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**Neither Separate Nor Equal:
How Race-Sensitive Enforcement of Criminal Laws
Threatens to Undo *Brown v. Board of Education***

Christian Halliburton¹

This year has given our country an opportunity to revisit and to reconsider the Supreme Court’s landmark decision in *Brown v. Board of Education*² and to ask questions about how the legacy of *Brown* has thus far been realized. Reflecting on *Brown*, and considering the various ways in which this single decision reshaped our society, by altering in some measure what it means to be black and white in America, it becomes clear how powerful the law can be when it is used to liberate a class of human beings from a dark chapter in their history of oppression.³ Unfortunately, judicial declarations promising freedom from discrimination and segregation do not, as it turns out, guarantee true equality for the formerly oppressed. Instead, the parasitic “separate but equal” technique of perpetuating American racial hierarchies and controlling the social mobility of blacks and other people of color finds an inviting and nourishing new host in the form of a purportedly race-neutral criminal justice system.

The American version of educational apartheid that the *Brown* Court ultimately declared to be incompatible with prevailing notions of liberty and freedom was a glaring example of parallel systems for blacks and for whites—parallel systems that perpetuated both the actual and the perceived psycho-sociological complex of black, second-class citizenship. By explicit design, segregated schooling both created and reinforced the devaluation of blacks in our social hierarchy, and created a lasting perception of black inferiority in the minds of blacks and whites, because of the unflinching approval with which such disparate treatment was received by the legal system.⁴ Under such a regime, explicit discrimination based on race was

not only the law of the land, but also represented the ordinary course of business. Black Americans were herded into substandard institutional settings without adequate consideration of what their humanity (rather than their race) deserved, and they were denied the opportunity for social advancement promised by truly equal access to a quality education. Systematic fairness was expressly denied, and it was a great day for the nation when this lingering badge of slavery was itself abolished.

Of course, these overt forms of apartheid, parallel social systems for blacks and whites, or for people of color more generally, could never withstand the light of even the most modest public scrutiny today. But I wonder, in light of *Brown*, if we have not driven the separate but equal doctrine underground—driven it deeper into the fabric of American society and deeper into the heart of our legal system as a whole.

I would suggest as an answer to this question that the separate but equal doctrine and its vampire-like ethos simply refused to die with the mighty blow struck by *Brown*. Instead, this doctrine is now lurking more subtly in the shadows of nominally colorblind legal norms that perpetuate the differential treatment of blacks and other communities of color, which constitutes a modern incursion against the very victory whose anniversary we now celebrate.

I contend that the separate but equal approach to social regulation that was ostensibly defeated in *Brown* has never lost its hold on the American legal community. The *Brown* decision could not uproot the potential for disparate, discriminatory treatment of disfavored minorities and communities of color because it failed to affect a true change of heart for those human beings who would otherwise resist the idea of racial equality. Ingeniously, our legal institutions have found myriad outlets for individual racial animus and have created a forum for the expression of collective bias that is now cloaked in the language of colorblindness. The output of these individual and collective expressions of bias, insulated as they are from personal reflection, public scrutiny, and judicial review, is a modern

iteration of the famous separate but equal doctrine. In this modern version, people of color walk through and confront the same formal legal procedures and proceedings as do their white counterparts, but they substantively receive a different brand of justice. The separate but equal doctrine lives on in the form of differential and/or disparate enforcement and application of domestic criminal laws.

On some basic level, this should not be surprising. The separate but equal approach to education achieved several ends. The obvious aim of insulating white children from exposure to “those Negroes,” the latter deemed unfit to share space (much less a classroom) with their white neighbors, was well served by an educational apartheid system. But reserving the most limited, ineffective, and inadequate educational resources for blacks also served to ensure that blacks’ mobility and advancement within the larger society was handicapped. Specifically, limiting access to quality education guaranteed that blacks would continue to occupy only the lowest rung of the American social hierarchy. But the continued racialized application of superficially colorblind legal norms achieves this same effect, and it does so without reliance on overt judgments or distinctions regarding race. While the gamut of ramifications that flows from felony arrests and convictions is beyond the scope of this work, there is no question that such convictions foreclose future educational opportunities, employment options, and civic participation (including the right to vote) for the convicted individual. These race-sensitive criminal convictions, which result in the explicit denial of the educational and economic opportunity necessary to develop a sophisticated world view, ensure that each succeeding generation of blacks and other people of color remain socially and economically marginalized and subject to management and control by a white-dominated social order.

While the present account cannot capture the entire catalogue of institutionalized racism, I offer three examples of the dynamic that I am positing within the context of criminal law. Through the American criminal

legal system, people of color fortunate enough to receive the full complement of trial proceedings often expect, and largely receive, a special brand of justice that is reserved only for their kind, a brand of justice simply not imposed on their white or white-identified counterparts. Part I, on race and capital punishment, discusses the effect that race has on skewing the rate of death sentences imposed on non-white defendants. This section also addresses the connections between slavery, lynching, and capital punishment, and suggests that there is a close relationship between individual racial biases and systematic or institutional inequalities. Part II focuses on a specific example of the institutional inequalities in the form of a race-based application of otherwise race-neutral drug laws in the city of Seattle. Part II also reveals a pattern of official decision-making that seems inextricably tied to race. Finally, Part III develops a general sketch of one of the defining characteristics shared by the separate but equal era and our current criminal justice system: a fear of, and desire to restrict, the expression of black male sexuality. This section also looks at popular conceptions of black male sexuality as a way to understand the scope of individual, racially animated behaviors. In short, these sections are designed to show that just as in the pre-*Brown* era of separate but equal education, black life and liberty are less important than white life and opportunity. A parallel system of justice has evolved that ensures that the equality of which those children dreamt at a small school in Little Rock, many years ago, remains both within sight and eternally out of reach.

I. RACE AND CAPITAL PUNISHMENT: KILLING BOTH BODY AND SPIRIT

The disproportionate application of the death penalty against blacks and other people of color convicted of capital crimes typifies the way in which criminal law has internalized the separate but equal ethos. This section evaluates the historical foundations and other causal factors that produce racial disparity in capital punishment. It also evaluates the statistical

correlation between the race of the victim or the offender and the imposition of the death penalty and some of the ways in which individual actors in this process exercise discretion that produces unbalanced results. In short, this section characterizes the modern death penalty mechanism as a legacy of the practice of lynching, as the act of imposing the death penalty relies on a misguided construction of the American legal regime as colorblind. Simply stated, the very refusal to confront racial sensitivity in the imposition of the death penalty effectively resurrects the separate but equal strategy.

