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Book Notes

Impeaching Judges at the Fringe

The Federal Impeachment Process: A Constitutional and Historical Analysis.
By Michael J. Gerhardt.* Princeton: Princeton University Press, 1996. Pp. xiii,
233. \$29.95.

Michael Gerhardt's *The Federal Impeachment Process* combines the virtues of the two twentieth-century classics on the impeachment power. Like Raoul Berger's scholarly tome,¹ Gerhardt's book delves into the full range of issues implicated by the Impeachment Clauses,² tracing the power from its genesis in the Constitutional Convention to contemporary reform proposals. Like Charles Black's *Handbook*,³ the book is straightforward, providing Congress an accessible reference source for impeachment administration. Indeed, Gerhardt has mastered the "hundred-ton gun"⁴ that is the impeachment power, and he has readied it for academics and policymakers alike.

But Gerhardt does not explore the possibility that Congress might use this weapon against anyone but the occasional corrupt President, cabinet secretary, or judge. As the first major work to consider the 1980s impeachment trials of

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1. RAOUL BERGER, *IMPEACHMENT: THE CONSTITUTIONAL PROBLEMS* (1973) Gerhardt attacks anew questions Berger claimed to answer, such as whether judges may be removed by means other than impeachment (pp. 82–102) (arguing that they may not be) and whether congressional exercise of the impeachment power should be subject to judicial review (pp. 118–46) (arguing that it should not be) Gerhardt relies more on constitutional structure and history than Berger and less on pre-1787 Anglo-American law; these different emphases partly account for their different conclusions. *Cf. id.* at 107–21 (arguing that impeachments are justiciable); *id.* at 122–73 (arguing that judges may be removed by means other than impeachment).

2. U.S. CONST. art. I, § 2, cl. 5 (granting House sole power of impeachment); *id.* § 3, cl. 6 (granting Senate power to try impeachments and convict on two-thirds vote); *id.* § 3, cl. 7 (restricting penalties upon impeachment to removal and disqualification from office); *id.* art. II, § 4 (requiring removal of civil officers "on Impeachment for, and Conviction of, Treason, Bribery, or other high Crimes and Misdemeanors")

3. CHARLES L. BLACK, JR., *IMPEACHMENT: A HANDBOOK* (1974). Gerhardt's conclusions are generally close to Black's, but Gerhardt fills in Black's brief, conclusory arguments with historical and analytic detail.

4. 1 JAMES BRYCE, *AMERICAN COMMONWEALTH* 190 (Liberty Fund 1995) (1908) (analogizing impeachment to "a hundred-ton gun which needs complex machinery to bring it into position, an enormous charge of powder to fire it, and a large mark to aim at").

three federal judges,⁵ Gerhardt's book gives much of its attention to judicial, rather than presidential, impeachment. To date, judicial impeachment has been a minor congressional power, resulting in the conviction of only seven lower court judges (p. 185 n.3). Its importance for American democracy lies not in its history but in its potential. Although the recent spat over an opinion by Judge Harold J. Baer, Jr.,⁶ resulted in a self-reversal,⁷ some members of Congress have advocated impeaching Judge Baer and others who have written opinions that they view as wrong.⁸ Because Gerhardt fails to address directly the legitimacy of impeaching judges for rendering decisions with which Congress disagrees, he does not consider whether such removals would unconstitutionally encroach on judicial independence or would provide a constitutionally acceptable check on judicial activism.

I

Rather than organizing the book as a seriatim inquiry into the various aspects of impeachment, Gerhardt has divided it into four multichapter parts that discuss the ratification of the Constitution (pp. 3–21), the practice of impeachment in Congress (pp. 23–71), constitutional issues in impeachment (pp. 73–146), and proposed reforms to the impeachment process (pp. 147–78). The result is a rich, lively, and even suspenseful study in which Gerhardt's historical assessments return to inform his constitutional and policy analysis. In the end, Gerhardt echoes Winston Churchill in saying "that impeachment may be the worst imaginable system for disciplining and removing impeachable officials, except for all of the others" (p. 178).⁹

The statement's ambivalence reveals the thrust of Gerhardt's argument and the tension within it. Gerhardt is confident that the Framers' decision to rest the impeachment power in Congress rather than the Supreme Court was right. Because of Congress's political accountability, as well as the Constitution's

5. All three 1980s impeachment trials—of Judges Harry Claiborne, Alcee L. Hastings, and Walter L. Nixon, Jr.—resulted in convictions (p. 185 n.3).

6. See *United States v. Bayless*, 913 F. Supp. 232 (S.D.N.Y. 1996) (granting motion to suppress evidence on Fourth Amendment grounds), *vacated by* 921 F. Supp. 211 (S.D.N.Y. 1996). Receiving particular criticism was Judge Baer's statement that it was ordinary for law-abiding citizens in a high-crime neighborhood to flee the police because "residents . . . tended to regard police officers as corrupt, abusive, and violent." *Id.* at 242.

