more than lazy carelessness. This, however, is precisely what the courts did. In federal habeas corpus proceedings, a U.S. district court judge noted that Dobbs's attorney could have performed better in developing mitigating evidence, but concluded that the steps he took constituted "a reasonably substantial investigation." The court of appeals agreed that the defense attorney's investigation was "adequate."[107] In sum, in Dobbs's case the courts elevated no investigation into an adequate investigation.

This attitude toward the scandalously deficient performance of Dobbs's attorney is by no means unusual. Appellate courts have proven themselves willing to affirm routinely convictions and death penalties even when the laziness, inexperience, or ignorance of defense attorneys has severely compromised the adversarial character of trials.

The sector of the population most at risk of being saddled with inadequate legal counsel are those without the money to hire attorneys. The risk of inadequate representation has become more acute recently because legislatures have diminished or withdrawn funding from agencies that have heretofore represented indigent defendants, including those facing capital charges.[108] Here, as in many contexts, racial bias superimposes another layer of burden upon socioeconomic class inequities. In at least some instances, the lethal default of defense attorneys is related either to their own racial prejudices or to the racial prejudices of their peers, whom these attorneys are afraid of angering by fighting too hard on behalf of black clients.[109]

Racial bias of this sort probably played a role in the poor quality of representation that Dobbs received. Describing the testimony given by Dobbs's attorney in a postconviction hearing focusing on the attorney's performance, a district judge noted:

> Dobbs' trial attorney was outspoken about his [racial] views. He said that many blacks are uneducated and would not make good teachers, but do make good basketball players. He opined that blacks are less educated and less intelligent than whites either because of their nature or because "my granddaddy had slaves." He said that integration has led to deteriorating neighborhoods and schools, and referred to the black community in Chattanooga as "black boy jungle." He strongly implied that blacks have inferior morals by relating a story about sex in a classroom. He also said that when he was young, a maid was hired with the understanding that she would steal some items. . . . He did say, however, that Martin Luther King, Jr., was "a great man."
>
> The attorney stated that he uses the word "nigger" jokingly. He testified further that, in his experience as a criminal defense lawyer, a black accused of killing a white is more likely to be convicted than a black charged with killing a black, although he did not know why.[110]

It is difficult to draw hard and fast conclusions from this portrayal of the attorney's racial attitudes. Although these comments have a bad odor of racism about them, one must still acknowledge the gap that can separate attitudes from conduct. A racially biased attorney can nonetheless be skillful and committed, and an unprejudiced attorney can be inept and complacent. Here, as in so many areas we have discussed, complexity and uncertainty abound. What is clear, however, is that the plight of defendants stuck with attorneys who neglect their clients is a woefully underpublicized subject. O.J. Simpson's criminal trial showed much that is disturbing about the administration of law. Disturbing, too, however, is the character of Wilburn Dobbs's trial, including the inadequacy of the representation he received, a type of embarrassment to the legal profession about which many of Johnnie Cochran's critics are silent.

Black Power in the Jury Box?

Whatever message Johnnie Cochran intended to send with his famous summation, the fact is that a small but appreciable number of Americans believe that it is proper for them to engage in jury nullification.[111] Jury nullification means voting to acquit a defendant despite a belief beyond reasonable doubt that, based on proper evidence, the defendant is guilty of the crime with which he is charged. Nullification occurs when guilt is established but the jury decides to acquit based on its own sense of fairness, propriety, prejudice, or any other sentiment or concern. Race-conscious jury nullification has historically been exercised predominantly by whites. The focus of this discussion will be race-conscious nullification exercised by blacks, particularly the provocative encouragement of it voiced by Professor Paul Butler.

In "Racially Based Jury Nullification: Black Power in the Criminal Justice System," Professor Butler urges black jurors to refuse to vote to convict black defendants charged with certain crimes regardless of the evidence arrayed against them. He proposes this course of action because "the black community is better off when some nonviolent lawbreakers remain in the community rather than go to prison." More specifically, Butler argues that, absent special circumstances, black jurors should nullify convictions of guilty black defendants charged with what he describes as "nonviolent, *malum prohibitum* offenses, including victimless crimes like narcotics offenses."[112]