By no means is the application of a separate but equal framework to the criminal justice system a new development.⁵ Instead, the drastic statistical disparity that we see in the pursuit and application of the death penalty against black defendants charged with violent crime is merely the contemporary account of long-established biases of the criminal justice system.⁶ Not only are blacks many times more likely to receive the death penalty than a similarly situated white defendant, but black defendants are vastly over represented in the general prison population (and specifically on death row) when compared to the size of the black population.⁷ As shocking as the disproportionate rate of state-sanctioned killing of black men is, there are only a few examples in which an individual with the power to change the system has actually done so.⁸

In order to appreciate the breadth of the disproportion problem, we must take a close look at current death row population studies to confront the reality that the use of the death penalty as a special punishment for people of color is not just an anomalous problem of a few rogue states, but is a replacement strategy for the official, overt forms of discrimination which were defeated in the civil rights era. Recent statistics from federal death row show that 68 percent of those awaiting death are black, while only 29 percent are white.⁹ When we compare those numbers to the pre-civil rights period from 1927 to 1963, we see that 79 percent of those executed on federal death row were white, and 8.8 percent of those executed were black.¹⁰ Currently, across the nation, about 42 percent of the approximately

3,500 death row inmates are black, while 46 percent are white, and about 10 percent are Latino.¹¹ Inexplicably, blacks represent only 12 percent of the general population,¹² yet they are three times more likely to be on death row, and they are about 4.3 times more likely than an otherwise equivalent white defendant to be sentenced to death for the same crime.¹³

Is this discrimination? The fact that approximately 50 percent of murder defendants and victims are black¹⁴ may suggest that murder is largely a crime committed against same-race victims. But, if we then look at the effect of the race of the victim, we begin to realize that a black life simply is worth less than a white life. Although about 50 percent of all homicide victims are black,¹⁵ only 13.77 percent of individuals of any race executed killed black victims,¹⁶ whereas 80.29 percent of those executed killed white victims.¹⁷ Further, even though black defendants accused of killing a white victim represent 8.1 percent of the homicides from year to year,¹⁸ black defendants convicted of killing a white victim made up 21 percent of those executed.¹⁹ In contrast, white defendants accused of killing a black victim represent 3.2 percent of the homicides from year to year,²⁰ but only 1.32 percent of those executed are white defendants who have been convicted of killing a black victim.²¹ The crime is the same, but the level of justice imposed depends on the color of one's skin.

There are myriad causes for this obvious disparity given the forces that are embedded in the many individual decisions and determinations that affect the fate of a black defendant prior to trial and sentencing. Beginning with discretionary choices made by investigating law enforcement officers and continuing through the prosecutor's charging decisions, a largely all-white criminal enforcement complex determines whether to apprehend a black suspect and whether or not to charge the suspect with a capital crime.²² Both the overrepresentation of blacks in the prison system at large, which is approaching 44 percent,²³ and the disproportionate representation of blacks authorized for federal death penalty prosecution from 1988 to

1998, which is approximately 59 percent,²⁴ bear witness to these official tendencies.

Moreover, once a defendant is actively facing prosecution, there are several potential sources of bias, including the race-based selection of jurors in capital cases.²⁵ In jury selection, there is a strong correlation between jurors who support the death penalty and their racial identity. For example, 73 percent of whites express a positive position on capital punishment, in comparison to only 46 percent of blacks.²⁶ Also, not only are prosecutors both expressly and subtly encouraged to make use of that difference,²⁷ but an overwhelming number of black federal and state death row inmates have had their convictions handed down by all-white juries.²⁸

Unfortunately, the modern imposition of the death penalty is a legacy of the nation's practice of slavery. During slavery, the American criminal code made it very clear that it reserved harsher punishments for blacks (of any legal status) than those punishments authorized for whites.²⁹ On both an individual level and in the legal sense, crimes committed against whites, especially those committed by blacks, were considered the most serious. An extra-judicial death penalty for blacks was the norm.³⁰ Of course, we know that officially-sanctioned and mob-induced lynching was the technique of the day, which was designed to both intimidate blacks and reinforce their status as non-human property.³¹ We also know that the practice of open lynching, which occurred in both the North and the South (and often included freedmen), was eventually suppressed in order to preserve the opinion of our nation.³² However, an overtly racist death penalty, characterized by swift, judicially sanctioned executions at the conclusion of sham trial proceedings, quickly stepped in to fill the void.³³ Thus, the subjugation of the black community to the will of a white majority continued, which served to legitimize the arbitrary assassination of black folks at the hands of the state.

Now, for those who find this to be objectionable evidence depicting a practice designed to execute blacks in order to keep them firmly situated in

an inferior social class, the prospects for change are less than encouraging. First, reform of this dysfunction is complicated by the apparent race-neutrality of the various death penalty enforcement regimes.³⁴ There are no codes that explicitly call for the application of the death penalty because of race, yet statistics show that race is an extremely important factor in predicting the application of capital sentences.³⁵ Moreover, it is unlikely that we will hear confessions from jurors admitting that they were swayed by a desire to see a black man pay, with his life, for the insolence of committing a crime against a white life. The current legal system simply lacks any mechanism for identifying and rooting out such improper motives; instead, it presumes that those who instinctively employ race as a cognitive sorting criterion can, and do, disregard race simply because they are told to.

Second, any hopes for a balanced, truly race-neutral application of the death penalty must be dampened by the Supreme Court's unwillingness to squarely address the problem. In death penalty disparity cases, ending with *McCleskey v. Kemp*, the Court has hobbled any meaningful chance to describe and rectify the problem of race in capital punishment cases. Both on a state and national level, the Court has refused to consider the statistical results of institutional racism as proof or proxy for the racist decision-making itself.³⁶ Apparently, the Court was not persuaded by the fact that blacks are being killed by the government faster than any other group through the government's use of procedures which have produced erroneous determinations of guilt. The message, *to everyone involved*, is that we are currently getting precisely what we deserve from the criminal justice system.

The current criminal justice system effectively reproduces the conditions and reiterates the inherent message of separate but equal education. Both then and now, the country has had two regulatory regimes operating simultaneously: one designed for white America, and the other designed for black America. As in the separate but equal era, no one needs to be

informed as to how the system operates because every person knows on which side of the line he or she stands. But it may also be that with the internalization and increasing transparency of race-based separate but equal criminal law enforcement, the stakes associated with the perpetuation of such a regime have increased substantially. Before *Brown*, it was separate restrooms, drinking fountains, and seating in the back of the bus for blacks. Now, the difference is literally between living white and dying black.

