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Of 'Subtle Prejudices,' White Supremacy and Affirmative Action: A Reply to Paul Butler

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OF "SUBTLE PREJUDICES," WHITE SUPREMACY, AND AFFIRMATIVE ACTION: A REPLY TO PAUL BUTLER

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I. INTRODUCTION

We are not a society with the ability to talk about race or racism. As proof, we need only think of Professor Lani Guinier, who attempted to talk publicly and with probity about these topics, only to suffer rejection and humiliation.[1] In a less grand fashion, others of us in the legal academy whose scholarly focus is race and racism have felt enmity, disregard, or ennui from our colleagues more often than engagement, involvement, and common purpose. Now, enter Paul Butler with *Affirmative Action and the Criminal Law*,[2] an unusually frank analysis of racism, the criminal injustice system, and the government's duty to correct systemic abuses through affirmative action.

Professor Butler established himself as a prominent and bold critic of the U.S. criminal justice system when the *Yale Law Journal* published his now controversial and widely noted article, *Racially Based Jury Nullification*.[3] His avowed purpose of

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* Associate Professor, University of New Mexico School of Law. I would like to thank Professor Richard Delgado for his perspicacity in conceiving and convening this symposium, where divergent opinions were respectfully debated, established friendships were nurtured, and new relationships were begun. Thanks also to Melissa Decker for her excellent editing and to the editorial board of the *University of Colorado Law Review* for their outstanding work in organizing the symposium. Special thanks to Paul Butler for challenging me/us to think critically about two areas of law that are usually disconnected. My talk benefited from discussions with Fran Ansley, Sumi Cho, Richard Gonzales, and Elizabeth Rapaport, and this article was improved by suggestions from David Cruz, Michael Olivas, David Oppenheimer, Ann Scales, and Christine Zuni. I also thank Mary Custy, the UNM law library staff, and Israel Torres and Antoinette Jacques, my research assistants, for responding quickly to my many requests. This article responds to Professor Butler's article as revised after the symposium presentations.

1. Professor Lani Guinier's nomination to head the Civil Rights Division of the Department of Justice was withdrawn by President Clinton after controversy arose over her positions on race and voting rights. *See* David Lauter, *Clinton Withdraws Guinier as Nominee for Civil Rights Job*, L.A. TIMES, June 4, 1993, at A1.

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

3. Paul Butler, *Racially Based Jury Nullification*, 105 YALE L.J. 677 (1995).

"subver[ting] . . . the American criminal justice [system],"[4] is part of a wider scholarly and social change agenda and clearly transcends the implementation of the six proposals he proffers in this latest paper.

Refusing to incarcerate guilty but nonviolent African American defendants is morally and legally compelling, Professor Butler posits in his earlier article.[5] His proposals in this volume pick up the argument where his earlier piece left off. Given that the criminal justice system is riddled with racism, it is as moral to keep nonviolent African American criminals out of prison as it is to release them—and Professor Butler's task is to find plausible legal arguments for the latter. Specifically, he asserts that releasing large numbers of African Americans from prisons and jails, limiting the startling apprehension and imprisonment rates of African Americans for drug offenses, prohibiting the death penalty for interracial homicides, requiring majority black juries for judging and sentencing, and renouncing retribution are moral and just. He then argues that these proposals can be made legal and constitutional as well.[6] Professor Butler asserts that affirmative action and its supporting "moral" justifications provide the constitutional foundation for his proposals, which seek to transform the criminal justice system until the demographics of U.S. prisons and jails "look like America."[7]

Professor Butler's thesis forces us to ask some subtle and disquieting questions about the possibility of utilizing affirmative action jurisprudence to address the racial inequities of the criminal justice system. The efficacy of affirmative action in the civil arena in promoting extensive structural and institutional

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Professor Butler explicitly promotes the morality of jury nullification—African American jurors acquitting an otherwise guilty defendant—because "the black community is better off when some nonviolent lawbreakers remain in the community rather than go to prison." *Id.* at 679. He exhorts leaders in the black community to educate potential jurors about jury nullification, which can serve as the black community's limited but powerful mechanism for intervening in the criminal justice system, by calling on black ministers to use their pulpits; musicians, writers, playwrights, and rap singers to engage popular culture; and political activists to distribute leaflets on the courthouse steps. *See id.* at 723. Professor Butler writes in the hope that "there are enough of us out there, fed up with prison as the answer to black desperation and white supremacy, to cause retrial after retrial, until, finally, the United States 'retries' its idea of justice." *Id.* at 724-25.

4. *Id.* at 680.
5. *See id.*
6. *See* Butler, *supra* note 2, at 874-88.
7. *Id.* at 844, 861.

change is demonstrable. Affirmative action, especially in higher education and private and public employment, has altered the face of the middle class in the United States. Virtually all colleges, universities, graduate schools, international companies, and smaller business enterprises are considerably more integrated today, through different forms of affirmative action, than they were only a few decades ago.[8]

New multicultural competencies, introduced and developed by people of color and white women, are making business enterprises more competitive in transnational and polylingual markets.[9] Racial and cultural diversity is accepted as an aspect of academic excellence by much of the professoriate and by large numbers of college administrators.[10] Within the legal academy, scholarship, teaching, and the corresponding notions of merit[11] have been transformed by expansive treatments of issues of difference, often of and by people of color. Unconventional scholarship in new jurisprudential movements, such as critical race theory, critical race-feminism, radical feminism, and, more recently, in queer theory, LatCrit, and novel pedagogical techniques, including innovations in clinical education, are among the institutional changes wrought by the beneficiaries of affirmative action. Social change has occurred.

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8. *See* Manning Marable, *Staying on the Path to Racial Equality*, *in* THE AFFIRMATIVE ACTION DEBATE 11 (George E. Curry ed., 1996) ("Affirmative action was largely responsible for a significant increase in the size of the black middle class; it opened many professional and managerial positions to blacks, Latinos, and women for the first time."). *See generally Affirmative Action Update and Alert*, 41 THE EMPLOYEE ADVOCATE 2 (Supp. 1995). "One 1984 study concluded that affirmative action had significantly reduced job segregation and improved occupational status and mobility for minorities and women." *NELA Position Paper on Affirmative Action*, *supra* 41 THE EMPLOYEE ADVOCATE at 4, 7 (citing CITIZEN'S COMM'N ON CIVIL RIGHTS, AFFIRMATIVE ACTION TO OPEN THE DOORS OF JOB OPPORTUNITIES 123-29 (1984)).

9. *See* A. Barry Rand, *Diversity in Corporate America*, *in* THE AFFIRMATIVE ACTION DEBATE, *supra* note 8, at 65 (arguing that diversity is good for the Xerox Corporation and for business generally).

10. Sixty-two leading research universities adopted a resolution proposed by Harvard University supporting the right of admission offices to use ethnicity, race, and gender to evaluate students. *See* Karen W. Arenson, *62 Top Colleges Endorse Bias in Admissions*, N.Y. TIMES, Apr. 24, 1997, at A27.

11. *See* Yxta Maya Murray, *Merit Teaching*, 23 HASTINGS CONST. L.Q. 1073 (1996) (using personal narratives and the concept of phronesis (experiential learning) from Aristotelian moral philosophy to add meaning to "merit").

Affirmative action in the context of the criminal justice system, however, obliges us to ask different questions. For example, can affirmative action accomplish drastic structural and institutional change for those at the bottom of the economic and social hierarchies? What are the limits of affirmative action within the civil area and, perforce, within the criminal area? What models of race and racism help us understand affirmative action's limits and potentialities? *Is* the state's allocation of burdens logically analogous to the state's allocation of benefits, as Professor Butler suggests?[12]

In Part II of this response to Professor Butler, I analyze the connection of affirmative action to two models of race and racism. I contend that the Supreme Court Justices who continue to support affirmative action adhere to a "prejudice" model in which race is a concept to be overcome and racism is merely a condition of individual ignorance.[13] On the other hand, I posit that Professor Butler's proposals fall within a "white supremacy" model, which looks at race as a historically contingent concept that has been used to subordinate non-white peoples from pre-colonial times through the present. This historical perspective offers the possibility that the concept of race can be given new meaning to serve as the basis for positive individual and collective identities. Given this paradigmatic and ideological rift, there is little common ground between Professor Butler and the Supreme Court Justices.

In Part III, I analyze Professor Butler's six separate proposals to reform the criminal justice system. In doing so, I question whether his proposals can be made to fit within conventional affirmative action jurisprudence. I also highlight how implementation of these proposals, as currently framed, would require a radical expansion of constitutional doctrine.

I conclude that his most controversial proposals, those that advocate placing caps not only on the percentage of African Americans who can be arrested and imprisoned for drug offenses, but also on the percentage of African Americans who can be kept

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12. *See* Butler, *supra* note 2, at 858-59 & nn.73-74.

13. I have entitled this article *Of "Subtle Prejudices," White Supremacy, and Affirmative Action* to draw the connections between the two models of race and racism and the public policy mechanisms called affirmative action. I have placed Subtle Prejudices in quotation marks to link the first model of race and racism analyzed with these specific words, this trope, taken from the narrative that illustrates the model. *See infra* text accompanying notes 24-28.

in prisons and jails, cannot be supported by current affirmative action jurisprudence. Current case law permits only programs that are narrowly tailored to further a compelling governmental purpose.[14] While diversity has been recognized as a governmental interest in the context of higher education[15] and radio licensing,[16] the only cognizable governmental interest within the criminal context is the elimination of the effects of prior discrimination. Unfortunately, establishing that particular criminal defendants have been discriminated against is a formidable task indeed.

In Part IV, I take issue with Professor Butler's singular focus on African American males and suggest that he, and other scholars as well, adopt a cross-gendered and multicultural approach to this type of race-based analysis. Historical racism combined with the economic dynamics from which poverty results are the criminogenic forces that lead disproportionately high numbers of young people to criminal activity;[17] these forces affect Latinos/as, other non-white populations,[18] *and* African Americans—albeit, in non-symmetrical ways. Relying on the work of Tomás Almaguer,[19] I claim that discussions of race constructed

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14. *See* Adarand Constructors, Inc. v. Pena, 115 S. Ct. 2097 (1995) (holding that the federal set-aside program for rebuttably socially and economically disadvantaged businesses must be reviewed under the strict scrutiny standard).

15. *See* Regents of the Univ. of Cal. v. Bakke, 438 U.S. 265 (1978) (holding that the medical school's admission program, which reserved 16 seats for minority students, was unconstitutional, but allowing the university to consider race as one factor in constituting a diverse student body).

16. *See* Metro Broadcasting, Inc. v. Federal Communications Comm'n, 497 U.S. 547 (1990) (holding that congressionally mandated FCC policies creating racial preferences in the granting of radio licenses served the important governmental interest of broadcast diversity and, in deference to Congress, would be reviewed under an intermediate level of scrutiny), *standard of review overruled by Adarand*, 115 S. Ct. 2097.

17. *See* MICHAEL TONRY, MALIGN NEGLECT 125-34 (1995).

> [C]rime by young disadvantaged black men does not result primarily from their individual moral failures but from their misfortune of being born in places and times and under circumstances that make crime, drug use, and gang membership look like reasonable choices from a narrow range of not very attractive options.

