

RACE AND CRIMINAL JUSTICE

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The major premise of Paul Butler's paper is that the relation of African Americans to the criminal justice system is beset with deep and intractable problems.¹ I readily agree, as would many. Professor Butler traces these problems to past and present discrimination against African Americans. He proposes two kinds of remedies: More lenient rules of criminal law and procedure that would apply only to African American defendants, and rules of mandated proportionality by race in administration of the drugs laws and of the prisons.²

Professor Butler labels his proposals affirmative action, racial preferences for blacks. For some proposals, I disagree with his designation. He argues that police practices discriminate against African Americans, as do the practices of prosecutors and juries in death penalty cases.³ These forms of present discrimination are hard to challenge in the courts because of the need to establish discriminatory intent of officials.⁴ However, the Supreme Court's rules do not preclude, indeed they sometimes invite, legislative remedies.⁵ To the extent that Professor Butler's measures are aimed at countering these forms of discrimination against black defendants, they are legislative remedies for present discrimination and thus not race preferences.

However, Professor Butler's proposals go well beyond remedies for specific kinds of present discrimination, and most of them are indeed properly called affirmative action. While these proposals are novel, they share an important feature with traditional kinds of affirmative action. That feature is the need for political power to undertake the proposals. These are not judicial remedies. Moreover, the smallest governmental unit involved is a state, that is, these measures would require the

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1. See Paul Butler, *Affirmative Action and the Criminal Law*, 68 U. COLO. L. REV. 841 (1997).

2. See *id.* at 877. Of course, proportionality can be achieved by arresting and jailing more whites. In the case of the drugs laws, that response does not seem far-fetched.

3. See *id.* at 864.

4. See, e.g., *McClesky v. Kemp*, 481 U.S. 279, 292 (1987).

5. See, e.g., *id.* at 319.

assent of at least a statewide political majority.

As he concedes, the political will does not exist to enact his recommendations.⁶ But if the political power were there, I would use it differently to attack the same problems. I would fundamentally overhaul the drugs laws along the lines of the systems in use in Western Europe, not legalizing drugs, but forgoing the search and destroy mentality. More emphasis should be placed on rehabilitation.⁷ Done right, the result would be much less incarceration for drugs offenses, which would especially affect African Americans for the reasons Professor Butler states.⁸

As an aside, during the last presidential campaign, Senator Dole accused President Clinton of deemphasizing the war on drugs.⁹ I recall hoping that Dole was right about that.

Next, I would deploy political power to change the relations of communities of color with the police in numerous and basic ways.¹⁰ Again the effect would be strongly, though not exclusively, felt in the African American community.

Finally, I would apply political power to abolish the death penalty. Of course, in my hypothetical world, there would be popular support to do that by legislative action. I believe this reform would have no effect on the crime rate, and the overall numbers involved would be small, but the effect on attitudes among African Americans would nevertheless be very great. Amid all the hoopla of polling to measure attitudes about the Simpson case, the polls quietly go on telling us that African Americans are much less favorable to the death penalty than are other Americans, in large measure because of the perception that its administration is racially biased.¹¹

6. See Butler, *supra* note 1, at 879.

7. See Robert MacCoun et al., *Comparing Drug Policies in North America and Western Europe*, in *POLICIES AND STRATEGIES TO COMBAT DRUGS IN EUROPE* 197 (Georges Estievenart ed., 1995).

8. See Butler, *supra* note 1, at 887.

9. See Eric Pianin, *Dole Slams Clinton, the "Liberal Media"; "Wake Up, America," He Implores Voters*, WASH. POST, Oct. 25, 1996, at A1.

10. The crucial task is to achieve trust and cooperation between the police and law-abiding African Americans, who very much want safer communities, but on just terms.

11. See Linnet Myers, *Death Penalty Issue Splits Black Community*, CHI. TRIB., Feb. 13, 1995, at N3. As this article recites, recent polls show increasing support for the death penalty among black Americans as crime rates have risen, but it is still much lower than among other groups. See also Arthur Hirsch, *Armstrong Williams, Proud Republican, Broadcasts His Message, Black and Right*, THE SUN (BALTIMORE), Feb. 19, 1995, § TDY, at 1J.