7. See *Bayless*, 921 F. Supp. 211 (vacating prior ruling).

8. See, e.g., John King, *Dole Pitches Crime Message at San Quentin*, PLAIN DEALER (Cleveland), Mar. 24, 1996, at 24A (noting Senator Robert Dole's recommendation that Judge Baer be impeached); Katharine Q. Seelye, *House G.O.P. Begins Listing a Few Judges to Impeach*, N.Y. TIMES, Mar. 14, 1997, at A23 (reporting House Republican Whip Tom DeLay's statement that Judge Baer and two others might be appropriate candidates for impeachment).

9. See Winston S. Churchill, Speech to the House of Commons (Nov. 11, 1947), in 7 WINSTON S. CHURCHILL: HIS COMPLETE SPEECHES, 1897 TO 1963, at 7566 (Robert R. James ed., 1974) ("[I]t has been said that democracy is the worst form of Government, except all those other forms that have been tried from time to time.").

procedural and substantive limits on impeachment,¹⁰ Gerhardt sees impeachment as a well-designed process that works—more or less. Despite some flaws in congressional impeachment practice (pp. 27–32, 39–53), Gerhardt concludes “that the House has rarely, if ever, and the Senate has never, successfully committed a serious or extreme abuse of its impeachment authority” (p. 55). Perhaps inspired by this record, Gerhardt devotes nearly half the book to analysis of various constitutional questions that a Congress contemplating impeachment should face.

Gerhardt repeatedly emphasizes that the impeachment power is unique, distinct both from ordinary legislative activities and from typical judicial processes. This uniqueness leaves Gerhardt wary of removals that do not strictly conform to the Constitution. For example, he agrees with Congress’s assessment that its own members are not impeachable since they are not “civil Officers” (pp. 75–77).¹¹ Members of Congress, he argues, may be removed only through expulsion,¹² and judges may be removed only through impeachment and conviction. They may not be removed by other legislative means (pp. 83–86) or by judicial self-enforcement (pp. 95–97).

The uniqueness of impeachment also causes Gerhardt to draw a sharp line between impeachment and other sanctions not entailing removal. His view of criminal and impeachment processes as independent compels his conclusion that judges may be prosecuted before impeachment, since criminal conviction does not technically remove a judge from the bench (pp. 87–91). Similarly, Gerhardt argues that officials who have resigned may still be impeached (pp. 79–81).¹³ Finally, the judiciary may police its own members with measures short of removal (pp. 97–102).¹⁴

10. To ensure that the Senate would convict only for serious offenses and only after serious deliberation, the Framers provided for impeachment only for “Treason, Bribery, or other high Crimes and Misdemeanors,” U.S. CONST. art. II, § 4, and required a two-thirds majority for a conviction, *id.* art. I, § 3, cl. 6.

11. In 1798, the Senate expelled William Blount but voted that he was not a “civil Officer.” U.S. CONST. art. II, § 4, and was thus not subject to the impeachment process (p. 48). Since then, no member of Congress has faced impeachment. While Gerhardt notes that the term “civil Officer” is nowhere clearly defined (pp. 76, 165), he assumes without explanation that the term includes judges. The Convention records provide no clarification of the term, and “[t]here is a legitimate textual question whether judges were included in the impeachment provisions of Article II.” Martha Andes Ziskind, *Judicial Tenure in the American Constitution: English and American Precedents*, 1969 S. CT. REV. 135, 151. However, judges technically are civil (as opposed to military) officers, and scholars agree that Section 4 includes judges. *See id.*; Maria Simon, Note, *Bribery and Other Not So “Good Behavior”: Criminal Prosecution as a Supplement to Impeachment of Federal Judges*, 94 COLUM. L. REV. 1617, 1621 n.14 (1994) (citing authorities for including judges within Section 4); *see also* BERGER, *supra* note 1, at 85 (noting sloppiness of placing judicial impeachment within Article II).

12. *See* U.S. CONST. art. I, § 5, cl. 2 (granting each House power to expel member by two-thirds vote).

13. The issue is more than symbolic, because the Senate has the power not only to remove officials, but also to disqualify them from holding future office. *See id.* § 3, cl. 7. Typically, however, the Senate has removed officials without disqualifying them (p. 78). When the Senate has disqualified impeached officials, it has done so by simple majority votes, a practice Gerhardt challenges (pp. 78–79).

