

## NOTES FROM CALIFORNIA: RODNEY KING AND THE RACE QUESTION

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Race doesn't matter in California. I don't mean that people do not have a race, but that it is not an important determinant of people's lives.<sup>1</sup>

California is our future. Residents of California make up more than ten percent of our country's population and it includes the largest segment of the people who help to structure our dreams and ambitions. California is the liberal vision of nirvana and meritocracy where family connections and eastern elitism have been eliminated in the caldron of American possibilities. California's role as creator of images in the movies and television makes the culture created there a part of the future only loosely and imperfectly connected to the past.<sup>2</sup> This is particularly true of changing social norms including those connected to race and gender. Race has been deconstructed by the call of the West. California has called so many people from other places to its shores that it is possible for it to permit people to reinvent themselves free of their past. If in California no person is limited by one's past cultural or individual situation, it should not surprise us that California has been able to decouple race from its Black-White divide and to broaden the notion of race to include brown, yellow and red people. In the rest of America, people may use concepts like "people of color" or "racial minorities" and mean black, but in California they have indeed become terms that include more than black people.

California seems to hold the promise of racial justice for all. During the 1980's while the relative incomes for most regions remained constant, the western region dominated by California experienced the only sustained relative income growth. Blacks and other racial minorities came closer to income parity with whites in the West than at any other time for which we have statistics. However, if California is our future with respect to racial relations and racial justice, it has failed. The most

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1. Statement of a former student as part of a larger conversation she had with me about race and Duke Law School. I was about to write that this student was black, but of course there is a certain problematic quality associated with that description in conjunction with this quotation.

2. California has played this role for a long time. See JOSEPH BOSKIN, *SAMBO: THE RISE & DEMISE OF AN AMERICAN JESTER* (1986) and DONALD BOGLE, *TOMS, COONS, MULATTOES, MAMMIES & BUCKS* (1973).

recent example of this failure is the riots associated with the verdict of "not guilty" on most of the charges against the four police officers who beat Rodney King. What we ought to learn from the "Rodney King" riots is that we cannot all get along without dealing with the race question, i.e., how we should alter the legal and social world because of race.<sup>3</sup> Even though our legal and political systems deal with the race question all the time, they consistently deny the importance of answering it.

### I. RULES OF ENGAGEMENT FOR BLACK MALES: BLACK ANGER

The Navy provides each ship commander with a set of rules defining appropriate conduct with respect to potential adversaries.<sup>4</sup> These rules, called "rules of engagement," are a blueprint for ship commanders. Every black male above the age of five is taught directly or indirectly the rules of engagement of black malehood. As a black male, I learned these rules early from the concern in my mother's eyes and my father's impatience.<sup>5</sup> These rules require that, at all times, we make no quick moves, remove any possibility of danger and never ever give offense to official power. Any black male who violates any part of these elaborate rules is subject to an immediate penalty. The penalty may be

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3. Rodney King, in the aftermath of the Los Angeles riots asked the famous question, "You know, can we all get along? Can we get along? Can we stop making it, making it horrible for the older people and the kids?" See Clarence Page, *Rodney King's Poignant Plea*, CHI. TRIB., May 6, 1992, at C29.

4. These military rules of engagement have been the focus of attention in recent months. The first involved the shooting down of an Iranian airliner by the U.S.S. Vincennes. See *NEWSWEEK Responds*, NEWSWEEK, Aug. 3, 1992, at 12.

First, was there an official cover-up of the fact, now acknowledged, that the Vincennes was in Iranian territorial waters when it shot down the plane? In the classified version of the official report on the incident that was delivered in August 1988, the Pentagon did notify key members of Congress that the Vincennes had been in territorial waters. But in the version released to the public, the single sentence acknowledging this was deleted. And at briefings on Sept. 8-9, 1988—after delivery of the classified report—the [N]avy showed Congress a map that made a point of locating the Vincennes in international waters. The *NEWSWEEK* article displayed this map, and dated it. Crowe's former spokesman says that this was because the Navy did not want Iran to know that its rules of engagement in the Gulf permitted such an incursion. But it is reasonable to suppose that Iran had already inferred the rules of engagement from its knowledge of the Vincennes's position at the time the plane was downed.

*Id.* The second was in connection with the scope of activity of UN peacekeeping troops in what used to be Yugoslavia. Paul Holmes, *Plan Drawn Up for Bosnia Peace-Keepers*, REUTERS, Sept. 19, 1992 ("Their rules of engagement under the Security Council resolution allow them not only to shoot in self-defence but also to open fire if any of the combatants — Serbs and their Moslem and Croat foes — prevent the peace-keepers from carrying out their mandate.").

