

Imagining A Greater Justice

Criminal Violence, Punishment and Relational Justice

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Chapter 10

HEALING THE AMERICAN COMMUNITY

Race and Criminal Justice

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HEALING THE AMERICAN COMMUNITY

Race and Criminal Justice

“You just don’t *get* it.”

No one likes to hear this, but how much these words sting depends on the speaker and situation.

When your kids tell you that you are clueless about their lives, you may sigh or grimace—or you may ask why—but you likely will not be devastated. You won’t be emotionally crushed, even if there is some truth to the statement. (And there usually is.) Parents and children stand in different places in the world, making it hard to fully appreciate the other’s situation. When men say this to women, or women to men, we may also accept that for all our efforts, our understanding of the other gender may fall short. We just seem to be built differently.

When the you-just-don’t-get-it proclamation crosses race lines and concerns race, though, when the statement is made by a person of color and is directed at me or folks like me, meaning white people, it cuts deep. Especially for a white liberal it cuts deep. *I have tried so hard to get it. Really. I could give you my good faith race credentials if you want. They go back years. No, you don’t want to hear them? Okay.* But really—after all these years of talk and soul-searching, after all of the stories and articles and books and documentaries and consciousness-raising programs, after all the protests and court cases and legislation, what could we still be missing? A lot, it turns out, and a lot that is critical to healing community. By community healing, I mean healing the wounds of past violence that discourage many from believing in justice, or the possibility of real peace in America.

In this chapter we consider a subject that has arisen many times before on our journey: race in American criminal justice. Our most serious community divides involve race,

often in the context of criminal justice. I take up two current issues, one which has garnered enormous attention, and the other considerably less. The first is police use of deadly force against minority men, particularly young unarmed African-American men. The second is minority on minority homicides, particularly black on black killings.

I use these controversies to explore white views about race and crime and how these can block needed change. I am looking for why whites don't "get it" about race and even more, why we (whites/majority Americans) might not want to get it. This leads to a discussion about white views of America's racial past, present desires for racial separation and the nature of relational responsibility for race.

Writing as a White Man

I write now, as I have written this entire book, as a white man. In this I had no choice; I am a white man.

Like many whites in America, I resist identification as White. As a liberal, I know that white consciousness has long been associated with white supremacy, the ideology used to justify the conquest of native peoples and the enslavement, segregation and oppression of blacks. But that's not the real reason, if I'm fully honest, that I resist identification as White. I resist my whiteness, in a way that I don't resist other aspects of my identity such as maleness or American-ness, because of the social and moral burdens that come with this racial assignation. I don't want to feel bad for being White.

I hate the idea that I must carry personal shame or culpability for the past wrongs of others with pale-ish complexions. I would like to be seen for who *I* am and not for what my appearance might signify. I want to be seen as a unique person and not a type. Isn't that what everyone hopes? It's an essential part of moral regard. It's what Martin Luther King meant, in his March on Washington line about hoping that his children would be judged on the content of their character and not the color of their skin.¹

So I'd like not to go where I go here. But this is where the route to greater justice goes.

A fundamental lesson of our journey so far is that who we are depends on relationships with others, chosen *and* unchosen. All in the United States are engaged in race relations, like it or not. All of us have racial identities that are shaped in part by the expectations of others. Acknowledging personal racial identity is essential to doing justice under law and to relational justice. For whites this does not mean forever cringing in guilt or shame. But it does mean taking responsibility for more than our own individually chosen actions. It means taking responsibility for

ingrained social attitudes and perceptions which we may never have chosen, but which still shape our lives. It means taking relational responsibility for race.

The Urge to Forget and the Need to Remember: Race and Police Use of Deadly Force

James Baldwin, one of America's greatest analysts of race, wrote of the necessity of accepting the truth of America's past. "To accept one's past—one's history—is not the same thing as drowning in it; it is learning how to use it. An invented past can never be used; it cracks and crumbles under the pressures of life like clay in the season of drought."²

Especially when it comes to race, many Americans resist the past. We have always been big on today and tomorrow; yesterday, not so much, particularly if yesterday was a bad day. Unlike other peoples who carefully preserve memories of historical hurts, handing them down from generation to generation like treasured heirlooms, we Americans, by which I mean majority Americans, try to put the bad stuff behind us and, as we like to say, *move on*.

There is a major cost to American impatience with painful and shameful events, though. Violence teaches that if we do not remember past losses, if we do not speak their truth and mourn the lives taken, past hurts will haunt us. To live fully today, we must respect the hurts of long ago, even if the people hurt were not *our* people.

A Los Angeles Story

From my office window I can see some of the recent history of racial conflict and wrongful violence in Los Angeles. It is a hidden history, though, visible only to those who know the past.

When I moved into my fourth floor office in 1986 I could see a liquor store, a mid-rise glass and steel office building, a pair of time-worn tenement apartment buildings and La Curacao, a department store catering to Latin American immigrants. Now I look out on a law school campus that has expanded to include a basketball court, a broad lawn with trees, and the school's Girardi Trial Advocacy Center. Beyond, on the next city block, I can see the new Olympic Primary Center for preschool and kindergarten.

The differences between the view now and then may be traced in part to the effects of an early 1990s economic recession and the Northridge earthquake of 1994, but the biggest factor may be what happened following the 1992 acquittals of LA police officers for beating Rodney King.³ Without the fires that burned in the

neighborhood, destroying the apartment buildings and damaging other structures nearby; without the looting and violence that followed the state trial verdict, it's hard to imagine the current view, because it was the consequent damage to property and faith in the city's future that opened the way for the new structures I see. Which means that without the videotape of King's beating replayed endlessly on the television news, and without the history of toxic relations between the Los Angeles Police Department and minority residents, especially African Americans, this view would not exist.

Another event that shaped this view was the killing of a 15-year-old African American girl, Latasha Harlins. On the morning of March 15, 1991, Harlins entered the Empire Liquor Market and Deli in South Los Angeles and picked up a \$1.79 bottle of orange juice. According to witnesses, she put the bottle halfway into her backpack and then approached the front counter with \$2 in her hand, apparently to pay for the juice.⁴

These were not good times to run a liquor or convenience store in South Los Angeles. It was a time of high crime in the city, with some of the most frequent and most violent crime occurring in then predominantly black South Los Angeles. The Empire store was run by Korean American immigrants, as were many liquor and convenience stores in South Los Angeles. Tensions between Korean Americans and African Americans had reached a dangerous state in the previous summer. African Americans complained of disrespectful treatment in stores owned and run by Korean Americans; Korean American owners and employees complained of crime and disrespect by blacks. The Empire market had been burglarized repeatedly and robbed three times. The eldest son, Joseph Du, reported being terrorized by local gang members. Shoplifting was a constant problem at the store.⁵

On that Saturday morning, filling in behind the cash register was Soon Ja Du, a 51-year-old woman who had come to the United States from Korea. According to witnesses, Du accused Harlins of trying to steal. Footage from the store surveillance camera showed that Du reached over the counter and grabbed Harlins by her sweater. Harlins responded by punching Du in the face several times. Harlins then broke away from Du's grasp. Du hurled a small stool at Harlins. Harlins tossed the contested orange juice bottle on the counter and turned to leave. Du reached down and pulled from its holster a .38 caliber handgun that was kept there for the store's protection. She raised the gun and shot Harlins once at close range, hitting her in the back of head.

The gun's firing mechanism had been altered to give it a hair trigger. Du may not have been aware of this. At trial she said that the shooting was accidental.

Du was charged with first degree premeditated murder, but at the end of the prosecution's case, the trial judge reduced the highest charge to second degree

murder. Although the trial was one of the highest profile proceedings in the county at the time and would normally have been assigned to an experienced jurist, it ended up with a recent appointee to the bench, Joyce Karlin. A former federal prosecutor, it was Judge Karlin's first jury trial presiding as a state judge.⁶

After four days of deliberations, the jury convicted Du not of murder but of voluntary manslaughter. Voluntary manslaughter is a serious felony generally punished by a significant prison term in California. Because Du used a gun, the maximum sentence in the case was 16 years in prison. But Judge Karlin placed Du on probation, meaning she did not serve any time behind bars. Du was also ordered to do community service and pay a fine.