Id. at 134. Tonry's analysis is limited by its almost exclusive focus on African American males.

18. The statistics gathered by the federal agencies include American Indians, Alaska Natives, Asians, and Pacific Islanders as one category. *See, e.g.*, DARRELL K. GILLIARD & ALLEN J. BECK, U.S. DEP'T OF JUSTICE, PRISON AND JAIL INMATES AT MIDYEAR 1996, at 6 tbl. 7 (Jan. 1997).

19. TOMÁS ALMAGUER, RACIAL FAULT LINES: THE HISTORICAL ORIGINS OF WHITE SUPREMACY IN CALIFORNIA (1994). Almaguer is an Associate Professor of Sociology and American Culture at the University of Michigan.

within a narrow black/white binary model re-create the very distortions of history and reproduce the exclusion, subordination, and silencing of "Other"-ized non-white groups that lie at the heart of white supremacy.[20]

II. TWO MODELS OF RACE AND RACISM

Paul Butler's paper raises fundamental questions about how race and racism operate within criminal justice systems. In order to analyze whether affirmative action jurisprudence can be used to correct some of the more blatant racial inequities of the criminal justice systems, it is necessary first to acknowledge that there are competing conceptualizations of where racial power is situated, how diverse groups are racialized within relationships of power with the dominant majority, and how racial power manifests, masks, and maintains itself. Two conceptualizations of race and racism are especially relevant to Butler's argument: the "prejudice" model[21] and the "white supremacy" model.

A. The "Prejudice" Model

Commentators writing about the criminal law and race have consistently "assumed a model of race and racism within which racial power is understood in terms of *bias* and *discrimination*."[22] This model of race and racism informed the civil rights reform agenda of the Warren Court in the 1960s,[23] and it continues to be the paradigm that undergirds affirmative action programs. Professor Peller describes this approach as "integrationist":

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20. *See, e.g.*, Deborah Ramirez, *Multicultural Empowerment: It's Not Just Black and White Anymore*, 47 STAN. L. REV. 957 (1995); *see also* George Martinez, *Mexican-Americans and Whiteness*, 2 HARV. LAT. L. REV. (forthcoming 1997).

21. The prejudice model of racial power is related to the color-blind theory of equal protection. *See* Suzanna Sherry, *Selective Judicial Activism in the Equal Protection Context: Democracy, Distrust, and Deconstruction*, 47 GEO. L.J. 89 (1984); *see also* ANDREW KULL, THE COLOR-BLIND CONSTITUTION (1992). *But cf.* Neil Gotanda, *A Critique of "Our Constitution Is Color-Blind,"* 44 STAN. L. REV. 1 (1991). Catharine MacKinnon's gender-based analysis using a difference versus dominance approach is analogous to the race-based models discussed herein. *See* CATHARINE A. MACKINNON, TOWARD A FEMINIST THEORY OF THE STATE (1989).

22. Gary Peller, *Criminal Law, Race, and the Ideology of Bias: Transcending the Critical Tools of the Sixties*, 67 TUL. L. REV. 2231, 2233 (1993).

23. *See id.* at 2233-34.

> [T]he evil of racism was deemed to be its irrationality. Racism was seen as a form of ignorance in that, while enlightened people understood that race made no difference between people, racists made malign assumptions about people based on skin color. . . . When "stereotypes" were acted upon by decisionmakers in the social world, bias assumed the form of discrimination. . . .
> . . . Enlightened people were colorblind in the sense that they did not engage in pre-judice, in the judging of people based on "stereotypes." . . . Once consciousness was cleansed of racial bias, there would follow social consequences. Discrimination, the social face of racism, would be replaced by equal treatment, and segregation, the systemic manifestation of discrimination, would be replaced by integration.[24]

The following story illustrates the vocabulary and dynamics of the prejudice model. Although situated in Scotland, the story's legal details are analogous to the manner in which a similar case might be tried in U.S. courts. Moreover, the notion of "subtle prejudices" has similar, although not exact, resonances for whites and non-whites in both British and U.S. public discourse.

On July 3-4, 1996, in Courtroom No. 11 of the High Court of Edinburgh, Scotland, the case of *H.R.M. v. J.J. White* was heard by Judge J.F. Wheatley, Q.C., and a jury of seven men and seven women. Jason White, a nineteen- or twenty-year-old black man, was charged with assault and attempted robbery. He and a friend had been playing games at an arcade and they had been winning. When they began to think that they were not getting fair payment, Jason went to talk with Mr. Taylor, the owner, to ask for their money or for tokens. The request was rebuffed. As they were about to leave the arcade, Jason returned to the small office to talk to Mr. Taylor. A knife was produced (to whom the knife belonged was never proven, although my recollection is that the police had found the knife in Mr. Taylor's house when they questioned him about the incident) and Jason's hand was cut. Jason proceeded to the hospital where he told the doctor that he had been cut in an altercation at an arcade. Because he was out on bail from another incident, he went to see his solicitor rather than the police, concluding they would not believe his version of the story.

What follows is my paraphrasing (from notes that I took

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24. *Id.* at 2245-46.

while in the courtroom) of a part of the closing argument by the solicitor representing Jason White:[25]

Your Lordship. Ladies and Gentlemen of the jury, allow me to begin by talking about subtle prejudices. We all have biases and prejudices, and I don't want to offend you by suggesting that you are different or worse than any of the rest of us. But we have to be careful that we don't allow these subtle prejudices to affect how we judge this matter.

The first subtle prejudice that I would like to point out is youth versus age. Age is thought to bring decorum and wisdom. The young are seen as inexperienced and self-involved. Mr. Taylor's advanced age works to bolster his credibility while Jason White's youth can create doubts about him. A second subtle prejudice concerns idleness and unemployment versus the industry shown by the owner of a family business. Jason testified that he spent inordinate time at the arcade. This was not the first time that he and his friend had gambled their money on the game machines. Mr. Taylor told you how he had built up his business and worked long hours at the arcade. A third subtle prejudice has to do with involvement with the criminal justice system versus law-abiding behavior. You are aware from the indictment that Jason was out on bail when this incident occurred. He testified that he distrusted the police. Mr. Taylor, on the other hand, expecting to be believed by the police, called for them immediately after Jason ran out of the arcade. . . .

We are all fed up with the crime, noise, and squalor we associate with young people on the streets. But you are not on this jury to get even with those who have pushed you off sidewalks. You are not on this jury to do something about crime. You are on this jury to decide whether the Crown has proven, beyond a reasonable doubt, that Jason White did what he is accused of doing.

Prejudice—subtle prejudices—can be the mood music in the background that is unheard but that sets the tone for the discussions we have and the decisions we make. That is why judging is hard. We ask you to be aware of your subtle prejudices and to set them aside. That is why we trust you, common people not lawyers, to decide the facts.

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25. I regret that I do not know the name of the solicitor, so I cannot properly acknowledge him.

Scotland is not like other countries that imprison large numbers of their citizens. I remind you, Scots, that you get the quality of criminal justice that you, acting together as a jury, are willing to mete out to persons like Jason White.

After deliberating for less than one hour, the jury returned a verdict of not guilty.

Edinburgh is a city of about half a million people of which fewer than one percent are black.[26] The chances of walking into a courtroom and witnessing a trial of a black Scot are, thus, very slim indeed. Yet, by chance and good fortune, I found myself listening to a trial in which the solicitor placed race at the center of the jury's attention—by never mentioning race. I am quite sure that, when the solicitor began his exposition on "subtle prejudices," others were as poised as I was to hear the juxtaposition of white with black; yet, cleverly, he never alluded to race or color. He did not have to. Race was, in his words, the "mood music" that was playing in the background of his argument.[27]

The solicitor's closing argument embodies this view of racism

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26. I am referring in this context to persons of African origin. I clarify this designation because the British occasionally use the term black to describe all persons of color whether Asian, East Indian, Pakistani, Latino/a, or African. Marie Helene Laforest explains:

> Already in the different terms used to name themselves today enormous differences are evident between African Americans and Black British. In Great Britain 'Black' has until very recently included all non-Europeans, from South Americans (classified as Hispanics in the United States) to West Indians and people from the Indian subcontinent (grouped with Far Easterners in the United States). ['Black'] is therefore a term charged with political valence. . . .
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> . . . With regard to race and ethnicity, the Black British purport their position to be more open inasmuch as it is pluralist. Black British intellectuals rightly argue that Blackness cannot be fixed and stable, that identities are not continuous, traversed as they are by other events: slavery then or the media today.

Marie Helene Laforest, *Black Cultures in Difference*, *in* THE POST-COLONIAL QUESTION: COMMON SKIES, DIVIDED HORIZONS 115, 115-18 (Iain Chambers & Lidia Curti eds., 1996).

27. Sending nonverbal cues to the jury, as I contend this solicitor did so successfully, can have different consequences in different settings. In his *Jury Nullification* article, Professor Butler analyzes a case in which John T. Harvey, an African American lawyer, represented a criminal defendant while wearing a stole made of *kente* cloth, "a multihued woven fabric originally worn by ancient African royalty, and [now] adopted . . . as a symbol of racial pride." Butler, *supra* note 3, at 685. Attorney Harvey was prevented from wearing the *kente* stole during a jury trial because, according to the white judge, he was "sending a hidden message to jurors." *Id.*

as prejudice. Implicit within this model is the notion that biases and prejudices can be eliminated one person at a time. This model of racism is individualistic in that correctives to racism are focused on individual persons. In the case of the Jason White story, individual jurors were called upon to resist acting on their "subtle prejudices." I contend that the jurors were just as aware of Jason White's race as was the solicitor and that he chose to caution the jurors tacitly. His argument was effective in drawing the connection between race and other "subtle prejudices" and suggesting that all such prejudices are similar, without ever mentioning race.[28]

B. The "White Supremacy" Model

A second model, called the ideology of white supremacy,[29] is fundamentally different in its conceptualization of race and racism. Historians including George Fredrickson,[30] Winthrop Jordon,[31] Ronald Takaki,[32] and, more recently, Tomás Almaguer[33]

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28. Within the prejudice model, bias and discrimination can be experienced in both subtle and overt ways. Racial markers, such as skin color or accents, are "read" and responded to with varying degrees of antagonism. An extreme example of overt individualized bigotry was the random murder of a black couple, Jackie Burden, 27, and Michael James, 36, by James N. Burmeister, a private in the 82nd Airborne Division at Fort Bragg. *See* Mari J. Matsuda, *Voices of America: Accent, Antidiscrimination Law, and a Jurisprudence for the Last Reconstruction*, 100 YALE L.J. 1329, 1391-92 (1991) (asserting that accent resides in one of those "sacred places of the self" and arguing for an extension of Title VII to prohibit accent discrimination); *see also Ex-G.I. at Fort Bragg Is Convicted in Killing of 2 Blacks*, N.Y. TIMES, Feb. 28, 1997, at A14.