5. For black males of my generation, the death of Emmett Till in 1955 symbolized the real threat to black men if they got out of line. See STEPHEN J. WHITFIELD, *A DEATH IN THE DELTA: THE STORY OF EMMETT TILL* (1988) (Emmett Till, a thirteen year old black boy from Chicago, was killed after an incident in a store while visiting Mississippi. Emmett Till claimed that he had a white girlfriend in Chicago and said, "Hello, Baby" to a white woman. Her husband and friends killed Emmett Till and were subsequently found not guilty by an all white jury.). This murder occurred in Mississippi, but all black men of my generation knew that similar or at least less drastic things could happen to you if you were perceived as being out of place.

simply embarrassment or discomfort, but it can also be our lives. About five years ago, a large black male law student who looked uncomfortably like myself was stopped by campus police on my campus at Duke University and arrested for being a large black male. He was stopped for being a black male who looked "too black" at the wrong place on campus. He was ultimately arrested for his anger at being stopped and for his threat to walk to the campus police station to make a complaint. He was arrested despite the fact that he presented a valid university identification card and despite the fact that he was simply walking across campus to go home. The officer subsequently contended that he did not look like a student because he was too old, he was walking at night in a dark area of the campus, and his identification card did not have a red sticker. I know that I am subject to these same rules of engagement on this campus despite my status as a tenured member of the law faculty. I, too, am a large black male who may appear inappropriately aged for my status.<sup>6</sup> I know that, as one of my white male colleagues in another department suggested, such intrusions are thought to be the price that black males have to pay to ensure the safety of women on campus.<sup>7</sup> I know, too, that many would believe the police officer who shot me and attempted to confirm my dangerousness by placing a gun in my hand afterwards. "Gee, I didn't know Jerome carried a gun," some of my colleagues would say as they shook their heads acknowledging the nature and power of race. My colleagues are not able to separate out my blackness from who I am. Race is only social construction, but as others have noted, such social construction has important power.

This past spring, I had the pleasure of spending part of my sabbati-

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6. This summer, one of the black guards at the university gym where I work-out regularly asked me to inform the white guard, who was new to the job, that indeed I was a law professor (and have been teaching for more than ten years as a law professor). She later informed me that, not surprisingly, he had questioned her statement that I taught at the law school.

7. The University's dilemma is that it must choose which set of victims gets priority consideration: those directly assaulted by criminal intruders or our black students whose skin color is used as camouflage by the large majority of those intruders.

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In the end, the situation calls for forbearance from and toward all parties involved in it. Through a terribly unfortunate but unavoidable ethical choice, our campus police have to increase the burden on one set of victims (our black students) in order to reduce the burden on another set, the victims of criminal assault.

Victor Strandberg, *Checking Student IDs a Necessary Evil*, DUKE CHRON., Feb. 17, 1987, at p. 9.

The problem I have with this formulation is that it is hard to find what sacrifice whites make in response to these problems. What are they willing to put up with in the interest of Black students? For my white colleague, these rules of engagement are fair. This is the problem with the law in general: whenever the interest of Blacks are weighed against the concerns of the majority, Black interests lose. To see this point with respect to my colleague Victor Strandberg, read his letter on affirmative action in the DUKE DIALOGUE/FACULTY NEWSLETTER, Sept. 1992, at p. 1, col. 2, in which he argues that we should not pay market wages to "affirmative action" assistant professors because their salaries are higher than his. I question whether the latter is really true. But, assuming that it is true, why can't the white faculty bear that burden if Black students and faculty have to bear other burdens?

cal at Boalt Hall at the University of California, Berkeley. During my visit, in addition to the obligatory earthquake, I got the full California experience when a non-black jury returned a verdict in the police misconduct trial of the four police officers who were accused of beating Rodney King. The hotel where I stayed was a staging area for the Berkeley police when the post-Los Angeles riots spread to Northern California, and a number of shops were destroyed two blocks away. About a week after these riots I had dinner at a former student and friend's house. He is Jewish and married to a Asian-American woman. Their marriage symbolizes all that California represents in terms of racial progress and justice. He asked me what I thought about the riots. I heard an implicit question,<sup>8</sup> one I had heard repeated in different ways over and over about the anger in the black community resulting in the riots. That question was, "Why were blacks so angry?" It was clear that I could not explain the anger. I had a hard time even expressing it when Berkeley law students asked me to speak at a town meeting about the aftermath of the Los Angeles riots. I tried to tell my friend that he perceived being black the same as being white, except for an occasional moment of discomfort when some insensitive bigots forget and revert to momentary and isolated racism.<sup>9</sup> However, for black people, particularly black men, we can never stop being seen as potential violators of a whole system of racial oppression. Being black, unlike being white, always means facing up to issues of race. White men may only think of their race when someone questions them about it; black men and women do not have that luxury. These rules of engagement do not influence simply one or two moments, but the entire lives of black men.