14. The constitutionality of such self-regulation arose in *Chandler v. Judicial Council of the Tenth Circuit*, 382 U.S. 1003 (1966), *second app. dismissed*, 398 U.S. 74 (1970). Although the Supreme Court did not reach the merits, two Justices dissented, arguing that impeachment is the only means by which a

Gerhardt also approves of another facet of impeachment uniqueness—its insulation from judicial review (pp. 118–46). In *Nixon v. United States*,¹⁵ the Supreme Court held that challenges to impeachments are nonjusticiable because the Constitution grants the Senate the power to “try” impeachments as it sees fit.¹⁶ Gerhardt labors to place this decision on a sound constitutional foundation (pp. 120–23).¹⁷ While the Court indicated that explicit violations of the Impeachment Clauses, such as conviction without a two-thirds majority, might be justiciable,¹⁸ Gerhardt argues against even this limited review (pp. 125–38).¹⁹

The book culminates with policy recommendations that echo the status quo. Gerhardt urges a clarification of procedural rules (pp. 149–52) and the delegation of some impeachment tasks to experts (pp. 153–56). But he counsels against proposals for statutes or constitutional amendments that would supplement or replace Congress’s authority to remove judges by impeachment (pp. 159–72).

II

Although he does not explicitly indicate his position on policy-motivated impeachment, Gerhardt implies that he would oppose impeachment of judges with extreme legal views (pp. 111, 167). Parts of his argument, however, open the door to such use of the removal power. Gerhardt insists that “high Crimes and Misdemeanors” are not coextensive with or limited to indictable offenses.²⁰ As a congressman, Gerald Ford maintained that an impeachable offense “is whatever a majority of the House [considers it] to be at a given moment in history,”²¹ and Gerhardt admits that this view “captures the

judge may even temporarily be deprived of office. See 398 U.S. at 129 (Douglas, J., dissenting); 382 U.S. at 1004 (Black, J., dissenting). Gerhardt disagrees with the dissenters, arguing that “claiming impeachment is the exclusive means, political or otherwise, for removing federal judges is not inconsistent with allowing judicial councils broad power to deal with administrative matters within their jurisdictions” (p. 98).

15. 506 U.S. 224 (1993).

16. See *id.* at 237–38. Gerhardt refers to the decision as “*Walter Nixon v. United States*” to distinguish it from the classic *United States v. Nixon*, 418 U.S. 683 (1974), which required President Richard Nixon to comply with a subpoena for Watergate tapes.

17. Earlier scholars disagreed about whether impeachment challenges are justiciable. Compare BERGER, *supra* note 1, at 107–21 (arguing for justiciability), with BLACK, *supra* note 3, at 53–63 (arguing against it).

18. See 506 U.S. at 229. A separate opinion concurring with the finding of nonjusticiability on the facts of *Nixon* urged that the Court would not need to abdicate review even of what it means “to try” an impeachment if the Senate were to overstep all reasonable bounds, for example, by flipping a coin. See *id.* at 253–54 (Souter, J., concurring).

19. Defending the practical ramifications of this conclusion, Gerhardt argues that “[g]iven media scrutiny on Congress . . . it is difficult to conceive how Congress would ever get away with violating an explicit constraint on the impeachment power” (p. 138).

20. This position enjoys a scholarly consensus. See, e.g., BERGER, *supra* note 1, at 62; BLACK, *supra* note 3, at 38–40.

21. 116 CONG. REC. 11,913 (1970) (statement of Representative Gerald Ford urging impeachment of Justice William O. Douglas for alleged personal improprieties).

practical reality of impeachment" (p. 103).

To Gerhardt, the standard for an impeachable offense includes political offenses that vary with an officeholder's "responsibilities, tenure, political accountability, and actions" (p. 107), as well as "actions [that] undermine confidence in the judge's neutrality and impugn the integrity of the judicial process" (p. 107). Given this expansive definition, there would be nothing unconstitutional about Congress using the impeachment power to remove judges who members believe have abused their power by rendering unsupportable decisions. Such removals would arguably realize the vision of Hamilton, who saw impeachment as a legislative check on the judiciary (p. 17).²² Even if there are contrary constitutional arguments, the courts would be unable to prevent Congress from removing judges for their decisions as long as impeachment remains nonjusticiable.²³

Congress might also try to expand judicial removals by passing a statute mandating the removal of judges convicted of specified crimes. Gerhardt claims that such removal outside impeachment, which would free up the impeachment process for consideration of noncriminal offenses, would suffer from a "fatal [constitutional] problem" (p. 160). His argument, however, is ultimately unconvincing. A major hurdle to the conclusion, as Gerhardt recognizes (pp. 92–95), is the first Congress's Act of 1790,²⁴ which provided for the disqualification of judges convicted of bribery. Gerhardt seems torn over whether the statute was constitutional,²⁵ but a number of scholars have made convincing, unanswered arguments that it was.²⁶ If a statute may

22. Hamilton observed:

[T]he supposed danger of judiciary encroachments on the legislative authority is in reality a phantom. . . . [T]he inference is greatly fortified by the consideration of the important constitutional check which the power of instituting impeachments in one part of the legislative body, and of determining upon them in the other, would give to that body upon the members of the judicial department.

