abandon the "key-man" system, in which local jury commissioners had vast discretion to tap the "best" citizens for jury service and to keep blacks off venires. [\[FN14\]](#) As a result of Supreme Court decisions rendered in the last dozen years, neither a prosecutor nor a defendant is legally entitled to use peremptory challenges to exclude black jurors because of their race. [\[FN15\]](#) African-American judges now sit on most courts in the country. Urban police departments, long viewed in minority communities as "colonial" and "occupying" forces (pp. 27, 115), are beginning to change their complexion:

By the end of the 1980s, the number of African-American police chiefs had increased to 130, and they served in six of the nation's largest cities (Baltimore, New York, Detroit, Chicago, Philadelphia, and Houston). This unprecedented phenomenon in American history represented a 180-degree change from the second-class status that African-Americans had traditionally held in American law enforcement (p. 301 n.*). [\[FN16\]](#) In short, the key institutions driving the criminal justice system are no longer white-dominated in the same way that they have been for most of American history. Indeed, many black citizens today believe in getting tough on crime and (if necessary) in building more prisons to permit longer sentences; many black lawmakers have supported and even spearheaded the war on drugs and the special criminal crusade on crack; many black jurors have been participants in the system that has ***1261** led to high black incarceration rates; the most prominent black jurist in America, Justice Clarence Thomas, is hardly soft on crime, and it appears that his stance is in line with that of many, many African-Americans today.

All of these facts lead to what is perhaps Kennedy's biggest point:

[B]lacks have suffered more from being left unprotected or underprotected by law enforcement authorities than from being mistreated as suspects or defendants, although it is allegations of the latter that now typically receive the most attention.

....

. . . In deciding whether rights have been infringed, . . . courts should be careful to avoid conflating the interests of a subdivision of blacks-- black suspects, defendants, or convicts--with the interests of blacks as a whole.

Like many social disasters, crime afflicts African-Americans with a special vengeance; at most income levels, they are more likely to be raped, robbed, assaulted, and murdered than their white counterparts. . . . More striking is that whereas white victimization rates declined as income increased,

black victimization rates rose at the higher income levels. . . . Thus, at the center of all discussions about racial justice and criminal law should be a recognition that black Americans are in dire need of protection against criminality. A sensible strategy of protection should include efforts to ameliorate the social ills that contribute to criminality, including poverty, child abuse, and the deterioration of civic agencies of social support. A sensible strategy of protection should also include, however, efforts aimed toward apprehending, incapacitating, deterring, and punishing criminals.

. . . .

. . . [T]he principal injury suffered by African-Americans in relation to criminal matters is not overenforcement but underenforcement of the laws (pp. x, 11-12 & n.*, 19).

Once again, Kennedy traces the origins of the problem (in this case, underprotection rather than overenforcement) to slave days:

The racial policy of withholding protection from blacks has its roots in slavery. . . . Part of the strategy for denigrating all blacks involved depriving them of legal protections against conduct that was deemed criminal when visited upon whites. Hence, in the slave South (the locus of the great mass of the black population in antebellum America), officials decriminalized violence inflicted upon blacks to the extent thought necessary to assert and preserve white supremacy (p. 30). A core purpose of the 1866 Equal Protection Clause was to affirm the rights of black victims of crime; the central idea was not merely to prevent the states from treating black criminal suspects, defendants, and convicts worse than white ones, but also (and perhaps even more *1262 emphatically) to guarantee that black victims of crime receive the same protection as white victims. [\[FN17\]](#) Of course, things didn't quite work out that way, and for the next hundred years, white-dominated police forces, grand juries, and petit juries often contrived to look the other way when blacks were victimized by crime--especially in the South, where racist whites terrorized blacks in a regime marked by lynchings and nooses and burning crosses (pp. 41-69).