Butler does not argue in favor of nullification in all cases. He asserts that black jurors should vote to convict black defendants guilty of *violent* crimes like murder, rape, and assault. For an intermediate level of nonviolent crime, for example, theft or perjury, Butler contends that "nullification is an option that the [black] juror should consider, although there should be no presumption in favor of it." In this middle tier of cases, a black juror might appropriately vote for acquittal when a poor black woman steals from Tiffany's, but not when the same woman steals from her next-door neighbor. "The decision as to what kind of conduct by African-Americans ought to be punished is better made by African-Americans themselves," Butler writes, "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." It is "the moral responsibility of black jurors," Butler concludes, "to emancipate some guilty black outlaws."[113]

Butler's proposal rests on three main points. One is that a juror's power to vote to acquit a defendant who has been shown to be guilty is a power that may be put to laudable uses. He cites the refusal of a jury in *Bushnell's Case*[114] to convict a group of Quakers for unlawful assembly and disturbance of the peace, a landmark instance of resistance to governmental religious oppression. He cites the acquittal of Peter Zenger, who was accused of seditious libel for criticizing British colonial rule in North America, a landmark in the growth of freedom of expression. English law authorized the judge exclusively to determine whether statements made by the defendant were libelous. Yet, at trial, Zenger's attorney told the jury that it should ignore the judge's instructions and "make use of their own consciences and understandings, in judging of

the lives, liberties, or estates of their fellow subjects."[115] Butler also cites *United States* v. *Morris* and other cases in which juries, prompted by defense attorneys, acquitted guilty defendants accused of violating the federal Fugitive Slave Act, which helped owners to recapture runaway slaves.[116]

Butler's second point is that a total breach of America's constitutional promises absolves blacks of a moral duty to obey the society's rules. " 'Democracy' as practiced in the United States," he writes, "has betrayed African Americans far more than they could ever betray it." According to Butler, the American power structure remains a pigmentocracy that condemns blacks to an inferior place in the social order and then punishes them harshly for antisocial conduct largely caused by the circumstances into which they have been thrown.[117] Butler's third point overlaps with the second. It is that white racism is the cause of much of the criminal conduct engaged in by blacks. "But for the (racist) environment," he writes, "the African American criminal would not be a criminal. . . .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."[118]

In Butler's view, blacks are subjected to "democratic domination" by a white majority that refuses to permit blacks to exercise a fair share of power. As a result, he contends, "African-Americans wield little influence over criminal law, state or federal."[119] Butler recognizes that, at least formally, blacks are protected against racial exclusion from participation in governance. To him, however, black participation is so limited that it amounts only to tokenism and reinforces the illusion that blacks are equal to whites in the eyes of the law. In light of their subjection to racist policies that they have had no fair opportunity to influence, blacks are morally justified, Butler concludes, in engaging in self-help, which means, in part, that they are ethically correct to exert black power in the jury box.

Professor Butler's essay brings into the open a clearly articulated version of a belief that had been known about previously only through furtive, vague, unnamed sources. Over the past few years, reports have surfaced of cases in which the evidence against black defendants being tried before predominantly black juries appeared to be so overwhelm-

ing that some observers speculated that jury nullification must account for acquittals or hung juries.[120] One example is the prosecution of Marion Barry, the mayor of Washington, D.C. After viewing a Federal Bureau of Investigation videotape that showed Barry smoking cocaine, and after listening to strong incriminating evidence from other sources, a predominantly black jury nonetheless declined to convict him of the most serious charges he faced.[121] Further evidence that black jurors engage in race-conscious nullification is provided by anonymous admissions of such conduct. In the District of Columbia, for instance, a person wrote an anonymous letter to court officials in which she identified herself as a juror who had recently declined to vote to convict a defendant charged with first degree murder. The letter writer stated that she and other members of the jury believed that the prosecution had proven the defendant's guilt but that they had voted to acquit anyway in deference to members of the jury who "didn't want to send any more Young Black Men to jail."[122]

The trial of O.J. Simpson, the most publicized criminal proceeding in American history, tremendously enlarged the specter (or hope) of race-conscious nullification by black jurors. Early on some commentators suggested that, in light of the intense anger felt by many blacks over racially discriminatory mistreatment by law enforcement officials, some black jurors might decline to vote to convict Simpson as a form of protest, regardless of the evidence in that particular case.[123] Those speculations were magnified when Johnnie Cochran focused jurors' attention on the infamous Mark Fuhrman.[124] Anxieties were heightened even more when, following Simpson's acquittal, some people celebrated in a fashion which suggested that they perceived the trial as a racial show of strength. Stating that he was happy with the acquittal even if Simpson did commit the murder, a black man in Boston ascribed his satisfaction to his perception that "we [blacks] never win *anything*." "A black man was charged with killing a white woman—a blond white woman at that," this man mused. "And the court said he didn't do it. Hell, that's worth celebrating."[125]

