In the minds of most Americans, the judge, and to a lesser extent the jury, symbolizes justice. This is especially true in criminal cases, where the role of the judge is to ensure that proper procedures are followed and the defendant’s rights are protected and where the jury—assuming there is one—is responsible for deciding whether the evidence proves the defendant’s guilt. If the defendant waives his or her right to a jury trial and is tried by a judge at a bench trial, the judge plays both roles: The judge determines the facts and applies the law. The judge’s role is more circumscribed if the defendant pleads guilty. In this case, the judge, perhaps with input from the prosecuting attorney, determines the appropriate sentence but does not decide whether the prosecutor has proved his or her case beyond a reasonable doubt.
The typical criminal case, then, involves both fact finding and application of the law; it involves “determining the facts and then choosing—often crafting, sometimes even creating—the appropriate rules of law to apply to these facts” (Murphy et al., 2006, p. 381). When we say that judges apply the law, we mean that judges decide the legal—as opposed to factual—matters before the court. For example, the defendant’s attorney may file a motion requesting that illegally obtained evidence be excluded. Perhaps the attorney believes that the defendant’s confession was coerced or that physical evidence was seized during an improper search. The judge, who will consider both appellate court decisions regarding these issues and relevant state and local rules governing the admissibility of evidence, will decide whether the evidence should be excluded or not. His or her decision amounts to applying the law, either as spelled out in statutes or interpreted by other courts’ decisions. Judges also may be asked to decide whether the case should be moved to another jurisdiction as a result of prejudicial pretrial publicity or whether potential jurors should be excused from the jury panel as a result of bias or other factors, and judges ensure that questioning of witnesses at trial comports with the rules of evidence. These complex legal matters are not left in the hands of jurors, the nonexperts in the courtroom drama.

The role that jurors play is that of fact finding. In the typical jury trial, jurors listen to the “facts” of the case as laid out by the defense attorney and prosecutor. They then decide based on that information what “happened.” Their decisions about what happened ultimately affect whether the defendant will be held accountable for the crime with which he or she is charged. For example, if an expert witness for the defense convinces the jury that the defendant was not of sound mind at the time of the crime or an alibi witness is able to create reasonable doubt about the defendant’s involvement in the crime, the jury may elect to find the defendant not guilty. Alternatively, if the prosecution calls 10 persuasive witnesses to the stand and the defense calls only 1 witness, the jury may be swayed by the prosecution’s version of the events that landed the defendant in court. We put the word facts in quotes at the beginning of this paragraph for just this reason; they are relative. Because jurors were not present when the crime occurred, they must determine the “facts” as presented to them by the prosecution and defense.

Both the application of the law by judges and fact finding by the jury are imperfect. For example, although most judges are impartial and fair, not all are. Judges’ decisions may be motivated by bribes, by fear of electoral defeat, or by prejudice or bias against one side in the case. In 1991, for example, U.S. District Judge Robert Collins was convicted of taking a $100,000 bribe from a drug smuggler in exchange for a lighter sentence, and in 2000, Judge Calvin Hotard of Jefferson, Louisiana, 2d Parish Court was forced to retire from the bench after it was revealed that he dismissed cases or imposed lenient sentences in exchange for sexual favors (Cox, 2001). Judges are also human, which means they do not always apply the law correctly. The judge might misinterpret an appellate court ruling on criminal procedure or allow the use of irrelevant evidence.

The jury system also is imperfect. The jury may not hear all of the facts in the case; the prosecutor and the defense may try to conceal facts that work to the other side’s advantage. For example, the defendant might decide not to testify, which means that the jury will not hear the defendant’s version of events. Although jurors are instructed not to assume anything as a result of the defendant’s failure to testify, they will nonetheless wonder why they didn’t hear from the defendant. Moreover, jurors usually hear two versions of the facts—one from the defense attorney and another from the prosecutor.
(see Box III.1). Even if all of the facts come out at trial, the jurors will not necessarily take all of them into consideration in reaching a verdict. If the jurors believe that the defendant, for whatever reason, should be acquitted, they can ignore or minimize evidence that establishes the defendant’s guilt. Finally, jurors, like judges, are also human and therefore fallible.

In this chapter, then, we focus on judges and jurors. We begin with a discussion of judges. We consider such topics as constraints on the discretion of judges, the methods of selecting judges, and the question of diversity (or the lack thereof) in the courtroom. We also consider the issue of nonlawyer judges. Our discussion of juries focuses on jury selection, jury decision making, and the controversial—though relatively rare—practice of jury nullification.

### Box III.1
**The Adversary Judge**

With partisan counsel fighting to win, and with the judge as umpire to ensure the rules of the fight, there might seem a priori no reason in the nature of the contest why the judge should himself be, or seem to be, or perceive himself as being drawn into the fray. . . . The adversary trial, however, happens to be a game in which the role of umpire includes unorthodox features. Although it has no instant replays or particular events, its participants have a large stake in increasing the probability that the whole game be replayed. This possibility depends, largely, of course, on whether the judicial umpire himself commits fouls—"errors," as we say—in the regulating of the contest. And this element is liable to cause the detachment of the trial judge to be tested, threatened, and sometimes impaired, if not entirely lost.

—Former U.S. District Judge Marvin Frankel (Frankel, 2006, p. 398)

### Judges

In the eyes of most Americans, the judge is the key player in the courtroom workgroup. The symbolism and ceremony of a criminal trial reinforce this view. The judge is seated on a raised bench, robed in black, and wields a gavel to maintain order in the courtroom. Moreover, the participants and spectators—including the defense attorney and the prosecutor—are commanded to “all rise” when the judge enters or leaves the courtroom. It is no wonder, then, that the judge is seen as the most influential person in court.

This view of the judge, though accurate to some degree, is misleading for at least two reasons. First, although the judge clearly plays an important role—in many cases, the lead role—in state and federal criminal courts, other actors play significant supporting roles. This is particularly the case in the majority of criminal cases that are settled by plea, not trial. In these cases, the key player may be the prosecutor rather than the judge; the prosecutor determines the charges the defendant will face, negotiates a guilty plea to these
(or lesser) charges with the defense attorney, and may even recommend a sentence to the judge. A second reason why the traditional view of the judge is misleading is that it is based on an inaccurate assessment of the role of the judge. Judging involves more than presiding at trials. In fact, most of what judges do during a typical day or week is something other than presiding at trials—reading case files, conducting hearings, accepting guilty pleas, pronouncing sentences, and managing court dockets.

The role played by the judge, in other words, is both less influential and more varied than the traditional view would have people believe.

**Constraints on Judges**

Judges are expected to be impartial and to decide cases fairly; the judge is to be an “impartial arbiter between the parties and faithful guide of the jury toward the truth” (Frankel, 2006, p. 398). There is, however, no constitutional requirement to this effect. The Sixth Amendment, for example, states that “[i]n all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury,” but it says nothing about the impartiality of the judge. Even so, the Supreme Court has held that the Due Process Clause of the Fourteenth Amendment guarantees criminal defendants the right to trial by an impartial judge. The Court arrived at this decision in *Tumey v. Ohio* (1927), a case involving the judge of a municipal court who received the fines and fees that he levied against those convicted in his courtroom. The Supreme Court concluded that due process is violated when the judge “has a direct, personal, substantial pecuniary interest” in the outcome of the case (*Tumey v. Ohio*, 1927, p. 523).

A related case is *Ward v. Village of Monroeville* (1972). In this case, a mayor/judge collected fines and fees that went to the town’s budget, as opposed to him personally. These fines and fees, however, provided a substantial portion of Monroeville’s total budget. The Supreme Court concluded, again, that due process was violated. It held that “the mayor’s executive responsibilities for village finances may make him partisan to maintain the high level of contribution from the mayor’s court” (*Ward v. Village of Monroeville*, 1972, p. 59). Contrast this decision with *Dugan v. Ohio* (1928), a case where the Supreme Court held that due process was not violated because the mayor/judge was one of several members of a city commission and did not have substantial control over the city’s funding sources.

**Disqualification or Challenges of Judges** What happens if the judge is not neutral and detached and therefore cannot decide the case fairly? Judges, like defense attorneys and prosecutors, are required to abide by codes of conduct that require them to remove (or *recuse*) themselves when conflicts of interest exist or if they are biased or prejudiced toward either party. But what happens if the judge does not voluntarily recuse himself or herself? In most jurisdictions, the prosecution or defense can move to have the judge disqualified or removed for cause; the side seeking to remove the judge files a motion that explains why the judge to whom the case is assigned should be disqualified. The criteria for disqualification vary, but generally they require that judges be disqualified only if they have a “substantial interest” in the outcome of the case. Montana law, for example, provides that a judge cannot sit on any case (1) to which he or she is a party, or in which he or she is interested; (2) if he or she is related to either party; or (3) if he or she
previously represented either side or rendered a decision in the case. According to the U.S. Supreme Court, “Disqualification is required if an objective observer would entertain reasonable questions about the judge’s impartiality. If a judge’s attitude or state of mind leads a detached observer to conclude that a fair and impartial hearing is unlikely, the judge must be disqualified” (Liteky v. U.S., 1994). If the judge being challenged does not recuse himself or herself, another judge (in Texas, e.g., it is the presiding judge of the judicial district) decides whether the motion should be granted.

Another method of removing biased judges, at least in the few states in which it is an option, is through a peremptory challenge (King, 1998). Under this system, the judge assigned to the case can be removed or struck by either side, without provision of any reason (Miller, 2004). Under Alaska’s Criminal Rule 25(d), both the prosecutor and the defense attorney have the right to one change of judge. Generally, each side gets only one challenge, and the challenge must be made soon after the identity of the judge to whom the case is assigned is known. The advantage of this procedure is that it allows either side to exclude a judge without having to prove that the judge is unable to be fair and impartial.

The Appellate Process Another formal method of constraining judges is through the appellate process. Appellate courts can alter the outcomes of criminal cases by overturning the offender’s conviction or sentence. Although offenders do not have a constitutional right to appeal their convictions, every jurisdiction has created a statutory right to appeal to one higher court. The purpose of this is to ensure that proper procedures were followed by all of the parties to the case, including the judge. A state court defendant who believes that his or her conviction was obtained improperly can appeal a conviction to the intermediate appellate court or, in states that do not have a two-tiered appellate court system, to the state supreme court. Similarly, a defendant who has been tried and convicted in U.S. District Court can appeal a conviction to the U.S. Courts of Appeals. If the appellate court sustains the appeal and rules that procedures were violated, the court will overturn the conviction and send the case back to the trial court. The case then may be retried or dismissed. If the appellate court rules against the offender, he or she can appeal to the next highest court, but that court does not have to hear the appeal.

Although the scope of appellate review is limited to final judgments of lower courts on questions of law (and not of fact), many of the decisions judges make are subject to appeal. This might include pretrial decisions regarding bail and provision of counsel, as well as a host of decisions during the trial itself. For instance, a defendant might appeal the judge’s decision to refuse to grant a change of venue, to allow the prosecutor to use his or her peremptory challenges to exclude racial minorities from the jury, to admit evidence that was obtained in violation of the law, or to refuse to exclude hearsay evidence. That judges’ decisions are potentially subject to review by an appellate court obviously constrains their behavior in court.

The ability of appellate courts to alter sentences imposed by trial court judges is more limited. The United States Supreme Court has ruled that “review by an appellate court of the final judgment in a criminal case . . . is not a necessary element of due process of law, and that the right of appeal may be accorded by the state to the accused upon such conditions as the state deems proper” (Murphy v. Com. of Massachusetts, 1900). Although
all states with death penalty statutes provide for appellate review of death sentences, only half of the states permit appellate review of noncapital sentences that fall within statutory limits (U.S. Justice Department, 2000, Table 45). The standards for review vary; in some states, appellate courts are authorized to modify sentences deemed “excessive,” while in other states only sentences determined to be “manifestly excessive,” “clearly erroneous,” or “an abuse of discretion” can be altered (Miller, Dawson, Dix, & Parnas, 1991, p. 1106).

A defendant sentenced under the federal sentencing guidelines can appeal a sentence that is more severe than the guidelines permit; federal law also allows the government to appeal a sentence that is more lenient than provided for in the guidelines. If an offender appeals his or her sentence and the appeal is sustained, the sentence must be corrected. An appellate court decision to vacate the sentence does not mean, however, that the offender will escape punishment. As the Supreme Court stated in 1947, “The Constitution does not require that sentencing should be a game in which a wrong move by the judge means immunity for the prisoner” (Bozza v. United States, 1947). Thus, the case will be sent back to the trial court for resentencing.

**Discipline and Impeachment** The behavior of judges is also regulated by procedures for disciplining or removing unfit judges. The only formal mechanism for removing federal judges is impeachment, which involves impeachment (or accusation) by the House of Representatives and trial in the Senate. As discussed in the introduction to this book, very few federal judges have been removed from the bench through impeachment. Since 1789 the House has impeached 13 judges, only 7 of whom were convicted by the Senate and removed. These numbers are somewhat misleading, however. The House has investigated about 50 judges; some of these judges were censured and some resigned during the investigation (Murphy et al., 2006, p. 156).

The procedures for removing state court judges are spelled out in each state’s constitution. Like federal judges, state judges can be impeached by the state legislature. Most states also provide for recall of state officials, including judges. This requires that a certain percentage of registered voters in the jurisdiction sign a petition requesting a special recall election; for example, a number of states require signatures from 25% or 30% of the voters who voted in the last election for the targeted office. The voters then decide whether the judge should be retained or removed.

Because impeachment and recall are cumbersome and slow procedures for disciplining judges, all of the states have adopted judicial disciplinary commissions. These commissions, which usually are made up of sitting or retired judges, lawyers, and laypersons, investigate complaints filed against judges. The investigation, however, is not made public unless the commission finds that there is probable cause to substantiate the complaint. The commission can dismiss the complaint or admonish, censure, or remove the judge. The California Commission on Judicial Performance, for example, issues an advisory letter expressing disapproval of the judge’s conduct if the misconduct is minor and issues a private admonishment if the misconduct is more serious. Both of these outcomes are confidential, however; not even the person who lodged the complaint is informed. In cases involving more serious misconduct, the commission can issue a public admonishment or censure or can remove the judge from office. In 2006, the California Commission considered 1,019 complaints against 848 judges; the commission removed two judges, publicly censured four judges, and publicly admonished nine judges (see http://cjp.ca.gov/).
Even though few judges are removed from office through impeachment or other means, the existence of these procedures serves as a check on the behavior of corrupt, inept, unethical, or rude judges. Judicial conduct commissions, in particular, remind judges “of their obligations and the price they will pay for ignoring litigants’ and lawyers’ legal rights as well as their rights to be treated with dignity and respect” (Murphy et al., 2006, p. 158).

The Politics of Judicial Selection

In the United States today there is no one method of selecting judges. There is uniformity at the federal level, where judges are appointed for life by the president with the advice and consent of the Senate, but the procedures used by the states vary enormously. As one commentator noted, “Almost no two states are alike, and many states employ different methods of selection depending upon the different levels of the judiciary, creating ‘hybrid’ systems of selection” (Berkson, 2005).

Despite these variations, the primary difference in selection procedures for state court judges is whether judges are elected, appointed, or chosen using some type of a merit system.

There is considerable controversy surrounding the various methods of selecting state court judges. The controversy largely revolves around the issues of accountability and independence. Proponents of electing judges argue that popular elections are a means of ensuring that judges remain accountable to the people. They are a means of ensuring that judges consider the will of the people in rendering decisions and guaranteeing that unfit or corrupt judges are voted out of office at the next election. Critics of elections, on the other hand, contend that voters typically know very little about the behavior of judges on the bench and thus cannot hold them accountable for their decisions. Critics also charge that electing judges reduces judicial independence and thus makes it less likely that judges will hand down fair and impartial decisions (Blankenship & Janikowski, 1992). Judges who must face election, in other words, may decide cases with one eye toward the upcoming election; they may hand down decisions that reflect, not an impartial interpretation of the law, but an analysis of where the voters stand on the issue.

Advocates of appointing judges, or using the merit system, assert that appointment maximizes judicial independence by removing politics from the process. They also contend that appointment results in the selection of judges based on their experience and scholarship, rather than on the basis of party affiliation or popular appeal. Not everyone agrees, however, that appointment of judges eliminates politics from the selection process. One scholar, for example, has pointed out that appointment of judges by elected governors or state legislators leads to “the logical inference that regardless of the academic merits or professional credentials of the candidate, the person chosen reflects the social, political, and economic views” of the person or persons making the appointment (Alarcon, 1983, p. 10). Politics, in other words, may be an inevitable part of judicial selection.

Methods of Selecting State Judges (American Judicature Society, 2004) Historically, judges were appointed by the governor or the state legislature. As shown in Table III.1, only five states currently use gubernatorial or legislative appointment for judges in trial
courts of general jurisdiction. In three states (Maine, New Jersey, and New Hampshire), the governor appoints judges; the appointment must be approved by either the state senate or some other elected or appointed body. In Virginia and South Carolina, judges are appointed by the state legislature. As discussed later, many states use a merit system, in which the governor appoints a judge from a list of candidates selected by a nominating commission.

More than half of the states elect at least some of their judges. Partisan elections are found in 11 states; in these states, the candidates are nominated by a political party and their party affiliation is included on the ballot. In an additional 20 states, judges are elected on nonpartisan ballots. In these states, the candidate’s party affiliation does not appear on the ballot. Selecting judges by partisan elections is, by definition, political. Historically, in fact, political party bosses used elected judgeships to reward campaign workers and those who contributed large amounts of money to the party coffers. Nonpartisan elections can also involve party politics. The local political parties may endorse judicial candidates and donate money to the candidates they support, and the candidates themselves may publicize their party affiliations.

Regardless of whether they are running in partisan or nonpartisan elections, judicial candidates tend to run low-key campaigns in which few controversial issues are raised;
voter turnout for these elections is low, and sitting judges who are running for reelection typically keep their seats. In fact, many judicial candidates run unopposed. In the past two decades, however, judicial elections—and particularly elections for state supreme courts—have become more contentious, more costly, and more politicized (Thomas, Boyer, & Hrebenar, 2005). According to Thomas and his colleagues, “These changes were largely a result of interest groups entering judicial campaigns with tactics and a level of funding more akin to legislative and executive elections” (p. 53). In 1986, for example, death-penalty advocates targeted three California Supreme Court justices who were opposed to the death penalty; all three were defeated (Wold & Culver). More recently, interest groups spent $8 million on television commercials in an attempt to reelect or defeat an Ohio Supreme Court justice. According to one commentator, “The content of ads bought by interest groups was hard hitting, very direct, and largely unconstrained, which enabled them to get more rhetorical force from their expenditures” (Thomas et al., 2005, p. 56).

The third method of judicial selection is the merit system, which is also called the Missouri Plan (Missouri was the first state to adopt this method of judicial selection). This system combines appointment and election. Three steps take place. First, a judicial nominating commission, which is usually composed of laypersons, lawyers, and judges, screens potential candidates and nominates several individuals (typically three) for the vacant position. Second, the governor appoints one of the individuals nominated by the commission to the bench. Third, after the initial term and at designated times thereafter, the appointee runs in a retention election in which the voters are asked whether the judge should be retained or not. Fourteen states use this plan, or some version of it, in selecting judges; other states use a nominating commission to select judicial candidates, but judges do not run in retention elections.

Although the Missouri Plan was designed to achieve both judicial independence and accountability, critics charge that it does not achieve either of these goals. At least some members of the nominating commission, as well as the judge, are appointed by the governor, an elected official, which raises questions about the independence of judges appointed using this process. Moreover, research shows that few of the judges who run for retention are defeated; from 1964 to 1998, only 52 of the 4,588 judges who ran for retention were defeated (Aspin, 2005). Retention elections, then, do not appear to have the capacity to hold judges accountable for their decisions.

Despite the controversy surrounding the various methods of selecting state court judges, there is little empirical evidence that the quality of judges varies depending on the method used (Atkins & Glick, 1974; Dubois, 1986; Nagel, 1975). Judges selected by one method rather than another have not been found to be more competent, honest, or effective. As we point out in the section that follows, this may reflect that the judicial recruitment process produces a relatively uniform pool of candidates from which judges are chosen.

Diversity on the Bench

Researchers have only recently begun to ask whether judges from different backgrounds decide cases differently. This is not surprising, given the homogeneity of the individuals who don judicial robes in courts throughout the United States. The typical judge—federal and state—is White, male, and middle-aged. Only about 10% of all state
court judges, for example, are racial minorities and fewer than 15% are women (Carp & Stidham, 1998, p. 261). Most state court judges also were born and went to law school in the state in which they serve; they typically came to the bench either from the private practice of law or from a lower court judgeship, such as a magistrate’s position. As Carp and Stidham noted, “They tend to be home-grown fellows who are moderately conservative and staunchly committed to the status quo . . . [they are] local boys who made good” (p. 261). Stumpf’s (1988) conclusion was even more pointed: “If you are young, female, a member of a racial minority, are of the wrong political party, or presumably have few contacts within the organized legal community in your state, the chances of making it to the trial bench are slight” (p. 184).

Judges appointed to the U.S. District Courts also “come from a very narrow stratum of American society” (Carp & Stidham, 1998, p. 210, Note 30). As shown in Table III.2, more than three fourths of the district court judges appointed by Presidents Carter, Bush (George H.), and Reagan; two thirds of those appointed by President Clinton; and three fourths of those appointed by President George W. Bush were men. Similarly, at least three fourths of the judges appointed by these five presidents were White (Goldman, Slotnick, Gryski, Zuk, & Schiavoni, 2005). In fact, a majority of the judges appointed by Presidents Carter, Reagan, Bush (George H.) and Bush (George W.) were White men; in contrast, slightly more than half of President Clinton’s appointees were either women or racial minorities. The typical district court judge was about 48 years old at the time of appointment and came to the bench from either a prior judicial position or a position as a public prosecutor. Not surprisingly, the political party affiliation of judges matches that of the president who appointed them; in fact, about 90% of the judges appointed by each president belonged to that president’s political party.

How does the fact that state and federal court judges are “much more alike than they are different” (Carp & Stidham, 1998, p. 218) affect the sentencing process? Does the judicial recruitment process produce “a corps of jurists who agree on how the judicial

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game is played” (Carp & Stidham, 1998, p. 218)? Would judicial decisions be different if more women and racial minorities were elected or appointed to the bench? If there were more diversity in terms of age, religion, and prior experience?

The answers to questions such as these are varied. Most of the debate centers on whether increasing the number of Black and female judges would produce a different type of justice. Those on one side of the debate argue that it would not. They contend that the judicial selection process produces a relatively homogenous bench and that judges of all racial groups—male and female—share similar background characteristics. The judicial recruitment process, according to this view, screens out candidates with unconventional views, with the result that women and racial minorities selected for judgeships “tend to be ‘safe’ candidates who are generally supportive of the system” (Walker & Barrow, 1985, p. 615). They are judges, in other words, who know how the judicial game is played.

Those who take the “no difference position” argue that the homogeneity of the bench is reinforced by the judicial socialization process, which produces a subculture of justice that encourages judges to adhere to prevailing norms, practices, and precedents (Frazier & Bock, 1982). It also is reinforced by the courtroom workgroup—the judges, prosecutors, and defense attorneys who work together day after day to process cases as efficiently as possible. To expedite sentencing, for example, members of the courtroom workgroup may informally agree on the parameters of acceptable plea negotiations and on the range of penalties appropriate for each type of crime. Although individual judges might deviate from these norms, there is no reason to expect women or racial minorities to deviate more often than men or Whites.

Some commentators assert that even unconventional or maverick judges eventually are forced to conform. As Bruce Wright, a Black man who now sits on the New York Supreme Court, stated in 1973, “No matter how ‘liberal’ black judges may believe themselves to be, the law remains essentially a conservative doctrine, and those who practice it conform” (p. 22). Twenty years later, Judge Wright made an even more pointed comment, noting that some Black judges “are so white in their imitation of life and in their reactions to Black defendants that they are known as ‘Afro-Saxons.’ As soon as these Black judges put on the black robes, they become emotionally white. But it’s not surprising. We have Eurocentric educations. We learn white values” (Washington, 1994, p. 251).

Those who champion diversity in the courtroom argue that Black judges and women judges can make a difference. They suggest that Black judges and women judges bring to the bench beliefs, attitudes, and experiences that differ from those of Whites and men. Goldman (1979), for example, maintained that racial minorities and women will bring to the court “a certain sensitivity—indeed, certain qualities of heart and mind—that may be particularly helpful in dealing with [issues of racial and sexual discrimination]” (p. 494).

Advocates of the “difference position,” then, contend that women judges and Black judges contribute something unique to the judicial process. In support of the argument that women judges “speak in a different voice,” some point to the work of Carol Gilligan (1982), who claimed that women’s moral reasoning differs from that of men: Whereas men emphasize legal rules and reasoning based on an ethic of justice, women, who are more concerned about preserving relationships and more sensitive to the needs of others, reason using an ethic of care. Others, who counter that “the language of law is explicitly the language of justice rather than care” (Berns, 1999, p. 197), claim that the differences women bring to the bench stem more from their experiences as women than from
differences in moral reasoning. They maintain, for example, that women are substantially
more likely than men to be victimized by rape, sexual harassment, domestic violence, and
other forms of predatory violence and that their experiences as crime victims or their
fears about crime shape their attitudes toward and their response to crime and criminals.
Noting that “[h]uman beings are products of their experiences,” Martha Fineman (1994)
suggested that “if women collectively have different actual and potential experiences from
men, they are likely to have different perspectives—different sets of values, beliefs, and
concerns as a group” (pp. 239–240).

How might these gender differences influence judges’ sentencing decisions? If, in fact,
women are more compassionate—more caring—than men, they might sentence off-
endes more leniently than men do. A female judge, in other words, might be more willing
than a male judge to sentence a nonviolent offender struggling to provide for his family
to probation rather than prison. Alternatively, that women are more likely to be victims
of sexualized violence and are more fearful of crime in general might incline them to
impose harsher sentences than men would, particularly for violent crimes, crimes against
women, and crimes involving dangerous repeat offenders. Still another possibility is that
the life experiences of women judges—and particularly Black or Hispanic women
judges—will make them more sensitive to the existence of racism or sexism; as a result,
they might make more equitable sentencing decisions than would White male judges.

Similar arguments are advanced by those who contend that increasing the number of
racial minorities on state and federal courts will alter the character of justice and the
outcomes of the criminal justice system. Because the life histories and experiences of
Blacks differ dramatically from those of Whites, in other words, the beliefs and attitudes
they bring to the bench also will differ. Justice A. Leon Higginbotham Jr., a Black man who
retired from the U.S. Court of Appeals for the Third Circuit in 1993, wrote that “[t]he
advantage of pluralism is that it brings a multitude of different experiences to the judicial
process” (Washington, 1994, p. 11). More to the point, he stated that “someone who has
been a victim of racial injustice has greater sensitivity of the court’s making sure that
racism is not perpetrated, even inadvertently” (p. 11–12). Judge George Crockett’s (1984)
assessment of the role of the Black judge was even more pointed: “I think a black judge . . .
has got to be a reformist—he cannot be a member of the club. The whole purpose of
selecting him is that the people are dissatisfied with the status quo and they want him to
shake it up, and his role is to shake it up” (p. 393).

Assuming that Black judges agree with Judge Crockett’s assertion that their role is to
“shake it up,” how would this affect their behavior on the bench? One possibility is that
Black judges might attempt to stop—or at least slow—the flow of young Black men into
state and federal prisons. If, in other words, Black judges view the disproportionately high
number of young Black men incarcerated in state and federal prisons as a symptom of
racial discrimination, they might be more willing than White judges to experiment with
alternatives to incarceration for offenders convicted of nonviolent drug and property
crimes. Welch and her colleagues (Welch, Combs, & Gruhl, 1988) made an analogous
argument. Noting that Blacks tend to view themselves as liberal rather than conservative,
the authors speculated that Black judges might be “more sympathetic to criminal defend-
ants than whites judges are, since liberal views are associated with support for the
underdog and the poor, which defendants disproportionately are” (p. 127). Others
similarly suggest that increasing the number of Black judges would reduce racism in the
criminal justice system and produce more equitable treatment of Black and White defendants (Welch et al., 1988).

**Nonlawyer Judges: A Dying Breed?**

Most judges are lawyers, but nonlawyer, or lay, judges have been common throughout American history. Even today, 34 states use nonlawyer judges in some capacity; most of them serve on state courts of limited jurisdiction, but some of them, such as the surrogate judges in New Jersey, serve on courts of general jurisdiction (McFarland, 2004). Lay judges, who are referred to by names such as *magistrate, justice of the peace, and associate judge*, decide millions of cases each year (Provine, 1986). An example can be found in Arizona Justice of the Peace Courts. There are only four requirements to be a justice of the peace: (1) age 18 years or older, (2) resident of the state, (3) an elector of the county or jurisdiction in which the duties are to be performed, and (4) able to read and write English. Those who meet these minimum qualifications can run for the elected position; if elected, they participate in a 19-day training program before taking the bench. Their responsibility is not to adjudicate criminal offenses but rather to settle disputes involving small amounts of money, usually $1,000 or less.

The history of lay judges in this country is one of ebbs and flows. In 17th century New England, legal matters were handled almost exclusively without lawyers. By the early 1700s, population growth, urban development, and the accumulation of wealth ushered in an era of a more formalized legal profession. As the legal profession began to grow in power and influence, adjudication of legal matters was increasingly delegated to legally trained judges. Eventually, lay judge positions were all but abolished in larger urban areas. Today, they are more likely to be found in thinly populated rural areas where lawyers are in short supply. They also suffer from what Doris Provine (1986), the author of *Judging Credentials: Nonlawyer Judges and the Politics of Professionalism*, referred to as an image problem (Chapter 5). This is not surprising, according to Provine, given that lay judges are “the worst paid, worst housed, worst outfitted, and least supervised judges in the nation” (p. 122). Provine’s analysis of lawyer and lay judges on New York’s Justice Courts, however, found no major differences in either their attitudes or behavior (other scholars are highly critical of lay judges; see, e.g., Mansfield, 1999).

**Jurors and Jury Decision Making**

The jury plays a critically important role in the criminal justice system. Indeed, “the jury is the heart of the criminal justice system” (Cole, 2000, p. 101). Although it is true that most cases are settled by plea and not by trial, many of the cases that go to trial involve serious crimes in which defendants are facing long prison terms or even the death penalty. In these serious—and highly publicized—cases, the jury serves as the conscience of the community and, in the words of the United States Supreme Court, as “an inestimable safeguard against the corrupt or overzealous prosecutor and against the compliant, biased, or eccentric judge” (*Duncan v. Louisiana*, 1968). As the Court has repeatedly emphasized, the jury also serves as “the criminal defendant’s fundamental ‘protection of life and liberty against race or color prejudice’” (*McCleskey v. Kemp*, 1987, quoting *Strauder v. West Virginia*, 1880).
Although the rarity of jury trials limits the jury’s overall influence on the criminal process, decisions made by the jury in the cases they do decide are obviously important. The jury decides whether to convict the defendant or not. The jury also may decide whether to convict the defendant for the offense charged or for a lesser included offense. In a murder case, for example, the jury might have the option of finding the defendant guilty of first-degree murder, second-degree murder, or manslaughter. Like the prosecutor’s charging decisions, these conviction decisions affect the sentence that will be imposed. A defendant who is charged with first-degree murder but convicted of manslaughter will be sentenced more leniently than if convicted of the more serious charge. The role of the jury in the criminal justice system, though limited to those cases where the defendant elects a jury trial, is thus both symbolically and substantively important.

**Issues in Jury Selection**

We noted in the introduction to this book that the Supreme Court has interpreted the Sixth Amendment’s requirement that the defendant be tried by an “impartial jury” to mean that the jury pool must be a “random cross-section of the community.” Many of the Supreme Court cases regarding jury selection have involved the question of racial discrimination. Black and Hispanic defendants have repeatedly challenged the procedures used to select juries, arguing that the procedures, which often produced all-White juries, violated both the Sixth Amendment and the Equal Protection Clause of the Fourteenth Amendment. Questions also have been raised about the potential for juror dishonesty during voir dire. There is evidence that jurors do not always tell the truth when asked about their backgrounds, their prior experiences with the justice system, and their attitudes and beliefs. We explore these issues in the following sections.

**Race and the Jury Selection Process** The Supreme Court first addressed the issue of racial discrimination in jury selection in its 1879 decision of *Strauder v. West Virginia*. The Court ruled that a West Virginia statute limiting jury service to White males violated the Equal Protection Clause of the Fourteenth Amendment and therefore was unconstitutional. The Court stated that the West Virginia statute denied Black defendants the right—in fact, even the chance—to have people of their own race on their juries. “How can it be maintained,” the justices asked, “that compelling a man to submit to trial for his life by a jury drawn from a panel from which the State has expressly excluded every man of his race, because of his color alone, however well qualified in other respects, is not a denial to him of equal legal protection?” (p. 309). The Court added that this was precisely the type of discrimination the equal protection clause was designed to prevent.

After *Strauder v. West Virginia* (1879), it was clear that states could not pass laws excluding Blacks from jury service. This ruling, however, did not prevent states from developing techniques designed to preserve the all-White jury. In Delaware, for example, local jurisdictions used lists of taxpayers to select “sober and judicious” persons for jury service. Under this system, Black taxpayers were eligible for jury service, but were seldom, if ever, selected for the jury pool. The state explained this result by noting that few of the Black people in Delaware were intelligent, experienced, or moral enough to serve as jurors.
The Supreme Court refused to accept this explanation. In *Neal v. Delaware* (1880), decided 1 year after *Strauder*, the court ruled that the practice had systematically excluded Black people from jury service and was therefore a case of purposeful—and unconstitutional—racial discrimination.

Since the mid-1930s, the Supreme Court has made it increasingly difficult for court systems to exclude Blacks or Hispanics from the jury pool. It consistently has struck down the techniques used to circumvent the requirement of racial neutrality in the selection of the jury pool. The Court, for example, ruled that it was unconstitutional for a Georgia county to put the names of White potential jurors on white cards, the names of Black potential jurors on yellow cards, and then “randomly” draw cards to determine who would be summoned (*Avery v. Georgia*, 1953). Similarly, the Court struck down the “random” selection of jurors from tax books in which the names of White taxpayers were in one section and the names of Black taxpayers were in another (*Whitus v. Georgia*, 1967). As the justices stated in *Avery v. Georgia*, “the State may not draw up its jury lists pursuant to neutral procedures but then resort to discrimination at other stages in the selection process.”

The states’ response to the Supreme Court’s increasingly vigilant oversight of the jury selection process was not always positive. The response in some southern jurisdictions “was a new round of tokenism aimed at maintaining as much of the white supremacist status quo as possible while avoiding judicial intervention” (Kennedy, 1997, p. 179). These jurisdictions, in other words, included a token number of racial minorities in the jury pool in an attempt to head off charges of racial discrimination. The Supreme Court addressed this issue as late as 1988 (*Amadeo v. Zant*, 1988). The Court reversed the conviction of Tony Amadeo, who was sentenced to death for murder in Putnam County, Georgia, after it was revealed that the Putnam County district attorney asked the jury commissioner to limit the number of Blacks and women on the master lists from which potential jurors were chosen.

The Supreme Court’s rulings that the jury must be drawn from a representative cross-section of the community and that race is not a valid qualification for jury service apply only to the selection of the jury pool. They do not apply to the selection of individual jurors for a particular case. In fact, the Court has repeatedly stated that a defendant is *not* entitled to a jury “composed in whole or in part of persons of his own race” (*Batson v. Kentucky*, 1986; *Strauder v. West Virginia*, 1880). This means that prosecutors and defense attorneys can use their peremptory challenges—“challenges without cause, without explanation, and without judicial scrutiny” (*Swain v. Alabama*, 1965)—as they see fit. They can, in essence, use their peremptory challenges in a racially discriminatory manner.

It is clear that lawyers do take the race of the juror into consideration during the jury selection process. Prosecutors assume that racial minorities will side with minority defendants, and defense attorneys assume that racial minorities will be more inclined than Whites to convict White defendants. As a result of these assumptions, both prosecutors and defense attorneys have used their peremptory challenges to strike racial minorities from the jury pool. Randall Kennedy, in fact, has characterized the peremptory challenge as “a creature of unbridled discretion that, in the hands of white prosecutors and white defendants, has often been used to sustain racial subordination in the courthouse” (Kennedy, 1997, p. 214, Note 64).
There is compelling evidence that prosecutors use their peremptory challenges to strike racial minorities from the jury pool. As a result, Black and Hispanic defendants are frequently tried by all-White juries. In 1964, for example, Robert Swain, a 19-year-old Black man, was sentenced to death by an all-White jury for raping a White woman in Alabama. The prosecutor had used his peremptory challenges to strike all six Blacks on the jury panel (*Swain v. Alabama*, 1965). In 1990, the state used all of its peremptory challenges to eliminate Blacks from the jury that would try Marion Barry, the Black mayor of Washington, D.C., on drug charges.

