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else's actions around you. Explain your actions and how you felt at the time the threat was presented to you. Notice how I said that; how the threat was presented to you and how you handled it. (Emphases added.)

According to Judge McDade, "The bone-chilling subtext in McDaniel's virtual monolog is that the police could pick up any young African-American male and he could be convicted, even if he does not confess, because the judges and jurors will be driven by media-hyped stereotypes and either will not hear or will not be open to any defense he would put on. It is hard to imagine anything more blatantly coercive than telling a suspect, whether it is true or false, that he needs to confess to killing the victim, claim self-defense and minimize his damages because, even if he is innocent, our system of justice will not work for him because he is young and black and male."

Postscript: In January 2015, Peoria County prosecutors dropped the case against Jackson, stating that the fact that the Appellate Court suppressed his statement and other evidence meant that they did not have enough evidence to proceed.

SOURCE: *People v. Jackson*, 2014 IL App (3d) 120239.

In summary, there is incontrovertible evidence that the reforms implemented since the Scottsboro Boys were tried, convicted, and sentenced to death by all-white juries have *reduced* racial discrimination in the jury selection process. Decisions handed down by the Supreme Court have made it difficult, if not impossible, for courts to make "no pretense of putting Negroes on jury lists, much less calling or using them in trials."⁸⁷ However, as the Equal Justice Initiative report and the other evidence presented in this chapter make clear, the jury selection process remains racially biased. There is compelling evidence that prosecutors continue to use the peremptory challenge to exclude African-American and Hispanic jurors from cases with African-American and Hispanic defendants and that appellate courts continue to rule that their "racially neutral" explanations adequately meet the standards articulated in *Batson*. Supreme Court decisions notwithstanding, the peremptory challenge remains an obstacle to impartiality.

In the next section, we turn our attention to the issue of wrongful convictions, noting that race and mistaken eyewitness identification combine to produce an especially high rate of exonerations of African Americans accused of rape. This is followed by a discussion of "playing the race card in a criminal trial."

EXONERATING THE INNOCENT: RAPE, RACE, AND MISTAKEN EYEWITNESS IDENTIFICATION

During the past three decades, the issue of wrongful convictions has appeared on the top of the national political agenda. Highly publicized exonerations of individuals convicted of murder, sexual assault, and other serious crimes have led to questions about the accuracy and fairness of the procedures used to investigate and adjudicate criminal cases. These concerns are based in part on the fact that a large number of the exonerees, many of whom were facing serious

Box 6.7 Exonerating the Innocent: The Role of DNA

In 1989, a Cook County (Chicago) circuit judge vacated Gary Dotson's conviction for rape and dismissed the charges against him. Dotson thus became the first prisoner in the United States to be exonerated by DNA identification technology. As the technology improved and became more widely available, the number of DNA exonerations increased, from 1 or 2 a year in the early 1990s, to about 6 per year in the mid-1990s, to an average of 20 per year from 2000 to 2009. By January 2016, there had been 337 post-conviction DNA exonerations—206 (61.1 percent) of the exonerees were African American, 103 (30.6 percent) were white, and 25 (7.4 percent) were Hispanic.

SOURCE: The Innocence Project. <http://www.innocenceproject.org/free-innocent/improve-the-law/fact-sheets/dna-exonerations-nationwide>.

of death or life in prison, were freed as a result of DNA tests that either were unavailable or were deemed unnecessary when their cases were being investigated and tried; this, in turn, has led some critics to suggest that the documented cases of wrongful conviction are only "the tip of the iceberg."⁸⁸ Concerns about false convictions also are based on research showing not only that a disproportionate number of those exonerated have been racial minorities but also that the disparity is particularly stark in cases of interracial sexual assault.⁸⁹ Together, these concerns have raised questions about the legitimacy and integrity of the criminal justice process (see Box 6.7 for additional evidence of the overrepresentation of racial minorities among those who have been exonerated as a result of DNA evidence).