But here too, Kennedy suggests that the current landscape is far more complicated. As already noted, central institutions of the criminal justice system--legislatures, police departments, courts, juries--now often include black voices and views. And blacks today are hardly of one mind on these issues. (Nor are whites, or other racial groups, for that matter.) Blacks are disproportionately criminal suspects, defendants, and convicts on the one hand and criminal victims on the other. Much of today's crime is intraracial-- white-on-white and black-on-black. Indeed, "four-fifths of violent crimes are committed by persons of the same race as their victims" (p. 19). And more striking still: "In terms of misery inflicted by direct criminal violence, blacks (and other people of color) suffer more from the criminal acts of their racial 'brothers' and 'sisters' than they do from the racist misconduct of white police officers" (p. 20). In support of this perspective, Kennedy invokes Gunnar Myrdal's 1944 classic, *An American Dilemma*, and the influential 1968 Kerner Report:

Law-abiding Negroes point out that [criminal Negroes] . . . are a danger to the Negro community. Leniency toward Negro defendants in cases involving crimes against other Negroes is thus actually a form of discrimination (p. 70 (omission in original)). [\[FN18\]](#)

* * *

The strength of ghetto feelings about hostile police conduct may even be exceeded by the conviction that ghetto neighborhoods are not given adequate police protection.

. . . [S]urveys have reported that Negroes in Harlem and South Central Los Angeles mention

inadequate protection more often than brutality and harassment as a reason for their resentment toward the police (p. 71 (omission in original)). [\[FN19\]](#)

Kennedy also points to more recent poll data:

[Professor Paul] Butler exudes keen sympathy for nonviolent drug offenders and similar criminals. By contrast, Butler is inattentive to the aspirations, frustrations, and fears of law-abiding people compelled by circumstances *1263 to live in close proximity to the criminals for whom he is willing to urge subversion of the legal system. Butler simply overlooks the sector of the black law-abiding population that desires more rather than less prosecution and punishment for all types of criminals. According to data collected by a 1993 Gallup Poll, 82 percent of the blacks surveyed believed that the courts in their area do not treat criminals harshly enough; 75 percent favored putting more police on the streets to combat crime; and 68 percent favored building more prisons so that longer sentences could be given. One would never know from Butler's analysis that a large number of ordinary, grass-roots blacks embrace such views (pp. 305-06 (citation omitted)).

What follows from all this? First, Kennedy suggests that we should hesitate to label a policy "racist" merely because it hurts some blacks, because such a policy may simultaneously help other blacks, who (along with nonblacks) may well have supported the law for legitimate nonracist reasons. A crackdown on crack hurts (largely black) crack users but may help their (largely black) law-abiding neighbors and may help save a (perhaps largely black) group of youngsters from falling prey to dealers of this devastating drug. Thus, Professor Kennedy rebukes Professor Butler for describing the crack-powder sentencing disparity as an example of "racism":

[O]ne would never suspect from [Butler's] account that when the federal law that [Butler] criticizes was enacted, Charles Rangel, the African-American representative from Harlem, chaired the House Select Committee on Narcotics Abuse and Control and voted in favor of this law as did about half of the members of the Congressional Black Caucus (p. 301).

Another example of the racial complexity of our current condition comes from the debate about racial justice in the administration of the death penalty. Because much murder is black-on-black, to insist that the death penalty be imposed on those who murder blacks with the same statistical likelihood as on those who murder whites could well mean that more black defendants are doomed to die at the hand of the state.

Second, Kennedy's narrative shows special sympathy for the innocent. On this point, the tradeoff between (disproportionately black) criminal defendants and victims dissolves--neither group is well served by a criminal justice machine that devours the innocent. Kennedy reminds readers that, initially, the NAACP under Thurgood Marshall represented only defendants whom the organization believed to be innocent (p. 20). Kennedy narrates with special passion the stories of the Scottsboro Boys and other black defendants convicted and punished despite their evident innocence (ch. 3). And although he spends less time on the matter, he hints at the need for strong measures to protect the rights of innocent citizens victimized by police racism, as exemplified by the infamous chokehold policy of the Los Angeles Police Department between 1975 and 1982 (pp. 113-25).