29. The media has chosen to identify extremist groups such as the Aryan Nation and the Ku Klux Klan with the term white supremacy. While such groups do espouse an ideology based on racial superiority, it is equally true that, historically, United States public policy has been based on similar beliefs, only such beliefs have been masked in theological, philosophical, biological, and anthropological rhetoric and discourse. For further discussion of this ideology in this symposium, see Evelyn Hu-DeHart, *Affirmative Action—Some Concluding Thoughts*, 68 U. COLO. L. REV. 1209 (1997), and Sumi K. Cho, *Multiple Consciousness and the Diversity Dilemma*, 68 U. COLO. L. REV. 1035 (1997).

30. *See* GEORGE FREDRICKSON, WHITE SUPREMACY: A COMPARATIVE STUDY IN AMERICAN AND SOUTH AFRICAN HISTORY (1981).

31. *See* WINTHROP JORDON, WHITE OVER BLACK (reprinted 1969). Jordon traces the naming practices of the English colonists, calling Negroes and Indians *savages*, while calling themselves *Christians*:

> In significant contrast, the colonists referred to *Negroes* and in the eighteenth century to *blacks* and to *Africans*, but almost never to Negro *heathens* or *pagans* or *savages*. Most suggestive of all, there seems to have been something of a shift during the seventeenth century in the

have developed this analysis, which traces the way that whites have deployed racial differences, from pre-colonial times[34] to the present, to justify the creation and maintenance of territorial,[35] spiritual,[36] moral,[37] labor,[38] social, constitutional, and other group hierarchies. These analyses emphasize the historical contingency of race and ethnicity, terms that acquire meaning under specific historical conditions, that occur within specific geographic spaces,

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> terminology Englishmen in the colonies applied to themselves. From the initially most common term *Christian*, at mid-century there was a marked drift toward *English* and *free*. After about 1680, taking the colonies as a whole, a new term appeared—*white*.

Id. at 95.

32. *See* RONALD TAKAKI, IRON CAGES: RACE AND CULTURE IN NINETEENTH-CENTURY AMERICA (1979).

33. *See* ALMAGUER, *supra* note 19.

34. Colonization in the Americas proceeded not only from New England westward but also from Mexico into the Southwest. The racialization practices of European colonists differed in their nature of the interactions with the indigenous peoples. For example, the Spanish, unlike the English, arrived in the Americas without women and took indigenous women as sexual partners, resulting in a mestizo population. *See* CLAUDIO ESTEVA-FABREGAT, MESTIZAJE IN IBERO-AMERICA (John Wheat trans., 1995).

35. Almaguer writes that, in the conflict with native peoples over the land they occupied, white colonists relied on assumptions about differences that they had brought with them from Europe. They saw themselves as *Christians* and *civil*, and the indigenous peoples as *heathens* and *savages*. Such binary distinctions were later used to racialize black populations and then "non-white" groups in the Southwest. *See* ALMAGUER, *supra* note 19, at 20; *see also* Martinez, *supra* note 20 (arguing that Mexican Americans were characterized in colonial discourses as non-white and were denied the benefits associated with whiteness although courts legally construed them as whites).

36. Fredrickson argues that while Europeans used both *The Bible* and classical philosophers such as Aristotle to support their categorizations and poor treatment of the diverse populations they encountered in the New World, these categories were only later termed racist because of their explicit assumptions of genetic or biological inferiority. *See* FREDRICKSON, *supra* note 30, at 7.

37. Almaguer writes:

> All that was rational, civilized, and spiritually pure was set off from that which was irrational, uncivilized, and tied to the body. Anglo-Saxon men became civilized republican men of virtue, devoting their lives to hard work, frugality, sobriety, and the mastery of both their passions and their lives. The non-white, in contrast, became the foil for the lofty self-image that white men accorded themselves. They were associated with qualities such as filth or dirtiness, impurity, vice, intoxication, and the lascivious indulgence of carnal "instincts."

ALMAGUER, *supra* note 19, at 22 (citing TAKAKI, *supra* note 32).

38. Almaguer explains that the racial segregation of labor markets and the advantages of voluntary immigration benefited white Europeans. *See id.* Their social and economic mobility was due to "the association of free labor with people of white European stock and the association of unfree labor with non-Western people of color." *Id.* at 24-25 (citing ROBERT BLAUNER, RACIAL OPPRESSION IN AMERICA (1972)).

and that affect different groups in various ways at different times. Almaguer draws these conclusions:

> Historically, differential access to valued social rewards ha[d] shaped the course of ethnic and race relations in the United States. Their unequal extension to white and non-white groups via social closures led to divergent mobility routes and different 'life chances' for these groups. Not every ethnic population that entered into competition with whites equally threatened their mobility aspirations, nor were they equally granted access to important institutional spheres. It is here that each group's collective attributes (such as their internal class stratification, gender composition, population demographics, literacy rates, occupational skills, employment background, physical differences from the white population, collective association with precapitalist labor systems, and explicit cultural factors such as values, religion, and ethnic traditions) were critically important. This complex of factors explicitly delineated these groups in racial terms and historically conditioned their mobility opportunities and potential conflict with the white population.[39]

In contrast to the prejudice model's focus on individualism, the white supremacist model sees social, political, and economic structures and institutions as the source of racial inequities. Analyses based on white supremacy focus on how group stigmatization and racial antagonisms affect and, at times, determine arrangements and configurations throughout the society.

This ideology of white supremacy, constructed within the black/white binary, has been acknowledged by the Supreme Court.[40] Most recently, Justice Ginsburg's dissent in *Adarand Constructors, Inc. v. Pena*[41] observed that

> [t]he United States suffers from those lingering effects [of racial discrimination] because, for most of our Nation's history, the idea that "we are just one race," was not embraced. For generations, our lawmakers and judges were

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39. ALMAGUER, *supra* note 19, at 25.

40. *See* Loving v. Virginia, 388 U.S. 1 (1967) (invalidating state statutes prohibiting interracial marriages). Chief Justice Warren stated that the Virginia state court "[had] concluded that the State's legitimate purposes were 'to preserve the racial integrity of its citizens,' and to prevent 'the corruption of blood,' 'a mongrel breed of citizens,' and 'the obliteration of racial pride,' *obviously an endorsement of the doctrine of White Supremacy*." *Id.* at 7 (emphasis added).

41. 115 S. Ct. 2097 (1995).

> unprepared to say that there is in this land no superior race, no race inferior to any other. In *Plessy v. Ferguson,* not only did this Court endorse the oppressive practice of race segregation, but even Justice Harlan, the advocate of a "color-blind" Constitution, stated:
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> > "The white race deems itself to be the dominant race in this country. And so it is, in prestige, in achievements, in education, in wealth and in power. So, I doubt not, it will continue to be for all time, if it remains true to its great heritage and holds fast to the principles of constitutional liberty."
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> Not until *Loving v. Virginia,* which held unconstitutional Virginia's ban on inter-racial marriages, could one say with security that the Constitution and this Court would abide no measure "designed to maintain White Supremacy."[42]

C. Affirmative Action Fits Within the Prejudice Model

The Supreme Court Justices who still weakly defend affirmative action recognize a temporary need to allow public and private entities to engage in race-based decisionmaking. However, as Professor Peller explains, these conceptualizations of race as irrational and of racism as similar to other prejudices that grow out of ignorance combine so as to compel the Supreme Court Justices to seek race-neutral alternatives and limit the use of race in decisionmaking.[43] Moreover, since they are not looking to expand the areas of social life they acknowledge as being affected by race, such as the criminal justice system, they are not susceptible to racialized analyses and/or the need for race-sensitive remedial action. Currently, the Supreme Court acts to minimize the use of race in order to eventually eliminate it from all public and private decisionmaking.[44]

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42. *Id.* at 2134 (Ginsburg, J., dissenting) (citations omitted).

43. *See* Peller, *supra* note 22, at 2248 ("When race as a category is abstracted from its social and historical context, race appears as an arbitrary, irrational factor upon which to make social decisions. . . . Since it was the category of race that was irrational, race consciousness was the evil, regardless of which way it ran.").

44. In *Adarand,* Justice O'Connor asserts, in explaining why even benign racial classifications are impermissible: "Because that perception [that the beneficiaries of preferences are perceived as less qualified]—*especially when fostered by the Congress of the United States*—can only exacerbate rather than reduce racial prejudice, it will delay the time when race will become a truly irrelevant, or at least insignificant, factor." *Adarand,* 115 S. Ct. at 2113 (citations omitted) (quoting

Affirmative action programs may, at one time, have had the potential to challenge the ideology of white supremacy. For example, the distinction between "benign" and "invidious" uses of race could have been retained and expanded by the Court.[45] Moreover, Justice Brennan's analysis in *Metro Broadcasting*[46] could have been the basis for broader and more creative affirmative action programs to subvert racism and its institutional manifestations and to create an alternative progressive ideology based on a racialized cultural pluralism. The Court's emphatic rejection of these analyses makes it difficult to envision the United States' legal system coming to grips with its history in this way.[47]

Recently, courts, state legislatures, and governors have acted to completely prohibit the concept of benign racial classifications

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Fullilove v. Klutznick, 100 U.S. 2758 (1980) (Stevens, J., dissenting)).

45. Justice Thurgood Marshall describes the difference between benign and invidious uses of race:

> A profound difference separates governmental actions that themselves are racist, and governmental actions that seek to remedy the effects of prior racism or to prevent neutral governmental activity from perpetuating the effects of such racism. . . . Racial classifications 'drawn on the presumption that one race is inferior to another or because they put the weight of government behind racial hatred and separatism' warrant the strictest judicial scrutiny because of the irrelevance of these rationales. By contrast, racial classifications drawn for the purpose of remedying the effects of discrimination that itself was race based have a highly pertinent basis: the tragic and indelible fact that discrimination against blacks and other racial minorities in this Nation has pervaded our Nation's history and continues to scar our society.

City of Richmond v. J.A. Croson Co., 488 U.S. 469, 551-52 (1989) (citations omitted). In *Metro Broadcasting*, Justice Brennan provided some historical context to the notion of "benign" uses of race, recalling that nonremedial race-conscious measures are as old as the Fourteenth Amendment. *See* Metro Broadcasting, Inc. v. Federal Communications Comm'n, 497 U.S. 547, 565 (1990). "For example, the Freedman's Bureau Acts authorized the provision of land, education, medical care, and other assistance to Afro-Americans." *Id.*

46. In *Metro Broadcasting*, Justice Brennan concluded that the FCC's minority ownership policies, as mandated by Congress, were subject to an intermediate level of scrutiny, a holding subsequently overturned by *Adarand*, 115 S. Ct. 2097. Justice Brennan wrote for the majority that

> [j]ust as a "diverse student body" contributing to a "'robust exchange of ideas'" is a "constitutionally permissible goal" on which a race-conscious university admissions program may be predicated, the diversity of views and information on the airwaves serves important First Amendment values. The benefits of such diversity are not limited to the members of minority groups who gain access to the broadcasting industry by virtue of the ownership policies; rather, the benefits redound to all members of the viewing and listening audience.

Metro Broadcasting, 497 U.S. 547, 568 (1990) (citations omitted).