In her sentencing decision, Judge Karlin emphasized Harlins's assault on Du, the past crimes that had been suffered by members of the Du family, the hair trigger on the gun and Du's lack of any criminal record. The judge said the offense involved "circumstances of great provocation, coercion and duress" and that Du's "over-reaction" to Harlins was "understandable."

The judge began her sentencing remarks by rejecting the Deputy District Attorney's argument for the maximum sentence of 16 years. "Statements by the district attorney [which] suggest that imposing less than the maximum sentence will send a message that a black child's life is not worthy of protection, [are] dangerous rhetoric, which serves no purpose other than to pour gasoline on a fire."⁷

Many African Americans in Los Angeles saw the sentence of probation as clear evidence of a racial double standard: while black defendants convicted of crimes against nonblacks invariably received harsh sentences, whites or other nonblacks who victimized African Americans received little or no punishment.

The case fit a pattern of what I call mercy discrimination, where race plays its greatest role in deciding when the harshness of criminal law should be alleviated according to the individual circumstances of offense and offender. From investigation to sentence, the individuals most suspected of dangerous criminality—and race here contributes strongly to such suspicion—receive the full measure of law's punitive force. Crimes by persons whose characters are seen as less essentially "criminal" may be treated with greater leniency, for similar deeds.

When the white LAPD officers who beat Rodney King were acquitted by a largely white jury the following April, many black Angelinos saw this as nothing new. That was the problem. With the memory of Latasha Harlins's case fresh, it seemed like the same awful story, all over again. Black victimization did not matter. Again.

I remember standing in the law school café on the afternoon of April 29, 1992, at the back of a crowd of students, watching the verdicts come in on the television that hung from the wall in one corner. As the court clerk read off the not guilty,

not guilty, not guilty verdicts from the verdict sheet, my gut tightened. So many times in the 1980s and 1990s the criminal justice system in Los Angeles seemed to fail us. Earlier that day, in the photocopy room, a fellow professor had asked me if I thought there was going to be trouble after the verdicts, which were expected shortly. I remember being surprised by the question. No, I didn't think so, I said. I had seen no signs of that. But by the time I reached home late that afternoon, it had started. I watched the beating of white truck driver Reginald Denny by a black man, Damian "Football" Williams. Williams had pulled Denny out of the cab of his truck at the intersection of Florence and Normandie and bashed him repeatedly in the head with a brick. Images of this violence were captured by a circling TV news helicopter and appeared on a small black-and-white television in our kitchen as my wife and I got our girls dinner. (What we did not see then was a group of African American residents put Denny in their car and rush him to the hospital, perhaps saving his life.⁸)

As violence to person and property spread across South Los Angeles, the police department retreated. Across the city, but concentrated in South Los Angeles and Koreatown, stores were looted and burned; people were assaulted and shot. Over a three day span, more than 60 died as a result of the violence and fires, many businesses, especially those owned by Korean immigrant owners, were destroyed.⁹ I remember coming back to the law school when order was finally restored, thanks in part to the deployment of the National Guard, and wondering what the dark powder was on the outside stairs of our Frank Gehry designed main building. It was ashes from the fires in the city.

After the violence came a period of intense civic introspection. Why had this happened? How could this have happened in such a cosmopolitan American city, in the last decade of the 20th century?

After the 1992 riots, Los Angeles took on issues of race discrimination in policing. Two LAPD officers were later convicted on federal charges for the assault on King. There were major public investigations of the city's police department and the county sheriff's department, changes in police leadership, a change in the city's charter, and a Department of Justice lawsuit against the city over policing practices that was resolved by a consent decree. Today the makeup of the city's police department is far more reflective of the city's racial diversity. Police leaders work hard at community relations. And yet controversies over race and police use of force arise again and again. In recent years, Los Angeles Police Commission meetings have featured displays of extraordinary public vitriol over the issue.¹⁰

It would be an enormous mistake to believe that Los Angeles, or any other jurisdiction in the United States, has solved problems of race and police use of force. History tends to repeat here. Again and again controversies about police use of

force against black men have triggered serious and sustained civic violence in the United States: see Baltimore, 2015, Ferguson, MO, 2014, Cincinnati in 2003, Los Angeles in 1992; Miami (Liberty City) in 1980. Other developed nations experience civic violence over political and economic differences; for Americans it seems to be race and use of force by police. Race is the great fault line in America's past which makes it the great fault line in society today. It remains our greatest barrier to the belonging needed for a peaceful and just community.

The Shadow of the Past: Fear of the Police

After the killing of Michael Brown in Ferguson, Missouri in 2014 and other controversial police shootings of African-American males, many commentators mentioned The Talk that black parents give their growing children about how to deal with the police. This conversation is often referenced in capital letters to signify its importance and ubiquity. Just as parents everywhere attempt to educate their children growing into adolescence about the mysteries and hazards of sexuality, black parents in America have seen the need to educate their children about police officers who may consider them threats because of their race. Parents teach African-American teen drivers how to act when stopped by police. They talk about how to keep hands on the steering wheel at the two o'clock and ten o'clock positions, how to remain calm and avoid angry, challenging responses. The Talk is preparation for an often fiercely administered police attitude test. The Talk is an education in racial fear. African-American parents teach their boys to be afraid of the police, because history teaches that a wrong move can cost a young black man his life.

The perceived necessity of The Talk has not changed even as cultural attitudes towards race appear to have changed, as local, state and national politics about race have changed, and as many big city police departments have become more diverse racially. Black parents educate their children about the dangers of the police because they believe, with reason backed by statistical evidence, that their children are at greater risk of being beaten or shot by law enforcement, because of their race.

White parents, and parents of other non-African-American children, do not have an equivalent talk with their children. In majority communities, the young are taught that the police are their friends. They can be trusted.

There is another kind of talk that white parents give children about racial dangers, however. This is a conversation, sometimes explicit, sometimes suggestive, about the connection between race and criminal violence. There may be comments about bad neighborhoods that need to be avoided, and the need to look out

for unspecified bad people. Among the more educated, any explicit reference to African-Americans tends to be orally italicized with pauses and a lowered voice to signal a matter of great sensitivity. The adult's message is that: we're not racist and you shouldn't be either, but you do have to be *careful*. It's a matter of understanding that *they*—at least some of them, not all of them, to be sure—can be very dangerous. These warnings go more to girls than boys. The great fear expressed, by words or implication, is of sexual violence by black men. This is another form of education in racial fear.

A long history of race relations lies behind each of these talks. African-American parents can point to a history of racial discrimination, in which law enforcement has done the dirty work of a bigoted majority. White parents can point to a history of high levels of criminal violence in predominantly black neighborhoods. While these parental conversations anticipate future encounters, they draw on lessons from the past.

White people and black people in America are divided as much by history as by appearance. Different histories create different expectations and relational patterns. As a result, we have different perceptions of who and what is dangerous and who and what is safe.

Many whites become impatient, even angry, with recollections of past racial wrongs that put whites on the wrong side of history. They complain that the past, especially the distant past, should not be used as an excuse for present shortcomings. As Darren Wilson, the police officer who shot Michael Brown in Ferguson, Missouri, told a journalist much later: "What happened to my great-grandfather is *not* happening to me. I can't base my actions off what happened to him." He maintained that in police work, "We have to fix what's happening now. That's my job as a police officer. I'm not going to delve into people's life-long history and figure out why they're feeling a certain way, in a certain moment."¹¹ He said he was not interested in a federal report that documented pervasive and long-standing race discrimination in local criminal justice: "I'm not going to keep living in the past about what Ferguson did. It's out of my control."¹² These value statements about the significance of the past, particularly our racial past, reflect a perspective shared by many white Americans today.

On this journey we learned early on about the present significance of past violence. How could anyone understand American public life today without appreciating the effects of the terrorist attacks of 9/11 and subsequent attacks targeting Americans and westerners, from London to Madrid to Paris to San Bernardino? In comparison, race violence in this country has a far longer history, has taken far more victims, and is entirely domestic. It has all happened on our shores. Worst of all, this wrongful violence has often been condoned, and frequently committed, by

public authorities, and then ignored, denied or rationalized by the majority.¹³ Of course this past still matters today.

