

BY ANY MEANS NECESSARY: USING VIOLENCE AND SUBVERSION TO CHANGE UNJUST LAW

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There remains law in the United States that discriminates against African Americans. Important legal advancements in racial justice in the United States historically have been accomplished by tactics that included subversion and violence. This Article evaluates the use of subversion and violence to change contemporary law perceived as discriminatory, when traditional methods are ineffective or too slow. It applies just war theory to determine whether radical tactics are morally justified to defeat certain U.S. criminal laws. This Article recommends an application of the doctrine of just war for nongovernmental actors. In light of considerable evidence that the death penalty and federal cocaine sentencing laws discriminate against African Americans, subversion—including lying by prospective jurors to get on juries in death penalty and cocaine cases—is morally justified. Limited violence is also morally justified, under just war theory, to end race-based executions. Those concerned about morality should not, however, use “any means necessary” to defeat race discrimination. Minorities must tolerate some discrimination, even if they know they have the power to end it.

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[Frederick] Douglass was great. I would rather have been taught about Toussaint L'Ouverture. We need to be taught about people who fought, who bled for freedom and made others bleed.¹

—Malcolm X

Thus, the rebel can never find peace. He knows what is good and, despite himself, does evil.²

—Albert Camus

Stakes is high.³

—De La Soul

1. Haitian Leaders and Heroes of Malcolm X, AfricanPerspective.com, Issue 44 (2000), at <http://www.africanperspective.com/dyouknow/dyouk44.html>. Frederick Douglass, the black abolitionist, worked to end slavery in pre-Civil War America through moral persuasion and the political processes. DAVID B. CHESEBROUGH, FREDERICK DOUGLASS: ORATORY FROM SLAVERY *passim* (1998). He started an anti-slavery newspaper, the *North Star*, attempting to educate slaveholders about the evils of slavery. *Id.* at 36. He also served as an advisor to President Lincoln during the Civil War. *Id.* at 59. Toussaint L'Ouverture, born a slave in Haiti, led a brutal slave revolt, which led to Haitian independence in 1804. Under his leadership, black slaves and ex-slaves fought and defeated Napoleon's army. See generally C.L.R. JAMES, THE BLACK JACOBINS: TOUSSAINT L'OUVERTURE AND THE SAN DOMINGO REVOLUTION (2d ed. 1963).

2. ALBERT CAMUS, THE REBEL 285 (Vintage International ed., Vintage Books 1991) (1956).

3. DE LA SOUL, STAKES IS HIGH (Tommy Boy 1996).

INTRODUCTION: CRITICAL QUESTIONS ABOUT CRIT TACTICS

There remains law in the United States that discriminates against African Americans. This Article evaluates the use of subversion and violence to change that law, when traditional methods are ineffective or too slow. In a few cases, subversion and violence are recommended. In other cases, the Article discourages those tactics, especially violence.

To defeat racial discrimination, Malcolm X recommended that black people use “any means necessary.”⁴ Is that a moral formula, and does morality matter? This Article answers those questions “no” and “yes.” There are right and wrong ways to fight injustice, including race discrimination. My thesis is that minorities should not choose “any means necessary,” even if the result is that they are prevented from doing everything they can do to eradicate discrimination. As an African American, I make this argument with trepidation, even shame, because it seems too accommodating to majoritarian constructs of morality. Living a moral life, however, is costly, as is living as an unpopular minority in a democracy. This Article examines the intersection of those costs.

Morality does not, however, mandate acquiescence to discrimination. It does not even require a moderate response to discrimination. I hope to bring glad tidings to those people who are frustrated by the continued existence of discriminatory laws in the United States, especially when those laws seem likely to persist for several years. There is a great expanse between the conservative tactics with which minority groups have usually fought discrimination, and the instrumentalist approach that Malcolm X urged. A clear picture of what means minorities should not employ also will reveal a clearer picture of what means they can use. The same construct of morality that says “no” to certain ways of changing the law will say “yes” to certain others, including some radical—even illegal—methods.

In this Article, I explore two methods, which I call “crit tactics” or “critical tactics,” that might be employed to change certain laws that many perceive as discriminatory. The crit tactics are subversion and violence. The laws I consider are those that punish criminals with death, and those that treat crack cocaine offenses more severely than powder cocaine offenses.

My conclusion is that people of color must consider the full range of their powers, but that they should be guided, and ultimately limited, by morality. I recommend that, for a useful construct of morality, American mi-

4. MALCOLM X, *BY ANY MEANS NECESSARY* 37 (2d ed. 1992) (stating that the freedom of people of African descent in the Western Hemisphere should be accomplished “by any means necessary”).

norities consult the international law doctrine of "just war." As it now exists, the doctrine applies only to state actors. I recommend its application to private persons and nongovernmental organizations.

The application of this doctrine to American race relations raises interesting questions. If, for example, the death penalty discriminates against African Americans, how far can concerned citizens go in preventing its administration? Should they lie to get on death penalty juries? Should they commit terrorist attacks against executioners? What about "lesser" discrimination, such as laws that punish people who use crack cocaine more severely than those who use powder cocaine? Would the same tactics be permissible to fight that kind of discrimination? Are some kinds of race discrimination tolerable, and others more amenable to radical challenges?

After September 11, 2001, the use of violence to achieve a political objective is no longer an abstract concept in the United States. Any academic evaluation is pointless unless it acknowledges the immense suffering that violence inflicts, even in those cases in which its goals seem worthy. In this Article I examine the intersection of the suffering caused by political violence with the suffering caused by race discrimination. I submit that a balance can be struck, one that results in a net reduction of misery. This calculus sounds cold, in the way that tort theory, or the law of war, can seem heartless.⁵ My goal, however, is anything but heartless. I want to end legal race discrimination, and to end it with dispatch. I have witnessed the lives that it wastes.

Part I of this Article provides a brief historical analysis of the way that some discriminatory laws have been eradicated. Part II describes two criminal laws that may be unjust, and the unsuccessful (at least so far) efforts of some people—using both the legislative and judicial processes—to change those laws. Part III considers the crit tactics of subversion of the justice system and violence as two means of challenging those laws. Part IV describes and recommends the theory of just war as a guide to the appropriate means that minorities should use to change the law. Part V compares the use of crit tactics to change discriminatory law to the more moderate approach recommended by the "politics of respectability." This Article concludes with a respectful lamentation on morality, when its price is that

5. Professor Cass Sunstein has noted that, though people are reluctant to acknowledge it, cost-benefit analysis informs their most personal choices:

We choose how much to spend on cars, knowing that safety is expensive; we decide how much to spend on security systems in the home; we choose where to live, knowing that some areas are safer than others; we go out at night, even though we know that by doing so, we increase our risks; when the cost of risk reduction is too high, we will not incur that cost even to protect our own children. What seems forbidden is not behavior that embodies tradeoffs, but rather unduly explicit talk to the effect.

CASS R. SUNSTEIN, *RISK AND REASON: SAFETY, LAW, AND THE ENVIRONMENT* 127 (2002).

minorities must tolerate some discrimination, even when they know they have the power to end it.

I. CHANGING THE LAW: THE OLD WAYS

How are minorities supposed to change discriminatory law?⁶ The formal legal answer is that they should petition the legislative and judicial branches of government, the two bodies that are responsible, respectively, for creating law and for interpreting it. The legislature is overtly political, while the judiciary is ostensibly not.

Historically, legislators and judges have remedied racist law,⁷ but they have also, on other occasions, established and enforced it.⁸ The American practice of democracy is a powerful tool for the majority to wreak havoc upon a despised minority, and the majority sometimes has used this tool to its full advantage.⁹ The judiciary is supposed to protect racial minorities from tyranny, but the U.S. Supreme Court allows this protection only when there is persuasive evidence of a racist intent. When the majority disguises its bias, or is not even aware of it, the U.S. Constitution is not offended, and minorities are not protected.¹⁰

6. By "change law," I mean to move a legislature or (less frequently) a court to act. Part III, *infra*, contrasts radical tactics with more traditional means of influencing legislatures (elections, lobbying, and campaign contributions) and judges (making legal arguments).

7. See, e.g., U.S. CONST. amend. XIII; U.S. CONST. amend. XIV; U.S. CONST. amend. XV; U.S. CONST. amend. XXIV; *Loving v. Virginia*, 388 U.S. 1 (1967).

8. See, for example, the Constitution, which states:

The Migration or Importation of Such Persons as any of the States now existing shall think proper to admit, shall not be prohibited by the Congress prior to the year one thousand eight hundred and eight, but a Tax or duty may be imposed on such Importation, not exceeding ten dollars for each Person.

U.S. CONST. art. I, § 9, cl. 1; see also *Korematsu v. United States*, 323 U.S. 214 (1944) (holding that "pressing public necessity" may justify restrictions on a particular racial group); *Plessy v. Ferguson*, 163 U.S. 537 (1896) (upholding Louisiana's law requiring separate accommodations for different racial groups).

9. In the Federalist Papers, James Madison noted that minorities in a democracy are prey to the tyranny of the majority. THE FEDERALIST NO. 10 (James Madison) (Isaac Kramnick ed., 1987). Madison's recommendation was "extend the sphere, and you take in a greater variety of parties and interests; you make it less probable that a majority of the whole will have a common motive to invade the rights of other citizens." *Id.*; see also LANI GUINIER, THE TYRANNY OF THE MAJORITY: FUNDAMENTAL FAIRNESS IN REPRESENTATIVE DEMOCRACY 71-118 (1994); Owen M. Fiss, *Groups and the Equal Protection Clause*, 5 PHIL. & PUB. AFF. 107, 152 (1976) (noting that blacks fail to prosper in American democracy because 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)"); Lani Guinier, *No Two Seats: The Elusive Quest for Political Equality*, 77 VA. L. REV. 1413, 1418 (1991).

10. Charles R. Lawrence III, *The Id, the Ego, and Equal Protection: Reckoning with Unconscious Racism*, 39 STAN. L. REV. 317, 387 (1987).