I see that these rules of engagement go beyond simply the non-black people I endure. After I returned to North Carolina from California, I pulled into my credit union one evening to withdraw money from my neighborhood money machine. I entered the parking lot behind a late model foreign car driven by a young black woman who, upon seeing my black face, (and perhaps my ancient American-made automobile) refused to get out to use the money machine until I drove off. Racism is so deeply embedded in our society that black cab drivers in Washington and New York will not even pick me up when I am dressed in a suit, and black women can find me inordinately and intolerably dangerous. In

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8. My friend posed a second implicit question about the state of Black and Asian relations in the wake of apparent targeting of some stores by mostly black rioters. I deplored such targeting and suggested to my friend that we have to figure out how to improve relations between those communities, but I am sure that was not a satisfactory answer to a difficult question. It is easy to point out that much of the problem stemmed from the failure of the police to adequately protect the property of Korean store owners. Such an answer, however, ignores the real differences between the Black and Asian communities, particularly the Black and Korean communities. These issues are the subject of the inaugural issue of the *Asian Law Review* that is being published by students at Boalt Hall.

9. I am sure that my friend's concern was heightened by the Californization of the riots to include not just Black-White conflicts, but Black-Asian conflicts, particularly Black-Korean conflicts, proving how much race indeed has and has not been transformed by California's expansion of race concepts.

such a world it is not possible to simply deny the importance of race. Many of my white colleagues, however, seem to think that race is always irrelevant to the discussion. They think that if we leave it out, race as an important concern will go away. It is this thinking that has led us to Rodney King. Only by denying the importance of the race question is it possible to create a police force that would beat a black man before a camera and despite the video record, call it justice.<sup>10</sup> Only by denying the race question is it possible for twelve non-black jurors to conclude that no crime was committed by those four officers despite the neutral uninvolved video record.

One night several years ago, I parked in front of Duke Law School at about 2:00 A.M. to get something from my office. I was tired and it was late so I ran from the front door to my 1981 blue Escort and jumped in and drove off hoping to get to bed as soon as possible. As I turned near the law school I noticed that a campus police car was following me. This police car sped up and followed as closely as it could as I approached the next light. After stopping at the last stoplight on this part of campus, I proceeded through the next intersection and the policeman turned on his overhead police lights and pulled me over. I got out of the car and came back to the officer. I asked him why he had pulled me over, and I showed him my driver's license. He stopped me, he said, because I had crossed the double lines at the intersection. I pointed out to him that that argument was just silly because the nature of the interchange made it virtually impossible to cross the yellow lines. He glanced at my driver's license and simply got back into his car and drove off. I never knew if he noticed that my driver's license lists me as a white male which, despite what his eyes told him, may have immunized me, or whether—as I have always contended—the campus police are required to remember the faces of all 35 black faculty members.<sup>11</sup> I have no doubt, however, why I was stopped. It was the interaction of the color of my skin, my apparent age in the dim light, and my gender that created a mythical possible—robber, rapist or intruder who needed to be controlled by our local constabulary. The problem for those of us trying to

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10. *But see* Roger Parloff, *Maybe the Jury Was Right*, *AM. LAW.*, June 1992, at 5 (White liberal attorney makes a case that the jury's verdict was rational and based upon the whole facts before them. He says he watched much of the trial and would have come to the same conclusion that the jury did because criminal intent had not been proven.). I also watched much of the trial and I thought that the jury could have failed to convict two of the police officers, but that the evidence of racism and culpability in both Koon's and Powell's testimony was substantial. It was the failure to convict anyone that led to the riots and my own anger. That part of the verdict was, in my view, deeply infected with racism. *See also* Steven Brill, *In Praise of Justice in Simi Valley*, *AM. LAW.*, June 1992, at 7 (Brill praises Parloff's article and argues that the not guilty verdicts for these officers, despite the videotape evidence, is proof of the strength of our criminal justice system.). Not only is this view of that case tautological, it ultimately means that we can never criticize a system of justice because every action is within a plausible range. Such a view requires black people to live inside an unfair system without complaint.

11. This driver's license containing my black picture and listing me as a white male is in my wallet. (I know that the characterization was a mistake. I do not know, however, whether it was due to some attitude of mine, or simply the vagaries of bureaucratic efficiency.)

deconstruct race is that the view of me as that mythical black person is a reflection of how society sees me, not just the police. If we are to change the way in which race is interpreted by the police, we cannot hope to change just the actions of police officers. When the Los Angeles police beat Rodney King, they acted appropriately with respect to white demands that dangerous "black men" be controlled. Compare our reaction to the pictures of the police officers beating Rodney King within an inch of his life with society's reaction to the police complaint that Rodney King was dangerous, black and out on parole.

