University of Colorado Law Review

Volume 92
Issue 5 *A Retrospective on Race in America*

Article 6

2021

Affirmative Action and the Criminal Law

Paul Butler

FOREWORD TO THE REPUBLICATION OF *AFFIRMATIVE ACTION AND THE CRIMINAL LAW*

PAUL BUTLER*

Twenty-four years later, *je ne regrette rien*. I do not mean that I got everything exactly right, but I miss my youthful exuberance. I wonder, in the words of Birdman, "What happened to that boy?"[1]

Here is one of the passages that, introspect, seems most poignant:

> I argue that but for the fruits of slavery and entrenched racism, African Americans would not find themselves disproportionately represented in the criminal justice system. It is important for the law to recognize that there are so many African Americans in prison because white people have driven them there.

The last sentence, it turns out, was incomplete.

I was making an argument for robust reform of the criminal legal process because I was more optimistic about "the law" than now. In 1997, neither Tamir Rice, Michael Brown, nor Elijah McClain had even been born. Breonna Taylor was a toddler. George Floyd was twenty-three years old and Eric Garner was twenty-seven. All of those Black people are gone now, their lives extinguished by "the law."

What happened to that young law professor was that he observed a tragic parade of Black death at the violent hands of the state. He came to understand that his exhortation that the law "recognize" the role of whiteness in creating Black criminality was naïve. The enforcement of white supremacy is, if not the animating purpose of mass incarceration and police brutality, an

---

*Albert Brick Professor in Law Georgetown University Law Center. I thank Imani Gunn for exemplary research assistance.

1. Birdman, *What Happened to that Boy?* (Nov. 26, 2002), https://genius.com/Birdman-what-happened-to-that-boy-lyrics [https://perma.cc/L7RE-998Y].

endemic feature of the law and policy that authorize those atrocities.

For this reason, the "problems" I described in 1997, including selective prosecution of African Americans for drug crimes and vast disparities in incarceration, are not bugs in the criminal legal system but integral features of it. Thus, in 2015 African Americans and Latinos comprised 29 percent of the U.S. population but 57 percent of the prison population.[2] They are half of those incarcerated for drug crimes, although they don't commit drug offenses more than white people.[3] The problems have not been solved because nothing was broken, and so there was nothing to fix.

Race disparities in incarceration have fallen some since 2000, but the number of Blacks locked up compared to whites is still extraordinary. The Black-white state imprisonment disparity fell from 8.3-to-1 in 2000 to 5.1-to-1 in 2016, and the Hispanic-white parole disparity fell from 3.6-to-1 to 1.4-to-1.[4] The most likely explanation is the dramatic decrease in urban crime during this time, rather than any race-conscious policies designed to reduce disparities. Even with the reductions, the United States is not close to reaching the goal described in the Article for 2000: prisons that look like America, meaning that their racial demographics reflect the diversity of their communities.

One reason these race disparities continue to exist is because they are what many white people prefer. Research by Stanford University social scientists revealed that when white people learn that a harsh criminal justice policy disproportionately burdens African Americans, it makes them support the policy more.[5]

I would not have imagined, in 1997, that criminal justice reform would have more political saliency than affirmative

---

2. U.S. JUSTICE DEP., BUREAU OF JUST. STATISTICS, PRISONERS IN 2016, at 5 (2018); RASTOGI, S. ET AL., U.S. CENSUS THE BLACK POPULATION: 2010, at 6 (2011); SHARON R. ENNIS ET. AL., U.S. CENSUS BUREAU, THE HISPANIC POPULATION 2010, at 6 (2011).

3. U.S. BUREAU OF JUSTICE STATISTICS, PRISONERS IN 2016, at 19 (2018).

4. WILLIAM J. SABOL ET. AL., COUNCIL ON CRIMINAL JUSTICE, TRENDS IN CORRECTIONAL CONTROL BY RACE AND SEX 1 (2019)

5. Rebecca C. Hetey & Jennifer L. Eberhardt, *Racial Disparities in Incarceration Increase Acceptance of Punitive* Policies, 25(10) PSYCHOL. SCI. 1949, 1949 (2014).

action. But two decades later, affirmative action is on life support and ending mass incarceration has broad political support.

The Court's shift on affirmative action is reflected in two competing aphorisms. In *Bakke*, Justice Blackmun wrote "[I]n order to get beyond racism, we must first take account of race. There is no other way. To treat some persons equally, we must treat them differently." In *Parents Involved in Community Schools v. Seattle School District*, which struck down a school desegregation plan, Justice Roberts contended: "The way to get beyond race is to get beyond race."

A few years after my Article was published, the Court decided *Grutter v. Bollinger*.[6] In *Grutter*, a white woman denied admission to the University of Michigan Law School accused the university of using race as a predominant factor in admitting students. In a 5-4 decision, *Grutter* affirmed that achieving diversity on college campuses is a compelling state interest.