Butler published his essay against the backdrop of the Simpson acquittal. That timing, the provocativeness of its thesis, the identity of the author (a young black Harvard-trained law professor who is a former prosecutor), the prestige of the *Yale Law Journal*, anxieties over racial

conflicts, and American culture's voracious appetite for controversiality assured it a wide audience. Useful as a document that verifies and illuminates an important thread of thought and sensibility, Butler's essay is profoundly misleading as a guide to action. Not only is its destination regrettable, but along the way "Racially-Based Jury Nullification" gives voice to erroneous claims, dubious calculations, and destructive sentiments.

Butler's proposal rests on a seriously flawed assessment of the state of race relations within the administration of criminal law. According to Butler's portrayal, white racism is almost wholly triumphant in the criminal law system.[126] He sees black–white race relations as a narrative completely dominated by the continuity of African-American subordination, as opposed to a narrative marked by significant discontinuity—the leap from slavery to freedom, and from castelike stigmatization to an increasingly respected place in all aspects of American life. That explains why he feels justified in calling for subversion. He perceives blacks as occupying a place in the mind, soul, politics, and law of America that is essentially the same as that occupied by their enslaved or segregated forebears.

There is, to be sure, racial injustice in the administration of criminal law. In some instances, the injustices stem from the actions of officials who mistreat black suspects, defendants, and convicts, or offer ordinary black citizens less protection against criminality than is offered to whites (see chapters 2 and 3). In other instances, the law itself is racially unjust, as in the case law which broadly authorizes police officers to take race into account in making determinations of suspicion (see chapter 4). So, *yes*, Butler is correct when he notes with dissatisfaction that invidious racial discrimination remains a large and baleful presence in the criminal justice system.

Racial wrongdoing, however, is *all* that Butler sees. His portrayal of the criminal law system wholly omits any facts, developments, or tendencies that contradict, or even merely complicate, his preferred narrative. He portrays a static, one-dimensional system that is totally at odds with what black Americans need and want, a system that unequivocally represents and unrelentingly imposes "the white man's law." To illustrate his argument, Butler provides a long list of examples that document "racism in criminal justice":

> 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 punishment for other crimes; more severe penalties for crack cocaine users than for powder cocaine users; the Charles Stuart 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 incarceration of African-American men.[127]

A striking feature of Butler's presentation of this list is the absence of any acknowledgment that much of what he offers as evidence of racism also has a different side which evidences the long-standing struggle in American political culture *against* racism. True, the Scottsboro boys were subjected to a horrible, racially motivated persecution. It is also true, however, that courts at both the state and federal levels did ultimately prevent their executions, at times intervening in an extraordinary fashion.[128] Rodney King may have been victimized by officers in a police department that is rightly notorious for racism. Ultimately, however, several of his assailants were convicted and imprisoned pursuant to a federal criminal civil rights prosecution even after a state criminal trial in which they had largely prevailed.[129] Remarkably, Professor Butler lists the O.J. Simpson case among his examples of racism in the administration of criminal law. But, of course, in the end Simpson was *acquitted* despite the presence of considerable, if not overwhelming, incriminating evidence.

Butler's account withholds completely any recognition that restrictions on state power that define much of the constitutional law of criminal procedure are limits that emerged largely from struggles against racism.[130] Similarly, his account neglects to credit the significant presence of African-Americans in law enforcement, including those blacks in major urban areas who exercise power at the highest circles of executive police authority.* He speaks of the disparity in punishment between crack cocaine and powder cocaine as an example of "racism." Yet one would never suspect from his account that when the federal law that he criticizes was enacted, Charles Rangel, the African-American representative from Harlem, chaired the House Select Committee on Narcotics Abuse and Control and voted in favor of this law as did about half of the members of the Congressional Black Caucus.[131] In sum, Butler ignores or suppresses inconvenient facts, omitting significant parts of the story that cannot properly be overlooked if one seeks a comprehensive understanding of the place of race relations in the administration of criminal law. The criminal justice system is beset by racial problems, but they are by no means as large, immutable, or one-dimensional as Butler suggests. The problems we do face require judicious attention, not a campaign of defiant sabotage.