The Supreme Court initially was reluctant to restrict the prosecutor’s right to use peremptory challenges to excuse jurors on the basis of race. In 1965, the Court ruled in *Swain v. Alabama* (1965) that the prosecutor’s use of peremptory challenges to strike all six Black people in the jury pool did not violate the equal protection clause of the Constitution. The Court reasoned,

The presumption in any particular case must be that the prosecutor is using the State’s challenges to obtain a fair and impartial jury. . . . The presumption is not overcome and the prosecutor therefore subjected to examination by allegations that in the case at hand all Negroes were removed from the jury or that they were removed because they were Negroes. (*Swain v. Alabama*, 1965, 222)

The Court went on to observe that the Constitution places some limits on the use of the peremptory challenge. The justices stated that a defendant could establish a prima facie case of purposeful racial discrimination by showing that the elimination of Black people from a particular jury was part of a pattern of discrimination in that jurisdiction. The problem, of course, was that the defendants in *Swain* (1965), and in the cases that followed, could not meet this stringent test. The ruling, therefore, provided no protection to the individual Black or Hispanic defendant deprived of a jury of his or her peers by the prosecutor’s use of racially discriminatory strikes.

Despite harsh criticism from legal scholars and civil libertarians (“Rethinking Limitations,” 1983; “Swain v. Alabama,” 1966), who argued that *Swain* imposed a “crushing burden . . . on defendants alleging racially discriminatory jury selection” (Serr & Maney, 1988, p. 13), the decision stood for 21 years. It was not until 1986 that the Court, in *Batson v. Kentucky*, rejected *Swain’s* systematic exclusion requirement and ruled “that a defendant may establish a *prima facie* case of purposeful discrimination in selection of the petit jury solely on evidence concerning the prosecutor’s exercise of peremptory challenges at the defendant’s trial” (93–94, 96). The justices added that once the defendant makes a prima facie case of racial discrimination, the burden shifts to the state to provide a racially neutral explanation for excluding Black jurors.

Although *Batson* (1986) seemed to offer hope that the goal of a representative jury was attainable, an examination of cases decided since 1986 suggests otherwise. State and federal appellate courts have ruled, for example, that leaving one or two Black people on the jury precludes any inference of purposeful racial discrimination on the part of the prosecutor (*United States v. Montgomery*, 1985)² and that striking only one or two jurors of the defendant’s race does not constitute a “pattern” of strikes (*Fields v. People*, 1987; *United States v. Vaccaro*, 1987). Trial and appellate courts have also been willing to accept virtually any explanation offered by the prosecutor to rebut the defendant’s inference of
purposeful discrimination (Serr & Maney, 1988, pp. 43–47). As Kennedy (1997) noted, “judges tend to give the benefit of the doubt to the prosecutor” (p. 211). Kennedy cited as an example State v. Jackson, a case in which the prosecutor used her peremptory challenges to strike four Black people in the jury pool. According to Kennedy,

> [t]he prosecutor said that she struck one black prospective juror because she was unemployed and had previously served as a student counselor at a university, a position that bothered the prosecution because it was “too liberal a background.” The prosecution said that it struck another black prospective juror because she, too, was unemployed, and, through her demeanor, had displayed hostility or indifference. By contrast, two whites who were unemployed were seated without objection by the prosecution. (p. 213)

Although Kennedy (1997) acknowledged that “one should give due deference to the trial judge who was in a position to see directly the indescribable subtleties,” he stated that he “still has difficulty believing that, had these prospective jurors been white, the prosecutor would have struck them just the same” (p. 213). Echoing these concerns, Serr and Maney (1988) concluded that the “cost of forfeiting truly peremptory challenges has yielded little corresponding benefit, as a myriad of ‘acceptable’ explanations and excuses cloud any hope of detecting racially based motivations” (p. 63).

Critics of Batson (1986) and its progeny maintain that until the courts articulate and apply a more meaningful standard or eliminate peremptory challenges altogether “peremptory strikes will be color-blind in theory only” (Cole, 2000, p. 124).

### Juror (Dis)honesty During Voir Dire

During the voir dire, jurors are asked questions designed to determine whether they can decide the case fairly and impartially. They are asked about their background and experiences and about their attitudes regarding issues, such as insanity or testimony by expert witnesses or law enforcement officers, that may come up in the case. In death penalty cases, they are asked questions about their views of capital punishment. There is an assumption—indeed, a legal requirement if the jurors are under oath—that jurors will answer these questions honestly. But do they? One researcher (Bush, 1976) interviewed jurors after a 1976 trial verdict and found that one in three of them had lied under oath. Another researcher (Spaeth, 2001) found that 71% of jurors had a fixed opinion regarding a defendant’s guilt, but only 15% admitted this during the voir dire phase. Others have found that the voir dire process itself inhibits full disclosure on the part of prospective jurors, possibly because of the intimidation factor (Suggs & Sales, 1980). According to one author,

> these statistics are striking. If they are representative of juror honesty generally, they suggest that questions put to jurors in certain formats are more likely to elicit a false response. This lack of candor by jurors can have a significant effect in trial strategy and in the verdicts rendered, because juror honesty during open voir dire in the courtroom is now the critical method for exposing juror bias and impartiality. (Spaeth, 2001, p. 39)
The question then becomes, what do we do about juror dishonesty? If prospective jurors are less than forthcoming during voir dire, what is the remedy? One solution would be to advise jurors that lies are subject to perjury charges. Most jurors, though, are aware of the consequences of being untruthful. Another problem with this solution is that prospective jurors are not always “under oath” during voir dire. An alternative solution involves the use of a written questionnaire that jurors can complete in relative anonymity. A number of reformers have called for just this approach, citing research from other fields that shows that people are more truthful in their written responses regarding questions about their drug use, sexual practices, and other sensitive topics. (Acree, Ekstrand, Coates, & Stall, 1999; Aquilino, 1990; Rasinski, Willis, Baldwin, Yeh, & Lee, 1999).

If prospective jurors regularly lie during voir dire, then perhaps attorneys should be given all the leverage they need to excuse questionable individuals. Challenges for cause are reserved for cases where prospective jurors have clear conflicts of interest, are biased toward one side or the other, or have already made up their minds in the case. Peremptory challenges, on the other hand, are challenges that the attorneys can use to excuse anyone, without giving a reason. Peremptory challenges are therefore useful for removing jurors whom the attorneys might have nagging doubts about, even if they are unable to convince the judge that these jurors should be removed for cause. Peremptory challenges also can be used to excuse jurors who fit a certain profile, possibly on the advice of a jury consultant (see next section).

There is considerable controversy about the peremptory challenge. We already noted that critics of the peremptory challenge charge that it is used in a racially discriminatory way. Defenders of the peremptory challenge, who acknowledge that there is inherent tension between peremptory challenges and the quest for a representative jury, argue that the availability of the challenge ensures an impartial jury. Defenders of the process further argue that restricting the number of peremptory challenges or requiring attorneys to provide reasons for exercising them would make selection of an impartial jury more difficult. Those who advocate elimination of the peremptory challenge, on the other hand, assert that prosecutors and defense attorneys can use the challenge for cause to eliminate biased or prejudiced jurors.

Some commentators contend that the system would be fairer without them. As Morris B. Hoffman (1997) put it,

> even assuming the peremptory challenge ever worked in this country as anything other than a tool for racial purity, and even assuming it is working today in its post-Batson configuration to eliminate hidden juror biases without being either unconstitutionally discriminating or unconstitutionally irrational, I submit that its institutional costs outweigh any of its most highly-touted benefits. Those costs—in juror distrust, cynicism, and prejudice—simply obliterate any benefits achieved by permitting trial lawyers to test their home-grown theories of human behavior on the most precious commodity we have—impartial citizens. (p. 871)

### Jury Consultants: Useful?

In 2004, a jury composed of six men and six women convicted Scott Peterson of murdering his wife and their unborn child. This high-profile case stands out both
because of the publicity it received and the length of the trial—almost 6 months. Even jury selection, which took nearly 3 months and involved interviews with 1,500 prospective jurors, received a wealth of publicity. What did not receive much press, though, was the behind-the-scenes process of jury selection, particularly the role of jury consultants during the voir dire phase. Jury consultants Howard Varinksky (for the prosecution) and Jo-Ellan Dimitrus (for the defense) both worked in relative obscurity to ensure that their side would benefit from a jury stacked in their favor. Varinksky, Dimitrus, and others like them perform an interesting function in the jury selection process, particularly for high-profile trials.

Where did jury consultants come from? Researchers who have tracked the evolution of jury consulting look back to the defense of the so-called Harrisburg Seven, a group of Vietnam War protestors who were accused of several acts of civil disobedience (Strier & Shestowsky, 1999). The trial was to take place in the conservative city of Harrisburg, Pennsylvania, and in an effort to combat the resources the government was devoting to the case and the negative views of the defendants, the defense attorneys hired a team of social scientists to help them select a jury that would be favorable to their side. The researchers created a demographic profile of people likely to be sympathetic to the defendants’ antiwar views, and this profile was used to select the jurors for the case. The government spent $2 million on the trial, but the jury acquitted the defendants. The verdict was largely attributed to the jury consultants and, so, the jury consulting profession was born.

Jury consultants use a number of different strategies. Although the most common strategy is to develop a profile of jurors likely to vote in favor of the defense, consultants also may perform background checks on prospective jurors or hire field investigators to gather additional information. Profiling involves surveying a large number of people about their views on the case and the issues surrounding the case and, at the same time, gathering demographic data, such as age, gender, race, education, occupation, political party affiliation, social standing, and marital status. Then the consultants use the data to develop models of juror decisions. These are basically statistical models that indicate the probability that individuals will decide the case a certain way based on their background characteristics and attitudes. The results of the analysis are then used to create a profile of a juror who would be likely to acquit the defendant. The defense team uses this profile during the peremptory challenge phase of the voir dire process; potential jurors who fit the profile are retained, whereas those who don’t fit it are excused.

There are arguments for and against professional jury consulting. One argument in consultants’ favor is that they take some of the guesswork out of selecting a jury. Prospective jurors are excluded based on what the data show, rather than the attorney’s preconceived notions regarding the types of people who will decide in his or her favor. An argument against juror consultants is that because they are expensive only wealthy defendants and those whose cases attract national attention can afford them (Hartje, 2005). Critics also have challenged jury experts’ claims of success, arguing that “if jury consultants are as effective as they claim, and ‘if the results of a trial can be controlled simply by choosing jurors labeled acceptable by social scientists, then trial by jury would cease to function impartially and would ultimately have to be abandoned’” (pp. 501–502).

Whether jury consultants perform a useful service or negatively affect the fairness of a trial remains to be seen. What seems unlikely is that they will disappear any time soon.
As long as attorneys—especially defense attorneys—believe that jury consultants increase their odds of winning, they are likely to use them whenever the situation warrants it.

**Factors Affecting Juror Decision Making**

The role of the jury in the criminal process is to determine what actually happened. After listening to evidence presented by the state and the defense and after being instructed on the law by the judge, the jurors go off by themselves to “deliberate” and to decide whether the defendant is guilty of the crime with which he or she is charged. How do the jurors make this decision? What factors do they consider as they attempt to determine the facts?

Questions such as these have long fascinated researchers, who have conducted hundreds of studies. Because jury deliberations are conducted behind closed doors, researchers are unable to observe the actual deliberation process. Instead, they use mock juries or mock trials that involve hypothetical scenarios. These may be actual mock trials, such as in a university classroom, or simple written scenarios wherein people (often college students) are asked to decide a hypothetical defendant’s fate. Then the researchers compare people’s demographic characteristics to the decisions they hand down. One problem with this approach is that the hypothetical situations presented are not real and therefore no one’s liberty is at stake. In addition, the vignettes are typically short and provide very limited information about the crime, the defendant, and the victim. The decisions that “jurors” make in these situations may or may not be the same as decisions they would make in actual trials.

Research on jury decision making generally has focused on the effects of procedural characteristics, juror characteristics, case characteristics, and deliberation characteristics (Devine, Clayton, Dunford, Seying, & Pryce, 2001). Procedural characteristics refer to such factors as jury size, juror involvement during the trial, and jury instructions. Juror characteristics refer to demographic factors, such as age, race, gender, employment status, and other individual variables. Case characteristics refer to variables associated with specific trials, such as the charges involved or the strength of the evidence. Finally, deliberation characteristics refer to such factors as polling procedures or participation in deliberation.

In an extensive review of the literature, Devine and his colleagues (2001) drew several conclusions regarding juror decision making (pp. 700–701). Not surprisingly, the studies revealed that juror decisions are affected by the quality and the quantity of the evidence; jurors are more likely to convict when the evidence is strong and conclusive. The personal characteristics of the participants (i.e., the mock juror, the victim, the defendant), on the other hand, do not reliably predict juror verdicts. These factors come into play primarily in cases where the evidence is ambiguous and the outcome is therefore less predictable. This has been explained using the liberation hypothesis (Kalven & Zeisel, 1966), which suggests that when the evidence is uncertain jurors are “liberated” from the constraints imposed by the law and therefore feel free to take legally irrelevant factors into consideration. Research also reveals that the deliberation process produces a reversal of the verdict preference initially favored by the majority in 1 of every 10 trials. Finally, the studies conducted to date indicate that jurors’ decisions reflect their past experiences, their stereotypes about crime and criminals, and their beliefs about what is right, wrong, and fair.
Jury Nullification

Most jury trials result in convictions. In 2002, for example, 85% of all defendants tried by juries in the 75 largest counties in the United States were convicted (U.S. Justice Department, 2006, p. 26). A jury’s decision to acquit the defendant usually means that the state has failed to prove its case beyond a reasonable doubt. Sometimes, however, the jury votes to acquit despite overwhelming evidence that the defendant is guilty. In this case, the jury ignores, or nullifies, the law.

Jury nullification, which has its roots in English common law, occurs when a juror believes that the evidence presented at trial establishes the defendant’s guilt, but nonetheless the juror votes to acquit. The juror’s decision may be motivated either by a belief that the law under which the defendant is being prosecuted is unfair or by an objection to the application of the law in a particular case. In the first instance, a juror might refuse to convict a defendant charged in U.S. District Court with possession of more than 5 grams of crack cocaine, based on his or her belief that the long prison sentence mandated by the law is unfair. In the second instance, a juror might vote to acquit a defendant charged with petty theft but also charged as a habitual criminal and facing a mandatory life sentence, not because the juror believes the law is unfair but because he or she believes that this particular defendant does not deserve life in prison (Dodge & Harris, 2000).

Although nullification allows the jury to be merciful when it believes that either the punishment or a criminal conviction is underserved, it also allows the jury to make arbitrary or discriminatory decisions. For example, there is evidence that southern juries have—and some would say, still do—refused to convict White defendants charged with offenses against Black victims, even in the face of convincing evidence of their guilt (Hodes, 1996). Nullification can also be used to make a political statement, such as to express dissatisfaction with a policy. Some have alleged that O.J. Simpson’s acquittal reflected in part the jurors’ beliefs that the Los Angeles Police Department was racist (Rosen, 1996). An even darker form of jury nullification has been called jury vilification (Horowitz, Kerr, & Niedermeier, 2001). “Juries may return verdicts that reflect prejudiced or bigoted community standards and convict when the evidence does not warrant a conviction” (Horowitz et al., 2001, p. 1210).

Jurors clearly have the power to nullify the law and vote their conscience (Scheflin & Van Dyke, 1980). If the jury votes to acquit, the Double Jeopardy Clause of the Fifth Amendment prohibits reversal of the jury’s decision. The jury’s decision to acquit, even in the face of overwhelming evidence of guilt, is final and cannot be reversed by the trial judge or an appellate court. In most jurisdictions, however, jurors do not have to be told that they have the right to nullify the law (see, e.g., United States v. Dougherty, 1972).

There is no way to know with any certainty how often jury nullification occurs. However, researchers have sought to identify the circumstances under which jurors will disregard the law. Some experimental evidence shows that as penalties become more severe, jurors are less likely to convict and in fact apply higher standards of proof (Kerr, 1978). Niedermeier, Horowitz, and Kerr (1999), for example, reported on an experiment they conducted wherein a physician was accused of knowingly transfusing a patient with blood he knew hadn’t been screened for HIV. Holding everything else constant (e.g., the evidence), the authors found that mock jurors were less likely to declare the physician...
guilty when the penalty was severe (25 years in prison relative to a $100 fine). The findings from these studies show that jurors are influenced by something other than the facts of the case as laid out by the prosecution and defense.

Summary: Judges and Jurors in the Courtroom

The judge, whose job it is to interpret the law and to ensure that proper procedures are followed at every step in the process, plays a key role in the criminal court system. The powers that judges wield are not, however, unlimited; their powers are constrained by rules that require them to be fair and unbiased, by procedures to disqualify or remove them if they are not impartial, and by appellate court rulings on questions of law and procedure. Jurors, whose job it is to determine the facts in a case and to decide whether the state has proved the defendant’s guilt beyond a reasonable doubt, also play an important role. Even though jury trials are rare, the cases that do go to trial typically involve serious crimes in which defendants are facing long prison sentences. In these serious cases, the jury serves as the conscience of the community and as a safeguard against the improper use of the criminal law.

In this chapter, we provided an introduction to some of the controversies surrounding judges and juries. Questions have been raised about the methods of selecting judges, the effects of recruiting more women and racial minorities to the bench, and the consequences of using nonlawyer judges. Issues related to juries include the use of peremptory challenges, the role of jury consultants, the factors that jurors take into consideration during deliberations, and the practice of jury nullification. The edited readings included in this section explore a number of these issues in greater detail.

Notes

1. A similar pattern is found for appointments to the United States Courts of Appeals. The percentage of appointees who were White men was 60.7% (Carter), 92.3% (Reagan), 70.3% (Bush), and 44.8% (Clinton) (see Carp & Stidham, 1998, Note 30, Table 8.2).


KEY TERMS

- Appellate review
- Application of the law
- Challenge for cause
- Discipline of judges
- Fact finding
- Impartial jury
- Impeachment of judges
- Judicial disciplinary commission
- Judicial impartiality
- Jury consultant
- Jury nullification
- Liberation hypothesis
- Merit system (Missouri Plan)
- Mock jury study
- Nonlawyer judges
- Peremptory challenge
- Prima facie case of racial discrimination
- Random cross-section of the community
- Recuse
- Retention election
- Right of appeal
- Voir dire
DISCUSSION QUESTIONS

1. In a criminal case, who determines the facts? Who applies or interprets the law? Why are both of these processes imperfect?

2. What is the traditional view of the judge and why is it misleading?

3. Under what circumstances should a judge recuse (remove) himself or herself from a case?

4. When can a defendant challenge his or her sentence? What are the standards that might be applied in reviewing the challenge?

5. How are federal judges removed from office? What procedures can be used to remove state court judges? What would justify removing a federal or state court judge?

6. What are the advantages and disadvantages of electing judges? Of appointing judges?

7. In your opinion, why is the typical judge White, male and middle-aged? At least in theory, how might electing or appointing more women and racial minorities change the quality of justice meted out by the courts?

8. Why is the role of the jury in the criminal justice system “both symbolically and substantively important”?

9. What has the U.S. Supreme Court said regarding race and the jury selection process? Why are the standards different for selection of the jury pool and selection of the jurors for a particular case?

10. What are the problems inherent in the use of the peremptory challenge? Should the peremptory challenge be eliminated? Why or why not?

11. Should either side in a criminal trial be prohibited from using jury consultants? Why or why not?

12. Why do jurors have the right to nullify the law? Should they have this right?

WEB RESOURCES

American Judicature Society: www.ajs.org
Decision Quest (jury consultants): http://www.decisionquest.com/
California Commission on Judicial Performance: http://cjp.ca.gov/
Federal Judges Association: http://www.federaljudgesassoc.org/
National Conference of State Trial Judges, American Bar Association: http://www.abanet.org/jd/ncstj/
National Consortium on Racial and Ethnic Fairness in the Courts: http://www.consortiumonline.net/index.html
READING

Most of the research investigating racial and gender differences in decision making by trial court judges focuses on the effects of the judge’s race and gender on sentencing decisions. This is the approach taken by Darrell Steffensmeier and Chris Hebert, whose article is included in this chapter. Using data on sentencing outcomes in Pennsylvania, the authors of this study investigate whether female judges sentence differently than male judges. The results of their study reveal that although there are many similarities in the sentencing practices of men and women judges, there are important differences as well. Female judges tended to impose harsher sentences than male judges, particularly on repeat Black offenders.

Women and Men Policymakers

Does the Judge’s Gender Affect the Sentencing of Criminal Defendants?

Darrell Steffensmeier and Chris Hebert

The long debate about whether a decision maker’s individual characteristics or organizational role has a greater influence on decision making has not been resolved: “What is the more important determinant of behavior, the internal dynamics of personality emphasized by psychologists, or the external pressures of the occupational role, stressed by sociologists?” (Niederhoffer 1967:109). In recent years, the issue has received renewed attention in studies of gender’s role in organizational decision making (Walker & Fennell 1986). The essential question is whether women—who are assumed to have been socialized differently and thus have a different “personality”—make substantively different decisions than men. Unfortunately, this important functional area of social science study suffers from a lack of strategic research opportunities. Conducting such research requires an organizational environment that includes substantial numbers of women who are in decision-making positions where their decisions can be clearly identified. The criminal courts provide such an environment.

Growing numbers of women are being attracted to law-related fields; many are pursuing careers in prosecutors’ and public defenders’ offices and other local, state, and federal criminal justice agencies. The most recent trend—and the one that may have the greatest ultimate impact—is the increasing numbers of women who are being appointed or elected to judgeships at both the federal and state levels. Highly visible examples of the integration of women into key criminal justice positions are Janet Reno, the U.S. attorney general, and the two U.S. Supreme Court justices, Sandra Day O’Connor and Ruth Ginsberg. Women today make up about 15% of all federal judges and about 10% of all judges at

the state and local levels (Schafran & Wilker 1992): In Pennsylvania, women now occupy about 15% of all the commonwealth’s judgeships, as compared to 5% just a decade ago. This sharp increase in the number of female judges is large enough both to overcome the tokenism described by Kanter (1977) and to enable a comparison of their sentencing patterns with those of their male counterparts while controlling for a number of important variables thought to influence sentencing.

Using 1991–93 sentencing data and additional archival data from Pennsylvania, we examine whether a judge’s gender makes a difference in the sentencing of criminal defendants. Judicial decision-making patterns are assessed both in terms of the sentencing outcomes (i.e., final decision to incarcerate and length of prison term) and the decision-making process. We ask two questions:

1. Do women and men judges give similar or different sentences to criminal defendants, net of controls for case characteristics, court contextual variables, and judge’s background?

2. Do women and men judges use the same criteria and give the same weight to case characteristics when arriving at a sentencing decision, net of controls?

The data allow us to greatly extend prior sentencing research that included judge’s gender as a sentencing variable (reviewed below). They also enable us to overcome a main impediment in most earlier research on women and men in traditional male occupations and decision-making positions—namely, the lack of adequate controls; that is, few studies have compared men and women in “matched” jobs or organizational positions (Bielby & Baron 1986; Coverman 1988; McGuinness & Donahue 1988; Hagan & Kay 1995; Reskin & Phipps 1988). Women’s recent entrance into male-typed occupations is characterized typically by a sexual division of labor within these occupations; for example, women lawyers are segregated into family law, women physicians into pediatrics, and so on. In contrast, we compare women and men who are employed in the same male-typed job, receive the same pay, perform a job entailing considerable work autonomy, and hold a position involving considerable skill and prestige. These features also enable us to better assess the importance of individual as compared to structural or organizational explanations of behavior, particularly gendered behavior.

Minimalist and Organizational Versus Maximalist and Individual Views of Gendered Behavior

The issue of whether women and men judges approach sentencing in gender-specific ways is at the core of concerns in law and criminology about the determinants of judicial decision making and the “law in action” (Peterson & Hagan 1984; Kruttschnitt 1984; Myers & Talarico 1987). More broadly, the issue is also an institutionally specific manifestation both of debates in current feminism concerning “maximalist” versus “minimalist” approaches to the existence and explanation of gender differences (Giele 1988) and of recurrent themes in organizations and occupations as regards the long-standing sociological inquiry into whether the person or the job most influences attitudes and behaviors (Hagan & Kay 1995; Kanter 1977; Walker & Fennell 1986).

Among the varied feminist schools of thought, two opposing camps have emerged with seemingly polar sets of assumptions about the nature of women and men (Epstein 1988). One camp, the maximalists, argues
that the sexes are fundamentally different cognitively, emotionally, and behaviorally as a result of the interaction of biological, psychological, and experiential realities of being male or female (Gilligan 1982). According to Lehman (1993), “These uniquenesses purportedly lead men and women to take different approaches to a wide variety of issues and problems, including how they engage in occupational pursuits” (179). The other camp, the minimalists, contends that, rather than different personality traits associated with sex or gender, variations in male and female attitudes and actions reflect the influence of external constraints and opportunities that happen to be associated more with one sex than with the other. These themes overlap individual versus organizational models of behavior that are long-standing concerns within sociology (Kanter 1977; Walker & Fennell 1986). The thrust of the individual model of work behavior is on beliefs and attitudes carried inside the individual, which lead to the conclusion that “women are different.” In the organizational model, common professional training and identical constraints imposed by organizational customs and rules overcome any biological, psychological, or experienced-based differences between the sexes (Cook 1978; Kanter 1977).

These alternative ways of treating gender differences in worker orientations and organizational decision making and the contrasting models within each set of approaches share a prominent premise. The maximalist and individual positions assume real and important differences in the ways men and women approach decision making. That female judges have grown up and lived as women, have played women’s roles in their families and community, and have functioned in women’s networks means that they are likely to have some perspectives and to have responses to some constituencies that differ from those of male judges. In sum, the different perspectives that women judges bring to the bench can be expected to influence their sentencing decisions.

The minimalist and organizational models assume few, if any, fundamental gender differences. The demands of the judicial role—that judges be bound by law, their oath of office, and the traditions and values of their profession—are likely to be sufficiently powerful not only to affect individual perceptions, values, and thinking but also to restrain the tendency to allow past experience to influence one’s behavior once elected or appointed (Hogarth 1971). In sum, women judges are likely to be governed more by their legal training and legal socialization than by their socially structured personal experiences when making sentencing decisions.

Prior Research and Theorizing About Gender-of-Judge Effects

Speculations and assumptions about the impact of more women on the bench thrive in both the popular and scientific writings on the judiciary (Kritzer & Uhlman 1977; Martin 1990; Nagel 1962; Schumaker & Burns 1988). Some people believe that women judges will be more liberal or compassionate (i.e., soft-hearted) and thus sentence offenders more leniently; that women judges will be particularly harsh toward rapists and other defendants convicted of sexual assault because of same-sex identification with victims; that male judges will be more paternalistic and thus sentence female defendants more leniently; and that the life experiences of women judges lead to greater concerns about sexism or racism and will result in more equitable decision making.

Yet there is little empirical evidence establishing differences between male and female judges’ approaches to sentencing. The few empirical studies that do exist are
summarized in Table 1. They find that the effects of judge’s gender on sentencing outcomes are small or negligible but that, where differences do exist, female judges are harsher. Also, there is little evidence that male and female judges sentence female defendants differently.

Important shortcomings in these studies, however, severely limit their usefulness for drawing conclusions about whether women judges make different decisions than men judges. The shortcomings, which vary from one study to another, include (1) no measure of defendant’s prior record, perhaps the most powerful determinant of sentencing outcomes; (2) inclusion of too few cases and offenses; (3) analysis limited to a single jurisdiction; (4) analysis of only a few female judges; and (5) an absence of contextual analysis to assess possible interaction effects of case or judge characteristics (e.g., time on the bench) on gender-of-judge sentencing practices. In addition, none of the studies examines whether women and men judges use the same criteria and give the same weight to case characteristics when arriving at a sentencing decision.

No theory about whether and how women and men judges might differ in their sentencing practices yet exists. Our approach in this study is to develop hypotheses that derive from the sociological writings on the courts, on organizations, and on gender (particularly as the latter has been linked to patterns of decision making, moral development, and criminal victimization). These hypotheses reflect both minimalist and maximalist positions.

On the one hand, a strong case can be made for the minimalist viewpoint that gender-of-judge effects will be small or negligible because the powerful influences of selection and socialization to the judicial role will offset any pre-officeholding attitudes of the judges. First, studies of judicial backgrounds indicate that judges recruited to state trial courts share similar characteristics and experiences. Most are middle or upper class, were born and attended law school in the state in which they serve, and frequently have legal experience in the prosecutor’s or public defender’s office (Spohn 1990). Second, these similarities are reinforced by a judicial socialization process that emphasizes the interplay of three focal concerns in reaching sentencing decisions: (1) the offender’s blameworthiness and the degree of harm caused the victim as indicated by the seriousness of offense, the offender’s role in the offense, and so forth; (2) protection of the community as indicated by prior criminal history, the facts of the crime such as use of a weapon, and so forth; and (3) practical implications of the sentencing decision such as assuring the steady flow of cases, the costs to be borne by the correctional system, and the offender’s ability to do time (see Steffensmeier, Kramer & Streifel 1993). Third, adherence to prevailing norms, practices, and precedents is also encouraged by the courtroom work group—the judges, prosecutors, and public defenders who work together day after day to process cases as efficiently as possible. To expedite sentencing, for example, members of the courtroom work group may informally establish a range of normal penalties for each type of crime and agree to sentence within that range (Spohn 1990; Sudnow 1965). Individual judges might deviate from the sentencing norms, but there is no reason to expect that the judicial socialization process is more or less effective among female judges than among male judges. In summary, then, we hypothesize that

**Hypothesis 1**: The sentencing practices of women and men judges are more noteworthy for their similarities than for their differences. For example, both male and female judges will be swayed heavily by offense severity and prior criminal history. Both will be sensitive to the plea bargaining process and the disadvantages for the
courtroom work group and the county of having too many trials.

Hypothesis 2: Background and career characteristics of judges—for example, age and time on the bench—will affect the sentencing practices of men and women judges similarly.

On the other hand, there also are solid reasons for expecting that pre-officeholding attitudinal differences between men and women might carry over and result in some gender-of-judge differences in sentencing practices. First, despite major efforts to promote greater gender equality in American society, fundamental differences remain in the effects of predatory criminality and victimization for men and women. The routine activity patterns of women and their associations with others are shaped much more by prospective exposure to risky or vulnerable situations that in turn increase an individual’s chances of victimization (Miethe & Meier 1994). Accordingly, fear of crime, concern for neighborhood protection, and sensitivity to risk of recidivism appear to be greater among females than among males (Schumaker & Burns 1988; Warr 1995). Second, there is evidence that women (including women officeholders) slant more toward a particularistic style of policymaking and that this leaning reflects women’s greater concern for preserving the relational webs of life, their sensitivity to the variable needs of others, and their tendency to be problem solvers (Gilligan 1982). Compared to their male counterparts, women officeholders are more concerned with the substance of policy and legislation than with abstract precepts (Diamond 1977; Darcy, Welch & Clark 1994). Because men's social orientation emphasizes formal external recognition gained through competition, male

<table>
<thead>
<tr>
<th>Study (Data Period)</th>
<th>Sample Size (No. Female)</th>
<th>No. Female Judges</th>
<th>Prior Record</th>
<th>Offense Type/Severity</th>
<th>Sex of Defendant</th>
<th>In/Out</th>
<th>Length of Term</th>
</tr>
</thead>
<tbody>
<tr>
<td>Kritzer &amp; Uhlman 1977 (1968–74)</td>
<td>23,328 “Metro City”</td>
<td>NA</td>
<td>No measure</td>
<td>6 offenses</td>
<td>No effect</td>
<td>No effect</td>
<td>NA</td>
</tr>
<tr>
<td>Gruhl, Spohn &amp; Welch 1981 (1971–79)</td>
<td>35,529 (10,432)</td>
<td>7</td>
<td>No measure</td>
<td>14 offenses</td>
<td>Female offenders more likely to be imprisoned</td>
<td>Female judge harsher</td>
<td>No effect</td>
</tr>
<tr>
<td>Myers &amp; Talarico 1987 (1976–85)</td>
<td>1,024 State of Georgia</td>
<td>NA</td>
<td>No measure</td>
<td>7 offenses</td>
<td>NA</td>
<td>No effect</td>
<td>No effect</td>
</tr>
<tr>
<td>Spohn 1990 (1976–85)</td>
<td>3,798 Detroit</td>
<td>9</td>
<td>No measure</td>
<td>Sexual assaults</td>
<td>NA</td>
<td>No effect</td>
<td>Female judges harsher</td>
</tr>
</tbody>
</table>

a. Analysis is based on offenders sentenced in courts where female judges presided. Authors examine the effects of the gender composition of the bench on sentence severity. Myers and Talarico (1987) look at the impact of the bench—with female judges versus without female judges—on sentencing decisions in Georgia. There were only 1,024 cases sentenced in jurisdictions where female judges presided.

NA = Not available or not applicable
morality and decision making are more subordinated to rules and universal principles of justice that are equated in terms of fairness; the impersonal application of laws is deemed fair and objective in a society where logical, analytical, and abstract thinking are highly valued attributes (Bordo 1987; Kathlene 1989). Third, because of differences in gender role socialization and apprehension about victimization, women tend to be more moralistic and feel more threatened by challenges to norms and law than men do (Archer 1996; Crow et al. 1991; Kritzer & Uhlman 1977; Steffensmeier & Allan 1995).

Extending these ideas, we expect that

**Hypothesis 3:** Women judges will be more severe in their sentencing decisions than men judges.

Assuming that women judges will be more influenced by indicators of dangerousness and recidivism risk and by pragmatic concerns such as the social costs to children of sending women to prison and the extra burdens for prison staff of incarcerating older offenders, we also hypothesize two main forms of interaction:

**Hypothesis 4a:** Prior record—an indicator of dangerousness and recidivism risk—will affect the sentencing decisions of women judges more than it will those of men judges.

**Hypothesis 4b:** Defendant’s age, race, and sex also are linked to attributions of recidivism risk and dangerousness; young, male, and black defendants are perceived as more dangerous and less amenable to reform (Steffensmeier, Ulmer & Kramer 1998). These variables also raise other pragmatic sentencing concerns such as ability to do time and costs to the correctional system. Specifically, we expect that, relative to male judges, female judges will be harsher in their sentencing of defendants who are male, black, and young (i.e., young adults vs. middle-aged or elderly adults).

Finally, it is arguable that male and female judges might respond differently to violent or sexual assault crimes than to property crime because of greater female concerns about safety and violent victimization. However, prior research on juror decision making generally finds that gender of juror has negligible effects on jury outcomes in rape or sexual assault cases (Faulkner 1979; Weisbrod 1986). Furthermore, most research on sentencing shows that discretion is more likely to occur in cases involving less serious crimes (e.g., property crime) than more serious or violent ones (Steffensmeier, Kramer & Streifel 1993). Thus,

**Hypothesis 5:** The effects of gender of judge (women judges harsher) will be more manifest in the sentencing of property offenders than in the sentencing of either violent or sexual assault offenders.

In view of the shortcomings and scarcity of research to date, the question of whether the judge’s gender makes a difference in sentencing decisions is unresolved. This study compares the sentencing decisions of women and men judges, focusing primarily on the maximalist argument: Can we document empirically the existence of gender differences in judicial decision making?

### Data and Procedures

Our data come from two sources: (1) sentencing outcomes in Pennsylvania from 1991 to 1993, compiled by the Pennsylvania Commission on Sentencing (PCS); and (2) archival information on judge characteristics such as gender, age, prior prosecutorial experience, and length of time on the bench. Together, these data provide perhaps the richest information available in the country for analyzing judges’ sentencing
practices. By Pennsylvania law, each sentence given for a felony or misdemeanor conviction must be reported to the PCS. Pennsylvania implemented presumptive guidelines in 1982 to structure, but not eliminate, sentencing discretion. The guidelines therefore represent a structured system in which offense severity and prior record are supposed to be the major determinants of sentencing. Unlike certain other guideline systems (e.g., Minnesota’s, the federal system), Pennsylvania’s allows more sentencing discretion, but it also risks the possible intrusion of sentencing disparity. The data provide detailed information on sentences given as well as unusually complete and specific information on offense severity and type, prior record, and other offender-related and court contextual variables that might affect sentencing decisions.

Our analysis is limited to counties that had at least one female judge. By comparing decisions handed down by women and men judges in the same jurisdiction, we can control for differences in local legal norms and practices. Eighteen of the 67 counties in Pennsylvania had at least one female judge. Also, in order to control for possible race effects and because only one female judge was black, our analysis is limited to white judges. Thus, we compare the sentencing decisions of 39 white female judges to those of 231 white male judges. Table 2 shows the dependent and independent variables used in our analysis and describes their coding.

### Outcome Variables

The recent literature points to the need to consider sentencing as at minimum a two-stage process involving, first, a decision about whether to incarcerate an offender and, second, if so, a determination about the length of incarceration (Kramer & Steffensmeier 1993). We therefore investigate the role of judge’s gender in these two stages separately, using logit models for the in/out decision and OLS models for the length-of-term decision.

### Independent Variables

Besides gender of judge, the independent variables include a combination of case and judge characteristics that have been previously shown to affect the sentencing of criminal defendants. The coding and definition of these variables are presented in Table 2 and are straightforward. Table 2 also compares women and men judges on key variables used in the analysis. Overall, the case characteristics and sentencing outcomes are noteworthy more for their similarities than for their differences.

The legal factors we control are offense severity and prior criminal history. Our control for offense severity is an eight-point scale developed by the PCS that ranks each statutory offense. The severity scale is based on factors such as degree of victim injury, offender culpability, and property loss. In addition, we control for whether the conviction offense involved a violent crime, a property crime, or a sexual assault. We also include a dummy variable to measure the number of concurrent offense convictions accompanying the most serious conviction (coded 0 if the offender had a single conviction, 1 if he or she faced multiple convictions). Our measure of prior record is a seven-point scale of prior convictions weighted according to their severity, which includes prior misdemeanors punishable by at least one year’s incarceration and all prior felonies. Prior misdemeanors may total no more than two points on the scale, while prior felonies count for one to three points each, depending on their severity. Recall that none of the earlier studies on gender-of-judge effects controlled for this important legally prescribed variable.

