

COMMENT

The Secret Ambition of Racial Profiling

In 2000, a year after the shooting of Amadou Diallo, a select committee of the New York City Council held a series of meetings in the Bronx to address police-community relations. The committee intended the meetings “to open a dialogue between police officers and city residents, perhaps even repair relations,” but the first meeting degenerated into a torrent of accusations from over two hundred attendees on police mistreatment of African-Americans.¹ “[O]ne resident after another relat[ed], with a mixture of passion and anger, humiliating encounters with the police” that they attributed to their race.² By the end, police officers could do nothing but sit quietly and hear out the people they were supposed to serve.

The meeting failed for a simple reason: The committee placed too much faith in the power of open dialogue and overlooked the bitterness then underlying any discussion of police-minority relations. A similar problem afflicts R. Richard Banks’s *Beyond Profiling: Race, Policing, and the Drug War*, which criticizes the current debate over racial profiling for focusing too much on profiling’s alleged irrationality.³ For Banks, the argument that racial profiling is irrational is mere masking rhetoric, obscuring underlying grievances about the consequences of profiling for minorities and minority communities. Banks urges opponents of racial profiling to debate these grievances openly rather than cloak them with claims of irrationality.

This Comment argues that Banks does not properly take into account the dangers of open dialogue. Dan Kahan pointed to these dangers six years ago in

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1. Juan Forero, *In Bronx, Tensions at Meeting on Police-Community Relations*, N.Y. TIMES, Mar. 28, 2000, at B5.
 2. *Id.* One man, for example, “said he has learned that despite his college education and middle-class life, he is always seen by police as a black man first. And that, he said, has meant constant traffic stops.” *Id.*
 3. R. Richard Banks, *Beyond Profiling: Race, Policing, and the Drug War*, 56 STAN. L. REV. 571 (2003).

The Secret Ambition of Deterrence,⁴ which argued that masking rhetoric is sometimes necessary to avoid conflicts over controversial topics. After providing background on the two articles, I argue that the debates Banks wants us to have about racial profiling are prone to the types of value conflicts that Kahan identified in *Secret Ambition*. I conclude that progress is possible if we forego Banks's contentious debates: The current rhetoric on racial profiling, despite its many weaknesses, enables us to make limited but important reforms.

I. BANKS'S CRITIQUE

Racial profiling occurs when law enforcement interprets race as "a mark of increased risk of criminality."⁵ Most racial profiling today is conducted by individual officers engaged in street-level policing; it is not generally a practice authorized by state statutes, local ordinances, or even police manuals or guidelines.⁶

By most accounts, the public campaign against racial profiling has been a great success.⁷ Banks attributes this success in large part to the popular appeal of an argument he dubs the "irrationality claim": "the empirical [argument] that racial profiling is unjustified because blacks and Latinos are no more likely than whites to commit drug crimes."⁸ This empirical argument also supports the related claim that racial profiling "is *not*, in fact, a sensible crime fighting tool."⁹ For Banks, however, the irrationality claim fails to live up to its reputation, for both empirical and explanatory reasons. First, it ignores growing evidence of a racial gap in crime rates.¹⁰ Second, the irrationality claim

4. Dan M. Kahan, *The Secret Ambition of Deterrence*, 113 HARV. L. REV. 413 (1999).

5. RANDALL KENNEDY, RACE, CRIME, AND THE LAW 136 (1997).

6. See, e.g., Jeffrey Goldberg, *The Color of Suspicion*, N.Y. TIMES, June 20, 1999, § 6 (Magazine), at 51 (stating that local police officers believe that racial profiling is both necessary and useful).

7. See, e.g., Banks, *supra* note 3, at 573 (describing "[t]he extraordinary success of the campaign" against racial profiling); Samuel R. Gross & Debra Livingston, *Racial Profiling Under Attack*, 102 COLUM. L. REV. 1413, 1413 (2002) (describing a national "consensus" on racial profiling); David Rudovsky, *Law Enforcement by Stereotypes and Serendipity: Racial Profiling and Stops and Searches Without Cause*, 3 U. PA. J. CONST. L. 296, 363 (2001) (describing the "almost universal condemnation" of the practice).