Another major failing of Butler's analysis is his failure to recognize that jury nullification is an exceedingly poor means for advancing the goal of a racially fair administration of criminal law. Two concerns are especially salient. First, as Professor Andrew C. Leipold notes, there is no reason to believe that a campaign of jury nullification will succeed in bringing about the broad social reforms that Butler demands. Jury nullification as typically implemented is a low-visibility, highly ambiguous protest unlikely to focus the attention of the public clearly on social problems in need of reform. "Because deliberations are secret and verdicts are opaque, it is hard to know why any particular jury decides to acquit"[132]—an observation vividly substantiated by the ongoing speculation over what animated the acquittal in the O.J. Simpson case. To publicize their aims, nullificationists would have to publicize their subversion of the criminal justice system, a route few have chosen to take.

That jury nullification is widely perceived as illegitimate under present circumstances suggests another reason for doubting the efficacy of

*"By the end of the 1980s, the number of African-American police chiefs had increaed to 130, and they served in six of the nation's largest cities (Baltimore, New York, Detroit, Chicago, Philadelphia, and Houston). This unprecedented phenomenon in American history represented a 180-degree change from the second-class status that African-Americans had traditionally held in American law enforcement." W. Marvin Dulaney, *Black Police in America* (1996).

Agency, Character and Identity / INSTITUTE FOR CRIMINAL JUSTICE ETHICS

Agenda
Character and Punishment

John Jay College of Criminal Justice
March 14 & 15, 2014

Friday March 14

Noon – 1:30 pm Room 08.70 NB	General welcome, refreshments in the office of the Institute for Criminal Justice Ethics
1:30 pm-5:00 pm Room L.61 NB	**Moving toward the Good: individuals and change post-prison** Alexandra Cox, Jonathan Jacobs, Shadd Maruna, Margaret Smith Discussion of identity, aspiration and change post-imprisonment. Agency: External validations and self-chosen identifications Recognizing and working with implicit choice
3:30 pm	Coffee & snacks
8:00 pm	Dinner – Boulud Sud – 20 West 64th Street

Saturday March 15

10:00 am – 2:00 pm Room L.61 NB	**Severe punishment and liberal values** Research report from Prison Research Centre projects: Bethany Schmidt 'Coercion Corruption and the Erosion of Agency' Jonathan Jacobs Fergus McNeill
2:00 – 3:00 pm	Lunch – Indie food and Wine – 65th Street
3:30 - 5:00 pm Room L.61 NB	Conclusion .. next steps .. papers, etc.

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Butler's proposal. Butler seems to believe that his proposal will move policymakers in the direction he desires, but there is little in the historical record to support this belief. Indeed, what evidence there is cuts the other way. When white Southern diehards made it clear that they would nullify criminal prosecutions of those who used racially motivated violence to resist reform in the aftermath of the Civil War, the ascendant political party in the national government responded with an unprecedented intervention of federal power in support of actions—the elevation of blacks to formal equality with whites—that the nullifiers abhorred.[133] A century later, when white Southern segregationist diehards again made it clear that they were prepared to nullify criminal prosecutions of violent criminals, large and powerful blocs in society again intervened in unprecedented ways, partly out of sympathy with those whom the nullifiers opposed, but also to show that they would not allow the legal order to be openly flouted.[134] In both of these instances, public opinion overwhelmed *white* nullifiers. An outspoken campaign of jury nullification carried on by blacks would reap no less of a reaction. The intimation that jury nullification explains, at least in part, several high-profile acquittals has already sparked tremendous condemnation that is likely to affect, for the worse, the fortunes of African-Americans. Referring to this danger, a columnist in the *New York Times* quoted a letter sent to him immediately before the Simpson acquittal. "When O.J. gets off," the writer declared, "the whites will riot the way we whites do: leave the cities, go to Idaho or Oregon or Arizona, vote for Gingrich . . . and punish the blacks by closing their day-care centers and cutting off their Medicaid."[135] Whether this prophecy will be borne out is unclear. Already, though, the perception that nullificationist sentiment is increasing has prompted calls for reaction. An example is the effort to replace the requirement that a jury be unanimous in order to convict with a less demanding standard under which convictions could be obtained with several jurors voting for acquittal. Critiques of the unanimity requirement have been around for a long time, and two states—Louisiana and Oregon—now permit convictions even with two or more jurors voting to acquit.[136] Fear of a perceived rise in nullificationist sentiments is giving new life to these criticisms.[137]