The question I wanted to pose to my friend in return was why most white people, even many of the most sensitive and socially conscious white people, have such a hard time understanding these rules of engagement and the anger that results. I cannot be sure, but I believe that there are two reasons why they cannot fathom the black anger that results. They see this incident as an isolated case, a random event. Therefore, like all chance events, these incidents simply become part of the risks imposed on all of us, like being struck by some form of "social lightning." In addition, many do not say, but believe, that Rodney King, twice since arrested for other things, "was dangerous" in exactly the way the police suggest. For them, there has been no violation of the rules of engagement. These rules have simply been enforced as both black and white people demand them to be. Such reactions miss the point. The problem with race is not that campus police should not be able to hassle an enrolled black student or a tenured black professor. The real problem with race is that it can be a marker for injustice. What is ultimately wrong is the injustice to the non-student who wanders onto campus and is treated as a criminal, and the non-professor who happens to be on campus and is scrutinized and injured by the deep racism of our society. The problem is our refusal to deal with the race question, and all the while demanding that black males adhere to rules of engagement that are tantamount to specialized oppression.

In a talk at the Frontiers of Legal Thought conference at Duke University in January, 1992, I predicted that the police officers who beat Rodney King would be acquitted, but until it happened, I did not understand how I would feel about the reality of those verdicts by twelve non-black jurors.<sup>12</sup> What I had trouble describing to my white friend was the nature of this injustice. There comes a point when the excuses made by Los Angeles police or campus police become too much. It does not surprise any black male that any police officer will be believed when he describes our actions as threatening or inappropriate. The rules of

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12. The one hispanic juror subsequently broke down and described the tremendous pressure she felt to agree with the other jurors and how racism infected part of their deliberations. See Nina Bernstein, *Bitter Division in Jury Room: How 12 Ordinary Citizens Met for 7 days to Produce Verdict that Shook L.A.*, *NEWSDAY*, May 14, 1992, at 5 (Richard Kossow, husband of one of the jurors, said, "They brainwashed the whole world with that little bit of video. The whole country, they're just looking for something to boil over about." He continued, "We have to have authority. What are police for? My wife has said many times, she's sorry for Mr. King. But how about the police officers? Their lives were completely ruined because Mr. King wanted to go out and have a good time.").

engagement are that we black males have no credibility. What the videotaped beating of Rodney King demonstrated was that there is no neutral way of describing that racial situation, and therefore, the search for neutrality is futile. A thousand white nuns testifying to our innocence will not prevent a police officer from successfully claiming that he is simply enforcing that thin blue line between black males and white civilization.<sup>13</sup> No neutral independent observer is a check on the racism deeply embedded in the fiber of American society. There is nothing that can be neutral about the racism that exists in such a society. All black men are Rodney King and all of us are subject to injustices that none deserve, even the non-innocent Rodney Kings, who are black, on parole, and therefore dangerous. If neutral rules will not protect even in that situation, the rules of engagement of black manhood become too onerous. It is that truth that fuels black anger.

This unfortunately seems a truth too powerful for law and the black community. If there is no justice, how can we belong to such a society. Certainly, burning down Los Angeles or Berkeley is not a solution. Likewise, burning down Simi Valley or the jurors' homes (a solution suggested by my sweet, gray-haired, god-fearing, mother), even if effective in the short run in making any particular juror more careful, is likely to produce a white response that limits and eventually prevents such retribution. However, relying on the current system and its rules is not satisfactory either. The truth is that we have not been able to deal with the issue of race because we have been willing to accept the failure to pose the race question. Race will not be eliminated from its pernicious

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13. See e.g., Rob, *Lawyers Seek an Advantage With Trial Consultants*, BUSINESS RECORD, June 29, 1992, at 1 (Trial consultants used mock juries to suggest that defense attorneys should use the thin blue line defense.); Richard A. Serrano & Jim Newton, *3 King Case Defendants Notified of U.S. Inquiry*, LOS ANGELES TIMES, July 31, 1992, at A1 ("Barry Tarlow, a criminal defense lawyer in Los Angeles [said the reason for the unwillingness of juries to convict is] . . . that police argue that they form the "thin blue line" protecting society and therefore should be given wide latitude in carrying out their duties.'). President Bush vacillating between wanting to deal with the issue of race and wanting to exploit the issue for reelection purposes went to see the riot scarred neighborhoods of Los Angeles and promise aid, but he could not help pointing out to an audience of police that they represent the thin blue line between criminals and the body politic. See also John W. Mashek, *Bush in Pennsylvania Hears Plea for Social Programs*, THE BOSTON GLOBE, May 16, 1992, at 8 (describing President Bush's speech at a memorial in Washington).

Bush praised law enforcement officers at a memorial in Washington honoring those slain in the line of duty. "Yours is the priceless task of upholding good against evil," Bush told the families of 139 police officers killed during the last year across the country.

"All of us saw the sickening sights in Los Angeles of criminals breaking windows and burning buildings and looting businesses," Bush continued. "But even worse was the looting of something harder to replace than merchandise, the stealing of something precious - stealing hope, promise, the future. This we cannot allow."