A recent analysis of 340 exonerations in the United States from 1989 to 2003 revealed that DNA exonerations were especially prevalent in rape cases. These cases also were characterized by eyewitness misidentification. In fact, 107 of the 121 exonerations for rape, the defendant was the victim of eyewitness misidentification, and in 105 of these cases the defendant was eventually cleared by DNA evidence. About half (102 of 205) of the exonerations in murder cases also involved eyewitness misidentification, but only 39 of the 205 defendants were cleared as a result of DNA evidence.⁹¹

Rape, Race, and Misidentification

Although the percentages of African Americans, Hispanics, and whites who were exonerated for all crimes were similar to the percentages of each group incarcerated in state prisons, this was not the case for rape. In 2002, 58 percent of people incarcerated for rape were white, 29 percent were African American, and 13 percent were Hispanic. Among defendants who were convicted of rape but later exonerated, the percentages were reversed: 64 percent were African American, 28 percent were white, and 7 percent were Hispanic. African Americans,

other words, comprised only 29 percent of all persons incarcerated for rape but 64 percent of all defendants exonerated for rape.⁹²

The authors of this study suggested that the key to the explanation for the overrepresentation of African Americans among defendants falsely convicted for rape "is probably the race of the victim."⁹³ As they pointed out, the race of the victim was known in 52 of the 69 exonerations of African Americans for rape. In 78 percent of these cases, the victim was white. As they noted, "Inter-racial rape is uncommon, and rapes of white women by black men in particular account for well under 10 percent of all rapes. But among rape exonerations for which we know the race of both parties, almost exactly half (39/80) involve a black man who was falsely convicted of raping a white woman."⁹⁴

The authors, who admitted that there were many possible explanations for this finding, stated that the "most obvious explanation for this racial disparity is probably also the most powerful: the perils of cross-racial identification."⁹⁵ Almost all of the exonerations in the interracial rape cases included in their study were based at least in part on eyewitness misidentification.

There is substantial evidence that cross-racial eyewitness identifications, and particularly eyewitness identifications of African Americans by whites, are unreliable.⁹⁶ What seems to happen, then, is that a white rape victim mistakenly identifies an African American as the perpetrator of the crime, the defendant is found guilty at trial based at least in part on the eyewitness identification, and the defendant is exonerated when DNA evidence reveals that he was not the man who committed the crime.

PLAYING THE "RACE CARD" IN A CRIMINAL TRIAL

In 1994 O. J. Simpson, an African-American actor and former All-American football star, was accused of murdering his ex-wife, Nicole Brown Simpson, and Ronald Goldman, a friend of hers. On October 4, 1995, a jury composed of eight African-American women, two white women, one Hispanic man, and one African-American man acquitted Simpson of all charges. Many commentators attributed Simpson's acquittal at least in part to the fact that his attorney, Johnnie L. Cochran, Jr., had "played the race card" during the trial. In fact, another of Simpson's attorneys, Robert Shapiro, charged that Cochran not only played the race card but he also "dealt it from the bottom of the deck."⁹⁷

Cochran was criticized for attempting to show that Mark Fuhrman, a Los Angeles police officer who found the bloody glove that linked Simpson to the crime, was a racist who planted the evidence in an attempt to frame Simpson. He also was harshly criticized for suggesting during his closing argument that the jurors would be justified in nullifying the law by acquitting Simpson. Cochran encouraged the jurors to take Fuhrman's racist beliefs into account during their deliberations. He urged them to "send a message" to society that "we are not going to take that anymore."⁹⁸

Although appeals to racial sentiment—that is, "playing the race card"—are not unusual in U.S. courts, they are rarely used by defense attorneys repre-

African Americans accused of victimizing whites. Much more typical are *prosecutorial* appeals to bias. Consider the following historical examples:

- An Alabama prosecutor, who declared in 1916, "Unless you hang this Negro, our white people living out in the country won't be safe."⁹⁹
- A prosecutor in North Carolina, who dismissed as implausible the claim of three African-American men that the white woman they were accused of raping had consented to sex with them. The prosecutor stated that "the average white woman abhors anything of this type in nature that had to do with a black man."¹⁰⁰
- A prosecutor in a rape case involving an African-American man and a white woman who asked the jurors, "Gentlemen, do you believe that she would have had intercourse with this black brute?"¹⁰¹
- A prosecutor in a case involving the alleged kidnapping of a white man by two African-American men, who said in his closing argument that "not one *white* witness has been produced" to rebut the victim's testimony [emphasis added].¹⁰²
- A prosecutor who stated, during the penalty phase of a capital case involving Walter J. Blair, an African-American man charged with murdering a white woman, "Can you imagine [the victim's] state of mind when she woke up at 6 o'clock that morning, staring into the muzzle of a gun held by this black man?"¹⁰³