Thus, the law may oppress and it may remedy oppression. What does it take to convert law from the former to the latter? "A long time," is the answer that American history suggests. The most infamous racist laws in the United States are, broadly writ, laws that supported slavery and laws that enforced de jure segregation. Slavery, after almost 250 years, was made illegal by the U.S. Congress, when it ratified the Thirteenth Amendment to the Constitution.¹¹ The Supreme Court, on the other hand, receives the credit for outlawing enforced segregation, by virtue of its decision in *Brown v. Board of Education*.¹²

The struggle of African Americans, and many concerned others, to crush both the "peculiar institution" of slavery and Jim Crow segregation, is well known and shall not be rehearsed here.¹³ Rather, I will make three observations, each towards an assessment of how and why the law changed from oppressing blacks to liberating them.

The first observation is that the conversion of these discriminatory laws was caused, in part, by violence and subversion. There are important differences, though, in the course of conduct that accomplished the Thirteenth Amendment and that led to the *Brown* decision. Slavery was ended because of violence, and not just any violence but war, and not just any war but the Civil War—the bloodiest, most destructive conflict in American history. Prior to the War Between the States, abolitionists lobbied lawmakers and brought court cases and appealed to public sentiment. In the end, however, the brute force of muskets and bayonets was the most direct cause of the liberation of four million African American slaves.¹⁴

In comparison, ending legally enforced segregation was less bloody. The Supreme Court, in *Plessy v. Ferguson*,¹⁵ decided in 1896, declared that Jim Crow laws were constitutional. Early in the next century, a group of black lawyers, including Charles Hamilton Houston and Thurgood Marshall, began an effort to change the Court's mind. This time the means of converting the law was not war, but rather a carefully calculated series of legal arguments, made in state courts and designed, ultimately, to undermine the

11. U.S. CONST. amend. XIII.

12. 347 U.S. 483 (1954).

13. See JOHN HOPE FRANKLIN & ALFRED A. MOSS, JR., FROM SLAVERY TO FREEDOM: A HISTORY OF AFRICAN AMERICANS 290 (8th ed. 2000) (chronicling the history of black Americans from their beginnings in various African countries to their arrival in the New World, followed by the liberation, struggles for freedom, and accomplishments during the twentieth century); RICHARD KLUGER, SIMPLE JUSTICE (1975) (giving a journalistic account of the U.S. Supreme Court decision in *Brown v. Board of Education* that outlawed school segregation and culminated a century-long social and legal struggle to establish black equality in the United States).

14. See *Civil War, (American)*, in AFRICANA: THE ENCYCLOPEDIA OF THE AFRICAN AND AFRICAN AMERICAN EXPERIENCE 456, 461 (Kwame Anthony Appiah & Henry Louis Gates, Jr. eds., 1999) [hereinafter AFRICANA].

15. 163 U.S. 537 (1896).

Supreme Court's analysis in *Plessy*.¹⁶ This effort proved successful, eventually. The Supreme Court, in *Brown v. Board of Education*, decided in 1954, ordered the end of laws requiring segregation in public education.¹⁷

Next, civil rights leaders turned to the federal legislature. Their goal was a sweeping civil rights law that would eliminate the remaining vestiges of formal discrimination in the law. To influence Congress to pass such a law, traditional methods were employed, including lobbying and "horse trading."¹⁸ In addition, some civil rights leaders encouraged the subversion of law, through the practice of "civil disobedience."¹⁹ People who subverted the law, for example, by disobeying laws that they believed were unjust, sometimes were treated violently by the police.²⁰ Some extreme examples were prominently publicized and helped create the political climate that accelerated passage of the Civil Rights Act of 1964²¹ and of the Voting Rights Act of 1965.²²

The second observation is that the transitions in race relations law from supporting slavery and segregation to championing emancipation and integration took a long time. Although the evil of forced bondage and de jure segregation seems obvious now, changing the law was a protracted and difficult struggle. The fight to end slavery in the United States persisted for more than two hundred years; efforts to end American apartheid required, in the most charitable assessment, "only" one hundred years. During these centuries of struggle, millions of Negroes lived lives of unspeakable pain, waiting for relief from the political and judicial branches.

The third point is that there has always been diversity of opinion in the minority community about ways to respond to oppressive laws, or indeed, even whether the laws are oppressive. Some African Americans did not feel

16. See Note on the NAACP Battle Against Jim Crow, in ROY L. BROOKS ET AL., CIVIL RIGHTS LITIGATION CASES AND PERSPECTIVES 43 (1995).

17. *Brown*, 347 U.S. at 483.

18. PETER B. LEVY, THE CIVIL RIGHTS MOVEMENT 91-93 (1998).

19. See MARTIN LUTHER KING, JR., LETTER FROM BIRMINGHAM JAIL (April 16, 1963), reprinted in LEADING AND LEADERSHIP 175-84 (Timothy Fuller ed., 2000).

20. RALPH E. LUKER, HISTORICAL DICTIONARY OF THE CIVIL RIGHTS MOVEMENT 231-32 (Jon Woronoff ed., 1997). An example is the Selma to Montgomery March that led between five hundred and six hundred marchers out of Selma. The march was conducted to remember Jimmie Lee Jackson, who was killed by state troopers while he was on his way to a meeting at church. *Id.* Mounted patrolmen fired tear gas and beat the members of the procession that was caught on television. *Id.* at 232. This day became known as "Bloody Sunday" and led President Johnson to send new voting rights legislation to Congress. *Id.* at 232.

21. Pub. L. No. 88-352, 78 Stat. 241 (codified as amended at 42 U.S.C. §§ 2000a-h (2000)).

22. Pub. L. No. 89-110, 79 Stat. 437 (codified as amended at 42 U.S.C. §§ 1971, 1973-1973bb (2000)).

insulted by the "separate but equal" statutes.²³ Even among blacks who believed that the Jim Crow laws were racist, the remedy of civil disobedience was controversial. Most African Americans, including southerners, did not engage in subversion. In fact, some blacks discouraged the tactic, because of legitimate concern about white backlash.²⁴

There may be people who think that slavery and segregation are unique examples of racially unjust laws and that, on that basis, deserved the extreme methods (for example, war and civil disobedience) that aided their termination.²⁵ There are, however, contemporary examples of laws that some people believe discriminate against blacks. In the next part, I describe two examples from criminal law and the unsuccessful efforts, so far, to change those laws using the old ways.

II. TWO CONTEMPORARY EXAMPLES OF DISCRIMINATORY LAWS

As formal legal barriers to equality have fallen in the traditional civil rights battlefields of education, employment, voting rights, and housing, advocates have increasingly turned their attention to the criminal justice system. This focus on criminal justice, while relatively new, seems almost inevitable for three reasons.

First, an examination of who a society's "criminals" are, and how it treats them, often yields searing insight into that society. Criminal law regulates the state's power at its most extreme—its power to punish its citizens. Punishment is the "intentional infliction of pain."²⁶ When a society chooses to harm one of its own members, its actions demand careful scrutiny. The

23. See Michael J. Klarman, *The Racial Origins of Modern Criminal Procedure*, 99 MICH. L. REV. 48, 88 (2000) (quoting a southern NAACP branch official as saying, in 1924, "it is a very hard matter to convince the mass of our people that Segregation is not the best thing for us"). Michael Klarman notes, regarding the fight for civil rights after World War I, "One of the most formidable challenges was simply convincing blacks that the status quo of racial subordination and oppression was not natural and inevitable, but rather contingent and malleable." *Id.*; see also ORLANDO PATTERSON, *THE ORDEAL OF INTEGRATION* 50 (1997). For a contemporary analysis of this issue, see, for example, Sharon Keller, *Something to Lose: The Black Community's Hard Choices About Educational Choice*, 24 J. LEGIS. 67 (1998) (discussing whether segregated high schools for black boys are acceptable).

24. PETER B. LEVY, *THE CIVIL RIGHTS MOVEMENT* 51 (1998). By "legitimate," I mean that these concerns were realistic.

25. I address that argument in Part III, *infra*.

26. JOSHUA DRESSLER, *UNDERSTANDING CRIMINAL LAW* 11–12 (3d ed. 2001). Dressler writes:

Criminal law scholars have generally concluded, however, that [a defendant] may be said to suffer "punishment" when, but only when, an Agent of the Government, pursuant to the authority granted to the agent by virtue of [the defendant's] criminal conviction, intentionally inflicts pain on [the defendant] or otherwise causes [the defendant] to suffer some consequence that is ordinarily considered to be unpleasant.

Id.

belief that a government hurts or kills its citizens on the basis of some illegitimate criterion gives rise to the strongest grievance a citizen can have against his country. This extreme sense of injustice may make extreme remedies seem warranted, or at least more reasonable, than if the same remedies were invoked to protest or change, say, antitrust law.²⁷

Second, since the mid-1980s, there has been a growing disparity in the punishment of African Americans and Hispanics, compared to whites. Nearly half of the two million people in U.S. prisons are black.²⁸ One-third of African American men between the ages of twenty and twenty-nine were under criminal justice supervision, either in prison, on probation or parole, or awaiting trial, in 1995.²⁹ In Washington, D.C. and Baltimore, Maryland, 50 percent of young black men were under criminal supervision in a year.³⁰ There are more young black men in prison than in college.³¹ Approximately 13 percent of black men cannot vote because they have felony convictions (in Alabama, Florida, Mississippi, and Virginia, 25 percent or more of African American men are disenfranchised for this reason).³² A black male born in 1991 has an approximately 30 percent likelihood of being imprisoned, compared with a 4 percent likelihood for a white male.³³

Third, critics have focused on the racial consequences of laws, based on the view that this is a better test for whether laws are discriminatory than whether lawmakers had a racist intent.³⁴ Laws that create disparate racial

27. Noncriminal law can also promote powerful reactions; indeed, in the popular imagination, "taxation without representation" was the basis of the American Revolution. See Part III, *infra*.

28. ALLEN J. BECK, U.S. DEPARTMENT OF JUSTICE, OFFICE OF JUSTICE PROGRAMS, BUREAU OF JUSTICE STATISTICS, PRISON AND JAIL INMATES AT MIDYEAR 1999 (2000), available at <http://www.ojp.usdoj.gov/bjs/pub/pdf/pjim99.pdf>.

29. MARC MAUER & TRACY HULING, THE SENTENCING PROJECT, YOUNG BLACK AMERICANS AND THE CRIMINAL JUSTICE SYSTEM: FIVE YEARS LATER 1 (1995), available at <http://www.sentencingproject.org/policy/9070.htm>.