These proposals, and some others that could be added, are pie-in-the-sky in the sense that the political will to adopt them is not out there, nor is it likely to be in my lifetime. And I do advocate that the judiciary undertake them. But they seem no more unlikely than Professor Butler's proposals. And they are really not so very different from his. The difference may be in style. Mine are old-fashioned and familiar, thus not very interesting. His are novel and intended to shock.

There is a familiar lesson in this discussion. Usually shocking proposals are much better at drawing attention to intractable problems. Of course, my remedies would readily be sustained by the courts, and his would not, but when we are discussing utopian ideas, that concern is of little moment.

Some African American leaders, notably Jesse Jackson, have proposed reparations as a basic remedy for past discrimination against blacks.¹² Although very different and not inconsistent with Professor Butler's proposals, this is an alternative remedy in the sense that a lot of political power would again be needed to enact it, so giving it top priority would suppress other remedies.

Comparing reparations with Professor Butler's proposals highlights an aspect of affirmative action that gets insufficient attention. I refer to the importance of who bears the cost of an affirmative action measure, of whose ox is gored. A number of Supreme Court cases deal with this issue, but the Court is badly fractured, and the issue has limited focus.¹³

Suppose Congress enacted a plan for payment of reparations to all descendants of persons who were lawfully enslaved in this country. The plan would include most African Americans, and it would be a racially exclusive class, or nearly so.¹⁴ Then suppose an equal protection challenge were filed against the plan. On the merits, would the plan pass the Supreme Court's test for remedial

12. See Jenifer Warren, *Demanding Repayment for Slavery*, L.A. TIMES, July 6, 1994, at A1.

13. Compare, e.g., *Wygant v. Jackson Bd. of Educ.*, 476 U.S. 267, 287 (1986) (O'Connor, J., concurring) (finding racial preferences in layoffs invalid and that the school board must use "means that do not impose disproportionate harm on the interests, or unnecessarily trammel the rights, of innocent individuals directly and adversely affected by a plan's race preference"), *with id.* at 306-11 (Marshall, J., dissenting) (layoffs carried out legitimate remedial purpose), *and id.* at 313-19 (Stevens, J., dissenting) (layoffs carried out legitimate purpose of achieving multi-ethnic faculty).

14. Some Native Americans were enslaved. See RONALD TAKAKI, *A DIFFERENT MIRROR: A HISTORY OF MULTICULTURAL AMERICA* 58 (1993).

justice?¹⁵ There is a good case to say no. The beneficiaries were not themselves enslaved. The United States government was not directly the wrongdoer, except in the District of Columbia, and its present-day taxpayers did not participate in slavery. But would any challenger have standing to attack the plan? I think not.¹⁶

The other side of this coin is the absence of a sustainable case to attack many instances of de facto discrimination against persons of color.¹⁷ This rule is one of the reasons why problems between communities of color and the police are so resistant to cure.¹⁸ In other words, much race-conscious action cannot be successfully challenged in the courts.

By these criteria, Professor Butler's proposals would be highly vulnerable. Making the death penalty and imprisonment depend on the race of the accused would produce plenty of challengers with standing, and his use of race is explicit. Reparations would probably be constitutional.¹⁹ And the possibility of their enactment is not any more remote than for Professor Butler's measures. But, like my proposals, reparations are humdrum and uninteresting.

Professor Butler's proposals raise another issue, again mainly political. His discourse is almost entirely about white and black Americans. Other communities of color are not part of the picture. This omission raises a number of hard questions. He says that in interracial cases when an African American is accused, there must be a black majority on the jury and there can be no death penalty.²⁰ If the victim were black, these rules would not apply. How would his proposals apply when the victim or the accused is neither white nor black?²¹

Of course, these and other issues that can be raised about the relation of these proposals to other races may be unimportant for

15. *Adarand Constructors v. Pena*, 115 S. Ct. 2097, 2116-17 (1995); *City of Richmond v. J.A. Croson Co.*, 488 U.S. 464, 493-94 (1989).