Changing the unanimity requirement does not exhaust the reactive possibilities that could ensue from implementation of Butler's proposal. If a large number of blacks clearly engage in "guerrilla warfare" as jurors, their action might call into question the right of blacks to be selected for jury service on precisely the same terms as others. Widespread adoption of Butler's proposal would likely give rise to measures designed to exclude prospective nullifiers from juries, measures that would result almost certainly in the disproportionate exclusion of blacks. Moreover, if adherents to the Butler program proved to be especially clever and relentless in their subversion, one can imagine (with horror) the emergence of demands that black prospective jurors show a special sign of allegiance to the legal system in return for the opportunity to be considered for jury service or, worse yet, demands that blacks be excused from jury service altogether during the pendency of the nullification crisis.

Professor Butler fails to mention the possibility that limiting the rights of blacks to sit on juries might be part of a reaction against his scheme. This is odd. Having called upon black jurors to sabotage the criminal justice system, he evinces little concern over the steps that might be taken in response. This omission may signal nothing more than a failure to think through the consequences of his proposal. I suspect, however, that it signals something more. I suspect that it signals, ironically, that despite all of his accusatory rhetoric, Professor Butler does not really believe that American society is as oppressively racist as he suggests. If a sufficient number of people were to follow his proposal, however, conditions might be brought into existence that would make his caricature of American society a self-fulfilling prophecy.

There are additional reasons to object to Butler's scheme and the reasoning and sensibility that it embodies. Butler suggests that black criminals should be exempt from *punishment* on the grounds that "but for the [racist] environment, the African-American criminal would not be a criminal."[138] Butler urges the conviction and incarceration of black *violent* criminals, but he claims to do so only for purposes of deterrence and incapacitation, not for purposes of retribution. Butler hints that he rejects retribution in general as a basis for coercive action.[139] However, as with every other significant aspect of his analysis, Butler develops a racial critique of retribution as applied to *black* criminals, maintaining that it is unfair to punish people for "negative" reactions to racist, oppressive conditions.[140]

This feature of Butler's analysis is significant for a variety of reasons. First, it both reflects and contributes to an argument made on behalf of

people whose misconduct is said to be attributable to conditions that have so victimized them as to excuse their misdeeds.[141] This argument has been made on behalf of battered wives who have killed abusive husbands and battered children who have killed abusive parents. Butler simply extends the logic of these "abuse excuses" to people whom he perceives as having been battered by white racism—nearly *all* African-Americans.*

There is good reason to scrutinize closely all of the abuse excuses that have been advanced recently to absolve persons of criminal responsibility for acts typically viewed as criminal. Some appear to be of dubious merit. The racial oppression excuse that Butler offers is particularly ill-founded. Unlike other abuse excuses, Butler's is untethered to particular events or individuals. Rather, it refers to all of American history and embraces an entire race, *all* African-Americans, from Colin Powell on down.

The implications of Butler's theory for American race relations are staggering. If it were believed and acted upon, his conception of the irresponsibility of blacks would impose upon African-Americans a disability from which they were free even during the era of slavery: the disability of being perceived as people wholly devoid of moral choice and thus blameless for purposes of retribution, the same way that infants, the insane, and animals are typically viewed as morally blameless. The slave codes were based in part on a racially demeaning perception of blacks. As bad as those codes were, though, they all conceded that blacks were sufficiently human, moral, and responsible to be held accountable for their actions.[142]

Butler contends that African-Americans cannot afford to lock up African-Americans who engage in relatively minor, nonviolent infractions because, in doing so, "there is too little bang for the buck." "Black people have a community that needs building, and children who need

*Butler, of course, is not alone in pursuing this path. After Colin Ferguson shot twenty-five people on the Long Island Railroad on December 7, 1993, his attorneys announced that they would mount a black rage defense based on the idea that American racism had pushed their already unstable client into insanity. Ferguson fired his attorneys before they could present their theory. He represented himself, was convicted, and was sentenced to imprisonment for life. See Judd F. Sneirson, "Black Rage and the Criminal Law," 143 *University of Pennsylvania Law Review* 2251 (1995); Kimberly M. Copp, "Black Rage," 29 *John Marshall Law Review* 205 (1995).

rescuing, and as long as a person will not hurt anyone, the community needs him there to help." Assuming that the lawbreaker will help is a gamble, Butler concedes, "but not a reckless one, for the 'just' African-American community will not leave [him] be: It will . . . encourage his education and provide his health care . . . and, if necessary, sue him for child support."[143]