30. See ERIC LOTKE, HOBBLING A GENERATION: YOUNG AFRICAN AMERICAN MEN IN D.C.'S CRIMINAL JUSTICE SYSTEM FIVE YEARS LATER (1997), at <http://www.igc.org/ncia/hobb.html>; JEROME G. MILLER, NATIONAL CENTER ON INSTITUTIONS AND ALTERNATIVES, HOBBLING A GENERATION: YOUNG AFRICAN-AMERICAN MEN IN THE WASHINGTON, D.C.'S CRIMINAL JUSTICE SYSTEM (1992), at <http://www.igc.org/ncia/dchob.html>.

31. Fox Butterfield, *Study Finds Big Increase in Black Men as Inmates Since 1980*, N.Y. TIMES, Aug. 28, 2002, at A14.

32. JAMIE FELLNER & MARC MAUER, THE SENTENCING PROJECT & HUMAN RIGHTS WATCH, LOSING THE VOTE: THE IMPACT OF FELONY DISENFRANCHISEMENT LAWS IN THE UNITED STATES 2, 8 (1998), available at <http://www.hrw.org/reports98/vote/>.

33. ALLEN J. BECK & THOMAS P. BONCZAR, U.S. DEPARTMENT OF JUSTICE, LIFETIME LIKELIHOOD OF GOING TO STATE OR FEDERAL PRISON 1 (1997), available at <http://www.ojp.usdoj.gov/bjs/pub/pdf/lgsfp.pdf>.

34. For example, Mari Matsuda has written:

The prescriptive message of outsider jurisprudence offers signposts to guide our way there: the focus on effects. The need to attack the effects of racism and patriarchy in order to attack the deep, hidden, tangled roots characterizes outsider thinking about law. . . . They

effects are suspect, unless there is a compelling nonracial justification for the disparity.³⁵ Criminal laws, we have seen, often produce dramatically different consequences for whites and nonwhites.³⁶ The Supreme Court has held, however, that a race-conscious intent must be proven for discrimination to be of constitutional significance.³⁷

Like the abolitionists and civil rights protesters of the two preceding centuries, advocates for equality in the criminal justice system face formidable legal barriers. This part describes two contemporary practices of the criminal justice system that may be discriminatory, and the unsuccessful (at least so far) efforts of some people—using both the legislative and judicial processes—to change those practices. This part is intended to provide a context for understanding why some might believe that radical methods are necessary, at least in the short term, to change the law (and why they might be impatient with waiting for relief through traditional ways of changing law).

A. Capital Punishment

The death penalty is a frequently cited example of a law that has discriminatory racial consequences. Indeed, it was the possibility that some people were being punished with death in an arbitrary and capricious manner that led the Supreme Court to invalidate the death statutes of most states during the 1970s.³⁸ Many states responded by reinstating capital punishment, but with regulations intended to guide the discretion of jurors in deciding who should be executed. Even with these measures, capital punishment is still frequently challenged on the ground that it is imposed arbitrarily and in a racially discriminatory manner.

The seminal Supreme Court decision on race and the death penalty is *McCleskey v. Kemp*.³⁹ There, the Court considered whether Georgia's death penalty was unconstitutional, on equal protection and Eighth Amendment grounds. McCleskey was a black man who had been convicted of killing a

have derived ratchet-like measures to eliminate effects of oppression, including affirmative action, reparations, desegregation, and the criminalization of racist and misogynist propaganda.

Mari J. Matsuda, *Public Response to Racist Speech: Considering the Victim's Story*, 87 MICH. L. REV. 2320, 2325 (1989).

35. See Lawrence, *supra* note 10, at 353.

36. Professor Angela Jordan Davis has recommended that prosecutors perform racial impact studies to assess the consequences of their practices, in much the same way that the law requires environmental impact studies in other contexts. See Angela Jordan Davis, *Prosecution and Race: The Power and Privilege of Discretion*, 67 FORDHAM L. REV. 13, 18 (1998).

37. *Washington v. Davis*, 426 U.S. 229, 248 (1976).

38. See *Furman v. Georgia*, 408 U.S. 238, 277 (1972).

39. 481 U.S. 279 (1987).

white police officer during the course of an armed robbery.⁴⁰ He was sentenced to death. His constitutional claims were based on empirical evidence that suggested that African Americans who killed white persons were more likely to be executed than whites who killed blacks, or blacks who killed other blacks.⁴¹ An elaborate statistical study (the Baldus study⁴²) indicated that, in Georgia, the death penalty was assessed in 22 percent of the cases involving black defendants and white victims, 8 percent of cases involving white defendants and white victims, 1 percent of cases involving black defendants and black victims, and 3 percent of cases involving white defendants and black victims.⁴³

The Baldus study controlled for hundreds of variables, including the race of the defendant and the victim, in capital trials. It found that race did not matter much in those cases in which juries rarely imposed the death penalty (for example, a man who kills his wife) or almost always imposed the death penalty (for example, mass murderers).⁴⁴ In a mid-range of cases (including cases in which law enforcement officials were victims), however, juries sometimes imposed death and sometimes did not.⁴⁵ In those cases, race made a big difference, with the killers of white victims being most likely to be punished with death.

The Supreme Court, for the purposes of its analysis, assumed that the empirical evidence was correct.⁴⁶ Nonetheless, the Court found that the death penalty in Georgia was constitutional, for several reasons.⁴⁷ First, McCleskey failed to prove that the Georgia legislature intended to discriminate against blacks when it established the death penalty.⁴⁸ Second, the Baldus study did not include McCleskey's own case and thus, even if the study proved discrimination in the abstract, it did not prove that McCleskey had been a victim of discrimination.⁴⁹ Finally, the Court held that there are so many variables in a jury's decision to impose death that the Baldus study did not demonstrate that race was a significant factor.⁵⁰

The Court also suggested that even if race discrimination existed in the administration of criminal justice, McCleskey's proposed remedy of abolish-

40. *Id.* at 283.

41. *Id.* at 286.

42. The study was conducted by Professors David C. Baldus, Charles Pulaski, and George Woodworth and is known as the "Baldus study." See DAVID C. BALDUS ET AL., *EQUAL JUSTICE AND THE DEATH PENALTY: A LEGAL AND EMPIRICAL ANALYSIS* (1990).

43. *McCleskey*, 481 U.S. at 283–86.

44. *Id.* at 287 n.5.

45. *Id.*

46. *Id.* at 289.

47. *Id.* at 291.

48. *See id.* at 298.

49. *See id.* at 292–93.

50. *See id.* at 294–95.

ing the Georgia death penalty law was impractical. Justice Lewis Powell wrote that, "taken to its logical conclusion, [McCleskey's proposal to eliminate capital punishment in Georgia because it is administered in a discriminatory manner] throws into serious question the principles that underlie our entire criminal justice system."⁵¹ Justice Powell was concerned that if the Court eliminated the death penalty because of discriminatory enforcement, it would create precedent that would require the elimination of other kinds of punishment also found to be administered in a discriminatory manner.⁵²

The Court concluded its analysis by suggesting that arguments about, and proposed remedies for, any racial consequences of capital punishment are "best presented to the legislative bodies."⁵³ And so they were. In response to *McCleskey*, the Congressional Black Caucus proposed the Racial Justice Act.⁵⁴ The act stated that "[n]o person shall be put to death under color of State or Federal law in the execution of a sentence that was imposed based on race."⁵⁵ It would have allowed courts to infer a presumption of racial bias by considering, among other things, statistical evidence regarding administration of the death penalty in the relevant locale. If the death-sentenced inmate established the presumption, the government would have to demonstrate a nonracial motivation for imposition of the death penalty. If the government was unable to prove a nondiscriminatory motive, the defendant could not be executed.

The act was twice passed by the U.S. House of Representatives as part of crime legislation and each time was dropped from the legislation in conference with the U.S. Senate.⁵⁶ Two commentators noted that the concern was "not about the Act's self-stated prohibition against racially motivated death sentences . . . [but] [r]ather . . . over the Act's implementation of that purpose and the perceived collateral effects of that implementation [that is,

51. *Id.* at 314-15.

52. *Id.* at 315. Justice Antonin Scalia was even more forthright: In a memorandum to the conference, he noted that unconscious racism by jurors and prosecutors is "real, acknowledged by the [cases] of this court and ineradicable" but not sufficient reason to overturn the death penalty. See Dennis D. Dorin, *Far Right of the Mainstream: Racism, Rights, and Remedies from the Perspective of Justice Antonin Scalia's McCleskey Memorandum*, 45 *MERCER L. REV.* 1035, 1038 (1994) (quoting Memorandum from Justice Antonin Scalia in No. 84-6811, *McCleskey*, 481 U.S. 279, to the Conference (Jan. 6, 1987) (on file at Library of Congress, Washington, D.C. in the *McCleskey v. Kemp* file of the Thurgood Marshall papers)).

53. *McCleskey*, 481 U.S. at 315.

54. H.R. 4092, 103d Cong., Title IX (1994), reprinted in 140 *CONG. REC.* 7387 (1994).

55. *Id.* § 2921(a).

56. See Don Edwards & John Conyers, Jr., *The Racial Justice Act—A Simple Matter of Justice*, 20 *U. DAYTON L. REV.* 699, 700-01 (1995).

that it would effectively eliminate the death penalty].”⁵⁷ In order to preserve the death penalty, Congress was willing to risk discriminatory executions.

If one “believes” the Baldus study, one believes that race plays an important role in determining which criminals are punished with death.⁵⁸ Black people are killed when similarly situated white people are spared. Perhaps for this reason, *McCleskey v. Kemp* was received by many racial critics with the same revulsion as the infamous decisions of *Dred Scott v. Sandford*⁵⁹ and *Plessy v. Ferguson*. In fact, some critics have argued that *McCleskey* is a worse decision than *Plessy*, because *Plessy* at least required equality (“separate but equal”), and in *McCleskey*, the Court seems willing to tolerate more severe punishment for blacks, even when that punishment includes killing them.