Going Back a Generation: Shooting Fleeing Felons and Patterns of Mercy Discrimination

After notice of intention to arrest the defendant, [if] he either flees or forcibly resist[s] arrest, the officer may use all the necessary means to effect the arrest.

*Statute on police authority to use of deadly force*¹⁴

You cannot know the terror that black folk feel when a cop car makes its approach and the history of racism and violence comes crashing down on us. The police car is a mobile plantation, and the siren is the sound of dogs hunting us down in the dark woods.

*Michael Eric Dyson*¹⁵

To better understand present controversies over police shootings, I want to go back to a law that was in effect for many years in many parts of the United States. This law illustrates how mercy discrimination operated in the past, which will shed light on how it operates today.

When I was a police reporter in Jacksonville, Florida in 1978, officers regularly shot and killed felony suspects as they ran from officers. The typical case involved a white police officer and a teenage African-American boy suspected of a potential felony, who instead of obeying a police order to halt, tried to run away. The young man would then be shot, often in the back. Under the law of Florida and many states at the time—see the Tennessee statute quoted above—it was lawful for police to use deadly force to capture a fleeing felon, regardless of the danger the suspect then posed. Police were instructed to shoot if no other means of capture seemed possible. In the newsroom we joked about police officers who practiced saying “Halt police, halt police, halt police” (these warnings being required by local police procedure) as fast as they could as training for shooting fleeing felons. Under these rules, a few patrol officers were responsible for a number of fatal shootings.

At least in the larger white community in Jacksonville, these shootings were accepted. Despite their frequency, they did not provoke serious protests. The assumption seemed to be that when the police yell at you to stop, you should stop, end of story. And if you had committed a crime and then got shot, well, you got what you deserved. The official law enforcement position was that the rule was required for deterrence. It was believed that without it, virtually all felons would run from police and some would get away.

I do not recall any cases of unarmed white teens, suspected of felonies, being shot and killed by police, though it seems likely that such crimes, burglaries especially, were committed by both white and black teens in this city of half a million. Did white teens never run from the police? Or did police largely refrain from shooting when they did? I do not know.

The law on shooting unarmed and nonviolent fleeing felons changed in 1985, when the United States Supreme Court by a 6 to 3 vote in *Tennessee v. Garner* held that the Fourth Amendment of the United States Constitution prohibited the use of deadly force in these situations. The Court ruled that the police could not use deadly force to arrest except to capture a felon who posed a serious risk of death or great bodily injury to officers or others.¹⁶

The case that spurred this ruling followed the pattern familiar to me from Jacksonville. On the night of October 3, 1974, two police officers responded to a “prowler inside” call in East Memphis. One of the officers went to the back of the property where he heard a door slam and saw a teenager run across the yard to a 6 foot chain link fence. With the light from his flashlight, the officer saw the teen’s hands and later said he did not believe that the individual was armed. The officer said that he believed the person to be 17 to 18 years of age and 5 foot 5 to 5 foot 7 inches tall. The officer issued a command to halt. After a moment’s hesitation, the teen tried to jump the fence. Believing that the suspect would escape if he made it over the fence, the officer fired. The shot struck the teen in the back of the head, killing him. The teen turned out to be Edward Garner, a 15-year-old boy who stood 5 foot 4 inches tall and weighed between 100 and 110 pounds. He was in the eighth grade. In his possession was \$10 and a purse that he had apparently taken from the house.

Neither the majority opinion by Justice Byron White nor the dissent authored by Justice Sandra O’Connor mentioned race. They did not mention that Edward Garner was African-American, nor that the civil case about the shooting arose out of long-standing bitter conflicts between the black community in Memphis and its police department. They wrote as American judges often do, as if race was not an issue, and indeed it was not the critical *legal* issue. The legal issue concerned the police officer’s constitutional authority to use deadly force against a person reasonably suspected of committing a nonviolent felony. And yet the Court’s decision occurred in a historical context in which race was *the* story.¹⁷

At the time of the Court’s decision, the old English common law’s fleeing felon rule remained in force in a number of states, but predominantly in the South. This is potentially significant, as the South has a particular violence history concerning race: race slavery, race discrimination in criminal justice and racial terrorism. By racial terrorism I mean the organized use of violence, usually officially condoned, to

kill, brutalize and threaten African-Americans and sometimes other groups such as Jews or Catholics, to effect political and cultural ends. Racial terrorism flourished in southern states from the end of Reconstruction in the 1880s until World War II and only dwindled in the 1950s and 1960s.¹⁸

Of course race discrimination in criminal justice was never confined to the South. Police use of extra force against blacks, the imposition of additional penalties against minority defendants by the courts, the disregard for claims of wrongful conviction of persons of color have occurred throughout the nation.

None of this background was referenced in the decision; the only history detailed in the Court's opinion was legal: accounts of 17th and 18th century English common law, the United States constitution, modern legislation and court decisions and police use of force policies.

In *Garner* the justices differed primarily about public safety. Justice White, writing for the majority found no need for police to use fatal force to capture apparently unarmed felons like Garner. Justice O'Connor disagreed. While she described the shooting as "deeply regrettable,"¹⁹ O'Connor believed the dangers of nighttime burglaries justified police use of all available means to capture suspects. She concluded that "[t]he legitimate interests of the suspect in the circumstances are adequately accommodated by the Tennessee statute: to avoid the use of deadly force and the consequent risk to life, the suspect need merely obey the valid order to halt."²⁰ If Garner had stopped atop that fence, he would have lived. If he had just trusted the police and the legal process, he would have lived.²¹ Note the classic expression of the autonomy ideal: an individual is held responsible for his or her own choices, regardless of the larger social context. Youth, race, history—none of these matter.

To appreciate this decision historically, we need to supply the context that the Court left out. The following are facts about Memphis police, use of force and race discrimination that were available to the Court at the time.

When Garner was killed, the Memphis police department had no formal shooting policy; it did not provide formal training in shooting for its officers. The only limits placed on officers were those of state law. Individual officers had discretion whether or not to shoot an unarmed suspect fleeing the scene of a possible felony. New officers were told that they just had to live with themselves if they killed someone.²² Underlining the free rein given city police officers at the time, it appeared that no Memphis police officer had ever been disciplined for improper use of a gun.²³ Unsurprisingly, given American history, this broad discretion was not exercised in a racially neutral fashion.

From 1969 through 1974, 85.7 percent of those shot by Memphis police were black; 14.3 percent were white.²⁴ Compared to their percentage of the Memphis population, blacks were ten times more likely to be shot at by police when

suspected of property crimes than whites, 18 times more likely to be wounded and five times more likely to be killed. Focusing just on rates of police shootings of those suspected of property offenses, the rate for blacks wounded by police gunfire was six times higher than the rate for whites. The death rate for blacks shot by police while unarmed and nonassaultive was 18 times higher than for whites.²⁵

In retrospect, the Court's conclusion in *Tennessee v. Garner* seems obviously correct. Of course using deadly force to seize a person suspected of a nonviolent offense, who presents no dangers to others, amounts to excessive force. This seems very much like an unreasonable seizure of the person under the Fourth Amendment. And when we consider contemporary controversies over police use of deadly force in cases where officers claim self-defense, a much more powerful moral and legal claim, it seems almost unimaginable that the law permitted and police departments encouraged officers to shoot unarmed, non-dangerous fleeing suspects just to effect their "arrest."

Thus we might take solace in how much has changed in American policing since Garner's shooting. Even by the time the Court handed down its decision, the Memphis Police Department had an actual shooting policy. As a result of the *Garner* decision, the law of shooting fleeing felons changed nationwide. No contemporary US police department does, or could, wield deadly force with such abandon and with such racially disparate results as did the Memphis police in the early 1970s. From these developments we might reach certain reassuring conclusions about our present race situation. We have learned a great deal about race and policing since the early 1970s. We have grown as a nation. We have fixed, mostly, what needed to be fixed. Which means that it's time to move on from this old controversy. Right?