All of these appeals to racial sentiment, with the exception of the last, resulted in reversal of the defendants' convictions. A federal court of appeals, for example, ruled in 1978 that the North Carolina prosecutor's contention that a white woman would never consent to sex with an African-American man was a "blatant appeal to racial prejudice." The court added that when such an appeal involves an issue as "sensitive as consent to sexual intercourse in a prosecution for rape . . . the prejudice engendered is so great that automatic reversal is required."¹⁰⁴

A federal court of appeals, however, refused to reverse Walter Blair's conviction and death sentence. Its refusal was based on the fact that Blair's attorney failed to object at trial to the prosecutor's statement. The sole dissenter in the case suggested that the court should have considered whether the defense attorney's failure to object meant that Blair had been denied effective assistance of counsel. He also vehemently condemned the prosecutor's statement, which he asserted "played upon white fear of crime and the tendency of white people to associate crime with blacks."¹⁰⁵

According to Harvard law professor Randall Kennedy, playing the race card in a criminal trial is "virtually always morally and legally wrong." He asserted that doing so encourages juries to base their verdicts on irrelevant considerations and loosens the requirement that the state prove the case beyond a reasonable doubt. As he noted, "Racial appeals are not only a distraction but a menace that can distort interpretations of evidence or even seduce jurors into believing that they should vote in a certain way irrespective of the evidence."¹⁰⁶ (Further evidence of this is presented in Box 6.8, which discusses the role that racial and cultural stereotypes played in recent

Box 6.8 Racial and Cultural Stereotypes in the Courtroom

A basic tenet of criminal law is that individuals are entitled to equal treatment at trial and that juries should not be asked to convict someone because of that person's race, color, creed, or national origin. As the U.S. Court of Appeals for the Second Circuit ruled in 1973, use of racial stereotyping "negates the defendant's right to be tried on the evidence in the case and not on extraneous issues . . . [and] helps further embed the already too deep impressions in public consciousness that there are two standards for justice in the United States. One for Whites and the other for Blacks" (*United States ex rel. Haynes v. McKendrick*, 481 F.2d 152 [2d. Cir. 1973]).

In an article published in the *Hamline Law Review*, William E. Martin and Peter N. Thompson illustrate the use of racial stereotyping in cases of sexual assault tried in Minnesota courts that involved victims and defendants of Hmong descent. In three different cases, prosecutors were allowed to introduce testimony regarding cultural stereotypes to discredit the defendants' consent defenses (i.e., the defendants in these cases asserted that the victim had consented to the sexual acts). In one case, for example, the prosecutor introduced expert testimony to establish that cultural values would preclude Hmong women from consenting to have sex with a person other than her spouse. At trial this prosecutor argued that the jurors should consider the expert witnesses' testimony that in the Hmong culture,

... it is not proper for a women to initiate sex, even with her husband. It is not proper for a woman to touch a man. It is not proper for a woman to kiss a man, and especially in public. There are cultural taboos you heard, even about being alone with a man not of your own class. Ask yourself if the woman you saw here is the kind of vixen that this defendant describes. The kind of vixen she would have to be [to be] so outside her own culture in behavior.

The defendant appealed his conviction, arguing that the use of cultural stereotypes was improper; his attorney compared the state's contention that a Hmong woman would not initiate sex to the oft-made but discredited argument that a white woman would never consent to sex with an African-American man because of cultural norms.

The Minnesota Court of Appeals upheld the defendant's conviction, noting that the prosecutor attempted to differentiate the victim and the defendant "by their social status and educational level not by social or cultural factors." However, as Martin and Thompson pointed out, even if the argument was an appeal to class bias or social status bias, it was nonetheless improper. Federal courts have ruled that appeals to class prejudice, like appeals to racial bias, will not be allowed in the courtroom.

