BOOK REVIEWS

RACE, CRIME AND THE LAW

BY RANDALL KENNEDY

PANTHEON BOOKS, 1997

*Reviewed by Keith O. Boykin**

In his book *Speaking Frankly*, Congressman Barney Frank writes, "Whenever something is obvious and has a significant impact on people's lives, those who try to make believe it does not exist cede control of the debate to those who are willing to talk about it."[1] In *Race, Crime and the Law*, Randall Kennedy proves Frank's point, attempting to redirect the race debate in criminal law merely by talking about it.

With credentials from every one of the so-called top institutions in our higher educational system, Kennedy is nothing if not credible. The Princeton undergrad went to Yale Law School, to Oxford as a Rhodes Scholar, and to Harvard to become a law professor. One might expect any arrogance in his academic credentials to be tempered by his experience clerking for one of the nation's most caring and sensitive jurists, Supreme Court Justice Thurgood Marshall. Yet this coveted clerkship helped to cap his credentials and made Kennedy the archetype black Ivy League law professor.

Kennedy gleefully defies the stereotypes of what a black legal scholar should say or think. He is not a conservative like Clarence Thomas, but he could hardly be labeled a liberal either. In the simplistic "zero sum" shorthand of a predictable legal rhetoric that disguises itself as "discourse," he is something of an enigma.

Despite his establishment credentials, Kennedy focuses his career on the vexing question of race, while other black credentialed intellectuals often shy away from these issues out of fear of being pigeonholed. Because of this fear, the two extremes — black conservatives and black progressives — dominate the race debate, leaving little room for moderates like Kennedy. Still, Kennedy makes room for himself in the dialogue, with a beautifully written book that offers an en-

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[1] BARNEY FRANK, SPEAKING FRANKLY 124 (1992).

lightening and sometimes challenging view through the cloudy window glass of America's courtrooms.

The thesis of *Race, Crime and the Law* seems to rest on two misleadingly appealing propositions. First, Kennedy contends that public discourse about race and the law has become too sloppy and predictable, and he uses this position to challenge liberals who pull out the "race card" too quickly or with inadequate research and thought. Second, he argues that American criminal law and policy should, to the greatest extent possible, be guided by principles of race-blindness.

Certainly, policy makers and advocates of all political persuasions too glibly and commonly bludgeon one another with disingenuous race-based arguments. Kennedy correctly reminds us that our debates have become "sterile," and he advocates a "proper appreciation for words" and a "proper interpretation of statistics." However, by extending his observation into a critique of progressives, Kennedy's comments run the risk of appearing to be more concerned about the violation of a pedagogic process of semantic purity than about the real need for racial justice. Why should we care if black progressives zealously play their race card when they cannot definitively prove that race is the defining factor for their oppression? Because, according to Kennedy, improper allegations of racism sometimes have the effect of "stiffening the resolve of opponents." He may be right, but they are, after all, opponents.

Kennedy's second argument is seductively attractive. In a society that publicly despises racism and privately continues to practice it, race-blind policies appeal to a simplistic, collective sense of fairness. They provide an imaginary tabula rasa, giving us an easy way to declare the death of racism by fiat and then allow us to start from scratch. To be sure, this is not Kennedy's position. He carefully documents the continuation of racism and prejudice in society and does not fall into the trap of arguing for race-blindness for everything. However, precisely because of his thorough documentation of the continued pervasiveness of race bias, Kennedy's advocacy of race neutrality in some policies such as jury selection seems hopelessly optimistic. We should only seek juries that contain "conscientious people," he argues, and states his belief that racial conflict "can be overcome," in part, by declining to formalize race-mindedness in jury selection. But this argument seems weakened by the current persistence of racism even though race consciousness is not now formalized in the jury selection process.

On their face, both of Kennedy's propositions make sense. We should, of course, choose our words more carefully and we should aspire to a race-blind society. But to establish acontextual, ahistorical, and anal retentive race-blindness is no way to run a legal system.

Structurally, *Race, Crime and the Law* is well organized and divided into four sections: first to show common ground between various political factions on race issues; second to explain how the history of unequal racial protection is worse than the history of unequal enforcement; third to determine when it is defensible to discriminate racially; and fourth to help determine how to analyze race discrimination in ostensibly race neutral policies.