But if we move on without looking beneath the surface of this history, we will miss its most important lessons. We need to ask tougher questions. Why did this rule of law persist for as long as it did? Why did it have such strong support among those in law enforcement and elected officials, among voters and even among Supreme Court justices in 1985 (there were three dissenters), long after the signal accomplishments of the civil rights movement some two decades earlier?

The answer involves moral regard. Who are seen as individuals, and who are seen as types? Do we see the person shot as a suspected *felon*, or as *person* suspected of a crime? Is he a burglar or a boy? Obviously he can be both, but what we initially perceive often dictates our moral—and legal—conclusions. Memphis's mayor at the time defended the police department's shooting practices this way: "[Y]ou let him get away, tomorrow he's in another place stealing guns and maybe the next week he's in the 7-11 blowing somebody's brains out. I'm just a strong man on feeling that a felon is a felon and if you commit a burglary you will step up gradually to

something else.”²⁶ Notice, the mayor did not mention race here; his justification was entirely about crime, violence and public safety. That does not mean that race did not matter, however.

A thought experiment may help here. Imagine a city where whites comprise the majority and hold a firm grip on political, social and economic power. Imagine that significant numbers of unarmed white teens are shot fatally in the back while fleeing from the scene of suspected business or residential burglaries, where there is no violence but a small amount of property is taken. Would these fatal shootings be seen as fully justified by most citizens and their elected representatives? Or would there be, in fairly rapid order, popular demand for changes in law and police practice with respect to use of deadly force? Might we expect even greater public concern if it was revealed that the police receive no specific training in when to shoot? Might that criticism grow on learning that the department uses soft-point (dum-dum) bullets because these bullets inflict the maximum damage on human targets?²⁷ And if there would be a public outcry in this situation, but there was little or none when young blacks were shot and killed—under the same circumstances—how can we say that race made no difference?

In the American criminal justice system, race disparities follow a standard pattern. Where the severity of criminal law falls primarily on minorities, severe treatment seems justified—to the majority. Criminals just get what they deserve under the law. When those who are judged to have “made a mistake” face harsh penalties for criminal violations, however, the exercise of discretion suddenly seems necessary to do justice. Police, prosecutors, or judges find ways to ameliorate the potentially harsh rule of law. Because obviously its full severity was not intended to fall on someone who just made a mistake.

The problem is that because of race, some suspected of wrongdoing are presumptively seen as criminals, while others are seen as persons who made a mistake. Because of this difference in character perception, the same rule of law can produce different results *according to race*. This is what happened with the rule allowing the shooting of fleeing felons; it’s what happens with many other rules today. The doctrinal particulars may change but the pattern of selective application remains the same.

Seen from today’s vantage, the wrongs of our racial past are clear. And so we may say to ourselves, *well, we’re never going to do that again*. And if we define what occurred in the past narrowly enough, that may be true. But the real lesson of the past comes in understanding what made it seem right or acceptable *then*. Because similar justifications will appear today, in slightly different circumstances, expressed in slightly different ways. We need to examine past failures to alert us to contemporary dangers; they should not reassure us of our present virtue.

Respecting the Past through Remembrance

Victims of violence know about anniversaries. The anniversary of a sexual attack, the birthday of a loved one who was murdered, or the date of her death, can bring emotional storms even decades later. At least on these days, the past is very much present. Most victims learn about the necessity of acknowledging anniversaries. Even as survivors move forward, anniversaries must be marked.

The other group with a keen appreciation for the need to honor past losses is the military. All branches of the military have rituals of remembrance both formal and informal, some to be done almost immediately and others much later, to honor lives taken by violence. We see a similar reverence for violent loss at the funerals of police officers killed on duty and, at their best, in public holidays to honor the military's dead, such as Memorial Day in the United States. Notice, though, that these are remembrances of majority suffering. They are not commemorations of suffering inflicted by the majority.

What if we had a day, or even just a designated time on a designated day, to remember lives lost in past racial attacks in America? This would be a time to acknowledge losses in both body and spirit. It would not be an occasion for recrimination or shaming, but acknowledgment, acceptance and accompaniment. I'm not sure this should be a day off from work or school, for such holidays quickly become excuses for sales events and sporting contests, with only passing recognition of their original purpose. This would be a time for sorrow and stillness. I imagine a time like when the siren sounds in Israel at 10am on the morning of Yom HaShoah, a day set aside every year in that nation to remember the Holocaust. Another example is Germany's commemoration of the Holocaust by prominent markers of places where Jews and their property were taken. Or the project of Bryan Stevenson and the Equal Justice Initiative, to commemorate lynchings in the United States.²⁸

The great obstacle to a broader remembrance of race violence is the American belief that we are morally special, an exemplar for the world. We celebrate our past victories, not our past losses. Formal remembrance of the ugly past would require us to sacrifice our historically-rooted sense of moral election. We could not use the glories of the Declaration of Independence (all men are created equal) and the constitution to erase memories of race slavery and colonial conquest. We could not erase past attacks on native populations, both direct and indirect, by celebrations of immigration, past and present. We would have to, at least for a time, admit that our past contains much of the same moral darkness found in the pasts of other nations.

To which the impatient reader may reasonably and forcibly object that all this remembering will do little to address immediate concerns with police use of force.

What does some general commitment to recalling past wrongs do for outraged communities and devastated families? Or, for that matter, what does it do for police officers who feel themselves under moral, physical and political siege? Where in this is the need for better police training on use of force, including a greater emphasis on conflict de-escalation rather than confrontation and unconscious bias training? Where's the consideration of civilian oversight boards or use of police body cameras? Most importantly, where is the discussion of the proliferation of guns in America, which is the underlying, foundational fact of law enforcement in the US that makes every citizen-police interaction potentially deadly in a way that is not true in any other developed nation?²⁹

These are critical issues in addressing police use of deadly force. But I have used this controversy on police use of force as a window into the larger question of what we whites often miss about race and criminal justice. An important part of the answer is, the weight of the violent past for African-Americans. The same is true for Native Americans. That is a weight that most whites do not feel, but need to appreciate if we are truly committed to equal justice for all.

To understand where the present level of black outrage comes from, and to resist the temptations to become defensive (*I am not a racist—how dare you say I am*), or to retreat from the discussion entirely (*just forget it, I'm out of here*), we need to respect the past. This means respecting our overlapping but very different pasts. Because of our radically different pasts, whites and blacks stand in a different place in America today even when we physically occupy the same space and even when we share the same apparent social status. It's a basic truth, easy for whites to forget, almost impossible for people of color.

Defining Us: White Views of Minority on Minority Homicide

What about the poor black child that is killed by another black child? Why aren't you protesting that? ... Why don't you cut it [black on black violence] down so many white officers don't have to be in black areas? ... The white peace officers wouldn't be there if you weren't killing each other 70–75 percent of the time.

*Former New York City Mayor Rudy Giuliani, debating Michael Eric Dyson on the protests against police use of force in Ferguson, Missouri*³⁰

To yell “black-on-black crime” is to shoot a man and then shame him for bleeding.
*Ta-Nehisi Coates*³¹

Police use of deadly force is statistically exceptional. Many police officers go their entire careers without firing their weapons except at the shooting range.

Police homicides of unarmed black or brown men are even more unusual as a statistical matter.

By contrast (and there is a great deal, we will see, in deciding to make this contrast), young black men shooting and killing other black men happens with some frequency in major American cities. Latino young men doing the same to other Latino young men is also common. This happens on Chicago's Southside, in South LA and East LA, in New Orleans and Detroit and Philadelphia and many other cities.

In terms of numbers, police shootings constitute a tiny part of the problem of deadly violence in the most stressed urban communities in America. The great majority of young African-American and Latino males who are shot, are shot by men like themselves, not by the police. And so some have argued, as Rudy Giuliani did above in the quote above, that the real violence problem facing minority communities is not police violence, but minority violence resulting from the dysfunction of family and community structure in some minority communities.³²

Most of the time, minority on minority shootings and killings receive little public notice. Most are not reported in any detail, or even mentioned at all, in the daily newspaper or on the nightly news. If the death numbers add up to a particularly sensational total, or the person killed is an especially sympathetic figure, such as a small child, a pregnant woman, or a teen going to school (maybe) then the majority may take notice. In this very basic sense, black on black homicides do not matter much to majority (predominantly white) America.