That is delusionary. If the communities Butler refers to possessed the resources he mentions, the crime problems they face would not be nearly so urgent; these communities could take care of these problems by themselves. Many poor, downtrodden communities, however, desperately weakened by social disorder and other ills, are apparently unable to address their crime problems adequately. That is why some of the residents in many of these communities clamor for curfews and even military intervention.* They want relief from criminals who both reflect and entrench social misery. Many of these criminal sowers of social decay are themselves victims of poverty, ignorance, joblessness, child abuse, and so on. Society ought to do more to prevent people from falling so low, and when people do fall, society ought to do more to attend to their plight. At the same time, however, society ought to insulate the neighbors of these victimized victimizers from criminal conduct.

Butler exudes keen sympathy for nonviolent drug offenders and similar criminals. By contrast, Butler is inattentive to the aspirations, frustrations, and fears of 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. Butler simply overlooks the sec-

*Recall that it was the African-American mayor of Washington, D.C., Sharon Pratt Kelly, who requested that President Clinton dispatch the National Guard to the nation's capital in order to quell spiraling violence. See B. Drummond Ayres, Jr., "Washington Mayor Seeks Aid on Guard in Combating Crime," *New York Times*, October 23, 1993. Prior to Mayor Kelly's request, other blacks had also called for extraordinary interventions on the part of law enforcement authorities, ranging from imposition of martial law to summary executions of drug dealers. See Michael Z. Letwin, "Report from the Front Line: The Bennett Plan, Street-Level Drug Enforcement in New York City and the Legalization Debate," 18 *Hofstra Law Review* 795, 797 n.13 (1990). Of African-Americans polled in February 1994, 25 percent designated crime the main problem facing the country today; 8 percent designated racism as the main problem. See William A. Henry, III, "How African Americans See It," *Time*, February 18, 1994.

tor of the black law-abiding population that desires *more* rather than *less* prosecution and punishment for *all* types of criminals. According to data collected by a 1993 Gallup Poll, 82 percent of the blacks surveyed believed that the courts in their area do not treat criminals harshly enough; 75 percent favored putting more police on the streets to combat crime; and 68 percent favored building more prisons so that longer sentences could be given.[144] One would never know from Butler's analysis that a large number of ordinary, grass-roots blacks embrace such views.*

If a large number of blacks have views on the administration of criminal law that are counter to Butler's, why worry about his proposal? Why not ignore his advice and simply wait for mass opinion within black and other communities to snub it? There are several reasons why it is worthwhile to oppose Butler's proposal openly and in detail. First, it would not take many people to wreak havoc with the jury system. The unanimity requirement renders juries uniquely susceptible to disruption by a resolute cadre of nullifiers. Since in most places it takes only one person to cause a hung jury, Butler would not need to convince an overwhelming number in order to succeed in creating substantial gridlock. Second, in terms of political significance, positioning, organization, and publicity are often more crucial than the popularity or unpopularity, intelligence or silliness, of a given viewpoint. Although many blacks hold views diametrically opposed to Butler's on nullification and related issues, *his* is the one that *60 Minutes* publicized and that will be deemed by many as the authentically "black" position.† Left un-

*Professor Butler does acknowledge the presence of those whom he refers to as African-American "law enforcement enthusiasts." He uses some of my writings to illustrate the views of that camp. See Butler, "Racially Based Jury Nullification: Black Power in the Criminal Justice System," 105 *Yale Law Journal* 677, 697–698 (1995). Nowhere, however, does he acknowledge the broad popularity of the views that he attributes to the law enforcement enthusiasts. To the contrary, although he writes that blacks "tend to be more worried about crime than whites," he asserts that "this enhanced concern . . . does not appear to translate into endorsement of tougher enforcement of traditional criminal law." Ibid., 699. As the polling data cited in the text and other evidence indicate, however, Butler's description of black public opinion is simply wrong. See Andrew D. Leipold, "The Dangers of Race-Based Jury Nullification," *UCLA Law Review* 109 (1996).

†See *60 Minutes,* 1996 WL 806 4808, March 10, 1996.

corrected, such misperceptions will gain currency, leading to the further isolation and stigmatization of Negroes in the eyes of many Americans.