The first section fails to achieve its own goals. It does not help in "changing the politics of the conflict," as the title indicates, nor does the section create any

"common ground," as advertised. In fact, Kennedy seems to make no effort to find common ground as he describes four competing camps in the rhetorical wars (law and order advocates, libertarian conservatives, proponents of color-blind policies, and liberal progressives) and then admittedly aims all his ammunition at the weakest camp — the progressives.

In analyzing the beneficiaries of policies that protect black criminals and defendants, Kennedy creates a false distinction between law-abiding black citizens and a black criminal class. "[C]ourts should be careful to avoid conflating the interests of a subdivision of blacks — black suspects, defendants, or convicts — with the interests of blacks as a whole," he writes. Unfortunately, this argument mistakenly assumes that the larger black society is not harmed by laws and policies that unfairly single out or mistreat black suspects and even criminals. Ironically, he allows conservative Glenn Loury to make the case "that the young black men wreaking havoc in the ghetto are still 'our youngsters' in the eyes of many of the decent poor and working class black people who are often their victims."

Later, Kennedy reveals that for every 100,000 black Americans, 1,860 were in jail or prison as opposed to only 289 for every 100,000 white Americans. Clearly, the loss of a major portion of a generation of black youth is a cognizable harm.

In the second section of his book, Kennedy again mischaracterizes the beneficiaries of racially just criminal policies and the protection of black defendants' civil liberties. Kennedy argues that unequal protection is "worse" than unequal treatment "because it has directly and adversely affected more people than have episodic misjudgments of guilt." Even assuming the questionable premise that the severity of discrimination can be ranked based on quantifiable traits, Kennedy still misses the larger point that misjudgments of guilt stigmatize the entire black race and therefore affect far more people than the specific individuals mistreated.

What he does accomplish in his discussion of the past is to present a compelling story of our nation's shameful history of racial injustice toward blacks. In vivid, painful detail, Kennedy paints picture after picture of horrors perpetrated against blacks. For the uninitiated, these pictures may be the greatest achievement of *Race, Crime, and the Law*.

In the final two sections of his book, Kennedy provides a serious, sophisticated, and complex analysis of race consciousness and race neutrality. He carefully examines the nuances of using race-based profiling for decisionmaking and evaluates the differing impact when such decisions are made by police, business operators, individuals, and others.

Given the complexity of Kennedy's views, he is not an easy target for progressives or conservatives. He appropriately criticizes the hypocrisy of some advocates of "color-blind" policies and then goes on to advocate his own version of color-blindness. On one page he rightly chastises the scandalous racial bias in the application of capital punishment, but on another page he suggests capital punishment is no big deal. Kennedy even suggests the federal sentencing

distinction between crack and powder cocaine may be misguided but then attacks those who call the disparity "racially biased."

Not surprisingly, Kennedy's arguments throughout the book are well supported by examples in the case law that bolster his views. Ultimately, however, the persuasiveness of his book rests not on which side can marshal more facts or cases to its cause but rather to a choice between competing visions of the role of the law in society. Those who view the law as a racially corrupt institution for the perpetuation of the status quo, as many blacks do, will not likely be persuaded.

BECOMING GENTLEMEN: WOMEN, LAW SCHOOL, AND INSTITUTIONAL CHANGE

BY

LANI GUINIER, MICHELLE FINE, AND JANE BALIN

BEACON PRESS, 1997

*Reviewed by Lynn S. Muster**

In *Becoming Gentlemen,* authors Lani Guinier, Michelle Fine, and Jane Balin ask readers to address a critical problem: the one-size-fits-all approach to learning in America's law schools does not allow women to reach their full academic potential. The authors seek to answer the question, "Why do women underperform?" by focusing on how women perceive law school. The basis of the argument is that all individuals learn differently; we can not use a single set of criteria or a single pedagogical style to measure or teach such a complex set of skills.