Sadly, those shuttled off to their death by the state are not the only casualties of the disparate use of capital punishment against minority offenders. The costs of this system are also imposed upon the surviving, but not yet criminally identified, black and Latino/a populous as a whole. To pay for the system, blacks and Latino/as must surrender their hopes for fairness and equality, surrender their aspirations for a prosperous future of opportunity, and accept the utter destruction of any sense of self that may presuppose a fully liberated, free individual. Perhaps more than the separate but equal educational system, the disproportionate use of capital punishment to devalue black life itself conditions communities of color to expect nothing more, and with that loss of expectation comes an acceptance of what looks like, but should not in fact be, our fate.

II. BULL'S EYE: RACE AS THE TRUE TARGET OF THE SPD NARCOTICS TASKFORCES

The popular conception that black crime and criminality are *sui generis* is a basic assumption underlying the separate but equal approach to race and criminal justice, even though evidence suggests that such notions are empirically unsound. This section takes as its starting point a statistical study, completed in November of 2003, which provides strong support for the proposition that the Seattle Police Department enforces local drug laws against residents in a manner disproportionately affecting people of color, particularly blacks.³⁷ After briefly summarizing the methodological design of the study and demonstrating its relevant data indicators, this section

seeks to explore some of the decision-making moments which lead to the documented over-policing of minority drug offenders before making a few observations about the effects this has on the community at large.

The study, which comes from and hits much closer to home here in Seattle, was designed to answer two related questions. Given the rate at which people of all ethnicities engage in criminal drug delivery, (1) are blacks overrepresented among those arrested for serious drug delivery crimes, and (2) are whites underrepresented among those arrests?³⁸ The answers to these questions are simply astounding, even to those of us who have seen this machine in motion. Simply put, race radically affects one's chances of being arrested in Seattle for a drug law violation.

The study was based on several data sources, including census information, medical indicators, local police records, and sociological observations of two "open air" drug markets in Seattle.³⁹ The first, heterogeneous as to race (38 percent persons of color) at 2nd & Pike downtown, and the second (over 90 percent white both in terms of buyers and sellers) existing on Capitol Hill and centered around Broadway and John.⁴⁰

The study is premised upon two central, scientifically verified, behavioral assumptions. First, habitual serious drug users overwhelmingly tend to engage in conduct that also constitutes a drug delivery offense, which produces a large statistical overlap between drug user communities and drug deliverer communities.⁴¹ Second, across communities and regions, people overwhelmingly engage in drug delivery transactions where the drug sources match the ethnic or racial background of the client.⁴² This racial congruity assumption basically says people "buy" from members of their own ethnic or racial communities.⁴³

Acknowledging these assumptions, the report reveals the following realities: in 2000, Seattle's black residents comprised 8.3 percent of the total population, whereas white residents comprised 67.9 percent.⁴⁴ In that same period, whites represented 70.3 percent of all drug users, whereas

blacks represented 13 percent of all drug users.⁴⁵ Based on interviews, not arrests, about 51.4 percent of people acting as sources for all drugs were white, while blacks made up only 14.5 percent of sources for drugs.⁴⁶

The problem, however, is that the Seattle Police Department data collection on the rate of drug interdiction shows that white arrestees represented 17.6 percent of suspects, while African Americans accounted for 64.2 percent of those arrested for drug delivery.⁴⁷ In all, blacks represent 7 percent of users, 14 percent of sources for drugs, and 62 percent of arrestees. Further, these rates are largely consistent no matter how the data is manipulated, across substances. The data shows that any given drug deliverer is approximately 3.6 times more likely to be white than black, and that any given drug buyer/user is approximately eleven times more likely to be white than black. In terms of going to jail, however, statistics show that a black drug seller is anywhere between 22 and 31 times more likely to be arrested than a white drug seller, depending on the substance.⁴⁸

Again, is this racism or do blacks really commit the lion's share of drug crimes in Seattle? Statistics simply do not allow the latter conclusion. Possible alternative factors such as the Seattle Police Department's aggressive focus on cocaine interdiction, or even the Department's frequent use of the buy-bust technique, do not explain away the problem.⁴⁹ Blacks are simply vastly overrepresented in the ranks of arrestees, regardless of the drug type or arrest technique involved.

Indeed, the Department's practices and policies that appear to be at the root of this disproportionate infliction of criminal sanctions for drug crimes against blacks are clearly identifiable. A primary factor is the Department's focus on racially diverse open-air drug markets, particularly those markets which have a substantial African American presence. Not surprisingly, the Seattle Police Department does not treat predominantly white markets with the same zeal. For example, the latest statistics show thirteen arrests in the U-District, eighteen arrests on Capitol Hill, and 548 arrests at 2nd and Pike.⁵⁰ Finally, even within mixed markets, the disproportionate targeting of black

suspects cannot be explained by statistical use rates or the prevalence of persons of color. Instead, these are conscious tactics that perpetuate the subjugation of people of color, by all appearances undertaken by design, which simply cannot be accounted for by race-neutral criteria.⁵¹

How do we extricate ourselves from this deepening dilemma? There is still a great deal of denial as to the cause and effect relationship between race and criminal interdiction (on all sides), and there is a real risk that documenting and quantifying the bias seemingly inherent in these enforcement patterns has the potential to open an irretrievable rift in the already tense relations between specific police departments, the criminal justice system generally, and the communities of color that they serve. Thus, the challenge for us may be to develop an aggressive, but reasonable, alternative to unjust treatment before all hope of reconciliation fades.

What we cannot do is continue to turn a blind eye to clear indications that the Black Codes of the post-civil war era are being informally resurrected in our contemporary penal system. Some may read the foregoing as a suggestion that the police should disregard drug dealing by blacks to ameliorate the disparity, but this is certainly not my contention. To the contrary, I would argue that the solution lies not in reduced enforcement, but in *neutral* enforcement. That is, a drug enforcement regime that targets people for their behavior rather than for their race is the best mechanism for avoiding the actual or apparent condition wherein particular crimes are defined and disproportionately enforced against minority communities. Such neutral enforcement is the only mechanism that both fosters the necessary faith and allegiance to the rule of law and that keeps communities of color invested in our collective social enterprise.