The authors of this article criticize the decisions of the Minnesota court, arguing that "the fundamental values of our trial system require that persons be tried for the acts they commit, not for the supposed cultural characteristics that determine who they are."

SOURCE: William E. Martin and Peter N. Thompson, "Judicial Tolerance of Racial Bias in the Minnesota Justice System," *Hamline Law Review* 25 (2001-2002), pp. 236-270, 253-259.

cases involving defendants and victims of Hmong descent.) As the case discussed in the "Focus on an Issue: The Lynching of an Innocent Man and Defiance of the U.S. Supreme Court" makes clear, appeals to racial bias also can seduce individuals into believing that they have a right to take matters into their own hands.¹⁰⁷

FOCUS ON AN ISSUE

The Lynching of an Innocent Man and Defiance of the U.S. Supreme Court

On January 23, 1906, Nevada Taylor, a 21-year-old white woman who worked as a bookkeeper for a shop in Chattanooga, Tennessee, was sexually assaulted after she got off the trolley near the home she shared with her father and her brothers and sisters (Curriden & Phillips 1999). Taylor did not see her attacker and initially could describe him only as about her height and dressed in a black outfit and a hat. When asked by Hamilton County Sheriff Joseph Shipp if her attacker was "a white man or a Negro," she first said that she did not know, that she had not gotten a good look at him. She then changed her mind, stating that she believed the man was black (Curriden & Phillips 1999, 31).

The next day, the *Chattanooga News* reported the attack in a story with the headline "Brutal Crime of Negro Fiend." According to the *News*, "The fiendish and unspeakable crime committed in St. Elmo last night by a Negro brute, the victim being a modest, pretty, industrious and popular girl, is a sample of the crimes which heat southern blood to the boiling point and prompt law abiding men to take the law into their own hands and mete out swift and horrible punishment" (Curriden & Phillips 1999, 33).

There were no clues as to the identity of the suspect, other than a leather strap found at the scene of the crime. A reward of \$375—more money than many people in Chattanooga earned in a year—was offered for information leading to the arrest of Taylor's attacker. Two days later, a man by the name of Will Hixson called Sheriff Shipp, asked if the reward was still available, and stated that he had seen a black man near the trolley station on the evening in question. He told Sheriff Shipp that he thought he could identify the man,

and later that afternoon he fingered Ed Johnson.

Ed Johnson denied the allegations, stating that he had been at work at the Last Chance Saloon that afternoon and evening. He gave the sheriff the names of witnesses, most of whom were black who could vouch for him. Despite the fact that there was no evidence, other than Hixson's identification, linking him to the crime and that he had an alibi, Johnson was arrested and charged with the rape of Nevada Taylor.

As news of Johnson's arrest spread, a mob began to gather at the jail. Within hours, more than 1,500 people had congregated, and many of them were urging the jailers to turn Johnson over to them. When informed by Hamilton County Criminal Court Judge Sam D. McReynolds that Johnson was no longer in Chattanooga, that he had been transported to Knoxville for safekeeping until trial, the crowd dispersed. As Curriden and Phillips (1999, 50) noted, the leaders of the mob "had put Sheriff Shipp and Judge McReynolds on notice: convict and punish this Negro quickly or they would be back."

Seventeen days after the attack on Nevada Taylor, a jury of 12 white men found Ed Johnson, who had steadfastly insisted that he was innocent, guilty of rape. The trial was replete with references to the fact that Johnson was black and his victim was white. The prosecutor, for example, asked Taylor to point out "the Negro brute" who assaulted her. Taylor pointed to Ed Johnson, who was the only black person in the courtroom. The prosecutor trying the case concluded his argument by stating that the jurors should "send that black brute to the gallows."

prove to the world that in Chattanooga and Hamilton County the law of the country does not countenance such terrible crimes, has not ceased to mete out the proper punishment for such horrible outrages" (Curriden & Phillips 1999, 118).