Many may remember Guinier for her 1993 nomination by then newly-elected President Clinton for Assistant Attorney General for Civil Rights. After the country misinterpreted her academic publications, she became known as the infamous "Quota Queen" though she merely questioned the reality that in the American system of elections, a 51% majority has 100% of the power. Her articles envisioned empowering all voters to make elected officials accountable to all constituents, advocating a cumulative voting system that allocates political power in relationship to voter organization and mobilization. Ironically, she learned this process in law school, in Business Units 1, where use of a cumulative voting system elects corporate Boards of Directors to protect minority stockholders. At the time of the nomination fiasco, however, she kept quiet on the advice of advisors, as a courtesy to the Senate prior to confirmation hearings. Guinier, however, never got a hearing and thus never got the chance to explain her side of the debate. Now, with *Becoming Gentlemen,* she speaks — starting a conversation with the hope of redefining the legal field to accommodate different perspectives and experiences.

Becoming Gentlemen, written in narrative format, relies upon statistical results from interviews, quantitative research data, and questionnaires answered by University of Pennsylvania Law School students. Guinier writes as professor of law at University of Pennsylvania Law School with co-authors Michelle Fine, professor of social psychology at the Graduate School and University Center, City

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University of New York, and Jane Balin, assistant professor of sociology at Colgate University. The book aims to answer three questions: (1) What does it mean to be "qualified" as a law student or legal practitioner?; (2) Does our commitment to equality imply that we should treat everyone exactly the same; and (3) What can we learn from diversity?

In addressing the first question, the authors' research confirmed the findings of others that the Law School Admission Test ("LSAT") does not accurately predict the academic performance of students in their first year of law school — *of any* students, not just women students. The LSAT correlates more with family income, status, and gender, but does not fulfill its purpose of predicting performance in the first year of law school. More specifically, the authors argue that, in the law school arena, because white males have made the rules, they developed the LSAT as a predictor of performance under those rules. Those *predicted* to do well would be those most similar to the rule-makers. Nevertheless, success on the LSAT by even a male student does not necessarily mean that he will perform well in the first year of law school even though his LSAT score identified him as a good law school candidate.

The authors also discuss the LSAT within the context of a "yardstick" debate arguing that although women and men enter law school with similar "neutral" credentials (LSAT scores, university success, and extracurricular activities), men leave law school with more of the "goodies" (Order of the Coif, Law Review membership and Boards, faculty awards, and Moot Court membership and Boards). This data raises the question: Why do women who enter law school with similar achievement and intelligence underperform in law school, or at least, seem to underperform? The authors suggest that many of those chosen to receive such "goodies" are chosen by members of the faculty looking for people to emulate themselves, using their own "yardsticks" to measure merit, achievement, and academic performance. The authors criticize this manner of selection as perpetuating white male standards of merit, as have other authors.[1] Guinier, Fine, and Balin argue that law schools must move from the nineteenth-century concept of merit (the "old boys' network"), beyond the twentieth-century concept of merit (one-size-fits-all standardized testing), to a democratic and egalitarian concept for the twenty-first century.

The argument propounded by the authors, however, assumes that entry and success in law school take place in a vacuum. Their theories should question admission and achievement in educational institutions such as college and/or private high school. The authors do not address how women competed successfully in their prior academic endeavors with the white male yardstick of so-called neutral credentials and predictors of performance. For example, entry to law school is based on, *inter alia*, a student's LSAT score and university transcript.

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[1] For example, this author wrote that hiring and tenure selection in higher education is a process whereby white males who traditionally, and currently, control educational resources seek to maintain a faculty roster of those "like" themselves. *See* Lynn Muster, *A Proposal for the Hire and Tenure of Faculty of Color in Higher Education*, 20 T. MARSHALL L. REV. 45 (1994).

Don't white male standards influence these credentials? How are women even entering law school with the same credentials as men?

In addressing the second proposed question, Guinier, Fine, and Balin portray law school environments as places where most women, as well as men of color, feel disempowered and therefore underperform. The research demonstrated that the "litigation is combat" model of lawyering begins in law school classrooms. Because of that model of teaching, women often feel alienated and therefore will not truly achieve their full potential until other teaching methods are applied. The authors argue that the psychological data supports this conclusion. For example, when experiencing normal law school difficulties, men think, "law school is hard," while women think, "I'm stupid." This mentality, if a reality, may contribute to women's lack of success on a more critical level: because women feel alienated in the classroom, they may not seek the advice and assistance of their male professors. Women law students will, therefore, not develop the kind of one-on-one relationships with professors that lead to academic success, and indirectly, to receiving the aforementioned "goodies."