***1264 II. Two Quibbles**

I suppose no review--even a rave--would be complete without a quibble or two, so here goes. First, I wish that Professor Kennedy had joined Justice Thurgood Marshall (and many others) in calling upon the judiciary to eliminate the inherently invidious institution of the peremptory challenge. Kennedy strides forcefully toward this conclusion and then, at the very last moment, pulls up short. He powerfully narrates the history of racial exclusion and discrimination in the American jury system. In antebellum America, most states formally barred blacks from the ballot box and the jury box. After Reconstruction, blacks won formal political rights, and thus informal mechanisms of exclusion took over. Many states vested local officials with vast discretion to put together lists of suitable jurors from those citizens whom they deemed sufficiently "upright," "intelligent," and of "good character." Under this key-man system, few blacks were chosen. However, in recent years, the key-man system has withered away--abolished at the federal level by congressional statute in 1968 and largely abandoned by the states (with a little help from Supreme Court doctrine stressing that juries should be drawn from a fair cross-section of the community [\[FN20\]](#)). With jury lists now drawn randomly from voting rolls, motor vehicle registration lists, and the like, the main locus of exclusion has shifted to the courtroom itself. And here, as late as 1986 and with the explicit blessing of the Supreme Court, both prosecutors and defendants were allowed to veto, to blackball, an otherwise eligible and proper juror simply because of the juror's skin color. [\[FN21\]](#) Kennedy rightly skewers the hypocritical reasoning offered in support of admittedly race-based peremptory challenges:

The Reagan administration attacked race-based affirmative action on color-blind grounds but supported permitting race-based peremptory challenges as a tool of litigation. . . . [Justice] Rehnquist argued that [race-based peremptories] did not invidiously discriminate against blacks because, after all, any person from any group was subject to racially discriminatory strikes--whites, yellows, reds, and browns as well as blacks. Rehnquist's argument is hauntingly reminiscent of segregationist logic which reasoned that governmental bans on interracial fornication, marriage, or transportation did not invidiously discriminate against blacks because whites, too, were burdened by the same laws (pp. 6-7, 207-08). [\[FN22\]](#) Kennedy thus applauds the 1986 *Batson v. Kentucky* [\[FN23\]](#) and the 1992 *Georgia v. McCollum* [\[FN24\]](#) decisions, which forbid the prosecution and the defense, respectively, from keeping a citizen off of a jury simply because of her pigmentation (pp. 227-28). [\[FN25\]](#)

Having gone this far, Kennedy confronts the obvious next question: won't many clever lawyers who want to win continue to use race as a factor (perhaps the overwhelming factor) in their exercise of peremptories but claim that their decisions are utterly color-blind? Kennedy seems to admit that this will happen frequently but that it will be very hard to prove in any given case. Thus, Kennedy casts his lot with commentators who favor the total abolition of the peremptory challenge system--a system that, by its nature, invites arbitrariness, stereotypes, and prejudice (p. 229). But then, at the end of the road, Kennedy suddenly stops short and announces that judges "should not . . . take it upon themselves to abolish the peremptory challenge" (p. 230). Why not? Formally and facially, the peremptory challenge system per se is color-blind--but so was the key-man system. Kennedy himself argues forcefully that judges should have abolished the key-man system, and every one of his points seems to apply equally to the peremptory challenge system:

I conclude that, as a prophylactic measure, the Supreme Court should have invalidated the key-man system. First, the key-man system has a baleful history in many locales. It has often been used as a

device to exclude people illicitly from the jury box. Second, the subjectivity of the criteria used by the arbiters of the key-man system invites abuse. Third, the legitimate aims of a key-man system can be obtained by procedures less vulnerable to invidious manipulation. For example, if a state wants knowledgeable jurors it can impose an objective test to screen for the knowledge desired. At a certain point, a procedure becomes so subject to corruption and so expensive to monitor that it should be adjudged incompatible with federal constitutional requirements (p. 184).