8. Banks, *supra* note 3, at 577.

9. David A. Harris, *Racial Profiling Redux*, 22 ST. LOUIS U. PUB. L. REV. 73, 82 (2003).

10. See Kennedy, *supra* note 5, at 145 ("It does no good to pretend that blacks and whites are similarly situated with respect to either rates of perpetration or rates of victimization. They are not. A dramatic crime gap separates them.").

does not accurately explain why people oppose racial profiling. According to Banks, the actual grievances that “animate the campaign against racial profiling” center on the consequences of street-level profiling, not its rationality.¹¹ Specifically, he highlights two issues that have been obscured by the current focus on the irrationality claim: the poor relationship between police and minority communities and the high levels of incarceration among minorities. Banks advocates moving the debate on racial profiling away from a focus on irrationality and toward “a focus on the consequences of drug policy and policing practices.”¹²

II. KAHAN’S THEORY OF MASKING RHETORIC

In *The Secret Ambition of Deterrence*, an article on the public debate over criminal punishment, Dan Kahan offered an argument with striking parallels to Banks’s. Just as Banks argues that the irrationality claim dominates public debate on how to evaluate racial profiling, Kahan noted that deterrence theory dominates public debate on how to evaluate criminal punishment. Mirroring Banks’s argument about the irrationality claim, Kahan maintained that deterrence theory fails to explain punishment on both theoretical and descriptive levels. It fails as a theory because it is incomplete: “Deterrence . . . presupposes a consequentialist theory of value. Yet nothing intrinsic to the deterrence theory supplies one.”¹³ It fails as a description because it does not clarify how people feel about various punishments, such as the death penalty: “Even if they honestly believe the deterrence arguments they are making, the vast majority of citizens and officials don’t believe such arguments are essential to their positions on highly charged issues.”¹⁴

But whereas Banks criticizes the masking rhetoric surrounding racial profiling, Kahan argued that the masking rhetoric of deterrence theory is valuable precisely because it prevents discussion of the actual grievances driving people’s public arguments: “[T]he real significance of deterrence theory lies not in what it says but in what it stops us from saying.”¹⁵ For Kahan, public debate on deterrence prevents a clash of fundamental values. Kahan

11. Banks, *supra* note 3, at 594; *see also id.* at 599 (“While some people oppose racial profiling simply because it is discrimination, much of the opposition to the practice reflects an underlying opposition to some aspect of the drug war.”).

12. *Id.* at 587.

13. Kahan, *supra* note 4, at 427.

14. *Id.* at 435.

15. *Id.* at 416.

maintained that individuals evaluate criminal punishment based not on its deterrent effect, but instead on deeply held moral judgments about their rights as citizens, the moral worthiness of criminals, and the responsibilities of the state.¹⁶ In a diverse society such as ours, people hold different, often incommensurable beliefs on these matters.¹⁷ If brought out in the open, these conflicting beliefs could lead people to distrust, condemn, and even despise each other, resulting in conflicts that frustrate collective action and complicate peaceful coexistence.

A masking rhetoric, such as deterrence theory, avoids such poisonous conflicts by replacing public value judgments with seemingly objective tests upon which reasonable people can civilly disagree.¹⁸ The value of masking rhetoric is that it elides the differences between people with incommensurable values and provides at least a tenuous form of common ground from which cooperation can emerge. Although, on closer inspection, the common ground provided by a masking rhetoric may only be a fiction, we should not be so quick to condemn this academic weakness so long as the cooperation it engenders results in genuine progress.

III. THE DANGERS OF OPEN DIALOGUE ON RACIAL PROFILING

Not all public issues threaten social cohesion by implicating irreconcilable values. But racial profiling may. The very existence of masking rhetoric suggests that there are divisive grievances being masked. In *Secret Ambition*, Kahan took an almost purposive view of masking rhetoric: Where there is contentious moral value conflict, masking rhetoric will arise.¹⁹ I suggest that we can also take this argument in reverse: From the existence of masking rhetoric we can infer that irreconcilable moral or political judgments lurk in the background. Thus, by identifying a form of masking rhetoric—the irrationality claim—Banks has provided prima facie evidence that the grievances he uncovers would be subject to contentious public debate.