THE FEDERALIST NO. 81, at 484–85 (Alexander Hamilton) (Clinton Rossiter ed., 1961)

23. Pervading Gerhardt's book is an implicit plea that Congress strive to honor the Framers' intentions (e.g., p. 73), and so he would probably counsel Congress not to impeach judges in a way it viewed as unconstitutional. See also BLACK, *supra* note 3, at 23–24 ("Congress's responsibility to preserve the forms and the precepts of the Constitution is greater, rather than less, when the judicial forum is unavailable . . ."). It might seem unseemly for Congress to defend an admitted violation of the Constitution simply on the basis that it can get away with it. However, there is a plausible rejoinder that two constitutional wrongs make a right: If Congress is concerned that judges are twisting the Constitution but believes that the Impeachment Clauses do not allow policy-motivated impeachments, it might prevent judicial misinterpretation at the cost of stretching the constitutional bounds of the impeachment process.

24. Act of Apr. 30, 1790, § 21, 1 Stat. 112, 117.

25. Gerhardt at first calls the Act a "reasonable attempt . . . by [Congress to] combin[e] its powers under the necessary and proper and the impeachment clauses" (p. 93) and later saves it from unconstitutionality by narrowly construing it "to represent nothing more than the First Congress's declaration that any federal judge convicted of bribery deserved automatic disqualification" (p. 95). While Gerhardt concludes that the statute was of "uncertain constitutionality" (p. 95), he avoided such straddling in earlier work. See Michael J. Gerhardt, *The Constitutional Limits to Impeachment and Its Alternatives*, 68 TEX. L. REV. 1, 72 (1989) (reasoning that because statute disqualified judges without removing them from office, it was constitutional).

26. See, e.g., Simon, *supra* note 11 (demonstrating that Act of 1790 was one of pattern of statutes indicating acceptability of removal as criminal punishment); Akhil Reed Amar, On Judicial Impeachment

effectively disqualify judges automatically upon criminal conviction, it should be able to remove judges as well.

Ultimately, Gerhardt's reluctance to explore the fringes of the impeachment power stems from an assumption that the primary value underlying the Impeachment Clauses is fairness. For example, in asking what the applicable burden of proof should be in impeachment trials, Gerhardt weighs the "preponderance of the evidence" and "beyond a reasonable doubt" standards (pp. 112–13), never considering that the value of accountability might demand that judges avoid even the appearance of impropriety. "The individual right at risk in an impeachment trial," Gerhardt asserts, "is a federal judge's potential loss of position, including the independence he or she is guaranteed by Article III" (p. 120).²⁷ The personal interests of a judge, however, seem *de minimis* in comparison with the broader, competing values of judicial independence and accountability.

Rather than attempt to resolve the tension between independence and accountability, Gerhardt uncritically endorses the aphoristic view that "[t]he ideal balance is one that involves the least possible threat to judicial independence consistent with maintaining public confidence in the system" (p. 167).²⁸ As Gerhardt notes, the impeachment process's hurdles probably preclude successful *partisan* assaults on judges (pp. 110–11), as the early failure by Congress to remove associate Justice Samuel Chase revealed (pp. 55–56). However, this does not mean that Congress would be unable to effect *bipartisan* removals of judges who were viewed as thwarting congressional statutory intent or the Framers' constitutional intent. The supermajority required for conviction means that such impeachments would be rare, but even the prospect of occasional impeachments could greatly increase accountability. Whether the accompanying loss of judicial independence would raise or lower the quality of American judging is a question that both Congress and scholars of impeachment should address.

—Michael Abramowicz

and Its Alternatives—Remarks Prepared for the National Commission on Judicial Discipline and Removal 5 (Dec. 18, 1992) (unpublished manuscript, on file with the *Yale Law Journal*) ("If Congress may provide for capital punishment of judges, it also has the lesser power to define punishment that would allow a convicted defendant to keep his head, but lose his office, salary, title, honor, and eligibility.").

27. Gerhardt makes this statement while evaluating Rebecca Brown's claim that the nonjusticiability of impeachment cases threatens individual rights. This is misleading, because the individuals Brown is concerned about are those protected by judges, not the judges themselves. *See* Rebecca L. Brown, *When Political Questions Affect Individual Rights: The Other Nixon v. United States*, 1993 S. CT. REV. 125, 136 ("[I]t is not necessarily true that the core purpose of the separation of powers—the protection of liberty—extends to the jobs of public officials accused of official misconduct in the same way that it encompasses attempted deprivations of private individuals' liberty.").

28. Quoting *Hearing Before the Subcommittee on the Constitution of the Committee on the Judiciary*, 101st Cong. 45 (1990) (statement of Judge Stapleton, United States Court of Appeals for the Third Circuit).