Elsewhere, I have tried to make the constitutional case against peremptories on grounds ranging far beyond the racial issues at the heart of Kennedy's book, [\[FN26\]](#) but here I am content to quibble with Kennedy *1266 on his own terms. He suggests that peremptories can serve a useful purpose in excluding truly oddball jurors--"three-dollar bills," in his words (p. 230)-- who might otherwise escape detection. But the same could be said about the key-man system, and in principle, the for-cause challenge is a much more carefully tailored and less invidious and arbitrary device to deal with the problem. To illustrate, I turn a few more of Kennedy's sentences (with my brackets) against Kennedy: "After all, jury selection in the context of the adversary process is part of a competition. The opposing attorneys do not simply want impartial [nonoddball] jurors. They each want jurors who will give their side an edge [and thus want to blackball other jurors, oddball or not]" (p. 219). Kennedy also suggests that, after Batson, peremptories are not utterly "unconstrained" (p. 230), but surely this cannot be Kennedy's test. The key-man system was never utterly "unconstrained" either--it was subject to Court rules forbidding explicit racial discrimination. Yet Kennedy himself rejects the idea that this formal (and hard-to-enforce) constraint was constitutionally sufficient to save an inherently vicious and invidious key-man system. Once again, why is the peremptory challenge system any different?

At a couple of points, Kennedy uses language that suggests that he may be especially sympathetic to peremptories in the hands of criminal defendants rather than prosecutors (pp. 207, 228), [\[FN27\]](#) but if so, this sympathy seems at war with his own insights elsewhere in the book. Giving defendants peremptories (many of which will predictably be used in race-based or other invidious but hard-to-detect ways) will no doubt help some innocent defendants, but so would a rule that mandated acquittals for defendants chosen in weekly lotteries. What we need is an argument that peremptories are especially helpful to innocent as opposed to guilty defendants, but Kennedy offers no such argument. In the absence of this argument, peremptories in the hands of defendants, but not prosecutors, might indeed help (disproportionately black) defendants--as would my hypothetical lottery. But what about the (disproportionately black) victims of crime that Kennedy so insistently urges us to remember? [\[FN28\]](#)

*1267 A second quibble. Professor Kennedy endorses the result of the 1986 case *Vasquez v. Hillery*. [\[FN29\]](#) I wonder. In 1962, a California grand jury indicted Booker T. Hillery for what the Supreme Court itself described as the "brutal murder" of a fifteen-year-old girl. [\[FN30\]](#) At the time, grand juries in this California county were handpicked by the sole Superior Court judge--a kind of key-man system--and these grand juries invariably contained no blacks. Hillery was convicted in a jury trial. [\[FN31\]](#) More than twenty years later, his case reached the Supreme Court on a writ of habeas corpus. [\[FN32\]](#) Hillery made no argument that the trial itself was in any way racially improper or otherwise unfair or unreliable. [\[FN33\]](#) Instead, he argued that, because the grand jury was racially stacked in an unconstitutional manner, it necessarily followed that his conviction must be set aside. [\[FN34\]](#) The Supreme Court agreed in an opinion authored by Justice Marshall. [\[FN35\]](#)

Assume for a moment, as does Kennedy, that the California key-man system of grand jury selection in place in 1962 was unconstitutional. Must the result be a rule of automatic reversal? Kennedy says yes but admits that he is troubled by the idea of "offering to guilty defendants the windfall of a new trial" (p. 187). He explains: "This policy does impose a heavy cost; the public pays dearly when persons who have committed crimes delay, minimize, or evade punishment for reasons having nothing to do with their culpability" (p. 188). We might ask why a new trial would be such a "windfall" for "guilty defendants" like Hillery, considering that they can be adjudged guilty again upon retrial, but elsewhere Kennedy explains why retrials held many years later often fail to convict the guilty "because of the accidents that afflict litigation: the dimming of memories, the death of witnesses, the disappearance of physical evidence, and so on" (p. 276).