Other factors we control are offender’s race, sex, and age and mode of conviction—that is, whether the offender was convicted through a guilty plea, bench trial, or jury trial. In addition, we include controls for judge attributes, other than gender, that might affect sentencing decisions. For example, increased
<table>
<thead>
<tr>
<th>Variable</th>
<th>Description</th>
<th>Female Judge</th>
<th>Male Judge</th>
</tr>
</thead>
<tbody>
<tr>
<td>Gender of judge</td>
<td>Whether judge was female or male</td>
<td>1 = Female</td>
<td>N = 39</td>
</tr>
<tr>
<td>Incarcerate or not (in/out)</td>
<td>Whether defendant was incarcerated or not</td>
<td>1 = Yes</td>
<td>62%</td>
</tr>
<tr>
<td>Prison sentence (length of term)</td>
<td>Length (in months) of minimum sentence</td>
<td>Number of months</td>
<td>18.1</td>
</tr>
<tr>
<td>Prior record</td>
<td>7-point score</td>
<td>0 None,</td>
<td>1.7</td>
</tr>
<tr>
<td></td>
<td>6 = Maximum</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Offense severity</td>
<td>8-point score</td>
<td>1 = Least serious,</td>
<td>4.6</td>
</tr>
<tr>
<td></td>
<td></td>
<td>8 = Most serious</td>
<td></td>
</tr>
<tr>
<td>Multiple convictions</td>
<td>Whether conviction included more than one charge</td>
<td>1 = Yes</td>
<td>36%</td>
</tr>
<tr>
<td>Mode of conviction</td>
<td>Plea of guilty of conviction at trial. Two dummy variables, bench and jury trial. (Plead guilty is omitted.)</td>
<td></td>
<td></td>
</tr>
<tr>
<td></td>
<td>Bench trial</td>
<td>1 = Yes</td>
<td>6%</td>
</tr>
<tr>
<td></td>
<td>Jury trial</td>
<td>1 = Yes</td>
<td>2%</td>
</tr>
<tr>
<td>Race of offender</td>
<td>Whether defendant was white or black</td>
<td>1 = Black</td>
<td>57%</td>
</tr>
<tr>
<td>Sex of offender</td>
<td>Whether defendant was female or male</td>
<td>1 = Female</td>
<td>14%</td>
</tr>
<tr>
<td>Age of offender</td>
<td>Dummy-coded groups*</td>
<td>Year</td>
<td>29(avg.)</td>
</tr>
<tr>
<td>Type of offense</td>
<td>Dummy coding of violent crime and sexual assault. (Property crime is omitted.)</td>
<td></td>
<td></td>
</tr>
<tr>
<td></td>
<td>Violent crime</td>
<td>1 = Yes</td>
<td>33%</td>
</tr>
<tr>
<td></td>
<td>Sexual assault</td>
<td>1 = Yes</td>
<td>5%</td>
</tr>
<tr>
<td>Age of judge</td>
<td>Years</td>
<td></td>
<td>48.1</td>
</tr>
<tr>
<td>Marital status of judge</td>
<td>Whether judge is married or not</td>
<td>1 = Yes</td>
<td>67%</td>
</tr>
<tr>
<td>Time on bench</td>
<td>Number of years judge had been on bench at time case was decided</td>
<td>Year</td>
<td>6.6</td>
</tr>
<tr>
<td>Prosecutorial experience</td>
<td>Whether judge had prior prosecutorial experience</td>
<td>1 = Yes</td>
<td>26%</td>
</tr>
</tbody>
</table>

a. The age categories are 30–49 years and 50 years and older. The omitted category is 19–29 years.
time on the bench might harden judges and incline them to impose severe sentences (Hogarth 1971). Other researchers have found that older judges tend to be more conservative and to impose harsher sentences than younger judges. The two variables—time on the bench and age—are not necessarily equivalent, but they should be related (Spohn 1990). Similarly, it appears that judges with prior prosecutorial experience are more likely to impose harsher sentences than judges without such experience. Consequently, we include as controls the length of time a judge has been on the bench, judge’s age and marital status, and prior prosecutorial experience.

Findings

Descriptive statistics are shown in Table 2. The key findings are as follows. First, female judges are younger, have served on the bench for a shorter period of time, and are less likely to be married. However, male and female judges have similar prior experience in the criminal justice system—roughly equal proportions served as a district attorney (26% of females, 23% of males). Second, the independent variables reflecting case characteristics (e.g., defendant’s prior record) indicate that female and male judges handled comparable kinds of cases, though female judges were somewhat more likely to have adjudicated defendants with higher scores for prior record and offense severity. These differences reflect the greater likelihood that female judges preside in the Philadelphia area, where a higher proportion of more serious offenders reside. Third, offense severity and prior record have large effects on sentencing outcomes, whereas the other variables—including judge’s gender—tend to be correlated only weakly with sentencing outcomes. Fourth, female judges on average are more likely to incarcerate offenders (62% to 51%) and to sentence those imprisoned to slightly longer sentences (1.5 months longer on average) than are male judges.

Because we are theoretically and empirically interested in the effects of judge’s gender on sentencing decisions, while controlling for case and judge characteristics, we begin by examining the independent, main effects of judge’s gender on sentencing. We then present interactive models of the influences on sentencing of these variables combined with judge’s gender. We also partition the data by gender of judge to examine the effects of the independent variables on the sentences imposed by female judges and to replicate this analysis for male judges. In addition, we partition the data by defendant characteristics and prior record in order to assess more specifically whether case and judge characteristics have different effects on the sentencing outcomes of women as compared to men judges.

Judge’s Gender and Sentencing Outcomes (Additive Models)

In/Out Decision

Our estimation of models predicting the effects of judge’s gender on the incarceration decision revealed that prior record and offense severity are strong predictors of the incarceration decision. Each increase in the scores for these variables increases the probability of incarceration by about 11%. The background and career variables have weak effects (under 4%), except for marital status: married judges are about 13% more likely to incarcerate. The most important finding is that female judges are 11% more likely to incarcerate than male judges.

Length-of-Term Decision

The results for models predicting sentence length reveal that prior record and offense severity have strong effects on sentence length—an increase in each score increases the period of incarceration by about 8 months and 10 months, respectively. There also is a substantial “trial penalty” effect—defendants convicted in a jury trial receive sentences that
are about 19 months longer on average than those of defendants who pled guilty. Offender characteristics such as race, sex, and age have small to moderate effects—whites, females, and older defendants receive shorter prison terms. The main finding is that judge's gender has a small effect on the length-of-term decision, with female judges handing out sentences that on average are about 5 months longer. Thus, in both the in/out and length-of-term decisions female judges are harsher than male judges.

Judge’s Gender and Sentencing Criteria (Partitioned Models)

We next examine whether and to what extent women and men judges use similar or distinct criteria in their sentencing decisions and whether judge's background attributes have similar or distinct effects on sentencing decisions. We begin by partitioning the data by gender of judge and comparing the coefficients of women judges to those of men judges across a range of variables. We then partition the data by key case characteristics and conduct additional tests for interaction effects in order to better describe important gender-of-judge differences. Our discussion of findings relies mainly on the partitioned analyses.

Legal and Case-Processing Variables

Beginning with the in/out decision, we find that prior record and offense severity have comparable effects on the incarceration decisions of male and female judges; that is, the effects are large and in the same direction, but the gender-of-judge difference is small or negligible. Each increase in the score for prior record increases the probability of imprisonment by 12% for female judges and 10% for male judges; similarly, each increase in the offense-severity score increases the probability of imprisonment by 12% for female judges and 11% for male judges. The trial penalty effect for a jury trial is also similar. Opting for a bench trial rather than a guilty plea has a negligible effect on whether male or female judges impose imprisonment, whereas opting for a jury trial substantially increases the likelihood that both genders will incarcerate the defendant (31% for female judges, 28% for male judges).

Regarding length of term, the effects of offense severity and prior record are generally comparable, as is the penalty for pursuing a jury trial. Female judges hand out sentences that are about 23 months longer to defendants convicted by way of a jury trial rather than a guilty plea, as compared to 18 months for male judges.

Offender Characteristics

Sex, race, and age all have moderate effects on the incarceration decision. Female judges are 22% less likely to incarcerate female than male offenders, as compared to 14% for male judges; female judges are 10% less likely to incarcerate white than black offenders, as compared to a 5% difference for male judges; both female and male judges are less likely to incarcerate older offenders than young adult offenders, but again, the difference is greater for female judges—24% less likely as compared to 18% for male judges.

For length of term, the effects of offender characteristics are small and in the same direction for female and male judges. Both are harsher toward male defendants (about 10 months for both female and male judges) and black defendants (about 3 months vs. about 2 months, respectively). Female judges, however, give older offenders a larger break in sentence length (about 15 months vs. about 7 months, respectively). We address these findings below.

Clarification of Gender-of-Judge Differences

So far, we have shown similarities and differences between male and female judges in the criteria they use in arriving at sentencing
decisions. The effects of key variables are in the same direction, and the differences in the size of the gender-of-judge effect across most criteria are small or negligible. The chief differences are that female judges are somewhat harsher in their sentencing decisions and that they are more strongly influenced by offender characteristics than are male judges. To the extent that discretion exists, it is more evident among female than male judges.

We are particularly interested in the interactions between gender of judge and defendant’s race, sex, age, and prior record. Recall that hypotheses 4 and 5 predict, respectively, that women judges will be more affected by prior record in their sentencing decisions and that they will be comparatively harsher in sentencing defendants who are male, black, and young. Among women judges (Table 3), being a repeat offender has negligible effects on differences in the level of leniency they grant to white female defendants as compared to white male defendants. However, a very different pattern emerges when the comparisons are between white and black defendants. For both sentencing decisions (in/out and length of term) and for female as well as male defendants, the overall race effect of harsher sentencing of black defendants is enhanced among female judges when they sentence repeat offenders, whereas among male judges the race effect is diminished or unchanged.

Taken together, therefore, the key finding is that the effect of prior record on the in/out decision differs across race-sex defendant subgroups among women judges but not among men judges. Being a repeat offender increases the sentence severity of both women and men judges, but the size of the increase is comparatively greater among women judges when the defendant is a repeat black offender. Indeed, the race effect among women judges (i.e., a harsher sentence for black defendants) is mainly evident in the case of repeat black offenders. In contrast, among men judges, the effect of prior record is generally consistent across the varied defendant subgroups.

### Discussion and Conclusion

The large number of cases sentenced by women and men judges and the inclusion of important control variables allow us to go considerably beyond prior sentencing research. Previous research was based on a small number of women judges, did not include a control for defendant’s prior record, and did not consider whether women and men judges use similar or distinct criteria in their sentencing decisions. The effects of key variables are in the same direction, and the differences in the size of the gender-of-judge effect across most criteria are small or negligible. The chief differences are that female judges are somewhat harsher in their sentencing decisions and that they are more strongly influenced by offender characteristics than are male judges. To the extent that discretion exists, it is more evident among female than male judges.

We are particularly interested in the interactions between gender of judge and defendant’s race, sex, age, and prior record. Recall that hypotheses 4 and 5 predict, respectively, that women judges will be more affected by prior record in their sentencing decisions and that they will be comparatively harsher in sentencing defendants who are male, black, and young. Among women judges (Table 3), being a repeat offender has negligible effects on differences in the level of leniency they grant to white female defendants as compared to white male defendants. However, a very different pattern emerges when the comparisons are between white and black defendants. For both sentencing decisions (in/out and length of term) and for female as well as male defendants, the overall race effect of harsher sentencing of black defendants is enhanced among female judges when they sentence repeat offenders, whereas among male judges the race effect is diminished or unchanged.

Taken together, therefore, the key finding is that the effect of prior record on the in/out decision differs across race-sex defendant subgroups among women judges but not among men judges. Being a repeat offender increases the sentence severity of both women and men judges, but the size of the increase is comparatively greater among women judges when the defendant is a repeat black offender. Indeed, the race effect among women judges (i.e., a harsher sentence for black defendants) is mainly evident in the case of repeat black offenders. In contrast, among men judges, the effect of prior record is generally consistent across the varied defendant subgroups.

<table>
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<tr>
<th>Relative Net Effect of Defendant’s Race, Sex, and Prior Record on Sentencing Decisions of Male and Female Judges$^a$</th>
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<tr>
<td><strong>In/Out (Odds Ratio)</strong></td>
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<tr>
<td><strong>Female Judge</strong></td>
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<td>Black male offender</td>
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<td>Black female offender</td>
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$^a$ White male offender is the omitted category.
sentencing decisions. Our findings (net of controls) are somewhat complex and address three main questions.

**Are There Gender-of-Judge Differences in Sentence Severity?**

Women judges sentence more harshly than men judges. On average, they are about 10% more likely to incarcerate, and they impose prison terms that are about five months longer. This greater punitiveness extends mainly to property offenders; however, there are negligible gender-of-judge differences at both the in/out and length-of-term stages in the sentencing of violent and sexual assault offenders. These findings support our hypotheses (nos. 3 and 6) that women judges will sentence more harshly because they are more threatened by challenges to norms and laws than men judges and that gender-of-judge variation will be more evident in cases involving less serious (e.g., property crime) as opposed to more serious or violent criminality. Both women and men judges view crimes such as robbery and rape as ranking high in seriousness and deserving of harsh punishment (Warr 1995), and when the crime is serious, a judge has less latitude in deciding whether the sentence will be served in prison or how long it will be (Steffensmeier, Kramer & Streifel 1993).

**Are There Gender-of-Judge Differences in the Weighing of Sentencing Criteria?**

The findings for whether women and men judges use the same criteria and give the same weight to characteristics of a case when arriving at a decision are mixed. Case characteristics generally have similar effects on the sentencing outcomes of women and men judges. For example, prior criminal history and offense severity are the main determinants of the sentencing decisions of both women and men judges, and women judges invoke a trial penalty in a fashion similar to their male counterparts. These findings are consistent with our first hypothesis—that the distinct life experiences of men and women judges and their differing beliefs about what is fair, if they exist, are in most respects offset by the judicial recruitment and socialization process.

But several noteworthy gender-of-judge differences also emerge. Our main finding is that the sentencing decisions of women judges are contextualized more by defendant
characteristics such as race, sex, and age and by defendant’s prior record. This greater contextualization exists for both the incarceration and the length-of-term decisions. Specifically, we find that women and men judges give approximately equal sentences to white female defendants, whereas women judges sentence the other race-sex subgroups—black female defendants, white male defendants, black male defendants—more harshly than men judges do. We also find that women judges sentence young adult offenders more harshly but that there are negligible gender-of-judge differences in the sentencing of older offenders. The most prominent finding, however, is that the overall race effect of harsher sentencing of black defendants is enhanced among female judges when they sentence repeat offenders, whereas among male judges the race effect is essentially unchanged. This pattern holds for both sentencing decisions, for both female and male defendants, and for younger as well as older defendants.

Stated another way, and keeping in mind that women judges begin with somewhat higher levels of severity in their sentencing decisions, case characteristics such as being an older defendant or a first-time offender (i.e., no prior criminal record) mitigate the sentence severity among female judges more than they do among male judges. Notably, prior record disproportionately increases the sentence severity of female judges toward both white and black defendants, but the increase is even greater when they sentence black defendants. Among men judges, case characteristics such as prior record and defendant attributes such as race, sex, and age all have main effects but main effects only. For example, men judges sentence young black defendants more harshly than young white defendants, and this difference is uniform regardless of whether the defendant is a first-time or repeat offender. Also, among male judges, race-sex-age defendant subgroups distribute on a sentence-severity continuum that is essentially rank-ordered: young black male defendants and young white male defendants receive the harshest sentences; older white female defendants and older black female defendants receive the most lenient sentences; and falling in-between are the sentences imposed on young white female defendants, young black female defendants, older white male defendants, and older black male defendants. In sum, there is less variability, or greater consistency, in the weighing of sentencing criteria on the part of men judges.

These findings support our hypotheses (nos. 4 and 5) that women judges will be more affected by recidivism risk and will be more particularistic in their sentencing decisions than men judges. Indicators of future criminality and risk to the community, such as prior record and defendant’s age, apparently contextualize the sentencing decisions of women judges more than they do those of men judges. In a broader sense, moreover, our findings support prior research that suggests that women policymakers are somewhat more concerned with the substance of policy than with abstract precepts and that their greater contextualization in policymaking reflects women’s greater concern for preserving the relational webs of life, their sensitivity to the variable needs of others, and their apprehension about the effects of decisions on neighborhoods or communities (Diamond 1977; Welch 1994). That women judges apparently are more influenced by indicators of risk to the community may also stem from their status as “tokens” and their greater concerns about prospective criticism of their sentencing decisions (see below).

Gender, as is true of most background variables, is of course an imperfect indicator of socialization experiences, attitudes and values, and risk assessments. However, we also have anecdotal evidence from an ongoing evaluation of sentencing practices in Pennsylvania that is consistent with our statistical findings and theoretical interpretation. This evaluation includes discussions with a number of female and male judges about sentencing practices and observations of a number of sentencing hearings. Both male and female judges were
We can only speculate on the meaning of the finding, largely unexpected, that female judges are exceptionally harsh toward repeat black offenders. Perhaps women judges are more affected by widespread views of black offenders, particularly black recidivists, as dangerous, streetwise, and crime-prone (Gibbs 1988; Lemelle 1994). Women judges may also be more influenced by whether the defendant is remorseful or exhibits conventionality in social ties or current circumstances (e.g., marriage, employment). Some evidence suggests that repeat black offenders are less contrite than repeat white offenders and that they also are less likely to have conventional ties and legitimate sources of income (Daly 1994). It may also be that the overall harsher sentencing and the harsher sentencing of repeat black offenders by female judges reflect the latter’s tendency to behave like tokens who are particularly sensitive to a judge’s accountability for her or his sentencing decisions within the framework of local politics and community norms, as the quote above suggests. That is, despite recent increases in the number of women judges, they continue to be greatly outnumbered by men judges. Tokens in skewed groups are vulnerable to performance pressure (Kanter 1977). Because their “differentness” is highly visible, women judges as tokens may feel that they are always under scrutiny and must perform well. Thus, they may put in extra effort and take greater notice of constituents’ criticisms about the consequences of their sentencing decisions. They also may be more concerned about the impact of offender recidivism on the court’s standing in the community.

Finally, our findings are clearly at odds with a number of speculations about the effects of judge’s gender on sentencing—that women judges will be soft or timid as sentencers but that they will be unusually harsh toward rapists and sexual assault offenders.
Theory on Gender, Decision Making, and Sentencing

We began this study by raising a question: Do women and men judges approach policy-making—that is, criminal sentencing—in gender-specific ways? The issue has relevance for theory and research in law and criminology as well as in other prominent social science interests, including work and organizations and the recurrent inquiry into whether the person or the organization or job most influences attitudes and behaviors; the question also addresses the current debate within feminism between minimalist and maximalist views of gender differences. The maximalist argues that fundamental differences between men and women purportedly lead them to take different approaches to a wide variety of issues and problems, including how they make policy decisions. To the minimalist, on the other hand, few demonstrable patterns of human functioning are uniquely female or male. The sources of what appear to be gender-specific patterns of action are in the sociocultural system rather than in the actors.

We find many similarities yet some differences in the sentencing decisions of women and men judges, indicating overall greater support for the minimalist and organizational perspectives. There is considerable overlap in the sentences imposed and in the weighing of criteria for determining sentence severity. For example, both women and men judges weigh prior criminal history and offense severity heavily in arriving at sentencing decisions, and women judges invoke a trial penalty in much the same way as male judges do. In addition, judge characteristics such as time on the bench and age have parallel effects on women and men judges. However, we also find some noteworthy gender-of-judge differences, including that women judges are somewhat more likely to incarcerate defendants and impose somewhat longer prison sentences than men judges. In addition, although the effects of the varied sentencing criteria are always in the same direction for female and male judges, the sentencing decisions of female judges are more contextualized by defendant attributes (i.e., race, sex, age) and defendant’s prior record. Notably, women judges are particularly harsh toward repeat black offenders.

Future theoretical work and empirical research might explore why women judges are somewhat more punitive and somewhat more particularistic in their sentencing decisions. Observations and interviews with judges that go beyond our statistical results and the anecdotal evidence we were able to access are needed to examine more directly the “gestalt” of their sentencing decisions and whether that gestalt differs among women as compared to men judges. Do women and men judges, for example, differ in their conceptions of the judicial role or in their personal theories of punishment, and, if so, how do such differences impact their sentencing practices? Are women judges more conscientious in their sentencing decisions and thus more careful about taking into account factors such as risk to the community and the mental or physical condition of the defendant?

Epstein (1988) suggests that the quest to identify gender differences may focus too much on differences rather than similarities and thus sometimes impair our ability to understand social phenomena. We find that in many respects women and men judges have similar sentencing practices, which suggests that both are governed more by their legal training and legal socialization than by their socially structured personal experiences. The job, not so much the individual, apparently makes the “man” or the “woman” judge. However, we also find important gender differences in sentence severity and in the effects of defendant characteristics and prior record on judicial decision making (i.e., greater contextualization among women judges), suggesting that the life experiences of women judges differ from those of men judges and will influence their organizational decision making. Rather than supporting or contradicting the opposing approaches (i.e., individual and maximalist
vs. organizational and minimalist), an important implication of our findings for theory and research is that a coherent picture of “gendered” reality must recognize both gender differences and gender similarities.

References


Walker, Henry, and Mary Fennell. 1986. “Gender Differences in Role Differentiation and Organizational Task Performance.” Pp. 255-75 in *Annual
**DISCUSSION QUESTIONS**

1. Steffensmeier and Hebert discussed two opposing views of decision making by male and female judges—the minimalist/organizational and the maximalist/individual. According to these perspectives, will the sentencing decisions of male and female judges be the same or different?

2. The authors used data from Pennsylvania to test a series of hypotheses about the effect of the judge’s sex on sentencing decisions (see following list). Explain the rationale for each of these hypotheses.
   - a. The sentencing practices of women and men judges are more noteworthy for their similarities than their differences (null hypothesis).
   - b. Background and career characteristics will have similar effects on the sentencing practices of men and women judges.
   - c. Women judges will be more severe in their sentencing decisions than men judges.
   - d. Prior record will affect the sentencing decisions of women judges more than it will those of men judges.
   - e. Defendants’ age, race, and sex will affect the sentencing decisions of women judges more so than those of men judges; women will imposed harsher sentences on young Black male offenders than on other types of offenders.
   - f. The effects of the gender of the judge will be more manifest in the sentencing of property offenders than in the sentencing of violent or sexual assault offenders.

3. Were the authors’ hypotheses confirmed or refuted?

4. After reading this article, how would you characterize the sentencing decisions of male and female judges?

**READING**

Although research generally reveals that the competence of judges does not vary dramatically depending on their method of selection, concerns have been raised about judicial impartiality in capital cases. Stephen Bright and Patrick Keenan argue that elected judges are influenced by politics in cases involving the death penalty. According to these authors, elected judges face “overwhelming pressure . . . to heed, and perhaps even to lead, the popular cries for the death of criminal defendants” (see also Wold & Culver, 1987). These authors discuss a number of problems inherent in electing judges who adjudicate capital cases. They also present several possible solutions to these problems.
The “higher authority” to whom present-day capital judges may be “too responsive” is a political climate in which judges who covet higher office—or who merely wish to remain judges—must constantly profess their fealty to the death penalty. . . . The danger that they will bend to political pressures when pronouncing sentence in highly publicized capital cases is the same danger confronted by judges beholden to King George III.

—Justice John Paul Stevens, dissenting in *Harris v. Alabama*¹

The thunderous voice of the present-day “higher authority” that Justice Stevens described is heard today with unmistakable clarity in the courts throughout the United States. Those judges who do not listen and bend to political pressures may lose their positions on the bench.

Decisions in capital cases have increasingly become campaign fodder in both judicial and nonjudicial elections. The focus in these campaigns has been almost entirely on the gruesome facts of particular murders, not the reason for the judicial decisions. Judges have come under attack and have been removed from the bench for their decisions in capital cases—with perhaps the most notable examples in states with some of the largest death rows and where the death penalty has been a dominant political issue. Recent challenges to state court judges in both direct and retention elections have made it clear that unpopular decisions in capital cases, even when clearly compelled by law, may cost a judge her seat on the bench, or promotion to a higher court. This raises serious questions about the independence and integrity of the judiciary and the ability of judges to enforce the Bill of Rights and otherwise be fair and impartial in capital cases.

California has the largest death row of any state in the nation. In 1986, Governor George Deukmejian publicly warned two justices of the state’s supreme court that he would oppose them in their retention elections unless they voted to uphold more death sentences. He had already announced his opposition to Chief Justice Rose Bird because of her votes in capital cases. Apparently unsatisfied with the subsequent votes of the other two justices, the governor carried out his threat. He opposed the retention of all three justices and all lost their seats after a campaign dominated by the death penalty. Deukmejian appointed their replacements in 1987.

The removal and replacement of the three justices has affected every capital case the court has subsequently reviewed, resulting in a dramatic change. In the last five years, the Court has affirmed nearly 97% of the capital cases it has reviewed, one of the highest rates in the nation.² A law professor who watches the court observed, “One thing it shows is that when the voters speak loudly enough, even the

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The once highly regarded court now distinguishes itself primarily by its readiness to find trial court error harmless in capital cases. The new court has “reversed every premise underlying the Bird Court’s harmless error analysis,” displaying an eagerness that reflects “jurisprudential theory” less than a “desire to carry out the death penalty.”

The voice of “higher authority” has also been heard and felt in Texas, which has the nation’s second largest death row. After a decision by the state’s highest criminal court, the Court of Criminal Appeals, reversing the conviction in a particularly notorious capital case, a former chairman of the state Republican Party called for Republicans to take over the court in the 1994 election. The voters responded to the call. Republicans won every position they sought on the court.

One of the Republicans elected to the court was Stephen W. Mansfield, who had been a member of the Texas bar only two years, but campaigned for the court on promises of the death penalty for killers, greater use of harmless-error doctrine, and sanctions for attorneys who file “frivolous appeals especially in death penalty cases.” Even before the election it came to light that Mansfield had misrepresented his prior background, experience, and record, that he had been fined for practicing law without a license in Florida, and that— contrary to his assertions that he had experience in criminal cases and had “written extensively on criminal and civil justice issues”—he had virtually no experience in criminal law and his writing in the area of criminal law consisted of a guest column in a local newspaper criticizing the same decision that prompted the former Republican chairman to call for a takeover of the court. Nevertheless, Mansfield defeated the incumbent judge, a conservative former prosecutor who had served twelve years on the court and was supported by both sides of the criminal bar. Mansfield was sworn in to serve for a six-year term in January 1995. Among his responsibilities will be the review of every capital case coming before the court on direct appeal and in postconviction review.

The single county in America responsible for the most death sentences and executions is Harris County, Texas, which includes Houston. Judge Norman E. Lanford, a Republican, was voted off the state district court in Houston in 1992 after he recommended in postconviction proceedings that a death sentence be set aside due to prosecutorial misconduct, and directed an acquittal in another murder case due to constitutional violations. A prosecutor who specialized in death cases, Caprice Cosper, defeated Judge Lanford in the Republican primary. Lanford accused District Attorney John B. Holmes of causing congestion of Lanford’s docket to help bring about his defeat. In the November election, Cosper was elected after a campaign in which radio advertisements on her behalf attacked her Democratic opponent for having once opposed the death penalty.

Judges in other states have had similar campaigns waged against them. Justice James Robertson was voted off the Mississippi Supreme Court in 1992. His opponent in the Democratic primary ran as a “law and order candidate” with the support of the Mississippi Prosecutors Association. Among the decisions for which Robertson’s opponent attacked him was a concurring opinion expressing the view that the Constitution did not permit the death penalty for rape where there was no loss of life. Robertson’s opponent exploited the opinion even though the U.S. Supreme Court had held ten years earlier that the Eighth Amendment did not permit the death penalty in such cases. Opponents also attacked Robertson for his dissenting opinions in two cases that the U.S. Supreme Court later reversed.

The voice of “higher authority” can also be heard in less direct, but equally compelling ways. As Justice Stevens observed in his dissent in *Harris v Alabama*, some members of the United States Senate have “made the death penalty a litmus test in judicial confirmation hearings for
nominees to the federal bench.”6 Several challengers for Senate seats in the 1994 elections “routinely savaged their incumbent opponents for supporting federal judicial nominees perceived to be ‘soft’ on capital punishment.”

It is becoming increasingly apparent that these political pressures have a significant impact on the fairness and integrity of capital trials. When presiding over a highly publicized capital case, a judge who declines to hand down a sentence of death, or who insists on upholding the Bill of Rights, may thereby sign his own political death warrant. In such circumstances, state court judges who desire to remain in office are no more able to protect the rights of an accused in a criminal case than elected judges have been to protect the civil rights of racial minorities against majority sentiment. In the three states that permit elected judges to override jury sentences in capital cases, judges override jury sentences of life imprisonment and impose death far more often than they override death sentences and impose life imprisonment. Judges have also failed to enforce constitutional guarantees of fairness. It has been observed that “[t]he more susceptible judges are to political challenge, the less likely they are to reverse a death penalty judgment.”7 Affirmance rates over a ten-year period suggest that “[n]ationally there is a close correlation between the method of selection of a state supreme court and that court’s affirmance rate in death penalty appeals.”8 Even greater pressure exists at the local level. Elected trial judges are under considerable pressure not to suppress evidence, grant a change of venue, or protect other constitutional rights of the accused. An indigent defendant may face the death penalty at trial without one of the most fundamental protections of the Constitution, a competent lawyer, because judges frequently appoint inexperienced, uncaring, incompetent, or inadequately compensated attorneys.9 State trial court judges in many states routinely dispose of complex legal and factual issues in capital postconviction proceedings by adopting “orders” ghostwritten by state attorneys general—orders that make no pretense of fairly resolving the issues before the court.

This Article examines the influence of the politics of crime on judicial behavior in capital cases. A fair and impartial judge is essential in any proceeding, but perhaps nowhere more so than in capital cases, where race, poverty, inadequate court-appointed counsel, and popular passions can influence the extermination of a human life. The legal system indulges the presumption that judges are impartial. The Supreme Court has steadily reduced the availability of habeas corpus review of capital convictions, placing its confidence in the notion that state judges, who take the same oath as federal judges to uphold the Constitution, can be trusted to enforce it. This confidence, however, is frequently misplaced, given the overwhelming pressure on elected state judges to heed, and perhaps even to lead, the popular cries for the death of criminal defendants.

Part I of this Article briefly summarizes the increasing use of the crime issue in local and national politics and the extraordinary prominence of the death penalty as a litmus test for politicians, including politicians who serve as judges, purporting to be “tough” on crime. Part II examines the politics of becoming and remaining a judge in such a climate. Part III assesses the effect of this political climate on a judge’s ability to preside impartially over highly publicized capital cases. Part IV proposes some modest steps that might limit the influence of politics and the passions of the moment on judicial behavior.

I. Crime in Politics and the Death Penalty in the Politics of Crime

During the Cold War, many politicians, seeking to avoid more controversial and difficult issues, professed their opposition to Communism. Because almost everyone aspiring
to public office was against Communism, politicians sought in various ways—such as support for loyalty oaths and investigation of unamerican activities—to demonstrate just how strongly they were opposed to Communism. Those who questioned the wisdom of such measures were accused of not being sufficiently strident—“soft” on Communism.

Since the collapse of the Soviet Union and other Soviet-bloc governments, crime has emerged as an issue that appears equally one-sided. No one is in favor of violent crime. Politicians demonstrate their toughness by supporting the death penalty, longer prison sentences, and measures to make prison life even harsher than it is already. Those who question the wisdom, cost, and effectiveness of such measures are branded “soft on crime.” Whether sound public policy emerges from such a discussion of crime is a question to be addressed elsewhere. The emergence of crime as a dominant political issue is, however, not only having an impact on the behavior of politicians seeking positions in the legislative and executive branches of government, but also on the behavior of judges who are sworn to uphold the Constitution, a document that protects the rights of those accused of even the most serious crimes.

Even before the end of the Cold War, Richard Nixon demonstrated the potency of the crime issue by promising, in campaign speeches and in his acceptance of the Republican nomination for President in 1968, to replace Democrat Ramsey Clark as Attorney General. Clark’s defense of civil liberties and procedural safeguards had led some, including Nixon, to denounce him as “soft on crime.” In 1988, Lee Atwater urged Republicans to concentrate on the crime issue because “[a]lmost every candidate running out there is a Democrat is opposed to the death penalty.” George Bush was elected President that year with the help of advertisements criticizing his opponent for allowing the furlough of Willie Horton, who committed a rape in Maryland while on a weekend furlough from a Massachusetts prison.

As crime has become a more prominent issue in political campaigns, the death penalty has become the ultimate vehicle for politicians to demonstrate just how tough they are on crime. During California’s 1990 gubernatorial primary, an aide to one Democratic candidate observed wistfully that the carrying out of an execution would be a “coup” for her opponent, the state attorney general. Candidates for governor of Texas in 1990 argued about which of them was responsible for the most executions and who could do the best job in executing more people. One candidate ran television advertisements in which he walked in front of photographs of the men executed during his tenure as governor and boasted that he had “made sure they received the ultimate penalty: death.” Another candidate ran advertisements taking credit for thirty-two executions. In Florida, the incumbent gubernatorial candidate ran television advertisements in 1990 showing the face of serial killer Ted Bundy, who was executed during his tenure as governor. The governor stated that he had signed over ninety death warrants in his four years in office.

Presidential candidate Bill Clinton demonstrated that he was tough on crime in his 1992 campaign by scheduling the execution of a brain-damaged man shortly before the New Hampshire primary. Clinton had embraced the death penalty in 1982 after his defeat in a bid for reelection as governor of Arkansas in 1980. In his presidential campaign ten years later, Clinton returned from New Hampshire to preside over the execution of Rickey Ray Rector, an African-American who had been sentenced to death by an all-white jury. Rector had destroyed part of his brain when he turned his gun on himself after killing the police officer for whose murder he received the death sentence. Logs at the prison show that in the days leading up to his execution, Rector was howling and barking like a dog, dancing,
singing, laughing inappropriately, and saying that he was going to vote for Clinton. Clinton denied clemency and allowed the execution to proceed, thereby protecting himself from being labeled as “soft on crime” and helping the Democrats to take back the crime issue. Clinton’s first three television advertisements in his bid for reelection—already begun a year and a half before the 1996 presidential election—all focused on crime and Clinton’s support for proposals to expand the death penalty.

By 1994, crime had so eclipsed other issues that an official of the National Governor’s Association commented that the “top three issues in gubernatorial campaigns this year are crime, crime, and crime.” Stark images of violence, flashing police lights, and shackled prisoners dominated the campaign, and candidates went to considerable lengths to emphasize their enthusiasm for the death penalty and attack their opponents for any perceived hesitancy to carry out executions swiftly. Even after Texas carried out forty-five executions during Democrat Ann Richards’s four years as governor, George W. Bush attacked Governor Richards during his successful 1994 campaign against her, complaining that Texas should execute even more people, even more quickly. Bush’s younger brother Jeb ran a television advertisement in his 1994 campaign for governor of Florida in which the mother of a murder victim blamed incumbent Governor Lawton Chiles for allowing the convicted killer to remain on death row for thirteen years. Jeb Bush knew, and acknowledged when asked, that there was nothing Chiles could have done to speed up the execution because the case was pending in federal court. Jeb Bush also argued that Florida’s eight executions since Chiles’s election in 1990 were not enough.

In her quest to win the 1994 California gubernatorial race, Kathleen Brown found that her personal opposition to the death penalty was widely viewed as a major liability even though she promised to carry out executions as governor. She had to defend herself against Governor Pete Wilson’s charges that, because of her personal moral convictions, she would appoint judges like Rose Bird. Governor Wilson, whose approval ratings had been “abysmal,” recovered by following the advice of the old master, Richard Nixon, who told him to hit his opponent hard on crime. Candidate Brown responded to the charges by producing an advertisement proclaiming her willingness to enforce the death penalty. Nevertheless, she lost to Wilson. Both Illinois Governor Jim Edgar and Iowa Governor Terry Branstad similarly attacked their opponents’ personal opposition to the death penalty. Both were reelected. New York Governor Mario Cuomo faced heated attacks for his vetoes of death-penalty legislation during twelve years in office and his refusal to return a New York prisoner to Oklahoma for execution. Cuomo defended himself by proposing a referendum on the death penalty, but still lost his office to a candidate who promised to reinstate capital punishment and to send the prisoner back to Oklahoma for execution.

As the public debate on crime and its solutions has become increasingly one-sided and vacuous, the death penalty has become the ultimate litmus test for demonstrating that one is not “soft on crime.” The impact of this development has been felt not only in the executive and legislative branches of government, where popular sentiment is expected to play a major role in the development of policy, but also in the judiciary, where judges are expected to follow the law, not the election returns.

II. The Politics of Becoming and Staying a Judge

Judges in most states that have capital punishment are subject to election or retention. Although all judges take oaths to uphold the
Constitution, including its provisions guaranteeing certain protections for persons accused of crimes, judges who must stand for election or retention depend on the continued approval of the voters for their jobs and concomitant salaries and retirement benefits. A common route to the bench is through a prosecutor’s office, where trying high-profile capital cases can result in publicity and name recognition for a prosecutor with judicial ambitions. A judge who has used capital cases to advance to the bench finds that presiding over capital cases results in continued public attention. Regardless of how one becomes a judge, rulings in capital cases may significantly affect whether a judge remains in office or moves to a higher court.