The judge in the case also allowed the people in the audience—and the jurors—to express their opinions about the case and about Ed Johnson. When Johnson testified, the pro-prosecution spectators booed and heckled him. The audience cheered when prosecutors made a point and hissed and jeered when the defense objected. At one point in the trial, one of the jurors leaped to his feet, pointed at Johnson, and yelled, "If I could get at him, I'd tear his heart out right now" (Curriden & Phillips 1999, Chap. 5).

Judge McReynolds sentenced Ed Johnson to die and scheduled his execution for March 13, 1906. When Johnson's attorneys announced that they did not intend to appeal his conviction, two prominent local African-American attorneys stepped in and filed a motion for a new trial. Noah Parden and Styles Hutchins believed that the evidence did not support a conviction and that there had been numerous violations of Johnson's constitutional rights. After their motion for a new trial was denied, they appealed to the Tennessee Supreme Court, which ruled that there had been "no serious errors" in the case.

Parden and Hutchins then appealed to the U.S. District Court, arguing that Johnson had not received a fair trial. District Court Judge C. D. Clark ruled that although "there was great haste in this trial" and "counsel were to an extent terrorized on account of the fear of a mob," the district court had no authority to intervene. The problem, according to Judge

Clark, was that the right to a fair trial guaranteed by the Sixth Amendment did not apply to state-court cases. Nonetheless, Judge Clark did issue a stay of execution to allow Johnson's lawyers to appeal to the U.S. Supreme Court (Curriden & Phillips 1999, 168).

In a precedent-setting decision, the Supreme Court decided to intervene in the case. On March 18, 1906, Supreme Court Justice John M. Harlan sent a telegram to Judge Clark announcing that the court would hear Johnson's appeal. The Court also sent a telegram to Sheriff Shipp and Judge McReynolds informing them that Johnson's execution was to be stayed pending the outcome of his appeal.

The citizens of Chattanooga were outraged that "people in Washington, DC" were interfering in the case and telling them how to run their court system. The *Chattanooga News* issued what amounted to a call to arms, predicting that mob violence would result if "by legal technicality the case is prolonged and the culprit finally escapes" (Curriden & Phillips 1999, 197).

On March 19, the newspaper's prediction of violence came true. A mob gathered at the jail and, led by 25 determined men, bashed in the doors of the jail, grabbed Johnson from his cell, and dragged him through town to the bridge that spanned the Tennessee River. The leaders of the mob urged Johnson to confess. Instead, he repeated his claim of innocence, stating, "I am going to tell the truth. I am not guilty." His words enraged the crowd, and as they prepared to hang him from the bridge, Ed Johnson uttered his last words: "God bless you all. I am innocent" (Curriden & Phillips 1999, 210–214).

Although the citizens of Chattanooga blamed the lynching of Ed Johnson on the

Continued

interference of the federal courts, the justices of the Supreme Court, and especially Justices Harlan and Holmes, were outraged that their order staying the execution had been ignored. President Theodore Roosevelt also condemned the lynching, which he called "contemptuous of the court" and "an affront to the highest tribunal in the land that cannot go by without proper action being taken." As Justice Harlan told the *Washington Post*, "The mandate of the Supreme Court has for the first time in the history of the country been openly defied by a community" (Curriden & Phillips 1999, 222).

The events that transpired next shocked the citizens of Chattanooga. In May 1906, the U.S. Department of Justice charged Sheriff Shipp, his deputies, and the ringleaders of the lynch mob with contempt of court. In December of that year, the Supreme Court announced that it had jurisdiction in the case and that the justices, sitting as a trial court, would determine the fate of the defendants. According to Curriden and Phillips (1999, 284), the Supreme Court was sending a message "that its authority was supreme" and that defiance of its orders "would not and could not be tolerated."

Although charges were eventually dropped against 17 of the 26 defendants and 3 of the remaining 9 were found not

guilty, the Supreme Court found Sheriff Shipp, one of his deputies, and four members of the lynch mob guilty of contempt of court. Shipp and two members of the mob were sentenced to 90 days in prison; the others received sentences of 60 days. Noah Parden, the lawyer who filed the appeal with the Supreme Court, told the *Atlanta Independent* that the Court's actions sent an important message. "We are at a time," he said, "when many of our people have abandoned the respect for the rule of law due to the racial hatred deep in their hearts and souls, and nothing less than our civilized society is at stake" (Curriden & Phillips 1999, 336).