47. *See* Hu-DeHart, *supra* note 29.

and other race-sensitive affirmative action mechanisms, thereby stopping the process of racial integration before the entrenched power groups were significantly affected. A historicized understanding of white supremacy suggests that civil affirmative action is currently under such broad attack precisely because it *has been* effective in promoting institutional change. In finding an "enduring aptness to the 'glass ceiling' metaphor," the bipartisan Glass Ceiling Commission and other governmental agencies reach similar conclusions:

> [A]lthough white men constitute a minority of the total work force (47%) and of the college educated work force (48%), they dominate the top jobs in virtually every field. White males comprise 91.7% of officers and 88.1% of directors. White men hold over 90 percent of the top news media jobs. White men constitute over 86 percent of partners in major law firms. White men make up 85 percent of tenured college professors. White men occupy over 80 percent of the management jobs in advertising, marketing and public relations. The median weekly earnings of white males in 1992 were 33 percent higher than those of any other group in America.[48]

The resultant institutional integration has occurred mostly at mid-level jobs rather than at the highest ranks of managers, partners, or public figures. Consequently, civil affirmative action has been only a modest adjustment to race relations in this society. As Professor Manning Marable has noted:

> [A]ffirmative action can and should be criticized from the Left, not because it was too liberal in its pursuit and implementation of measures to achieve equality, but because it was too conservative. It sought to increase representative numbers of minorities and women within the existing structure and arrangements of power, rather than challenging or redefining the institutions of authority and privilege. As implemented under a series of presidential administrations, liberal and conservative alike, affirmative action was always more concerned with advancing remedies for unequal racial out-

48. 41 THE EMPLOYEE ADVOCATE, *supra* note 8, at 2-3 (citing U.S. DEP'T OF LABOR, GOOD FOR BUSINESS: MAKING FULL USE OF THE NATION'S HUMAN CAPITAL, FACT-FINDING REPORT OF THE GLASS CEILING COMMISSION, BNA Supp. (Mar. 16, 1995) [hereinafter GLASS CEILING REPORT] and U.S. DEP'T OF COMMERCE, BUREAU OF CENSUS, 1993 STATISTICAL ABSTRACT OF THE U.S., at 393 tbl.622, 154 tbl.234).

comes than with uprooting racism as a system of white power.[49]

D. Professor Butler's Proposals Fit Within the White Supremacy Model

Professor Butler's implied meaning of "white supremacy" and the one I utilize are conceptually distinct. When using the term "white supremacy" in his earlier article as well as in this symposium issue, he limits it to the white majority's oppressive and repressive relationship with the African American population, dating back to the days of slavery. I favor a different meaning for the same term, one that encompasses the white majority's treatment of many groups of non-white peoples from pre-colonial times to the present. Specifically, my meaning for the term "white supremacy" adopts a broader temporal focus that begins even before slavery, emphasizing a historical link between the colonists' racialization of indigenous peoples—the English in the Northeast and the Spanish in the Southwest—and, later, the English colonists' racialization of peoples of African ancestry. My use of the term encompasses the social mechanisms and the ideas the white majority developed and used to subordinate different non-white groups in varying ways and to different degrees not only in the past, but today as well.

White supremacy is not a process that ended at some nebulous point in the past. Instead, within my definition, current racialization practices, including affirmative action programs, are seen as fitting within a historical pattern of treatment of non-white groups. This definition affords a better understanding of: (1) how affirmative action has been defined, applied, and limited by the Supreme Court; (2) why affirmative action programs exhibit contradictory and inconsistent effects, liberating some subgroups while overlooking others within non-white communities; and (3) why affirmative action jurisprudence will not support Professor Butler's proposal for a radical transformation of criminal justice systems.

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49. Marable, *supra* note 8, at 12; *see also* Richard Delgado, *Affirmative Action as a Majoritarian Device: Or, Do You Really Want to Be a Role Model?*, 89 MICH. L. REV. 1222 (1991) (arguing that affirmative action and its related notion of role-modeling are disempowering to people of color).

Professor Butler's reliance on affirmative action jurisprudence as support for the constitutionality of his proposed reforms is misplaced. His proposals are animated by an understanding of racial power that is consistent with the white supremacist model, one that explains racial inequities as the result of long-term institutionalized racism as opposed to racism that targets individuals within societal institutions.

Professor Butler asks us to imagine a future in which the parameters of race-based programs are re-drawn and no longer cabined by the current jurisprudence.[50] However, his proposals are out of sync with even those Supreme Court Justices (with the possible exception of Justice Ginsburg[51]) who continue to support race-conscious decisionmaking because they subscribe to the prejudice model.

III. PROFESSOR BUTLER'S AFFIRMATIVE ACTION ANALYSIS

A. Specific Observations

Professor Butler argues that an extension of affirmative action propositions and rationales lays the legal foundation for the constitutionality of his six reform proposals.[52] While Profes-

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50. *See* Butler, *supra* note 2, at 844.

51. *See supra* notes 41-42 and accompanying text.

52. *See* Butler, *supra* note 2, at 874-76. Professor Butler particularizes his affirmative action program by identifying the following proposals:

> 1. Retribution shall not justify punishment of any African American criminal defendant.
> 2. Rehabilitation shall be the primary justification of punishment of African Americans.
> 3. African American criminal defendants shall have the right to majority black juries. If convicted, they shall have the right to be sentenced by their majority black juries.
> 4. African Americans shall not be sentenced to death for interracial homicide.
> 5. Effective immediately, African Americans shall be arrested for drug offenses and sentenced to prison only in proportion to their involvement in those crimes, that is, they shall comprise no more than twelve percent of those arrested and twelve percent of those incarcerated. African Americans whose arrest or incarceration increases the total proportion of arrested or incarcerated blacks in excess of twelve percent shall be released from custody.
> 6. Every jurisdiction in the United States shall maintain, by the year 2000, a prison population that accurately reflects the racial diversity of the jurisdiction. The percentage of African Americans in prison shall not exceed their proportion of the population of that jurisdiction by more than two percent.

Id. at 877.

sor Butler's last two proposals are surely the most controversial, I will also briefly examine each of the first four proposals. Although I disagree with several of Professor Butler's justifications for his proposals,[53] I agree with him that implementing these four changes would bring greater justice, humanity, and rationality to the criminal justice system.[54]

What follows is a close reading of Professor Butler's specific proposals. My purpose is twofold: first, to try to anticipate some of the constitutional objections to the proposals and, second, to suggest strategies for crafting Professor Butler's proposals so they fall within conventional affirmative action doctrines.

1. Proposals One and Two: Replacing Retribution with Rehabilitation

Professor Butler explains that the premise for his first two proposals, which would replace retribution with rehabilitation as the justification for the punishment of African Americans, is the past discrimination theory of affirmative action.[55] According to Professor Butler, retribution is unjust because the disproportionate criminality of blacks is the result of slavery and segregation.[56]

These proposals share two common aspects: one aspect advocates attitudinal change within the criminal justice system, and the other advocates the provision of special services. The attitudinal portion of the proposal bears a resemblance to certain components of voluntary affirmative action plans developed by federal contractors in compliance with Executive Order 11,246.

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53. I particularly disagree with Professor Butler's comparison of the process of affirmative action to the "discomforting" "mechanics" of abortion. *See id.* at 845-46. I personally find nothing discomforting about racial preferences and find the comparison with abortion gratuitously provocative and un-illuminating. Moreover, I consider reproductive rights as crucial for women's economic security and occupational mobility as affirmative action.

54. I would not, however, restrict the changes to benefit only African Americans.

55. *See* Butler, *supra* note 2, at 879.

56. *See id.* at 879-80.

Such plans often include policies used by the employer to facilitate the integration of people of color and white female employees into the workforce.[57] At one time, such policies as diversity training, antidiscrimination policies, and complaint resolution procedures were innovative and somewhat controversial;[58] today, they are used by both public and private employers, who frequently include such policies in employee manuals.[59] It has become unnecessary to provide any constitutional justification for such affirmative action mechanisms, which operate, to a large extent, in a race-neutral manner.

Arguably, having people reject retribution in favor of rehabilitation could be compared to diversity training programs in that both seek to change people's behavior in the hopes of changing their core attitudes and values as they pertain to race. Seen in this light, these proposals could be designed so that no racial preference is required for their implementation. For instance, a program could be designed so that all employees in criminal justice (guards, parole and probation officers, secretaries, maybe even lawyers and judges) would be required to participate in training programs that address the benefits of rehabilitation and the ignominy of retribution.[60]

On the other hand, Professor Butler has articulated his first two proposals so as to benefit only African Americans. This

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57. *See* 41 C.F.R. § 60-741.44 (1996) (describing the required contents of affirmative action plans under Exec. Order No. 11,246, Reorg. Plan No. 1 of 1966, 3 C.F.R. 339 (1964-65), *reprinted in* 5 U.S.C. app. at 1522-23 (1994)).

58. On January 18, 1997, I observed on a CSPAN television broadcast Speaker of the House Newt Gingrich saying that he would support these types of practices in response to the question of whether he supported affirmative action.

59. See David Benjamin Oppenheimer, *Understanding Affirmative Action,* 23 HASTINGS CONST. L.Q. 921 (1996), in which the author sorts out what is and, by extension, what is not included within the term affirmative action. He identifies the five following race- and gender-conscious practices as "under the umbrella of affirmative action: (1) quotas, (2) preferences, (3) self-studies, (4) outreach and counseling, and (5) anti-discrimination." *Id.* at 926. The practices involving attitudinal change on the part of correctional system employees correspond to Professor Oppenheimer's fifth category of affirmative action programs, what he calls antidiscrimination.

60. The general public's emphasis on the punishment of criminals and its interest in retribution despite the concomitant recidivism is the subject of numerous books. *See, e.g.,* ALEXIS M. DURHAM III, CRISIS AND REFORM: CURRENT ISSUES IN AMERICAN PUNISHMENT (1994); LOIS G. FORER, A RAGE TO PUNISH (1994); HARM AND CULPABILITY (A.P. Simester & A.T.H. Smith eds., 1996); PRINCIPLED SENTENCING (Andrew von Hirsch & Andrew Ashworth eds., 1992); MICHAEL TONRY, SENTENCING MATTERS (1996).

seems to indicate that his recommendation that "[r]ehabilitation shall be the primary justification of punishment of African Americans"[61] could coexist alongside a regime whereby whites and other non-white groups were imprisoned for retributive reasons. As such, the more conservative members of the federal bench would likely see these proposals as no different from the types of racial preferences that they are determined to eliminate.[62]

Another aspect that Professor Butler's first two proposals have in common is the provision of "job training, physical and mental health care, and treatment of chemical dependencies."[63] These proposals are most likely to pass constitutional muster if they are likened to outreach and counseling programs in affirmative action plans targeting people of color and white women. These latter affirmative action mechanisms have weak allocational consequences. In other words, these programs do not ensure that beneficiaries will end up with jobs or services. Their purpose is to diversify the pool of qualified persons being considered for social benefits. Within such a design, prisoners would be recruited and counseled about existing services that could be of benefit to them once they are released. Nonetheless, even such programs with weak affirmative action features would be susceptible to constitutional challenge as impermissible preference programs, particularly in those jurisdictions that have determined to eliminate all race-based programs.[64]

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61. Butler, *supra* note 2, at 877.