Why, then, does Kennedy support the Vasquez rule of automatic reversal and retrial? He supports it because such a rule will "deter future constitutional violations, the same goal that primarily animates the famous exclusionary rule" (p. 187). On other occasions, I have set out my own critique of the exclusionary rule and the particular brand of (in my view, often shoddy) deterrence logic associated with that rule. [\[FN36\]](#) But here, let me try to bracket as much of that as possible and *1268 quibble with Kennedy on his own terms, as measured by his own observations. A scholar with such deep and heartfelt empathy for victims of crime, who is skeptical of "windfalls" for "guilty defendants" who walk free, grinning, "for reasons having nothing to do with their culpability," should think long and hard before embracing the "famous" exclusionary rule and seeking to extend its logic to other domains. Other remedial approaches exist that lack some of the vicious features of exclusion, [\[FN37\]](#) but Kennedy does not pay them sufficient heed. Thus, he ends up endorsing an approach that fails to do justice to some of his own deepest commitments and most penetrating insights.

Kennedy's "deterrence" one-liner has many other problems as applied to Vasquez. By the time the case reached the Supreme Court, the key-man system was ancient history in California--what exactly would springing Hillery deter? Deterrence logic is future-oriented rather than backward-looking; thus, it seems rather inapt on the facts of Vasquez. Contrary to Kennedy's framing of the issue, perhaps Hillery's best argument sounded in backward-looking corrective justice: he was entitled to an indictment process free from racial discrimination and was denied this process. I return to this point momentarily, but it is also worth noting that the unconstitutionality at issue in Vasquez occurred at the hands of a judge, acting in good faith. If we take seriously legal doctrine under the exclusionary rule that Kennedy himself invokes, the logic of deterrence should only be deployed against police officers and the like, not against judges themselves. This is the explicit teaching of *United States v. Leon* [\[FN38\]](#): when judges err, they should simply be told of their error by appellate courts, and the law presumes that they will then go forth and sin no more. [\[FN39\]](#)

This doctrinal difference between wrongs committed outside the judicial system (say, by cops) and wrongs committed inside the system (say, by judges) leads to another difference with important remedial consequences. When a wrong has occurred outside the courtroom, judges acting after the fact ordinarily cannot turn back the clock of *1269 time and "rerun" the world (say, by decreeing that cops "unsearch" a wrongly searched house). But when a wrong has occurred within the courtroom, judges can often "rerun" the judicial proceeding, this time without the judicial mistake.

Now look one last time at Hillery's claim. His trial was (by hypothesis) fair and proper, but his indictment was improper. Why wouldn't an apt remedy-- doing corrective justice to Hillery, "undoing" the wrong, and emphatically affirming the constitutional unacceptability of race discrimination--be to allow California to uphold Hillery's conviction as long as the state simply reindicted Hillery (in 1986!) by a fairly selected grand jury? In this new grand jury proceeding, missing witnesses, stale evidence, and the like would probably not be major problems, because the proceeding would not need to establish guilt beyond reasonable doubt, but only probable cause; and the proceeding would not need to be constrained by hearsay rules and other technical rules of evidence. [\[FN40\]](#) The new grand jury could probably reach a fair verdict merely by reading the transcript of Hillery's (fair) trial. Professor Kennedy never considers the possibility of reindictment without retrial as an apt remedy in Vasquez, but such a remedy seems to fit well with many of the other things that he says in his book. [\[FN41\]](#)

Of course all this is, as advertised, mere quibbling. Thus, I would like to end as I began, with sincere words of praise and admiration. Professor Kennedy has written a great and wise book.

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[\[FN1\]](#). For another reason why the current landscape is not black-and-white, see [Viet D. Dinh, Races, Crime, and the Law, 111 Harv. L. Rev. 1289 \(1998\)](#), also reviewing Kennedy's book.

[\[FN2\]](#). [United States v. Martinez-Fuerte, 428 U.S. 543, 564 n.17 \(1976\)](#). Professor Kennedy discusses this case and the Court's language (pp. 142-43).

[\[FN3\]](#). Professor Kennedy seems to distance himself from such views. For instance, he says: "I do not believe, as does Justice Thomas, that all racial lines are equally dangerous" (p. 245). For Kennedy's earlier-expressed views on this subject, see [Randall Kennedy, Persuasion and Distrust: A Comment on the Affirmative Action Debate, 99 Harv. L. Rev. 1327, 1328-37 \(1986\)](#), which offers a qualified defense of affirmative action.