Ninety-four years later, Hamilton County Criminal Court Judge Doug Meyer overturned Johnson's conviction. "It really is hard for us in the White community to imagine how badly Blacks were treated at that time," said Judge Meyer. "Something I don't believe the White community really understands is that, especially at that time, the object was to bring in a Black body, not necessarily the person who had committed the crime. And I think that's what happened in this case. There was a rush to find somebody to convict and blame."¹⁰⁸ The attorney who filed the petition to overturn Johnson's conviction was Leroy Phillips, one of the coauthors of *Contempt of Court*.

RACE-CONSCIOUS JURY NULLIFICATION: BLACK POWER IN THE COURTROOM?

In a provocative essay published in the *Yale Law Journal* shortly after O. J. Simpson's acquittal, Paul Butler, an African-American professor of law at George Washington University Law School, argued for "racially based jury nullification"¹⁰⁹—that is, he urged African-American jurors to refuse to convict African-American defendants accused of nonviolent crimes, regardless of the strength of the evidence mounted against them. According to Butler, "It is the moral responsibility of black jurors to emancipate some guilty black outlaws."¹¹⁰

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 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 to a particular defendant. In the first instance, a juror might refuse to convict a defendant tried in federal court for possession of more than 50 grams of crack cocaine, based on his/her belief that the draconian penalties mandated by the law are unfair. In the second instance, a juror might vote to acquit a father charged with child endangerment after his 2-year-old daughter, who was not restrained in a child safety seat, was thrown from the car and killed when he lost control of his car on an icy road. In this case, the juror does not believe that the law itself is unfair, but, rather, that the defendant has suffered enough and that nothing will be gained by additional punishment.

Jurors clearly have the power to nullify the law and to vote their conscience. If a jury votes unanimously 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 by an appellate court. In most jurisdictions, however, jurors do not have to be told that they have the right to nullify the law.¹¹¹

Butler's position on jury nullification is that the "black community is better off when some nonviolent lawbreakers remain in the community rather than go to prison."¹¹² Arguing that there are far too many African-American men in prison, Butler suggested that there should be "a presumption in favor of nullification"¹¹³ in cases involving African-American defendants charged with *nonviolent, victimless* crimes like possession of drugs. Butler claimed that enforcement of these laws has a disparate effect on the African-American community and does not "advance the interest of black people."¹¹⁴ He also suggested that white racism, which "creates and sustains the criminal breeding ground which produces the black criminal,"¹¹⁵ is the underlying cause of much of the crime committed by African Americans. He thus urged African-American jurors to "nullify without hesitation in these cases."¹¹⁶

Butler did not argue for nullification in all types of cases. In fact, he asserted 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. He contended that nullification is not morally justifiable in these types of cases because "people who are violent should be separated from the community, for the sake of the nonviolent."¹¹⁷ Violent African-American offenders, in other words, should be convicted and incarcerated to protect potential innocent victims. Butler was willing to "write off" these offenders based on his belief that the "black community cannot afford the risks of leaving this person in its midst."¹¹⁸

The more difficult cases, according to Butler, involve defendants charged with nonviolent property offenses or with more serious drug-trafficking offenses. He discussed two hypothetical cases, one involving a ghetto drug dealer and the other involving a thief who burglarizes the home of a rich family. His answer to the question "Is nullification morally justifiable here?" is "It depends."¹¹⁹ Although he admitted that "encouraging people to engage in self-destructive behavior is evil"

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and that therefore most drug dealers should be convicted, he argued that a juror's decision in this type of case might rest on the particular facts in the case. Similarly, although he is troubled by the case of the burglar who steals from a rich family because the behavior is "so clearly wrong," he argued that the facts in the case—for example, a person who steals to support a drug habit—might justify a vote to acquit. Nullification, in other words, may be a morally justifiable option in both types of cases.