Reckoning with Race and Criminal Justice

Search and Destroy: African-American Males in the Criminal Justice System. By Jerome G. Miller. New York: Cambridge University Press, 1996. Pp. xiv, 304. \$24.95.

In 1995, one in three African-American men between the ages of twenty and twenty-nine was under the supervision of the criminal justice system.¹ Two distinct academic fields, legal scholarship and criminology, have attempted to account for the effects of the criminal system on African Americans. While legal academics² and criminologists³ share the conclusion that race plays a significant role in the criminal justice system, they rarely share their findings with one another.⁴ Robert Weisberg, a legal scholar, criticizes the lack of interface between law and criminology: “[T]hough criminal law scholarship has a distinct discipline to draw on—criminology—it has barely tried to benefit from the relationship.”⁵ Rather than contend with the paralysis engendered by depressing criminological findings, “criminal law scholars . . . tend[] their own garden of abstractly satisfying solutions to abstract dilemmas.”⁶ Legal scholarship would benefit from a recognition of two unique aspects of criminology: a systemic perspective and the use of sociological theory to explore the effects of the legal system on individuals and communities. The benefits of dialogue, however, are hardly unidirectional. Criminologists would be able to target their reform efforts more precisely if

1. See MARC MAUER & TRACY HULING, SENTENCING PROJECT, YOUNG BLACK AMERICANS AND THE CRIMINAL JUSTICE SYSTEM: FIVE YEARS LATER 3 (1995).

2. See, e.g., Paul Butler, *Racially Based Jury Nullification: Black Power in the Criminal Justice System*, 105 YALE L.J. 677 (1995); Charles J. Ogletree, Jr., *The Death of Discretion? Reflections on the Federal Sentencing Guidelines*, 101 HARV. L. REV. 1938 (1988).

3. See, e.g., AFRICAN-AMERICAN PERSPECTIVES ON: CRIME CAUSATION, CRIMINAL JUSTICE ADMINISTRATION, AND CRIME PREVENTION (Anne T. Sulton ed., 1994) [hereinafter AFRICAN-AMERICAN PERSPECTIVES]; THE CRIMINAL JUSTICE SYSTEM AND BLACKS (Daniel Georges-Abeyie ed., 1984); MARVIN D. FREE, JR., AFRICAN AMERICANS AND THE CRIMINAL JUSTICE SYSTEM (1996); RACE AND CRIMINAL JUSTICE (Michael J. Lynch & E. Britt Patterson eds., 1991). *But see* WILLIAM WILBANKS, THE MYTH OF A RACIST CRIMINAL JUSTICE SYSTEM (1987).

4. For some refreshing exceptions, see, e.g., MICHAEL TONRY, MALIGN NEGLECT: RACE, CRIME, AND PUNISHMENT IN AMERICA (1995) (authored by legal scholar); Samuel L. Myers, Jr., *Racial Disparities in Sentencing: Can Sentencing Reforms Reduce Discrimination in Punishment?*, 64 U. COLO. L. REV. 781 (1993) (authored by non-lawyer); Joseph F. Sheley, *Structural Influences on the Problem of Race, Crime, and Criminal Justice Discrimination*, 67 TUL. L. REV. 2273 (1993) (same).

5. Robert Weisberg, *Criminal Law, Criminology, and the Small World of Legal Scholars*, 63 U. COLO. L. REV. 521, 525 (1992). *But see* FRANKLIN E. ZIMRING & GORDON HAWKINS, THE SCALE OF IMPRISONMENT (1991) (combining law and criminology).

6. *Id.* at 527.

they attended to the legal distinction between intentional discrimination and disparate impact.⁷

Authored by Jerome G. Miller, a social worker by training and a seasoned criminologist by trade, *Search and Destroy: African-American Males in the Criminal Justice System* exemplifies this methodological gulf. In both its criminological strengths and its legal weaknesses, *Search and Destroy* highlights the valuable insights law and criminology can offer one another. Miller ably presents the criminological perspectives legal scholarship often ignores: a comprehensive, holistic approach and the application of sociological theory. He fails to address, however, the crucial legal question of causation: Is the disproportionate representation of African-American men in the criminal justice system evidence of disparate impact or the result of intentional discrimination? More generally, he ignores the evolving consensus in both social science and law that the increasingly covert nature of contemporary racism requires new approaches to reform.⁸

Miller sets out to prove that since at least the 1980s,⁹ the criminal justice system has victimized African-American males under the guise of providing "domestic tranquillity" (p. 1). He attributes the disproportionate involvement of young black men in the criminal system to, among other factors, the Reagan-initiated "war on drugs" (pp. 80–86); overinclusive definitions of "crime" (pp. 12–13) and "violent crime" (pp. 35–37) that criminalize a range of behavior better addressed through nonlegal channels; police practices, like the widespread use of snitches, that increase rather than decrease incidents of crime (pp. 89–136); and popular conceptions of black men as particularly inclined, whether by social conditioning or genetics, to commit crime (pp. 178–216). Moving from cause to effect, Miller systematically demonstrates the methodological flaws of studies concluding that racial bias does not exist and describes more rigorous studies that do demonstrate racial bias (pp. 62–69).