A. Judges Face Election in Most States That Employ the Death Penalty

Almost all judicial selection systems fall into one of four categories. First, judges in eleven states and the District of Columbia are never subjected to election at any time in their judicial careers. Second, the judges of three states are elected by vote of the state legislature. Third, the judges of twenty-nine states are subjected to contested elections, either partisan or nonpartisan, at some point in their careers, whether during initial selection for the bench or after appointment by the governor. The fourth category of judicial selection systems includes those systems in which the judge or justice is at some time subjected to a retention election but never faces an opponent. Thirteen states employ such a system.

There are currently thirty-eight states that have capital punishment statutes. Thirty-two states both elect their judges and sentence people to death.

In nine states—including Alabama and Texas—judges run under party affiliations. The success of the party in national or state elections may have a significant impact on the judiciary. For example, Texas Republicans swept into state judicial offices as part of the party’s general success in the 1994 elections. Republicans won every elected position they sought on the Texas Court of Criminal Appeals and the Texas Supreme Court. Republican straight-ticket voting contributed to the defeat of nineteen Democratic judges and a Republican sweep of all but one of the forty-two contested races for countywide judgeships in Harris County, Texas, which includes Houston. Such straight-ticket voting, which comprised one-quarter of all votes cast in Harris County, also resulted in the removal of the only three black judges and left only one Hispanic on the bench.

The lack of racial diversity now found in Houston is consistent with the exclusion of minorities from the bench throughout the country. One reason for the lack of minority judges is that in many states—particularly those in the “death belt” states such as Florida and Texas—judges have long been elected from judicial districts in which the voting strength of racial minorities is diluted.

B. Prosecuting Capital Cases as a Stepping Stone to the Bench

One of the most frequently traveled routes to the state trial bench is through prosecutors’ offices. A capital case provides a prosecutor with a particularly rich opportunity for media exposure and name recognition that can later be helpful in a judicial campaign. Calling a press conference to announce that the police have captured a suspect and the prosecutor will seek the death penalty provides an opportunity for a prosecutor to obtain news coverage and ride popular sentiments that almost any politician would welcome. The prosecutor can then sustain prominent media coverage by announcing various developments in the case as they occur. A capital trial provides one of the greatest opportunities for sustained coverage on the nightly newscasts.
and in the newspapers. A noncapital trial or resolution with a guilty plea does not produce such coverage.

The relationship between prosecuting capital cases and moving to the bench is evident in Georgia’s Chattahoochee Judicial Circuit, which sends more people to death row than any other judicial circuit in the state. Two of the four superior court judges in the circuit obtained their seats on the bench after trying high-profile capital cases. Mullins Whisnant, who now serves as chief superior court judge in the circuit, became a judge in 1978 after serving as the elected district attorney. He personally tried many of the ten capital cases the office prosecuted in 1976 and 1977, five of which involved African-Americans tried before all-white juries for homicides of white victims. His last capital trial as prosecutor involved a highly publicized rape, robbery, kidnapping, and murder of a white Methodist Church organist by an African-American. The extensive news coverage of the case included electronic and photographic coverage of the trial. Whisnant made a highly emotional plea to jurors to join a “war on crime” and “send a message” by sentencing the defendant to death.

Once Whisnant became a judge, his chief assistant, William Smith, took over as the district attorney. Smith personally tried many of the fourteen capital cases that took place during his tenure before he joined his former boss on the bench in 1988. One of those cases involved the highly publicized trial of an African-American accused of being the “Silk Stocking Strangler” responsible for the murders of several elderly white women in the community.

And benefits other than publicity came to Smith’s eventual campaign for judge as a result of his use of the death penalty as a district attorney. In a case involving the murder of the daughter of a local contractor, Smith contacted the victim’s father and asked him if he wanted the death penalty. When he replied in the affirmative, Smith said that was all he needed to know, and subsequently obtained the death penalty at trial. The victim’s father rewarded Smith with a contribution of $5000 during Smith’s successful run for judge in the next election. The contribution was the largest Smith received. Smith’s chief assistant succeeded him as district attorney and, after prosecuting eight capital cases, has announced an interest in the next opening on the Superior Court bench. So close is the relationship between the judiciary and the prosecutor’s office in the circuit that the prosecutor’s office has made the assignments of criminal cases to judges for the last six years, assigning the more serious drug and homicide cases to former prosecutors Whisnant and Smith.

These prosecutors in the Chattahoochee Judicial Circuit have demonstrated that capital cases produce good publicity even when a guilty verdict is reversed for prosecutorial misconduct. After the United States Court of Appeals set aside a death sentence because of a lynch-mob-type appeal for the death penalty by then-District Attorney Smith, which the court characterized as a “dramatic appeal to gut emotion” that “has no place in a courtroom,” Smith called a press conference, insisted he had done nothing wrong, and announced that he would seek the death penalty again in the case. When a federal court set aside a second death sentence due to similar misconduct, Smith called another press conference and expressed his “anger” at the decision, accused the reviewing court of “sensationalism” and “emotionalism,” suggested that the “judges of this court have personal feelings against the death penalty,” and vowed to seek the death penalty again.

Attempts to exploit capital cases for political purposes may backfire, however, particularly if the prosecution is not ultimately successful in obtaining the death penalty. For example, a verdict of voluntary manslaughter instead of first degree murder transformed the case of Bruce R. Morris in St. Charles County, Missouri, from one in which a defendant’s life was at stake to one in which a political career was at stake. “[C]ourthouse observers, including [the prosecutor’s] former employees”
criticized the prosecutor, who was a candidate for circuit court judge, and stated that the trial was the prosecutor’s first jury trial in memory. They also accused him of taking the case to trial just because he was running for judge.

Prosecutors may be criticized for failure to seek the death penalty, even when the law does not permit it. For example, a California prosecutor criticized a Colorado prosecutor for not seeking the death penalty against a defendant who had committed crimes in both states even though the Colorado prosecutor explained that there were no statutory aggravating circumstances that would permit him to seek the death penalty.

Although it may be unethical and improper for prosecutors to campaign on promises to seek the death penalty or on their success in obtaining it, there is no effective remedy to prevent the practice. Moreover, capital cases produce so much publicity and name recognition that explicit promises to seek death are hardly necessary. As a result, prosecuting capital cases remains a way of obtaining a judgeship. As will be discussed later, some persons who reach the bench in this manner have difficulty relinquishing the prosecutorial role. But even when a prosecutor is not seeking a judicial post, or is unsuccessful in obtaining one, the political use of the death penalty in the discharge of prosecutorial responsibilities may spill over into elections for judicial office and influence the exercise of judicial discretion. The political consequences of decisions by both prosecutor and judge become apparent for all to see.

C. The Death Penalty’s Prominence in the Election, Retention, and Promotion of Judges

With campaigning for the death penalty and against judges who overturn capital cases an effective tactic in the quest for other offices, it is not surprising that the death penalty has become increasingly prominent in contested and retention elections for judges. Not only the judge, but her political supporters as well, may suffer the consequences of an unpopular ruling in a capital case.

In the 1994 primary election for the Texas Court of Criminal Appeals, the incumbent presiding judge accused another member of the court of voting to grant relief for convicted defendants more often than other judges. Although a Republican candidate for the second seat on the court lamented what he called the “lynch mentality” of the campaign, two other candidates for the Republican nomination, both former prosecutors, indicated their willingness to treat defendants severely. One stated that the role of the court is to ensure justice, not to reverse conviction because of “technicalities” or “honest mistakes,” while the other called the Court of Criminal Appeals a “citadel of technicality” that neglected the interests of crime victims and citizens at large. Two candidates for the third position on the court criticized the incumbent for granting a new trial to a man convicted of homicide. One challenger promised to bring a “common sense” approach to such cases.

A judge’s votes in capital cases can threaten his or her elevation to a higher court. No matter how well qualified a judge may be, perceived “softness” on crime or on the death penalty may have consequences not only for the judge, but also for those who would nominate or vote to confirm the judge for another court. For example, in 1992 groups campaigned against the retention of Florida Chief Justice Rosemary Barkett for the Florida Supreme Court because of her votes in capital cases. Then in 1994 Barkett’s nomination to the U.S. Court of Appeals for the Eleventh Circuit came under fire because of her record on capital punishment during nine years on the Florida Supreme Court. After a long delay, the Senate finally confirmed Barkett by a vote of sixty-one to thirty-seven.

Despite Barkett’s confirmation to the Eleventh Circuit, campaigns against her and other judges tagged as “soft on crime” continued. Bill Frist, in his successful campaign to unseat Tennessee Senator Jim Sasser, attacked
Sasser for voting for Barkett and for having recommended the nomination of a federal district judge who, two months before the election, granted habeas corpus relief to a death-sentenced man. Frist appeared at a news conference with the sister of the victim in the case in which habeas relief had been granted. After the victim’s sister criticized Sasser for recommending U.S. District Judge John Nixon for the federal bench, Frist said that Sasser’s vote to confirm Judge Barkett showed that he “still hasn’t learned his lesson.”

Although pro-death-penalty campaigns are not always successful in defeating judges, even the threat of such a campaign may intimidate a judge. Challenges also make retaining a judgeship more expensive than it would otherwise be, thereby forcing a candidate to raise more money and contributing to the perception that those who contribute to judicial campaigns can get more justice than others. One of the saddest and most recent examples is the bitter campaign waged for chief justice of Alabama’s supreme court in 1994. The challenger accused the incumbent of shaking down attorneys who had cases before the court for contributions, while the incumbent ran advertisements in which the father of a murder victim accused the challenger of being an accomplice to the murder.

Whether the “hydraulic pressure” of public opinion that Justice Holmes once described and the political incentives accompanying it are appropriate considerations for publicly elected prosecutors is doubtful, but clearly such considerations have no place in the exercise of the judicial function. Yet in jurisdictions where judges stand for election—often with the prosecution in a position tantamount to that of a running mate—judges are subject to the same pressures. As a result of the increasing prominence of the death penalty in judicial elections as well as other campaigns for public office, judges are well aware of the consequences to their careers of unpopular decisions in capital cases.

III. The Impact on the Impartiality of Judges

The political liability facing judges who enforce the Bill of Rights in capital cases undermines the independence, integrity, and impartiality of the state judiciary. Judicial candidates who promise to base their rulings on “common sense,” unencumbered by technicalities, essentially promise to ignore constitutional limits on the process by which society may extinguish the life of one of its members. Justice Byron White once observed, “If [for example,] a judge’s ruling for the defendant . . . may determine his fate at the next election, even though his ruling was affirmed and is unquestionably right, constitutional protections would be subject to serious erosion.” Justice William Brennan noted that the risk of a biased judge is “particularly acute” in capital cases:

Passions, as we all know, can run to extreme when the State tries one accused of a barbaric act against society, or one accused of a crime that—for whatever reason—inflames the community. Pressures on the government to secure a conviction, to “do something,” can overwhelm even those of good conscience. When prosecutors and judges are elected, or when they harbor political ambitions, such pressures are particularly dangerous.15

Rulings in a publicized case can have major political effects, such as loss of one’s position or any hope of promotion, and judges are aware of this as they make controversial decisions, particularly in capital cases.

The American Bar Association’s Commission on Professionalism found that “judges are far less likely to . . . take . . . tough action if they must run for reelection or retention every few years.”16 In no other area of American law are so many tough decisions presented as in a capital case. And no other cases demonstrate
so clearly the validity of the ABA Commission’s finding.

A judge who faces election is more likely to sentence a defendant to death than a jury that heard the same evidence. In some instances, political considerations make it virtually impossible for judges to enforce the constitutional protections to a fair trial for the accused, such as granting a change of venue or continuance, or suppressing evidence. Judges have failed miserably to enforce the most fundamental right of all, the Sixth Amendment right to counsel, in capital cases. And many judges routinely abdicate their judicial responsibility and allow the lawyers for the state to write their orders resolving disputed factual and legal issues in capital cases.

### A. Overrides of Jury Sentences

Four states—Alabama, Florida, Indiana, and Delaware—permit a judge to override a jury’s sentence of life imprisonment and impose the death penalty. Alabama judges, who face partisan elections every six years, have overridden jury sentences of life without parole and imposed the death penalty forty-seven times, but have vetoed only five jury recommendations of death. Between 1972 and early 1992, Florida trial judges, who face contested elections every six years, imposed death sentences over 134 jury recommendations of life imprisonment, but overrode only fifty-one death recommendations. Between 1980 and early 1994, Indiana judges, who face retention elections every six years, imposed death sentences over eight jury recommendations of life imprisonment, but overrode only four death recommendations to impose sentences of life imprisonment. Delaware did not adopt the override until 1991, and that state’s judges do not stand for election; the first seven times judges used it, they overrode jury recommendations of death and imposed life sentences.

Indeed, the sentencing decisions of some judges are a foregone conclusion. Members of the U.S. Supreme Court have noticed the tendency of Jacksonville, Florida judge Hudson Olliff to override jury sentences of life imprisonment and impose death. An override could also be anticipated from another Florida circuit judge, William Lamar Rose, who protested the U.S. Supreme Court’s decision in 1972 finding the death penalty unconstitutional by slinging a noose over a tree limb on the courthouse lawn. In Alabama, three judges account for fifteen of the forty-seven instances in which jury sentences of life imprisonment were overridden and death imposed.

### B. Failure to Protect the Constitutional Rights of the Accused

The Bill of Rights guarantees an accused certain procedural safeguards, regardless of whether those safeguards are supported by popular sentiment at the time of the trial, in order to protect the accused from the passions of the moment. But nothing protects an elected judge who enforces the Constitution from an angry constituency that is concerned only about the end result of a ruling and may have little understanding of what the law requires. Judges who must keep one eye on the next election often cannot resist the temptation to wink at the Constitution.

As previously discussed, some judges have scheduled capital cases for before an election or have refused to continue a case until after an election in order to gain the publicity and other political benefits that accompany presiding over such a trial. In these situations, the judge is under immense pressure to make rulings that favor the prosecution because an unpopular decision will quickly turn the anticipated benefits of association with the case into a major liability that could result in defeat in the election.

But even in less politically charged circumstances, judges face conflicts between
personal political considerations and their duty to enforce the law in making decisions on a wide range of issues. For example, among the many decisions by trial judges to which reviewing courts defer are determinations under *Batson v. Kentucky* of whether the use of peremptory jury strikes was racially motivated. As previously discussed, many judges are former prosecutors. Before going to the bench, a judge may have hired the prosecutor appearing before him as an assistant. Even if the judge is not personally close to the prosecutor, she may be dependent upon the prosecutor’s support in the next election to remain in office. Therefore, it may be personally difficult or politically impossible for a judge to reject a prosecutor’s proffered reason for striking a minority juror.

Judges may find it difficult to make other decisions required by law and remain popular with the voters. The Mississippi Supreme Court has acknowledged that the discretion to grant a change of venue places a burden on the trial judge because “the judge serves at the will of the citizenry of the district . . . [and] might be perceived as implying that a fair trial cannot be had among his or her constituents and neighbors.”

Even when a judge grants a change of venue, the objective may not be to protect the right of the accused to a fair trial. The clerk of a circuit court in Florida revealed several years after the death sentence was entered against Raleigh Porter that the presiding judge, Richard M. Stanley, had told the clerk that he was changing the venue to another county that had “good, fair minded people here who would listen and consider the evidence and then convict the son-of-a-bitch. Then, Judge Stanley said he would send Porter to the chair.” The jury returned the expected verdict and Judge Stanley, wearing brass knuckles and a gun at the sentencing hearing, sentenced Porter to death.

In *Coleman v. Kemp*, a Georgia trial judge denied a change of venue from a small rural community inundated with media coverage of six murders committed by Maryland prison escapees. The media coverage included strong anti-defendant sentiments, such as those of the local sheriff who publicly expressed his desire to “pre-cook [the defendants] several days, just keep them alive and let them punish,” and of an editorial writer who compared the defendants to rattlesnakes and rabid dogs. A local citizen who served as a juror in one of the cases testified that news of the murders spread in the small community “like fire in a broom sage,” that “everybody was so excited and upset over it,” and that the sentiment of “everybody” prior to trial was “fry ’em, electrocute ’em.” The elected trial judge, faced with a choice between his community’s urge for a quick and violent response to the crime and the defendants’ constitutional rights, refused to grant a change of venue. The local jury convicted the defendants and the elected Georgia Supreme Court upheld the convictions.

The difficult job of setting aside the convictions obtained at three trials that lacked any semblance of fairness was left to the judges serving life tenure on the United States Court of Appeals for the Eleventh Circuit. The political consequences of protecting the rights of the accused became even more apparent after the grant of habeas corpus relief. Citizens throughout Georgia presented petitions containing over 100,000 signatures to U.S. House of Representatives Judiciary Committee’s Subcommittee on Courts, urging it to impeach the three members of the Court of Appeals panel who voted unanimously for the new trials.

The price paid for an elected judiciary in Alabama, California, Georgia, Texas, and other states has been the corruption of the judges and the courts of those states. Once a judge makes a decision influenced by political considerations, in violation of the oath he or she has taken to uphold the law, both the judge and the judicial system are diminished, not only in that case, but in all cases. The realization that a ruling in a case was made with more of an eye toward the next election
than the requirements of the law can irreparably damage a judge’s self-perception and commitment to justice. After the first such breach of one’s judicial responsibility, it is more easily repeated in future cases. Once the public understands that courts are basing their rulings on political considerations—even when the courts are giving the voters the results they want, as the California Supreme Court is now doing—it undermines the legitimacy and the moral authority of courts as enforcers of the Constitution and law.

C. Appointment and Tolerance of Incompetent Counsel for Indigent Persons

Judges often fail to enforce the most fundamental protection of an accused, the Sixth Amendment right to counsel, by assigning an inexperienced or incompetent lawyer to represent the accused. As a result of appointments by state court judges, defendants in capital cases have been represented by lawyers—and in at least one instance a third-year law student—trying their cases or with little or no experience in trying serious cases, lawyers who were senile or intoxicated or under the influence of drugs while trying the cases, lawyers who were completely ignorant of the law and procedures governing a capital trial, lawyers who used racial slurs to refer to their clients, lawyers who handled cases without any investigative or expert assistance, lawyers who slept or were absent during crucial parts of the trial, lawyers who lacked even the most minimal skills, lawyers who filed one-page to ten-page briefs on direct appeal, and other equally incompetent lawyers who were deficient in a number of other respects.

When the community that elects the judge is demanding an execution, the judge has no political incentive to appoint an experienced lawyer who will devote large amounts of time to the case and file applications for expert and investigative assistance, all of which will only increase the cost of the case for the community. As a result, judges frequently assign lawyers who are not willing or able to provide a vigorous defense.

For example, judges in Houston, Texas have repeatedly appointed an attorney who occasionally falls asleep in court, and is known primarily for hurrying through capital trials like “greased lightning” without much questioning or making objections. Ten of his clients have received death sentences. Similarly, judges in Long Beach, California, assigned the representation of numerous indigent defendants to a lawyer who tried cases in very little time, not even obtaining discovery in some of them. The attorney has the distinction of having more of his clients sentenced to death, eight, than any other attorney in California.

Local elected judges in Georgia have repeatedly refused to appoint for retrials of capital cases the lawyers who had successfully represented the defendants in postconviction proceedings, even after the Georgia Supreme Court made it abundantly clear that counsel familiar with the case should be appointed.

Local elected judges may base their assignment of counsel to indigent defendants on political ties or other considerations than the ability of the lawyer to provide competent representation. A defense attorney in Cleveland contributes thousands of dollars toward the reelection campaigns of judges and is “notorious for picking up the judges’ dinner and drink tabs. They, in turn, send [the attorney] as much business as he can handle in the form of case assignments.”

A study of capital cases in Philadelphia found that “Philadelphia’s poor defendants often find themselves being represented by ward leaders, ward committeemen, failed politicians, the sons of judges and party leaders, and contributors to the judge’s election campaign.” The lawyer who received the most appointments one year to homicide cases in Philadelphia was a former judge whom the state’s supreme court removed from the bench for receiving union money. He handled
thirty-four murder cases in that year and submitted bills for $84,650 for fees and expenses.

As might be expected, treating the assignment of criminal cases as part of a judicial patronage system does not always result in the best legal representation. The study of capital cases in Philadelphia found that “even officials in charge of the system say they wouldn’t want to be represented in Traffic Court by some of the people appointed to defend poor people accused of murder.”

Regardless of the basis for selection, assignment of cases to lawyers by judges undermines the fairness and integrity of the adversary system in other ways. Lawyers who owe their livelihood to judicial appointments may be unwilling to provide zealous representation out of fear that it will cost them future appointments. So long as this system continues, neither the judges nor the lawyers are truly independent and able to play their proper role in the adversary system.

D. Judges Acting as Prosecutors

The prosecution of high-profile capital cases is often a stepping stone to a judgeship, as has been described. Unfortunately, more than a few prosecutors who become judges continue to prosecute from the bench. Although they fail to discharge their responsibility to be neutral, disinterested judges, they may continue to reap the same political benefits from capital cases that they received as prosecutors.

In a recent Georgia capital trial, a sitting superior court judge took the witness stand to tell the jury why, while serving as district attorney, he had sought the death penalty and had refused to agree to a plea disposition in the case. After testifying that the governor appointed him to the bench after having “serve[d] the citizens of Hall and Dawson count[ies] as their district attorney” for six years, the judge summarized the factors he had considered in making the decision as prosecutor to seek the death penalty for Stephen Anthony Mobley:

[The defendant’s] lack of remorse and a personality of “pure unadulterated meanness”;

The financial cost of death cases to taxpayers;

Discussion with the victim’s family and their support for a death sentence as the appropriate penalty;

Consideration of whether the “last minutes of [the victims’] lives were more horrible to them than in other cases”;

[The judge’s] feeling that Mobley’s description of the murder to [one victim] was “unmerciful”;

The strength of the State’s evidence.

The judge summarized his decision by stating that “I’ve handled many cases with heinous facts of a killing, but I have never, never seen a defendant like Mr. Mobley.” Remarkably, the Georgia Supreme Court upheld Mobley’s death sentence over the dissent of only a single member.

Edward D. Webster, a former prosecutor in Riverside, California, publicly criticized a federal court of appeals for its decision in a capital case, even though he is now the presiding superior court judge in Riverside. Judge Webster, speaking “as a former prosecutor,” expressed his “outrage” at a decision by the United States Court of Appeals for the Ninth Circuit remanding a capital habeas corpus case on grounds that the federal district court had failed to provide funds for expert assistance in support of the habeas petition. Judge Webster accused the federal court of anti-death-penalty bias and called upon Congress to prevent all federal courts
except the Supreme Court from reviewing death-penalty cases.

A former prosecutor who now presides as a judge over capital cases in Houston, Texas, William Harmon, stated to a defendant during a 1991 capital trial that he was doing “God’s work” to see that the defendant was executed. In the same case, Judge Harmon taped a photograph of the “hanging saloon” of Texas Judge Roy Bean on the front of the bench with his own name superimposed over Judge Bean’s, and referred to the judges of the Texas Court of Criminal Appeals as “liberal bastards” and “idiots.” In another capital case, Judge Harmon, upon a witness’s suggestion that some death row inmates should be transported to court, stated, “Could we arrange for a van to blow up the bus on the way down here?” In another capital trial in 1994, Judge Harmon allowed the victim’s father to yell obscenities at the defendant in the presence of jurors and the press.

These are among the more pronounced examples of judges who have continued the prosecutorial role upon assuming the bench. Other judges may be more sophisticated in understanding their role and more subtle in their approach to capital cases. A judge does far more to undermine the fairness of a trial and hasten the imposition of a death sentence by appointing deficient counsel and in making discretionary rulings, as previously described, than by engaging in conduct such as Judge Harmon’s.

It is not surprising that such judges are produced by a system that rewards prosecutors for obtaining the death penalty by giving them the public recognition and support needed to be elected judges. But this system often does not produce judges who will be fair and impartial in capital cases. It is most difficult for a prosecutor who has made his name prosecuting capital cases to refrain as a judge from further exploitation of capital cases upon assuming the bench.

IV. Remedies for the Resulting Lack of Impartiality

Elected judges are expected to “remain faithful to the values and sentiments of the people who elected them, and to render decisions using common sense rather than newfangled legalisms.” But remaining faithful to popular sentiment is sometimes inconsistent with a judge’s duty to mete out equal justice and to enforce the Bill of Rights. As Justice Jackson wrote:

The very purpose of a Bill of Rights was to withdraw certain subjects from the vicissitudes of political controversy, to place them beyond the reach of majorities and officials and to establish them as legal principles to be applied by the courts. One’s right to life, liberty, and property, to free speech, a free press, freedom of worship and assembly, and other fundamental rights may not be submitted to vote; they depend on the outcome of no elections.

In contrast, federal judges have life tenure and are appointed by the President with the advice and consent of the Senate in order to ensure the independence of the judiciary and to guarantee that the courts will perform their roles as protectors of “the rights of individuals.” Recognizing that “a steady, upright, and impartial administration of the laws” was essential because “no man can be sure that he may not be tomorrow the victim of a spirit of injustice, by which he may be the gainer today,” Alexander Hamilton wrote in the The Federalist No. 78: “That inflexible and uniform adherence to the rights of the Constitution, and of individuals, which we perceive to be indispensable in the courts of justice, can certainly not be expected from judges who hold their offices by temporary commission.”
The state bench also differs from the federal bench in that it is more likely to be a stepping stone to a higher political office. In comparing the state and federal judiciary, Chief Justice William Rehnquist has pointed out that the life tenure of federal judges makes for a “different kind of judge” than someone “looking out of one corner of his eye for the next political opportunity that comes along.” However, the politics of crime have increasingly had an impact on nominations to the federal judiciary and even the Supreme Court has seemed responsive to the political potency of the crime issue.

Nevertheless, although some appointees may take a political agenda with them to the federal bench, life tenure still insulates judges from the threat of being voted out of office for an unpopular decision. Every new election reminds state judges of their vulnerability to popular sentiment. Such constant reminders make it politically and practically impossible for many judges to enforce the Constitution when doing so would be unpopular.

If courts are to have integrity and credibility, judges must be selected, evaluated, and assigned cases in a way that makes it possible for them to uphold the law without imperiling their jobs. Political considerations will always be a factor in the selection and promotion of judges in both the state and federal courts, and some who become judges will allow their personal prejudices to interfere with the faithful discharge of their duties, regardless of how they are selected. But the selection and promotion process should not allow a judge’s ruling in a particular case to dominate his or her prospects for remaining on the bench. If this is not the case, judges will continue to work under unreasonable pressures and the public will not view their decisions as fair, impartial, and legitimate. The judiciary and bar should exercise leadership in bringing about the replacement of judicial elections—both retention and contested—with merit selection and periodic performance review. Although such systems are desirable and may be more likely after elections that have significantly diminished the standing of the courts in Alabama, California, Mississippi, Texas, and other states, one can expect that elections will remain in many jurisdictions.

As long as judges are selected at the ballot box, several less effective measures, small and large, should be taken to reduce the influence of political considerations on judicial rulings. Judges must recognize their constitutional and ethical responsibility to disqualify themselves in cases in which one might reasonably question their impartiality due to political pressures. Capital cases should be assigned to judges who do not face the voters from the locality of the crime. The discretion of trial judges in areas where they are under political pressures should be limited and reviewing courts should give more careful scrutiny to rulings that are susceptible to influence by political considerations. Regardless of how judges are selected, they should not appoint counsel for indigent defendants. Removal of appointment responsibility from judges is necessary to ensure the independence of the judiciary and the zealous defense of the accused.

A. Using Diffuse and Indirect Citizen Input in Appointment and Evaluation Systems

The elimination of direct and retention elections is a necessary step to improve the fairness and impartiality of the judiciary. Eleven states and the District of Columbia already employ systems in which judges never face election. The systems in those states provide for removal of judges only for misbehavior or other ethical improprieties, avoiding the opportunity to turn a judicial election into a popular referendum on a judge’s rulings in controversial cases.

Although judicial elections appear to be immensely popular in the United States, judges
were not always selected and retained this way. The American colonial governments utilized executive selection of judges and service during good behavior in an effort to depoliticize the judiciary. Resentment toward the Crown's control of the judiciary resulted in a shift from judges serving in the pleasure of the executive to judges serving during good behavior.

Dissatisfaction with the appointed judiciary during the period of populist Jacksonian democracy led to the election of judges. The public viewed judges as too protective of the interests of property owners. States began to adopt systems of electing judges in an effort to divorce the judiciary from property owners. However, it became apparent that popular election resulted in a highly politicized judiciary, with political machines often controlling judges. States again began to tinker with judicial selection methods, with some eventually adopting a selection plan that included gubernatorial appointment from a list compiled by a judicial selection committee, with a subsequent retention election after a certain period of time. This reform sought to depoliticize the judiciary and allow judges to make decisions unswayed by political considerations while still allowing for some form of input from citizens. But, as has been the case in California, Florida, and other places, even a retention election can degenerate into a referendum on a judge's rulings in capital or other controversial cases. Indeed, a strong argument can be made that retention elections are even worse than direct elections where the incumbent is challenged. In retention elections, there is no comparison to be made among candidates. The judge standing for retention may be a target for negative votes from various groups dissatisfied with decisions on issues ranging from crime to abortion. Voters may want to express their disapproval of the judge with no consideration of whether the replacement judge will be any better.

The independence of the judiciary can be best preserved by a merit selection system in which a bipartisan judicial qualifications commission nominates a slate of qualified candidates to the executive, who then nominates a judge subject to confirmation by at least one branch of the state legislature. Meaningful citizen input can come by ensuring that a substantial number of persons on the judicial qualifications commission are not lawyers, but people who represent various segments of the public. Such a system should provide for terms for judges of substantial length, such as ten to fifteen years. Retention in office for additional terms should depend upon an evaluation of the judge's performance by the commission, not a retention election.

One state that employs such a system is Hawaii, where the governor selects judges with the consent of the senate, from a list of nominees that a judicial selection commission compiles. The judicial selection commission's list must contain not less than six nominees. If a judge indicates at least six months before the end of his term that he wishes reappointment, the commission determines whether the judge should be retained. The primary purpose of the retention process is to “exclude or, at least, reduce partisan political action.”

There are many positive aspects to Hawaii's selection and retention process. First, it provides for diffuse and indirect input in the judicial selection and retention process by allowing the governor, the president of the senate, and the speaker of the house of representatives, all of whom are elected, to appoint a total of five members of the commission. Thus, there is public accountability in a selection process that provides a layer of protection for judges who may make unpopular decisions.

Second, a judge serves a term of ten years, after which time the judicial selection commission again evaluates and either retains or rejects the judge. Commission review allows an informed body to evaluate a judge's entire ten-year record. The commission sees any unpopular or controversial decisions in the
context of a broader record. In addition, the commission can review the legal reasons for the judge’s decision, not just the result.

Third, commission review avoids judicial electoral campaigns, some of which can be demagogic, undignified, and unsophisticated. Judges create complicated records of rulings on a variety of issues, and an informed body representing the public can examine a judge’s entire record rather than merely focus on a judge’s rulings in the most notorious or highly publicized cases. Because a judge knows that an informed body will review her performance, she will be less susceptible to community pressures and will be more likely to enforce constitutional and statutory law. Such a method of selection would also result in better judges. Many capable and highly qualified individuals are unwilling to seek judgeships where they must stand for election, knowing that the responsible discharge of their duties in a controversial case could cost them their positions. Such individuals may also be unwilling to solicit campaign contributions to finance a judicial campaign, knowing that it creates an appearance of impropriety, engage in campaign tactics that are inconsistent with the Model Code of Judicial Conduct but may be necessary to obtain office, or assume the bench knowing that they will be unable to defend themselves when attacked politically for a single ruling or decision.

Fourth, the public may have more confidence in and respect for the judiciary because it knows that judges who do not have to worry about offending a particular segment of the population in order to raise campaign funds or stay in office are more likely to be impartial. At the same time, periodic review of judicial behavior protects the public from those who are unfit for judicial service.

Finally, and most importantly, such a system ensures that when an individual takes the bench, he or she is independent in the sense that former United States Supreme Court Justice Owen Roberts described:

> When a man goes on the Court he ought not to have to depend upon the strength . . . of his own character to resist the temptation to shade a sentence in an opinion or shade a view. [He should not have] to put an umbrella up in case it should rain. He ought to be free to say his say, knowing as the founding fathers meant he should know, that nothing could reach him and his conscience was as free as could be. 27

To be independent, a judge must be free to disregard public sentiment when required by the law, and to take unpopular, but constitutionally mandated, action.

Until recently judicial elections, whether direct or retention, attracted little public attention. Judges seldom encountered opposition either from opponents or from interest groups opposing their retention. However, this is no longer the case. The judiciary in states all across the nation is becoming increasingly politicized. The success in defeating incumbent judges in some states is leading to new efforts in others. No judge can risk alienating a powerful special interest group or being viewed as “soft on crime.” The elimination of both direct and retention elections is essential if courts are to be responsive to the commands of the law and Constitution instead of the will of the majority.

B. Judicial Disqualification When Rulings Could Imperil Election

In jurisdictions in which judges stand for election or retention, judges should be disqualified from presiding over cases in which there is the appearance that political considerations could tempt judges in their ruling. The law of judicial disqualification and due process currently provides for this, but courts
fail to apply this law properly, relying on fictions of impartiality while ignoring political realities.

In *Tumey v. Ohio*\(^{28}\), the Supreme Court held as violative of due process a judicial system in which a mayor sat in judgment of alleged violators of a Prohibition ordinance, and was not paid unless he convicted and fined at least some of those brought before him. The Court concluded such a system deprives the accused of due process in several ways. First, it “subjects [a defendant’s] liberty or property to the judgment of a court the judge of which has a direct, personal, substantial, pecuniary interest in reaching a conclusion against him in his case.” Second, “It is certainly not fair to each defendant, brought before the Mayor for the careful and judicial consideration of his guilt or innocence, that the prospect of such a loss by the Mayor should weigh against his acquittal.” Third, any system that “offer[s] a possible temptation to the average man as a judge to forget the burden of proof required to convict the defendant, or [that] might lead him not to hold the balance nice, clear and true between the State and the accused, denies the latter due process.” Fourth, given the mayor’s position, “might not a defendant with reason say that he feared he could not get a fair trial or a fair sentence from one who would have so strong a motive to help his village by conviction and a heavy fine?”

In *Ward v. Village of Monroeville*, the Court extended the *Tumey* principle to prohibit a mayor from acting as a judge in a case in which his financial interest was not personal, but in which his general mayoral responsibilities included revenue production. The Court rejected the village’s argument that this system does not deprive defendants of due process because the mayor’s decisions were correctable on appeal and trial de novo in the County Court of Common Pleas. Justice Brennan wrote that “there is nothing to suggest that the incentive to convict would be diminished by the possibility of reversal on appeal. . . . [The defendant] is entitled to a neutral and detached judge in the first instance.”

The impartiality of judges who promise to be “tough on crime” is also called into question by the Model Code of Judicial Conduct. Canon 3 provides that a judge “should not be swayed by partisan interests, public clamor or fear of criticism.”\(^{29}\) Canon 5 provides that a judge “shall not (i) make pledges or promises of conduct in office other than the faithful and impartial performance of the duties of the office; [or] (ii) make statements that commit or appear to commit the candidate with respect to cases, controversies, or issues that are likely to come before the court.”\(^{30}\)

The *Tumey* situation is analogous to a typical capital case tried, appealed, or brought for postconviction review before an elected judge. The justices of the Supreme Courts of California and Mississippi, the judges of the Texas Court of Criminal Appeals, and trial judges in Houston and other jurisdictions certainly know that their future on the courts and their judicial salaries and pensions are closely related to their decisions in capital cases. At the very least, these pressures create the appearance of partiality.

The legitimacy of judicial decisions depends on the appearance of fairness, and elected judges hearing capital cases too often make rulings that appear to be patently unfair. It is apparent not only to Justice Stevens but also to those who observe the courts that judges are frequently responding to a “higher authority” than the Constitution. In some instances, that voice sounds too much like the cries of a lynch mob. *Tumey* commands judges not have an improper temptation to rule in one way or the other. A judge who will lose his position by ruling against the prosecution in a single case is under far greater pressure not to “hold the balance nice, clear and true between the state and the accused” than is a judge whose salary comes from fines that may be imposed in some of the many cases that come before him. It is
possible to construct fictions of impartiality and impute them to every judge, but the reality is that capital punishment is popular and judicial elections can become referenda on the death penalty.

One step in the right direction would be to permit disqualification of at least one judge without attempting to assess the question of impartiality. For example, in Maryland, a party who believes that a fair and impartial trial cannot be had before the assigned judge may file a suggestion that the judge is incapable of affording him or her an impartial trial and the case must be removed to another court. A judge in a capital case may not refuse to grant the motion. This at least allows the defendant to decide if the judge originally assigned to his case may not be in a position to put aside political considerations, such as a judge facing a tough election. This system is attractive because it does not operate on the presumption that judges become somehow immune to influences that would weigh strongly on non-judges. This system does not attempt to discern a judge’s actual biases, but recognizes that the appearance of bias may make it appropriate for another judge to hear the case. On the other hand, when there is no concern about improper influences, the judge will remain on the case. There is no assurance, however, that the new judge assigned to a case will not also be facing a tough reelection campaign and be subject to the same pressures.