Standing coatless in a light rain, Bush paid tribute to what he called the "THIN BLUE LINE THAT SEPARATES GOOD PEOPLE FROM THE WORST INSTINCTS IN OUR SOCIETY."

*Id.* (emphasis added).

It may be no accident that Bush, severely behind in the polls in California, transferred some of the aid scheduled to go to the riot scarred neighborhoods of Los Angeles to the hurricane impacted areas of Florida.

place in the justice system until we are able to look the rules of engagement of black manhood in the face and call them what they are—racial oppression—and to know that oppression will only be lessened by dealing with the racism involved in their implementation.

One of my friends who is black and is in charge of one of the largest metropolitan police departments responded to an earlier version of this article by saying, "So, what do I tell the police officer who stops you late at night?" His real question was, "How does the race question help me implement practical police policy?" Race is important. In a world so involved with race and gender it is not possible to ask the police officers to be totally blind to the race of particular offenders. My response is that the police have to be required to not end up increasing the racial oppression of black people by their actions. To me it is the distinction between the Boston Police Department collecting every black male between the ages of 18 and 35 after the Stuart murder and a police department that would have looked for a person who was black and fitted the appropriate height, weight and other descriptive characteristics.<sup>14</sup> Race is not irrelevant, but the police and citizens have to figure out ways to allow me to have rights as a black male too. Every time there is a conflict between the rights of the majority and my rights as a stereotypical black male, my rights cannot always be subordinate, or else I have no rights at all.

## II. HOW TO POSE THE RACE QUESTION

It is more difficult to face the question of race than it might appear on the surface. All of us are influenced by the racism that exists in society so that all of us, in our day to day lives, help to replicate the racial oppression represented by the trial of the four officers who beat Rodney King. We see the difficulty in the legal system's response to Rodney King's beating. The defense attorneys successfully convinced the non-black jurors that race was not an issue. After all, officer Powell, the officer who executed most of the blows and who joked on police tapes about "gorillas in the mist," came from a household that worked with children of color and has a sexual relationship with a person of color.<sup>15</sup> Rodney King was beaten because he refused to stop moving and he was always in control of the situation.<sup>16</sup> The defense was able to put police experts on the stand who testified that the officers' actions were within

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14. Charles Stuart is the white man who apparently murdered his pregnant wife and blamed it on a black robber. The Boston police spent a considerable amount of time rousting the black neighborhoods near the incident for this fictional robber. This police activity included convincing some people to implicate a black man for this crime. After Mr. Stuart was discovered to have killed his wife and wounded himself, he committed suicide. The mayor has never apologized for the racial nature of the investigation. Some people still seem more horrified by the prospect that a stranger, particularly a black stranger, might have committed this crime than that a man would kill his wife and future child.

15. *Policeman Who Beat Rodney King Apologizes for Injuries*, REUTERS, May 20, 1992 ("I want you to know that I never harbored any personal malice toward Mr. King, nor do I to this date.").

16. See generally Parloff, *supra* note 10.



the neutral standards of the Los Angeles police.<sup>17</sup> When these four police officers were indicted by the district attorney's office, one of the attorneys, who is black, was willing to accept an all white jury in Simi Valley because he thought the videotaped evidence would be sufficient to convince any jury of the defendants' guilt. Race was not an issue. When the verdict came back and a number of Los Angeles' citizens (black, white, and brown) rioted, the only reaction of the legislature and governor was to enact into law an emergency bill to allow the legal authorities to keep people in custody without being arraigned within the statutory forty-eight hour time period.<sup>18</sup> Some of those arrested were in custody simply for sitting on their porches in violation of the curfew. That a disproportionate number of those so arrested on these flimsy charges were black did not make this a racial issue for the California legislature. Race was not involved in the exclusion of the only black judge from hearing the case involving the beating of a white motorist by a number of black participants during the riots that followed the verdict. The black judge was removed at the instigation of the prosecution because he was erratic and possibly overworked.<sup>19</sup>

I found my own reaction to the Los Angeles riots and their aftermath in Northern California also problematic. The night before the largest amount of property destruction in Berkeley, I was standing in the lobby of my hotel when a young black male walked in the door. I had come in from the streets a short time before and I had a feeling of anticipation that I had never felt before as young teenagers milled around. When I saw that young black man come in the door, I started to enforce the rules of engagement of black manhood against him by asking him why he was there and whether I could help him. Fortunately, I stopped myself, but I have in the past enforced such rules. Despite teaching and writing about aspects of these issues, I am not, and was not, free of the impact of race and gender in such a situation.

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17. *Id.*

18. The state legislature subsequently passed SB 1427 that changed the criteria governing the rules for changing venue in criminal trials to include questions of the extent to which the new venue was similar in terms of race, age, ethnicity and income. See Editorial, LOS ANGELES TIMES, Sept. 5, 1992. As of the date of this article, the bill has remained unsigned on governor's desk.