B. Crack Cocaine

The harsh punishment for people convicted of offenses involving crack cocaine, compared to powder cocaine offenders, is another frequently cited contemporary example of a racially unjust law. Crack cocaine is created by “cooking” powder cocaine and baking soda. There is dispute about which substance is more addictive or dangerous.⁶⁰

57. Daniel E. Lungren & Mark L. Krotoski, *The Racial Justice Act of 1994—Undermining Enforcement of the Death Penalty Without Promoting Racial Justice*, 20 U. DAYTON L. REV. 654, 654 (1995).

58. Several studies have found a correlation between the race of the victim and the likelihood of the defendant being sentenced to death, with the most likely candidate for capital punishment being a black murderer of a white victim. See Susan Levine & Lori Montgomery, *Large Racial Disparity Found in Study of Md. Death Penalty*, WASH. POST, Jan. 8, 2003, at A1 (“In at least nine states, researchers have found compelling statistical evidence that victims’ race plays a major role when prosecutors decide whether to seek the death penalty or, less often, when judges and juries decide to impose it”); see also DAVID C. BALDUS ET AL., *EQUAL JUSTICE AND THE DEATH PENALTY: A LEGAL AND EMPIRICAL ANALYSIS* (1990) (Georgia); SAMUEL R. GROSS & ROBERT MAURO, *DEATH AND DISCRIMINATION: RACIAL DISPARITIES IN CAPITAL SENTENCING* 35–105 (1989) (studying the effects of the race of a victim on capital sentencing for homicides from 1979 to 1980 in Florida, Georgia, Illinois, North Carolina, Mississippi, Oklahoma, Virginia, and Arkansas); RAYMOND PATERNOSTER ET AL., *AN EMPIRICAL ANALYSIS OF MARYLAND’S DEATH SENTENCING SYSTEM WITH RESPECT TO THE INFLUENCE OF RACE AND LEGAL JURISDICTION* (2003) (Maryland); Raymond Paternoster, *Race of Victim and Location of Crime: The Decision to Seek the Death Penalty in South Carolina*, 74 J. CRIM. L. & CRIMINOLOGY 754, 784 (1983) (noting that, in South Carolina the “prosecutor’s decision to seek the death penalty is significantly related to the race of the victim”); David C. Baldus et al., *Racial Discrimination and the Death Penalty in the Post-Furman Era: Empirical and Legal Overview, with Recent Findings from Philadelphia*, 83 CORNELL L. REV. 1638 (1998) (Pennsylvania).

59. 60 U.S. 393 (1856) (upholding the constitutionality of the Fugitive Slave Act, Act of Feb. 12, 1793, ch. 7, 1 Stat. 302 (1793)).

60. See *United States v. Clary*, 846 F. Supp. 768, 791–92 (E.D. Mo. 1994), *rev’d*, 34 F.3d 709 (8th Cir. 1994); David A. Sklansky, *Cocaine, Race, and Equal Protection*, 47 STAN. L. REV. 1284, 1291–93 (1995).

According to U.S. Sentencing Commission statistics, most people accused of crack cocaine offenses are black, and most powder cocaine defendants are nonblack.⁶¹ There are conflicting accounts of whether African Americans actually use crack more than whites, and if so, why they do. Compelling evidence exists that the “war on drugs” is selectively waged against African Americans. There is an economic explanation for why blacks might use crack more than whites. Crack is cheaper, and blacks are disproportionately poorer. There also might be cultural reasons why black cocaine users prefer crack to powder. Studies have revealed other racial differences in consumer tastes. African American soda drinkers, for example, prefer fruit-flavored soda to cola.⁶² Black cigarette smokers prefer menthol cigarettes, while white smokers enjoy nonmenthol cigarettes.⁶³

The debate about the fairness of punishing crack offenders more severely than powder offenders has focused on federal law (though many states also treat crack offenders more severely). The federal penalty includes mandatory prison sentences for distributing either form of cocaine, but only for possession of crack. The sentence is determined by the quantity of the drug. To receive the same sentence as a crack distributor, for example, a powder distributor must possess one hundred times the quantity of cocaine. As an example, consider the distributor of five grams of crack, which is enough for twenty-five doses and has an estimated value of \$500. Under federal law, this person receives the same five-year sentence as the distributor of five hundred grams of powder, which is enough for three thousand doses and is worth roughly \$40,000. This stricter punishment for crack has resulted in lengthy terms of imprisonment for convicted low-level crack sellers, who are almost exclusively African American. By contrast, low-level distributors of powder cocaine, most of whom are not black, often receive probation.⁶⁴

61. In 1993, blacks were 88.3 percent of federal crack cocaine distribution defendants, and whites were only 4.1 percent. Melissa C. Brown, *Equal Protection in a Mean World: Why Judge Cahill Was Right in United States v. Clary*, 11 NOTRE DAME J.L. ETHICS & PUB. POL'Y 307, 308 (1997) (citing UNITED STATES SENTENCING COMMISSION, SPECIAL REPORT TO THE CONGRESS: COCAINE AND FEDERAL SENTENCING POLICY xi (1995), available at <http://www.ussc.gov/crack/exec.htm>). In that same year, 32 percent of federal powder cocaine distribution defendants were white, and 27.4 percent were black. *Id.*

62. Lafayette Jones & Gary Berman, *Marketing to the African-American Community*, FOOD & BEVERAGE MARKETING, Sept. 1997, at 10 (noting that “the average African-American drinks more than twice as much fruit-flavored soda as the average non-African-American consumer”).

63. *Sports Fans and Alcoholic Risk*, CHI. TRIB., Jan. 5, 2003, at Q8 (quoting Karen Ahijevych, an associate professor of nursing at Ohio State University, who said, “African-Americans in general smoke more menthol cigarettes than whites”).

64. See *United States v. Clary*, 846 F. Supp. 768, 797 (E.D. Mo. 1994), *rev'd*, 34 F.3d 709 (8th Cir. 1994).

Many African American individuals and organizations, including the Congressional Black Caucus, the National Association for the Advancement of Colored People, and the Urban League have made appeals to Congress to end the sentencing disparity.⁶⁵ In 1995, the U.S. Sentencing Commission, in response to lobbying from people concerned about the racial effect of the law, issued a report to Congress.⁶⁶ The Commission found that there was little rationale for the 100-1 distinction, and proposed that it be reduced.⁶⁷ Congress, however, rejected the recommendation, and then President Clinton agreed, promptly signing the legislation that maintained the disparity.⁶⁸ This marked the first time in the history of the Sentencing Commission that Congress rejected one of its recommendations.⁶⁹

Appeals to the federal judiciary for relief also have been unsuccessful, although there have been several efforts. One example is *United States v. Clary*.⁷⁰ In that case Judge Clyde Cahill, of the U.S. District Court for the Western District of Missouri, found that the disparity violated the defendant's constitutional right to equal protection of the law. The U.S. Court of Appeals for the Eighth Circuit reversed, although it found that Judge Cahill had "undoubtedly present[ed] the most complete record on this issue."⁷¹ The appellate court held that the district judge failed to demonstrate that a discriminatory purpose was behind the disparity.⁷²

Several other federal and state courts have been critical of the sentencing disparity because of its lack of scientific basis and because of its racial consequences.⁷³ Thus far, however, no federal appellate court has sustained

65. See Lawrence L. Knutson, *Caucus Urges Cash for Schools*, NEW ORLEANS TIMES-PICAYUNE, Sept. 11, 1997, at A11; cf. Ricky Young, *Allard Retools Bill on Cocaine Sentencing Equal Penalty Nixed for Powder Possession*, DENV. POST, Feb. 7, 1998, at B01 (reporting Michael Hancock of the Urban League encouraging statements by Senator Allard that "Cocaine is cocaine").

66. UNITED STATES SENTENCING COMMISSION, *supra* note 61.

67. *Id.* at 198-200.

68. Ann Devroy, *Clinton Retains Tough Law on Crack Cocaine; Panel's Call to End Disparity in Drug Sentencing Is Rejected*, WASH. POST, Oct. 31, 1995, at A1.

69. *Id.* Congress's rejection of the Sentencing Commission's recommendations precipitated rioting in federal prisons. Michael Sniffen, *Laws, Prison Riots Linked, Report Cites Anger over Crack Sentences*, SEATTLE TIMES, July 27, 1996, at A2. A Bureau of Prison report concluded that eight days of disturbances at federal prisons were triggered by Congress's refusal to equalize the penalties for crack and powder cocaine. *Id.* The report noted that the riots cost the government \$39.7 million to control and precipitated the first nationwide precautionary lockdown in federal prison history. *Id.*; see also Jefferson Morley, *Crack in Black and White: Politics Profits and Punishment in America's Drug Economy*, WASH. POST, Nov. 19, 1995, at C1.

70. *United States v. Clary*, 846 F. Supp. 768 (E.D. Mo. 1994), *rev'd*, 34 F.3d 709 (8th Cir. 1994).

71. *Clary*, 34 F.2d at 713.

72. *Id.*

73. See, e.g., *United States v. Dumas*, 64 F.3d 1427, 1432 (9th Cir. 1995) (Boochever, J., concurring) (describing the crack-powder differential as "an unjustified distinction with appalling racial effects"); *United States v. Then*, 56 F.3d 464, 467 (2d Cir. 1995) (Calabresi, J., concurring)

a finding that the disparity violates equal protection.⁷⁴ In one case, Judge Guido Calabresi, of the U.S. Court of Appeals for the Second Circuit, stated that the issue is “deeply troubling” and warned that if Congress negated the Federal Sentencing Commission’s proposed reduction of the disparity, “subsequent equal protection challenges based on claims of discriminatory purpose might well lie.”⁷⁵ Calabresi wrote in 1995, before Congress rejected the proposed reduction. The U.S. Sentencing Commission recently recommended that Congress reconsider its decision.⁷⁶

Throughout his two terms, President Clinton reportedly remained committed to some disparity, even though the member of his cabinet responsible for federal policy toward illegal drugs—the “Drug Czar”—recommended that there be none at all.⁷⁷ Prior to his election, President George W. Bush said, in response to a question about the sentencing disparity, “[T]hat ought to be addressed by making sure the powder-cocaine and the crack-cocaine penalties are the same. I don’t believe we ought to be discriminatory.”⁷⁸ Thus far, however, President Bush has proposed no legislation that would eliminate the disparity. In fact, President Bush’s Deputy Attorney General told the United States Sentencing Commission that “[t]he current federal policy and guidelines for sentencing crack cocaine offenses are appropriate” and that crack “traffickers should be subject to significantly higher penalties than traffickers of like amounts of powder [cocaine].”⁷⁹

A crack user is hardly a sympathetic poster child for an important civil rights issue. Justice demands, however, that like cases be treated alike, including cases in which people use or sell cocaine. We would be suspicious of, and courts would probably hold unconstitutional, a special tax on compact discs that feature hip-hop music, or more severe punishment for people who committed crimes while speaking Spanish rather than English. In the same way, many people are troubled by the enhanced punishment for crack offenders. If, among cocaine users, getting high with crack is “acting black”

(“The unfavorable and disproportionate impact that the 100 to 1 crack/cocaine sentencing ratio has on members of minority groups is deeply troubling.”); *United States v. Willis*, 967 F.2d 1220, 1226–27 (8th Cir. 1992) (Heaney & Lay, JJ., concurring).