And yet the subject of black on black homicide comes up with regularity in the discussion of race in criminal justice, often when race discrimination by police has been asserted. It's a revealing juxtaposition. The killing of young people in certain urban communities is certainly a major public safety and justice issue in modern America. It has huge economic costs. But why should this be considered a question of race—and what does it have to do with police conduct?

There are many non-racial ways of framing issues concerning high rates of urban homicide today. We might ask about killings of young men by young men, because that is the standard pattern. We might be interested in killings by firearms, as guns take the most lives. We might want to study killings by geography, as most of these killings occur within relatively small geographic areas. We might highlight poverty or education issues (the correlation between school problems and youthful violence is particularly striking) or family dysfunction including mental illness and substance abuse, child abuse and neglect, or the absence of a father figure in a boy's life: all frequently appear in the backgrounds of perpetrators. We might focus on killings by gangs, because a great deal of minority on minority homicide is gang-related.

Asking about race in homicide means that we seek a race answer, at least in part. This may be because we are interested in assessing race fault to rebut racial

criticisms of police. As in, *no, what's happening is not the police's fault, it's your fault*. This suggests an effort to find a racial group, or at least a part of that group, socially or morally responsible for these homicides. Another explanation might be that we choose to focus on race because it seems to play an important role in homicide dynamics and therefore can play an important role in homicide prevention. As we proceed, we will need to keep in mind the question of why race should be highlighted here.

Race Differences in Homicide

There are a few basic facts about violent crime in America that have persisted over decades. The US has a higher homicide rate than other developed nations and more firearms offenses. Violent crime is committed at higher rates in the South and the West than in the Northeast. And African-Americans commit homicide and are victims of homicide at significantly higher rates than any other race.

Homicide is and has always been a largely intra-racial offense. While cross-racial killings are the most publicized—particularly if the victims are white—for the most part, whites kill whites, blacks kill blacks, Latinos kill Latinos—and men kill men (although they also kill plenty of women, it must be said). With relatively small yearly variations, some 90 percent of African-Americans killed were killed by African-Americans; roughly 82 percent of white victims of homicide were killed by whites.³³

Proportionally, African-Americans are far more likely to be killed than persons of any other race in the US. For 2015, over 50 percent of homicide victims in the country were black, although African-Americans made up just 13.3 percent of the population.³⁴ By contrast, whites, who comprised 77 percent of the population made up 43.5 percent of the victims of homicide.

The race of homicide offenders roughly tracks the percentages of victims, consistent with the intra-racial nature of homicide. In 2015, for those homicides where the race of the offender was known, 36.7 percent of offenders were African-American; 30.2 percent were white, 12.7 percent were Latino or Hispanic. (Reflecting the fact that many homicides go unsolved, the race of the offender was unknown in 31.2 percent of reported cases.)³⁵ From this we see that African-Americans commit a disproportionate number of homicides compared to their overall population numbers.

There are many explanations for race disparities in American homicide, just as there are many explanations for huge gender differences in homicide commission, age differences, geographic differences and even differences according to time of day and season of the year. But any account of race disparities in homicide today

must begin with our history of race violence. The highest contemporary rates of violence are found in the two race groups, African-Americans and Native Americans, who have experienced the worst race violence and oppression in the past and whose status in the larger American community has always been intensely contested by the majority.

The race disparities for homicide parallel race disparities in socioeconomic status, physical and mental health, education and housing.³⁶ High levels of homicide occur in highly stressed communities where fierce competition for belonging, economic and social, inspires cultures of violence.³⁷

An important piece of the puzzle from a criminal justice perspective is the relative ineffectiveness of homicide investigations in urban minority neighborhoods. Although the rates vary by city and police department, minority on minority homicides are solved at a lower rate in the United States than other homicides.³⁸ Unsolved homicides increase the chance of future violence, both by uncaught perpetrators and by those retaliating for the homicide. They also deepen the sense of exclusion, isolation and grievance in communities that feel simultaneously abandoned and oppressed by the police.

In some minority neighborhoods, many residents assume that the police do not care about solving homicide cases if the victim is black or brown. They have reasons to believe this. The level of police attention and the attitudes of responding officers, particularly patrol officers, suggest as much.³⁹ Resources for homicide investigation in minority communities can be astonishingly paltry compared to the need. Finally, as noted before, clearance rates for homicides in minority communities are low. Without arrests, there can be no prosecutions, convictions or punishment.

Police respond that low clearance rates for homicides in minority neighborhoods are not due to lack of diligence on their part but lack of cooperation on the community's part. After killings that happen in public places that are witnessed by many, frequently no one will admit to seeing anything. Identified witnesses do not speak forthrightly. Despite what we might see on television, most homicides are not solved by physical evidence; arrests and convictions depend on witness accounts. *If they won't talk to us, how is that our fault?* A lack of trust in the police and a general culture of noncooperation with police in minority urban communities undoubtedly contributes to low success rates in crime solving.⁴⁰

In many cities a powerful negative feedback loop has taken hold. Community members do not trust the police based on prior mistreatment and so provide little cooperation with investigators, which angers and frustrates the police, who come to accept low clearance rates as a result, which leads to further community distrust,

including a sense that killers in the community have legal impunity. This leads to greater incentives for violent retaliation, which worsens the homicide problem. *The police won't do anything; we have to take care of this ourselves.* Jill Leovy, a journalist who embedded with homicide detectives in South Los Angeles, has asked us to imagine the response of white teens to the situation faced by many black teens in high-homicide neighborhoods:

Take a bunch of teenage kids from the whitest, safest suburb in America and plunk them down in a place where their friends are murdered and they are constantly attacked and threatened. Signal that no one cares, and fail to solve the murders. Limit their options for escape. Then see what happens.⁴¹

Minority on minority homicide represents a serious justice problem in America today, perhaps our most serious justice problem involving criminal violence. But my concern remains what white people don't get about race and criminal justice, which prompts the question, what do majority Americans think about minority on minority homicide? Consistent with the approach taken in this book, I begin asking this question with respect to victims. What do majority Americans think about the victims of minority on minority homicide?

A Difference in Value According to Race

The plight of those most hurt by violence should be at the heart of criminal justice. The race of a violence victim should not matter. Who would say that the killing, or rape, or robbery of a person of one race is worse than the same violence against a person of another race? And yet the strongest evidence we have of race discrimination in criminal justice in America today involves different treatment according to the race of the victim.

From death penalty sentencing to resources for homicide investigations to media attention, the story is the same: killings of people of color appear less blameworthy to legal decisionmakers and less noteworthy to the public than the killings of whites. The first time I saw this was when I covered state courts in Jacksonville, Florida and noticed that the State's Attorney almost always charged criminal homicides with black victims (and usually with black defendants) as second-degree murders, while those with white victims (regardless of the defendant's race) were charged as first-degree murders.

In earlier chapters we saw how in recent years we have tried to help victims of violent crime through increasing punishment for convicted offenders. We have also

seen how this effort may speak more to our emotional needs than to the deepest needs of victims. We have seen how survivors need security, accompaniment and mourning to heal. In this chapter we have seen how low clearance rates for homicide investigations in minority communities contribute to ongoing violence, a major security concern. But what of accompaniment and mourning for victims of minority on minority homicides?

America knows how to accompany and to mourn outrageous violence. It seems that almost every month, and in a bad month, almost every week, brings some terrible mass violence episode that inspires vigils and memorials and personal remembrances of those taken. We know the drill. When wrongful violence does not come in some extraordinary form, though, and when it takes people we do not know, who live in a place we do not know very well (even if it is close by) and especially if the victims do not seem to be entirely “innocent,” most Americans swiftly move on, assuming they notice at all. Under these circumstances a local murder will mean less than the chance of rain in the forecast. A lot less.

In majority communities, the murder of a Steve inspires more concern than the slaying of a Ta’Quan; a John more than a Juan. Can you recall a murder making the headlines when the victim was a young black man or Latino? Especially if his likely killer was of the same race? Have there ever been any contenders for the crime of the century, or decade, or even the year, where the victims were *not* white? White deaths really do matter more to the majority in America than do black deaths.