19. See Danelia Wild, *White Judge Appointed to hear Denny Trial*, UNITED PRESS INTERNATIONAL, Aug. 31, 1992.

Superior Court Judge Roosevelt Dorn, the only black jurist assigned to hear criminal cases in the Central District of the Superior Court, was the first judge assigned to the Denny case. He was removed in a preemptory challenge filed by District Attorney Ira Reiner.

... The removal of Dorn was a controversial move, with prosecutors initially saying the judge did not have room on his calendar for the extended trial and was lacking a security courtroom.

But Reiner later said the real reason was that Dorn lacked the temperament to hear such a highly charged case.

... Mills [supervising judge] said the initial choice of Dorn was influenced by the fact he is a black judge and that assigning the case to him "would have some calming effect on the community."

*Id.*

I am willing to concede that there may be circumstances in which race does not matter. However, it cannot be that race is not important and does not need to be addressed in any of these circumstances. How does race influence the circumstances of this situation? This question has to be addressed at some point. The law's refusal to recognize it is a kind of color blindness that destroys black lives and makes Black Americans people without the support of law.

I came to realize the difficulty of dealing with the race question when my Black Legal Scholarship class this fall was discussing the case of *Colorcraft Corp. v. Jandrucko*.<sup>20</sup> This case grew out of a workmen's compensation claim by Ruth Jandrucko.<sup>21</sup> Ms. Jandrucko, a 65 year old white woman, was attacked and had a vertebra in her back broken by a assailant while working as a troubleshooter for a film processor five years ago. She was attacked from behind and, therefore, was not able to see her attacker's face. However, she saw his arms and concluded that he was dark skinned and black.<sup>22</sup> She presented evidence that the attack has left her with an uncontrollable fear of "big" black men, and since she cannot be in a situation free of such men she is unable to work.<sup>23</sup> Since the injury happened while she was at work and her disability arose from her injury, the court concluded that she was entitled to workmen's compensation. The court accepted her evidence that she was a Mennonite, had harbored no racial prejudice before this attack, and that the racial antipathy was not the result of some preexisting condition.<sup>24</sup> Supported by the ACLU, the company contended that such an award based upon her fear of black men would amount to support for racial discrimination, and, therefore, would violate the Fourteenth

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20. 576 So. 2d 1320 (Fla. Dist. Ct. App. 1991), cert. denied sub nom. Fuqua Indus., Inc. v. Jandrucko, 111 S.Ct. 2893 (1991). There is, however, no reported opinion stating the facts of this case. The Florida citation simply affirms a lower court opinion that also is not reported in substance. The subsequent effort in the district court challenging the decision on constitutional grounds is not reported.

21. See Don Williamson, *Humility, Like Stupidity, Can be Recycled*, SEATTLE TIMES, Sept. 3, 1992, at A18.

22. Lynne Duke, *Color Me Stressed; What If We All Sought Compensation for Our Race-Based Problems?*, WASH. POST, Aug. 16, 1992, at C5 ("Jandrucko did not see her mugger's face, but she says she knows he was black because she saw parts of his neck and arms. As a result, black people in general—with a few exceptions (her manicurist, and CNN's Bernard Shaw)—freak her out.').

23. Despite my argument below about this case, I want to emphasize that courts should be extremely careful about accepting evidence of such fears. I cannot be sure that the psychiatrist who testified to this disability was not applying a non-neutral standard infected with issues involving the race-gender intersection. Other evidence suggests that legal actors and social participants are infected with racist reactions. See e.g., Ian Ayres, *Fair Driving: Gender and Race Discrimination in Retail Car Negotiations*, 104 HARV. L. REV. 817 (1991) (explaining how black car buyers appear to experience different treatment from car dealers than white car buyers). In a slightly different area, death penalty cases, see Michael Radelet and Glenn L. Pierce, *Race and Prosecutorial Discretion in Homicide Cases*, 19 LAW & SOC'Y REV. 587 (1985) (differentiating between the police classification of a case and the prosecution classification connected to the race of victim and race of defendant. Blacks killing whites are most likely to have their case upgraded and least likely to have their case downgraded). We, therefore, have to make sure that this is not a situation where psychiatry is infected with racism.

24. Williamson, *supra* note 21, at A18.

Amendment.<sup>25</sup>

We were discussing how to do Black Legal Scholarship, and I contended to the class that we had to force the courts to ask the race question, much as feminists have required courts to ask the woman question. I asked my class, "How do we ask that question in the context of this case?"