74. The Minnesota Supreme Court found that a state law containing a lower disparity (25 to 1) violated equal protection, but it based its analysis on state constitutional grounds. See *State v. Clausen*, 493 N.W.2d 113, 118 (Minn. 1992).

75. *Then*, 56 F.3d at 467–68.

76. UNITED STATES SENTENCING COMMISSION, *supra* note 61, at 8. More recently, U.S. Congressman Charles Rangel introduced the Crack-Cocaine Equitable Sentencing Act of 2001, H.R. 697, 107th Cong. (2001).

77. See Peter Baker, *Clinton Would Cut Disparity in Some Cocaine Sentences*, WASH. POST, July 23, 1997, at A21.

78. CNN *Inside Politics* (CNN cable broadcast, Jan. 18, 2001), at <http://www.cnn.com/TRANSCRIPTS/010118/ip.01.html>.

79. Neil A. Lewis, *Justice Department Opposes Lower Jail Terms for Crack*, N.Y. TIMES, Mar. 20, 2002, at A24 (quoting U.S. Deputy Attorney General Larry D. Thompson).

and getting high with powder is "acting white," black actors are punished much more severely than white actors for roughly equivalent conduct.

We have now considered two contemporary examples of laws that some people believe are racially unjust. Thus far, the old ways have failed to change these laws, although challenges are ongoing. The next part considers different approaches: subversion and violence. We shall examine whether these radical methods of augmenting legal change have the same moral force as the methods that advanced the law's ultimate opposition to slavery and de jure segregation.

III. THE NEW WAYS: CRIT JURORS AND RACE REBELS

A. Critical Tactics

If the old ways have failed to accomplish the reform that racial critics seek, there are other approaches that these critics might consider. Perhaps these methods would be more successful at accomplishing the end of discrimination. In this part, I consider two radical methods, both intended to push lawmakers and/or judges towards abolishing discriminatory laws: first, subversion, and second, violence.

Both of these methods are illegal. This observation is more a warning for practitioners of radical tactics than a critique of the tactics themselves. Legislators are influenced by more than simply "legal" pressures. It may be that when legal processes to change law are ineffective, "illegal" processes must be brought to bear. Professor Girardeau Spann has noted:

What minorities should focus on is how best to maximize their influence in [the political] process. Minority participation in pluralist politics can, of course, take the form of voting, running for office, or making campaign contributions, but it is not limited to those forms of involvement. Minority participation can also take the form of demonstrations, boycotts, and riots. Although such activities may be independently illegal, for purposes of positive politics their significance is limited to their potential for increasing or decreasing political strength.⁸⁰

Although I consider the tactics of subversion and violence separately, both are likely to be greeted by the government with hostility. As Robert Penn Warren stated, "[E]very act of insubordination by conscience necessarily condemns a state."⁸¹ Governments usually react with hostility to acts of civil disobedience because "there is a *logical relationship between civil disobe-*

80. Girardeau A. Spann, *Pure Politics*, 88 MICH. L. REV. 1971, 1992-93 (1990).

81. Letter from Robert Penn Warren, author, to Nicole Chiaromonte, editor of *TEMPO PERMANENTE* (ROME), reprinted in 50 YALE REV. 462, 480 (1961).

ence and civil rebellion and . . . this relationship explains the suspicion and fear with which acts of civil disobedience are frequently regarded.”⁸²

A key question, then, is how does the government respond to racial critics in the face of its suspicion and fear? Does it meet the racial critics’ demands, or does it try to crush them? American history contains evidence of both kinds of responses. As we shall see, it will be important to calibrate the tactics to ensure that they cause more good than harm. In the following portions of Part III, I explore how subversive jurors and violent race rebels might challenge discrimination in the criminal justice system.

B. Subversion

1. Lying to Save Lives

There are a number of reasons why one might want to subvert a criminal trial, including to ridicule the process or to achieve a particular outcome in the case.⁸³ If, as in the case of the race crits, the objective of the subversion is to advance a change in law, the subversion should create some pressure on a legislative body. The legislature must be moved to act out of self-interest, or fear, or (even) the will to implement just law.⁸⁴ Here, I shall

82. JAMES F. CHILDRESS, CIVIL DISOBEDIENCE AND POLITICAL OBLIGATION: A STUDY IN CHRISTIAN SOCIAL ETHICS 19 (1971) (quoting Stuart Brown, *Civil Disobedience*, 58 J. PHIL. 669, 678 (1961) (emphasis added)). Examples of civil disobedience include:

1. Muhammad Ali’s refusal of “induction into the armed forces when the draft board rejects his claim to be a religious conscientious objector.” *Id.* at 21. Ali’s act was “paralleled numerous times by the Jehovah’s Witnesses, who constitute the majority of imprisoned Selective Service violators.” *Id.*

2. “In protest against the war in Vietnam, Thomas Cornell of the Catholic Peace Fellowship said, ‘The idea is to get as many people as possible to burn their draft cards so that the government would not be able to prosecute all of them.’” *Id.* (quoting Thomas Cornell as cited in the NEW HAVEN REG., Oct. 20, 1965).

83. The “Chicago 8” trial is a famous example of subversion of a criminal trial. In the case eight people, including Abbie Hoffman of the Youth International Movement (“Yippies”) and Bobby Seale of the Black Panther Party, were charged with intent to incite riots for actions arising during protests of the 1968 Democratic National Convention. See Prina Lahav, *The Chicago Conspiracy Trial: Character and Judicial Discretion*, 71 U. COLO. L. REV. 1327, 1330 (2000). The trial became a national spectacle. The defendants distributed an “official program” for the trial in which the prosecutors and defendants were portrayed as opposing baseball teams playing in the “World Series of Injustice.” *Id.* at 1345. Seven of the eight defendants refused to stand when the judge entered the courtroom. John Schultz, *The Substance of the Crime Was a State of Mind—How a Mainstream, Middle Class Jury Came to War with Itself*, 68 UMKC L. REV. 637, 646 (2000). Abbie Hoffman and co-defendant Jerry Rubin wore choir robes as “judges robes” and at one point during the trial took them and stomped on them. *Id.* at 645. Bobby Seale called the judge a fascist and racist throughout the trial. *Id.* at 648.

84. Klarman, *supra* note 23, at 97 (“[T]his same dynamic, by which southern white violence against blacks induces a sympathetic northern response, accounts for the enactment of landmark civil rights legislation in 1964 and 1965, in reaction to televised scenes of brutality inflicted on peaceful black demonstrators at Birmingham and Selma.”).

consider subversion designed to accomplish the goal of abolishing the death penalty (based on the belief that it cannot be imposed without racial bias), or ending the cocaine sentencing disparity.⁸⁵

What, if anything, can be done in a criminal case to accomplish these objectives? The men who wrote the Constitution included an important safeguard against unjust criminal laws—the right to trial by jury. Jurors were intended to relieve potential oppressiveness by the government by not permitting the application of unjust laws. Modern jurisprudence has attempted to limit jurors' exercise of their historical right to judge the law as well as the facts. The power remains, however, as a practical matter, because the Constitution's double jeopardy clause prohibits judicial review of "not guilty" verdicts.⁸⁶ Our instrumentalist inquiry, then, is whether jury service can be hijacked in the service of a political challenge to discriminatory laws. If the answer is affirmative, the moral analysis will consider whether crit jurors should be encouraged or discouraged.

As indicated in the preceding discussion, there is historical evidence that jury nullification can facilitate changes in the law.⁸⁷ In another article I proposed selective jury nullification in cases involving black defendants charged with victimless crimes.⁸⁸ I argued that the most important purpose of the nullification there would be self-help: to prevent the incarceration of those blacks when their incarceration would not enhance public safety but instead serve only as an abstract expression of the morality of (predominantly) white legislatures.⁸⁹ A secondary purpose of the nullification, however, would be political protest—to encourage legislatures to reconsider unfair laws.

Now, to push the question of morality to the forefront, the subversion I shall consider is both more limited and more radical than jury nullification. It is more limited because it is directed at ending two discrete criminal laws, rather than emancipating every African American prosecuted for a victimless crime. It is more radical, though, because critical jurors would be required to do something more subversive than simply acquit outside of the evidence.⁹⁰ Here jurors would almost certainly be required to lie, under

85. Of course from the standpoint of racial justice, the options of "leveling up" the punishment for powder cocaine or establishment of a nonracial administration of capital punishment would also be just.

86. WAYNE R. LAFAVE & JEROLD H. ISRAEL, *CRIMINAL PROCEDURE* § 22.1(g) (2d ed. 1992).

87. JEFFREY ABRAMSON, *WE, THE JURY* 61–64 (1994) (giving examples of jury nullification in fugitive slave, alcohol prohibition, and consensual sodomy cases).

88. Paul Butler, *Racially Based Jury Nullification: Black Power in the Criminal Justice System*, 105 *YALE L.J.* 677, 679 (1995).

89. *Id.*

90. While the "legality" of jury nullification is constantly debated, it is clear that jurors can not be punished for nullification. See *id.* at 700–05.

oath. Under the laws of most jurisdictions they would then be guilty of perjury.