Another reason to object to Butler's scheme is that it pays insufficient attention to excesses that Butler himself claims to oppose. Butler urges black jurors to nullify prosecution of black defendants only in cases involving nonviolent crime; he urges that they act normally, that is, vote based on their view of the evidence, in cases involving violent offenses. It is not all clear, however, why he draws the line at violent crime.* This vagueness suggests that Butler's primary concern is with protecting *blacks* against violence, and comments he made regarding the acquittal of O.J. Simpson raise doubts about the extent of his commitment to protecting *all* persons from criminal violence.

Explaining why nullification would be improper in a murder case, Butler says that black jurors should vote to convict (if the evidence points beyond reasonable doubt to guilt) because "there is a possibility that a guilty verdict will prevent another person from becoming a victim." "In effect," he notes, "I 'write off' the black person who takes a life . . . because the black community cannot afford the risks of leaving this person in its midst."[145] But just suppose that this murderer, objecting to black-on-black crime out of a sense of racial kinship, only kills white people? Not so long ago, after all, an entertainer-activist of note, Sister Souljah, suggested that "if black people kill black people every day, why not have a week [in which blacks] kill white people."[146] For black jurors to subvert openly a prosecution in such a case would surely send a powerful message, and to the extent that the hypothesized murderer self-consciously kills only white people, he poses no direct threat to black lives. This scenario would seem to present a difficult case for Butler. He concedes that he encounters problems deciding whether nullification is warranted in a case in which a black person burglarizes the home of a rich family. (Butler inexplicably omits the race of the rich family, but given the structure of his argument, it is fair to conclude that

*Indeed, Butler is inconsistent in drawing the line at violent crime. At one point, he concedes that under his analysis "this limitation is not morally required." Butler, "Racially Based Jury Nullification," 709. At other points, however, he draws the line at violent crime unequivocably. Ibid., 716 ("Under my proposal, violent lawbreakers would go to prison").

he is referring to a rich white family.) "I would encourage nullification here only in extreme cases (i.e., nonviolent theft from the very wealthy)," he writes, "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."[147] Having pushed the *property* of rich whites outside the protection of criminal law based on the supposition that doing so might scare them into supporting egalitarian social reforms, why not at least experiment with pushing the *lives* of rich whites outside the protection of criminal law, hoping for a similarly good result?

Butler shrinks from taking his jury nullification scheme this far, but he offers no reason why. Nor does he explain why anyone should have faith that those who follow his prescription will heed his (weak) admonition to draw the line at violent crime. He says that he is "confident that balancing the social costs and benefits of incarceration would not lead black jurors to release violent criminals simply because of their race."[148] Yet on the same page he concedes that "some violent offenders currently receive the benefits of jury nullification . . . from a misguided if well-intentioned attempt by racial critics to make a political point."* Moreover, in a revealing opinion-editorial piece published soon after the acquittal of O.J. Simpson, Butler expressed sentiments of the sort that would likely benefit some violent offenders through racially motivated exertions of black power in the jury box. Butler writes that, after hearing the verdict, "I danced my freedom dance along with my sisters and brothers all over the world." It would be one thing if Butler had danced his freedom dance upon a firm belief in Simpson's innocence, but that is not how Butler viewed the case. Butler writes that he believes that Simpson "probably did it,"[149] in other words, that Simpson probably murdered two human beings, one of whom was his former wife and the mother of his children. Butler properly notes that a perception of probable guilt is an inadequate basis for conviction, which requires a finding of guilt beyond reasonable doubt. Even assuming, however, that reasonable doubt was present, thereby rightly precluding a conviction, what is the character of the sentiment that would prompt one to *dance* after the

*Later in the essay he repeats the point, saying that "it appears that some black jurors now excuse some conduct—like murder—that they should not excuse." Ibid., 723.

acquittal of a defendant whom one believes to be probably guilty of a double murder? It is a sentiment that is morally repugnant and politically dangerous.

There are, as we have seen, reasons to object to Butler's proposal. First, the nature of the social injustice Butler rightly objects to is not of the sort that properly gives rise to revolutionary subversion. When blacks were enslaved, revolutionary means of redress were appropriate—including armed rebellion, not to mention jury nullification.[150] Today, however, blacks are not enslaved. In contrast to the period which witnessed the fugitive slave laws, blacks share in the shaping of governmental policies, including those that Butler portrays as the result of white domination.

