

BRING THE NOISE

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When Professor Podgor first invited me to address this gathering of fellow laborers in the ripe vineyards of criminal law and criminal procedure scholarship, I gladly accepted. My mind raced through a myriad of pressing potential topics for discussion. I initially viewed this as a chance to refine and extend a critique of the canard of so-called rational discrimination.¹ Or perhaps, it would present a golden opportunity to find fresh applications for the insights of research in social cognition on the nature and scope of unconscious bias.² Maybe it would serve as an ideal platform for the further elaboration of the self-serving contradictions in current scholarly approaches to the issue of “just deserts.”³ Pragmatism lay at the source of my enthusiasm for this speaking engagement—I thought that what I might say might make a difference. At a conference such as this, I would be addressing scholars who influence the thinking of today’s judges and advocates, as well as teachers who shape the minds of tomorrow’s bench and bar. If only I could make the right noises, marshal the most cogent proofs and arguments, perhaps the criminal justice experts and mavens at this forum could be moved to more clearly appreciate the core injustices of our current system.

Then a funny thing happened on the way to this forum. Before describing this defining moment, however, allow me to interject a confession. Until just before this conference, I was an inveterate optimist, especially about the criminal justice system. Despite having firsthand experience of virulent racism in the administration of justice, I remained steadfast in my hopefulness. Refusing to suffer lightly those I considered pessimists and fatalists, I exhorted them to light a candle rather than curse the gloom. I countered contentions that prejudice is inevitable and ubiquitous with polls and studies indicating that prejudice has been declining steadily over the past forty years. “Between 1956 and 1978, reports on attitudes of White Americans toward

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¹ See JODY DAVID ARMOUR, *NEGROPHOBIA AND REASONABLE RACISM: THE HIDDEN COSTS OF BEING BLACK IN AMERICA* 35–60 (1997).

² See *id.* at 115–53.

³ See *id.* at 81–114.

Black Americans show a steady increase in the percentage of Whites who favor equality for Blacks in all areas of American society."⁴ Moreover, "[a] review of studies and surveys conducted between 1984 and 1990 on young White adults . . . showed that there was no significant decline in liberal racial attitudes among men and women who became adults between 1960 and 1990."⁵ Drawing on these encouraging findings, as well as recent discoveries in social cognition research, I argued that advocates of racial justice could make progress by appealing to the racially liberal personal beliefs of white Americans.⁶

Then, just before this conference, I spoke at a prison near San Pedro, California, fittingly called Terminal Island. As part of my speaking engagement, I was given a tour of the prison grounds and cell blocks. What I saw froze me in my tracks: cell blocks and walled yards chock full of disproportionately young black men. Sure, we all know the statistics by now: half of prison inmates are black;⁷ nationally, nearly one-third of young black men are either in prison, on probation or on parole⁸ and more young black men are in prison than in college.⁹ But nothing viscerally registers the reality of those abstract numbers like walking among, meeting and looking into the eyes of the men (and women)¹⁰ behind the statistics. For me it was an epiphany. Suddenly I saw in the eyes of these inmates the eyes of the kids I'd grown up with—Junebug, Popeye, Money, Roach, Dede, P-Comet. Each new face was a looking glass in which I saw my own reflection.

Upon subsequent contemplation, my Terminal Island encounter yielded the two conclusions I want to share this morning. The first concerns the profoundly political dimensions of theories and debates

⁴ *Id.* at 119 (citing Charles E. Case & Andrew M. Greeley, *Attitudes Toward Racial Equality*, 16 HUMBOLDT J. SOC. REL. 67, 68 (1990)).

⁵ *Id.* (citing Charlotte Steeh & Howard Schuman, *Young White Adults: Did Racial Attitudes Change in the 1980s?*, 98 AM. J. SOC. 340, 361 (1992)).

⁶ See ARMOUR, *supra* note 1, at 139–53.

⁷ See Fox Butterfield, *More in U.S. Are in Prisons, Report Says*, N.Y. TIMES, Aug. 10, 1995, at A14.

⁸ See MARC MAUER & TRACY HULING, *THE SENTENCING PROJECT, YOUNG BLACK AMERICANS AND THE CRIMINAL JUSTICE SYSTEM: FIVE YEARS LATER* 3 (1995).

⁹ In 1994, approximately 678,300 black males were in state and federal prisons and local jails. See *Black Males in College or Behind Bars in the United States, 1980 to 1994*, POSTSECONDARY EDUC. OPPORTUNITY (Postsecondary Educ. Opportunity, Oskaloosa, Iowa), Mar. 1996, at 9. In the same year, 549,600 black males were enrolled in post-secondary educational institutions. See *id.*; see also MARC MAUER, *THE SENTENCING PROJECT, YOUNG BLACK MEN AND THE CRIMINAL JUSTICE SYSTEM: A GROWING NATIONAL PROBLEM* 9 (1990) (showing that, in 1989, there were more young black men under criminal justice supervision than there were men of all ages enrolled in higher education).