Miller's suggestions for reform are as sweeping and numerous as his causal assessments. His reform options range from specific proposals, like appointing prosecutors and terminating the use of snitches, to more general policy goals, like diverting young offenders from the system altogether (pp. 239–40). Calling for a paradigm shift in the nation's approach to crime, he exhorts policymakers "to wrestle seriously with 'root causes'" (p. 237).¹⁰ A society more attuned to the life history of the individual (p. 237), more hesitant to overwhelm communities with destructive police practices (p. 239), and more inclined to use rehabilitative methods of handling social problems labeled

7. See *infra* text accompanying notes 20–21.

8. See *infra* notes 24–27 and accompanying text.

9. Miller notes that disproportionate effects could be detected long before 1980 (p. 5).

10. Miller suggests "massive infusions of funding [to the inner cities] to rebuild the infrastructure, programs directed at Head Start, family support systems, nutrition, improved education, employment opportunities, housing, and adequate family income" (p. 237).

“crime” (pp. 239–41) would better develop “humane and decent ways to address crime” (p. 236).

Miller examines the root causes of crime, many social science studies analyzing racial bias in the criminal system, and the various points at which the system has a disproportionate effect on African Americans. Unlike scholars in both fields, he has produced a major scholarly work that aggregates and assesses abundant statistical data about each stage of the criminal process.¹¹ Because “[r]ace effects at any one stage . . . may be canceled out or enhanced at other stages” (p. 70),¹² holistic projects such as Miller’s allow us to “gain a more complete picture of the way in which minority status does or does not influence outcome decisions” (p. 70).¹³ *Search and Destroy* thus provides a valuable resource for both legal scholars and social scientists who confront the inherently intertwined issues of racial bias in the various stages of the criminal justice process.

Miller’s insightful use of sociological theory offers an even more important contribution to legal scholarship than his holistic approach. Miller’s sociological perspective allows him to cast wide his analytical net in assessing the underlying causes of the “war on crime,” the unanticipated consequences of increased law enforcement, and the changes necessary for effective reform. Shedding light on the causes of the recent escalation of law enforcement, he connects the implementation of the “search and destroy” program with the unspoken fears of middle-class whites. Despite growing evidence that crime rates have decreased (pp. 28–30, 153–58)¹⁴ and that whites are less likely to be victimized than blacks (pp. 175–77),¹⁵ whites perceive a greater threat to their well-being (pp. 175–77). Targeting black men for prosecution serves to allay these fears (pp. 153–64). Miller’s sociological approach also allows him to question the effects of enforcement mechanisms. For example, the destructive social consequences of using snitches and the experience of arrest (pp. 89–136) exceed the ken of legal scholars, but are, as Miller demonstrates,

11. Most recent legal scholarship on racial disparities in the criminal justice system focuses on a single aspect of the criminal process. See, e.g., Ian Ayres & Joel Waldfogel, *A Market Test for Race Discrimination in Bail Setting*, 46 STAN. L. REV. 987 (1994) (bail setting); Butler, *supra* note 2 (jury nullification); Drew S. Days III, *Race and the Federal Criminal Justice System: A Look at the Issue of Selective Prosecution*, 48 ME. L. REV. 179 (1996) (selective prosecution); Ogletree, *supra* note 2 (sentencing disparities); Randall S. Susskind, Note, *Race, Reasonable Articulate Suspicion, and Seizure*, 31 AM. CRIM. L. REV. 327 (1994) (police practices). But cf. Floyd D. Weatherspoon, *The Devastating Impact of the Justice System on the Status of African-American Males: An Overview Perspective*, 23 CAP U. L. REV. 23 (1994) (providing multi-issue overview). Similarly, social scientists have produced numerous compilations of single-issue articles because they recognize the need for comprehensive coverage, but none has individually authored systematic studies. See, e.g., AFRICAN-AMERICAN PERSPECTIVES, *supra* note 3; THE CRIMINAL JUSTICE SYSTEM AND BLACKS, *supra* note 3; RACE AND CRIMINAL JUSTICE, *supra* note 3.

12. Quoting CARL E. POPE & WILLIAM FEYERHERM, U.S. DEP’T OF JUSTICE, MINORITIES AND THE JUVENILE JUSTICE SYSTEM 73–74 (1992).

13. Quoting *id.*

14. Even conservative sociologists acknowledge a decrease in the rate of crime (p. 30) (citing, *inter alia*, Charles Murray, *The Legacy of the Sixties*, COMMENTARY, July 1992, at 27).