62. In *Adarand Constructors, Inc. v. Pena*, 115 S. Ct. 2097, 2118 (1995), Justice Scalia made it clear that he would not agree to reparations or perhaps even a leveling of the playing field for non-whites. He wrote:

> In my view, government can never have a "compelling interest" in discriminating on the basis of race in order to "make up" for past racial discrimination in the opposite direction .... Individuals who have been wronged by unlawful racial discrimination should be made whole; but under our Constitution there can be no such thing as either a creditor or a debtor race.

Id. (Scalia, J., dissenting).

63. Butler, *supra* note 2, at 880.

64. *See* Erwin Chemerinsky, *The Impact of the Proposed California Civil Rights Initiative*, 23 HASTINGS CONST. L.Q. 999, 1005-06 (1995) (warning that the California Civil Rights Initiative would allow even these types of programs with minimal allocational effects to be challenged as race-based).

2. Proposal Three: Majority Black Juries

Professor Butler's third proposal would require majority black juries and would reallocate the functions of the judge and the jury by allowing the latter to sentence the defendant.[65] Professor Butler offers two rationales for this proposal: the elimination of ongoing discrimination and "essential-diversity, voting rights rhetoric (particularly as it concerns maximization of the minority voice)."[66] With respect to the first rationale, the Supreme Court has not been persuaded by recent arguments that prosecutors are behaving in discriminatory ways in the constitution of juries.[67]

The current law on the racial composition of juries and the related issue of the use of preemptory challenges to potential jurors creates a significant obstacle for Professor Butler's suggested changes. The Sixth Amendment provision guaranteeing a "jury of one's peers" has not been interpreted by the federal courts to require a jury that mirrors the defendant's race. The Court requires only that the jury be drawn from "a cross-section of the community"[68] and does not require that the jury "contain representatives from every group in the community,"[69] much less even contemplate using race as the defining characteristic of the jury. Although a defendant has a right to jury selection procedures that are fair and nondiscriminatory, "a defendant has no

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65. Perhaps the legal justifications that have been formulated for all-male black schools would also support majority black juries. *See, e.g.*, Kevin Brown, *After the Desegregation Era: The Legal Dilemma Posed by Race and Education*, 37 ST. LOUIS U. L.J. 897, 900 (1993) (explicating the legal and cultural contradictions in proposing solutions to the education of African Americans); Pamela J. Smith, *All Male Black Schools and the Equal Protection Clause: A Step Forward Toward Education*, 66 TUL. L. REV. 2003 (1992) (arguing that the resegregation of schools is necessary to remedy past educational discrimination against African American boys).

66. Butler, *supra* note 2, at 880-81. In proffering "essential-diversity" or "maximization of the minority voice" as a second rationale for this proposal, Professor Butler references racial redistricting. *See id.* at 881. An important difference between racial redistricting and jury selection is that all persons end up in a voting district, while some persons are excluded from jury service. However, I am unable to find a doctrinal connection between the democratic concerns that underlie the voting rights cases and this proposal for majority black juries. *See* Shaw v. Reno, 509 U.S. 630 (1993).

67. *See, e.g.*, Hernandez v. New York, 500 U.S. 352, 362 (1991) (accepting the prosecutor's explanation that striking potential jurors for their Spanish language ability was not race- or national origin-based).

68. Thiel v. Southern Pac. Co., 328 U.S. 217, 220 (1946).

69. *Id.*

right to a 'petit jury composed in whole or in part of persons of his own race.'"[70] Recently, in *J.E.B. v. Alabama ex rel. T.B.*,[71] the Supreme Court expanded the *Batson* ruling[72] to prohibit gender-based challenges. However, even this case offers little support for Professor Butler's proposal because prosecutors can continue to use preemptory challenges to strike black women from death penalty cases if the black women are reluctant to impose this punishment.[73] Even this clearly discriminatory practice has not been frowned upon by the federal courts. Short of the Supreme Court overruling these precedents, I fail to see how Professor Butler's proposal could be implemented.

3. Proposal Four: Eliminating the Death Penalty for Interracial Homicides

Professor Butler's fourth proposal would prohibit imposition of the death penalty for interracial homicides. Application of the Court's "death is different" paradigm could allow for implementation of this proposal,[74] but it is unlikely given the pro-death climate in the general population and among lawmakers. Nonetheless, another alternative may be available: *Congress*, even after *Adarand*,[75] may yet have the power under Section Five of the Fourteenth Amendment[76] to enact race-conscious legislation of the type recommended by Professor Butler. Several precedential cases support this assertion. For example, in *Katzenbach v. Morgan*,[77] the Court stated that "Section 5 is a positive grant of legislative power authorizing Congress to

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70. J.E.B. v. Alabama *ex rel.* T.B., 511 U.S. 127, 128 (1994) (Blackmun, J.) (quoting Strauder v. West Virginia, 100 U.S. 303, 305 (1880)).

71. *Id.*

72. *See* Batson v. Kentucky, 476 U.S. 79 (1986) (prohibiting the use of preemptory challenges to eliminate potential jurors on the basis of their race).

73. *See* Lockhart v. McCree, 476 U.S. 162 (1986) (holding that the Constitution does not prohibit the removal of jurors whose opposition to the death penalty prevents them from considering it as a possible sentence).

74. *See* Butler, *supra* note 2, at 883-84.

75. In *Adarand*, Justice O'Connor clarifies that "we need not decide today whether the program upheld in *Fullilove* [*v. Klutznick*, 448 U.S. 448 (1980),] would survive strict scrutiny as our more recent cases have defined it." Adarand Constructors, Inc. v. Pena, 115 S. Ct. 2097, 2117 (1995).

76. Section Five is called the enforcement clause and reads as follows: "The Congress shall have the power to enforce, by appropriate legislation, the provisions of this article." U.S. CONST. amend. XIV, § 5.

77. 384 U.S. 641 (1966).

exercise its discretion in determining whether and what legislation is needed to secure the guarantees of the Fourteenth Amendment."[78] Furthermore, in *Fullilove v. Klutznick*,[79] the Court described the unique remedial powers given to Congress by Section Five of the Fourteenth Amendment in the following manner:

> Here we deal . . . not with the limited remedial powers of a federal court, but with the broad remedial powers of Congress. It is fundamental that in no organ of government, state or federal, does there repose a more comprehensive remedial power than in the Congress, expressly charged by the Constitution with competence and authority to enforce equal protection guarantees.[80]

In the lead opinion in *Adarand*, Justice O'Connor noted that the various Justices have differing views on the nature of the authority delegated to Congress by Section Five and the extent to which the Courts must defer to Congress in its exercise of this authority, but acknowledged that these remain unanswered questions.[81] Section Five may represent the best constitutional foundation for challenging the manner in which the application of the death penalty is skewed in state courts by racial considerations, given that the fundamental purpose of the Fourteenth Amendment is "to secure . . . equal protection of the laws against State denial or invasion"[82] and that the states, not the federal government, are largely responsible for the administration of the death penalty.

In order to establish the necessary factual record to support Section Five action on Professor Butler's death penalty proposal, the Congress could hold hearings to make extensive and specific

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78. *Id.* at 651. In *City of Boerne v. Flores*, 117 S. Ct. 2157 (1997) (holding the Religious Freedom Restoration Act unconstitutional), the Supreme Court, in defining the limits of congressional enforcement power under Section Five of the Fourteenth Amendment, emphasized that the nature of the power is remedial rather than substantive, that is, that the power is limited to measures that remedy or prevent unconstitutional actions.

79. 448 U.S. at 448.

80. *Id.* at 483.

81. *See* Adarand Constructors, Inc. v. Pena, 115 S. Ct. 2097, 2114 (1995). Justice Souter, in dissent, opined that Section Five is "the source of an interest of the national government sufficiently important to satisfy the corresponding requirement of the strict scrutiny test." *Id.* at 2133.

82. *Ex Parte* Virginia, 100 U.S. 339, 346 (1879).

findings about the strong correlation between the imposition of the death penalty and its imposition in cases with non-white defendants and white victims.[83] If the Congress were then to craft a remedial statute that was narrowly tailored to address the identified injustice, the statute might pass constitutional muster.

4. Proposals Five and Six: Capping the Number of African American Prisoners

Professor Butler's fifth and sixth proposals entail the most inflexible use of race-based decisionmaking because they advocate the establishment of caps on the number of African Americans arrested and punished for drug offenses and the number of African Americans incarcerated generally. These proposals turn conventional affirmative action on its head in two respects: first, by using race not as a justification for the *inclusion* of minority members, but as a justification for their *exclusion* from government-sponsored programs, such as prisons; and second, by using race not as a plus among many other criteria,[84] but as the sole and dispositive criterion for releasing prisoners. Professor Butler asserts that either the legal justification of combating ongoing discrimination or "parity-diversity" would be the premise for these proposals.[85] He argues that imprisoning far fewer African Americans would lower the overall total of persons imprisoned because the "punishment of African Americans would be 'leveled down' as opposed to the punishment of whites being 'leveled up.'"[86] This would result in a substantial decrease in the money now spent to support prisons as well as "a net increase in public safety."[87]

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83. The Congress, unlike other administrative and judicial bodies, may legislate without compiling a factual record and can take account of the "abundant historical basis . . . which . . . could perpetuate the effects of prior discrimination." *Fullilove*, 448 U.S. at 449-50.

84. *See* Ian Ayres, *Narrow Tailoring*, 43 UCLA L. REV. 1781 (1996). "[T]he term 'credit' has been loosely interchangeable with the terms 'plus-factor,' 'plus,' or, most generically, 'preference.' . . . By credits, I mean a preference that forces minorities to compete with whites for government benefits, but gives minorities an advantage over similarly situated whites." *Id.* at 1800-01.

85. *See* Butler, *supra* note 2, at 853 (explaining "parity-diversity" as "measur[ing] the fairness of resource allocation by its racial effect").

86. *Id.* at 887.

87. *Id.* at 888.

I am of two minds about Professor Butler's "radical"[88] proposals (as I am about the more general aspects of this reform project). As I state later, I fear that proposing changes that have no possibility of being implemented under the current political regime diverts us from the more difficult work of designing remedial programs that are palatable to those in power and that stand a chance of improving the material conditions of communities of color.[89] At the same time, I completely agree that the drug laws and their consequences are irrational, draconian, and indefensible, and must be challenged as contrary to the interests of both the white majority and communities of color.[90]

Several unanswered questions may determine the salience of the various justifications that Professor Butler proffers.

5. What Legal Entity Would Implement the Proposals: The President, Congress, States, or Municipalities?

Professor Butler's six race-based proposals for transforming the criminal justice system could be implemented through various means. They could be instituted via presidential action, such as an executive order along the lines of the aforementioned Executive Order 11,246;[91] congressional action, such as the FCC

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88. Professor Butler tells us that he proudly accepts the description "radical", "because it suggests the degree of [his] discomfort with the status quo." Butler, *supra* note 3, at 689 n.67.

89. *See infra* Part III.B.