III. CRIMINAL LAW AS A MEANS OF REGULATING BLACK SEXUALITY

Finally, I want to end my submissions on the modern separate but equal doctrine in the application of criminal law with what appears to be a more

complex, and perhaps anecdotal, condition. The story that I want to tell was reported in the *New York Times* a few months back and comes to us from the great state of Georgia.⁵² It is the story of Marcus Dixon, a well-regarded high school senior, honor student, football star, and black man living in a predominantly white part of Georgia, who was arrested last year for having sex with a fellow student that he knew from class.⁵³ She was a young white woman, just shy of turning sixteen-years-old when the incident occurred.⁵⁴ While there is certainly conflicting evidence regarding their encounter, Mr. Dixon was acquitted of rape charges and was convicted of the lesser offenses of statutory rape and child molestation.⁵⁵ Bound by Georgia's sentencing guidelines, the judge gave Mr. Dixon a 10-year minimum sentence and sent him away to pay his debt to society.⁵⁶

What is wrong with this picture? Nothing, obviously, but that is part of the problem. This story harkens back to the slavery and post-abolition practices of using the criminal law to restrain the perceived threat of black sexuality and to preserve the sexual purity of white women. Rape laws, when situated historically, were inherently race-based laws that operated on a *de facto* classification of black men as rape offenders⁵⁷ and of white women as rape victims.⁵⁸ These laws were intimately associated with both lynching⁵⁹ and with the death penalty as a sanction for the actual or alleged black sexual aggression against white chastity.⁶⁰ To illustrate, over a forty year span, 405 of 455 men executed for rape in the United States were black.⁶¹

For their internal consistency, ordered rape laws and their attendant penalties depend upon the paradigmatic caricature of black male heterosexuality as "promiscuous [and] threatening to white women, and as . . . unmatched [in] sexual prowess."⁶² This myth of the black male is a consequence, at least in part, of the former economic nature of the black male as a promiscuous and potent "breeder" of new slaves.⁶³ However, the same fecundity attributed to the black male, which measured in part his value as a chattel, was simultaneously perceived as a threat to the monopoly

on white female sexuality.⁶⁴ This perceived monopoly was built on the perception that female white chastity was a property interest for the white male class; the perception was founded upon a set of gender norms that construct women as frail, vulnerable, and sexually helpless beings.⁶⁵

Black male sexuality was also considered to be so menacing, at least in part, because of the perceived allure that the exotic, ravenous black man held for white women, who apparently could not be trusted to resist themselves.⁶⁶ This perception of black male sexuality caused rape laws to racially evolve in a hierarchical social context. Moreover, the attendant assignment of racial and sexual identities to the binary offender and victim roles provided a formative blueprint for an inherently discriminatory yet nominally colorblind legal doctrine; the very facial neutrality of rape laws, in spite of the manner of their application, is precisely what gives them their sustenance.

What we cannot see on the face of the news reports concerning Marcus Dixon is the way in which both the race of the victim and the race of the suspect influenced the individual actors' choices. For example, we are unable to see what influence race had on the prosecutor's decision to charge an aggravated child molestation count and to reject plea offers, and on the jurors' credibility determinations regarding conflicting testimony and witness inconsistencies. What is clear, and perhaps most damaging, is how the community in which this case arose perceives "justice" to depend on the race of the individual who seeks it.

The ideas implicated by these discretionary decisions spring not just from their historical legacy, but also from several more recent sources. Ideas about race are both hereditary and environmental. The pathology of racial bias can reflect both the inclinations we receive from our parents, and the ways in which those inclinations are nurtured during one's upbringing. In terms of direct inheritance, it is basic human behavior for children to learn to navigate and to create order in their perceptual world by mimicking the behaviors and actions of their parents and caregivers. As social animals,

many of the important techniques we learn represent subtle communicative or expressive behaviors that indicate a mental or emotional disposition and are taught unconsciously, like smiling upon and making eye contact with one another, or laughing at the appropriate time when a joke is told. The racist ideals and perceptions of one generation are transmitted, admittedly imperfectly and often incompletely, to the succeeding generation in the same manner. A child watching or listening to a parent express or manifest a racialized construction of the world, in particular a construct regarding a crime or sexual conduct, will internalize these norms and will then use them as a basis for the child's own mapping of the subjective social landscape that this child will negotiate for the rest of his or her life.

Moreover, contemporary popular culture continues to deploy stereotypical images that presume inherent black criminality, which off-handedly celebrate the kind of animalistic sexual passions supposedly encapsulated in the black male body, in ways that pluck at the racial chord which spans generations of Americans. The prospect for change in public opinion appears to be severely hampered by these notions and expectations of black criminality,⁶⁷ which are pandered to through media depictions of black culture.⁶⁸ You cannot live in this culture without being aware of movies and music videos that both glamorize black violence and use visual and other sensory cues to play on stereotyped formulations of the black man, particularly, as the eternally latent, if not presently active, criminal.⁶⁹ The news media furthers that effort by sensationalizing instances of black criminality, especially when white victims are involved, and it largely ignores, or at least underreports both black-on-black violence and white-on-black violence.⁷⁰ To illustrate, when was the last homicide or rape reported in the news that did not mention the race of the suspected perpetrator?

These same vehicles reinforce distorted perceptions about modern black sexuality. Music videos are replete with images of the "porn star": hulky black men, often shirtless, heavily muscled, oiled-up, and encircled by throngs of scantily-clad voluptuous women (black and white) simulating

sexual activity. Music videos also depict black men as the “pimp”: stunningly dressed, draped in gold, climbing out of a \$200,000 automobile flanked by his fur-clad and Prada-clad “hos.”⁷¹ These caricatures of black sexuality are far too valuable for story-telling for them not to be included in movies and television programming. The images appear everywhere you turn—from Sheriff Bart’s implicitly sexual query, “where all the white women at?” in the movie *Blazing Saddles*,⁷² to the “baby’s mama” syndrome of Jerry Springer and the paternity test spectacle.⁷³ These media practices further entrench culturally transferred assumptions about who the law is meant to regulate, and who it is meant to protect.

These modern social tendencies demonstrate that black crimes (specifically sex crimes) are systematically constructed as different; they are separate and distinct from white crimes, both prospectively and retrospectively. Before allegations of criminal activity arise, there exists an expectation that blacks and people of color, specifically black men, will eventually manifest suspicious or dangerous behavior. These expectations affect official police tactical decisions and law enforcement patterns, victim or witness credibility determinations, and evidence gathering techniques. After a person has been accused of committing a crime, societal beliefs about the significance of the racialized actor’s illegal conduct will infuse public and judicial determinations not only with respect to innocence or guilt and appropriate sentencing, but it will also infect an individual’s attempt to challenge the propriety of his prosecution or conviction from the outset.

This is precisely the technique that was employed during the era of explicit separate but equal justice formulations. Under such a system, assumptions about race were used as a basis on which to prospectively design an overt two-tiered approach to social regulation. Likewise, racist beliefs were used pre-*Brown* as a post-hoc justification to answer questions regarding the fundamental fairness of such a two-tiered approach. That such a method of lawmaking can persist today, that it can even possibly be

involved in the administration of justice for just one case (Marcus' or anyone else's case) may give us legitimate cause for substantial concern and alarm.