It may be that practical considerations prevent courts from acknowledging the appearance of partiality of elected judges due to political pressures. If an entire state supreme court is disqualified, how is the case decided? If a judge is disqualified from all criminal cases because he promised to be “too tough on criminals,” how is the criminal docket to be managed? The answer to these practical problems, however, is not to substitute legal fictions for political reality.

The popular frustration regarding crime is making it increasingly difficult for courts to discharge their constitutional obligation of fairness. Judges who realize they cannot hold the balance nice, clear, and true between the state and the accused in particular cases because of political considerations have a duty to recuse themselves. Lawyers have a duty to move for the disqualification of judges who are subject to the temptation to give in to political pressures in the cases before them. In reviewing disqualification issues, trial and appellate courts should face the reality of the political pressures that are present instead of hiding behind legal fictions. If disqualification in cases in which one might reasonably question judges’ partiality due to political pressures begins to burden dockets, the legislature and the bar will be forced to devise different selection systems that will minimize the influence of political pressures on judges.

C. Altering Judicial Assignment Systems

One way to reduce the political pressures on elected judges is to prohibit those judges from presiding over capital cases in the districts that elect them. This could be accomplished through the judicial assignment system.

For example, in both North and South Carolina judges rotate among judicial districts within the state. When out of his county of residence, the judge is relieved from the political pressure of having to portray himself as the protector of his community; a judge would not necessarily stand for election in the very place in which he had made controversial rulings.

This system would help to diminish the role of political pressure on judicial decision making, but would not eliminate it. A judge could still seek to impress the voters at home with his toughness in the case before him in another district. In a highly publicized case, a controversial ruling would still be well known and, even if it were not, an opponent could still seize upon an unpopular but correct ruling and use it in opposing the judge. Additionally,
in any system a judge who intends to run for higher office may want to use his or her position for visibility.

D. Limiting the Deference Reviewing Courts Give to Judges Influenced by Political Pressures

So long as judges are subject to election or retention, the discretion of trial judges on crucial matters should be limited by objective standards that are carefully reviewed on appeal and in postconviction proceedings. Reviewing courts should acknowledge the reality of the political pressures on trial judges, and, where the potential for such influence is present, they should carefully scrutinize rulings without the normal deference accorded to trial judges.

Appellate courts routinely defer to findings of fact of state trial judges, and review decisions of trial judges under the highly deferential abuse-of-discretion and clearly-erroneous standards on critical issues such as granting of a change of venue, allowing a continuance, the extent and scope of voir dire, whether there has been racial discrimination in the exercise of jury strikes, the impartiality of prospective jurors, and the admission of certain types of evidence. Federal courts, when reviewing state court judgments in habeas corpus proceedings, are required to give a presumption of correctness to findings of fact by the state courts. The notion that the trial judge, having observed the demeanor of the witnesses and heard all of the evidence first hand, is in a better position to make determination of credibility forms much of the basis for the deference accorded the trial judge. This deference also rests upon the prevailing legal fiction that assumes the impartiality of judges.

In reality, however, political considerations may be more important than legal principles or the demeanor of witnesses. As previously discussed, judges are under immense political pressure in making discretionary rulings in high-profile capital cases. A classic example is the case of Sheppard v. Maxwell. The murder trial of Dr. Samuel H. Sheppard started, after extensive pretrial publicity, just two weeks before a November election in which the chief prosecutor was a candidate for judge and the trial judge was a candidate for reelection. The Supreme Court held that Sheppard was entitled to habeas corpus relief because the trial court had failed to protect his right to a fair trial by taking measures such as continuing the case until after the election, changing venue, and controlling the trial participants’ release of prejudicial information to the press.

Unfortunately, since Sheppard, the Supreme Court has not mandated procedures to minimize the risk of prejudice in such volatile situations or required careful scrutiny based on objective standards of similar discretionary decisions by trial judges. The Court has also retreated from its earlier pronouncements that because of the exceptional and irrevocable nature of the death penalty, capital cases require a heightened degree of procedural protection.

A few state supreme courts have recognized the political pressures on trial judges and have fashioned more objective standards and mandatory procedures to reduce the discretion of trial judges in making rulings that may be politically unpopular. For example, the Mississippi Supreme Court, after acknowledging the political pressures that may influence a judge’s decision on whether to grant a change of venue, decided that “some objective standards should be available to shield the [trial] court from even the appearance of such subtle coercion.”

The Mississippi Supreme Court described the political reality for elected trial judges in considering a motion to change venue:

[B]y perennially holding that a change of venue is granted solely at the discretion of the court, we perpetuate a burden on the trial judge. On the one hand, the judge is to act impartially,
dispassionately and with scrupulous objectivity. On the other hand, in reality, the judge serves at the will of the citizenry of the district; the judge is, after all, a public official who must occasionally, perhaps even subconsciously, respond to public sentiment when making the decision to refuse a change of venue. It must be observed that, in granting a change, the trial judge might be perceived as implying that a fair trial cannot be had among his or her constituents and neighbors.

To keep such sentiment from influencing the judge, the court held that

the accused has a right to a change of venue when it is doubtful that an impartial jury can be obtained; such doubt is implicit when there is present strong public sentiment against the defendant; upon proper application, there arises a presumption that such sentiment exists; and, the state then bears the burden of rebutting that presumption.

The court also emphasized the importance of fairness in capital cases:

A heightened standard of review is employed on appeal where the defendant’s life is at stake. . . . It follows then that the trial court should, likewise, be particularly sensitive to the need for a change of venue in capital cases.

The Georgia Supreme Court also modified its standard of review of denials of motions for a change to venue and directed trial judges in Georgia to grant changes of venue when a capital defendant makes “a substantive showing of the likelihood of prejudice by reason of publicity.”

The Court rejected the argument of the dissent that the determination of the trial judge was subject to “special deference” and should not be overturned unless it was “manifestly erroneous.”

Venue decisions are but one example of potential for the influence of improper political considerations on judicial rulings and the need for reviewing courts to remedy politically influenced decisions by adopting and applying objective standards. Where a particularly notorious crime produces volumes of publicity, that publicity often creates pressure on the judge to score political points. The more objective standards that the Supreme Courts of Mississippi and Georgia have adopted lessen the discretion allowed the trial judge, and allow courts a greater distance from the political influences to review trial decisions. A reviewing court can examine the testimony, the newspaper articles, and the tapes of broadcasts and make its own determination of whether there is a “likelihood of prejudice” or the prosecution has rebutted a defendant’s showing that public sentiment makes the likelihood of an impartial jury doubtful.

Although these decisions of the Supreme Courts of Georgia and Mississippi providing for greater protection of the rights of the accused than the decisions of the U.S. Supreme Court may appear encouraging, they say more about the retreat of the U.S. Supreme Court from protecting the rights of the accused than they do about the willingness—or political practicality—of the state courts upholding the Constitution in these situations. Most courts have shown little inclination to face reality with regard to many other discretionary decisions of trial judges that political considerations may influence. Decisions recognizing the political pressures on elected judges and adopting and applying more objective standards to limit discretion are the rare exceptions to thousands of decisions routinely deferring to decisions by trial judges
on a wide range of issues. The deference in federal habeas corpus actions to state court factfinding, as well as other increasingly severe restrictions on habeas review, insulate many decisions by state courts from federal review.

Nevertheless, a reexamination of the deference given to elected judges on discretionary matters is urgently needed. The outcomes of the judicial elections in California, Texas, Mississippi, and other states discussed in this Article are exposing for all to see the political pressures that influence the decisions of judges who face election or retention. It is of course impossible to know the number of judges who simply give in, either consciously or subconsciously, to their political pressures or the number of judicial rulings and opinions that political considerations influence. But the political realities are apparent to anyone who practices in the courts and observes these pressures at work. In many of the jurisdictions where the death penalty is frequently imposed, the political reality is that the elected state court judge cannot even consider granting relief to one facing the death penalty.

If judges continue to be voted off trial and appellate courts for their decisions in capital cases and are replaced with judges who are little more than conductors on railroads to the execution chambers, it will be impossible for courts to maintain the fiction that judges who face election are impartial without risking public ridicule and immense damage to the perception of the legitimacy and credibility of the courts. Until more fundamental reform of judicial selection is feasible, courts must acknowledge and deal with the political pressures on judges. In addition, full federal habeas corpus review of state court convictions should be restored. The once Great Writ of habeas corpus barely survives the blows that have rained upon it from the efforts of the Supreme Court and the Congress to expedite executions, achieve finality, and reduce friction between the state and federal courts. Yet as numerous examples set out in this Article make clear, only federal judges have the independence and job security that enable them to enforce the protections of the Constitution when doing so would be vastly unpopular. If the Constitution is to serve its purpose as fundamental law that protects us from “our baser selves” when there is “a demand for vengeance on the part of many persons in the community against one who is convicted of a particularly offensive act,” its enforcers must be judges who cannot be swept from office for making a controversial decision.

### E. Appointment of Counsel Independent of Judges

Regardless of how judges are selected, they should not be responsible for the appointment of counsel for poor persons accused of crimes. An independent judiciary should be independent not only of political influences and the prosecution, but also of the defense. Judges have a different role to play in the adversary system than the management of the defense. In addition, defense counsel should be independent of the judge in order to fulfill the obligation of providing zealous representation to the accused.

The American Bar Association recommends that there be a defender office or a special appointments committee to select counsel for indigent defendants. Removing the responsibility for the representation of defendants from judges and placing it with a program charged with protecting only the best interests of the defendants will not completely depoliticize the process or always ensure adequate counsel, but it would be an important step toward a properly working adversary system and effective representation of indigent defendants.
Conclusion

Justice Hugo Black once observed that “[u]nder our constitutional system, courts stand against any winds that blow as havens of refuge for those who might otherwise suffer because they are helpless, weak, outnumbered, or because they are . . . victims of prejudice and public excitement.” This role is of particular importance in capital cases, where the winds of public excitement blow especially hard against the poor, members of racial minorities, and the despised who stand accused of heinous crimes. Judges are not legislators; they have a different role than simply carrying out the wishes of their constituents to impose the death penalty.

Capital cases put extraordinary pressures on all participants in the legal system. Even the most conscientious and independent judge faces an enormous challenge of reining in the emotions that accompany a brutal crime and the loss of innocent life. If decisions about guilt and punishment are to be made fairly, objectively, and reliably, it is critical that judges be guided by the Constitution, not personal political considerations.

Yet in high-visibility capital cases in which public opinion is overwhelmingly one-sided though often ill-informed, the political pressures may be so great that a judge who has an interest in remaining on the bench cannot ignore them. In today’s political climate, a commitment to fairness is too often perceived as “softness” on crime—a political liability for a judge who must run for office. The lack of electoral clout of those facing the death penalty makes the political equation easy; however, the cost to justice and the rule of law is significant.

Nevertheless, it appears unlikely that even the most modest proposals discussed in this Article will be implemented in many jurisdictions—particularly those where they are most urgently needed—in the near future. In part, this is because there are many people who prefer judges who follow the election returns to judges who follow the law. It is also partly because the judiciary and the bar persist in hiding behind the legal fiction that judges are impartial instead of acknowledging the reality that in many instances they are not. The U.S. Supreme Court indulges in wishful thinking about what the state courts should be, instead of facing what they are, including the political pressures on those judges.

It is, however, time for open and honest discussion of the political pressures on judges who must stand for election and retention. The integrity, credibility, and legitimacy of the courts are at stake. Judges themselves should lead the discussion by disqualifying themselves sua sponte from cases in which they recognize that political considerations may keep them from holding the balance “nice, clear and true.” But it may be necessary for lawyers to prompt the discussion by filing motions for recusal in cases in which such pressures are present. The judiciary and the bar have a duty to explain to the public the difference between the representative function of legislative bodies and the adjudicatory function of courts. These steps are urgently needed to bring about reforms that will increase the likelihood that the only “higher authority” to which judges are responsive is the Constitution and laws of the United States.

Notes

3. Dolan, State High Court Is Strong Enforcer of Death Penalty, supra note 7, at A1 (quoting Professor Clark Kelso).


18. Johnson v. state, 476 So. 2d 1195, 1209 (Miss. 1985).

19. 778 F.2d 1487 (11th Cir. 1985).


28. 273 U.S. 510 (1927)


**DISCUSSION QUESTIONS**

1. Why do Bright and Keenan argue that a judge who opposes the death penalty “may thereby sign his own political death warrant”? What evidence do they provide in support of this?

2. What types of judicial selection systems are found in the states with the death penalty? According to Bright and Keenan, why is it problematic that more than half of the states elect judges and sentence people to death?

3. What are the effects of electing judges who must render decisions in capital cases—how does election affect the impartiality of judges in these types?

4. What are the remedies advocated by Bright and Keenan? In your opinion, which of these would be the most effective? The most politically palatable?
This study, like most research on jury decision making, uses a mock jury approach. Gerstenfeld investigates whether stereotypes and prejudice encourage people, particularly Whites, to characterize a crime as a hate crime when the accused is Black. Participants in the study, who were told that they were to act as jurors in a criminal case, read a description of a criminal case in which a defendant had been charged with three crimes, one of which was a hate crime; they then decided whether the defendant was guilty or not. The results of the study revealed that the mock jurors were more likely to find the White defendant than the Black defendant guilty of a hate crime; this was particularly true if the defendant was White and the victim was Black.

**Juror Decision Making in Hate Crime Cases**

*Phyllis B. Gerstenfeld*

Although hate crimes themselves are probably as old as civilization, and although they certainly have existed throughout the history of the United States (e.g., Petrosino, 1999), hate crime laws themselves are a relatively new phenomenon. The first hate crime laws were enacted in the early 1980s; by the end of the century, nearly every state and the federal government had some kind of hate crime law. In the summer of 2000, Congress was acting to broaden the federal law.

Like much legislation, hate crime laws have been primarily the result of a social movement based on such “triggering events” as the murder of gay University of Wyoming student Matthew Shepherd (Jacobs & Henry, 1996; Jenness & Grattet, 1996). The laws have not been based on social science, and in fact, there has been virtually no social science research conducted on how these laws operate in the real world. Instead, most of the academic discussion has focused on hate crime victims (e.g., Herek & Berrill, 1992; Matsuda, Lawrence, Delgado, & Crenshaw, 1993; Torres, 1999) or offenders (e.g., Byers, Crider, & Biggers, 1999; Hamm, 1993) or on the legal questions these laws raise (Dunbar, 1999; Gellman, 1991; Gerstenfeld, 1992).

The practical effects of hate crime laws are particularly problematic. These laws, unlike any others, require the determination of the offender’s motive (Gellman, 1992). Because motives tend to be ambiguous, this determination may be colored by the beliefs of the decision makers (e.g., victims, witnesses, police officers, prosecutors, jurors). The law enforcement data show a surprising phenomenon: African Americans are disproportionately likely to be accused of committing hate crimes (Gerstenfeld, 1998). Whereas Gerstenfeld (1998) suggests several explanations for this, one possibility is that stereotypes and prejudices may lead people to be more likely to label a crime hate motivated when it is committed by an African American. This article describes a study that was meant to explore this possibility.
Stereotypes and Perception

Extensive research has demonstrated that stereotypes in general, and stereotypes about race specifically, are pervasive in our culture (Brigham, 1971; Fiske, 1993). By about age 3, children are able to categorize people on the basis of race (Brigham, 1971; Katz, 1976, 1983; Milner, 1975), and attitudes about race develop soon afterward (Devine, 1989; Goodman, 1964; Katz, 1976). When we see a person of a particular race, our stereotypes about that race are automatically activated (Devine, 1989; Ford, Stangor, & Duan, 1994; Macrae, Bodenhausen, Milne, & Jetten, 1994; Macrae, Stangor, & Milne, 1994; Moskowitz & Roman, 1992). These stereotypes affect our perceptions in many ways. The influence of stereotypes on cognitive processes is greatest when the information that we receive is ambiguous (Fiske, Neuberg, Beattie, & Milberg, 1987).

At least under some conditions, information that confirms preexisting stereotypes tends to be recalled better (Fiske, 1993; Hamilton, Sherman, & Ruvolo, 1990; Hamilton & Trolier, 1986; Jones, 1982). Another effect of stereotypes is that subcategory information seems to be recalled better for one’s own group than for other groups (Linville & Jones, 1980; Linville, Salovey, & Fischer, 1986). There is also evidence that people are better at remembering negative information about members of other races than they are at remembering negative information about in-group members (Howard & Rothbart, 1980). People also better recall information that is consistent with stereotypes than information that is inconsistent (Fyock & Stangor, 1994; Macrae & Shepherd, 1989; Stangor & McMillan, 1992). This helps us to process information more quickly, but it also leads to self-perpetuation of stereotypes (Macrae, Hewstone, & Griffiths, 1993).

Although there seems to be strong influence of stereotypes on recall, stereotypes influence other processes, such as attribution, as well. In general, people make more favorable attributions about their own group than about others (Hamilton & Trolier, 1986). Again, this is not surprising, inasmuch as we tend to see ourselves as more similar to members of our own groups.

How people make causal attributions is also affected by group membership. For members of our own group, we view positive information as having an internal cause and negative information as being situationally caused. For members of other groups, these attributions are reversed (Hewstone & Jaspars, 1984; Taylor & Jaggi, 1974).

Our ratings of people of other races tend to be more polarized than ratings of members of our own group. For example, when White individuals are given information about law school applicants or candidates for a job, they will rate well-qualified Blacks higher than well-qualified Whites, but they will also rate poorly qualified Blacks lower than poorly qualified Whites (Linville & Jones 1980; McConahay, 1983, 1986). Linville and Jones (1980) and Linville et al. (1986) argue that the reason for this is that Whites have more complex schemas about Whites than about Blacks, and so the positive or negative information has less impact on the overall evaluation.

These effects of stereotypes appear to be automatic and, to some extent, unrelated to whether a person is high in prejudice. Although perception of a minority group member will automatically activate the stereotype schema, relatively unprejudiced observers will, given the opportunity, further process incoming information to avoid having the information biased by stereotypes. However, if observers are not given the opportunity to undertake this additional processing (for example, if they are not conscious that the stereotype schema has been activated), even the judgments of people low in prejudice will be affected by stereotypes (Devine, 1989). These findings are unsettling because in the realm of real life, such as in hate
crime trials, the information is apt to be ambiguous and decision makers may not have the opportunity to counteract the effects of stereotypes. Moreover, it has been suggested that attempts to suppress stereotypic thoughts may actually result in those thoughts having a greater effect upon judgments (Macrae et al., 1994).

Research that has replicated real-life decisions has supported this fear. For example, as described above, the race of the applicant causes polarized appraisals in hiring and admissions (Linville & Jones, 1980; McConahay 1983, 1986). How might race affect jury decision making in hate crime cases?

Stereotypes and Hate Crimes

To answer this question, it is first important to realize that today, the most common theme of stereotypes about Blacks is that they are aggressive, hostile, or criminal (Devine, 1989). Therefore, when a non-Black sees a Black person (particularly a young, Black male) aggression and criminality feature prominently in the schema that is automatically activated, and so these attributes might color an interpretation of ambiguous acts a person commits.

Research supports this hypothesis. Duncan (1976) showed videotapes of an ambiguous shove (that ostensibly was occurring live in an experiment) to White college students. The participants rated the shove as more violent when it was performed by a Black actor than when it was performed by a White actor. They also made more dispositional attributions for the Black actor and more situational attributions for the White actor. Similar results have been found for children who are asked to rate the ambiguous behavior of children in a story (the results even held for participants who were Black) (Sagar & Schofield, 1980) and for college students who were supposed to decide punishments for job-related transgressions and for criminal acts (Bodenhausen & Wyer, 1985; Macrae & Shepherd, 1989). Additionally, a study by McArthur and Solomon (1978) suggests that these results may occur not only when the actor is Black but whenever the victim is salient (salience was produced through having the victim wear a leg brace or have red hair). Race apparently has an effect not just on determinations of aggression in general but in jury decision making in criminal cases specifically. Several studies have indicated that mock jurors are more likely to convict a defendant of a different race and to give him a harsher sentence (the defendants in the studies, as in reality, are mostly male) (Ugwuegbu, 1979), and that Black defendants in general receive more convictions and harsher sentences than Whites (Pfeifer & Ogloff, 1991). Study participants are more likely to ignore base-rate information when the defendant is a minority (Hewstone, Benn, & Wilson, 1988). In a review of the literature on racism in the courtroom, Nickerson, Mayo, and Smith (1986) conclude,

The law may not see color, but jurors and judges and lawyers do. Research has shown that a substantial proportion of jurors do not even believe that defendants in criminal cases are innocent until proven guilty . . . and our analysis suggests that minority defendants are seen as even less innocent than others. (p. 274)

These findings are not confined to the laboratory. In real criminal cases, Blacks are treated more harshly than Whites by the criminal justice system (Mann, 1993; Nickerson et al., 1986). Additionally, it has been demonstrated that race differentials exist at all stages of juvenile justice processing (Bishop & Frazier, 1996; Krisberg & Austin, 1993). A rather extensive body of research has shown that race plays a part in capital cases as well, in that Blacks who kill Whites are significantly more likely to receive the
death penalty than other offenders (Baldus & Woodworth 1998; Bowers, 1984; Gross & Mauro, 1989). The U.S. Supreme Court, although upholding the constitutionality of capital punishment, acknowledged the validity of these studies (McCleskey v. Kemp, 1987).

Does race affect decisions in hate crime cases as well? Several commentators have expressed fear that hate crime laws might ultimately hurt minorities, in part because minorities will be disproportionately accused of these crimes (Fleisher, 1995; Gellman, 1991; Greene, 1994). This issue has not previously been addressed empirically.

Craig and Waldo (1996) conducted two studies on how people view hate crimes. In the first study, they gave college students a series of open-ended questions about hate crimes. Examples of these questions are “The typical hate crime involves . . .” and “The typical perpetrator of a hate crime is . . .” (p. 118). In the second study, students were read a description of an assault that was either hate motivated or ambiguous. Several factors were varied, including the type of hate crime (race, religion, sexual orientation, or ambiguous) and the gender of the victim. In both of these studies, the researchers found that participants’ perceptions about hate crimes varied according to the demographic characteristics of both the offenders and the victims.

The Craig and Waldo (1996) study provides some support for the hypothesis that race may make a difference in hate crime cases. However, that study was not designed specifically to look for such effects, nor did it attempt to replicate real-life decision making. The present study is the first to focus specifically on whether juror decisions in hate crime cases are affected by the defendant’s race. It was hypothesized that participants would be more likely to find the defendant guilty of a hate crime when he was Black than when he was not, would be more certain of Black offenders’ guilt, and would give Black offenders more severe sentences.

Method

Overview

A mock juror design was used to examine whether three main variables—the offender’s race, the victim’s race, and the participant’s level of racism—affect the participant’s decisions in a case in which the defendant was charged with a hate crime.

Participants

The sample consisted of 190 volunteers, all of whom were residents of California’s Central Valley. Of these, 101 were undergraduate students, and the remaining 89 were nonstudent adults. There were no significant differences between the students and nonstudents on any of the dependent variables. Participants’ ages ranged from 18 to 86, with a mean of 28.9. Seventy-seven were male and 113 were female. The self-reported racial and ethnic background of the participants was as follows: 110 (58%) White, 42 (22%) Latino, 17 (9%) Asian/Pacific Islander, 6 (3%) African American, and 13 (7%) “other.”

Procedure

The participants were told that they were to act as jurors in a criminal case. After signing a consent form, each participant was given a manila envelope containing the materials packet. The first page of the packet was an instruction sheet that told the participants what their general task was and gave them some directions as to how to proceed.

The second page of the packet was a juror questionnaire. This asked some general demographic information about the participants: age, gender, and race/ethnicity. Participants were asked not to write their name anywhere, to ensure confidentiality.

The next item in the packet was the case summary.¹ It began by stating that the
defendant, John Williams, had been charged with three crimes: felony assault, felony assault with a deadly weapon (ADW), and hate crime. It also gave definitions of these crimes; these definitions were adapted from the California Penal Code. The two levels of assault were included to take some emphasis off of the hate crime charge; it was desired that participants not realize that the hate crime was the primary focus of the study. Participants were told that they could not find the defendant guilty of both assault and ADW and that they should only consider the hate crime charge if they convicted the defendant of one of the assault charges.

Next came a two and one-half page summary of the evidence in the case, as presented by both the prosecutor and the defense. Participants were randomly given one of six versions of the case summary. These versions differed in the race of the offender and victim (Black/Black, Black/White, Black/Jewish, White/White, White/Black, and Jewish/Black), in the specific racial slurs uttered by the defendant (“You Black [White, Jewish] son of a bitch,” and “You Black [White, Jewish] bastard.”), and in the name of the hate group to which the defendant belonged (“African Americans United,” “Aryan Activists United,” or “Jewish Americans United”). All other details of the case were identical.

Next, the packet contained two pages of jury instructions. These instructions informed the participants of their duty to find the defendant guilty beyond a reasonable doubt or not guilty, defined reasonable doubt, and defined each crime.

The packet also contained a jury decision form. On this form, participants were asked to state whether the defendant was guilty or not guilty of each crime. For those crimes for which they found the defendant guilty, they were asked to choose one of three sentence options for the defendant. For each of the charges, they were asked to state, on a scale of 1 to 10, how certain they were of the defendant’s guilt.

Once they completed their jury task, the participants completed an opinion survey form. This form contained the item from McConahay’s (1986) Modern Racism Scale, hidden among dummy questions. The participants’ scores on this scale permitted a test of Devine’s (1989) findings that even people with low levels of prejudice can, unconsciously, behave in a racist manner.

Results

The defendant in this case was charged with assault, ADW, and bias crime. Only nine of the participants (4.7%) found the defendant not guilty of either assault charge. This was as expected, as his guilt was fairly obvious. Fifteen participants (7.9%) found the defendant guilty of assault but not ADW; again, it was fairly obvious that the defendant had used a deadly weapon (a broken beer bottle). The remaining participants found the defendant guilty of ADW. Overall, 98 of the participants found the defendant guilty of a hate crime (i.e., 54% of those who found him guilty of one of the assault charges), and 84 (46%) did not. This confirms that the case was ambiguous, as desired.

The Effects of Offender and Victim Race

There was a significant difference between the six conditions on whether the participants found the defendant guilty of a hate crime. There was also a significant difference between the conditions as to how certain the participants were of the defendant’s guilt. However, the conditions did not differ significantly as to the sentence given to the defendant. The mean guilt determination, certainty of guilt, and sentences for each condition are presented in Table 1.

What accounts for these differences? Further analysis revealed that participants made different
decisions when the offender and victim were of different groups than when they were of the same group. That is, people were more likely to find the defendant guilty of a hate crime when the actors were of different groups. People were also more certain that the defendant was guilty of a hate crime when he was a member of a different group than the victim. Again, however, there was no overall significant difference in sentences.

Participants made different decisions when the offender and victim were of the same group than when they were of different groups. Therefore, two sets of ANOVAs were run to determine whether the offender’s race had an effect on participants’ decisions. One set of ANOVAs was run for conditions in which the offender and victim were of the same race and another for when they were of different races.

When the offender and the victim were of the same group, the race of the victim had a significant effect on whether the participants found him guilty of a hate crime and on the degree to which they were certain of his guilt. The direction of these differences, however, was actually opposite to the hypotheses: White offenders were more frequently convicted of the hate crime than were Black offenders, and participants were more certain of the White offender’s guilt. Interestingly, participants were also more certain of the White offender’s guilt of ADW than of the Black offender’s when the offender and the victim were of different groups.

On the other hand, there was a different trend for the sentence: Black offenders received higher average sentences than Whites (3.2 years vs. 2.6 years) for the hate crime, although this difference was nonsignificant. Perhaps a significant difference would have emerged with a larger sample; only 20 participants who had offenders and victims of the same race had the opportunity to choose a sentence for the hate crime. When a post hoc comparison was done of the sentences received by Black offenders versus those received by Jewish or White offenders (regardless of whether the offender and victim were of the same group), the difference approached, but did not quite reach, significance.

When the offender and victim were of different races, the race of the offender had no effect on the guilt determination, the sentence, or the certainty of guilt. This, too, was contrary to the original hypotheses.

<table>
<thead>
<tr>
<th>Condition</th>
<th>Guilt Determination (M)**</th>
<th>Certainty of Guilt (M)**</th>
<th>Sentence (M)</th>
</tr>
</thead>
<tbody>
<tr>
<td>White offender</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>White victim</td>
<td>1.45</td>
<td>5.58</td>
<td>2.60</td>
</tr>
<tr>
<td>Black victim</td>
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<td>7.61</td>
<td>3.00</td>
</tr>
<tr>
<td>Black offender</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>White victim</td>
<td>1.55</td>
<td>6.38</td>
<td>3.00</td>
</tr>
<tr>
<td>Black victim</td>
<td>1.18</td>
<td>3.57</td>
<td>3.20</td>
</tr>
<tr>
<td>Jewish victim</td>
<td>1.63</td>
<td>6.97</td>
<td>3.16</td>
</tr>
<tr>
<td>Jewish offender</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Black victim</td>
<td>1.66</td>
<td>6.88</td>
<td>2.95</td>
</tr>
</tbody>
</table>

a. 1 = Not guilty; 2 = Guilty.

***p < .001.
Racism

After completing their jury task, participants were given the Modern Racism Scale, the items for which were embedded among several other opinion questions. Devine (1989) argues that stereotypes are automatically activated and that they affect perceptions without a person’s being consciously aware of their effects. Furthermore, she suggests, racism may be consciously controlled. Therefore, if a person is unaware that his or her stereotypes have been activated, those stereotypes will influence decision making regardless of the person’s level of racism. To test this hypothesis, a median split was performed on the racism scale, and participants were labeled as having either low or high levels of racism on each scale. Participants with scores of 32 and below were classified as low in racism. An ANOVA was then run to see if there was a relationship between levels of racism and juror decisions.

The only significant relationship was between level of racism on the Modern Racism Scale and sentence in the hate crime case. The direction of this relationship was interesting: People who scored low on the racism scale tended to give higher sentences ($M = 3.10$) than people who scored high ($M = 2.74$).

Discussion and Conclusions

Although the psychological research offers good reason to suspect that hate crime laws may have a paradoxical effect on minorities, this study suggests that this fear may be misplaced. Contrary to the original hypothesis, African American offenders were not treated more harshly by the jurors in this case, and, in fact, the opposite was true: The White offender was convicted more frequently and the jurors were more certain of his guilt. Therefore, the results of this study lend support to the idea that perhaps hate crime laws are one viable and reasonably harmless method for governments to fight hate.

On the other hand, care must be taken in drawing conclusions from this study. There were a number of factors that compromised the study’s external validity. Foremost among those factors was the design of the study itself: Participants read a summary of a case, rather than sitting through an actual trial, and the decisions were made by individual jurors, rather than juries after deliberation. Furthermore, many of the statistical findings of this study were nonsignificant, and great care should be taken in interpreting nonsignificant findings. They may be due to such factors as Type II statistical error, rather than reflecting “true” results.

However, it must be remembered that this was the first study to examine decisions in hate crime cases. As such, it should be considered somewhat exploratory. Its greatest strength is that it suggests many avenues for future research.

At the same time, however, this study does begin to answer some important questions about the operation of hate crime laws. The conclusions that can be drawn from this study about the role of the offender’s race are complex. To begin with, it seems clear that people are more likely to identify a crime as hate motivated when the offender and victim are of different groups, in contrast to when they are of the same group. There is some logic to this: It does seem likely that people more often harbor hatred of groups other than their own.

On the other hand, there is danger in the assumption that crimes between people of different groups are racially motivated. Purely as a matter of probability, the odds are that members of minority groups who commit crimes are more likely to victimize someone of another race than are members of the majority. If crimes between people of different groups are attributed to hate, then minorities are more likely to be accused of hate crimes. Furthermore, during an altercation, racial slurs may be exchanged when the people involved...
are of different races. This does not necessarily indicate, however, that race was the motive for the attack.

A real example of this was cited in the case of *UWM Post v. Board of Regents of the Univ. of Wis.* (1991), in which a federal district court held a campus hate speech code unconstitutional. According to the court, a White student had been disciplined under the code for calling a Black student “nigger” during an argument. Even the Black student asserted to the university that the other student had used the term as a general one of disrespect, as was done in many Black and racially mixed neighborhoods, and that the White student was not expressing racial animus (p. 1180).

It is not clear, however, exactly what cues lead a person to believe that an incident is a hate crime. Is it enough that the actors be of different groups? What part does evidence of racial slurs and hate group membership play? Constitutional problems may arise if people are convicted of hate crimes merely because of their speech and their group membership.

The law enforcement data (Gerstenfeld, 1998) suggest that Blacks are disproportionately likely to be named as both offenders and victims of hate crimes. The results of this study provide support for one explanation for this phenomenon: that crimes in which the offender and victim are of different races are apt to be labeled as hate crimes. This explanation need not suppose that people are being biased when they make these determinations. It might merely be a matter of statistics, as Blacks are disproportionately accused of crimes in general. Another explanation for the law enforcement data, however, was that because of stereotypes, people are more likely to interpret a crime as hate motivated when the offender is Black than when he is White. This study permitted an analysis of this hypothesis.

In fact, contrary to hypotheses, the bias against Black offenders was not evident in this study. When the offender and victim were of different races, the offender’s race did not affect any of the dependent variables. When they were of the same race, the offender’s race was a factor but in the exact opposite way as predicted: It was White defendants who were convicted more often, and participants were more certain of White defendants’ guilt.

There are several explanations for these unexpected results. One possibility, of course, is that any bias the jurors had was against Whites, rather than Blacks. This seems unlikely, however, as it runs counter to virtually all previous research.

A more real possibility is that the race factor was simply too overt or artificial in this study. Because the case was a written summary, rather than a real trial, the race of the defendant and of the victim had to be specifically mentioned. At trial, of course, these variables would generally be too obvious to bear mentioning; perhaps actually naming the races involved increases their conscious salience. Having been made consciously aware of the issue of race, participants might have chosen to act in a “politically correct” or socially desirable manner.

A third possibility is that the particular case that was used in this study did activate a stereotype—but the stereotype did not pertain to Blacks. In this case, the materials stated that the defendant belonged to a hate group. Although hate groups composed of members of minority groups do exist, when most people think of hate groups, they probably think of White supremacist groups (such as the Ku Klux Klan and the Skinheads). Therefore, evidence of a hate crime may actually be more consistent with the schema of Whites than of Blacks. To test this explanation, it would be useful to conduct an experiment in which no evidence of hate group membership was introduced.

The data in this study revealed another interesting relationship: Although Whites were more often convicted of hate crimes and participants were more certain of their guilt, they did not receive harsher sentences. In fact, it was Black defendants who received longer sentences, although this difference did not quite
reach a statistical level of significance. Clearly, this needs to be explored with larger sample sizes. If Black offenders do, indeed, receive harsher sentences, what could account for this pattern?

Devine (1989) suggests that when people become aware that their race schemas have been activated, those who are low in racism will make the effort to ignore those schemas. On the other hand, when people are not aware of the activation of the schema, even people low in racism will be affected by stereotypes. Perhaps that is what was operating here. When participants made decisions as to the defendant’s guilt, they were aware that race was an issue and tried not to be affected by stereotypes. When it came to sentencing, however, they may have been less aware of the stereotypes, and those stereotypes may have been stronger. After all, by the time they were able to choose a sentence, they had already decided that the defendant was a dangerous character, for they had already convicted him of assault or ADW and a bias crime. The idea of a dangerous criminal is highly consonant with stereotypes about Black men.

Thus, this study could be seen to provide support for Devine’s (1989) work. It does not provide strong support for the argument that minorities are harmed by hate crime laws, yet it does not entirely refute it, either. It is important that further research be conducted to examine these issues more closely.

One interesting finding of this study was that there was no relationship between participants’ ethnic groups and their responses to the juror task. White participants might have been hypothesized to react differently than members of minority groups. On the other hand, perhaps it is erroneous to separate Whites from “minority members”: California is very close to having no single ethnic majority. Instead, Whites will soon be the largest of a large number of minorities. A more accurate question, perhaps, is, “Do White participants react differently than Black participants?” There were not enough Black participants in this study to permit such a comparison: Only 6 identified themselves as African American. It would be interesting to repeat this study among large samples of several different ethnic groups, so that comparisons could be made.

Another issue addressed by this study was the relationship between participants’ level of racism and their responses in the juror study. It was hypothesized that levels of racism would not be related to decisions about hate crimes. This hypothesis was based on the work of Devine (1989), who suggested that even people low in racism might be affected by stereotypes if they were not aware that those stereotypes had been activated. In other words, it takes cognitive effort to counteract the effects of stereotypes on decision making.

The data in this study were as hypothesized, in that racism scores were not related to hate crime conviction or certainty of the defendant’s guilt. However, this study does not necessarily support Devine’s (1989) theory. In Devine’s study, both racist and nonracist participants made stereotype-based (i.e., racist) choices when they were unaware that they had been primed with racial cues. In the present study, neither participants high in racism nor those low in racism discriminated against the Black offenders in convictions or certainty of guilt. In fact, if anything, the participants were biased against White defendants.

The results are further clouded by two complications. First, people who scored low on the Modern Racism Scale gave significantly higher sentences for the hate crime than those who scored high. Second, Black offenders received higher sentences for the hate crime than did Whites, although this difference was not significant.