[\[FN4\]](#). Elsewhere in the book, Kennedy sounds similar themes. For instance, he states: "Furthermore, there is the deeper question of whether the 'looking like America' metaphor is an appropriate guiding aspiration. I do not think that it is" (p. 252). In addition, in the last chapter's last sentence, he affirms "the uncompromisable ideal of treating all persons equally regardless of race, an aspiration best sought by responding to persons strictly on the basis of conduct not color" (p. 390).

[\[FN5\]](#). [U.S. Const. amend. XIII, §1](#). Compare Kennedy's comment: "After the abolition of slavery, incarceration became a 'legal' way to subject blacks to servitude" (p. 130).

[FN6]. See [U.S. Const. amend. XIV, §2](#) ("[W]hen the right to vote at any election ... is denied ... or in any way abridged, except for participation in rebellion, or other crime, the basis of representation ... shall be reduced").

[FN7]. Kennedy is quoting William Cohen, *Negro Involuntary Servitude in the South, 1865-1940: A Preliminary Analysis*, 42 *J.S. Hist.* 31, 56 (1976).

[FN8]. Kennedy draws this quote from Cohen, cited above in note 7, at 56.

[FN9]. Pub. L. No. 99-570, 100 Stat. 3207 (codified as amended in scattered sections of [18 U.S.C., 21 U.S.C., and 31 U.S.C.](#)).

[FN10]. See [21 U.S.C. §841\(b\)\(1\)\(A\)\(iii\) \(West Supp. 1997\)](#).

[FN11]. See *id.* [§841\(b\)\(1\)\(A\)\(ii\)](#).

[FN12]. [42 U.S.C. §§1973-1973bb \(1994\)](#).

[FN13]. [28 U.S.C. §§1861-1869, 1871 \(1994\)](#).

[FN14]. See, e.g., [Castaneda v. Partida, 430 U.S. 482, 501 \(1977\)](#) (holding that racially underrepresentative grand juries generated by a key-man system violate equal protection); [Carter v. Jury Comm'n, 396 U.S. 320, 339-40 \(1970\)](#) (affirming an injunction that required jury clerks to stop excluding African-Americans from jury rolls).

[FN15]. See [Batson v. Kentucky, 476 U.S. 79, 96-98 \(1986\)](#); [Georgia v. McCollum, 505 U.S. 42, 57-59 \(1992\)](#).

[FN16]. Kennedy is quoting W. Marvin Dulaney, *Black Police in America* 102 (1996).

[FN17]. See generally Jacobus tenBroek, *Equal Under Law passim* (1965) (documenting this historical purpose).

[FN18]. Kennedy is quoting 1 Gunnar Myrdal, *An American Dilemma: The Negro Problem and Modern Democracy* 551 (1944).

[FN19]. Kennedy is quoting the 1988 version of *The Kerner Report: The 1968 Report of the National Advisory Commission on Civil Disorders* 307 (1988).

[FN20]. See, e.g., [Castaneda v. Partida](#), 430 U.S. 482, 495-96 (1977); [Taylor v. Louisiana](#), 419 U.S. 522, 526-33 (1975).

[FN21]. See [Swain v. Alabama](#), 380 U.S. 202, 221 (1965).

[FN22]. For a similar critique of Justice Rehnquist's argument, see [Akhil Reed Amar & Jonathan L. Marcus, Double Jeopardy Law After Rodney King](#), 95 *Colum. L. Rev.* 1, 50 n.246 (1995).

[FN23]. [476 U.S. 79 \(1986\)](#).

[FN24]. [505 U.S. 42 \(1992\)](#).

[FN25]. See [Batson](#), 476 U.S. at 89; [McCullum](#), 505 U.S. at 59.