90. *See* Butler, *supra* note 2, at 864 & n.91. "African Americans comprise thirteen percent of drug consumers, a figure roughly equivalent to their percentage of the population. Yet thirty-three percent of all people arrested for drug use and seventy-four percent of all people incarcerated for drug use are African Americans." *Id.* at 864

91. Exec. Order No. 11,246, 30 Fed. Reg. 12,319 (1965); *see* Michael H. LeRoy, *Presidential Regulation of Private Employment: Constitutionality of Executive Order 12,954 Debarment of Contractors Who Hire Permanent Striker Replacements*, 37 B.C. L. REV. 229, 297 (1996) (expressing the opinion that, after *Adarand*, the courts are increasingly likely to review the President's use of federal contracts for other social and economic goals). Executive orders issued by the President raise a difficult separation of powers question: "Whether the contemporary President and Congress share lawmaking powers, or whether the President's powers are confined to those expressly enumerated in Article II." *Id.* at 231. Such orders have been an important source of executive authority and have been used frequently to resolve labor disputes, to regulate wages and hours, and to address the problem of racial discrimination in federal employment. *See id.* at 236. In 1941, President Roosevelt issued Executive Order 8802 ending racial and religious discrimination in defense

preferences at issue in *Metro Broadcasting*;[92] or judicial approval of a consent decree[93] or entry of the court's own order.[94]

Adarand revealed that the standard of review for any equal protection challenge to, or appeal of, any one of these race-based initiatives will be strict scrutiny regardless of the nature (federal, state, or private) of the initiating entity.[95] Conceivably, a court that has made findings of discrimination will have greater leeway in fashioning a race-based remedy, but the scope of the remedy will be limited to the nature of the violation and limited to the identified victims.[96] *Adarand* leaves open the question of whether a congressional enactment would withstand constitutional challenge although it might if it, too, were enacted under Section Five of the Fourteenth Amendment.[97] If it were an executive branch initiative, it would likely face greater resistance than a congressional initiative would because the executive lacks enforcement powers expressly granted to the Congress under Section Five of the Fourteenth Amendment.[98] Thus, the Supreme Court would probably refuse to defer to the race-based policies formulated by the executive branch; therefore, in all likelihood, the Court would subject an executive order to the same strict scrutiny applied to congressional enactments.[99]

However, the appropriate inquiry does not end with agreement regarding the correct standard of review to be applied to Butler's proposals. This is because the identity of the legal actor initiating Professor Butler's proposals would determine which affirmative action cases the Court would rely upon as precedent

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employment. *See id.* at 252-53. Subsequent presidents used executive orders to expand the prohibitions against discrimination, to create employment opportunities, and to enact affirmative action programs. *See id.* at 252-61. Only one executive order has been successfully challenged in the courts. *See* Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579 (1952).

92. Metro Broadcasting, Inc. v. Federal Communications Comm'n, 497 U.S. 547 (1990).

93. *See, e.g.*, Local 93, International Ass'n of Firefighters v. City of Cleveland, 478 U.S. 501 (1986) (approving a consent decree creating an affirmative action promotion plan for blacks and Hispanics).

94. *See, e.g.*, U.S. v. Paradise, 480 U.S. 149 (1987) (affirming lower court's order requiring the Alabama state troopers to promote one black trooper for every white trooper promoted).

95. *See* Adarand Constructors, Inc. v. Pena, 115 S. Ct. 2097, 2113 (1995).

96. *See Paradise*, 480 U.S. 149.

97. *See supra* text accompanying notes 75-83.

98. *See supra* text accompanying notes 75-83.

99. *See Adarand*, 115 S. Ct. at 2113.

for its analysis. In other words, precedential cases would vary depending on whether the initiating agency is a federal entity or a state or local municipality. For example, if the executive branch or Congress were to implement Professor Butler's proposals and the statute were then challenged, the equal protection analysis would involve the Fifth Amendment Due Process Clause (a *Fullilove/Metro Broadcasting/Adarand* issue). If the states or a local municipality were to implement Professor Butler's proposals, the equal protection analysis would involve the Fourteenth Amendment (a *Croson*-type issue). My point is that Professor Butler has not clarified which governmental entity might implement his proposals, and the various choices can increase the likelihood of these proposals having some viability or being immediately moribund.

6. Are Professor Butler's Proposals Preferences or Quotas?

Although Professor Butler defines affirmative action in terms of "preferences," his fifth and sixth recommendations[100] seem to be quotas, not preferences. These proposals define a maximum level of participation by a racial group and direct governmental entities to develop programs to implement these numerical rates of incarceration.[101]

Succinctly stated, I know of no legal precedent that would allow quota programs to be implemented by any type of entity, public or private, federal or state, congressional or executive.[102]

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100. To paraphrase, his recommendations are that (1) African Americans be arrested and incarcerated for drug crimes at a percentage equal to their percentage of the total population; (2) they be released from custody until no more than 12% of all inmates are African American; and (3) prison populations reflect the population of the jurisdiction. *See* Butler, *supra* note 2, at 877.

101. *See generally* Ayres, *supra* note 84 (asserting that the analysis differentiates between quotas and credits, either of which can be rule- or standard-based).

102. *See* City of Richmond v. J.A. Croson Co., 488 U.S. 469 (1989). Justice O'Connor, in the lead opinion, states that

> the city's only interest in maintaining a quota system rather than investigating the need for remedial action in particular cases would seem to be simple administrative convenience. But the interest in avoiding the bureaucratic effort necessary to tailor remedial relief to those who truly have suffered the effects of prior discrimination cannot justify a rigid line drawn on the basis of a suspect classification.

Id. at 508.

As Professor Oppenheimer notes: "We may argue the merits of affirmative action quotas, but the Court has foreclosed any further experiments with such plans. They are a dead letter."[103] Moreover, it is equally unlikely that, even after making specific findings of discrimination, the federal courts could craft a remedy sufficiently broad in scope so as to implement these proposals. In other words, litigation would have to proceed prison by prison, alleging and proving discrimination by individuals. Only then could the courts fashion orders releasing convicted prisoners.

If these two proposals are read as involving targets or goals,[104] they still face several constitutional hurdles. Suffice it to say that any entity developing and implementing race-based proposals that entail releasing African Americans from prison would have to overcome strict scrutiny. Under this two-prong test, the entity would have to demonstrate that Professor Butler's proposed racial preferences were narrowly tailored to achieve a compelling governmental interest, and that no alternative race-neutral means for accomplishing racial equity in criminal law existed.[105] In all likelihood, this constitutional standard would bar implementation of these proposals.

7. How Would Strict Scrutiny Be Applied to Professor Butler's Proposals?

Professor Butler offers a diversity rationale as a justification for affirmative action or race-based preferences and offers two alternative definitions of diversity: "essential diversity," which uses race as a proxy for perspective, and "parity-diversity," which "measures the fairness of resource allocation by its racial effect."[106] Professor Butler sees this second definition as "more persuasive" than the first.[107] While I agree that it may be persuasive, courts do not share this sentiment. The Supreme Court has rejected allocational schemes, such as Professor

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103. Oppenheimer, *supra* note 59, at 926.

104. The proposals, if viewed as targets or goals, would be similar to the goals and timetables generated by federal contractors after they conduct utilization/availability studies, pursuant to Executive Order 11,246. *See* Exec. Order No. 11,246, 3 C.F.R. 339 (1964-1965), *reprinted as amended in* 42 U.S.C. § 2000e, n (1994).

105. *See* Adarand Constructors, Inc. v. Pena, 115 S. Ct. 2097, 2113 (1995).

106. Butler, *supra* note 2, at 852, 853.

107. *Id.* at 853.

Butler's proposals, that are based on population profiles.[108] But let us assume that an argument can be made against this prerequisite that race-neutral mechanisms be exhausted. There are still formidable narrow tailoring requirements that Professor Butler has not addressed. The case law articulates clear standards for constitutionally permissible race-based preferences:

> First, the plan must be flexible, eschewing strict quotas in favor of fluid and amendable goals and timetables . . ., rather than mere by-the-numbers decisionmaking. Second, the plan must be temporary, continuing only as long as necessary to correct the problem it addresses. Third, the plan must not interfere with the legitimate settled expectations of incumbent majority members . . . .[109]

Professor Butler must provide more specifics about how the prison release would be implemented—that is, how flexible goals would be determined by each jurisdiction, the duration of each program, and how the rights of white victims or inmates are not adversely affected by this plan—before his proposals could be seriously considered.

B. General Observations

I am frankly of two minds about Professor Butler's proposals. I agree with much of his underlying analysis of the inequities of the criminal justice system: people of color are more involved in criminal activity because of the squalor of their living conditions and lack of training or job possibilities.[110] Thus, they are arrested, imprisoned, and sentenced to death in numbers that are greatly disproportional to their representation in the total population,[111] and communities of color are seriously weakened

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108. In *City of Richmond v. J.A. Croson Co.*, Justice O'Connor could find no goal to support the 30% set-aside, except perhaps "outright racial balancing," which she considers so out-of-the-question that she does not even analyze it. 488 U.S. at 507. Instead she dismisses it without comment. *See id.* at 507.

109. Oppenheimer, *supra* note 59, at 935 (citation omitted).

110. *See* Butler, *supra* note 2, at 860-62; *see also* WILLIAM JULIUS WILSON, THE DECLINING SIGNIFICANCE OF RACE 23 (1978) (positing that the elimination of racial discrimination is necessary but not sufficient to secure economic integration for African Americans).

111. *See* Butler, *supra* note 2, at 865-66.

because of this cycling of people in and out of prisons.[112] I also agree that race (and racism) play a significant role in the operation and implementation of the criminal law,[113] including the use of the death penalty.[114] I agree that race-conscious measures are necessary to correct many of these abuses. However, I do not agree that affirmative action can be the legal architecture with which to rebuild the criminal justice system. Thus, Professor Butler and I differ in the means we would employ to accomplish our agreed-upon objective of radically changing the criminal justice system.[115]

I am, however, of two minds about Professor Butler's proposals for another reason—a substantive reason grounded in power, politics, and the role of theorists of color in promoting social change advantageous to communities of color. Specifically, I wonder whether trying to attach the massive inequities of the criminal law to the weak foundation of civil affirmative action makes political sense. Are Professor Butler's proposals so unconventional as to distract us from focusing on theories that are more likely to lead to positive changes for communities of color? At first blush, I think many, especially whites, would dismiss his proposals. Upon reflection, however, we are forced to ponder why this society, whose history is interwoven with racism, resists developing race-sensitive solutions to clearly race-linked problems. If affirmative action jurisprudence, as currently articulated by the courts, is not appropriate, then what alternative race-conscious legal mechanisms can we even imagine and then formulate for correcting the race-based inequities of the criminal justice systems?

Professor Butler's thesis evokes programs that are premised on a historical, *retrospective* view of race, a view that acknowledges race as a conceptual outgrowth of white supremacy.

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112. *See id.* at 864 n.88 (citing an article that argues that minority communities are better off with more law enforcement and Butler's own article that rebuts this argument).

113. *See id.* at 864-66 (arguing that race is already a consideration in the administration of justice, as exemplified by police uses of racial profiles, the racial segregation of prisons for reasons of security or discipline, or minority preferences in the hiring of prison guards).

114. *See id.* at 882-83.

115. The televised criminal trial of O.J. Simpson in the Fall of 1995 convinced many people, for varying reasons, that changes should be made in the administration of criminal justice. I consider the matter to be *sui generis* because of the wealth and celebrity of the defendant and the excessive media attention.