Some may say that this is just human nature. Everyone, on some level, cares more for their own. Their own nation, town, school, team. Their own family. Surely there is a limit to how much we can care about what happens to strangers. Caring about every victim of wrongful violence would lead to emotional paralysis.

While there is truth here, it should be a very uncomfortable truth. Remember, we are now concerned with minority on minority homicides in our own cities and states, not across the country or across the world. And we are talking here about a difference in caring about victims *according to race*. Also, it must be said, often according to class.

The difference in caring about murder victims illuminates where black and brown minorities stand in majority white America. They stand over there. They do not stand with us. We do not want to stand with them.

The differential in concern suggests that for whites, black membership in the American community is contingent, dependent on proof of individual value or special claim on our sympathies (the elderly, children, a recently returned veteran). White membership in community is presumed and may be lost—if at all—only on proof of serious individual wrongdoing.

How is This My Problem? Or, White Dreams of Separation

Given that the worst homicidal violence in most cities is intra-racial and occurs in minority communities, given that significant (though far less than optimal) law enforcement resources are deployed in such communities, many who live in safer areas, especially if white, may think to themselves: *of course this is awful. It's just terrible to see young people killing each other so senselessly. Better schools, better housing, more jobs, well, maybe that would help. But stopping the killing— isn't that really up to them? Honestly, what can we do about that? How is this my fault? How is this my problem?*

Note again the significance of the pronouns used: *them* and *us* and *my*. These pronouns are simple but powerful indicators of belonging and exclusion. These simple pronouns raise the question of who counts as *us* in America. It's a question we have been struggling with from the very beginning of America.

From the earliest European settlement, the white peoples of America have dreamed that this land would be their place of freedom and prosperity. If this sounds strange and malignant, let me shift to the first-person plural more standardly used in American accounts of the past: Our ancestors came here seeking opportunity and freedom, and through their efforts and sacrifice, they bequeathed to us precious gifts of freedom and opportunity.

But who, exactly, is this *us*, this *we*, this *our*?

The abolitionist and former slave, Frederick Douglass became one of the first to publicly question how America defined itself racially. In his “What to the Slave Is the Fourth Of July?” delivered in Rochester, New York on July 5, 1853, Douglass distinguished between the legacies of American independence for white citizens and black slaves. Speaking to a predominantly white, antislavery audience, he declared, “the 4th Fourth of July . . . is the birthday of your National Independence, and of your political freedom. This, to you, is what the Passover was to the emancipated people of God.” He carefully delineated the moral and political achievements of the nation's leaders in throwing off English rule. After further prologue, he transitioned from third person to first:

I say it with a sad sense of the disparity between us. I am not included within the pale of this glorious anniversary! Your high independence only reveals the immeasurable distance between us. The blessings in which you, this day, rejoice, are not enjoyed in common. The rich inheritance of justice, liberty, prosperity and independence, bequeathed by your fathers, is shared by you, not by me. The sunlight that has brought life and healing to you, has brought stripes and death to me.

Then having built up a powerful head of rhetorical steam, Douglass turned to the title of his address. He asked, “What, to the American slave, is your 4th of July? I

answer: a day that reveals to him, more than all other days in the year, the gross injustice and cruelty to which he is the constant victim.”⁴²

From the earliest days of what would become America, white settler hopes of freedom and prosperity depended on white ownership and control. Efforts to eliminate, dominate, segregate or move nonwhite peoples were integral to achieving the (white) American dream. It’s true that this was now a long time ago. In American historical terms, the conquest of native tribes seems like ancient history. Racial slavery is also long gone. The rule of racial segregation that was law for so long in the South and an organizing principle of social life in the North and West, is history too. In the work force (mostly) and in culture (mostly) and in politics (sometimes), the people of America are diverse. Look, we’ve even elected a black President, twice!

But facts on the ground speak another truth. Whites still prefer—strongly prefer—race separation in the most important personal spaces of their lives. Neighborhoods and churches and elementary schools and middle schools and high schools are still largely segregated by race. Public schools, for example, are as racially segregated today in many parts of America as they were at the time of the *Brown v. Board* decision. Many high paying industries, most notably high tech, employ few black and brown workers. Many whites have few personal relationships with black people and even less contact with the black community.

Many Americans believe that this state of race separation is fine. It is the morally neutral (on its own, neither good nor bad) product of free choice: people living where they want to, among the people they feel most comfortable with. It reflects a personal preference, like choices in cars or music or movies or clothes or food. It’s a free country; we get to choose. Except that the freedom to live where one wishes, limited only by affordability, is a freedom enjoyed far more by whites than by blacks. Except that the freedom to choose the best schools for children is a freedom enjoyed far more by whites. That is because most neighborhoods remain racially segregated less because of contemporary choices about where parents of color want to live, than a history of intentional segregation decisions by financial institutions, developers, and government officials throughout the country.⁴³

Racial separation is not a morally neutral act when it replicates and reinforces historical patterns of race discrimination. Racial separation is not a morally neutral act when money and power concentrate with some racial groups and not with others. It is not a morally neutral act when separation brings great differentials in economic opportunity, educational opportunity, quality of housing and health services. During the civil rights struggles of the mid-20th century, Northern liberals scoffed at Southern pretenses of separate but equal, pointing out the obvious ways that Jim Crow segregation created and enforced inequality. Today legal segregation

is gone, but the appeal of separate but equal remains, everywhere. Then, as now, racial separation and equality are enemies.

Minority on minority homicide has a distinct geography. It occurs primarily in minority communities where racial segregation was in the past enforced by law and violence. Especially for African-Americans it occurs in places of historical concentration, which are also places of exclusion from the rest of the community. Given all that we have learned about violence and its intimate association with not-belonging, that it should thrive in such places should not surprise.

A white preference for racial separation makes accompaniment of black homicide survivors and mourning for black victims almost impossible. How can we feel for their loss if they live over there, where we will not go? How can we call them to belonging with us if we are committed to their not-belonging? Can't be done.

Separation and White Fear of Violent Crime

But what about race separation that comes from legitimate fear of violent crime? We know the cost of wrongful violence. I have mentioned before the need for violence prevention. To the extent that racial separation, especially residential, is linked to fear of violent crime, how is that wrong? No one wants to live in a high crime neighborhood if that can be avoided and predominantly African-American neighborhoods generally have higher crime rates. *Look at way they kill each other. I'm going to do whatever I need to protect my family. Including living in a safe neighborhood and sending my kids to safe schools. If that leads to race separation, so be it. But don't blame me for what other people are doing.*

In Chapter 3 we first encountered the problem of race fear. We saw there the power of race to exaggerate fear in decisionmakers. It's not that race is entirely irrelevant to statistical assessment of risk; like gender and age and class, it has some predictive power. The problem is that unlike these other categories, our race-based fears almost always go beyond the evidence in practice. In assessing risk in particular cases, which is the critical task for criminal justice decisionmakers, intuition based on race proves faulty, again and again. In this regard it's also worth noting that our current concern is with black *on black* homicide. Those most at risk of being killed by a black man—by far—are other black men. Not whites.

We must also confront the close relationship between separation and fear here. Race separation may result from racial fear; race separation also fosters it. Living in separate neighborhoods and sometimes behind gates, barred windows and in homes with private security systems would seem to provide extra protection from outside threats. Many people, from real estate agents to security companies to politicians, sell this promise to receptive listeners. But by providing a constant reminder of the

apparent threat of outsiders, separation can *increase* anxiety and fear. It is possible to heighten security and fear at the same time.

And yet for all this, the race-violence link in America is real. It is a fact of American life. Minorities suffer more from this race differential in wrongful violence than do whites, but whites are victims as well. And all wrongful violence must be taken seriously. Taking violence seriously is a fundamental of justice. Reducing levels of minority on minority homicides should be a priority for all because it affects all, directly or indirectly.

The Impossibility of Relational Separation

Physical separation of the races may occur in America, but relational separation is impossible. We are in racial relationship, even if we do not personally interact with persons of another race. President Lincoln's words issued in 1861 to the southern states that had either seceded from the Union or were contemplating secession, could also apply to the races in America today.