In addressing the third question, the authors propound the value of a learned and diverse faculty. They stress that diversity is not "add women and stir," because the value of diversity extends beyond the picture of the cultural icon. Diversity is about valuing, and promoting, opinions and pedagogy that vary from the traditional white male standard. Guinier, Fine, and Balin argue that divergence from the traditional white male pedagogy will promote institutional change from within.

In the third section of the book, Guinier, Fine, and Balin discuss solutions to the problems elucidated in the first two sections of the book. First, they suggest that one way to move beyond the "litigation is combat" model of teaching is to decrease the use of the Socratic Method. The authors postulate that the Socratic Method, where law professors train students to "think like lawyers" by asking individual students a stream of questions in front of their peers, often calling on students not identified in advance, is the one teaching mechanism that substantially contributes to women's alienation. The Socratic Method of teaching, the authors assert, intimidates students to the extent that women, especially, feel their voices are "stolen." Even if women feel empowered enough to be outspoken in class, if they succeed within the white male model of learning, they are berated and referred to in derogatory terms; all students must "become gentlemen."

The major problem with the authors' suggestion that law schools abandon the Socratic Method is that it is the teaching model most similar to an attorney's courtroom experience. Guinier, an experienced trial attorney, should recognize the usefulness of this learning tool. The Socratic Method need not be a method of intimidation; it can be applied in a more user-friendly style. The Socratic Method is best used as a collaborative exercise, a tool to follow a student's analysis and thinking. As attorneys know, success within the law is often not about the answer. At the end of the day, law is often about the road traveled to the result. The authors postulate that effective representation consists of mutual respect, honest and continuous communication, intimacy with facts, and familiarity

with the law. Why can't these qualities be developed within the Socratic mold? To some extent, the authors acknowledge the benefits of the Socratic Method, stating that the entire legal system must undergo radical change because "litigation is combat" is indeed the rule in America's legal system. Until such radical change occurs, however, students must be prepared for the realities of litigation.

In starting the process toward radical change, Guinier, Fine, and Balin first propose a method of peer teaching consisting of small work groups that promote group versus individual instruction. Modeled after Asian teaching methods, the authors advocate this mini-classroom model because it allows students to "try out" their arguments with a small group of peers who can contribute to the refinement and strength of those arguments. The mini-classrooms prepare students for full classroom discussions. Most law school students already recognize the value of peer teaching and form their own study groups throughout their law school careers.

Second, the authors promote mentoring, as distinguished from the passé concept of role models. The authors say that role models are merely symbolic and, quoting Professor Anita Allen, reiterate that role models "trumpet our necessity as [they] whisper our inferiority."[2] Mentoring, however, is an interdependent coproductive effort, a communicative and interactive relationship between professors and students that contributes to the furthering of knowledge for both parties. Mentors are not merely pictures of cultural icons (as are role models) because mentors hold those who follow to high expectations. Mentors do their greatest service when they replace themselves with the next cadre.

Third, Guinier, Fine, and Balin hope to promote public interest law as a profession. They hope to convey to students that psychic satisfaction is more than compensation for the salary differential compared to more lucrative areas of practice. Their statistics show that, of the students interested in public interest law upon entry to law school, more women students became disillusioned and do not enter this area of practice upon graduation. The authors are disappointed that women lose interest in public interest law. Shouldn't we be disappointed when any student loses interest in public interest law? Maybe law school disillusions all students? More likely, maybe law school breaks the bank for all students? The authors do not connect the reality of women being alienated in law school to statistics saying that women then lose interest in public interest law. How is this a function of the institution?

In sum, *Becoming Gentlemen* presents a compelling analysis of the dysfunction within American law schools. Even if the problems within law schools that lead to women's alienation can not be fixed without radical societal change, the authors certainly provide some answers to unasked questions and propose viable solutions to the issues they bring to the forefront. With this substantive work, Guinier, again, challenges us to hear her speak, and propose change with our own voice.

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[2] Anita Allen, *On Being a Role Model*, 6 BERKELEY WOMEN'S L.J. 22, 25 (1990-91).