Professor Butler's thesis also suggests a historicized, *prospective* view of race, a view of race as a concept with the potential to dismantle racial hierarchies, constitute positive individual and collective identities, and promote social cohesion.

Those of us who are proponents of affirmative action have defended it from attacks, both theoretical and political. Civil affirmative action, as weak as it has been in addressing structural and institutional arrangements, is all we have had. Perhaps the primary virtue of Professor Butler's article is its clamor for more ambitious, more subversive theories and programs of change.

Although Professor Butler's proposals to release convicted felons cannot meet constitutional requirements, the criminal justice system is ripe for the enactment of a wide range of other reforms. Unfortunately, Congress and the President have recently passed up opportunities to implement such changes. For example, in 1995, the President refused the recommendations of the United States Sentencing Commission to equalize the penalties for possession of crack and powder cocaine.[116] Similarly, Congress twice failed to pass the Racial Justice Act.[117] Nonetheless, improvements, such as the equalization of sentences for similar drug-related crimes committed by whites and non-whites, are urgently needed to insure racial justice in the administration of criminal law.

One additional reality dooms Professor Butlers proposals, especially those that require a determination of the inmate's race. If racial identities are socially constructed rather than biologically

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116. *See* President's Statement on Signing S. 1254 (Oct. 30, 1995), *available in* 1995 WL 634347, at *1.

117. H.R. 4092, 103d Cong., 2d Sess. Title IX (1994), *reprinted in* 140 CONG. REC. H2655-56 (daily ed. Apr. 25, 1994). In 1994 the House of Representatives approved the Racial Justice Act, but it was later dropped from the Crime Bill in conference with the Senate. A 1990 version had met with the same fate. The Act would have permitted defendants to present data raising an inference that the death sentence was imposed with a racial motivation. The Act also specified the process by which the government could rebut the inference. If it was unable to do so, the Act prohibited the imposition of the death penalty. *See* Symposium, *Violent Crime Control and Law Enforcement Act of 1994: The Racial Justice Act*, 20 U. DAYTON L. REV. 557, 653 (1995). *See generally* Don Edwards & John Conyers, Jr., *The Racial Justice Act—A Simple Matter of Justice*, 20 U. DAYTON L. REV. 699 (1995); Daniel E. Lungren & Mark L. Krotoski, *The Racial Justice Act of 1994—Undermining Enforcement of the Death Penalty Without Promoting Racial Justice*, 20 U. DAYTON L. REV. 655 (1995).

fixed,[118] then the possibility of bogus or newly adopted racial identities must be addressed. During the height of segregation, courts routinely determined the racial identities of litigants; more recently, courts have moved away from involving the government in determining the race of a particular person.[119]

Under Professor Butler's proposals, it would be very favorable for prison inmates to self-identify or to be determined to be African American. As such, attempts at falsifying racial identities or claiming an African American identity based on an attenuated blood line would likely follow. This, in turn, could necessitate government enactment of pernicious rules, similar to the "one drop" rule,[120] to determine racial identities.[121]

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118. *See* IAN F. HANEY LÓPEZ, WHITE BY LAW: THE LEGAL CONSTRUCTION OF RACE xiv (1996) ("'White' does not denote a rigidly defined, congeneric grouping of indistinguishable individuals. It refers to an unstable category which gains its meaning only through social relations and that encompasses a profoundly diverse set of persons."); *see also* Margaret E. Montoya, *Bordered Identities: Narrative and the Social Construction of Legal and Personal Identities, in* CROSSING BOUNDARIES: TRADITIONS AND TRANSFORMATIONS IN LAW AND SOCIETY RESEARCH (Austin Sarat et al. eds., forthcoming 1998).

119. *See* Kenneth L. Karst, *Myths of Identity: Individual and Group Portraits of Race and Sexual Orientation*, 43 UCLA L. REV. 263 (1995). Professor Karst explains:

> In the field of race relations much remains to be done to make good on the constitutional promise of equal citizenship. Yet it does seem that the nation has turned a corner in one respect: Government largely leaves it to individuals to define—the sociologists would say, negotiate—their own racial identities. The census form asks for racial self-identification, and the government ordinarily does not second-guess individual responses. The form is designed, not to police the boundaries of racial identities, but to permit the sorting of personal data into demographic categories. Surely the policy of self-definition is a healthy one.

Id. at 328.

120. *See* F. JAMES DAVIS, WHO IS BLACK?: ONE NATION'S DEFINITION (1991).

121. In *Fullilove*, Justice Stevens articulated a serious concern about defining the race of individual citizens:

> [T]he very attempt to define with precision a beneficiary's qualifying racial characteristics is repugnant to our constitutional ideals. . . . If the National Government is to make a serious effort to define racial classes by criteria that can be administered objectively, it must study precedents such as the First Regulation to the Reichs Citizenship Law of November 14, 1935 . . . .

Fullilove v. Klutznick, 448 U.S. 448, 534 n.5 (1980) (Stevens, J., dissenting). One commentator notes that Justice Stevens' expressed concern is

> ultimately not persuasive. Racial classifications need not turn on the arcane measures of consanguinity used in the Nuremberg laws, South Africa's Apartheid or our own Jim Crow regimes. . . . Defining an individual's race by making inferences (or possibly requiring evidence) about whether she was exposed to disparate treatment should not raise the same constitutional concerns.

Ayres, *supra* note 84, at 1798-99 (citations omitted).

Professor Butler's proposals raise a gender-based concern as well. Women of all races are currently incarcerated at rates far below their proportional representation in the total population.[122] Does Professor Butler propose to increase the numbers of women who are incarcerated in order to have the prison population match the demographic profile of the general population? He answers in a footnote:

> [S]hould women be proportionately incarcerated, that is, should women comprise 50% of those in prison? Once again the answer might depend upon the reason for the disparity. Is it possible that men are more dangerous or immoral, for reasons that are deserving of punishment? . . . I would punish men even if the gender disparity in their criminality stems from biology.[123]

Thus, Professor Butler fails to conclusively analyze the issue of gender proportionality. If his proposals do implicate an increase in the imprisonment of women, what principled reason could be offered to convince African American women to accept an increased burden of arrest and incarceration?

For the foregoing reasons, I disagree with Professor Butler's assertion that current civil affirmative action jurisprudence would create a legal foundation upon which to establish his criminal law proposals. Regardless of my conclusion that Professor Butler's proposals ultimately might lead to a more just society, the Supreme Court opinions that birthed the concept of affirmative action are not sufficiently elastic to embrace these reforms.

IV. COMPLEXITIES OF RACIALIZED PERSPECTIVES

Professor Butler's article tentatively explores the possibility for reconciliation around issues of race and uses the concept of affirmative action to examine the outer edges of this society's commitments to equality and inclusion. In this section I critique Professor Butler for not heeding his own call for an expansive

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122. White women comprise more than half of the population but only comprise seven percent (or 7657 women) of the federal prison population. *See* BUREAU OF JUSTICE STATISTICS, U.S. DEP'T OF JUSTICE, SOURCEBOOK OF CRIMINAL JUSTICE STATISTICS-1995, at 563 (Kathleen Maguire & Ann L. Pastore eds., 1996).

123. Butler, *supra* note 2, at 887 n.172.

application of race-based solutions to the inequities of the criminal justice system. Specifically, I chide Professor Butler for two reasons: first, for using the concept of race as virtually co-extensive with the African American experience, and second, for accepting, without problematizing, the conservative opinion that race is an inaccurate proxy for group perspectives. Finally, I credit Professor Butler for surfacing some of the inconsistencies in civil affirmative action when refracted through the lens of the inequities of the criminal justice system.

A. Distortions of Black/White Binary Analyses

Professor Butler explains that he focuses "on African Americans because of their extreme participation in the criminal justice system compared with other groups."[124] I believe his statement reveals a weakness in his understanding of the power of white supremacy.

Professor Butler's claim that *African American* criminality is rooted in "the disease of white supremacy"[125] oddly disregards the comparable reality of Latino/a economic deprivation and disproportionate incarceration rates. On January 30, 1997, the *New York Times* carried a front page, top of the fold, article with the following headline: "Hispanic Households Struggle Amid Broad Decline in Income."[126] This article included a graph showing that while the family income of whites increased by 2.2%, and that of African Americans by 9.9% in the period from 1992-1996, the family income of Hispanics, whether American-born or newly arrived, fell by 6.9%.[127] These economic statistics have their unfortunate corollaries in Latino imprisonment rates: the states with the four largest prison populations, California, Texas, New York, and Florida, all have substantial Latino/a populations. Approximately one-third of the prison populations of California and New York are Latino/a, although the percentages of Latinos/as in the general population are twenty-seven percent and thirteen percent, respectively.[128]

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124. *Id.* at 857 n.71.

125. *Id.* at 862.

126. Carey Goldberg, *Hispanic Households Struggle Amid Broad Decline in Income*, N.Y. TIMES, Jan. 30, 1997, at A1.

127. *See id.*

128. *See* BUREAU OF JUSTICE STATISTICS, *supra* note 122, at 563. These statistics do not disaggregate inmates by drug offenses.

I am not trying to make a dash for the bottom on behalf of Latinos/as,[129] nor am I taking issue with the fact that African Americans are unconscionably overrepresented in prisons. Instead, I am making a somewhat different point: Race relations in this country are extremely complex. White supremacy is experienced by non-white groups in *different* ways in *different* geographic regions under *different* historical conditions. Professor Almaguer provides a particularly cogent analysis of this complexity. Because the scholarly understanding of "race" has developed in the shadow of the black/white encounter, academics have typically focused on national racial demographics and have overlooked racial dynamics in the American Southwest.[130] He identifies three consequences of this academic oversimplification:

> (1) [W]e tend to see 'race relations' as a binary and bipolar relationship, a perspective that offers little understanding of what happens when more than two racialized groups are competing; (2) we often view race and class hierarchies as neatly corresponding or symmetrical, as in the prototypical slaveowner/slave relationship; and (3) we generally assume that racializing discourses and practices are derived from or mask other, more fundamental underlying structures such as the class relationship between capital and labor.[131]

Thus, I posit that a multi-racial and cross-gendered analysis

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129. Professor Almaguer explains how the relative position of different groups shifts over time:

> [T]he social character of "race" and the racialization of Mexicans in California . . . speak to ways in which race is fundamentally a sociohistorical category that is historically contingent. Although I have argued that nineteenth-century Mexicans occupied an "intermediate" group position in the racial hierarchy that white supremacy structured at that historical moment, this century has witnessed the reconfiguration of these racial fault lines. What is perhaps most obvious to me today is the reassignment of Mexicans—especially the undocumented, non-English-speaking population—to the bottom end of the new racial and ethnic hierarchy. They are part of the contemporary subaltern class of non-citizen Latino and Asian workers still bound by exploitative labor relations which harken back to the nineteenth century.

ALMAGUER, *supra* note 19, at 212; *see also* DAVID MONTEJANO, ANGLOS AND MEXICANS IN THE MAKING OF TEXAS, 1836-1986 (1987) (providing a sociological and historical account of the conflict and accommodation that characterized the border region of Texas, including detailed descriptions of the organization of labor markets divided by race; the territorial displacements of Mexicans; the legal segregation of housing, employment, and education; and the struggle for political and social inclusion).