Physically speaking, we cannot separate. We cannot remove our respective sections from each other, nor build an impassable wall between them. A husband and wife may be divorced, and go out of the presence, and beyond the reach of each other; but the different parts of our country cannot do this. They cannot but remain face to face; and intercourse, either amicable or hostile, must continue between them.⁴⁴

No one can opt out of race relations in America. We can physically separate, but that only changes the nature of our race relations, it does not end them.

Many Americans, mostly but not all white, claim immunity from any relational responsibility for race, citing personal freedom. *Everyone is responsible for their own choices. If I do something wrong, I gotta take the consequence. But if I don't do anything wrong myself, then somebody else's hard time is just not my problem. It's a free country.*

Once more, talk of individual choice proves misleading because it ignores relational realities. In relationships, choice is real, but limited. Like family relations, our race relations have certain features that were established long before we came on the scene. We have to deal with the race, class, gender and other relational patterns in which we find ourselves, with all their pre-existing complexities. We must choose how to respond to relational dynamics, but with very few exceptions, we cannot, by ourselves, transform those relations. They are bigger than any individual.

Finally, it turns out that the independence we say we want may not be what we truly desire. Turns out that majority Americans are also vulnerable to feelings of racial exclusion. We also may feel a need to belong that depends on others.

White Need for Belonging in America

Whether I like it or not, or whether you like it or not, we are bound together forever. We are part of each other. What is happening to every Negro in the country at any time is also happening to you. There is no way around this. I am suggesting that these walls—these artificial walls—which have been up so long to protect us from something we fear, must come down.

*James Baldwin*⁴⁵

On my sabbatical in 2013–14, I filled in occasionally on Sunday for the Protestant chaplain at the Greene Correctional Facility in upstate New York. I led worship services for a predominantly black congregation of inmates.

In taking on this new role, adjustments had to be made on all sides. The men had to assess this Episcopal deacon, in part to make sure that I wasn't really Catholic. (In prison there is an important, perceived, divide between Catholic and Protestant.) I had to figure out the men's worship expectations and needs. And then there was the race thing. I specifically addressed our race differences when we did a special service to honor the birthday of Martin Luther King, Jr. I noted that I was white and that King was an important figure in my life, which he is. The men appreciated the celebration, as did the regular chaplain who was able to attend that service. It was not something that had been done before.

On my last Sunday at Greene, several months later, we said our goodbyes and talked about our time together. I said how much I appreciated their acceptance of me as a white man. One of the men joked that I was "white even for a white guy." Something about how I dressed and spoke, I think.

The generosity of the men at Greene in accepting me, in seeing me for who I was (at least a part of who I was) and not the type that I presented, moved me greatly. I was—and am—socially clueless sometimes, including about race. But in that large, over-heated, and unadorned room on those Sunday mornings, I belonged for a time, which felt like a gift beyond words.

Looking back at this experience, what strikes me is not that we achieved racial harmony in our times together, or even any great cross-racial understanding. There was so much about them I did not know and so much about me they did not know. Our many differences were not tested by the need for hard decisions or actions. What strikes me is how much I wanted their acceptance. I really wanted them to like

and accept me. I think this mirrors a larger white need for black acceptance that we have seen from the very beginning of our racial history. We can see this in the passionate insistence of many white slave holders that they had a wonderful and even loving relationship with their slaves. We can see this in their sense of betrayal when after slavery ended, freed slaves began to speak and act freely—and without a second thought left their former masters to fend for themselves.⁴⁶

Looking back, I see that it's also possible that the inmates responded to me as they did because they wanted me to accept *them*. As prisoners of color (mostly), to be accepted by a white man from the outside world, from a respected institution like the church, might have been important. Prisoners experience a great deal of rejection by majority (mostly white) society.

A need to be accepted by persons of another race is hard to admit in the contemporary United States. We Americans are an independent and proud people. We don't need anyone else to accept us to know our own value. We do not want to give any other group that power over us. African-Americans have especially strong reasons for rejecting dependence on whites.

Speaking now just as a white man, it seems to me that *whites* cannot fully belong in America without the assent of people of color, particularly African-Americans. Regardless of political and economic power disparities, minorities hold the key to full belonging for the majority. Why else would minority accusations of bigotry and cluelessness cut white people in America so deeply? These same accusations made by non-Americans we easily reject. Only when they come from our own people—yes, *our own* people—do they really hurt. Again a relational truth emerges from the conflict. We are connected, intimately.

The moral power that people of color hold over whites is just what many whites want to deny. This denial may be expressed in efforts to separate. I think it lies behind a great deal of the racial tension felt by white Americans. But in this most uncomfortable truth about connection, we should also find hope. We cannot be who we want to be without the other.⁴⁷

Conclusion

Race is the ghost in the machinery of American criminal justice. It appears everywhere and, simultaneously, nowhere. From certain perspectives, race bias seems pervasive, ubiquitous. Look at who is in prison, at who is in jail, at who receives the worst treatment from law enforcement. Look at how the present criminal justice system replicates many of the worst features of past racial oppression.

From other perspectives, though, the significance of race for criminal decision-making almost seems to disappear. Race differentials in arrests and punishment

mostly reflect race differences in rates of offending. Even if current race disparities can be traced to past discrimination, system defenders argue that all that matters is whether the criminal justice system discriminates today. And mostly, it does not.

Occasionally racial bias will be caught in the act. As if captured by a camera's electronic flash, bias will be starkly recorded, allowing us to see how it affected criminal judgment. Then we can confidently respond with righteous indignation. *Got you now—you're not getting away with it this time.* But more often the significance—and even existence—of race bias in American criminal justice depends on where we stand. It depends on where we stand today, where we stood yesterday, and where we expect to stand tomorrow. In each case, our location depends significantly on race. It depends on the imagined color of “we.”

People like me, meaning white folks, will never entirely get it when it comes to race in America. There is too much difference between the white experience and the experience of people of color for complete understanding. But recognizing the intractability of our differences does not ease our relational responsibilities. Tragedy does not excuse. And we must not give up on justice just because its full achievement seems beyond our present grasp.

To heal the American community from past race violence, we need to remember and accept the worst of our past, which is the past of all of us, and to appreciate its present significance. It lives with us today.

Creating just relations in the American community requires engaging across race lines: speaking honestly and listening closely. We must have hard conversations in which we speak the truth as we understand it, never denying another person's experience or dignity. In striving for justice this way, we have our best chance for building a greater peace.

Notes

- 1 Martin Luther King, “I have a dream that one day my four little children will one day live in a nation where they will not be judged by the color of their skin but the content of their character.” August 28, 1963, Address to the March on Washington.
- 2 James Baldwin, *The Fire Next Time* (New York: Vintage, 1989, 1962), p. 81.
- 3 To be precise, the jury acquitted on all counts except one; on that count, the jury could not reach a unanimous verdict. I refer to the verdicts as acquittals here because that was their effect. There was no further state prosecution against any of the LAPD officers. Federal authorities subsequently brought criminal civil rights charges against officers based on the same events. See *Koon v. U.S.*, 518 US 81 (1996).
- 4 For accounts of the case, see Lou Cannon, *Official Negligence: How Rodney King and the Riots Changed Los Angeles and the LAPD* (Boulder, CO: Westview, 1999), pp. 108–20, 148–73; Brenda Stevenson, *The Contested Murder of Latasha Harlins: Justice, Gender, and the Origins of the LA Riots* (New York: Oxford University Press, 2013).