Second, there remains the problem of efficacy. Because jury nullification is often opaque, it is ill suited as a vehicle for attacking widespread problems, as opposed to particular instances of injustice. Butler, moreover, limits his call for nullification only to prospective *black* jurors. This is strange. Butler himself recognizes that a much stronger message would certainly be sent if *all* prospective jurors pursued a campaign of nullification. Butler justifies limiting his call for nullification to black jurors on the grounds that blacks have a "unique history and position in the United States."[151] That is true as a matter of description. Why should that make a difference, however, as a matter of prescription? Perhaps Butler means to suggest that only black jurors have the moral right to engage in nullification because only their history and present circumstances relieve them of the duty to follow the rules of the legal order. If the rules of the legal order are fundamentally oppressive, however, then *all* citizens, whatever their race, should feel morally bound to disobey and change them. A black slave should not have felt bound by proslavery laws in the antebellum South, but neither should a white person have felt bound by those rules.

Perhaps Butler believes that only black jurors have a moral responsibility to address the plight of black communities, or (a variation on the theme) that only black jurors have a sufficiently strong responsibility to warrant the extraordinary step of nullification. Why, however, should the moral responsibility of whites to address the racial wrongs of American society be any less intense and exacting than the moral responsibility of blacks? Indeed, if anything, whites have *more* of a moral responsibility to act because of their greater ability to reform the society

(and also perhaps because of having benefited, albeit involuntarily, from the society's privileging of white skin).

The most fundamental reason to oppose Professor Butler's call for racially selective jury nullification is that it is based on a sentiment that is regrettably widespread in American culture: an ultimately destructive sentiment of racial kinship that prompts individuals of a given race to care more about "their own" than people of another race. He expresses this sentiment throughout his essay by explicitly erecting racial boundaries around his conception of responsibility, community, and empathy.* Because of that sentiment, he assumes that it is proper for prospective black jurors to care more about black communities than white communities, that it is proper for black jurors to be more concerned with the fate of black defendants than white defendants, and that it is proper for the black juror to be more protective of the property (and perhaps the lives?) of black people than white people. Along that road lies moral and political disaster. The disaster includes not only increasing but, worse, *legitimizing* the tendency of people to privilege in racial terms "their own."† Some will say that this racial privileging has already happened and is, in any event, inevitable. The situation can and will get worse, however, if Butler's plan and the thinking behind it gain adherents. His program, although animated by a desire to challenge racial injustice, would demolish the moral framework upon which an effective, attractive, and compelling alternative can and must be built.

*He writes, for instance, that "African-American jurors should . . . exercise their power in the best interests of the black community." Butler, "Racially-Based Jury Nullification," 715. If that is so, should white jurors exercise their power in the best interests of the white community? Some white jurors, judges, and legislators do exercise their power in what they perceive to be the best interest of the white community. They are wrong, however, to the extent that they do so on a racial basis. That correct sense of wrong is the basis upon which a moral critique of their actions must rest.

†One of the black members of the jury that acquitted O.J. Simpson reportedly stated after the verdict, "We've got to protect our own." See Jeffrey Toobin, *The Run of His Life: The People v. O.J. Simpson*, 431 (1996). One should be careful with this report; the author reporting it does not offer a specific source that permits an assessment of reliability. For my purposes, though, it is enough to note that the juror's alleged statement is wholly plausible because of the widespread existence of the racial sentiments I criticize.

9.

Race, Law, and Punishment:
The Death Penalty

"[T]he unconscious operation of irrational sympathies and antipathies, including racial, upon jury decisions and (hence) prosecutorial decisions is real , acknowledged in the decisions of this court, and ineradicable."
—Antonin Scalia

NO ISSUES CONCERNING race and criminal law are more sobering than those raised by allegations that racial selectivity affects the administration of capital punishment. First, sentencing a person to death as punishment for crime is a unique flexing of state power that inevitably reflects the society's deepest values, emotions, and neuroses. Second, the legal system has shown itself to be largely incapable of acknowledging the influence of racial sentiment in the meting out of punishment even in circumstances in which the presence of such bias is obvious. In no other area of criminal law have judges engaged in more obfuscation, delusion, evasion, and deception. Third, addressing racial discrimination in capital sentencing poses a daunting task for those seeking to craft appropriate remedies.

If a jurisdiction tends to punish more harshly murderers of whites than murderers of blacks, is the appropriate response to abolish capital punishment, to more narrowly limit the circumstances in which capital punishment is imposed, or to execute more people who murder blacks? Even if such a tendency exists, should it be the basis for grant-