Several of my students contended that this was an easy case and that this woman should not be able to collect for such fear. They seemed to be saying that too many black people suffer injuries, big and small, that are bigger than this injury for which they receive no compensation. Therefore, she should not be entitled to recovery for such fear. Descriptions of her as a sweet little old lady previously free of racial animus were ridiculed by my knowing students. They concluded that racial bigotry was at the heart of this woman's concern and it must be stopped. When I asked my class whether this case could be seen as a catalyst for protecting the injuries suffered by black people from the attacks of white people on the job, my students contended that we could never expect the existing judges and the law to protect black interests in that way. The law will never give real protection to black interests and, therefore, we have to prevent them from giving protection to what amounts to racial stereotypes by this white woman.

I remain convinced that my student's response to how to raise the race question was wrong. Unfortunately, the error that I found in their analysis seems to me to be common to most analyses of race and the law. They would have the law ultimately adopt a form of racial blindness in this case. The ACLU and my students would require that the law ought to be blind to the real injury suffered by a woman who cannot work because it is connected to race. This seems to me to be a different version of liberal color blindness. There are three things that militate in this particular case in favor of this woman being able to collect her workmen's compensation. She admits her response is irrational and ought to be aberrational. She has proven, at least to the satisfaction of a workmen's compensation judge that she had no prior racial animus. This means that she does not predicate her claim on some right to dislike or oppress black men. She is also not making a claim that she has a right to work in an environment that is totally free of black males, and accordingly she is not claiming the right to have the world changed to make it safe for her whiteness. Forcing white plaintiffs in such cases to prove these elements works against racial subordination.<sup>26</sup> Is this woman's response "colored" by the racism in the world? The answer to that question has to almost certainly be yes. But, we cannot punish such actions

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25. See Lynne Duke, *supra* note 22, at C5.

26. Those who have read some of my previous work might be surprised that I am defending this old white woman. See Jerome McCristal Culp, Jr., *Autobiography and Legal Scholarship and Teaching: Finding the Me in the Legal Academy*, 77 VA. L. REV. 539 (1991) (I discuss whether I should be able to say "boo" to an old white woman who is apparently infected with racism. However, if I can say "boo," she ought to be able to stay at home with a provable disability.).

effectively in the long run unless we limit that punishment to situations where vindication of the racism will not increase racial stereotypes and or racial oppression. Ms. Jandrucko is not entitled to oppress black people, but she does not have to live in some mythical world free of racism. Such a world does not exist. Would we deny Ms. Jandrucko a disability claim from a private insurer because her injury is infected with racial stereotypes and concerns at some level? Workman's compensation is supposed to be the public version of this private insurance situation. The employer owes this to her through workmen's compensation, and to his black employees and customers he owes the enforcement of rules that reduce racial subordination.

The same company arguing that the Fourteenth Amendment prevents this action would argue, perhaps successfully, that black men could not do certain jobs because of "business necessity," (i.e., having black males around in certain situations is a danger to others and economic pressures require that they be excluded) just as similar employers have argued that it is alright to impose a rule that would exclude black women who are pregnant from such jobs because of their status as role models.<sup>27</sup> I suspect my students are right. Most courts will not be willing to extend these arguments to protect black people from the kind of injuries suffered by them due to racial hostility. I have seen black students and black employees driven literally mad by the racism they had to face, and it is difficult to get those real injuries considered by the courts. This Supreme Court is very likely to treat such claims in the way that it treated the claims of black people in *McCleskey v. Kemp*.<sup>28</sup> The Court will acknowledge their existence, but contend that they are so pervasive that any effort to ameliorate them would destroy other interests or the public

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27. *Chambers v. Omaha Girls Club, Inc.*, 834 F.2d 697 (8th Cir. 1987) (Employer contended that its role model policy that prohibited the employment of unmarried pregnant women was a Bona Fide Occupational Qualification. Therefore, the subsequent firing of a pregnant black woman was consistent with Title VII because she worked with teenage girls and served as a role model.). See also Regina Austin, *Sapphire Bound!*, 1989 Wts. L. REV. 539; Paulette Caldwell, *A Hair Piece: Perspectives on the Intersection of Race and Gender*, 1991 DUKE L.J. 365, 372-76.

28. 481 U.S. 279 (1987) (McCleskey was sentenced to death for killing a white police officer during an armed robbery. In his habeas corpus action, McCleskey claimed that his race and the race of the victim unconstitutionally tainted the sentencing.). The Court held that:

[I]f we accepted McCleskey's claim that racial bias has impermissibly tainted the capital sentencing decision, we could soon be faced with similar claims as to other types of penalty. Moreover, the claim that his sentence rests on the irrelevant factor of race easily could be extended to apply to claims based on unexplained discrepancies that correlate to membership in other minority groups, and even to gender. Similarly, since McCleskey's claim relates to the race of his victim, other claims could apply with equally logical force to statistical disparities that correlate with the race or sex of other actors in the criminal justice system, such as defense attorneys or judges. . . . As these examples illustrate, there is no limiting principle to the type of challenge brought by McCleskey. The Constitution does not require that a State eliminate any demonstrable disparity that correlates with a potentially irrelevant factor in order to operate a criminal justice system that includes capital punishment.