What might account for this pattern of results? One possibility, as discussed above, is that the matter of race was too salient in this case. In other words, when it came to deciding whether the defendant had committed a hate crime, participants were aware that their
stereotypes had been activated. When it came
to the sentencing decision, however, perhaps they were less aware of this. Another possi-
bility, also discussed above, is that the stereotype that was activated in this case was of
a White racist. The participants who were low
in racism were, perhaps, more appalled at what seemed to be a race-related attack and so imposed more severe sentences.

What does all of this imply about the hate
crime laws themselves? Unfortunately, what was
already a muddy issue has not been made much clearer. This study does not support the hypothesis that Black defendants will be treated
more harshly than White defendants in hate
crime cases, at least when there is evidence of
the defendant’s hate group membership. On the
other hand, the data do suggest that offenders
who choose victims of a different race are more likely to be convicted of a hate crime than those who choose victims of the same race. Because members of minority groups are, purely as a matter of chance, more likely to have victims of different groups, this means that minority
group members might be more likely to be convicted of hate crimes. Furthermore, this study implies nothing about decision making at other steps in the judicial process. Jurors have
as much time as they wish to deliberate and make their decisions and thus may have the
opportunity to become aware of, and to counteract, their biases. Police officers, wit-
tnesses, and victims, however, often must make
more immediate decisions (and often under
conditions of great stress) and so may be more likely to be influenced by stereotypes.

It is very important that more research be
conducted to study these issues. This research
may help inform policymakers as to the
necessity for hate crime laws, the impact (both positive and negative) of the laws, the potential
effects of drafting laws in different ways, the
best ways to implement the laws, and possible alternative or supplemental methods of redu-
ucing hate. As the first empirical research done on this topic, this study serves the purpose of clarifying which issues must be examined and
of identifying some potential confounds to be avoided in future work. Based on the results of
this study, it is possible to make several specific suggestions as to the direction that future investigations might take.

First, research ought to be done under
more realistic circumstances. Rather than
simply reading a summary of a case, participants should watch a simulation of an actual
trial, perhaps on videotape. The artificiality of
designs such as that used in this study has been
a source of criticism by judges and other legal scholars. Furthermore, participants should be
allowed to deliberate and make decisions as
juries, rather than individual jurors. There is
ample evidence that decision making in a group context is different from individual choices. A
larger sample size should also be used, so that
the study will be more sensitive to differences between conditions.

Another area that should be studied is the
effects of including information about the
defendant’s hate group membership. This
information would be legally relevant, as one
criticism of hate crime laws has been that they may result in people being punished because
they belong to hate groups (a constitutionally
protected activity), rather than because of
their actions. Furthermore, if evidence about
hate group membership were excluded, the
particular stereotypes that are most salient to participants might be different, and thus their responses might be different as well. Exclusion
of hate group evidence also increases the
realism of the case, as the majority of hate
crimes are committed by people who do not belong to organized hate groups.

The jury decision is only one of several
steps within the adjudication of a hate crime.
Before a case ever reaches a jury, decisions
have been made by victims, witnesses, police
officers, prosecutors, defense attorneys, and
judges. In fact, one criticism that has been
made of hate crime laws is that they permit too
much discretion on the part of prosecutors,
perhaps allowing the prosecutors’ own biases to operate (Hernandez, 1990). Certainly, very few hate crime cases ever go to court. Others have commented that enacting hate crime laws does not change the levels of prejudice of the people who enforce them (Greene, 1994). As stated above, there may actually be more opportunity for the effects of bias in the initial stages of a crime than there are once it goes before a jury. Therefore, research should be conducted that focuses on these other aspects of the justice system.

There is little question that when a person is singled out for criminal attack because of his or her race, religion, sexual orientation, or ethnicity, it can be emotionally devastating for the victim and for the community. A legislature rushing headlong into passing hate crime laws, however, will not necessarily assuage this devastation, nor will it necessarily deter future acts. This is particularly true if the laws themselves only serve as a vehicle for even more bias.

This study should be considered a beginning exploration of the real-life effects of hate crime laws. As the constitutional arguments have reached a logical and legal dead end, inquiry should turn to other matters, including the issues addressed by this study. It is hoped that this study will serve as an impetus for a great deal of further research into hate crimes and hate crime laws. If policy makers are more informed about the reality of these acts and these laws, then perhaps they will be able to shape more effective methods of eliminating hate.

Notes

1. The facts of the case were adopted from a real incident that occurred in Oregon in 1992, in which a young male Skinhead brutally attacked an intoxicated Black man who may have been harassing the Skinhead’s girlfriend at a convenience store. An ambiguous case was deliberately used: In a pilot study, 14 of 26 participants concluded that this was a hate crime. Had the case been unambiguous, any racial effects would have been masked. Also, in real life it is very often not clear whether an incident was hate motivated.

2. This would be true in a real life case, because assault is a lesser included offense of assault with a deadly weapon. A defendant cannot be convicted of both an offense and a lesser included offense.

3. The combinations with the Jewish offender and with the Jewish victim were included to permit a more careful testing of the hypothesis. If only Black and White offenders and victims were used, and a difference was found between them, it would not be certain whether the difference was due to stereotypes about Blacks or was due to minority status per se. A Jewish actor was chosen for two reasons. First, using a Jewish actor contributes to the realism of the case, as Jews are actually common targets of hate crimes. Furthermore, the commonly held stereotypes about Jews are quite different from those about Blacks and primarily focus on money issues rather than crime. Therefore, if stereotyping, rather than minority status, is what influences juror decisions, it would be expected that Jewish and Black offenders would receive different verdicts.

4. This was due, in part, to the fact that relatively few people who had offenders and victims of the same race found the defendant guilty of a hate crime; therefore, relatively few had the opportunity to choose a sentence.

5. It should be noted that levels of hate crime determination and certainty of guilt were at least as high for Jewish offenders as for White offenders. Because Jews are not often associated with hate groups in the media, the explanation for this is unclear. It may be due to general lack of knowledge about Jewish people (the area in which the study was conducted has a very small Jewish population) or perhaps partly due to knowledge of Israeli extremist groups.

6. For a discussion of how this issue relates to jury size, see the Supreme Court case of Ballew v. Georgia (1978).

References


UWM Post v. Board of Regents of the Univ. of Wis., 774 F. Supp. 1163 (E.D. Wis. 1991).
DISCUSSION QUESTIONS

1. Why might people be better able to remember or recall negative stereotypes about members of races/ethnicities other than their own?

2. What evidence does Gerstenfeld provide in support of her statement that “the most common theme of stereotypes about Blacks is that they are aggressive, hostile or criminal”?

3. What did the Craig and Waldo study reveal about perceptions of hate crimes?

4. What were the results of the Gerstenfeld study? Are they consistent with the concerns of critics of hate crime statutes, who argue that these laws may be used more frequently against Blacks than against Whites?

5. Are there any methodological problems with the research design used in this study? How might the design be improved?

READING

Capital juries in the State of Texas must answer three questions in the affirmative in order to sentence a defendant to death. Of these, the most important is “whether there is a probability that the defendant would commit criminal acts of violence that would constitute a continuing threat to society.” The jurors, in other words, must predict the offender’s future dangerousness. This study examines the degree to which these predictions are accurate. The authors compare the institutional and postinstitutional behavior of two groups of offenders: 107 defendants in capital murder cases who were sentenced to life in prison and 92 offenders whose death sentences were later reduced. The results of their analyses raise questions about the ability of jurors to make accurate predictions of future dangerousness.

Gazing Into the Crystal Ball

Can Jurors Accurately Predict Dangerousness in Capital Cases?

James W. Marquart, Sheldon Ekland-Olson, and Jonathan R. Sorensen

I. Introduction

Between 1924 and 1972, the state of Texas executed 361 persons for the crimes of murder, rape, and armed robbery. Prosecutors, jurors, and judges had wide discretion in deciding whether to execute an offender. No one raised a serious legal challenge to the death penalty.

until 1972, when the United States Supreme Court decided *Furman v. Georgia* and its companion case *Branch v. Texas* (408 U.S. 238). In this landmark decision, the Court declared that capital punishment as administered constituted cruel and unusual punishment because of the broad disparity and arbitrariness in sentencing practices. This decision invalidated death statutes in thirty states and the District of Columbia.

Almost immediately, states began restructuring their capital statutes to comply with *Furman*. In Texas, House Bill 200 was passed by the sixty-third legislature in an attempt to limit discretion in capital sentencing; it became effective on June 14, 1973 (Kuhn, 1974). This new statute limits capital punishment to offenders who knowingly and intentionally commit murder in one of five circumstances.⁴ A sixth circumstance was added in 1985.² When a person is found guilty of murder and at least one of these circumstances exists, a punishment hearing is held. The jury in the punishment stage of the bifurcated proceedings must address the following three questions:

1. whether the conduct of the defendant that caused the death of the deceased was committed deliberately and with the reasonable expectation that the death of the deceased or another would result;

2. whether there is a probability that the defendant would commit criminal acts of violence that would constitute a continuing threat to society; and

3. if raised by the evidence, whether the conduct of the defendant in killing the deceased was unreasonable in response to the provocation, if any, by the deceased (*Tex. Crim. Proc. Code* art. 37.071b (1985)).

The state must prove these facts beyond a reasonable doubt.³ The jury must answer “yes” to all three questions before the death penalty may be imposed. Affirmative responses to the questions result in an automatic death sentence. A negative answer to any question results in automatic life imprisonment.⁴ Texas law also provides for a mandatory review by the Court of Criminal Appeals (*Tex. Crim. Proc. Code* art. 37.071 c-f (1985)). The United States Supreme Court upheld the Texas statute in *Jurek v. Texas* (428 U.S. 262 (1976)).

Questions 1 and 3 are nearly always answered affirmatively. Of the seventy-four capital murder cases tried between June 14, 1973, and February 4, 1976, eighteen resulted in life sentences (3 were from plea bargains). Of the fifteen that went through a punishment hearing, the jurors in every instance answered “no” to the second question (Crump, 1977: 535). In only three of the fifteen cases did jurors also answer “no” to the first question. Our data on cases between 1974 and 1988, discussed in a later section, reveal the same pattern (see also Black, 1976; Davis, 1976; Scofield, 1980). Thus, it is Question 2 that prevents capital punishment from being mandatory and hence unconstitutional. In other words, it is the prediction of future dangerousness that is the determining factor between a life and a death sentence in Texas.

No research has measured the accuracy of juror predictions of future dangerousness in capital murder trials. In this paper, after a review of the literature, we shall first examine the evidence on which predictions are made in response to Question 2 of the Texas capital statute and then examine the evidence that offenders sentenced to death did in fact “constitute a continuing threat to society.” This latter check on jury predictions of dangerousness is made possible through a “natural experiment” in which we examine the institutional and post-release behavior of ninety-two persons sentenced to death in Texas who later had their sentences reduced (by commutation or otherwise) in 1974–88. In all ninety-two cases, the jury answered “yes” to the continuing threat question, deciding (and
predicting) that these individuals were too dangerous to be permitted to live. The behavior of this group is then compared to all defendants ($N = 107$) in capital murder trials who were sentenced to life from 1974 to 1988 because juries had failed to affirmatively answer Question 2 in the punishment proceeding.

### II. Predicting Future Violence

The criminal justice system regularly depends on three types of prediction. The first is anamnestic, with predictions based on past behavior of the individual (see, e.g., Dix, 1981). The second is actuarial, with predictions based on the behavior of persons with similar characteristics (e.g., drug courier profiles). The third, and perhaps most common, is clinical, with predictions based on the clinical judgment of an expert, usually a psychologist or psychiatrist ($Barefoot v. Estelle$, 463 U.S. 880 (1983)).

Predictions of future behavior are routinely accepted by the criminal justice system ($Jurek$). While all prediction is difficult, violent behavior is relatively infrequent, and the low base rate makes accurate predictions particularly problematic. As many researchers have observed, overprediction (a high rate of false positives) is the norm (see Floud and Young, 1982; Morris and Miller, 1985; Monahan, 1981).

Studies measuring the accuracy of predictions of violence among the mentally ill illustrate this pattern of overprediction. Steadman and Cocozza (1974) examined the effect of $Baxstrom v. Herold$ (328 U.S. 107 (1966)), which resulted in the transfer of 967 patients from a hospital for the criminally insane to civil hospitals. Only 3 percent of those committed to civil hospitals were violent enough to be returned to maximum security institutions. About one-fifth of those released were arrested (they averaged two and one-half years in the community), but only 2 percent were ever convicted of subsequent violent crimes. $Thornberry and Jacoby$ (1979) followed the 586 patients released from a maximum security hospital for the criminally insane as a result of $Dixon v. Attorney General of the Commonwealth of Pennsylvania$ (325 F. Supp. 966 (M.D. Pa. 1971)). Like Steadman and Cocozza, they found that a minority of the released patients were seriously assaultive during confinement. More important, only 14 percent of the former patients assaulted others in the free community within four years after their release.

One prior study has assessed dangerousness among what is arguably the most dangerous of populations: capital offenders. Marquart and Sorensen (1988; in press) examined the level of violent behavior over fourteen years by Texas offenders whose death sentences were reversed in $Furman$. They found that although prison personnel claimed that the group of $Furman$ commutes would pose a disproportionate threat to prisoners and guards, and to citizens in the event of parole, this threat did not materialize. Over the fourteen years, one commutee committed a second murder while on parole. The majority of the offenders were model inmates; among those paroled, most adjusted to the “free world” without serious arrest or conviction.

The Texas death penalty statute studied by Marquart and Sorensen required no explicit predictions of future dangerousness. Under the current post-$Furman$ statute, however, juries must make an explicit prediction about the dangerousness of the offender. The question posed here is whether such predictions are in fact related to future behavior.

### III. A Test of Jury Predictions of Dangerousness

To test the accuracy of jury predictions of dangerousness, we compared 92 offenders sentenced to capital punishment who subsequently had their sentences commuted or reversed to capital offenders who had received a life sentence. A control group of inmates—those
convicted of capital murder but sentenced to life imprisonment—was extracted from the population of murderers who entered the Texas Department of Corrections (TDC) from 1974 to 1988. This control cohort \( N = 107 \) consists only of those prisoners convicted of capital murder who had their life sentences determined by juries during the punishment proceedings. Defendants found guilty of capital murder but given life imprisonment as a result of a plea bargain were not included in this analysis. Texas law also stipulates that juveniles (those who are 15 or 16 years old at the time of the offense) certified to stand trial as adults in capital cases may be found guilty of capital murder; however, they are automatically sentenced to life after a finding of guilt rather than having their penalties determined by juries. These cases were also excluded from the analysis (see Stadnik, 1989). We also excluded 19 offenders who were convicted of capital murder and sentenced to life imprisonment but for whom the jury predicted dangerousness by responding affirmatively on Question 2. These 19 offenders will be included in a later analysis in this paper. In short, the control group represents those 107 lifers who, like the 92 prisoners whose sentences were commuted or reversed, experienced both stages in the Texas capital sentencing scheme.

Of the final group of those released from death row \( N = 92 \), the majority (82) were released by commutation; this group also includes those who were retried and sentenced to prison and those who had their original cases dismissed. Commutations were granted mostly in the 1980–83 period due to appellate rulings on jury selection procedures and questions of admissible evidence (see, e.g., Adams v. Texas, 448 U.S. 38 (1980); Estelle v. Smith, 451 U.S. 454 (1981)). Prior research suggests that these commutations were supported by local prosecutors who felt they might lose an expensive retrial (Ekland-Olson, 1988). The commutations usually led to a sentence of life imprisonment. Some death row inmates, however, were either retried and received non-capital sentences or commuted to serve time on concurrent sentences that ranged from six years to life. Two had their cases dismissed and served no additional prison time after their release from death row.

Once the final list of persons released from death row and the life-sentence capital inmates was obtained, three data sources were utilized: TDC records, the records of the Texas Board of Pardons and Parole, and trial transcripts at the court of criminal appeals. Demographic information, prior criminal history, institutional conduct, and current status were recorded for each of the releasees based on a manual search of the inmates’ institutional files at the TDC’s Classification Office. Post-institutional information was gathered on those offenders released on parole through the Texas Board of Pardons and Parole. From the court transcripts we gathered psychiatric testimony and other insights into the evidence the jury had considered in determining that the defendant constituted a continuing threat to society. In the following sections, we shall inspect this evidence and then examine the institutional and post-release behavior of the commutees during 1974–88 to determine the degree to which these offenders did in fact represent a continuing threat of violence to society.

**IV. Jury Predictions of Dangerousness**

In the sentencing phase of a Texas capital murder trial, the jury must predict that the defendant will “commit criminal acts of violence that would constitute a continuing threat to society” if it is to impose capital punishment. This must be established beyond a reasonable doubt. What evidence do jurors use in reaching this conclusion?
A. Prior Record

One factor juries consider is the defendant’s prior criminal history (an anamnestic prediction). Table 1 displays criminal data gathered from extensive case files maintained by the Board of Pardons and Parole and the TDC, and supplemented by cross-checks with records from the Texas Department of Public Safety. Researchers disagree about which variables to use for prior record (see Tonry, 1987). Some scholars maintain that to obtain a “complete” picture of a defendant’s criminal history arrests, indictments, and all other “contacts” with the system should be reported. Others insist that only conviction data should be used as the most accurate depiction of previous criminality. Table 1 reports both.

Table 1 shows that the criminal backgrounds of former death row inmates and those who were sentenced to life were similar. These data suggest that the juries’ decision to sentence to death or life was not based primarily on the defendant’s prior record. In terms of prior incidents, nine out of ten inmates from both groups had some contact with the police (e.g., under investigation for a crime). Well over three-quarters of the offenders from each group had no convictions for violent assaultive behavior. If convictions for violent offenses had been the sole factor used to predict future dangerousness, only 18 percent of the death-sentenced and 17 percent of the life-sentenced (control cohort) prisoners could have been considered threats to society. Only three of the former death row and two control cohort inmates had a prior murder conviction. In addition, two-thirds of each group had never been imprisoned. These conviction data suggest that most offenders in both groups were not violent, repetitive criminals. Instead, based on conviction data, they could be best described as property offenders who eventually committed a capital homicide.

B. Instant Offense

Jurors need not focus solely on a defendant’s prior history of violent crime, for they are also presented with extensive and sometimes graphic details about the immediate offense. All capital murders are not treated equally by prosecutors and jurors. Ekland-Olson (1988) has shown that rape-homicide cases are more likely to result in a death sentence than are robbery-murders. It is reasonable to assume that some of this differential final disposition is due to the jury’s perception that the individual who rapes and then kills is a more violent threat and thus more deserving of execution than one who robs and kills. Similarly, the level of violence may vary within various types of murders. Because the prosecution usually presents this evidence, jurors are quite aware that the offense involved an unusual amount of brutality. On these facts alone, they may make predictions about the violent potential of the offender in the future.

Table 2 presents data on the type of capital murder for which the offender was indicted. At least 50 percent of each group were convicted of robbery-murders. The two groups were also very similar in the rest of the felony murder types, with no major or significant difference. From these data it is apparent that jurors did not rely solely on the type of homicide in making predictions about future dangerousness. They were confronted with fairly extensive criminal records and at times with stark patterns of violence in the instant offense.

C. Expert Opinion

A review of the trial transcripts suggests that juries also used psychiatric testimony in making a prediction about the defendant’s future dangerousness. We reviewed twenty cases involving death-sentenced inmates in which expert clinical testimony was used. The
testimony generally followed the same pattern in which defendants were labeled “sociopaths,” or people who felt no remorse for their acts and were highly effective manipulators. When asked if there was a probability that the defendant would commit criminal acts of violence that would constitute a continuing threat to society, psychiatrists typically answered “yes,” despite defense counsel objections that the question invaded the jury’s province to answer that same question. The following testimony from different cases reveals this pattern:

He will continue his previous behavior, there is no reason to think he will change this in any way (Adams v. Texas, 1409 (1977)).

Well, again from a medical standpoint or a psychiatric standpoint, [the defendant] . . . is going to go ahead and continue his previous behavior and pose a very serious threat to the lives of other human beings as long as he is allowed to operate within our society (Hughes v. Texas, 2563–64 (1975)).

Well, certainly at times [the defendant] . . . can be very pleasant and these type of things, but no matter what society he is in with regard to his destructive behavior, he will continue to exhibit this, and this type of behavior will only continue, no matter where he might be (Robinson v. Texas, 921 (1975)).

Some psychiatrists specialize in capital murder cases. One such psychiatrist, James P. Grigson, has been nicknamed “Dr. Death” and has testified for the prosecution in nearly one-third of the Texas cases involving death row inmates (Richards, 1988; Ewing, 1983). Grigson’s very strong opinions are illustrated by his testimony in cases in which the offender was sentenced to death but later received a commutation:

Prosecutor: In your opinion, will he kill again?
Grigson: Yes he certainly will if there is any way at all he was given the opportunity to, he certainly will. . . . Well, society can restrict him, confine him; yet even in areas of confinement, this behavior [killing people] will continue (Boulware v. Texas, 1991–92 (1974)).

Prosecutor: Can you tell us whether or not, in your opinion, having killed in the past, he is likely to kill in the future, given the opportunity?
Grigson: He absolutely will, regardless of whether he’s inside an institutional-type setting or whether he’s outside. No matter where he is, he will kill again.

Prosecutor: Are you telling me, then, that even if he were institutionalized, put in a penitentiary for a life sentence—would he still be a danger to guards, prisoners, and other people around him?
Grigson: Yes. He would be a danger in any type of setting, and especially to guards or to other inmates. No matter where he might be, he is a danger (Rodriguez v. Texas, 2136 (1978)).

Prosecutor: Say, if a person were put in a rigid setting, would you think these acts of violence would continue, if given an opportunity, even in the rigid setting, say of perhaps prison guards?
Grigson: Oh, absolutely. It certainly would continue.
Prosecutor: So, a person like the defendant, if given the opportunity, would be a menace to even the prison guards?

Grigson: Yes. As well as other prisoners.

Prosecutor: Do you feel that he would be a continuing threat to whatever society he might be in?

Grigson: Yes. He certainly will be (Collins v. Texas, 2083–84 (1975)).

Implicit in these answers is Grigson’s firm belief that there is no hope of treating, curing, or rehabilitating these offenders, as the following remark illustrates:

A lot of research is being done and a lot of money has been spent, a lot of people are involved in trying to develop something but at the present time and thus far we can see medicine, psychiatry has absolutely nothing

<table>
<thead>
<tr>
<th>Type of Past Activities</th>
<th>Released from Death Row (N = 92)</th>
<th>Initially Sentenced to Life Imprisonment (Control Cohort) (N = 107)</th>
</tr>
</thead>
<tbody>
<tr>
<td>Prior incidents(a)</td>
<td></td>
<td></td>
</tr>
<tr>
<td>0</td>
<td>11%</td>
<td>9%</td>
</tr>
<tr>
<td>1–2</td>
<td>24%</td>
<td>21%</td>
</tr>
<tr>
<td>3–5</td>
<td>30%</td>
<td>29%</td>
</tr>
<tr>
<td>5 or more</td>
<td>35%</td>
<td>41%</td>
</tr>
<tr>
<td>Prior violent incidents(b)</td>
<td></td>
<td></td>
</tr>
<tr>
<td>0</td>
<td>60%</td>
<td>69%</td>
</tr>
<tr>
<td>1–2</td>
<td>29%</td>
<td>25%</td>
</tr>
<tr>
<td>3 or more</td>
<td>11%</td>
<td>6%</td>
</tr>
<tr>
<td>Convictions for UCR violent crimes(c)</td>
<td></td>
<td></td>
</tr>
<tr>
<td>0</td>
<td>82%</td>
<td>83%</td>
</tr>
<tr>
<td>1–2</td>
<td>15%</td>
<td>16%</td>
</tr>
<tr>
<td>3 or more</td>
<td>3%</td>
<td>1%</td>
</tr>
<tr>
<td>Convictions for UCR property crimes(d)</td>
<td></td>
<td></td>
</tr>
<tr>
<td>0</td>
<td>54%</td>
<td>61%</td>
</tr>
<tr>
<td>1–2</td>
<td>21%</td>
<td>27%</td>
</tr>
<tr>
<td>3 or more</td>
<td>25%</td>
<td>12%</td>
</tr>
<tr>
<td>Adult incarcerations</td>
<td></td>
<td></td>
</tr>
<tr>
<td>0</td>
<td>66%</td>
<td>69%</td>
</tr>
<tr>
<td>1–2</td>
<td>27%</td>
<td>28%</td>
</tr>
<tr>
<td>3 or more</td>
<td>7%</td>
<td>3%</td>
</tr>
</tbody>
</table>

*a* Includes every known contact with a police agency, regardless of whether it resulted in an official disposition.

*b* Includes all violent arrests and contacts with the police from serious (e.g., murder) to minor (e.g., fighting).

*c* Includes murder, aggravated assault, armed robbery, and rape.

*d* Includes burglary, auto theft, arson, and larceny.
whatever to offer that modifies or improves the sociopathic behavior. We don’t have anything (Moore v. Texas, 3269 (1974)).

Whatever the merits of the positions taken by psychiatrists in capital murder trials, the American Psychiatric Association (APA), in Barefoot v. Estelle (463 U.S. 880 (1983)), stated that predictions such as “100% certainty that the defendant will kill again” are prejudicial to the defendant (see also Worrell, 1987; Green, 1984; Levine, 1984). The APA, in Barefoot, concluded that “psychiatric testimony of future dangerousness impermissibly distorts the fact-finding process in capital cases.” According to some psychologists (Faust and Ziskin, 1988), clinicians are no more accurate in their predictions than lay persons. Currently many defendants on death row in Texas are contesting psychiatric predictions on which their sentences were based (Dallas Morning News, April 10, 1988: 1).

Psychiatrists are often presented with hypothetical situations that essentially present the facts of the case. This increasingly popular method allows psychiatrists to predict future behavior without having examined the defendant (see Appelbaum, 1984). The hypothetical describes the prior criminal acts committed by the defendant and the details of the instant offense. Even though most of the defendants’ previous offenses are non-violent, the prosecution uses these crimes to demonstrate a pattern of criminal behavior as well as a failure to be rehabilitated. In the punishment stage of one death-sentenced inmate, the state's attorney referred to the defendant’s failure to be rehabilitated from using drugs:

**Prosecutor:** You take what we know about him: He's been to the penitentiary. Did he get off dope

<table>
<thead>
<tr>
<th>Table 2</th>
<th>Type of Homicide</th>
</tr>
</thead>
<tbody>
<tr>
<td><strong>Homicide Characteristics</strong></td>
<td><strong>Released from Death Row (N = 92)</strong></td>
</tr>
<tr>
<td>Elements of capital murder</td>
<td></td>
</tr>
<tr>
<td>Robbery</td>
<td>50%</td>
</tr>
<tr>
<td>Police officer</td>
<td>14%</td>
</tr>
<tr>
<td>Rape</td>
<td>12%</td>
</tr>
<tr>
<td>Burglary</td>
<td>11%</td>
</tr>
<tr>
<td>Hired/paid killer</td>
<td>8%</td>
</tr>
<tr>
<td>Kidnapping</td>
<td>4%</td>
</tr>
<tr>
<td>Other*</td>
<td>1%</td>
</tr>
<tr>
<td>Weapon involved</td>
<td></td>
</tr>
<tr>
<td>Firearm</td>
<td>74%</td>
</tr>
<tr>
<td>Knife</td>
<td>11%</td>
</tr>
<tr>
<td>Club</td>
<td>5%</td>
</tr>
<tr>
<td>Strangulation/beating</td>
<td>10%</td>
</tr>
<tr>
<td>Relationship to victim</td>
<td></td>
</tr>
<tr>
<td>Stranger</td>
<td>75%</td>
</tr>
<tr>
<td>Non-stranger</td>
<td>25%</td>
</tr>
</tbody>
</table>

* a. Includes murder to collect on insurance policies, murder during arson, and murders involving multiple victims.
when he went to the pen for dope? No. He goes on to heroin. You take that evidence, you stick it together with . . . [the details of the offense], and then you ask yourself is there a probability, more than not, that if this man were allowed to reenter society he would commit criminal acts of violence? Is there any doubt in your mind whatsoever?

Nobody can say for certain, but we can darn sure say there’s a probability. There’s no doubt about that, and we can darn sure say this was deliberate killing. Between this dough hook and this roller and this 10-inch butcher knife, that’s about as deliberate as it gets (Grijalva v. Texas, 6663–4 (1978)).

While there is little direct evidence that such testimony affects jury decisions, it is regularly presented, and the Supreme Court has at least been willing to assume that the testimony affects jury decisions (Barefoot at 905).

D. Other Bases for Predicting Dangerousness

The state’s attorneys consistently cited the three kinds of evidence—the testimony of psychiatrists, the past criminal acts of the defendant, and especially the heinousness of the immediate offense—when concluding that defendants are a continuing threat to society. They also appealed to the civil duty of the jurors and their willingness (established during voir dire) to impose the death penalty in an appropriate case. The following excerpts from two cases typify the attorneys’ arguments:

Now, a person that will . . . [commit that type of act] has got to be a threat to society. It has got to be a threat to all of us, to our wives, to our families, to everybody in this country. What would be more of a threat to society, is he going to stop, is he going to stop with these two? We don’t know. How do we know? Are you going to go into the jury room and say two is okay, I don’t think he will do it again? (Granger v. Texas, 6 (1979)).

I tell you now that unless you do observe the evidence, and base your decision, and find beyond a reasonable doubt and find the answer to be yes in this case, that upon your heads will lie the next man that’s dead due to . . . [the defendant’s] hands (Fortenberry v. Texas, 4719 (1977)).

In summary, jurors in capital cases must decide whether the offender represents a continuing violent threat to the community based on the facts of the case, including the offender’s prior record. In some cases they are also confronted with expert psychiatric testimony and dramatic appeals to their civil duty.

V. Evidence of Dangerousness

We next examine the behavior of the ninety-two prisoners sentenced to death in part because the jury determined they represented a continuing threat, but who were later either released into the general prisoner population or paroled to the broader community.

A. Institutional Behavior

To evaluate the institutional behavior of these inmates, we compared their behavior with three comparison groups: (1) the control group of all 107 prisoners convicted of capital murder during 1974–88 who were sentenced to life imprisonment, but not predicted to be
dangerous during the punishment stage of
their trials; (2) the entire prison population in
1986; and (3) all inmates housed in a single
high security prison (the Darrington Unit) in
the TDC in 1986. If jurors acting under the
current statute are effective at predicting the
future dangerousness of convicted murderers,
we would expect that the 92 inmates under the
sentence of death who were later released from
death row would have a record of more violent
institutional conduct than any of the com-
parison groups.

It is difficult to make direct compar-
isons between these groups due to the differ-
ences in time spent in prison, or the “at risk” period.
However, it is possible to make some general
observations regarding prison behavior as
well as the degree to which the commutees
constituted a menace or disproportionate
threat to other inmates and the custodial staff.
The best indicator of a “continuing threat”
concerns murders and violent assaults, espe-
cially those involving weapons. The data in
Table 3 reveal that the yearly rate of weapon-
related rule violations for those released from
death row was somewhat lower than the rate
for other groups. One commuted capital
murderer (Noe Beltran), however, was involved
in a gang-related prison murder in July 1988.
Beltran, a member of the Hispanic prison gang
the Texas Syndicate (TS), and several fellow
gang members murdered another TS member
in a power struggle. He thus became the first
inmate in Texas since the inception of state-
imposed executions in 1924 to be released from
death row and returned with a second death
sentence. However, murder in prison was not as
common as the clinical predictions promised.
Nor were the death row releasees, compared to
the other groups, more violently assaultive or
predatory, or a disproportionate threat to other
inmates and staff.

We examined the evidence of positive
institutional behaviors as well as rule-breaking
activity, including time-earning status or class,
good time accumulated, and program
enrollment. As of January 1, 1989, approx-
imately 90 percent of both the former death

---

**Table 3**  Reported Serious Violent Rule Violations\(^a\)

<table>
<thead>
<tr>
<th>Prison Rule Infraction</th>
<th>Released from Death Row (N = 90^a)</th>
<th>Life Sentence (N = 107)</th>
<th>Systemwide (1986) ((N = 38,246))</th>
<th>Darrington (1986) ((N = 1,712))</th>
</tr>
</thead>
<tbody>
<tr>
<td>Murder of an inmate</td>
<td>1 (.18)</td>
<td>0</td>
<td>3 (.007)</td>
<td>1 (.05)</td>
</tr>
<tr>
<td>Aggravated assault on an inmate with a weapon</td>
<td>4 (.72)</td>
<td>7 (.90)</td>
<td>266 (.69)</td>
<td>23 (1.3)</td>
</tr>
<tr>
<td>Sexual abuse of an inmate by threat</td>
<td>0</td>
<td>1 (.13)</td>
<td>48 (.12)</td>
<td>1 (.05)</td>
</tr>
<tr>
<td>Murder of an officer</td>
<td>0</td>
<td>0</td>
<td>0</td>
<td>0</td>
</tr>
<tr>
<td>Striking an officer</td>
<td>4 (.72)</td>
<td>12 (1.56)</td>
<td>4144 (10.8)</td>
<td>308 (17.9)</td>
</tr>
<tr>
<td>Total infractions</td>
<td>9 (1.61)</td>
<td>20 (2.60)</td>
<td>4461 (11.66)</td>
<td>333 (19.54)</td>
</tr>
</tbody>
</table>

\(^a\) The first number represents the actual number of infractions; the number in parentheses is the average yearly rate per 100 inmates.

\(^b\) Excludes institutional rule violations by two commutees who were discharged from death row to the community and did not serve any
time in the general prison population.
row inmates and the life-sentenced control cohort who were still incarcerated held trusty status. Further, four of the former death row prisoners received a total of thirteen furloughs (a 4-day stay with family members); two life-sentenced inmates had a total of fourteen furloughs. Inmates from both groups completed these furloughs without incident. Two-thirds of both groups have never been in solitary confinement, a punishment for serious disciplinary infractions. One former death row inmate graduated cum laude with a bachelor’s degree in psychology from Sam Houston State University in May 1988. One-fifth of offenders in both groups (27% of commuted capital offenders and 22% of the control group) had clean records with no minor violations of any type recorded during their prison stay.

Despite these “glowing marks,” some former death row prisoners, albeit a minority, have been disciplinary problems. Eight have been identified as prison gang members, and they have been confined indefinitely in administrative segregation or high security housing areas. Six control group members have been identified as gang members and have been housed in administrative segregation wings.

B. Post-Release Behavior

Of the ninety-two commutees, seventy-eight remain in prison. Of the fourteen who are no longer in prison, two died in the general prisoner population; another died while on parole in a construction accident in late 1987 more than one year after his release. The other eleven include one inmate who was transferred to a federal prison in New York in 1977 and was paroled in 1983. Four other inmates discharged their sentences. The remaining six inmates were paroled. As of April 1989, the average time spent in the broader community by these eleven inmates was 4.5 years. One of the six was returned to prison for a serious violent crime.

Of the life-sentenced control cohort, ninety-four (88%) have never been released to the free society; one died in prison. Of the remaining thirteen, four had their cases reversed or dismissed. Nine have been paroled, spending an average of four years (at this writing) in the outside community; one of the nine parolees was returned to prison. This inmate has been released and returned to prison four times over the past seven years for the possession of drugs, aggravated assault, and aggravated robbery. He is currently out on parole.

C. Jury Predictions Among Life-Sentenced Prisoners

The difference between the two categories of capital offenders we are examining lies in the responses juries gave to the three questions in the sentencing phase of the bifurcated trial. Table 4 presents the pattern of these responses among the 126 inmates who received a life sentence after being convicted of capital murder. These data show that the decision to give life versus death in Texas rests squarely on Question 2—future dangerousness. In 85 percent ($N = 107$) of the cases (the control cohort), the jury failed to predict that the defendant would pose a continuing threat to society. This finding parallels Crump’s (1977) research conducted over a decade ago.

Table 5 presents the prison behavior of all 126 life-sentenced inmates in response to Question 2. Of those 19 inmates jurors predicted would be a continuing violent threat, 4 (21%) engaged in violent assaultive behavior in the prison setting, while 15 (79%) did not commit any aggressive or predatory acts as prisoners. Among the inmates predicted not to be continuing threats, 10 (12%) did in fact commit violent acts. If the juries predicted no future prison violence for all cases, they would have been accurate in 110 (87%) instances, with no false positives and 13 percent false negatives. Instead, juries made correct predictions in 76 percent of the 104 cases, with 14 percent false positives and
10 percent false negatives. Even when the jury was deadlocked (badly split such as 6–6, 7–5, or 8–4) on the question of dangerousness, the majority of the inmates were not violent in prison.

Nevertheless, it can be argued from these data that Texas juries in capital cases have some predictive power. In this sense, the law is working successfully. However, there is a good deal of hidden irony. For example, one capital offender, Noe Beltran, was given a death sentence but later received a commutation. The Texas Court of Criminal Appeals reversed his death sentence, ruling there was insufficient evidence to predict future dangerousness. In 1988, however, Beltran murdered a fellow gang member and received a new death sentence. On the other hand, in the celebrated case represented in *The Thin Blue Line* (1988), Randall Dale Adams was predicted (by Dr. James Grigson) to be a danger, spent time on death row, had his death sentence commuted to life, and was recently released from prison. It is widely acknowledged that Adams is innocent. Finally, one life-sentenced capital offender who was predicted not to be a future threat has been released from prison and returned several times for committing new violent felonies. It is very difficult to resolve the implications of these findings. Predicting future dangerousness appears to depart little from gazing in a crystal ball when it comes to determining the fate of capital murderers.