16. *Id.* at 444-45.

17. *Id.* at 439-40; see also *id.* at 441-42 (providing “rough expressive profiles of the proponents and opponents of the death penalty”).

18. See *id.* at 446 (“[I]f I claim to be for/against the death penalty because it is/is not the penalty most likely to protect lives . . . then I can be seen as saying only that you are factually misinformed, rather than morally obtuse, for feeling otherwise.”).

19. For example, Kahan recounted how in the case of *Brown v. United States*, 265 U.S. 335 (1921), Justice Oliver Wendell Holmes “aspir[ed] to channel conflict away from the judicial process” by deliberately writing his opinion in the language of deterrence, thus masking the deeper moral values at stake. Kahan, *supra* note 4, at 434.

In addition to this general argument, there are more specific reasons to believe that the particular grievances outlined by Banks risk causing social tension if openly discussed. First, Banks advocates direct discussion of the troubled relationship between police and racial minorities. But, as the meeting in the Bronx demonstrated, the sorry history of this relationship has left each side with strong views about the other that may poison any direct discussions. Minority (particularly African-American) communities carry long memories of violent treatment at the hands of law enforcement, from slavery and Jim Crow to modern scandals like the shooting of Amadou Diallo and the sexual abuse of Abner Louima.²⁰ On the other side of the line, many police officers continue to subscribe to “the ‘warrior model’ of the detached, aloof crime-fighter who daily battles the hostile enemy—the public,”²¹ despite attempts by reformers to align the interests of the police and their constituents.²² These feelings of mutual mistrust have already impeded recent efforts to build partnerships between police and minority communities.²³

Even if both sides do learn to trust each other, they may discover that they have drastically different values and goals.²⁴ For example, although both sides may want more policing, police may want to focus on more serious crimes,²⁵ while minority communities may prefer more aggressive “quality of life” policing to prevent low-level “soft crime” such as loitering and small-time drug-dealing.²⁶ And even if both sides agree to crack down on soft crime, police may favor an aggressive approach, while minority communities may

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20. See Lindsay N. Kendrick, Comment, *Alienable Rights and Unalienable Wrongs: Fighting the “War on Terror” Through the Fourth Amendment*, 47 HOW. L.J. 989, 1031 (2004) (citing statistical studies showing deep distrust of police and law enforcement among African-Americans).
 21. James Forman, Jr., *Community Policing and Youth as Assets*, 95 J. CRIM. L. & CRIMINOLOGY 1, 4-5 (2004).
 22. See Sarah E. Waldeck, *Cops, Community Policing, and the Social Norms Approach to Crime Control: Should One Make Us More Comfortable with the Others?*, 34 GA. L. REV. 1253, 1268 (2000) (“Paradoxically, however, the same dynamics that community policing seeks to change are a significant obstacle to community policing really taking hold.”).
 23. See, e.g., David Thacher, *Conflicting Values in Community Policing*, 35 LAW & SOC’Y REV. 765, 783-84 (2001); Forero, *supra* note 1.
 24. See Thacher, *supra* note 23, at 766 (“Police and their would-be partners do not always value the same, or even compatible, things . . .”).
 25. *Id.*
 26. See James Q. Wilson & George L. Kelling, *Broken Windows*, ATLANTIC MONTHLY, Mar. 1982, at 29.

consider such an approach unnecessarily invasive.²⁷ These conflicting institutional values, when combined with the history of mutual mistrust, pose serious obstacles to the fruitfulness of any direct discussion between police and minority communities on their troubled relationship.