16. *See, e.g., United States v. Richardson*, 418 U.S. 166 (1974) (holding that a federal taxpayer lacked standing to challenge the validity of statutes governing the C.I.A.).

17. *See supra* note 4 and accompanying text.

18. *See Developments in the Law—Race and the Criminal Justice Process*, 101 HARV. L. REV. 1472, 1494-1520 (1988). *See generally* SAMUEL WALKER ET AL., *THE COLOR OF JUSTICE: RACE, ETHNICITY AND CRIME IN AMERICA* 85-121 (1996).

19. *See supra* note 16 and accompanying text.

20. *See* Butler, *supra* note 1, at 877.

21. *See also* Margaret E. Montoya, *Of "Subtle Prejudices," White Supremacy, and Affirmative Action: A Reply to Paul Butler*, 68 U. COLO. L. REV. 891 (1997).

the reasons already cited. The proposals have no realistic chance of enactment, so their force is rhetorical. Practical questions can be set aside.

The O.J. Simpson trial should also inform our response to these proposals. Over the last half century, the Supreme Court has adopted constitutional rules that have fundamentally altered the nature of criminal trials, arrests, and interrogations in this country.²² All have been done ostensibly to promote fairness to accused persons.²³ Many of the rulings have indeed done that, but others have been made so complex and technical that their relation to fairness is dubious.²⁴ Timothy McVeigh's counsel recently moved to exclude eye-witness testimony from his trial.²⁵ This proposal would be astonishing in any trial system outside this country.²⁶

One result of these changes is that defendants with enough money—including defendants of color—have a much better chance of acquittal than other folks.²⁷ We even have the remarkable example of the Menendez brothers, who staved off conviction when they had millions to spend, then were convicted after the money ran out.²⁸ Because of wealth differences among races, this regime has disproportionate effects according to race. One test we should impose on any proposal to aid defendants in criminal cases is to ask if it would simply provide another way to acquit the better off—in this case among African Americans—but do nothing for the typical defendant. Helping country club defendants cannot be a path to racial justice.

22. See CRAIG M. BRADLEY, *THE FAILURE OF THE CRIMINAL PROCEDURE REVOLUTION* 18-34 (1993).

23. See *id.*

24. See *id.* at 37-87.

25. See Jo Thomas, *Truck Was Rented by Oklahoma Bomb Suspect, Witnesses Say*, N.Y. TIMES, Feb. 19, 1997, at A11. Of course, the motion may have been merely a ploy for discovery purposes. But under prevailing rules, the trial judge thought enough of it to hold an extensive hearing.

26. Some other countries use an exclusionary rule to deter police misconduct, but none known to me would go so far as to exclude testimony of a lay witness. See, e.g., BRADLEY, *supra* note 22, at 129-32; Mirjan Damaška, *Evidentiary Barriers to Conviction and Two Models of Criminal Procedure: A Comparative Study*, 121 U. PA. L. REV. 506, 521 (1973).

27. See JEFFREY REIMAN, *THE RICH GET RICHER AND THE POOR GET PRISON: IDEOLOGY, CLASS, AND CRIMINAL JUSTICE passim* (4th ed. 1995).

28. See Alan Abrahamson, *Cast Readies for Retrial of Menendez Brothers*, L.A. TIMES, Mar. 1, 1994, at B3; Ann W. O'Neill, *Menendezes Given Consecutive Terms*, L.A. TIMES, July 3, 1996, at B1.

My final comment is a general plea on the subject of affirmative action. Much of the debate is being carried on at the level of grand abstraction. Opponents assert a principle of a color-blind Constitution, despite the obvious consciousness of race that permeates society. Proponents argue that the history of slavery and discrimination justifies anything. The real problems require attention to particulars that are badly obscured by appeals to such moral absolutes.²⁹

29. For an example of needed, particularized analysis, see Professor Butler's discussion of *Wittmer v. Peters*, 87 F.3d 916, 918-19 (7th Cir. 1996) (Posner, C.J.), which sustained racial preference in hiring a lieutenant for "boot camp" because of the need for African Americans in authority at the camp. See Butler, *supra* note 1, at 871-72.