Imagine that you are in the pool of potential jurors for the following two criminal cases.

a. Case 1: Death Penalty

Kwame Doe, an African American, is being prosecuted for the murder of a white police officer in Georgia. The state is seeking the death penalty. You, the potential juror, are familiar with the following passage from Justice William Brennan's dissent in *McCleskey v. Kemp*:

At some point in this case, Warren McCleskey doubtless asked his lawyer whether a jury was likely to sentence him to die. A candid reply to this question would have been disturbing. First, counsel would have to tell McCleskey that few of the details of the crime or of McCleskey's past criminal conduct were more important than the fact that his victim was white. Furthermore, counsel would feel bound to tell McCleskey that defendants charged with killing white victims in Georgia are 4.3 times as likely to be sentenced to death as defendants charged with killing blacks. In addition, frankness would compel the disclosure that it was more likely than not that the race of McCleskey's victim would determine whether he received a death sentence: 6 of every 11 defendants convicted of killing a white person would not have received the death penalty if their victims had been blacks, while, among defendants with aggravating and mitigating factors comparable to McCleskey's, 20 out of every 34 would not have been sentenced to die if their victims had been black. Finally, the assessment would not be complete without the information that cases involving black defendants and white victims are more likely to result in a death sentence than cases featuring any other racial combination of defendant and victim. The story could be told in a variety of ways, but McCleskey could not fail to grasp its essential narrative line: there was a significant chance that race would play a prominent role in determining if he lived or died.⁹¹

b. Case 2: Crack Cocaine

Sharon Shepherd is being prosecuted in federal court with distribution of crack cocaine.⁹² The evidence at Shepherd's trial indicates that on two

91. *McCleskey v. Kemp*, 481 U.S. 279, 321 (1987) (citations omitted).

92. This fact pattern is taken from *United States v. Shepherd*, 857 F. Supp. 105, 106 (D.D.C. 1994).

occasions she attempted to sell powder cocaine to an undercover drug enforcement agent. Both times, the undercover agent

insisted that the defendant convert the drugs into crack prior to the sale, and defendant complied. To carry out this plan, [the undercover agent] waited in his automobile while defendant entered a building and cooked . . . the cocaine in a microwave oven. The evidence showed that it only takes a few minutes to accomplish the cooking.⁹³

If the substance Shepherd sold had been left in the original powder form, she would face a five-year prison term. Because she cooked the powder into crack, the mandatory minimum sentence is twice as long: ten years.

c. You, the Juror

What should a potential juror do, if she believes that the applicable criminal laws are discriminatory? If she can get on the jury, she has two options. One, she can apply the judge's instructions about the law to the facts of the case and vote appropriately. Afterwards, she might send a letter to her elected representative relating her hope that the law will change. The second option is that she can use her power as a juror to subvert the trial, with the goals of preventing the application of a racist law in the specific case, and of sending a message to the legislative and judicial branches of government. In the death penalty case, she would vote for life imprisonment rather than death. In the crack case, she would vote "not guilty," regardless of the evidence.

All of this depends on whether she can get on the jury. In criminal cases potential jurors are usually questioned in a pre-trial proceeding called a *voir dire*.⁹⁴ The jurors answer questions under oath. The judge and lawyers can eliminate from the pool any jurors who would be biased, and lawyers can also strike a limited number of other jurors. Many judges would remove for cause any potential juror who admitted racial concerns about the criminal law at issue. If somehow the prospective juror manages to survive a challenge for cause, she almost certainly would be peremptorily struck by the prosecutor.

Moreover, in capital cases potential jurors usually are questioned about their opinion on the death penalty. The Supreme Court has held that if

93. *Id.* at 108. Crack is created by "cooking" powder cocaine and baking soda. See UNITED STATES SENTENCING COMMISSION, *supra* note 61, at 14.

94. See, e.g., Yale Kamisar et al., *Basic Criminal Procedure: Cases-Comments-Questions* 27 (10th ed. 2002).

prospective jurors are opposed to capital punishment, prosecutors may strike them from the pool of potential jurors.⁹⁵

Thus, in order to invoke their power to prevent the government from imposing death or imprisonment on the basis of race, jurors probably would have to lie about their racial sympathies. Once on the jury, they would perform their crit services. Afterwards, they might hold a press conference, advertising their subversion of the law and their reasons for doing so. Their purpose would be to expose the injustice of the law through the "creative tension" of disobedience.⁹⁶ It would be unreasonable to expect this tactic, by itself, to end the cocaine disparity or the death penalty. It might advance those causes, however, in the same way that civil disobedience in the 1960s advanced civil rights legislation, even if those acts were not solely responsible for the conversion of those laws.⁹⁷

Even if lying would be an effective political strategy, is it morally acceptable? The stakes are high indeed; the proposition is that lying could impede the application of racist laws. Is it morally acceptable to lie (and break the law) to stop the government from incarcerating or killing people on the basis of race?

To answer those difficult questions, it may be helpful to recall crit jurors from another age. These men believed that certain federal criminal law was racist and so they decided to subvert it by means that probably included committing perjury during voir dire. Then, on the jury, these old school crits emancipated people who were obviously guilty of violating the law, even though the law had been legislated by the Congress of the United States and approved by the U.S. Supreme Court. This account will emphasize two points about this kind of civil resistance. First, it "worked," that is, it helped cause lawmakers to abolish the complained-of law. Second, I believe that most of us—but not all of us—will think that those jurors were

95. *Witherspoon v. Illinois*, 391 U.S. 510, 522 n.21 (1968).

96. Martin Luther King, Jr. observed that "there is a type of constructive, nonviolent tension which is necessary for growth. . . . The purpose of [civil disobedience] is to create a situation so crisis-packed that it will inevitably open the door to negotiation." Martin Luther King, Jr., *Letter from Birmingham Jail*, 26 U.C. DAVIS L. REV. 835, 838 (Summer, 1993). The reason extreme measures are necessary, King wrote, is that "We know through painful experience that freedom is never voluntarily given by the oppressor; it must be demanded by the oppressed." *Id.*

97. We should note that it is very difficult to predict the efficacy of political movements (especially for minorities); twenty-five years ago the (largely) nonviolent revolutions that occurred in South Africa and the former Soviet Union probably would not have seemed plausible. If the reader remains interested in efficacy to the point of distraction, the efficacy concerns here are similar to those in race-based jury nullification. I have addressed those concerns at length in several other writings. See Paul Butler, (*Color*) *Blind Faith: The Tragedy of Race, Crime, and the Law*, 111 HARV. L. REV. 1270, 1282–86 (1998) (reviewing RANDALL KENNEDY, *RACE, CRIME, AND THE LAW* (1997)) [hereinafter (*Color*) *Blind Faith*]; Paul Butler, *The Evil of American Criminal Justice: A Reply*, 44 UCLA L. REV. 143, 148 (1996); Butler, *supra* note 88, at 700.

morally right, even if they lied in order to gain the opportunity to serve as crit jurors.

2. Heroic Case

The first crit jurors were white men: They lived at a time when, in most jurisdictions, white men were the only people allowed to be jurors.⁹⁸ During this era, American blacks were not African Americans, because in *Dred Scott v. Sandford*, the Supreme Court held that blacks were not citizens of the United States.⁹⁹ For the most part, blacks were slaves, and in the Fugitive Slave Law of 1850,¹⁰⁰ Congress mandated that slaves who escaped to the North had to be returned, in the way that any lost or stolen property should be restored to its rightful owner.¹⁰¹ The Fugitive Slave Law made it a crime to aid and abet the escape of a slave.¹⁰²

Many people believed that this law was unjust. When white men of this view sat as jurors in fugitive slave cases, they sometimes refused to convict, even though they had taken an oath to follow the law, and even though the defendants they sat in judgment of were, without doubt, guilty.

*United States v. Morris*¹⁰³ presents a compelling example of critical jurors at work. Shadrach, a slave, escaped from Norfolk, Virginia to Boston, where he found work as a waiter. He was soon captured, and the Fugitive Slave Law was invoked to deliver Shadrach back to Norfolk. The relevant provision of this law did not permit testimony from the slave; rather, it established a summary proceeding in which a federal magistrate determined whether there was satisfactory proof of ownership of the slave.¹⁰⁴ During this hearing, at which Shadrach was present, a large crowd entered the courtroom and “‘invited Shadrach to accompany them’” out of the courtroom, which Shadrach did, eventually making his way to Canada, with the help of this crowd.¹⁰⁵

Eight of Shadrach’s emancipators—four black and four white—were charged with felony violation of the Fugitive Slave Act. The chosen jurors, who swore that they were unbiased, took an oath to follow the law. After the jurors heard testimony, the judge reminded them that they “‘have not

98. KENNEDY, *supra* note 97, at 169 (stating that blacks were not permitted to serve on juries prior to the Civil War and that blacks were still barred in some locales during Reconstruction).

99. 60 U.S. 393, 454 (1856).

100. Act of Sept. 18, 1850, ch. 60, § 7, 9 Stat. 462.

101. ARNA BONTEMPS, *STORY OF THE NEGRO* 141 (5th ed. 1969).

102. Fugitive Slave Law of 1850, § 7.

103. 26 F. Cas. 1323 (C.C.D. Mass. 1851) (No. 15,815).

104. Fugitive Slave Law of 1850, § 6.

105. See ABRAMSON, *supra* note 87, at 80 (quoting STANLEY CAMPELL, *THE SLAVE CATCHERS: ENFORCEMENT OF THE FUGITIVE SLAVE LAW, 1850–1860*, at 148–50 (1968)).

the right to decide any question of law” and that it was “‘their duty and oath . . . to apply to the facts, as they may find them, the law given to them by the court.’”¹⁰⁶

In blatant disregard of their oath, the judge’s instruction, and the law, the jurors acquitted the obviously guilty criminals.¹⁰⁷ The government then declined to prosecute the other five defendants. The civil resistance practiced by the *Morris* jurors was not unusual in fugitive slave prosecutions.

Were the first crit jurors right to lie under oath, in the cause of subverting slavery? I have discussed, during the past few years, the Fugitive Slave Act trials with a great number of people. Most people regard the activist jurors in those cases as heroes (which is consistent with what school-children are taught about others who were subversive of the law of slavery, for example, the keepers on the Underground Railroad—even though, pursuant to the rule of law, these “heroes” were common thieves). On the other hand, a few people—including a federal judge speaking off the record—have stated that the first critical jurors acted immorally and were unfit for jury service.