15. But see pp. 36–37 (describing rising crime rates in newly affluent areas).

crucial to understanding the effects of criminal justice on young black men.

Similarly, Miller's wide-ranging suggestions for reform can improve a legal scholarship that often neglects the realities of the society in which the law operates. Legal scholars' emphasis on law-centered reforms can impede their consideration of social and political changes necessary for effective improvement. Paul Butler, for example, recognizes that large numbers of African-American men wallow in prison because "the law uses punishment to treat social problems,"¹⁶ but his call for jury nullification is poorly tailored to his assessment of the problem. By the time a defendant reaches a jury decision (if he ever does), he has run a gauntlet of systemic racial bias. *Search and Destroy* points the way toward transformation of the system as a whole rather than recommending stop-gap measures that continue to result in the victimization of African-American males by the criminal system, even if they occasionally win a singular victory at the end of the process.

While Miller has much to teach the legal academy, he also has much to learn from it. At the heart of his examination of criminal justice lies his concern with white racism. Miller assumes that racism among the general white public plays a major role in criminal legislation: "[T]he criminal justice rite . . . may exist not so much to lower crime as to reassure the larger society that its metaphors regarding offenders in general, and the black male offender in particular, are sustained" (p. 92). As the title of the book implies, black men are not in prison by accident; someone intends to "search and destroy" African-American men. The question that *Search and Destroy* fails to answer, except by subtle implication, is exactly who has that mission and exactly how it becomes public policy.

A more sophisticated understanding of the nature of contemporary racism would enable Miller to answer these crucial questions. The vast array of statistical and narrative data that Miller draws upon points to "racial bias" (p. 72 & n.60),¹⁷ "race effects"¹⁸ (p. 70),¹⁸ or "racial disproportionality"¹⁹ (pp. 72)¹⁹ in the criminal system. While these terms imply differential treatment of people of color without necessarily attaching blame for such treatment—one scholar even explicitly disavows "*conscious prejudice*" (p. 60)²⁰—Miller implies intentional, conscious action throughout the book (e.g., pp. 4, 75, 81, 83). To support his claim, Miller must address two separate but related theoretical distinctions, one legal and one primarily sociological. The legal distinction focuses on whether disproportional representation in the criminal

16. Butler, *supra* note 2, at 709.

17. Citing KIMBERLY L. KEMPF, PENNSYLVANIA COMM'N ON CRIME & DELINQUENCY, THE ROLE OF RACE IN JUVENILE JUSTICE PROCESSING IN PENNSYLVANIA, at abstract 1 (Aug. 1992) (referring to "biased outcomes").

18. Quoting POPE & FEYERHERM, *supra* note 12, at 73-74.

19. Quoting Edmund F. McGarrell, *Trends in Racial Disproportionality in Juvenile Court Processing: 1985-1989*, 39 CRIME & DELINQ. 29, 29-48 (1993).

20. Citation omitted.

system constitutes disparate impact or results from intentional discrimination. The sociological distinction differentiates historically overt racism from the increasingly "unconscious" nature of contemporary American racial prejudices.

From a legal perspective, Miller's most critical omission is his failure to distinguish between racial disparities arising from intentionally discriminatory policies and those resulting from "race-neutral" policies. Despite the care he takes to assess cause and effect in most aspects of his analysis, Miller fails to distinguish between what the law calls intentional discrimination (cause) and disparate impact (effect).²¹ Using a criminological framework, Miller glosses over the intent/impact distinction and consequently neglects questions that the law considers crucial.²² Miller's failure to reckon with this distinction raises questions about both his analysis of why and how the criminal system targets black men and his suggestions for reform. A regime created by intentional discrimination requires different reforms from a race-neutral system that nonetheless affects a particular racial group disproportionately. If Miller had explicitly attacked the distinction itself, or the need to demonstrate intent in the face of overwhelming impact, his book could have contributed to the ongoing legal debate about the need for a discriminatory intent requirement.²³ Miller's refusal or inability to address this issue detracts from the cogency of his explanations for the racially disproportionate effect of the criminal process.

Even viewing *Search and Destroy* within the social science literature Miller has chosen to engage, Miller evades fundamental questions about race. Sociological,²⁴ and even legal,²⁵ theories regarding the nature of contemporary racism demonstrate that it is not as easy to uncover as the old-fashioned Bull Connor variety of the 1950s and 1960s. The general consensus among social scientists is that although racial bias has changed its form since the civil rights movement, it has hardly disappeared. "Symbolic racists"²⁶ do

21. For the Supreme Court's distinction between disparate treatment and disparate impact, see *Washington v. Davis*, 426 U.S. 229 (1976), which holds that proof of racially discriminatory intent or purpose is required to demonstrate violation of the Equal Protection Clause.