¹⁰ Nearly half of the women in state prison are black. See Butterfield, *supra* note 7, at A14.

about blame and punishment. By “political” I mean more than the traditional conception of politics primarily as a struggle over material resources—a battle, as Harold Lasswell defined it, between pre-existing interests groups “over who gets what, when and how.”¹¹ Instead, I mean politics as a process that is critical to the formation of “us” and “them” and by which individuals bond together as collective social actors to pursue collective social action.¹² In this conception of politics, “say it loud, I’m black and I’m proud” is as much a political slogan as “no taxation without representation.” Political movements in which the former slogan figures are not driven solely by distributional concerns, but by moral and cultural ones as well; they aim at the “creation and transformation of community and the establishment of individual and collective identities.”¹³ In short, while the traditional conception of politics might be characterized as the politics of getting, the more expansive conception I am invoking might be termed the politics of becoming.¹⁴

Hence, how we view inmates, convicts and those who violate our legal norms is profoundly political. Inasmuch as we, on some level, identify with violators, perhaps inwardly intoning “there but for the grace of God go I” when looking in their eyes, as I did at Terminal Island, we are counting them as one of “us” for purposes of establishing “individual and collective identities.” On the other hand, insofar as we see them as fundamentally different from our law-abiding selves, we define them as “them” and show much less sympathy and concern for their interests when formulating rules and sanctions. This latter approach is exemplified by Professor Randall Kennedy’s call for a “politics of respectability” by which blacks should distinguish sharply between “good Negroes” (law-abiding blacks) and “bad Negroes” (blacks convicted of crimes).¹⁵ While I can understand how Professor Kennedy’s concern for the racial reputation of blacks and black crime victims inspired his thesis, his analysis fails to weigh adequately the deep sense of connectedness and sympathy that law-abiding blacks feel toward their wayward sons and daughters, brothers and sisters, fathers and mothers, friends and cousins, as well as toward blacks they don’t know personally but with whom they share a common plight in a racially oppressive society. Kennedy gives too short shrift to Glenn

¹¹ SAMUEL BOWLES & HERBERT GINTIS, *DEMOCRACY AND CAPITALISM* 10 (1986) (citing HAROLD D. LASSWELL, *THE POLITICAL WRITINGS OF HAROLD D. LASSWELL* (1951)).

¹² *See id.* at 10–11, 154.

¹³ *Id.* at 10.

¹⁴ *See id.* at 11.

¹⁵ *See* RANDALL KENNEDY, *RACE, CRIME, AND THE LAW* 17–21 (1997).

Loury's observations that "the young black men wreaking havoc in the ghetto are still 'our youngsters' in the eyes of many of the decent poor and working class black people who are often their victims"¹⁶ and that "[f]or many of these people the hard edge of judgment and retribution is tempered by sympathy for and empathy with the perpetrators."¹⁷

The other product of my Terminal Island engagement was a growing sense of pessimism about the prospects of turning around this sorry state of affairs. Professor Paul Butler has observed that "if the incarceration of black men continues to increase at the current rate, the majority of African-American men between the ages of eighteen and forty will be incarcerated by the year 2010."¹⁸ Even if this grim forecast fails to materialize, there can be little doubt that increasing numbers of Americans view prisons as dumps for human toxic waste and convicted criminals as "bad seeds." Were nearly one-third of young *white* men either in prison, on probation or on parole and more young *white* men in prison than in college, we would certainly hear the clarion call to action from nearly every pundit, politician and policy wonk in the land. Instead, the clamor is for more prisons and tougher sentences for every kind and grade of offense. The fact is that the face of crime for most Americans is black,¹⁹ and black faces seem easier for Americans to demonize²⁰ and to discard indifferently.

So where does all this leave the black legal scholar who increasingly doubts the efficacy of his academic exertions in the minds of his white readers and listeners? One possibility is to follow the tack of Professor Butler in *Racially Based Jury Nullification: Black Power in the Criminal Justice System*²¹ and speak primarily to other jurors, judges, prosecutors and police officers of color. Another is to adopt the fatalistic attitude of a Sisyphus, defiantly finding meaning in the (seemingly futile) struggle for justice, as Derek Bell has suggested. Finally, one could don the mantle of a visionary and assume the stance of the little heeded but nonetheless truth-seeking diagnostician and prognosticator. Perhaps we already have such prophets in our midst but we refuse to acknowledge them seriously. They used to say that the words of the prophets are written on the subway walls and tenement halls; now we

¹⁶ *Id.* at 19 (citing GLENN C. LOURY, *ONE BY ONE FROM THE INSIDE OUT* 301-02 (1995)).

¹⁷ *Id.* at 396 n.45 (citing LOURY, *supra* note 16, at 301-02).

¹⁸ Paul Butler, *(Color) Blind Faith: The Tragedy of RACE, CRIME, AND THE LAW*, 111 HARV. L. REV. 1270, 1280 (1998) (book review) (citing Butterfield, *supra* note 7, at A14).

¹⁹ See ARMOUR, *supra* note 1, at 20.

²⁰ See *id.* at 132-33, 137-39.

²¹ 105 YALE L.J. 677 (1995).

may find them blaring from boomboxes propped up against these same walls and halls.

I am referring, of course, to the so-called "gangsta rappers." To be sure, many of the children and young adults of the inner city, standing waist deep in the toxin of this nation's hypocritical rhetoric, have bitten off their tongues and used bullets instead to declare their rage. Some rappers, however, have turned the Queen's English on its ear and, disdaining euphemisms, circumlocutions and sundry other verbal evasions, have bluntly described their reality and warned of the consequences of continuing to deny their humanity. Albeit "bad negroes" by the lights of a politics of respectability, their warnings have proven to be prophetic. We ignore them and their message at our peril.