### VI. Conclusion

The Texas capital statute, enacted in 1973, was an attempt to restrict the arbitrary and capricious imposition of the death penalty. The new statute was created to limit capital punishment to society’s most dangerous offenders. Question 2, which asks jurors to predict whether there is a probability that the defendant would commit future criminal acts of violence, is clearly the major sentencing question that Texas jurors decide.

This paper analyzed the behavior of ninety-two persons, each of whom jurors judged to be a continuing violent threat to society. The former death row offenders spent an average of just over six years in the general prison population. A minority of these inmates committed a handful of violent offenses at rates comparable to or lower than other inmates. One, however, killed another prisoner in a gang-related murder. Overall these former death row prisoners were not a disproportionate threat to the institutional order,

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**Table 4**  
<table>
<thead>
<tr>
<th>Response</th>
<th>Question 1</th>
<th>Question 2</th>
<th>Question 3a</th>
</tr>
</thead>
<tbody>
<tr>
<td>Yes</td>
<td>76% (96)</td>
<td>15% (19)</td>
<td>91% (29)</td>
</tr>
<tr>
<td>No</td>
<td>21% (27)</td>
<td>67% (85)</td>
<td>6% (2)</td>
</tr>
<tr>
<td>Deadlock</td>
<td>2% (3)</td>
<td>17% (22)</td>
<td>3% (1)</td>
</tr>
</tbody>
</table>

a. This question was asked in only 25% of the cases.

b. The number in parentheses is the number of defendants.

**Table 5**  
<table>
<thead>
<tr>
<th>Prison Behavior</th>
<th>Predicted to Be a Continuing Threat</th>
<th>Violent in prison</th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td>Yes</td>
<td>No</td>
</tr>
<tr>
<td>Violent in prison</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Yes</td>
<td>4a (21%)</td>
<td>10b (12%)</td>
</tr>
<tr>
<td>No</td>
<td>15 (79%)</td>
<td>75 (88%)</td>
</tr>
<tr>
<td>Total (N = 126)</td>
<td>19</td>
<td>85</td>
</tr>
</tbody>
</table>

a. These are actual figures rather than percentages.

b. One of these 10 prisoners was released on parole, committed a subsequent armed robbery, and was returned to prison.
other inmates, or the custodial staff. Indeed, their total rate of assaultive institutional misconduct was lower than those of both the capital murder offenders who were given a life sentence and the general prisoner population. Further, the majority of infractions were committed by a minority of the capital prisoners; most never committed any serious rule violations after their release from death row. Likewise, most never spent time in solitary confinement.

Behavior in prison is one thing. Behavior when released may be another. Twelve former death row inmates were eventually released to free society. One committed a second homicide, a brutal slaying in some ways similar to the offense for which he was originally sentenced to death. This, of course, is a disturbing finding. At this point, on the basis of a sample of twelve, the post-prison behavior of the former death row inmates cannot be assessed (1 of these 12 died while on parole).

Moreover, even if we were confident that one of twelve released prisoners would commit a future violent act, the policy implications are unclear. Should we kill all twelve persons, or all ninety-two, because an unknown minority in their midst are likely to be repeat offenders? Punishment, particularly capital punishment, on the basis of predictions of future behavior will always involve a large proportion of false positives. There is nothing to suggest a future that offers “100 percent certainty” in the prediction of violence. The data presented here indicate that overprediction is the norm. The Texas capital murder statute, as currently drawn, cannot avoid the dilemma.

Traditionally, it is argued that under the United States Constitution false positives are an anathema: Better that a hundred guilty go free than one innocent be sentenced to death. This raises the question of whether, in the context of the Texas predictive capital punishment scheme, future jurors should be told of the predictive record of their predecessors. The finding that past jurors have overpredicted violence may serve to caution future jurors in their deliberations. While this serves an important purpose, assignment of punishment to an individual offender even partially on the basis of the past behavior of similarly situated offenders also clearly entails important pitfalls.

The Supreme Court of New Jersey, in New Jersey v. Davis (477 A.2d 308, 314 (1984)), has held that in the penalty phase of a capital case the defendant “may offer in evidence, through expert witness, testimony relating to empirical studies, including presentation and analysis of statistical data, that is generally relevant to issue of the defendant’s potential for rehabilitation when defendant presents character as mitigating factor.” In a parallel argument, Justices Marshall and Brennan dissented when the United States Supreme Court refused to review a South Carolina case involving predictive statistical evidence in Patterson v. South Carolina (471 U.S. 1036 (1985)). They noted, in particular, the findings of Jurek, which held that in the predictive context of the Texas death penalty statute the jury should have before it “all possible relevant information about the individual defendant whose fate it must determine” (1975: 276). Arguably, general statistical information might not be considered relevant in that it does not apply to the immediate defendant. However, this line of argument is undercut by Barefoot, in which the Court approved the relevance of expert psychiatric predictions of the offender’s future dangerousness, even though the expert never actually examined the defendant. It is only a small step from generalized psychiatric conclusions, based on hypotheticals, to predictions based on statistical patterns.

While this line of reasoning would seem to favor the defendant, Goodman (1987) has convincingly argued that reliance on statistical patterns for predictions of violence and the assignment of punishments may create pernicious distinctions when expanded to include a range of demographic comparisons. What if it
were found that one racial category of capital offenders was more likely than another to commit future acts of violence? Should this evidence be introduced during the sentencing phase of capital murder trials to soften or, alternatively, to maximize the punishment? In this context, as Goodman (ibid., p. 521) correctly notes, “A procedure that allows judgments about an individual’s blameworthiness to be based on statistical correlations to anonymous prior malefactors is deeply inconsistent with the general principles undergirding our system of law.”

The data presented in this paper suggest that jurors err in the direction of false positives when it comes to predicting future dangerousness. What we do not know on the basis of these data is whether jury decisions in Texas would be different if jurors were not required to predict dangerousness as a precondition for sentencing an offender to death. We know that utilitarian justifications for punishment are preferred by the public over retributivist sentiments. Yet there is evidence that support for the death penalty is not based solely on instrumental motives; that is, respondents who claim to favor the death penalty for reasons of deterrence often report that they would be willing to support it even if it served no deterrent purpose (Sarat and Vidmar, 1976; Vidmar and Dittenhoffer, 1981).

Jurors in Texas may be reacting to the instant offense, the same way jurors do in California, Florida, Georgia, and other death-sentencing states. If so, the structure of the statute in Texas simply preserves the fiction that jurors are basing this crucial decision on anything approaching consistently valid predictions of future behavior. Even for those who have committed very violent acts in the past, the data simply do not bear out this rational, utilitarian image of capital sentencing. Further research is needed to assess whether jurors, consciously or unconsciously, decide that an offender deserves to die and then tailor their responses to the questions accordingly.

Notes

1. The circumstances were as follows:
   - The person murdered a peace officer or fireman who was acting in the lawful discharge of an official duty and who the defendant knew was a peace officer or fireman;
   - the person intentionally committed the murder in the course of committing or attempting to commit kidnapping, burglary, robbery, forcible rape, or arson;
   - the person committed the murder for remuneration or the promise of remuneration or employed another to commit the murder for remuneration or the promise of remuneration;
   - the person committed the murder while escaping or attempting to escape from a penal institution; or
   - the person, while incarcerated in a penal institution, murdered another who was employed in the operation of the penal institution (Tex. Penal Code § 19.03 (1974)).

2. The sixth circumstance was: the person murdered more than one person: (a) during the same criminal transaction; or (b) during different criminal transactions but the murders are committed pursuant to the same scheme or course of conduct (Tex. Penal Code § 19.03 (1985)).

3. Question 3 is given to the jury only if the evidence warrants it; otherwise jurors consider only Questions 1 and 2.

4. The quoted expert testimony comes from the indicated page(s) in the trial transcript of the named case.

5. To calculate the average yearly rates of Level 1 rule violations (serious violent behavior) for the former death row prisoners, we computed the rate per prisoner (4/90 = .44). We then divided this rate by the average number of years spent in prison by these offenders (.044/6.3 = .007). For the control cohort we followed the same procedure: 7/107 = .065; and then .065/7.2 (average time spent in prison) = .009.

6. Trusty status in the Texas prison system is a reward for good behavior. Trusties receive more good time than non-trusties. Trusties can also work without armed supervision both in the institution and outside the prison compound.

7. In 1975 Kenneth Dee Stogsdill was convicted in Texas of capital murder (a dismemberment slaying).
In 1977 his capital murder case was overturned by the Texas Court of Criminal Appeals due to a lack of evidence. However, he was sentenced to ten years for burglary and sexual assault connected to the same crime for which he was originally sentenced to death; he was released from prison in 1980. Stogsdill then moved to California, where in 1985 he was convicted of first degree murder (a dismemberment slaying) and sentenced to a 25-year to life term.

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DISCUSSION QUESTIONS

1. Briefly summarize the Supreme Court’s decisions in Furman v. Georgia and Gregg v. Georgia.

2. How did Texas structure its death penalty statute in response to the Supreme Court’s concerns in Furman? What role does the jury play?

3. Why is the study described here referred to as a “natural experiment”?

4. The first question the authors ask is, “what evidence do jurors use in making predictions of dangerousness?” How do they answer this question? Are there differences in the characteristics of offenders who were predicted to be dangerous in the future and those who were not?

5. The authors argue that if jurors can accurately predict dangerousness, one would expect those sentenced to death to behave differently than those sentenced to life in prison. What did they find?

6. Of the 12 former death row inmates who were eventually released from prison, 1 committed a second homicide. What are the policy implications of this finding? How would you answer the question posed by the authors: “Should we kill all twelve persons, or all ninety-two, because an unknown minority in their midst are likely to be repeat offenders?”

7. Based on the data discussed in this article, how would you answer the question posed in the title?

READING

In a provocative essay published in the Yale Law Journal shortly after O. J. Simpson’s acquittal, Paul Butler, a Black law professor at George Washington University Law School, argued for “racially based jury nullification.” That is, he urged Black jurors to refuse to convict Black defendants accused of nonviolent crimes, regardless of the strength of the evidence mounted against them. Butler’s position on jury nullification was that the “black community is better off when some nonviolent lawbreakers remain in the community rather than go to prison.” Arguing that there are far too many Black men in
prison, Butler suggested that there should be a presumption in favor of nullification in cases involving Black defendants charged with *nonviolent, victimless* crimes, such as possession of drugs.

# Racially Based Jury Nullification

**Black Power in the Criminal Justice System**

**Paul Butler**

## Introduction

I was a Special Assistant United States Attorney in the District of Columbia in 1990. I prosecuted people accused of misdemeanor crimes, mainly the drug and gun cases that overwhelm the local courts of most American cities. As a federal prosecutor, I represented the United States of America and used that power to put people, mainly African-American men, in prison. I am also an African-American man. While at the U.S. Attorney’s office, I made two discoveries that profoundly changed the way I viewed my work as a prosecutor and my responsibilities as a black person.

The first discovery occurred during a training session for new Assistants conducted by experienced prosecutors. We rookies were informed that we would lose many of our cases, despite having persuaded a jury beyond a reasonable doubt that the defendant was guilty. We would lose because some black jurors would refuse to convict black defendants who they knew were guilty.

The second discovery was related to the first, but was even more unsettling. It occurred during the trial of Marion Barry, then the second-term mayor of the District of Columbia. Barry was being prosecuted by my office for drug possession and perjury. I learned, to my surprise, that some of my fellow African-American prosecutors hoped that the mayor would be acquitted, despite the fact that he was obviously guilty of at least one of the charges—he had smoked cocaine on FBI videotape. These black prosecutors wanted their office to lose its case because they believed that the prosecution of Barry was racist.

Federal prosecutors in the nation’s capital hear many rumors about prominent officials engaging in illegal conduct, including drug use. Some African-American prosecutors wondered why, of all those people, the government chose to “set up” the most famous black politician in Washington, D.C. They also asked themselves why, if crack is so dangerous, the FBI had allowed the mayor to smoke it. Some members of the predominantly black jury must have had similar concerns: They convicted the mayor of only one count of a fourteen-count indictment, despite the trial judge’s assessment that he had “never seen a stronger government case.”

Some African-American prosecutors thought that the jury, in rendering its verdict, jabbed its black thumb in the face of a racist prosecution, and that idea made those prosecutors glad.

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As such reactions suggest, lawyers and judges increasingly perceive that some African-American jurors vote to acquit black defendants for racial reasons, a decision sometimes expressed as the juror’s desire not to send yet another black man to jail. This essay examines the question of what role race should play in black jurors’ decisions to acquit defendants in criminal cases. Specifically, I consider trials that include both African-American defendants and African-American jurors. I argue that the race of a black defendant is sometimes a legally and morally appropriate factor for jurors to consider in reaching a verdict of not guilty or for an individual juror to consider in refusing to vote for conviction.

My thesis is that, for pragmatic and political reasons, the black community is better off when some nonviolent lawbreakers remain in the community rather than go to prison. The decision as to what kind of conduct by African-Americans ought to be punished is better made by African-Americans themselves, based on the costs and benefits to their community, than by the traditional criminal justice process, which is controlled by white lawmakers and white law enforcers. Legally, the doctrine of jury nullification gives the power to make this decision to African-American jurors who sit in judgment of African-American defendants. Considering the costs of law enforcement to the black community and the failure of white lawmakers to devise significant nonincarcerative responses to black antisocial conduct, it is the moral responsibility of black jurors to emancipate some guilty black outlaws.

Part I of this essay describes two criminal cases in the District of Columbia in which judges feared that defendants or their lawyers were sending race-conscious, “forbidden” messages to black jurors and attempted to regulate those messages. I suggest that the judicial and public responses to those cases signal a dangerous reluctance among many Americans to engage in meaningful discourse about the relationship between race and crime. In Part II, I describe racial critiques of the criminal justice system. I then examine the evolution of the doctrine of jury nullification and suggest, in light of this doctrine, that racial considerations by African-American jurors are legally and morally right. Part III proposes a framework for analysis of the kind of criminal cases involving black defendants in which jury nullification is appropriate, and considers some of the concerns that implementation of the proposal raises.

My goal is the subversion of American criminal justice, at least as it now exists. Through jury nullification, I want to dismantle the master’s house with the master’s tools. My intent, however, is not purely destructive; this project is also constructive, because I hope that the destruction of the status quo will not lead to anarchy, but rather to the implementation of certain noncriminal ways of addressing antisocial conduct. Criminal conduct among African-Americans is often a predictable reaction to oppression. Sometimes black crime is a symptom of internalized white supremacy; other times it is a reasonable response to the racial and economic subordination every African-American faces every day. Punishing black people for the fruits of racism is wrong if that punishment is premised on the idea that it is the black criminal’s “just deserts.” Hence, the new paradigm of justice that I suggest in Part III rejects punishment for the sake of retribution and endorses it, with qualifications, for the ends of deterrence and incapacitation.

In a sense, this essay simply may argue for the return of rehabilitation as the purpose of American criminal justice, but a rehabilitation that begins with the white-supremacist beliefs that poison the minds of us all—you, me, and the black criminal. I wish that black people had the power to end racial oppression right now. African-Americans can prevent the
application of one particularly destructive instrument of white supremacy—American criminal justice—to some African-American people, and this they can do immediately. I hope that this essay makes the case for why and how they should.

I. Secret Messages Everyone Hears

Americans seem reluctant to have an open conversation about the relationship between race and crime. Lawmakers ignore the issue, judges run from it, and crafty defense lawyers exploit it. It is not surprising, then, that some African-American jurors are forced to sneak through the back door what is not allowed to come in through the front: the idea that “race matters” in criminal justice. In this part, I tell two stories about attempts by defense attorneys to encourage black jurors’ sympathy for their clients, and then I examine how these attempts provoked many people to act as though the idea of racial identification with black defendants was ridiculous or insulting to black people. In fact, the defense attorneys may well have been attempting to encourage black jurors’ sympathy as part of their trial strategies. The lesson of the stories is that the failure of the law to address openly the relationship between race and crime fosters a willful and unhelpful blindness in many who really ought to see and allows jury nullification to go on without a principled framework. This essay offers such a framework and encourages nullification for the purpose of black self-help.

A. United States v. Marion Barry

The time is January 1990. The mayor of the District of Columbia is an African-American man named Marion Barry. African-Americans make up approximately sixty-six percent of the population of the city. The mayor is so popular in the black community that one local newspaper columnist has dubbed him “Mayor for Life.” Barry is hounded, however, by rumors of his using drugs and “chasing women.” Barry denies the rumors and claims that they are racist.

On January 18, 1990, the mayor is contacted by an old friend, Rasheeda Moore, who tells him that she is visiting for a short time, and staying at a local hotel. She is expected to testify. The mayor has four passes to give to guests he would like to attend his trial. On this day, he has given one pass to Minister Louis Farrakhan, the controversial leader of the Nation of Islam. Farrakhan has publicly supported Barry since his arrest, in part by suggesting that the sting operation and the prosecution were racist.
deputy marshal bars his entry. When Barry’s attorney protests, the judge states, outside of the jury’s hearing, that Farrakhan’s “presence would be potentially disruptive, very likely intimidating, and he is a persona non grata for the [rest] of this case.” Rasheeda Moore then takes the stand.

The next day, the Reverend George Stallings appears at the trial with one of Barry’s guest passes in hand. Stallings is a black Roman Catholic priest who, the previous year, received extensive publicity when he accused the Catholic Church of being hopelessly racist, left it, and founded his own church. When Stallings reaches the courtroom, the deputy marshal, following the instructions of the judge, does not let him enter. The judge explains, again outside of the jury’s hearing, that Stallings is “in my judgment, not an ordinary member of the public and his presence would very likely have the same effect as Mr. Farrakhan’s.” The judge also indicates that there are “others who fit the same category.” Barry’s attorney, asks for a list of those persons. The judge replies, “I think you will know them when you see them.”

In the wake of these two episodes, the American Civil Liberties Union, representing Barry, Farrakhan, and Stallings, files an emergency appeal of the trial judge’s decision. It argues that the judge’s refusal to allow Barry’s guests to attend the trial violated Barry’s Sixth Amendment right to a fair trial and the First Amendment rights of the guests. In response, the judge’s attorneys state that the judge excluded Farrakhan and Stallings because their presence in the courtroom would send an “impermissible message” of “intimidation” and “racial animosity” to jurors and witnesses. The judge’s attorneys argue that the excluded persons’ views of the prosecution had been highly publicized and that their appearance at the trial was consistent with Barry’s “publicly avowed strategies of seeking a hung jury and jury nullification.” The judge’s attorneys argue that Farrakhan and Stallings attended the trial “not to view the proceeding or to show generalized concern, but instead to send a forbidden message to the jury and witness.”

The U.S. Court of Appeals for the District of Columbia Circuit rules that Farrakhan and Stallings should have presented their constitutional claims to the trial judge prior to seeking relief in the appellate court. Accordingly, it remands the case back to the trial judge. Because the trial has been halted pending appeal, however, the D.C. Circuit, in light of the “exigent circumstances,” lists several “pertinent considerations” for the trial judge on remand. The considerations mainly concern the judge’s power to regulate the attendance of those who threaten physically to disrupt a courtroom. The court does note, though, that:

No individual can be wholly excluded from the courtroom merely because he advocates a particular political, legal or religious point of view—even a point of view that the district court or we may regard as antithetical to the fair administration, of justice. Nor can an individual be wholly excluded from the courtroom because his presence is thought to send an undesirable message to the jurors except that of physical intimidation.

The trial judge hears the message of the court of appeals. In lieu of resolving Farrakhan and Stallings’s constitutional claims, he instead seeks assurances from their attorneys that their clients know how to conduct themselves in a courtroom. Indeed, the judge provides the attorneys with his own “special rules” of decorum regarding the trial, stating that “any attempt to communicate with a juror may be punished as criminal contempt of court. Farrakhan and Stallings’s attorneys assure the court that their clients will act with decorum in the courtroom. The trial continues. The mayor is eventually convicted of one of the indictment’s fourteen counts (for perjury), but not
of the count in which he smoked the cocaine on videotape.

**B. The Attorney Who Wore *Kente* Cloth**

It is now June 11, 1992. John T. Harvey, III is an African-American criminal defense attorney who practices in the District of Columbia. Harvey represents a black man who is charged with assault with intent to murder. The case is scheduled for arraignment before a white judge. At the arraignment, Harvey wears a business suit and tie, and his jacket is accessorized by a colorful stole made of *kente* cloth. *Kente* cloth is a multihued woven fabric originally worn by ancient African royalty, and many African-Americans have adopted it as a fashion statement and a symbol of racial pride.

In pretrial proceedings, the judge had warned Harvey that he would not be permitted to wear *kente* cloth before a jury. According to Harvey, the judge told him that wearing the fabric during a jury trial “was sending a hidden message to jurors.” The judge had informed Harvey that he had three options: He could refrain from wearing the *kente* cloth; he could withdraw from the case; or he could agree to try the case before the judge, without a jury. Harvey’s client decided to plead guilty. At the June 11 hearing, however, Harvey refuses to enter his client’s plea before the judge because he doubts that the judge will be impartial. The judge then removes Harvey from the case, “not on the basis of [the] kente cloth, but on the basis that [Harvey] will not enter a plea which [his] client wishes to enter.”

The same day, another client of Harvey’s is scheduled to go to trial, also for assault with intent to kill, before another white judge. During the voir dire, the judge asks if any of the jurors are familiar with Harvey, whose battle with the other judge was well publicized. Four of the potential jurors know of the controversy. “[T]he concern we think we have here,” the judge says, is “that we won’t influence a juror improperly.” He also informs them of case law in another jurisdiction suggesting that a court may prevent a Catholic priest from wearing a clerical collar in court. When Harvey asks the judge to inform the potential jurors of contrary cases, the judge refuses.

Ultimately, the judge allows Harvey to wear the cloth, but he suggests that when Harvey submits an attorney fee voucher to him for approval, he might not allow Harvey to be paid for the time the *kente* cloth issue has consumed. Harvey’s client is tried before an all-black jury and is acquitted.

**C. The Judicial and Popular Response: Willful Blindness**

As described above, the trial judge’s attempt to exclude Farrakhan and Stallings from Barry’s trial met with disapproval from the D.C. Circuit. In the case of John Harvey, no higher court had occasion to review the judge’s prohibition against the *kente* cloth but, as discussed below, much of the public reaction to the judge’s prohibition was critical. These responses scorned the trial judge’s fears that black jurors might acquit on the basis of racial identification rather than the “evidence.” The D.C. Circuit and many observers, however, failed to acknowledge the significance of the “forbidden” message. I believe that this failure was deliberate. It reflected an intention to avoid serious consideration of the issue of black jurors acquitting black defendants on the basis of racial identification rather than the “evidence.” The D.C. Circuit and some of the public did not want to face the reality that race matters, in general and in jury adjudications of guilt and innocence.

**1. The D.C. Circuit: We Hate Fights**

The D.C. Circuit’s per curiam opinion discussed the issue before it as though the judge’s concern was that Barry’s invitees would cause some type of physical disruption. The court listed a series of live “pertinent considerations,”
four of which actually were not pertinent because they involved the physical disruption of courtrooms or physical threats to witnesses. The only relevant consideration was so vague that it was nearly useless: The trial judge must exercise his discretion to exclude people from attending criminal matters “consistently with the First and Fifth Amendment rights of individuals to attend criminal trials.” The court’s discussion of this consideration is even more ambivalent: No one can be “wholly” excluded from a trial, even if he advocates a point of view that “we may regard as antithetical to the fair administration of justice” or if his presence sends an “undesirable message” to jurors. Because the appellate court did not suggest a procedure for partial exclusion of courtroom spectators, the trial judge’s response was to pretend as though he had been concerned all along about physical disruption and subsequently to insist that Farrakhan and Stallings act in accordance with his rules of decorum. In the view of the D.C. Circuit, trial guests should keep their hands and their feet to themselves, but their messages may run amuck. In reality, Farrakhan’s and Stallings’s manners in the courtroom were an issue created by the appellate court. Ironically, the trial judge’s response—the patronizing insistence that Farrakhan and Stallings agree to behave themselves—smacks of racism more than does his initial decision to exclude them from the courtroom.

United States v. Barry suggests that no trial spectator can be barred from a courtroom unless she threatens physically to disrupt the trial. In this respect, the court established a severe restriction on the discretion of judges to control public access to trials. Not all courts have taken this position; however. Two of the few other federal appellate courts that have considered symbolic communication by trial spectators have found it appropriate to regulate this type of communication. In one case, the Ninth Circuit slated that “[w]hen fair trial rights are at significant risk . . . the first amendment rights of trial attendees can and must be curtailed at the courthouse door.” In another case, the Eleventh Circuit ordered the retrial of a man convicted of the murder of a prison guard, partly because of the presence, at the first trial, of numerous uniformed prison guards. The court was concerned that the guards’ presence posed an unacceptable risk of prejudicing the jurors.

Significantly, the decisions from the Ninth and Eleventh Circuits involved cases in which the presence of the spectators was not thought to implicate race. The D.C. Circuit is the first appellate court to consider a “forbidden” racial message. My intention in noting this distinction is not to criticize the restrictive standard the D.C. Circuit established; indeed, there are potentially troubling implications of standards that allow trial judges more discretion in terms of which “secret” messages to regulate. I suggest, however, that the D.C. Circuit’s holding was not mandated by clear constitutional dictates and was not supported by precedent from other federal jurisdictions. Indeed, other appellate courts have considered and regulated the contents of the messages that trial spectators were thought to be sending. Those cases suggest that the D.C. Circuit could have talked about race, and yet it did not.

2. The Skeptics: What’s Race Got to Do with It?

The response of a number of commentators to the controversy over John Harvey’s kente cloth was disdainful of the trial judge’s apprehension about race-based appeals to black jurors. For example, the Washington Times characterized one of the judge’s concerns as “sheer, unadulterated goofiness.” The editorial continued:

[The judge] apparently believes that the [kente] cloth is no innocent fabric but rather possesses hypnotic powers of seduction, powers that will turn the judicial system on its head and hold jurors in its sway.
... [W]hile most of us common folk are puzzled by this kind of judicial behavior, lawyers are widely inured to the fact that judges are free to act like fools with impunity—even when it is an abuse of discretion, an abuse of power, a waste of time and an injustice to someone who has come before the court seeking justice.

The National Bar Association, an African-American lawyers’ group, expressed a similar concern, and one black attorney called the judge’s actions “almost unbelievable” and wondered why the judge “injected race” into the trial proceedings by making an issue of the kente cloth. Even the prosecutors in the kente cloth case “remained conspicuously silent” and refrained from endorsing the judge’s concerns about the cloth.

D. The Forbidden Message Revealed

I am fascinated by the refusal of these actors to take seriously the possibility and legal implications of black jurors’ sympathy with black defendants. The criminal justice system would be better served if there were less reluctance to consider the significance of race in black jurors’ adjudications of guilt or innocence. The remainder of this essay argues that race matters when a black person violates American criminal law and when a black juror decides how she should exercise her power to put another black man in prison.

The idea that race matters in criminal justice is hardly shocking; it surely does not surprise most African-Americans. In the Barry and Harvey stories, I believe that it was known by all of the key players: judges, jurors, attorneys, defendants and spectators. The trial judges in those cases were correct: Somebody—the controversial black demagogue, the radical black priest, the kente-cloth-wearing lawyer—was trying to send the black jurors a message. The message, in my view, was that the black jurors should consider the evidence presented at trial in light of the idea that the American criminal justice system discriminates against blacks. The message was that the jurors should not send another black man to prison.

There is no way to “prove” what Farrakhan’s and Stallings’s purposes were in attending Barry’s trial—nor can I “prove” the intent of the kente-cloth-wearing lawyer. I believe that my theory that they were encouraging black jurors’ sympathy is reasonable, based on the relevant players’ statements, the trial judge’s observations, and common sense and experience. Even if one is unwilling to ascribe to those players the same racially based motivations that I do, acknowledgement and concern that some black jurors acquit black defendants on the basis of race are increasing, as my experience at the U.S. Attorney’s Office showed. For the remainder of this essay, I focus on the legal and social implications of this conduct by black jurors.

II. “Justice Outside the Formal Rules of Law”

Why would a black juror vote to let a guilty person go free? Assuming that the juror is a rational actor, she must believe that she and her community are, in some way, better off with the defendant out of prison than in prison. But how could any rational person believe that about a criminal? The following section describes racial critiques of the American criminal justice system. I then examine the evolution of the doctrine of jury nullification and argue that its practice by African-Americans is, in many cases, consistent with the Anglo-American tradition and, moreover, is legally and morally right.

A. The Criminal Law and African-Americans: Justice or “Just Us”?

Imagine a country in which more than half of the young male citizens are under the
supervision of the criminal justice system, either awaiting trial, in prison, or on probation or parole. Imagine a country in which two-thirds of the men can anticipate being arrested before they reach age thirty. Imagine a country in which there are more young men in prison than in college. Now give the citizens of the country the key to the prison. Should they use it?

Such a country bears some resemblance to a police state. When we criticize a police state, we think that the problem lies not with the citizens of the state, but rather with the form of government or law, or with the powerful elites and petty bureaucrats whose interests the state serves. Similarly, racial critics of American criminal justice locate the problem not so much with the black prisoners as with the state and its actors and beneficiaries. As evidence, they cite their own experiences and other people’s stories, African-American history, understanding gained from social science research on the power and pervasiveness of white supremacy, and ugly statistics like those in the preceding paragraph.

For analytical purposes, I will create a false dichotomy among racial critics by dividing them into two camps: liberal critics and radical critics. Those are not names that the critics have given themselves or that they would necessarily accept, and there would undoubtedly be disagreement within each camp and theoretical overlap between the camps. Nonetheless, for the purposes of a brief explication of racial critiques, my oversimplification may be useful.

1. The Liberal Critique

According to this critique, American criminal justice is racist because it is controlled primarily by white people, who are unable to escape the culture’s dominant message of white supremacy, and who are therefore inevitably, even if unintentionally prejudiced. These white actors include legislators, police, prosecutors, judges, and jurors. They exercise their discretion to make and enforce the criminal law in a discriminatory fashion. Sometimes the discrimination is overt, as in the case of Mark Fuhrman, the police officer in the O.J. Simpson case who, in interviews, used racist language and boasted of his own brutality, and sometimes it is unintentional, as with a hypothetical white juror who invariably credits the testimony of a white witness over that of a black witness.

The problem with the liberal critique is that it does not adequately explain the extent of the difference between the incidence of black and white crime, especially violent crime. For example, in 1991, blacks constituted about fifty-five percent of the 18,096 people arrested for murder and non-negligent manslaughter in the United States (9924 people). One explanation the liberal critique offers for this unfortunate statistic is that the police pursue black murder suspects more aggressively than they do white murder suspects. In other words, but for discrimination, the percentage of blacks arrested for murder would be closer to their percentage of the population, roughly twelve percent. The liberal critique would attribute some portion of the additional forty-three percent of non-negligent homicide arrestees (in 1991, approximately 7781 people) to race prejudice. Ultimately, however, those assumptions strain credulity, not because many police officers are not racist, but because there is no evidence that there is a crisis of that magnitude in criminal justice. In fact, for all the faults of American law enforcement, catching the bad guys seems to be something it does rather well. The liberal critique fails to account convincingly for the incidence of black crime.

2. The Radical Critique

The radical critique does not discount the role of discrimination in accounting for some of the racial disparity in crime rates, but it also does not, in contrast to the liberal critique, attribute all or even most of the differential to police and prosecutor prejudice. The radical critique offers a more fundamental, structural explanation.
It suggests that criminal law is racist because, like other American law, it is an instrument of white supremacy. Law is made by white elites to protect their interests and, especially, to preserve the economic status quo, which benefits those elites at the expense of blacks, among others. Due to discrimination and segregation, the majority of African-Americans receive few meaningful educational and employment opportunities and, accordingly, are unable to succeed, at least in the terms of the capitalist ideal. Some property crimes committed by blacks may be understood as an inevitable result of the tension between the dominant societal message equating possession of material resources with success and happiness and the power of white supremacy to prevent most African-Americans from acquiring “enough” of those resources in a legal manner. “Black-on-black” violent crime, and even “victimless” crime like drug offenses, can be attributed to internalized racism, which causes some African-Americans to devalue black lives—either those of others or their own. The political process does not allow for the creation or implementation of effective “legal” solutions to this plight, and the criminal law punishes predictable reactions to it.

I am persuaded by the radical critique when I wonder about the roots of the ugly truth that blacks commit many crimes at substantially higher rates than whites. Most white Americans, especially liberals, would publicly offer an environmental, as opposed to genetic, explanation for this fact. They would probably concede that racism, historical and current, plays a major role in creating an environment that breeds criminal conduct. From this premise, the radical critic deduces that but for the (racist) environment, the African-American criminal would not be a criminal. In other words, racism creates and sustains the criminal breeding ground, which produces the black criminal. Thus, when many African-Americans are locked up, it is because of a situation that white supremacy created.

Obviously, most blacks are not criminals, even if every black is exposed to racism. To the radical critics, however, the law-abiding conduct of the majority of African-Americans does not mean that racism does not create black criminals. Not everyone exposed to a virus will become sick, but that does not mean that the virus does not cause the illness of the people who do.

The radical racial critique of criminal justice is premised as much on the criminal law’s effect as on its intent. The system is discriminatory, in part, because of the disparate impact law enforcement has on the black community. This unjust effect is measured in terms of the costs to the black community of having so many African-Americans, particularly males, incarcerated or otherwise involved in the criminal justice system. These costs are social and economic, and include the perceived dearth of men “eligible” for marriage, the large percentage of black children who live in female-headed households, the lack of male “role models” for black children, especially boys, the absence of wealth in the black community, and the large unemployment rate among black men.

3. Examples of Racism in Criminal Justice

Examples commonly cited by both liberal and radical critics as evidence of racism in criminal justice include: the Scottsboro case; the history of the criminalization of drug use; past and contemporary administration of the death penalty; the use of imagery linking crime to race in the 1988 presidential campaign and other political campaigns; the beating of Rodney King and the acquittal of his police assailants; disparities between punishments for white-collar crimes and punishments for other crimes; more severe penalties for crack cocaine users than for powder cocaine users; the Charles Murray and Susan Smith cases; police corruption
scandals in minority neighborhoods in New York and Philadelphia; the O. J. Simpson case, including the extraordinary public and media fascination with it, the racist police officer who was the prosecution’s star witness, and the response of many white people to the jury’s verdict of acquittal; and, cited most frequently, the extraordinary rate of incarceration of African-American men.

4. Law Enforcement Enthusiasts

Of course, the idea that the criminal justice system is racist and oppressive is not without dissent, and among the dissenters are some African-Americans. Randall Kennedy succinctly poses the counterargument:

Although the administration of criminal justice has, at times, been used as an instrument of racial oppression, the principal problem facing African-Americans in the context of criminal justice today is not overenforcement but under enforcement of the laws. The most lethal danger facing African-Americans in their day-to-day lives is not white, racist officials of the state, but private, violent criminals (typically black) who attack those most vulnerable to them without regard to racial identity. 13

According to these theorists, whom I will call law enforcement enthusiasts, the criminal law may have a disproportionate impact on the black community, but this is not a moral or racial issue because the disproportionate impact is the law’s effect, not its intent. For law enforcement enthusiasts, intent is the most appropriate barometer of governmental racism. Because law enforcement is a public good, it is in the best interest of the black community to have more, rather than less, of it. Allowing criminals to live unfettered in the community would harm, in particular, the black poor, who are disproportionately the victims of violent crime. Indeed, the logical conclusion of the enthusiasts’ argument is that African-Americans would be better off with more, not fewer, black criminals behind bars.

To my mind, the enthusiasts embrace law enforcement too uncritically: They are blind to its opportunity costs. I agree that criminal law enforcement constitutes a public good for African-Americans when it serves the social protection goals that Professor Kennedy highlights. In other words, when locking up black men means that “violent criminals . . . who attack those most vulnerable” are off the streets, most people—including most law enforcement critics—would endorse the incarceration. But what about when locking up black men has no or little net effect on public safety, when, for example, the crime with which he was charged is victimless? Putting aside for a moment the legal implications, couldn’t an analysis of the costs and benefits to the African-American community present an argument against incarceration? I argue “yes” in light of the substantial costs to the community of law enforcement. I accept that other reasonable people may disagree. But the law enforcement enthusiasts seldom acknowledge that racial critics even weigh the costs and benefits; their assumption seems to be that the racial critics are foolish or blinded by history or motivated by their own ethnocentrism.

5. The Body Politic and the Racial Critiques

I suspect that many white people would agree with the racial critics’ analysis, even if most whites would not support a solution involving the emancipation of black criminals. I write this essay, however, out of concern for African-Americans and how they can use the power they have now to create change. The important practicability question is how many
African-Americans embrace racial critiques of the criminal justice system and how many are law enforcement enthusiasts?

According to a recent USA Today/CNN/Gallup poll, sixty-six percent of blacks believe that the criminal justice system is racist and only thirty-two percent believe it is not racist. Interestingly, other polls suggest that blacks also tend to be more worried about crime than whites; this seems logical when one considers that blacks are more likely to be the victims of crime. This enhanced concern, however, does not appear to translate into endorsement of tougher enforcement of traditional criminal law. For example, substantially fewer blacks than whites support the death penalty, and many more blacks than whites were concerned with the potential racial consequences of the strict provisions of the Crime Bill of 1994. While polls are not, perhaps, the most reliable means of measuring sentiment in the African-American community, the polls, along with significant evidence from popular culture, suggest that a substantial portion of the African-American community sympathizes with racial critiques of the criminal justice system.