The idea is that the racialized history of rape and other criminal sanctions, in particular the application of the death penalty in response to allegations (real or concocted) of black-on-white sexual violence, set the stage for the inherently color-sensitive criminal law regime that we currently "enjoy." By uncritically accepting this historical legacy as integral to our contemporary body of laws and the structure of our criminal enforcement complex, and without seriously asking whether times have changed to such an extent that we can operate a criminal justice system with such a questionable legacy, our nation has tolerated an approach to criminal law that provides ample room for the expression of the racial, and often racist, perceptions in modern society.

However, these perceptions and the decisions that they infect are a reflection not just of historical nineteenth century notions of race, but of contemporary, active, and pervasive associations between racial identity and criminal character. The point is that the separate but equal form of criminal justice is not simply a legacy of the past; the technique of using criminal laws to broadly regulate minority populations cannot be studied only in hindsight. This is a persistent, ever-new dysfunction of contemporary American society that is reiterating, not reverberating, a race-based criminal justice system that was nominally dismantled in the middle of the twentieth century. Current fears about unrestrained black male heterosexuality, which are both created and reinforced in popular culture, provide the up-to-date animus necessary to perpetuate an inherited race-based justice system whose racist ideals were philosophically, if not practically, repudiated in *Brown*. Perhaps to our eternal detriment, even in this regard, American ingenuity never rests.

IV. CONCLUSION

In light of the foregoing, it appears that the promise of *Brown* is incomplete, and that we have not yet fully realized the potential of the great idea manifested therein. It also appears, however, that the fundamental premises of *Brown* remain vulnerable and are subject to attack. Furthermore, retrenchment in our public consciousness threatens to render that great legal victory pragmatically useless in our everyday lives. Still, it is proper to celebrate the spirit of *Brown*. This issue of the *Seattle Journal for Social Justice* is in print because of the *Brown* decision, and because so many people of color have penetrated the ranks of educational institutions and have achieved other professional successes that were categorically foreclosed to our predecessors. With that admission, how can the failure of *Brown* be fairly suggested?

It is true that this landmark decision is our reason for being here in more ways than one. *Brown* is of enduring importance to the battle for racial equality that is still being waged in this country, but not because as a matter of precedent it can solve the problems outlined above. It is precisely on this latter point that *Brown* is a substantial failure. However, to see it only in this way asks too much of the opinion, of the Court, and too much of any legal institution.

The social pathology that is racism is a problem of human, not institutional, proportions—it infects institutional decision makers, not their office. There is no pronouncement that can be issued from on high that can forcibly alter the cognitive map and the array of values that make up each individual human character. Instead, *Brown* offers the greatest promise as a catalyst for social change when we recognize that the decision itself cannot unweave the fabric of racism in which American society is cloaked, and when we admit that the issuance of this decision does not, by any means, end the struggle. It is far too easy to rely on a written opinion as a substitute for an actual change in the circumstances and experiences of a racialized society, and it is too easy to use the existence of an opinion, with

its declaration that separate but equal must end, as an obstacle to resist further movements or efforts towards true social and sexual equality.

However, if *Brown* itself embodies a disposition of the heart, a vision of human character, and related notions of individual liberty, integrity, and precious freedom, then our social duty is to embrace that notion on an individual basis in order to begin living the values that the Court could model for us, but never effectively imposed. It is this model of justice, one that is not colorblind but color *honest*, which can and must prevail against insidious hangover notions of black criminality and against defining our legal system's concept of justice by reference to unfounded constructions of race.

¹ Christian Halliburton is Assistant Professor of Law at Seattle University School of Law. The author wishes to sincerely thank John Mitchell, Maggie Chon, and Natasha Martin for their invaluable assistance in developing the ideas contained in this article. A special note of appreciation is due to Nathan Todd for his tireless and thorough research, and to the editorial board and staff of the *Seattle Journal for Social Justice* for their invitation to publish this piece, and for the many hours of work they put into bringing this article to fruition. Finally, the author wishes to express his deepest gratitude to Katherine Beckett for allowing her seminal study on drug policy enforcement in Seattle to serve as the basis of much of the discussion that follows.

² *Brown v. Bd. of Educ.*, 347 U.S. 483 (1954).

³ The Court's decision in *Brown* is but one example of a judicial declaration that instantaneously alters the status, character, and social construction of an entire demographic.

⁴ *See Brown*, 347 U.S. at 494.

To separate them from others of similar age and qualifications solely because of their race generates a feeling of inferiority as to their status in the community that may affect their hearts and minds in a way unlikely ever to be undone. . . . 'Segregation of white and colored children in public schools has a detrimental effect upon the colored children. The impact is greater when it has the sanction of the law; for the policy of separating the races is usually interpreted as denoting the inferiority of the Negro group. A sense of inferiority affects the motivation of a child to learn. Segregation with the sanction of law, therefore, has a tendency to [retard] the educational and mental development of Negro children and to deprive them of some of the benefits they would receive in a racial[ly] integrated school system.'

Id.

⁵ The first Supreme Court decision to acknowledge the disparate impact of race on death sentencing was *Furman v. Georgia*, 408 U.S. 238 (1972). "Finally there is

evidence that the imposition of the death sentence and the exercise of dispensing power by the courts and the executive follow discriminatory patterns. The death sentence is disproportionately imposed and carried out on the poor, the Negro, and the members of unpopular groups.” *Id.* at 249–50 (Douglas, J., concurring). In his concurrence, Justice Douglas cited a study on death penalty cases in Texas to show that the co-defendants were subject to a disparate risk of the death penalty based on their race. *Id.* He also quoted H. BEDAU, *THE DEATH PENALTY IN AMERICA* 474 (rev. ed. 1967), for the proposition that “because the Negro/high-execution association is statistically present, some suspicion of racial discrimination can hardly be avoided.” *Furman*, 408 U.S. at 250. In Justice Marshall’s concurrence in *Furman*, he argued that “Negroes [are] executed far more often than whites in proportion to their percentage of the population. Studies indicate that while the higher rate of execution among Negroes is partially due to a higher rate of crime, there is evidence of racial discrimination.” *Id.* at 364.