22. Other criminologists similarly gloss over the distinction. See, e.g., AFRICAN-AMERICAN PERSPECTIVES, *supra* note 3; FREE, *supra* note 3.

23. It is possible that Miller ignores the intent/impact distinction on principle. Much legal scholarship strongly criticizes the requirement that plaintiffs demonstrate discriminatory intent in order to claim an equal protection violation. See, e.g., Theodore Eisenberg & Sheri Lynn Johnson, *The Effects of Intent: Do We Know How Legal Standards Work?*, 76 CORNELL L. REV. 1151 (1991); Pamela L. Perry, *Two Faces of Disparate Impact Discrimination*, 59 FORDHAM L. REV. 523 (1991).

24. See, e.g., PREJUDICE, DISCRIMINATION, AND RACISM (John F. Dovidio & Samuel L. Gaertner eds., 1986); ROBERT C. SMITH, RACISM IN THE POST-CIVIL RIGHTS ERA (1995).

25. See, e.g., Barbara J. Flagg, "Was Blind, But Now I See": *White Race Consciousness and the Requirement of Discriminatory Intent*, 91 MICH. L. REV. 953 (1993); Sheri Lynn Johnson, *Unconscious Racism and the Criminal Law*, 73 CORNELL L. REV. 1016, 1022 (1988); Charles R. Lawrence III, *The Id, the Ego, and Equal Protection: Reckoning with Unconscious Racism*, 39 STAN L. REV. 317 (1987).

26. The theory of "symbolic racism" posits that whites express negative feelings toward blacks indirectly rather than directly. See John B. McConahay, *Modern Racism, Ambivalence, and the Modern Racism Scale*, in PREJUDICE, DISCRIMINATION, AND RACISM, *supra* note 24, at 91; John B. McConahay & J.C. Hough, Jr., *Symbolic Racism*, 32 J. SOC. ISSUES 23 (1976).

not express blatantly racist attitudes because it is no longer socially acceptable to do so, while "aversive racists"²⁷ believe that they are not racist even while holding racist beliefs. Whatever the label, social scientists agree that a major shift has occurred in the ways in which Americans express racist attitudes.

Miller occasionally indicates his understanding of the more covert forms of contemporary racism. Implicitly acknowledging the infrequent public expression of racist attitudes, for example, Miller is shocked by the overtly racist comments of one white chief judge of a criminal court. He recognizes, however, that the judge's spoken comments were "probably uncomfortably close to the quietly held attitudes that define the 'social context' of justice for most young African-American males entering that judicial system" (p. 87). From these "quietly held attitudes," Miller infers that "our . . . reliance on imprisonment and harsher sentences [increases] as the skin color of . . . defendants grows ever darker" (pp. 87-88). He implies that individual actors within the criminal justice apparatus hide their conscious racist attitudes in "chambers and courthouse offices" (p. 61). Miller does not, however, address the consequences of these covert racist attitudes for reforms. Moreover, he fails to account for aversive racism—racism that is truly unconscious to the perpetrator, but harmful just the same to the victim of discrimination.²⁸

Instead, Miller asserts that these theoretical subtleties obscure the larger point: "Whether racial disparities are the result of conscious or unconscious motives is probably of minimal interest to those who are subject to them" (p. 60). Miller is most certainly correct. Such distinctions should be of interest, however, to the author of a book claiming to demonstrate the ways in which the criminal justice system targets African-American men and to remedy this trend with extensive reforms. In a nation that many claim still harbors "unconscious racism," Miller should have addressed the mechanisms by which generalized white fears and prejudices "search and destroy" African-American males. By compiling widespread data demonstrating the extent of racially disparate impacts in the criminal justice system, Miller partially achieves his goal. Because he neglects the nature and manifestations of contemporary racism, however, Miller fails to provide a satisfying theoretical account of the racial bias he so comprehensively demonstrates.

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27. "Aversive racists" believe that they are not prejudiced, but they retain subtly racist attitudes because of the historically embedded racist culture of the United States. See John Dovidio et al., *Resistance to Affirmative Action: The Implications of Aversive Racism*, in *AFFIRMATIVE ACTION IN PERSPECTIVE* 83, 86 (F.A. Blanchard & F.J. Crosby eds., 1989).

28. Legal scholars have suggested numerous methods of tailoring equal protection jurisprudence to encompass discrimination resulting from unconscious racism. See, e.g., Flagg, *supra* note 25, at 960 (proposing government burden of justifying disparate impact); Lawrence, *supra* note 25, at 324 (proposing test of "cultural meaning" of state action); Matthew F. Leitman, *A Proposed Standard of Equal Protection Review for Classifications Within the Criminal Justice System That Have a Racially Disparate Impact*, 25 U. TOL. L. REV. 215 (1994) (suggesting less deferential rational basis test for criminal classifications).