Whether the first critical jurors were right or wrong, the cumulative effect of their subversive tactics on the law is clear: Because the Fugitive Slave Law “was ‘obnoxious to a large part of the population and difficult to enforce because juries habitually acquitted in cases of obvious violation,’ the Congress repealed it in 1864.”¹⁰⁸

People who believe that the death penalty and crack sentencing laws are discriminatory may be emboldened by the first crit jurors. Should they be? Is there any basis for distinguishing between appropriate responses to various racially unjust laws? It cannot be that slavery, as opposed to, say, the death penalty, is “obviously” unjust. The injustice of slavery was not obvious to all Americans at the time that the first crit jurors acted.¹⁰⁹ Moreover, it is “obvious” to many modern-day abolitionists that the death penalty is unjust, especially in its discriminatory application.

Is the important distinction between then and now that the Fugitive Slave Law is an extreme example of racial injustice, and the death penalty

106. *Id.* at 81 (quoting *Morris*, 26 F. Cas. at 1336).

107. *Id.* at 82.

108. Aaron T. Oliver, *Jury Nullification: Should the Type of Case Matter?*, 6 KAN. J.L. & PUB. POL’Y 49, 51 (1997) (quoting Alan Schefflin & Jon Van Dyke, *Jury Nullification: The Contours of a Controversy*, 43 LAW & CONTEMP. PROBS. 51, 60 (1980)).

109. Even today some historians, and others, have suggested that slavery was probably not as bad for slaves as is commonly thought. See ROBERT WILLIAM FOGEL & STANLEY L. ENGERMAN, *TIME ON THE CROSS: THE ECONOMICS OF AMERICAN NEGRO SLAVERY* 5–6 (1974). Some legal scholars have suggested that some contemporary laws, including criminal laws, saddle African Americans with the disabilities of slavery. See, e.g., Paul Finkelman, *The Crime of Color*, 67 TUL. L. REV. 2063, 2064 (1993).

and crack laws are less extreme because they apply to fewer people and to people who are criminals? That rationale implies that “too much” racial injustice is amenable to subversive tactics, but that “just enough” injustice should be tolerated with patience. It also implies that discrimination against black criminals is more tolerable than discrimination against law-abiding blacks. Who decides how much injustice is too much? In fact there probably are degrees of injustice; in Part IV I suggest that extreme injustice is amenable to extreme tactics and that it is important for minorities, in choosing their tactics, to distinguish between degrees of injustice.

The judgment of history seems to be that the critical jurors in the fugitive slave cases did the right thing. They had the power to subvert racial injustice, and so they did, and so they should have done. What will history—one hundred years from now—tell us about critical jurors in contemporary cases, if those jurors use their power in the same way?

3. Lying and Morality

Why shouldn't a juror lie, if her lie could help allay discrimination in criminal justice? The immediate response seems simple: that the end does not justify the means, that lying under oath is a crime, and that if the juror lies to achieve a particular outcome, other actors in the criminal process might lie to achieve their desired outcomes as well.¹¹⁰ There are well respected sources of moral authority, however, that allow a person not to tell the truth in certain situations. I will describe three such authorities—criminal law, Jewish law, and a prominent legal ethicist. All espouse doctrines that allow lesser degrees of harm to prevent greater degrees of harm when certain conditions are present. In these moral universes, sometimes the end does justify the means. “White” lies are sometimes the right thing to say.¹¹¹

The criminal law doctrine of necessity affords a defense if a law breaker can demonstrate that her crime was necessary in order to prevent a greater evil.¹¹² Theoretically, then, one can legally commit perjury, if the perjury deters greater harm. The judge or jury balances the evil that the proscribed crime is designed to prevent against the evil that the accused tried, by breaking the law, to avoid. Thus, one may violate the speed limit in order to rush

110. I discuss the latter concern in Part IV.E, *infra*.

111. In her famous treatise on lying, Sissela Bok writes:

To justify is to defend as just, right, or proper, by providing adequate reasons. It means to hold up to some standard, such as a religious or legal or moral standard. Such justification requires an audience: it may be directed to God, or a court of law, or one's peers, or one's own conscience; but in ethics it is most appropriately aimed, not at any one individual or audience, but rather at 'reasonable persons' in general.

SISSELA BOK, LYING 91 (1978).

112. DRESSLER, *supra* note 26, at 287–89.

a sick child to the hospital. One can trespass or steal in order to save a drowning man by jumping into a private pool or throwing a life jacket that belongs to someone else.

It is interesting that the classic examples of when the necessity defense is applied usually involve defendants who break laws in order to save lives. Even so, the doctrine would not justify lying to get on a jury to prevent application of the crack or death penalty laws because the defense is not allowed if the legislature has already expressed its view that the perceived evil (that is, the crack and death penalty statutes) are legal. My argument, then, is not that crit jurors must escape punishment for their crime. I simply note a principle that seems surprising when stated in the abstract: The criminal law blesses some forms of law breaking as a means to an end, as long as the end is a legitimate one.

Likewise, the Torah—the formal expression of Jewish law—permits one to tell a lie in order to save a life.¹¹³ Indeed, the sanctity of life is a priority of the first order in Jewish law, and one may offend several lesser principles, in addition to the prohibition against lying, in order to protect life.

Finally, there is an endorsement from a prominent legal ethicist of exactly the kind of subversion that this Article describes. Professor Monroe Freedman writes:

Several years ago, a friend expressed his disappointment that he could never serve on a jury. At that time, the jury commission where we lived used a questionnaire that asked, among other things, whether the potential juror had moral objections to the death penalty. Anyone answering yes to that question was automatically disqualified from serving. Because my friend believed, as a matter of religious conviction, that human life is sacred and that its preservation is paramount to all other moral values, he responded in the affirmative and was disqualified each time he submitted the questionnaire.

I suggested to my friend that his conduct was inconsistent with his asserted moral priorities. The preservation of human life was not paramount for him—telling the truth to the jury commission was. Because of his scruples about answering the questionnaire truthfully, he had been making it impossible for himself to serve on the jury, and, as a juror, to vote against death.

113. Samuel J. Levine, *An Introduction to Legislation in Jewish Law with References to the American Legal System*, 29 SETON HALL L. REV. 916, 924 (1999) ("With the exception of murder, idolatry, and certain forms of illicit sexual relations, all of the laws in the Torah may and must be violated when necessary to save a life." (citing MOSES MAIMONIDES, MISHNE TORAH: LAWS OF YESODEI HA-TORAH ch. 5, laws 1–2 (various trans. & Elias Soloweyczik ed., 1863))).

After reflection, my friend decided to lie on the next jury questionnaire. It happens that my friend was a reform rabbi, and his religious beliefs helped him to reach his decision.¹¹⁴

Thus, even now, a piecemeal moral argument can be assembled to support lying in order to get on Kwame Doe's jury. While the necessity doctrine might also apply to Sharon Shepard's case, the Torah and the Freedman analysis probably would not, because Shepard does not face the loss of her life.

A piecemeal approach, however, is inadequate to the larger task of advising racial critics of the appropriate range of their tactics. The crit needs moral guidance for her full bag of tricks, not just jury subversion. Part V provides a broader construct of morality that would be useful in assessing any potential act of civil resistance.

4. The Utility of Lying

Would subversion of criminal cases effect reform of the death penalty or drug laws? The not entirely satisfying answer, from history and political science, is "maybe." We have already considered the important role of subversion of fugitive slave cases in eradicating that law. Jury subversion (in the form of nullification) has been credited with other reforms as well, including ending alcohol prohibition and consensual sodomy laws.¹¹⁵ In the contemporary context, the claim is not that subversion alone will change the laws; rather, subversion would be part of a broader political campaign. History and political science teach that the old ways will not, by themselves, effect change. Professor Cornel West has observed that efforts at legal reform fail "unless significant extraparliamentary social motion or movements bring power and pressure to bear on the prevailing status quo. Such social motion and movements presuppose either grassroots citizen participation in credible progressive projects or rebellious acts of desperation that threaten the social order."¹¹⁶ The practical effect of the crit jurors on the death penalty and cocaine sentencing laws is further considered in Part IV, *infra*. In the next

114. Monroe H. Freedman, *Religion Is Not Totally Irrelevant to Legal Ethics*, 66 *FORDHAM L. REV.* 1299, 1300 (1998).

115. ABRAMSON, *supra* note 87, at 61–64.

116. Cornel West, *The Role of Law in Progressive Politics*, in *THE POLITICS OF LAW, A PROGRESSIVE CRITIQUE* 708, 708 (David Kairys ed., 3d ed. 1998). Significantly, however, the crit methods by themselves would also not result in the change in the laws. Professor Kimberlé Crenshaw has noted that African Americans reformed civil rights law "by using a powerful combination of direct action, mass protest, and individuals acts of resistance, along with appeals to public opinion and the court couched in the language of the prevailing legal consciousness." Kimberlé Williams Crenshaw, *Race, Reform, and Retrenchment: Transformation and Legitimation in Antidiscrimination Law*, 101 *HARV. L. REV.* 1331, 1382 (1988).

part, though, I will describe another crit tactic that will make subversion of criminal trials seem moderate, in comparison.

C. Violence

1. Killing to Save Lives

For some racial critics of American criminal justice, the depth of the problem, or the slow pace of change, might inspire the desire for extraordinary measures. As we have seen, there is substantial evidence that some punishment, including death, is imposed on the basis of race. Courts presented with evidence of this race-based regime have deemed it "legal." One response might be that any system of law that would tolerate this kind of discrimination is illegitimate and needs to be overthrown or forced to change "by any means necessary," including violence.

The objective of race rebels might be the establishment of a government in which the complained-of ills of the criminal justice system would be illegal. Racial critics might look for models in the constitutions of those nations that offer stronger protections for minority rights, or have more expansive constructs of discrimination, than does the U.S. Constitution (at least as interpreted by the Supreme Court).¹¹⁷ On the other hand, the crits might have the more modest goal of using violence to coerce lawmakers into repealing the specific discriminatory laws.