[FN26]. See Akhil Reed Amar, *The Constitution and Criminal Procedure: First Principles* 170-71 (1997); Akhil Reed Amar & Alan Hirsch, *For The People: What the Constitution Really Says About Your Rights* 64-78 (1998). The argument in these pages sweeps beyond race and equal protection principles to encompass broader issues of democratic representation, popular sovereignty, and constitutional structure. In my view, juries should represent the people, not the parties; the jury should function as the democratic lower house of a bicameral judiciary in which judges sit as the upper house. The parties do not handpick the legislature that fashions laws, the grand jury that approves indictments, or the appellate bench that pronounces the law; neither should the parties handpick the petit jury that sits in judgment. All who vote should serve on juries, and each jury should strive to bring together diverse citizens--rich and poor, black and white, male and female, urban and rural-- into a common conversation affirming and nurturing a deliberative democracy.

[FN27]. Kennedy seems moderately sympathetic to a proposal to "strongly privilege[] the [criminal] defendant's choice of venue" (p. 251). Would he support the choice of Klansmen to be tried in all-white areas or the choice of white cops to be tried in Simi Valley? I wonder whether Kennedy's tentative

leanings on this point are fully consistent with his overall analytic argument and historical narrative.

[FN28]. To be sure, abolition of peremptories might require rethinking the rule of jury unanimity, but once again, the same could be said about abolition of the key-man system. At one point, Kennedy uses language that seems to link the issue of peremptories to unanimity (p. 228); elsewhere he chides Professor Butler for not considering how certain changes in jury practice might lead to a rethinking of unanimity (p. 302). The unanimity issue is too large to be addressed in this Review; my own views are set out in Amar, cited above in note 26, at 175-77.

[FN29]. [474 U.S. 254 \(1986\)](#).

[FN30]. [Id. at 255](#).

[FN31]. See [id. at 256](#).

[FN32]. See [id. at 256-57](#).

[FN33]. See [id. at 256](#). Perhaps such an argument could have been made, but the Justices and Professor Kennedy all proceed on the assumption that the trial itself was fair and constitutionally flawless, and I do the same.

[FN34]. See [id.](#)

[FN35]. See [id. at 264](#).

[FN36]. See [Akhil Reed Amar, Fourth Amendment First Principles, 107 Harv. L. Rev. 757, 785-800, 811-16 \(1994\)](#); Amar, *supra* note 26, at 150-60; Akhil Reed Amar, *Against Exclusion (Except To Protect Truth or Prevent Privacy Violations)*, [20 Harv. J.L. & Pub. Pol'y 457, 457-66 \(1997\)](#); Akhil Reed Amar, *The Fourth Amendment, Boston, and the Writs of Assistance*, [30 Suffolk U. L. Rev. 53, 64, 71-72 \(1996\)](#). Among my many arguments, I assert that the exclusionary rule does violence to constitutional text, history, and structure; is in no way compelled by (and in fact offends) general legal principles; has been conceptually undermined by the logic of important recent cases; deters much less well than suitably crafted alternative remedies; fails to fit the analytic scope of the constitutional violation; is "upside-down" in rewarding the guilty while doing nothing for (or making worse off) the innocent; encourages erroneous "upside-down" thinking elsewhere in constitutional criminal procedure;

breeds popular contempt for the Fourth Amendment; inclines judges to deny that the Fourth Amendment was violated in close (and not so close) cases; is insufficiently supple to address problems of over- and underdeterrence; and imposes savage demoralization costs on identifiable victims of crime when they see grinning criminals walk free. (But apart from all that, it is just fine.)

[\[FN37\]](#). See Amar, *supra* note 26, at 40-43, 150-60.

[\[FN38\]](#). [468 U.S. 897 \(1984\)](#).

[\[FN39\]](#). See *id.* at 916-17.

[\[FN40\]](#). See [Costello v. United States, 350 U.S. 359, 361-63 \(1956\)](#).

[\[FN41\]](#). Professor Kennedy does discuss an article by Professor Meltzer that analyzes the remedial and deterrence issues raised by Vasquez and other cases (p. 188). In a footnote, Professor Meltzer floats the notion of reindictment without retrial as a possible remedy, see [Daniel J. Meltzer, Deterring Constitutional Violations by Law Enforcement Officials: Plaintiffs and Defendants as Private Attorneys General, 88 Colum. L. Rev. 247, 257 n.43 \(1988\)](#); however, Meltzer does not pursue the idea, and Kennedy does not mention it.

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