Second, Banks urges open debate on the effects that mass incarceration of minorities has had on minority communities. But direct discussion of the effects of legitimately imposed punishment²⁸ could be as contentious as the death penalty debates that Kahan described in *Secret Ambition*.²⁹ Two competing values are at stake: one is the justice of locking away guilty criminals and vindicating the rights of victims; the other is the injustice of depriving communities of family members and productive citizens. These two values coexist and conflict, even within the minority communities most afflicted by mass incarceration.³⁰ As a result, to borrow Kahan's words, a debate that directly pits these competing values against each other has the potential to become "pregnant with accusation"³¹:

[I]f I favor [incarceration] because it's essential to vindicating the worth of the victim, then you must be against it because you don't sufficiently appreciate her worth and overvalue the worth of the wrongdoer; if I oppose [incarceration] because it is administered in a way that [harms minority communities], then you must be for it because you are a racist.³²

The academic debate on this subject sometimes adopts such an accusatory tone. David Cole, for instance, has argued that "the white majority can 'afford' the costs associated with mass incarceration because the incarcerated mass is disproportionately nonwhite," and that "in practice the rules assure that law enforcement prerogatives will generally prevail over the rights of minorities

27. See Jerome H. Skolnick, Terry and Community Policing, 72 ST. JOHN'S L. REV. 1265, 1268 (1998) (noting "increasing dissatisfaction with the police in minority communities, because of the large number of people who are being stopped").

28. Banks focuses on the wrongful effects of mass incarceration, rather than the wrongful imposition of punishment. I assume that he takes as given that the disproportionate imprisonment of minorities (particularly African-Americans) stems from some increased proportion of criminality in minority communities. See Banks, *supra* note 3, at 581-82.

29. See Kahan, *supra* note 4, at 446.

30. See, e.g., Regina Austin, "The Black Community," *Its Lawbreakers, and a Politics of Identification*, 65 S. CAL. L. REV. 1769, 1772 (1992); William Spade, Jr., *Beyond the 100:1 Ratio: Towards a Rational Cocaine Sentencing Policy*, 38 ARIZ. L. REV. 1233, 1277 (1996).

31. Kahan, *supra* note 4, at 446.

32. *Id.* (emphasis omitted).

and the poor.”³³ On the other side of the debate, Randall Kennedy has argued that “efforts to address the danger crime poses to minority communities are confused and hobbled by a reflexive, self-defeating resort to charges of racism when a policy, racially neutral on its face, gives rise to racial disparities when applied.”³⁴ If these value-laden accusations become a part of the public discourse, they may frustrate any attempt to achieve resolution through the open debates on racial profiling that Banks envisions.

IV. THE VALUE OF THE IRRATIONALITY CLAIM

Of course, conflict over values is sometimes necessary. But the choice here is not between conflict leading to a political standstill and toleration of an unjust practice. Rather, the choice is between an emotionally charged debate on the grievances underlying criticisms of racial profiling, and a less emotionally charged debate on the irrationality claim. Debating the irrationality claim may allow us to avoid divisive value conflicts while still permitting genuine progress toward mending the difficult relationship between minorities and law enforcement.

The major benefit of the irrationality claim is that it appeals to values that command wider acceptance than the more contentious values at stake in direct debates regarding police-minority relations and disproportionate mass incarceration. First, the empirical nature of the irrationality claim seems more “objective” or “scientific” than arguments about, say, whether to value victims or communities more.³⁵ Debates over the irrationality claim thus satisfy what Kahan referred to as “a social norm against public moralizing” that “stigmatizes public appeals to contested moral values.”³⁶

Second, as Banks notes,³⁷ the irrationality claim subjects racial profiling to the condemnation of the widely accepted antidiscrimination norm, which holds that “discrimination is arbitrary [and therefore illegal] if the criterion upon which it is based is unrelated to the state purpose.”³⁸ The most contentious modern battles on the use of race in public policy have centered on

33. David Cole, *No Equal Justice: How the Criminal Justice System Uses Inequality*, CHAMPION, Sept.-Oct. 1999, at 20, 24.

34. Randall Kennedy, *The State, Criminal Law, and Racial Discrimination: A Comment*, 107 HARV. L. REV. 1255, 1260 (1994).

35. See Kahan, *supra* note 4, at 446.

36. *Id.* at 445.