130. *See* ALMAGUER, *supra* note 19, at 2.

131. *Id.*

would reveal structures of subordination within the context of the criminal justice system more accurately than Professor Butler's binary racial construct. Moreover, such an analysis is more consistent with the historicity of "race" and provides a vocabulary that moves us beyond the black/white model that characterizes much of what is written about racial groups.[132]

B. Practices of Universalizing Racialized Perspectives

Professor Butler acknowledges "some sympathy with the traditional critique of diversity"[133] (presumably that it stereotypes African Americans as having collective and universalized perspectives)[134] and states that "[r]ace is a troubling and usually inaccurate proxy for perspective."[135] Yet, both of his articles proceed on the assumption that race tells us something important about how African Americans as a group view the world and how they act in it. African Americans are presumed by Professor Butler to possess some common perspectives about the criminal law, race, and justice. I fail to understand why the use of race as a proxy is troubling for Professor Butler in the context of affirmative action and, specifically, as a means of achieving some diversity within institutions of higher education[136] or within the broadcasting industry,[137] but less troubling with respect to juries or the collective perception within the black community about the urgency of dismantling the criminal justice system. Why is Professor Butler troubled by others who assume that African Americans share perspectives in the context of affirmative action? Why is he troubled by others who universalize racial perspectives,

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132. Two works that I have drawn on for this article are good examples of works that focus almost exclusively on the African American experience when analyzing race relations, *viz*, Peller, *supra* note 22, and TONRY, *supra* note 17.

133. Butler, *supra* note 2, at 853.

134. This critique has been expressed by several members of the current Supreme Court. For example, after comparing a congressional mandate of racial preferences in FCC licensing policies to Jim Crow segregation, South Africa's apartheid, and the Nazi citizenship laws, Justice Kennedy observed that "the FCC policy seems based on the demeaning notion that members of the defined racial groups ascribe to certain 'minority views' that must be different from those of other citizens." Metro Broadcasting, Inc. v. Federal Communications Comm'n, 497 U.S. 547, 636 (1990).

135. Butler, *supra* note 2, at 853.

136. *See* Regents of the Univ. of Cal. v. Bakke, 438 U.S. 265 (1978).

137. *See Metro Broadcasting*, 497 U.S. at 547.

but not troubled by his own universalizing in the context of the criminal law?

My own position is that, while conceding that it can be both over- and under-inclusive, race has been, and in many respects still is, a fairly accurate proxy for group-identified perspectives. Families, neighborhoods, and racial groups have shared narratives that construct individual and collective understandings of race.[138] We have fairly reliable data that proves that groups have shared perspectives with respect to voting; African Americans tend to vote for African American candidates, just as Latinos/as tend to vote for Latino/a candidates. Consequently, we have racial redistricting. We also know that members of different racial groups prefer to be treated by doctors from their own racial group.[139] Madison Avenue knows that products from cars to jeans can be effectively marketed to discrete racial groups. Several cosmetic companies have developed make-up lines that target African American women, while others target Latinas. All of this is evidence of group preferences, of race operating as a proxy for ideas, viewpoints, and desires.

Any expansion of affirmative action programs beyond the confines of identified discrimination depends on a diversity rationale, for example, seeing race as at least an adequate proxy for viewpoints and ideas. Consequently, if one understands race as an attribute that is irrational and, therefore, something to be overcome, then race-based diversity programs are implicitly wrong.[140] If, on the other hand, one understands race as a positive source of personal and collective identity that provides a meaningful connection to a racialized community's past, then race-based programs are desirable, and, indeed, crucial for racial justice.[141]

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138. *See* Montoya, *supra* note 118 (analyzing how narratives construct and transform personal and collective identities while mediating the hegemonic effects of the legal system's construction of our formal legal identities).

139. *See* Coalition for Econ. Equity v. Wilson, 946 F. Supp. 1480, 1498 (N.D. Cal. 1996) ("On average, black physicians care for nearly six times as many black patients and Hispanic physicians care for nearly three times as many Hispanic patients as other physicians."), *vacated*, 110 F.3d 1431 (9th Cir. 1997).

140. For an example of this conceptualization, see Hopwood v. Texas, 78 F.3d 932, 945 (5th Cir.) (Smith, J.) ("The use of race, in and of itself, to choose students simply achieves a student body that looks different. Such a criterion is no more rational on its own terms than would be choices based upon the physical size or blood type of applicants."), *cert. denied*, 116 S. Ct. 2581 (1996).

141. Professor Peller writes,

Affirmative action fosters a greater diversity of perspectives within racial groups. Persons who benefit from racial preferences are likely to have different life experiences, that is, holding better jobs or enjoying better educational opportunities and less overt discrimination. As a result, they are likely to develop different values, preferences, and perspectives, and perhaps more open-mindedness than those persons from their racial group who have not so benefited. For this reason, I would venture to guess that there is much greater diversity of opinion about Professor Butler's proposals among African American lawyers, judges, and law professors than among lower income African Americans.

C. Cross-Fertilizing Analyses of White Supremacy

Those of us who focus on increasing racial justice through the civil law can conclude, at least at moments, that the society's mechanisms for racial oppression have weakened. Those who focus on the injustices of the criminal law have not been so sanguine. Professor Butler's interdisciplinary paper reminds us that constant study of the interrelated mechanisms of the civil and criminal systems is the only means of arriving at a fuller understanding of the self-sustaining nature of white supremacy. Professor Butler laudably seeks to transpose the nascent benefits of affirmative action in the civil law upon the criminal system as a possible remedy for comparable racial injustices. Linking the correlative effects of the criminal and civil systems is Professor Butler's thematic objective. His analysis attempts to subvert criminal justice systems that disproportionately discriminate against African Americans by invoking the emancipatory potential of race-based civil law decisions. I enthusiastically endorse his attempt to develop this linkage.

> [Black] nationalists contended that racial identities were historic, meaningful and constituitive of the Black community's and Black people's individual identity. For nationalists, it wasn't race consciousness that marked racism, but rather the hierarchical power relations that defined white and black communities. . . . From the nationalist view, the idea of transcending racial identity in the name of "colorblindness" and "integrationism" was an invitation to assimilation to white culture and a corresponding "painless genocide" of the Black community.

Peller, *supra* note 22, at 2249. For a detailed description of the emergence of Chicano student activists in the late 1960s and the history of the Chicano Power Movement within more nationalized social protests, see CARLOS MUNOZ, JR., YOUTH, IDENTITY, POWER: THE CHICANO MOVEMENT (5th prtg. 1993).

We who support and defend race-based preferences have not done enough work to understand how both liberal and conservative programs have created fissures in the structures of subordination; civil affirmative action has widened these fissures by granting some people of color greater opportunity and economic security. Many of these programs have been a "brain drain" on communities of color. Those who could leave the inner city, the *barrio,* or the ghetto often did so with devastating consequences for the communities of color who were left with few role models, thin tax bases, and deteriorating infrastructures. The absence of criminal affirmative action has exacted and exacerbated tremendous suffering from the poorest sectors of our communities. Thus, white elites have maintained their power by loosening their hold on some segments of the society while concurrently tightening their grip on communities of color at the lower end of the economic spectrum. This reality is evidenced by the fact that some of us are considerably better off—even as members of our extended families or other parts of our racial and ethnic communities are caught in conditions of deplorable deprivation. Such conditions, not surprisingly, contribute to increased criminality by some people of color; this, in turn, reinforces attitudes of racial bigotry not only among some whites but also among some people of color. These perceptions lead to inter-group as well as intra-group racial tensions and disunity.

CONCLUSION

Affirmative action analyses that focus on institutions of higher education,[142] glass ceilings,[143] set asides,[144] and radio licenses[145] do not directly address the problems of communities of color struggling to survive on a day-to-day basis. Professor Butler's article forces our attention on those at the bottom:[146]

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142. *See* Regents of the Univ. of Cal. v. Bakke, 438 U.S. 265 (1978).

143. *See* GLASS CEILING REPORT, *supra* note 48.

144. *See* Adarand Constructors, Inc. v. Pena, 115 S. Ct. 2097 (1995); City of Richmond v. J.A. Croson Co., 488 U.S. 469 (1989); Fullilove v. Klutznick, 448 U.S. 448 (1980).

145. *See* Metro Broadcasting, Inc. v. Federal Communications Comm'n, 497 U.S. 547 (1990).

146. *See* Mari J. Matsuda, *Looking to the Bottom: Critical Legal Studies and Reparations,* 22 HARV. C.R.-C.L. L. REV. 323 (1987) (urging criticalists to listen to and learn from the stories of people at the bottom).

those he calls "the most dangerous and pathetic victims: black criminals."[147] Intense collaboration between those of us who teach and write about race-based decisionmaking by governmental and private entities and those who work to reform and transform criminal justice systems is a prerequisite to bringing about effective social change.

Affirmative action mechanisms have been indispensable to the integration of this society; affirmative action programs are of continuing value because racial integration is always contested by the white majority and, as a result, integration remains only partial. I agree with Professor Butler that the extreme overrepresentation of men, and more recently women, of color in prisons and jails is the most blatant example of the continued vitality of white supremacy.[148] The criminalization decisions of this society—what is deemed a crime, who gets charged, who gets convicted, who is deprived of adequate legal assistance, who gets incarcerated and for how long, together with the demonization and discarding of young offenders—expose how societal processes of racialization change and adapt slowly over time, while simultaneously preserving the advantages of whites over non-whites in the racial hierarchy.[149] Thus, the lives of far too many African Americans are being wasted by their disproportionate representation within prisons. Professor Butler is an eloquent and passionate advocate for the need to radically transform the federal and state criminal justice systems.

In closing, let me express the hope that symposia such as this one will explore explanations for how and why constructs of "race" have condemned too many African Americans and others to live

147. Butler, *supra* note 2, at 845.

148. For a provocative discussion of the similarities in form and substance between penitentiaries and slavery, see ADAM JAY HIRSCH, THE RISE OF THE PENITENTIARY: PRISONS AND PUNISHMENT IN EARLY AMERICA (1992). Drawing connections between chattel slavery and penal slavery, Hirsch writes that "because of the high rate of recidivism, many more convicts became, in effect, permanent residents of the penitentiary." *Id.* at 74.

149. *See* Richard Delgado, *Rodrigo's Eighth Chronicle: Black Crime, White Fears—On the Social Construction of Threat*, *in* THE RODGRIGO CHRONICLES: CONVERSATIONS ABOUT AMERICA AND RACE (1995) (using the fictional mugging of a law professor to illustrate how the white family structure contributes to the antisocial behaviors that engender white-collar crime. The resultant costs to society greatly surpass those of street crimes; yet, such crimes are rarely prosecuted vigorously, and, more importantly, the perpetrators are not vilified.).

in "iron cages."[150] Perhaps the safety, economic security, and ideological distance the ivory tower provides those of us who have escaped the *barrio* or the ghetto will allow us to gestate ideas and implement strategies that materially improve the lives of the most marginalized individuals and our respective communities.

150. *See* TAKAKI, *supra* note 32.