African-American jurors who endorse these critiques are in a unique position to act on their beliefs when they sit in judgment of a black defendant. As jurors, they have the power to convict the defendant or to set him free. May the responsible exercise of that power include voting to free a black defendant who the juror believes is guilty? The next section suggests that, based on legal doctrine concerning the role of juries in general, and the role of black jurors in particular, the answer to this question is “yes.”

B. Jury Nullification

When a jury disregards evidence presented at trial and acquits an otherwise guilty defendant, because the jury objects to the law that the defendant violated or to the application of the law to that defendant, it has practiced jury nullification. In this section, I describe the evolution of this doctrine and consider its applicability to African-Americans. I then examine Supreme Court cases that discuss the role of black people on juries. In light of judicial rulings in these areas, I argue that it is both lawful and morally right that black jurors consider race in reaching verdicts in criminal cases.

1. What Is Jury Nullification?

Jury nullification occurs when a jury acquits a defendant who it believes is guilty of the crime with which he is charged. In finding the defendant not guilty, the jury refuses to be bound by the facts of the case or the judge's instructions regarding the law. Instead, the jury votes its conscience.

In the United States, the doctrine of jury nullification originally was based on the common law idea that the function of a jury was, broadly, to decide justice, which included judging the law as well as the facts. If jurors believed that applying a law would lead to an unjust conviction, they were not compelled to convict someone who had broken that law. Although most American courts now disapprove of a jury’s deciding anything other than the “facts,” the Double Jeopardy Clause of the Fifth Amendment prohibits appellate reversal of a jury’s decision to acquit, regardless of the reason for the acquittal. Thus, even when a trial judge thinks that a jury’s acquittal directly contradicts the evidence, the jury’s verdict must be accepted as final. The jurors, in judging the law, function as an important and necessary check on government power.

2. A Brief History

The prerogative of juries to nullify has been part of English and American law for centuries. In 1670, the landmark decision in Bushell’s Case established the right of juries...
under English common law to nullify on the basis of an objection to the law the defendant had violated. Two members of an unpopular minority group—the Quakers—were prosecuted for unlawful assembly and disturbance of the peace. At trial, the defendants, William Penn and William Mead, admitted that they had assembled a large crowd on the streets of London. Upon that admission, the judge asked the men if they wished to plead guilty. Penn replied that the issue was not “whether I am guilty of this Indictment but whether this Indictment be legal,” and argued that the jurors should go “behind” the law and use their consciences to decide whether he was guilty. The judge disagreed, and he instructed the jurors that the defendants’ admissions compelled a guilty verdict. After extended deliberation, however, the jurors found both defendants not guilty. The judge then fined the jurors for rendering a decision contrary to the evidence and to his instructions. When one juror, Bushell, refused to pay his fine, the issue reached the Court of Common Pleas, which held that jurors in criminal cases could not be punished for voting to acquit, even when the trial judge believed that the verdict contradicted the evidence. The reason was stated by the Chief Justice of the Court of Common Pleas:

A man cannot see by another’s eye, nor hear by another’s ear, no more can a man conclude or infer the thing to be resolv’d by another’s understanding or reasoning; and though the verdict be right the jury give, yet they being not assur’d it is so from their own understanding, are forsworn, at least in foro conscientiae.\[15\]

This decision “changed the course of jury history.” It is unclear why the jurors acquitted Penn and Mead, but their act has been viewed in near mythological terms. Bushell and his fellow jurors have come to be seen as representing the best ideals of democracy because they “rebuffed the tyranny of the judiciary and vindicated their own true historical and moral purpose.”\[16\]

American colonial law incorporated the common law prerogative of jurors to vote according to their consciences after the British government began prosecuting American revolutionaries for political crimes. The best known of these cases involved John Peter Zenger, who was accused of seditious libel for publishing statements critical of British colonial rule in North America. In seditious libel cases, English law required that the judge determine whether the statements made by the defendant were libelous; the jury was not supposed to question the judge’s finding on this issue. At trial, Zenger’s attorney told the jury that it should ignore the judge’s instructions that Zenger’s remarks were libelous because the jury “ha[d] the right beyond all dispute to determine both the law and the facts.” The lawyer then echoed the language of \textit{Bushell’s Case}, arguing that the jurors had “to see with their eyes, to hear with their own ears, and to make use of their own consciences and understandings, in judging of the lives, liberties or estates of their fellow subjects.”\[17\]

Famously, the jury acquitted Zenger, and another case entered the canon as a shining example of the benefits of the jury system.

After Zenger’s trial, the notion that juries should decide “justice,” as opposed to simply applying the law to the facts, became relatively settled in American jurisprudence. In addition to pointing to political prosecutions of white American revolutionaries like Zenger, modern courts and legal historians often cite with approval nullification in trials of defendants “guilty” of helping to free black slaves. In these cases, Northern jurors with abolitionist sentiments used their power as jurors to subvert federal law that supported slavery. In \textit{United
States v. Morris, for example, three defendants were accused of aiding and abetting a runaway slave’s escape to Canada. The defense attorney told the jury that, because it was hearing a criminal case, it had the right to judge the law, and if it believed that the Fugitive Slave Act was unconstitutional, it was bound to disregard any contrary instructions given by the judge. The defendants were acquitted, and the government dropped the charges against five other people accused of the same crime. Another success story entered the canon.

3. Sparf and Other Critiques

In the mid-nineteenth century, as memories of the tyranny of British rule faded, some American courts began to criticize the idea of jurors deciding justice. A number of the state decisions that allowed this practice were overruled, and in the 1895 case of Sparf v. United States, the Supreme Court spoke regarding jury nullification in federal courts.

In Sparf, two men on trial for murder requested that the judge instruct the jury that it had the option of convicting them of manslaughter, a lesser-included offense. The trial court refused this request and instead instructed the jurors that if they convicted the defendants of any crime less than murder, or if they acquitted them, the jurors would be in violation of their legal oath and duties. The Supreme Court held that this instruction was not contrary to law and affirmed the defendants’ murder convictions. The Court acknowledged that juries have the “physical power” to disregard the law, but stated that they have no “moral right” to do so. Indeed, the Court observed, “If the jury were at liberty to settle the law for themselves, the effect would be...that the law itself would be most uncertain, from the different views, which different juries might take of it.” Despite this criticism, Sparf conceded that, as a matter of law, a judge could not prevent jury nullification, because in criminal cases “[a] verdict of acquittal cannot be set aside.” An anomaly was thus created, and has been a feature of American criminal law ever since: Jurors have the power to nullify, but, in most jurisdictions, they have no right to be informed of this power.

Since Sparf, most of the appellate courts that have considered jury nullification have addressed that anomaly and have endorsed it. Some of these courts, however, have not been as critical of the concept of jury nullification as the Sparf Court. The D.C. Circuit’s opinion in United States v. Dougherty is illustrative. In Dougherty, the court noted that the ability of juries to nullify was widely recognized and even approved “as a necessary counter to case-hardened judges and arbitrary prosecutors.” This necessity, however, did not establish “as an imperative” that a jury be informed by the judge of its power to nullify. The D.C. Circuit was concerned that “[w]hat makes for health as an occasional medicine would be disastrous as a daily diet.” Specifically:

Rules of law or justice involve choice of values and ordering of objectives for which unanimity is unlikely in any society, or group representing the society, especially a society as diverse in cultures and interests as ours. To seek unity out of diversity, under the national motto, there must be a procedure for decision by vote of a majority or prescribed plurality—in accordance with democratic philosophy. To assign the role of mini-legislature to the various petit juries, who must hang if not unanimous, exposes criminal law and administration to paralysis, and to a deadlock that betrays rather than furthers the assumptions of viable democracy.
The idea that jury nullification undermines the rule of law is the most common criticism of the doctrine. The concern is that the meaning of self-government is threatened when twelve individuals on a jury in essence remake the criminal law after it has already been made in accordance with traditional democratic principles. Another critique of African-American jurors engaging in racially based jury nullification is that the practice by black jurors is distinct from the historically approved cases because the black jurors are not so much “judging” the law as preventing its application to members of their own race. The reader should recognize that these are moral, not legal, critiques because, as discussed above, the legal prerogative of any juror to acquit is well established. In the next section, I respond to these moral critiques.

C. The Moral Case for Jury Nullification by African-Americans

Any juror legally may vote for nullification in any case, but, certainly, jurors should not do so without some principled basis. The reason that some historical examples of nullification are viewed approvingly is that most of us now believe that the jurors in those cases did the morally right thing; it would have been unconscionable, for example, to punish those slaves who committed the crime of escaping to the North for their freedom. It is true that nullification later would be used as a means of racial subordination by some Southern jurors, but that does not mean that nullification in the approved cases was wrong. It only means that those Southern jurors erred in their calculus of justice. I distinguish racially based nullification by African-Americans from recent right-wing proposals for jury nullification on the ground that the former is sometimes morally right and the latter is not.

The question of how to assign the power of moral choice is a difficult one. Yet we should not allow that difficulty to obscure the fact that legal resolutions involve moral decisions, judgments of right and wrong. The fullness of time permits us to judge the fugitive slave case differently than the Southern pro-white-violence case. One day we will be able to distinguish between racially based nullification and that proposed by certain right-wing activist groups. We should remember that the morality of the historically approved cases was not so clear when those brave jurors acted. After all, the fugitive slave law was enacted through the democratic process, and those jurors who disregarded it subverted the rule of law. Presumably, they were harshly criticized by those whose interests the slave law protected. Then, as now, it is difficult to see the picture when you are inside the frame.

In this section, I explain why African-Americans have the moral right to practice nullification in particular cases. I do so by responding to the traditional moral critiques of jury nullification.

1. African-Americans and the “Betrayal” of Democracy

There is no question that jury nullification is subversive of the rule of law. It appears to be the antithesis of the view that courts apply settled, standing laws and do not “dispense justice in some ad hoc, case-by-case basis.” To borrow a phrase from the D.C. Circuit, jury nullification “betrays rather than furthers the assumptions of viable democracy.” Because the Double Jeopardy Clause makes this power part-and-parcel of the jury system, the issue becomes whether black jurors have any moral right to “betray democracy” in this sense. I believe that they do for two reasons that I borrow from the jurisprudence of legal realism and critical race theory: First, the idea of “the rule of law” is more mythological than real, and second, “democracy,” as practiced in the United States, has betrayed African-Americans far
more than they could ever betray it. Explication of these theories has consumed legal scholars for years, and is well beyond the scope of this essay. I describe the theories below not to persuade the reader of their rightness, but rather to make the case that a reasonable juror might hold such beliefs, and thus be morally justified in subverting democracy through nullification.

2. The Rule of Law as Myth

The idea that “any result can be derived from the preexisting legal doctrine” either in every case or many cases, is a fundamental principle of legal realism (and, now, critical legal theory). The argument, in brief, is that law is indeterminate and incapable of neutral interpretation. When judges “decide” cases, they “choose” legal principles to determine particular outcomes. Even if a judge wants to be neutral, she cannot, because, ultimately, she is vulnerable to an array of personal and cultural biases and influences; she is only human. In an implicit endorsement of the doctrine of jury nullification, legal realists also suggest that, even if neutrality were possible, it would not be desirable, because no general principle of law can lead to justice in every case.

It is difficult for an African-American knowledgeable of the history of her people in the United States not to profess, at minimum, sympathy for legal realism. Most blacks are aware of countless historical examples in which African-Americans were not afforded the benefit of the rule of law: Think, for example, of the existence of slavery in a republic purportedly dedicated to the proposition that all men are created equal, or the law’s support of state-sponsored segregation even after the Fourteenth Amendment guaranteed blacks equal protection. That the rule of law ultimately corrected some of the large holes in the American fabric is evidence more of its malleability than of its virtue; the rule of law had, in the first instance, justified the holes.

The Supreme Court’s decisions in the major “race” cases of the last term underscore the continuing failure of the rule of law to protect African-Americans through consistent application. Dissenting in a school desegregation case, 22 four Justices stated that “[t]he Court’s process of orderly adjudication has broken down in this case.” The dissent noted that the majority opinion “effectively . . . overrule[d] a unanimous constitutional precedent of 20 years standing, which was not even addressed in argument, was mentioned merely in passing by one of the parties, and discussed by another of them only in a misleading way.” Similarly, in a voting rights case, 23 Justice Stevens, in dissent, described the majority opinion as a “law-changing decision.” And in an affirmative action case, 24 Justice Stevens began his dissent by declaring that, “[i]nstead of deciding this case in accordance with controlling precedent, the Court today delivers a disconcerting lecture about the evils of governmental racial classifications.” At the end of his dissent, Stevens argued that “the majority’s concept of stare decisis ignores the force of binding precedent.”

If the rule of law is a myth, or at least is not applicable to African-Americans, the criticism that jury nullification undermines it loses force. The black juror is simply another actor in the system, using her power to fashion a particular outcome; the juror’s act of nullification—like the act of the citizen who dials 911 to report Ricky but not Bob, or the police officer who arrests Lisa but not Mary, or the prosecutor who charges Kwame but not Brad, or the judge who finds that Nancy was illegally entrapped but Verna was not—exposes the indeterminacy of law, but does not create it.

3. The Moral Obligation to Disobey Unjust Laws

For the reader who is unwilling to concede the mythology of the rule of law, I offer
another response to the concern about violating it. Assuming, for the purposes of argument, that the rule of law exists, there still is no moral obligation to follow an unjust law. This principle is familiar to many African-Americans who practiced civil disobedience during the civil rights protests of the 1950s and 1960s. Indeed, Martin Luther King suggested that morality requires that unjust laws not be obeyed. As I state above, the difficulty of determining which laws are unjust should not obscure the need to make that determination.

Radical critics believe that the criminal law is unjust when applied to some antisocial conduct by African-Americans: The law uses punishment to treat social problems that are the result of racism and that should be addressed by other means such as medical care or the redistribution of wealth. Later, I suggest a utilitarian justification for why African-Americans should obey most criminal law: It protects them. I concede, however, that this limitation is not morally required if one accepts the radical critique, which applies to all criminal law.

4. Democratic Domination

Related to the “undermining the law” critique is the charge that jury nullification is antidemocratic. The trial judge in the Barry case, for example, in remarks made after the conclusion of the trial, expressed this criticism of the jury’s verdict: “The jury is not a mini-democracy, or a mini-legislature. . . . They are not to go back and do right as they see fit. That’s anarchy. They are supposed to follow the law.” A jury that nullifies “betray[es] rather than furthers the assumptions of viable democracy.” In a sense, the argument suggests that the jurors are not playing fair: The citizenry made the rules, so the jurors, as citizens, ought to follow them.

What does “viable democracy” assume about the power of an unpopular minority group to make the laws that affect them? It assumes that the group has the power to influence legislation. The American majority-rule electoral system is premised on the hope that the majority will not tyrannize the minority, but rather represent the minority’s interests. Indeed, in creating the Constitution, the Framers attempted to guard against the oppression of the minority by the majority. Unfortunately, these attempts were expressed more in theory than in actual constitutional guarantees, a point made by some legal scholars, particularly critical race theorists.

The implication of the failure to protect blacks from the tyrannical majority is that the majority rule of whites over African-Americans is, morally speaking, illegitimate. Lani Guinier suggests that the moral legitimacy of majority rule hinges on two assumptions: 1) that majorities are not fixed; and 2) that minorities will be able to become members of some majorities. Racial prejudice “to such a degree that the majority consistently excludes the minority, or refuses to inform itself about the relative merit of the minority’s preferences,” defeats both assumptions.

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Similarly, Owen Fiss has given three reasons for the failure of blacks to prosper through American democracy: They are a numerical minority, they have low economic status, and, “as a ‘discrete and insular’ minority, they are the object of ‘prejudice’—that is, the subject of fear, hatred, and distaste that make it particularly difficult for them to form coalitions with others (such as the white poor).”

According to both theories, blacks are unable to achieve substantial progress through regular electoral politics. Their only “democratic” route to success—coalition building with similarly situated groups—is blocked because other groups resist the stigma of the association. The stigma is powerful enough to prevent alignment with African-Americans even when a group—like low income whites—has similar interests.

In addition to individual white citizens, legislative bodies experience the Negrophobia
described above. Professor Guinier defines such legislative racism as

a pattern of actions [that] persistently disadvantag[es] a fixed, legislative minority and encompasses conscious exclusion as well as marginalization that results from “a lack of interracial empathy.” It means that where a prejudiced majority rules, its representatives are not compelled to identify its interests with those of the African-American minority.

Such racism excludes blacks from the governing legislative coalitions. A permanent, homogeneous majority emerges, which effectively marginalizes minority interests and “transform[s] majority rule into majority tyranny.” Derrick Bell calls this condition “democratic domination.”

Democratic domination undermines the basis of political stability, which depends on the inducement of “losers to continue to play the political game, to continue to work within the system rather than to try to overthrow it.” Resistance by minorities to the operation of majority rule may take several forms, including “overt compliance and secret rejection of the legitimacy of the political order.” I suggest that another form of this resistance is racially based jury nullification.

If African-Americans believe that democratic domination exists (and the 1994 congressional elections seem to provide compelling recent support for such a belief), they should not back away from lawful self-help measures, like jury nullification, on the ground that the self-help is antidemocratic. African-Americans are not a numerical majority in any of the fifty states, which are the primary sources of criminal law. In addition, they are not even proportionally represented in the U.S. House of Representatives or in the Senate. As a result, African-Americans wield little influence over criminal law, state or federal. African-Americans should embrace the antidemocratic nature of jury nullification because it provides them with the power to determine justice in a way that majority rule does not.

D. “[J]ustice Must Satisfy the Appearance of Justice”: The Symbolic Function of Black Jurors

A second distinction one might draw between the traditionally approved examples of jury nullification and its practice by contemporary African-Americans is that, in the case of the former, jurors refused to apply a particular law, e.g., a fugitive slave law, on the grounds that it was unfair, while in the case of the latter, jurors are not so much judging discrete statutes as they are refusing to apply those statutes to members of their own race. This application of race consciousness by jurors may appear to be antithetical to the American ideal of equality under the law.

This critique, however, like the “betraying democracy” critique, begs the question of whether the ideal actually applies to African-Americans. As stated above, racial critics answer this question in the negative. They, especially the liberal critics, argue that the criminal law is applied in a discriminatory fashion. Furthermore, on several occasions, the Supreme Court has referred to the usefulness of black jurors to the rule of law in the United States. In essence, black jurors symbolize the fairness and impartiality of the law. Here I examine this rhetoric and suggest that, if the presence of black jurors sends a political message, it is right that these jurors use their power to control or negate the meaning of that message.

As a result of the ugly history of discrimination against African-Americans in the criminal justice system, the Supreme Court has had numerous opportunities to consider the significance of black jurors. In so doing, the Court has suggested that these jurors perform a symbolic function, especially when they sit on cases involving African-American defendants,
and the Court has typically made these suggestions in the form of rhetoric about the social harm caused by the exclusion of blacks from jury service. I will refer to this role of black jurors as the “legitimization function.”

The legitimization function stems from every jury’s political function of providing American citizens with “the security . . . that they, as jurors actual or possible, being part of the judicial system of the country can prevent its arbitrary use or abuse.” In addition to, and perhaps more important than, seeking the truth, the purpose of the jury system is “to impress upon the criminal defendant and the community as a whole that a verdict of conviction or acquittal is given in accordance with the law by persons who are fair.”

This purpose is consistent with the original purpose of the constitutional right to a jury trial, which was “to prevent oppression by the Government.”

When blacks are excluded from juries, beyond any harm done to the juror who suffers the discrimination or to the defendant, the social injury of the exclusion is that it “undermine[s] . . . public confidence—as well [it] should.” Because the United States is both a democracy and a pluralist society, it is important that diverse groups appear to have a voice in the laws that govern them. Allowing black people to serve on juries strengthens “public respect for our criminal justice system and the rule of law.”

The Supreme Court has found that the legitimization function is particularly valuable in cases involving “race-related” crimes. According to the Court, in these cases, “emotions in the affected community are inevitably . . . heated and volatile.” The potential presence of black people on the jury in a “race related” case calms the natives, which is especially important in this type of case because “[p]ublic confidence in the integrity of the criminal justice system is essential for preserving community peace.”

The very fact that a black person can be on a jury is evidence that the criminal justice system is one in which black people should have confidence and one that they should respect.

But what of the black juror who endorses racial critiques of American criminal justice? Such a person holds no “confidence in the integrity of the criminal justice system.” If she is cognizant of the implicit message that the Supreme Court believes her presence sends, she might not want her presence to be the vehicle for that message. Let us assume that there is a black defendant who the evidence suggests is guilty of the crime with which he has been charged and a black juror who thinks that there are too many black men in prison. The black juror has two choices: She can vote for conviction, thus sending another black man to prison and implicitly allowing her presence to support public confidence in the system that puts him there, or she can vote “not guilty,” thereby acquitting the defendant or at least causing a mistrial. In choosing the latter, the juror makes a decision not to be a passive symbol of support for a system for which she has no respect: Rather than signaling her displeasure with the system by breaching “community peace,” the black juror invokes the political nature of her role in the criminal justice system and votes “no.”

In a sense the black juror engages in an act of civil disobedience, except that her choice is better than civil disobedience because it is lawful. Is the black juror’s race-conscious act moral? Absolutely. It would be farcical for her to be the sole color-blind actor in the criminal process, especially when it is her blackness that advertises the system’s fairness.

At this point every African-American should ask herself whether the operation of the criminal law in the United States advances the interests of black people. If it does not, the doctrine of jury nullification affords African-American jurors the opportunity to control the authority of the law over some African-American criminal defendants. In essence black people can “opt out” of American criminal law.

How far should they go? Completely to anarchy? Or is there some place between here
and there, safer than both? The next part describes such a place, and how to get there.

III. A Proposal for Racially Based Jury Nullification

To allow African-American jurors to exercise their responsibility in a principled way, I make the following proposal: African-American jurors should approach their work cognizant of its political nature and their prerogative to exercise their power in the best interests of the black community. In every case, the juror should be guided by her view of what is “just.” For the reasons stated in the preceding parts of this essay, I have more faith in the average black juror’s idea of justice than I do in the idea that is embodied in the “rule of law.”

A. A Framework for Criminal Justice in the Black Community

In cases involving violent malum in se crimes like murder, rape, and assault, jurors should consider the case strictly on the evidence presented, and, if they have no reasonable doubt that the defendant is guilty, they should convict. For nonviolent malum in se crimes such as theft or perjury, nullification is an option that the juror should consider, although there should be no presumption in favor of it. A juror might vote for acquittal, for example, when a poor woman steals from Tiffany’s, but not when the same woman steals from her next-door neighbor. Finally, in cases involving nonviolent, malum prohibitum offenses, including “victimless” crimes like narcotics offenses, there should be a presumption in favor of nullification.

This approach seeks to incorporate the most persuasive arguments of both the racial critics and the law enforcement enthusiasts. If my model is faithfully executed, the result would be that fewer black people would go to prison; to that extent, the proposal ameliorates one of the most severe consequences of law enforcement in the African-American community. At the same time, the proposal, by punishing violent offenses and certain others, preserves any protection against harmful conduct that the law may offer potential victims. If the experienced prosecutors at the U.S. Attorney’s Office are correct, some violent offenders currently receive the benefit of jury nullification, doubtless from a misguided if well-intentioned attempt by racial critics to make a political point. Under my proposal, violent lawbreakers would go to prison.

In the language of criminal law, the proposal adopts utilitarian justifications for punishment: deterrence and isolation. To that extent, it accepts the law enforcement enthusiasts’ faith in the possibility that law can prevent crime. The proposal does not, however, judge the lawbreakers as harshly as the enthusiasts would judge them. Rather, the proposal assumes that, regardless of the reasons for their antisocial conduct, people who are violent should be separated from the community for the sake of the nonviolent. The proposal’s justifications for the separation are that the community is protected from the offender for the duration of the sentence and that the threat of punishment may discourage future offenses and offenders. I am confident that balancing the social costs and benefits of incarceration would not lead black jurors to release violent criminals simply because of race. While I confess agnosticism about whether the law can deter antisocial conduct, I am unwilling to experiment by abandoning any punishment premised on deterrence.

Of the remaining traditional justifications for punishment, the proposal eschews the retributive or “just deserts” theory for two reasons. First, I am persuaded by racial and other critiques of the unfairness of punishing people for “negative” reactions to racist oppressive conditions. In fact, I sympathize with people who react “negatively” to the countless manifestations of white supremacy that black
people experience daily. While my proposal does not “excuse” all antisocial conduct, it will not punish such conduct on the premise that the intent to engage in it is “evil.” The antisocial conduct is no more evil than the conditions that cause it, and, accordingly, the “just deserts” of a black offender are impossible to know. And even if just deserts were susceptible to accurate measure, I would reject the idea of punishment for retribution’s sake.

My argument here is that the consequences are too severe: African-Americans cannot afford to lock up other African-Americans simply on account of anger. There is too little bang for the buck. Black people have a community that needs building and children who need rescuing and as long as a person will not hurt anyone, the community needs him there to help. Assuming that he actually will help is a gamble, but not a reckless one, for the “just” African-American community will not leave the lawbreaker be: It will, for example, encourage his education and provide his health care (including narcotics dependency treatment) and, if necessary, sue him for child support. In other words the proposal demands of African-Americans responsible self-help outside of the criminal courtroom as well as inside it. When the community is richer, perhaps then it can afford anger.

The final traditional justification for punishment, rehabilitation, can be dealt with summarily. If rehabilitation were a meaningful option in American criminal justice, I would not endorse nullification in any case. It would be counterproductive for utilitarian reasons: The community is better off with the antisocial person cured than sick. Unfortunately, however, rehabilitation is no longer an objective of criminal law in the United States and prison appears to have an antirehabilitative effect. For this reason, unless a juror is provided with a specific, compelling reason to believe that a conviction would result in some useful treatment for an offender, she should not use her vote to achieve this end, because almost certainly it will not occur.

B. Hypothetical Cases

How would a juror decide individual cases under my proposal? For the purposes of the following hypothesis, let us assume criminal prosecutions in state or federal court and technically guilty African-American defendants. Easy cases under my proposal include a defendant who possessed crack cocaine and a defendant who killed another person. The former should be acquitted and the latter should go to prison.

The crack cocaine case is simple: Because the crime is victimless, the proposal presumes nullification. According to racial critiques, acquittal is just, due in part to the longer sentences given for crack offenses than for powder cocaine offenses. This case should be particularly compelling to the liberal racial critic, given the extreme disparity between crack and powder in both enforcement of the law and in actual sentencing. According to a recent study, African-Americans make up 13% of the nation’s regular drug users but they account for 35% of narcotics arrests, 55% of drug convictions, and 74% of those receiving prison sentences. Most of the people who are arrested for crack cocaine offenses are black; most arrested for powder cocaine are white. Under federal law, if someone possesses fifty grams of crack cocaine, the mandatory-minimum sentence is ten years; in order to receive the same sentence for powder cocaine, the defendant must possess 5000 grams. Given the racial consequences of this disparity, I hope that many racial critics will nullify without hesitation in these cases.

The case of the murderer is “easy” solely for the utilitarian reasons I discussed above. Although I do not believe that prison will serve any rehabilitative function for the murderer, there is a possibility that a guilty verdict will prevent another person from becoming a victim, and the juror should err on the side of that possibility. In effect, I “write off” the black person who takes a life not for retributive
reasons, but because the black community cannot afford the risks of leaving this person in its midst. Accordingly, for the sake of potential victims (given the possibility that the criminal law deters homicide), nullification is not morally justifiable here.

Difficult hypothetical cases include the ghetto drug dealer and the thief who burglarizes the home of a rich family. Under the proposal, nullification is presumed in the first case because drug distribution is a nonviolent, malum prohibition offense. Is nullification morally justifiable here? It depends. There is no question that encouraging people to engage in self-destructive behavior is evil; the question the juror should ask herself is whether the remedy is less evil. I suspect that the usual answer would be “yes,” premised on deterrence and isolation theories of punishment. Accordingly, the drug dealer would be convicted. The answer might change, however, depending on the particular facts of the case: the type of narcotic sold, the ages of the buyers, whether the dealer “marketed” the drugs to customers or whether they sought him out, whether it is a first offense, whether there is reason to believe that the drug dealer would cease this conduct if given another chance, and whether, as in the crack case, there are racial disparities in sentencing for this kind of crime. I recognize that, in this hypothetical, nullification carries some societal risk. The risk, however, is less consequential than with violent crimes. Furthermore, the cost to the community of imprisoning all drug dealers is great. I would allow the juror in this case more discretion.

The juror should also remember that many ghetto “drug” dealers are not African-American and that the state does not punish these dealers—instead, it licenses them. Liquor stores are ubiquitous on the ghetto streets of America. By almost every measure, alcoholism causes great injury to society, and yet the state does not use the criminal law to address this severe social problem. When the government tried to treat the problem of alcohol use with criminal law during Prohibition, a violent “black” market formed. Even if the juror does not believe that drug dealing is a “victimless” crime, she might question why it is that of all drug dealers, many of the black capitalists are imprisoned, and many of the non-black capitalists are legally enriched. When the juror remembers that the cost to the community of having so many young men in jail means that law enforcement also is not “victimless,” the juror’s calculus of justice might lead her to vote for acquittal.

As for the burglar who steals from the rich family, the case is troubling, first of all because the conduct is so clearly “wrong.” As a nonviolent malum in se crime, there is no presumption in favor of nullification, though it remains an option. Here, again, the facts of the case are relevant to the juror’s decision of what outcome is fair. For example, if the offense was committed to support a drug habit, I think there is a moral case to be made for nullification, at least until drug rehabilitation services are available to all.

If the burglary victim is a rich white person, the hypothetical is troubling for the additional reason that it demonstrates how a black juror’s sense of justice might, in some cases, lead her to treat defendants differently based on the class and race of their victims. I expect that this distinction would occur most often in property offenses because, under the proposal, no violent offenders would be excused. In an ideal world, whether the victim is rich or poor or black or white would be irrelevant to adjudication of the defendant’s culpability. In the United States, my sense is that some black jurors will believe that these factors are relevant to the calculus of justice. The rationale is implicitly premised on a critique of the legitimacy of property rights in a society marked by gross economic inequities. While I endorse this critique, I would encourage nullification here only in extreme cases (i.e., nonviolent theft from the very wealthy) and mainly for political reasons: If the rich cannot rely on criminal law for the protection of their property and the law prevents more direct self-help measures, perhaps they will focus on
correcting the conditions that make others want to steal from them. This view may be naive, but arguably no more so than that of the black people who thought that if they refused to ride the bus, they could end legally enforced segregation in the South.

C. Some Political and Procedural Concerns

1. What if White People Start Nullifying Too?

One concern is that whites will nullify in cases of white-on-black crime. The best response to this concern is that often white people do nullify in those cases. The white jurors who acquitted the police officers who beat up Rodney King are a good example. There is no reason why my proposal should cause white jurors to acquit white defendants who are guilty of violence against blacks any more frequently. My model assumes that black violence against whites would be punished by black jurors: I hope that white jurors would do the same in cases involving white defendants.

If white jurors were to begin applying my proposal to cases with white defendants, then they, like the black jurors, would be choosing to opt out of the criminal justice system. For pragmatic political purposes, that would be excellent. Attention would then be focused on alternative methods of correcting antisocial conduct much sooner than it would if only African-Americans raised the issue.

2. How Do You Control Anarchy?

Why would a juror who is willing to ignore a law created through the democratic process be inclined to follow my proposal? There is no guarantee that she would. But when we consider that black jurors are already nullifying on the basis of race because they do not want to send another black man to prison, we recognize that these jurors are willing to use their power in a politically conscious manner. Many black people have concerns about their participation in the criminal justice system as jurors and might be willing to engage in some organized political conduct, not unlike the civil disobedience that African-Americans practiced in the South in the 1950s and 1960s. It appears that some black jurors now excuse some conduct—like murder—that they should not excuse. My proposal, however, provides a principled structure for the exercise of the black juror’s vote. I am not encouraging anarchy. Instead, I am reminding black jurors of their privilege to serve a higher calling than law: justice. I am suggesting a framework for what justice means in the African-American community.

3. How Do You Implement the Proposal?

Because Sparf, as well as the law of many states, prohibits jurors from being instructed about jury nullification in criminal cases, information about this privilege would have to be communicated to black jurors before they heard such cases. In addition, jurors would need to be familiar with my proposal’s framework for analyzing whether nullification is appropriate in a particular case. Disseminating this information should not be difficult. African-American culture—through mediums such as church, music (particularly rap songs), black newspapers and magazines, literature, storytelling, film (including music videos), soapbox speeches, and convention gatherings—facilitates intraracial communication. At African-American cultural events, such as concerts or theatrical productions, the audience could be instructed on the proposal, either verbally or through the dissemination of written material; this type of political expression at a cultural event would hardly be unique—voter registration campaigns are often conducted at such events. The proposal could be the subject of rap songs, which are already popular vehicles for racial critiques, or of ministers’ sermons.

One can also imagine more direct approaches. For example, advocates of this proposal might stand outside a courthouse
and distribute flyers explaining the proposal to prospective jurors. During deliberations, those jurors could then explain to other jurors their prerogative—their power—to decide justice rather than simply the facts. *Sparf* is one Supreme Court decision whose holding is rather easy to circumvent: If the defense attorneys cannot inform the people of their power, the people can inform themselves. And once informed, the people would have a formula for what justice means in the African-American community, rather than having to decide it on an ad hoc basis.

I hope that all African-American jurors will follow my proposal, and I am encouraged by the success of other grass-roots campaigns, like the famous Montgomery bus boycott, aimed at eliminating racial oppression. I note, however, that even with limited participation by African-Americans, my proposal could have a significant impact. In most American jurisdictions, jury verdicts in criminal cases must be unanimous. One juror could prevent the conviction of a defendant. The prosecution would then have to retry the case and risk facing another African-American juror with emancipation tendencies. I hope that there are enough of us out there, fed up with prison as the answer to black desperation and white supremacy, to cause retrial after retrial, until, finally, the United States “retries” its idea of justice.

**Conclusion**

This essay’s proposal raises other concerns, such as the problem of providing jurors with information relevant to their decision within the restrictive evidentiary confines of a trial. Some of these issues can be resolved through creative lawyering. Other policy questions are not as easily answered, including the issue of how long (years, decades, centuries?) black jurors would need to pursue racially based jury nullification. I think this concern is related to the issue of the appropriate time span of other race-conscious remedies, including affirmative action. Perhaps when policymakers acknowledge that race matters in criminal justice, the criminal law can benefit from the successes and failures of race consciousness in other areas of the law. I fear, however, that this day of acknowledgement will be long in coming. Until then, I expect that many black jurors will perceive the necessity of employing the self-help measures prescribed here.

I concede that the justice my proposal achieves is rough because it is as susceptible to human foibles as the jury system. I am sufficiently optimistic to hope that my proposal will be only an intermediate plan, a stopping point between the status quo and real justice. I hope that this essay will encourage African-Americans to use responsibly the power they already have. To get criminal justice past the middle point, I hope that the essay will facilitate a dialogue among all Americans in which the significance of race will not be dismissed or feared, but addressed. The most dangerous “forbidden” message is that it is better to ignore the truth than to face it.

**Notes**

hidden message was pro-conviction, see id. al 1459-60, unlike the pro-acquittal messages in the cases involving Barry and Harvey.


11. Woods v. Dugger, 923 F.2d 1454 (11th Cir.), cert. denied, 502 U.S. 953 (1991). In this case, the hidden message was pro-conviction, unlike the proacquittal messages in the cases involving Barry and Harvey.


18. 26 F. Cas. 1323 (C.C.D. Mass. 1851) (No. 15.815).

19. 156 U.S. 51 (1895).


24. Missouri v. Jenkins, 115 S. Ct. 2038 (1995) (holding that district court order to attract nonminority students to school district in furtherance of interdistrict goal was beyond scope of court’s authority).


32. See McCollum, 505 U.S. at 49.

33. Id.

**DISCUSSION QUESTIONS**

1. Why did Butler contend that “the black community would be better off when some nonviolent lawbreakers remain in the community rather than go to prison”? Do you agree or disagree with his analysis?

2. What are the “secret messages everyone hears” in the two cases Butler discussed (i.e., Marion Barry and the attorney who wore kente cloth)?

3. Why does Butler advocate racially based jury nullification—what justifies this course of action, in his view?

4. Butler argued that nullification should be confined to nonviolent crimes and that defendants charged with violent crimes, such as murder, rape, and armed robbery, should be convicted if there is proof beyond a reasonable doubt of guilt. Why is nullification not morally justifiable (in Butler’s opinion) in cases of offenders charged with violent crimes?

5. The more difficult cases, according to Butler, involve defendants charged with nonviolent property offenses or with more serious drug trafficking offenses. How does he answer the question, “Is nullification morally justifiable” in these types of cases?

6. Randall Kennedy, a Black law professor, critiqued Butler’s proposal in his book, Race, Crime, and the Law (Kennedy, 1997, pp. 305–307). He objected to Butler’s expression of more sympathy for nonviolent Black offenders than for “the law-abiding people compelled by circumstances to live in close proximity to the criminals for whom he is willing to urge subversion of the legal system.” He asserted that law-abiding Black people “desire more rather than less prosecution and punishment for all types of criminals.” How might Butler answer Kennedy’s criticisms?