But many of the Court's subsequent cases have narrowed the reach of race-conscious remedies. In a decision handed down on the same day as *Grutter*, the Court ruled in *Gratz v. Bollinger* that the University of Michigan undergraduate school could not use a point system that awarded underrepresented minority applicants a fixed number of points towards admission.[7] The Court found that such a policy did not provide the "individualized consideration" of applicants deemed necessary under the strict scrutiny standards established in previous cases.[8]

In *Parents Involved in Community Schools v. Seattle School District No. I*, the Court, split 4-1-4, struck down efforts for voluntary school desegregation in Seattle and Louisville.[9] Both school districts at issue used individualized racial isolation through student assignment. The *Parents Involved* Court recognized that seeking diversity and avoiding racial isolation are compelling state interests but concluded, nonetheless, that the plans were not sufficiently "narrowly tailored" to satisfy the strict scrutiny standard.[10]

---

6. 539 U.S. 306 (2003).
7. 539 U.S. 244 (2003).
8. *Id.* at 246–47.
9. 551 U.S. 701 (2007).
10. In 2013, and again in 2016, the Court again undertook the question of affirmative action in college admissions in *Fisher v. University of Texas at Austin*. Here, following her denial of admission to the University, Abigail Fisher, a white woman, claimed that the University's two-part admissions system was unconstitutional. The system in question first guaranteed admission to the top ten percent of

In *Grutter* Justice O'Connor declared, "The Court expects that 25 years from now the use of racial preferences will no longer be necessary to further the interest approved today."[11] Justice Clarence Thomas dissented, but concurred with the majority only on this point: "racial discrimination in higher education admissions will be illegal in 25 years."[12]

Seven years short of the deadline that the justices set for the sunset of affirmative action, its prediction may come to fruition even sooner than anticipated. The Supreme Court in 2021 is perhaps the most right wing of the last hundred years, and it is likely that there are enough votes to declare affirmative action unconstitutional when the appropriate case reaches it.

While affirmative action in education is on its' deathbed, the need for affirmative action in the criminal law has never been more clear. Perhaps the most consequential development since publication is that a movement for Black lives has risen up. The death of George Floyd inspired, in the summer of 2020, the largest social justice protests in the history of the United States.[13] Many progressives are embracing radical measures, including defunding the police and abolishing prison. Their proposals have been extremely controversial, including among liberals. But for many in the movement for Black lives, reform has lost its prestige. I want to suggest that adoption of the proposals outlined in my Article might have forestalled this development. As I wrote, affirmative action in criminal law is less "subversive than alternatives such as race-based jury nullification or revolution."

Still, while racial justice is one of the primary objectives of many police and prison abolitionists, the projects themselves are largely color-blind. The conservative project for color-blindness has been largely a success. Even many progressives reject race-based remedies. When President Barack Obama was pressed to do more for communities of color, he responded, "I can't pass

---

every in-state graduating senior, and then filled remaining slots considering many factors, including race. In *Fisher I*, 570 U.S. 297 (2013), the Court ruled that strict scrutiny was the proper standard to be applied, and in *Fisher II*, 579 U.S. ___. 136 S. Ct. 2198 (2016), that the university's policy was indeed narrowly tailored to the legitimate interest of promoting educational diversity, and therefore passed muster under strict scrutiny.

11. 539 U.S. 306, at 322 (2003).

12. *Id.* at 346–47.

13. Larry Buchanan et al., *Black Lives Matter May Be the Largest Movement in U.S. History*, N.Y. TIMES (July 3, 2020), https://www.nytimes.com/interactive/2020/07/03/us/george-floyd-protests-crowd-size.html [https://perma.cc/SU4F-5UJL].

laws that say I'm just helping Black folks."[14] He relied on a color-blind "rising tide lifts all boats" approach to racial justice. But many Black and Native people never had a boat in the first place.

In the Article I observed "it is unfortunate that race-conscious solutions sometimes engender more controversy than race-conscious problems. Affirmative action assumes, correctly, that legal and political strategies exalting color blindness are doomed to fail, or at least to fail African Americans."

I worry that even radical, but color blind, strategies will fail Black people. For example, many abolitionists promote gradual decarceration, which begins with people who are incarcerated for nonviolent offenses, like drug crimes. This would in the short term actually enhance race disparities, because Black men are disproportionately represented among the people convicted of violent crimes who would remain locked up. The abolitionist concept of the "dangerous few," i.e., people who would have to be closely monitored bythe state even in an abolitionist regime, might also have a racial skew.[15]

In the end, the proposals I made in 1997 are just as necessary now as they were then, and this country is no closer to achieving them, or the Article's larger objective of equal justice under the law for African Americans. Black lives continue to be discounted by the criminal law, while the right-wing project of eliminating race consciousness from the law, including affirmative action, steadily advances.

---

14. Sheryl Gay Stolberg, *For Obama, Nuance on Race Invites Questions*, N.Y. TIMES (Feb. 8, 2010), https://www.nytimes.com/2010/02/09/us/politics/09race.html [https://perma.cc/FC4T-RQ2E].

15. Allegra M. McLeod, *Prison Abolition and Grounded Justice*, 62 UCLA L. REV. 1156, 1168–69 (2015)