⁶ Although the disparate pursuit and application of the death penalty by prosecutors contributes to racial differences in rates of death sentencing, several other factors help to produce a disparity in criminal enforcement. For example, police officers often have discretion in whether to stop, detain, or arrest individuals. See Angela J. Davis, *Prosecution and Race: The Power and Privilege of Discretion*, 67 *FORDHAM L. REV.* 13, 26–27 (1998). When police choose to disproportionately arrest blacks, they inject racial bias into the criminal justice system. *Id.* at 26. African Americans and Latinos have long complained about racial profiling by arresting officers. Thomas L. Johnson & Cheryl W. Heilman, *Racial Disparity in the Criminal Justice System*, *BENCH & B. MINN.*, May-June 2001, at 29. A broad range of seemingly race-neutral prosecution decisions also contribute to the racial discrepancy in arrest rates. See Davis, *supra*, at 34–35. Questions of “the seriousness of the offense, the defendant’s prior criminal record, the victim’s interest in prosecution, the strength of the evidence, the likelihood of conviction, and the availability of alternative dispositions” may be influenced by unconscious racial stereotyping. *Id.* For a broad discussion of the racial disparity influenced by discretionary decisions of the criminal justice system, see *id.*

⁷ See *Furman*, 408 U.S. at 251, 364.

⁸ Former Illinois governor, George Ryan, used his power to grant clemency to respond to the broad racial discrepancy in criminal enforcement. Governor Ryan appointed a Commission on Capital Punishment to study the death penalty and various proposals to alter Illinois’ criminal justice system to correct this discrepancy. When the Illinois legislature failed to act on the findings of Governor Ryan’s commission, Governor Ryan pardoned or commuted the sentences of all of the prisoners on Illinois’ death row. His actions created a roar of controversy. Victims’ families, prosecutors, and some politicians on both sides of the aisle argued that the decision to grant a blanket clemency to all prisoners on death row did a disservice to justice. See David Firestone, *Absolutely, Positively for Capital Punishment*, *N.Y. TIMES*, Jan. 19, 2003, at Week in Review 5. Others argued that “capital punishment in practice is so fraught with systemic error and injustice as to make it intolerable in our society” and that “gross prosecutorial misconduct in capital cases” justify Governor Ryan’s decision. Rod Dreher, *Gov. Ryan Did the Right Thing*, *NATIONAL REVIEW ONLINE*, Jan. 13, 2003, at

<http://www.nationalreview.com/dreher/dreher011303.asp>. See also Dan Markel, *Against Mercy*, 88 MINN. L. REV. 1421 (2004); Austin Sarat, *Putting a Square Peg in a Round Hole: Victims, Retribution, and George Ryan's Clemency*, 82 N.C.L. REV. 1345 (2004).

⁹ Deborah Fins, NAACP Legal Def. & Educ. Fund, *Death Row U.S.A.*, Spring 2004, at 31 (summary of state lists of prisoners on death row), available at <http://www.deathpenaltyinfo.org/DRUSA-20040401.pdf> (last visited Nov. 9, 2004).

¹⁰ Rory K. Little, *The Federal Death Penalty: History and Some Thoughts About the Department of Justice's Role*, 26 FORDHAM URB. L.J. 347, 481 (1999) ("Of the thirty-four federal prisoners actually executed from 1927 through the last federal execution in 1963, twenty-seven, or 79 percent, were white.").

¹¹ See Fins, *supra* note 9, at 1.

¹² Human Rights Watch, *Incarcerated America*, at Figure 1 (Apr. 2003), at <http://hrw.org/backgrounders/usa/incarceration/us042903.pdf> (last visited Nov. 13, 2004) (showing that blacks represent 12.32 percent of the total U.S. population, as computed from 2000 U.S. Census statistics).

¹³ David C. Baldus et al., *Racial Discrimination and the Death Penalty in the Post-Furman Era: Empirical and Legal Overview, with Recent Findings from Philadelphia*, 83 CORNELL L. REV. 1638, 1660 (1998).

¹⁴ *Id.* at 1656 ("[There is a] disproportionately high percentage of blacks (about 55 percent) among citizens arrested for homicide nationally.").

¹⁵ FED. BUREAU OF INVESTIGATION, U.S. DEP'T OF JUSTICE, CRIME IN THE UNITED STATES 2002: CRIME INDEX OFFENSES REPORTED 20 (2002), available at http://www.fbi.gov/ucr/cius_02/pdf/02crime2.pdf (last visited Nov. 13, 2004).

¹⁶ See Fins, *supra* note 9, at 10.

¹⁷ *Id.*

¹⁸ James Alan Fox & Marianne W. Zawitz, U.S. Dep't of Justice, Bureau of Justice Statistics, *Homicide Trends in the United States: Trends by Race*, at <http://www.ojp.gov/bjs/homicide/tables/ovracetab.htm> (last revised Sept. 28, 2004).

¹⁹ See Fins, *supra* note 9, at 10.

²⁰ See Fox, *supra* note 18.

²¹ See Fins, *supra* note 9, at 10.

²² See Jeffrey J. Pokorak, *How the Death Penalty Works: Empirical Studies of the Modern Capital Sentencing System*, 83 CORNELL L. REV. 1811, 1817-19 (1998) (explaining that prosecutors with charging discretion in death penalty states are overwhelmingly white; that whites comprise 97.5 percent of the total prosecutors in death penalty states; and that in eighteen death penalty states 100 percent of prosecutors are white).

²³ Human Rights Watch, *supra* note 12, at Figure 1.

²⁴ Of the 133 defendants authorized for federal death penalty prosecution over the decade from 1988 to October 1998, 59 percent were black and 76 percent were non-white. Little, *supra* note 10, at 480.

²⁵ See Baldus et al., *supra* note 13, at 1724-25.

²⁶ BUREAU OF JUSTICE STATISTICS, SOURCEBOOK OF CRIMINAL JUSTICE STATISTICS-2000, at 143 (Kathleen Maguire & Ann L. Pastore eds., 2001) (Survey respondents

answered the question, “Do you believe in capital punishment, that is, the death penalty, or are you opposed to it?”).

²⁷ See Baldus et al., *supra* note 13, at 1725.

²⁸ See *id.*

²⁹ See N. Jeremi Duru, *The Central Park Five, the Scottsboro Boys, and the Myth of the Bestial Black Man*, 25 CARDOZO L. REV. 1315, 1322–23 (2004).

[T]he very existence of blacks as slaves reinforced the perception of their bestiality: ‘the slave is outside of culture and therefore is nonhuman; is deprived of freedom and therefore is a beast.’ Slavery enhanced the criminality stereotype as well. In fact, the assertion of the most basic human right, liberty, was, for the slave, criminal. Slaveholding America lived in constant fear of this assertion in the form of slave rebellion, resulting in close scrutiny of blacks’ actions. Virginia’s early slave codes are illustrative of statutory restrictions on blacks’ movements and gatherings. . . . [S]tates criminalized activities simply on the basis that a black person was involved. Regimes such as these both justified and promoted the conception that ‘black people were to be mistrusted and feared, and that they were naturally criminal.’ Consequently, ‘[i]n colonial and early national America, color became associated with inherently criminal behavior in almost every area of the law.’