- 5 See Stevenson (2013), pp. 152–5; Cannon (1999), p. 109.
- 6 See Cannon (1999), p. 148. That Judge Karlin had spent her practice career in federal court is relevant because the kind of criminal cases handled and courthouse culture are very different in federal and state court. For example, federal courts handle relatively few murder cases.
- 7 “Great Provocation and Duress”: The Judge in the Du Manslaughter Trial Explains her Reasons for Imposing Probation Rather than Prison Time, *Los Angeles Times*, Nov. 22, 1991 (text of sentencing remarks).
- 8 Mary Harris, Good Samaritan Remembers the LA Riots 20 Years Later: “I Had to Do Something,” found at <https://www.nbclosangeles.com/news/local/A-Good-Samaritan-Remembers-148613585.html>. More details of the story are included in John Ridley’s documentary, *Let It Fall: Los Angeles, 1982–1992*, Lincoln Square Productions (2017).
- 9 Los Angeles Times Staff, Deaths during the L.A. Riots, *Los Angeles Times*, April 25, 2012.
- 10 Kate Mather, LA’s Uncivil War: Once-Staid Police Commission Meetings Are Regularly Upended by Protesters, *Los Angeles Times*, May 22, 2016; see also Kate Mather, A Traffic Stop Turns Deadly: LAPD Officer Fatally Shoots a Man in South L.A. Hours after an Emotional Police Commission Meeting, *Los Angeles Times*, Aug. 17, 2016.
- 11 Jake Halpern, The Cop: Darren Wilson Was Not Indicted for Shooting Michael Brown. Many People Question whether Justice Was Done. *The New Yorker*, Aug. 10, 2015 (interview with former Ferguson police officer Darren Wilson).
- 12 *Id.*
- 13 For an introduction to this history in 19th century South, see Leon F. Litwack, *Trouble in Mind: Black Southerners in the Age of Jim Crow* (New York: Knopf, 1998).
- 14 Tennessee statute, cited in *Tennessee v. Garner*, 471 U.S. 1, 4–5 (1985).
- 15 Michael Eric Dyson, *Tears We Cannot Stop: A Sermon to White America* (New York: St Martin’s Press, 2017), p. 181.
- 16 474 U.S. 1 (1985).
- 17 The police officer who shot Garner was also black, but this does not, by itself, demonstrate that race played no part in the shooting. Historically there were very few African-American police officers in Memphis and those officers historically had suffered systemic discrimination. For example, after nine black officers were hired in 1948 following an initiative by local black leaders, they were told only to arrest blacks and had a separate roll call from white officers, which was held in the department garage. Roll call in the department was not racially integrated until 1964. Patrol cars were integrated in 1966. Tennessee Advisory Committee to the US Comm. on Civil Rights, *Civil Crisis—Civic Challenge: Police Community Relations in Memphis* (1978), p. 9. The police director in Memphis said that in order to secure their place in the department, “the black officers tried to out red-neck the white officers.” Brief for Appellee-Respondent, fn. 52.
- 18 See Litwack (1998); Equal Justice Initiative, *Lynching in America: Confronting the Legacy of Racial Terror*, <https://eji.org/reports/lynching-in-america>.
- 19 She continued: “No one can view the death of an unarmed and apparently nonviolent 15-year-old without sorrow, much less disapproval.” *Id.* at 29.

- 20 *Id.* at 29.
- 21 An autopsy revealed that the teenage Garner had been drinking. He may have feared not only legal consequences but parental discipline if he was caught. Brief for Appellee-Respondent, fn. 5.
- 22 Brief for Appellee-Respondent (Cleamtree Garner), p. 17, citing Record at 326, 345.
- 23 Brief for Appellee-Respondent, p. 20.
- 24 James F. Fyfe, Blind Justice: Police Shootings in Memphis, 73 *J. Crim. Law & Criminol.* 707, 718 (1982).
- 25 Fyfe (1982), pp. 718–20.
- 26 Brief for Appellee-Respondent, fn. 39.
- 27 Brief for Appellee-Respondent, pp. 15–16.
- 28 See particularly, the new National Memorial for Peace and Justice in Montgomery, Alabama; Campbell Robertson, A Lynching Memorial Is Opening. The Country Has Never Seen Anything Like It, *The New York Times*, April 15, 2018.
- 29 For evidence of dangers to police from widespread gun ownership, see David I. Swedler, et al., Firearm Prevalence and Homicides of Law Enforcement Officers in the United States, 105 *Am. J. Public Health* 2042 (2015) (finding correlation between rates of police officers killed in a state and rates of state firearm ownership). For a correlation between state laws regulating guns and fatal police shootings of civilians, see A. Kivisto, B. Ray & P. Phalen, Firearm Legislation and Fatal Police Shootings in the United States, *Am. J. Pub. Health*, May 18, 2017.
- 30 Meet the Press, Nov. 23, 2014.
- 31 Ta-Nehisi Coates, *Between the World and Me* (New York: Spiegel & Grau, 2015), pp. 110–11.
- 32 See generally, Heather Mac Donald, *The War on Cops: How the New Attack on Law and Order Makes Everyone Less Safe* (New York: Encounter, 2016), pp. 119–47.
- 33 Matthew Cella and Alan Neuhauser, Race and Homicide in America, by the Numbers, *U.S. News & World Report*, Sept. 29, 2016. In 2011, African-Americans were 13 percent of the population but were 50 percent of all homicide victims. Violence Policy Center, Black Homicide Victimization in the United States: An Analysis of 2011 Homicide Data, Jan. 2014, www.vpc.org.
- 34 Cella & Neuhauser (2016).
- 35 FBI, Crime in the U.S., 2015 found at <https://uci.fbi.gov>.
- 36 For the strong connection between poverty, crime and punishment, see Bruce Western, *Punishment and Inequality in America* (New York: Russell Sage, 2006).
- 37 Geoffrey Canada, *Fist Stick Knife Gun: A Personal History of Violence in America* (Boston: Beacon, 1995).
- 38 For evidence of this in New York City, see Sarah Riley, Barry Paddock Rocco Parascandola & Rich Schapiro, Tale of Two Cities: Even as Murders Hit Record Low in NYC, a Mountain of Cases Languishes in Outer Boroughs as Cops Focus More Manpower on Manhattan Cases, *N.Y. Daily News*, Jan. 5, 2014. For low clearance rates in minority communities in Los Angeles, see Jill Leovy, *Ghettoside: A True Story of Murder in America* (New York: Spiegel & Grau, 2015), pp. 48–9; Catherine Lee, The Value of Life in Death: Multiple Regression and Event History Analyses of Homicide Clearance in Los Angeles County, 33 *J. Crim. Just.* 527 (2005).

- 39 E.g., Leovy (2016), pp. 6, 69; Jim Newton, Change in Black and White in L.A., Los Angeles Times, March 6, 2011 (citing old LAPD code of NHI—no human involved—used by patrol officers to refer to domestic violence in black families).
- 40 Social scientists have described certain neighborhoods as “poverty traps” in which violence is common and police are widely distrusted, with devastating community effects. See Jeffrey Fagan & Daniel Richman, Understanding Recent Spikes and Longer Trends in American Murders, 117 Col. L. Rev. 1, 17 (2017). This seems to occur in some Chicago neighborhoods. See David Heinzmann, As Chicago Killings Surge, the Unsolved Cases Pile up, Chicago Tribune, Sept. 9, 2016 (reporting a homicide clearance rate of 30 percent in Chicago, far lower than other comparable cities; distrust in police, which leads to witness noncooperation, and understaffing of detective units seen as causes). For the effects of failures of policing in minority communities, see Alexandra Natapoff, Underenforcement, 75 Ford. L. Rev. 1715, 1722–27 (2006).
- 41 Leovy (2015), p. 253.
- 42 The text may be found at historyplace.com/speeches/douglass.htm. For a 20th century critique from a similar perspective, see the address given by Justice Thurgood Marshall, Reflections on the Bicentennial of the United States Constitution, May 6, 1987, published in the Harvard Law Review, 101 Harv. L. Rev. 1 (1987).
- 43 See Richard Rothstein, *The Color of Law: The Forgotten History of How Our Government Segregated America* (New York: Liveright, 2017).
- 44 Abraham Lincoln, First Inaugural Address. It may be found online at http://avalon.law.yale.edu/19th_century/lincoln1.asp.
- 45 James Baldwin, In Search of a Majority, in *Nobody Knows My Name* (New York: Vintage, 1989, 1961), p. 136.
- 46 See Eugene D. Genovese, *Roll, Jordan, Roll: The World the Slaves Made* (New York: Pantheon, 1976); *The World the Slaveholders Made: Two Essays in Interpretation* (Hanover, NH: University Press of New England, 1988).
- 47 As James Baldwin wrote: “my own experience proves to me that the connection between American whites and blacks is far deeper and more passionate than any of us like to think.” Baldwin (1961), Introduction, p. xiii.