*Id.* at 314-19 (footnotes omitted). This argument ignores the history of race relations in this country. See also Jerome McCristal Culp, Jr., *Toward A Black Legal Scholarship: Race and Original Understandings*, 1991 DUKE L.J. 39, 85-87.

fisc. The courts are always denying the race question, but it does not help us to join them. To support the company's position in this case is ultimately to conclude that race should not be used when it will cost them resources. Such a rule not only does not eliminate racial subordination, it is likely to increase the income and class subordination that exists in our society.

If my students have such a difficult time appropriately asking the race question, how can we expect mainly white male judges to figure out how to pose the question in their deliberations. The answer is ultimately that the legal participants have to be forced to look racial subordination in the face and to discuss how that subordination will increase or decrease with how we treat race.

If I could adopt a general rule, it would be that not looking at issues of race, claiming to be racially blind, is likely to increase racial subordination, and therefore should not be adopted. If the courts had been willing to look at the racial facts of Rodney King's experience, they would not have permitted the case to be moved to a jurisdiction where the racial circumstances were so unfair to his interests. If the racial facts were examined, then the black prosecuting attorney would have permitted Rodney King to testify about his experiences with these four police officers before a jury that had some number of jurors who could understand them. The truth is that we have to reorient our approach to race and the law and appreciate how important it is to take account of the racial truth that exists. If we fail to do so, we ultimately fail justice.

### III. SINGIN' THE BLUES IS A POLITICAL ACT: BEING WISE AND SAYING SOMETHING

In my schoolboy days I had no aversion to slavery. I was not aware that there was anything wrong about it. No one arraigned it in my hearing; the local papers said nothing against it; the local pulpit taught us that God approved it, that it was a holy thing, and that the doubter need only look in the Bible if he wished to settle his mind—and then the texts were read aloud to us to make the matter sure; if the slaves themselves had an aversion to slavery, *they were wise and said nothing*.<sup>29</sup>

I want to be a realist about the racial circumstances that Rodney King leaves us in the law. Much of the legal response to race is to deny the importance of race and to seek a form of racial blindness that ultimately reinforces racial oppression. Black people do not have the power to unilaterally alter this situation. It is not likely that any short run political change will alter this fact.<sup>30</sup> Black people and those who would join

29. SAMUEL CLEMENS, MARK TWAIN'S AUTOBIOGRAPHY 101 (1924) (emphasis added).

30. Some might argue that simply electing a president who is opposed, at least in some situations to racial oppression, would be enough, or that we might ally ourselves with a progressive coalition who could pass legislation. Unfortunately, unless the administrators appointed by such a president and the judges and lawyers who enforce these laws understand how to deal with the race question, the interpretation of any new legislation or regulation will not be sufficient to eliminate important aspects of these concerns. This of

us in fighting racial oppression have to understand that we have power, but limited power. Derrick Bell has asked all of us to rethink the potential for law to be redemptive; in his book, *And We Are Not Saved*,<sup>31</sup> he repeatedly makes the point that law has not "saved" black people and is unlikely to do so. In more recent work, Bell fleshed out this point by contending that there can be no salvation, i.e., that race and racism are so deeply embedded in the fiber of our society that it cannot be eradicated by law, or other simple means; and that all we can do, in the words of one of Bell's former black Mississippi clients, is to "harass the white folks."<sup>32</sup> I interpret that argument to be a different way of saying that if we are not harassing the white folks we are acquiescing in the racism that exists in our society; or, as my colleague put it, "We may not be able to change the world, but we do not have to take it." The point is that either we harass by our actions, or we are wise like the free blacks and black slaves in Mark Twain's time and we acquiesce in the racism. Part of this harassment is our requirement that judges, lawyers and law students face the race question. Such efforts will not be magical. Simply posing the race question will not make all white (or black) judges see the truth of our racial present, but it is a start on the road to change in California and the rest of America.

There is a potential for change nascent in that failure to acquiesce and part of the change in our status as black people is that we are no longer wise by continuing to be silent. Certainly, as my colleague Jim Coleman points out, the status of black people in the 80's was at least partially impacted by the acquiescence of the black community in some of the actions of the Reagan Administration and the Supreme Court that helped to increase the power of white supremacy. Black art (jazz and the blues), black literature (slave narratives, novels, and autobiographies), and black religion have all been about ways around the required silencing of black voices. Black Legal Scholarship and Critical Race Theory have to be about altering that history by adding our voices to the singin', writing and arguing of other black voices.

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course does not mean that we can stop trying to make such efforts, but that they are unlikely to prevail in the long or short run when the enforcers and interpreters of those laws do not know how to deal with the race question.

31. DERRICK BELL, *AND WE ARE NOT SAVED* (1987).

32. Derrick Bell, *Racial Realism*, 24 *CONN. L. REV.* 363, 379 (1992).