Id.

³⁰ See Erin Edmonds, *Mapping the Terrain of Our Resistance: A White Feminist Perspective on the Enforcement of Rape Law*, 9 HARV. BLACKLETTER J. 43 (1992).

Lynching’s most obvious victims were most often [b]lack men, who were seized by mobs without warning, strung up in trees, often mutilated genitally, and burned. Its derivative victims were all [b]lack women, men, and children. Jennifer Wiggins states, ‘The influence of lynching extended far beyond the numbers of [b]lack people murdered because accounts of massive white crowds torturing, burning alive, and dismembering their victims created a widespread sense of terror in the [b]lack community.’ . . . Further, mob violence extended its reach of terror into the [s]outhern courtroom. ‘Legal lynching’ was the phenomenon whereby violent mobs coerced courts (that were trying [b]lack male defendants) into handing down a capital sentence.

Id. at 53.

³¹ See Duru, *supra* note 29, at 1325–27.

Faced with the idea of living in a society in which blacks reverted to their ‘savage instincts,’ concerned whites sought to develop post-slavery means of controlling blacks. So, without the legal right to chain and beat blacks, to frighten and subjugate them, the institution of lynching gained hold. . . . Although a particular lynching targets a particular victim or set of victims, lynchings have served historically to terrorize and strike fear into all American blacks. . . . To many, lynchings were a perfectly reasonable and necessary means of controlling semi-civilized blacks, who ‘had undergone a salutary civilizing process through enslavement that was tragically ended by emancipation.’ Indeed, ‘the notion that the freed slaves were or would become

lawless bands of savages served as popular justification for lynchings and anti-black riots, particularly when the link was made between black men as rapists and white southern women as their victims.⁷

Id.

³² See *id.* at 1330.

³³ See Serena L. Hargrove, *Capital Punishment: 21st Century Lynching*, 6 UDC/DCSL L. REV. 33, 35–36 (2001).

Lynching was used as an eliminating tool specifically targeted at African American males. This was due to the fact that white people felt, and still feel threatened, by African American males. There were a total of 2,805 documented lynchings between 1882 and 1930. However, African Americans accounted for 2,500 of the lynched victims. Congress threatened this channel of elimination by proposing to establish anti-lynching laws. Therefore, a new tool was needed. The new tool would have the same effect as lynching, but be implemented in a legal fashion, withstanding judicial scrutiny. A historian stated that, “‘Southerners . . . discovered that lynchings were untidy and created a bad press. . . . [L]ynchings were increasingly replaced by situations in which the Southern legal system prostituted itself to the mob’s demand. Responsible officials begged would-be lynchers to ‘let the law take its course,’ thus tacitly promising that there would be a quick trial and the death penalty. . . . [S]uch proceedings ‘retained the essence of mob murder, shedding only its outward forms.’” Like lynchings, African American males are the target victims in capital punishment.

Id.

³⁴ See Kenneth Williams, *The Death Penalty: Can it be Fixed?*, 51 CATH. U. L. REV. 1177, 1203–04 (2002).

One major challenge for proponents of the death penalty is to find a way to administer it in a manner in which race is not a key determinant of who is sentenced to death and who is not. . . . [A]ttempts have been made to eliminate racism in the imposition of the death penalty, and these attempts have proven unsuccessful. . . . While most of the proposed reforms are well-intentioned and should be implemented as long as capital punishment exists, they will not eliminate race from infecting the process. Minorities, particularly African Americans, will continue to be sentenced to death disproportionately, and those who kill whites will continue to be sentenced to death at a higher rate than killers of minorities. This will continue to be the case, as indicated by:

1. [O]ur experience with the federal death penalty,
2. [T]he military’s death penalty process,
3. [J]urors continued discrimination in these cases, and
4. [E]vidence of racism in the broader society.

Id. For a broad discussion of the benefits and perils of a race-neutral death penalty, see RANDALL KENNEDY, *RACE, CRIME, AND THE LAW* (1997). See also Sheri Lynn Johnson, *Respectability, Race Neutrality, and Truth*, 107 YALE L.J. 2619, 2657 (1998) (book review).

³⁵ See *McClesky v. Kemp*, 481 U.S. 279, 353 (1987) (Blackmun, J., dissenting).

White victim cases are nearly [eleven] times more likely to yield a death sentence than are black victim cases. The raw figures also indicate that even within the group of defendants who are convicted of killing white persons and are thereby more likely to receive a death sentence, black defendants are more likely than white defendants to be sentenced to death.

Id.

³⁶ See McCleskey, 481 U.S. at 294–296.

³⁷ See Katherine Beckett, *Race and Drug Law Enforcement in Seattle*, May 3, 2004, at 87, <http://www.defender.org/Beckett-20040503.pdf>.

³⁸ *Id.* at 5–6.

³⁹ *Id.* at 19, 21, 29, 36.

⁴⁰ See *id.* at 36–37.

⁴¹ See *id.* at 32–33.

⁴² *Id.* at 34.

⁴³ *Id.*

⁴⁴ *Id.* at 22.

⁴⁵ *Id.* at 42.

⁴⁶ *Id.* at 40.

⁴⁷ *Id.* at 45.

From January 1999 to April 2001, the Seattle Police Department made 2,146 purposeful arrests for delivery of the serious drugs under consideration in this report. Of these, 64.2 percent involved black suspects. . . . Despite evidence that a clear majority of those who deliver serious drugs in Seattle are white, only 17.6 percent of those arrested for delivery of serious drugs were non-Hispanic whites. . . . The black drug delivery arrest rate in Seattle is thus thirty-one times the white drug delivery arrest rate.

Id.

⁴⁸ See *id.*

⁴⁹ See *id.* at 4–5. The study found that the primary cause of racial disparity in drug delivery arrests is the result of “several inter-related factors. . . . [T]he SPD focuses overwhelmingly on racially diverse drug venues downtown where crack is more likely to be sold than on other markets, focuses on crack within those markets, and largely ignores predominately white outdoor drug venues where heroin dominates.” *Id.*

⁵⁰ *Id.* at 63–64 (“The SPD arrested over thirty times more deliverers of serious drugs in . . . the downtown market at 2nd and Pike than in . . . the Capitol Hill market.”).

⁵¹ See *id.* at 87.