Randall Kennedy's Critique

Randall Kennedy¹²⁰ raised a number of objections to Butler's proposal, which he characterized as "profoundly misleading as a guide to action."¹²¹ Although he acknowledged that Butler's assertion that there is racial injustice in the administration of the criminal law is correct, Kennedy nonetheless objected to Butler's portrayal of the criminal justice system as a "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.'"¹²² Kennedy faulted Butler for his failure to acknowledge either the legal reforms implemented as a result of struggles *against* racism or the significant presence of African-American officials in policymaking positions and the criminal justice system. The problems inherent in the criminal justice system, according to Kennedy, "require judicious attention, not a campaign of defiant sabotage."¹²³

Kennedy objected to the fact that Butler expressed *more* sympathy for nonviolent African-American 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."¹²⁴ He asserted that law-abiding African Americans "desire *more* rather than *less* prosecution and punishment for *all* types of criminals,"¹²⁵ and suggested that, in any case, jury nullification "is an exceedingly poor means for advancing the goal of a racially fair administration of criminal law."¹²⁶ He claimed that a highly publicized campaign of jury nullification carried on by African Americans will not produce the social reforms that Butler demands. Moreover, such a campaign might backfire. Kennedy suggested that it might lead to increased support for proposals to eliminate the requirement that the jury be unanimous in order to convict, restrictions on the right of African Americans to serve on juries, or widespread use of jury nullification by white jurors in cases involving white-on-black crime.

According to Kennedy, the most compelling reason to oppose Butler's call for racially based jury nullification is that it is based on "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."¹²⁷ He objected to the implication that it is proper for African-American jurors to be more concerned about the fate of African-American defendants than white defendants, more disturbed about the plight of African-American communities than white communities, and more interested in protecting the lives and property of African American than white citizens. "Along that road," according to Kennedy, "lies moral and political disaster." Implementation of Butler's proposal, Kennedy insisted, would not only

increase but also legitimize "the tendency of people to privilege in racial terms 'their own.'"128

CONCLUSION

In Chapter 5, we concluded that the reforms implemented during the past few decades have substantially reduced racial discrimination during the pretrial stages of the criminal justice process. Our examination of the jury selection process suggests that a similar conclusion is warranted. Reforms adopted voluntarily by the states or mandated by appellate courts have made it increasingly unlikely that African-American and Hispanic defendants will routinely be tried by all-white juries.

An important caveat, however, concerns the use of racially motivated peremptory challenges. As the recent report by the Equal Justice Initiative demonstrates, the peremptory challenge stands in the way of a racially neutral jury selection process. Supreme Court decisions notwithstanding, prosecutors still manage to use the peremptory challenge to eliminate African Americans and Hispanics from juries trying African-American and Hispanic defendants. More troubling, prosecutors' "racially neutral" explanations for strikes alleged to be racially motivated, with few exceptions, continue to be accepted at face value. Coupled with anecdotal evidence that prosecutors are not reluctant to "play the race card" in a criminal trial, these findings regarding jury selection suggest that the process of adjudication, like the pretrial process, is not free of racial bias.

Based on the research reviewed in this chapter and the previous one, we conclude that contemporary court processing decisions are not characterized by *systematic* discrimination against racial minorities. This may have been true at the time that the Scottsboro Boys and Ed Johnson were tried, but it is no longer true. As we have shown, the U.S. Supreme Court has consistently affirmed the importance of protecting the rights of criminal defendants and has insisted that the race and ethnicity of the defendant not be taken into consideration in making case processing decisions. Coupled with reforms adopted voluntarily by the states, these decisions make systematic racial discrimination unlikely.

We are not suggesting, however, that these reforms have produced an equitable, or color-blind, system of justice. We are not suggesting that contemporary court-processing decisions reflect *pure justice*. Researchers have demonstrated that court-processing decisions in some jurisdictions reflect racial discrimination, whereas decisions in other jurisdictions are racially neutral. Researchers also have shown that African Americans and Hispanics who commit certain types of crimes are treated more harshly than whites and that being unemployed, having a prior criminal record, or being detained prior to trial may have a more negative effect on court outcomes for people of color than for whites.

These findings lead us to conclude that discrimination against African Americans and other racial minorities is not universal but is confined to certain types of cases, certain types of settings, and certain types of defendants. We conclude that the court system of today is characterized by *contextual discrimination*.