37. Banks, *supra* note 3, at 600.

38. Owen M. Fiss, *Groups and the Equal Protection Clause*, 5 PHIL. & PUB. AFF. 107, 109 (1976).

policies—such as affirmative action or segregation of prisoners³⁹—in which taking race into account arguably achieves worthwhile goals. By contrast, there is widespread agreement that race should not be used if it does not advance public welfare. Profiling based on inaccurate stereotypes of minorities certainly fails that test.

Third, the irrationality claim addresses the effectiveness of law enforcement, a goal that could be shared by all the relevant communities involved in racial profiling: minority communities subject to profiling (because they bear the brunt of both criminal activity and law enforcement),⁴⁰ police (because they wish to use resources efficiently), and nonminority communities not subject to profiling (because ineffective policing wastes their resources too). This last group is particularly important. Due to social and residential segregation, nonminority communities do not bear many of the costs of social policies that weigh disproportionately on minorities, such as racial profiling.⁴¹ An argument that ties racial profiling to their fiscal interests, however weakly, may involve them in the problems of minority communities more than an argument based on consequences that they will never personally witness, such as the collateral effects of mass incarceration.

But will the irrationality claim in fact lead to progress on racial profiling, police-minority relations, and the mass incarceration of minorities? The evidence suggests that the answer is a qualified yes. Although the irrationality claim has yet to prevail in federal courts,⁴² state courts have used the statistics underlying the irrationality claim to invalidate individual instances of racial profiling.⁴³

In addition, investigations into the validity of the irrationality claim may serve as common ground for law enforcement and minority communities to develop meaningful relationships. Police-community partnerships have already been established for the purpose of information-gathering and analysis—the

39. See, e.g., *Johnson v. California*, 125 S. Ct. 1141 (2005).

40. See David Cole, *The Paradox of Race and Crime: A Comment on Randall Kennedy's "Politics of Distinction,"* 83 GEO. L.J. 2547, 2560 (1995) ("Black citizens living in the inner city are disproportionately victimized by crime, but they are also disproportionately victimized by law enforcement.").

41. See DAVID COLE, *NO EQUAL JUSTICE: RACE AND CLASS IN THE AMERICAN CRIMINAL JUSTICE SYSTEM* 46 (1999).

42. See, e.g., *Chavez v. Ill. State Police*, 251 F.3d 612 (7th Cir. 2001).

43. See, e.g., *Commonwealth v. Lora*, No. 20020413, 2003 WL 22350945 (Mass. Super. Ct. Sept. 12, 2003); *State v. Soto*, 734 A.2d 350 (N.J. Super. Ct. 1996).

precise activities that lie at the heart of the irrationality claim.⁴⁴ Focusing on data collection is advantageous because “[s]imply convening a group with a vague mission to discuss race, or the problem of racial profiling, might degenerate into a shouting match. . . . Data collection, if nothing else, gives everyone something discrete to work with and evaluate.”⁴⁵ A cooperative examination of the irrationality claim also provides the kinds of “formal, deliberative meetings between police and community residents [that] are the heart” of the modern trend toward community policing,⁴⁶ a strategy of policing that itself emphasizes strengthening ties between police and the communities they serve. Partnerships built on the common ground of the irrationality claim can serve as gateways to further cooperation, including, perhaps, the examination of more sensitive issues in the future.

CONCLUSION

Banks may be right that the current debate over racial profiling ignores and even masks people’s actual grievances. But the logic of Kahan’s article suggests that this rhetoric is valuable despite being misleading, shallow, and inaccurate. In a fractious society still divided by race and crime, the irrationality claim provides some common ground upon which public debate can proceed. This common ground, in turn, allows us to make fitful moves toward resolving our underlying grievances. More importantly, it forestalls potentially divisive cultural warfare—such as that sparked by the current debates over abortion, gay marriage, and the role of religion in government—in which each side accuses its opponent of failing to grasp fundamental moral values. The key to properly evaluating the current rhetoric of racial profiling is understanding that it is not an end in itself. Rather, the masking rhetoric we use lays the necessary groundwork for even more meaningful progress in the future.

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44. See Brandon Garrett, *Remedying Racial Profiling*, 33 COLUM. HUM. RTS. L. REV. 41, 115 (2001).

45. *Id.* at 132.

46. Forman, *supra* note 21, at 8.