⁵² Andrew Jacobs, *Student Sex Case in Georgia Stirs Claims of Old South Justice*, N.Y. TIMES, Jan. 22, 2004, at A14.

⁵³ *Id.*

⁵⁴ *Id.*

⁵⁵ *Id.*

⁵⁶ *Id.*

⁵⁷ See Edmonds, *supra* note 30, at 51.

[T]he sex crime [of rape] became racialized in the sense that almost exclusively [b]lack men were prosecuted and lynched as rapists and even then,

usually only when the victim was white. Despite a totally contraindicated history, white men were not ‘rapists.’ Rape functioned in white psyches as a crime that only Black men committed against white women.

Id.

⁵⁸ See Kimberle Crenshaw, *Mapping the Margins: Intersectionality, Identity Politics, and Violence Against Women of Color*, 43 STAN. L. REV. 1241, 1271 (1991) (discussing how rape laws “operate primarily to condemn rapes of white women by black men” in a way that excludes women of color from the universe of potential rape victims). See also Edmonds, *supra* note 31, at 51 (suggesting that “the white man’s rape of the [b]lack woman was buried beneath the phantasmal [b]lack man’s rape of the white woman”).

⁵⁹ See Edmonds, *supra* note 30, at 52.

Between 1882 and 1946 nearly 5,000 people were lynched, approximately [70] percent of whom were [b]lack. Any discussion of current rape law enforcement must comprehend the history and impact of lynching, because the most common justification for lynching was the claim that a [b]lack man had raped a white woman [and] as a creed of racial terror, was intimately tied up with the politics of sexuality.

Id.

⁶⁰ See Darren Lenard Hutchinson, *Ignoring the Sexualization of Race: Heteronormativity, Critical Race Theory and Anti-Racist Politics*, 47 BUFF. L. REV. 1, 83 (1999).

The horrible ‘institution’ of lynching in the post-bellum South, for example, was justified by the construction of black male heterosexuality as a violent threat to white women . . . the pervasive fear of black men as rapists of white women was exploited to legitimate the slayings and to excuse white control and domination over blacks generally.

Id. See also Crenshaw, *supra* note 58, at 1272 (“The well-developed fear of [b]lack sexuality served primarily to increase white tolerance for racial terrorism as a prophylactic measure to keep [b]lacks under control.”).

⁶¹ See MICHAEL MELTSNER, CRUEL AND UNUSUAL: THE SUPREME COURT AND CAPITAL PUNISHMENT 75 (1973) (citing United States Dept. of Justice, Bureau of Prisons, National Prisoner Statistics, Bulletin No. 46, *Capital Punishment 1930–1970*, at 11 (Aug. 1971)).

⁶² Hutchinson, *supra* note 60, at 81. Hutchinson also notes, helpfully, that this sexualization of race also occurs with respect to other people of color, including Latina/os and Asian Americans. See *id.* at 86–96.

⁶³ See *id.* at 81–82.

In order to generate more ‘commodities’ for the capitalistic slavery industry, black reproduction was needed . . . [Thus] black male slaves were compelled to ‘breed’ with black female slaves in order to produce offspring, thereby augmenting the property holdings of slave owners. The profit-driven ‘breeder’ role, along with generalized notions of black sexuality as ‘unclean,’ provided the roots for and reinforced the construction of black male heterosexuality as promiscuous and potent.

Id. See also Lisa A. Crooms, *Don't Believe the Hype: Black Women, Patriarchy and the New Welfarism*, 38 HOW. L.J. 611, 619 (1995) (suggesting that the conditions of slavery included the obligation to reproduce offspring “in accordance with their owners’ expectations”).

⁶⁴ See Hutchinson, *supra* note 60, at 82–83 (“Black male heterosexual practice, though encouraged by white supremacist society to increase the number of slaves, was at the same time stigmatized by white males who saw black men as a threat to their patriarchal domination over white women.”).

⁶⁵ See Edmonds, *supra* note 30, at 52 (describing the “myth of the [b]lack rapist” as necessarily depending on the “sexist-racist image of the delicate white woman,” in which “[w]hite women in subordinate sexual roles—that is, roles of quintessential helplessness, delicacy, and frigidity—became the medium by which to express and justify racial subordination”).

⁶⁶ See PAULA GIDDINGS, WHEN AND WHERE I ENTER: THE IMPACT OF BLACK WOMEN ON RACE AND SEX IN AMERICA 28 (1984). According to Giddings, these interracial attractions represented

the rawest nerve in the South’s patriarchal bosom. In the course of her investigations, [Ida B.] Wells uncovered a significant number of interracial liaisons . . . in many cases [w]hite women had actually taken the initiative. Black men were being killed for being ‘weak enough,’ in Wells’s words, to ‘accept’ [w]hite women’s favors.

Id.

⁶⁷ For a detailed discussion of race-based assumptions about criminal behaviors from slavery to the present, see William M. Carter, Jr., *A Thirteenth Amendment Framework for Combating Racial Profiling*, 39 HARV. C.R.-C.L. L. REV. 17 (2004). See also Frank Rudy Cooper, *The Un-Balanced Fourth Amendment: A Cultural Study of the Drug War, Racial Profiling, and Arvizu*, 47 VILL. L. REV. 851, 870–876 (2002).

⁶⁸ For an interesting discussion of the media’s depiction of the black person as a nameless criminal threat, see Barry C. Feld, *Race, Politics, and Juvenile Justice: The Warren Court and The Conservative “Backlash”*, 87 MINN. L. REV. 1447, 1534–38 (2003).

⁶⁹ For an argument that the media often depict blacks as murderous drug dealers and ineffectual celebrities, see Christopher Miller, *The Representation of the Black Male in Film*, AFR.–AM. MALE RES., Sept./Oct. 1996, <http://www.pressroom.com/%7Eafrimale/miller.htm> (last visited Nov. 1, 2004).

⁷⁰ See Feld, *supra* note 68, at 1534–1538.

⁷¹ In an interesting testament to the pervasiveness and persuasiveness of these image constructions, a great number of these motifs are conceived and presented by black actors and artists, suggesting the deep internalization of the racial norms that they reflect. Some of this may be self-conscious pandering to a white suburban middle-class audience hungry for such racial pornography, but the greater part, I suspect, reflects the actual aspirations of a large part of the black community.

⁷² BLAZING SADDLES (Warner Bros., 1974).

⁷³ For a duly comprehensive and wide-ranging consideration of the ways in which modern culture perpetuates and recreates racialized notions of black sexuality for both

men and women, see PATRICIA HILL COLLINS, *BLACK SEXUAL POLITICS: AFRICAN AMERICANS, GENDER AND THE NEW RACISM* (2004).