There are a number of forms politically motivated violence could take. There could be a formal, organized war, or terrorist attacks by racial critics. War might be waged in such a way as to try to avoid "innocent" victims. Racial critics might announce, for example, that until the death penalty laws are changed, for every two blacks who are executed, they will execute one legislator or executioner who is involved in implementation of the laws.

For the purposes of analysis, this discussion will examine the morality of two possible kinds of violence, both intended to create pressure on lawmakers and judges to halt discriminatory laws: The first is indiscriminate "terrorist" violence, and the second, targeted violence directed at those decisionmakers in the criminal justice system who are cognizant of the death penalty's discriminatory effect but who still support it.

2. The Tradition of Violence in American Political Ideology

Belief in the moral righteousness of violence as a means of protesting and changing unjust laws is at least as old as the United States of America.

117. See, e.g., INDIA CONST. art. 30(1); S. AFR. CONST. (Act No. 108 of 1996) § 9.

Violent protests of the Stamp Act¹¹⁸ (1765) and the Townshend Acts¹¹⁹ (1767) helped launch the American Revolution.¹²⁰ After the war was won, Thomas Jefferson wrote, "God forbid we should ever be twenty years without such a rebellion. . . . And what country can preserve its liberties, if its rulers are not warned from time to time, that this people preserve the spirit of resistance? Let them take arms. . . . The tree of liberty must be refreshed from time to time, with the blood of patriots and tyrants."¹²¹

Steeped in the rhetoric of American rebellion, African American rebels have existed since slavery. Notable slave uprisings include the Stono Rebellion in South Carolina (1739), an attempted attack on New Orleans (1811), and the Nat Turner insurrection in Virginia (1831).¹²² Significantly, none of the American slave rebellions proved successful.¹²³ The *Africana Encyclopedia of the African and African American Experience* states, regarding the Nat Turner incident, "Like other slave uprisings in the United States, it caused enormous fear among whites but did not seriously threaten the slave regime."¹²⁴

After slavery, some black nationalists sought to establish a separate African American nation, either on U.S. territory or in Africa or the Caribbean. Sometimes the use of force was justified in order to achieve this goal. Later the Black Panther Party espoused a broad notion of self-defense that supported the use of arms for blacks to protect themselves from police brutality, and even to take over the means of production, if the government did not provide full employment.¹²⁵

Some scholars have described the violent race riots that marked the twentieth century as civil insurrections. The Los Angeles Riot of 1992, for example, can be seen as "'a revolutionary democratic protest characteristic of African American history when demands for equal rights have been thwarted by the major institutions.'"¹²⁶ Similarly, violence after an unarmed black man was killed by Cincinnati police in 2001 were described by a member of the New Black Panther Party as "not a riot," but "a righteous, divinely

118. The Stamp Act, 5 Geo. 3, ch. 12 (1765).

119. The Townshend Acts, 7 Geo. 3, ch. 41 (1767).

120. COLIN BONWICK, *THE AMERICAN REVOLUTION* 71–75 (1991).

121. Letter from Thomas Jefferson, U.S. Minister to France, to Colonel William S. Smith (Nov. 13, 1787), in THOMAS JEFFERSON, *DEMOCRACY* 20 (Saul K. Padover ed., 1939).

122. Peter Kolchia, *Slavery in the United States*, in *AFRICANA*, *supra* note 14, at 1728, 1732.

123. *Id.*

124. *Id.*

125. *Black Panther Party*, in *AFRICANA*, *supra* note 14, at 260, 260.

126. Eric Bennett, *Los Angeles Riot of 1992*, in *AFRICANA*, *supra* note 14, at 1200, 1200 (quoting historian Mike Davis).

ordained rebellion.”¹²⁷ The *Los Angeles Times* reported that the speaker “drew a prolonged standing ovation [at the funeral of the man who had been shot by the police] when he commanded: ‘We must continue to resist by any divine means necessary.’”¹²⁸

A prominent legal scholar has also recommended rebellion when the law fails to correct racial discrimination. Harvard Law School professor Randall Kennedy wrote that rather than enforce racist law, Supreme Court justices might

most radically . . . have explicitly defied existing law Though rare, such acts of judicial defiance are not without precedent. Rebellion by figures as central as Supreme Court justices raises the specter of complete dissolution of the legal order. That alternative, however, should never be absent from the spectrum of possibilities we implicitly use in evaluating the political morality of a justice’s conduct. There are regimes that do not warrant continued existence.¹²⁹

3. Heroic Case

At what point is violence acceptable as a tactic for making a political point? After September 11, 2001, the best answer might appear to be “never.” Yet American history may offer a different lesson. Consider, for example, the case of Denmark Vesey.

Vesey was a free black man who attempted, in 1822, to organize a rebellion among South Carolina slaves. The plan was to burn the city of Charleston, kill the whites, steal ships, and escape to Haiti. The plan was thwarted by an informant, and thirty-five blacks, including Vesey, were executed. In 2001, the city of Charleston approved funds to erect a monument in Vesey’s honor.¹³⁰ Some whites protested, but the South Carolinians who regarded Vesey as a hero carried the day.¹³¹

The Denmark Vesey case reveals an interesting disjunction between morality and efficiency. Denmark Vesey’s plan was surely impractical; no American slavery rebellion ever was successful. Yet, Vesey’s inefficiency does not seem to have negated his heroism. Perhaps our contemporary race rebels would be viewed the same way one hundred years from now.

127. Stephanie Simon, *In Anger, with Hope, a Black Man’s Mourners Pray He Didn’t Die in Vain; Funeral: Hundreds Attend Cincinnati Services for Timothy Thomas, 19, Who Was Killed by a Police Officer. Grief Turns to Calls for Action in a Tense City*, L.A. TIMES, April 15, 2001, at A15.

128. *Id.* (quoting New Black Panther Party Chairman Malik Zulu Shabazz).

129. Randall Kennedy, *Race Relations Law and the Tradition of Celebration: The Case of Professor Schmidt*, 86 COLUM. L. REV. 1622, 1655–56 (1986) (footnote omitted). Kennedy does not, however, espouse violent revolution.

130. See Jon Wiener, *Denmark Vesey: A New Verdict*, THE NATION, Mar. 11, 2002, at 21.

131. *Id.*

Race-based punishment, however, is a different kind of injustice than slavery, and one that does not directly impact as many blacks. It may be that violence, including violence against civilians, is morally permissible to combat extraordinary racial discrimination (for example, slavery or genocide), but not “ordinary” racial discrimination. Would violence be acceptable if the majority of African American men are incarcerated, but not be acceptable when only a few African American criminals are killed on the basis of race? When, if ever, does the subordination caused by the American criminal justice system reach the point where African Americans can make a morally justifiable decision to “live free or die?”¹³²

By almost any definition of the term, Denmark Vesey was a terrorist. Now, however, in the city of Charleston, Vesey is a heroic terrorist. The moral of his story may be, in the eyes of many Americans, that terrorism is not always morally wrong. It may be foolish, but that is a utilitarian critique.¹³³

4. Violence and Morality

Is using violence to change discriminatory law immoral? To frame the question, one might think of two historic discriminatory laws in the United States: the laws that authorized slavery, and the post-Civil War “black codes,” which punished blacks more severely than whites for the same crime.¹³⁴ One of the most notorious black codes involved the crime of rape. In some states the death penalty was reserved for black men who raped white women.¹³⁵

Would it have been immoral to use violence to expedite the end of slavery or the black codes? Would you have killed or condemned those who did? The answer will depend one’s own construct of morality.¹³⁶ Is there a defensible construct that tolerates violence in these circumstances?

132. The well-known Negro spiritual “Oh Freedom” includes the words: “Before I’d be a slave I’d be buried in my grave.” SING FOR FREEDOM: THE STORY OF THE CIVIL RIGHTS MOVEMENT THROUGH ITS SONGS 74–75 (Guy Carawan & Candie Carawan eds., 1990). African American writer Toni Morrison explored this theme in the novel *Beloved*. See TONI MORRISON, *BELoved* (1987).

133. See discussion *infra* Part IV.B (explaining that “just war” doctrine, in its calculus of morality, requires consideration of the chances of success of the war).

134. KENNEDY, *supra* note 97, at 84–86.

135. *Id.* at 85 (citing Mississippi, South Carolina, and Alabama as examples of states in which “blacks alone [were] eligible for hanging for raping white women”); see also BELL HOOKS, *AIN’T I A WOMAN* 33–36 (1981).

136. For a discussion of common philosophical constructs of moralism, applied to terrorism, see Theodore P. Seto, *The Morality of Terrorism*, 35 LOY. L.A. L. REV. 1227, 1239–48 (arguing that neither consequentialism, deontology, nor virtue ethics provide a sufficient basis for moral analysis of terrorism).

The question about the black codes is relevant to our analysis of the race rebels because the current death penalty and cocaine sentencing laws have the same effect. African Americans are punished differently from whites for what is essentially the same conduct. Professor Derrick Bell has observed, "McCleskey falls squarely in line with [the black codes] in its devaluation of the lives of both black defendants and black victims."¹³⁷

There is, unsurprisingly, less moral authority to support violence rather than subversion. Jewish law, which empowered the subversive crit jurors, would not advance the moral case of the race rebels. It forbids killing, even to save a life.¹³⁸ But secular law and philosophy have more expansive views.

The United States' criminal law allows private violence, including deadly force, in defense of self or others, but only if it is a proportionate response to an imminent attack.¹³⁹ Some U.S. jurisdictions also allow private actors to kill to thwart any felony.¹⁴⁰ The necessity doctrine in criminal law allows an individual to engage in conduct that otherwise would be criminal if the act would avoid a greater harm.¹⁴¹

Self-defense and necessity are useful but not determinative for our moral analysis. Both doctrines justify the use of force in the service of some important cause. The view of justice contained in these doctrines requires neither pacifism nor acquiescence to subordination. Both doctrines contain limitations, though, that make them inapplicable to political violence. The criminal law requires a threat of immediate harm in order for a violent response to be justified.¹⁴² The race rebels, on the other hand, would strike for political reasons, not for self-help. Moreover, both doctrines allow force only in response to unlawful aggression. The "aggression"—discriminatory law—that the race rebels fight is, by its very terms, legal.

In sum, under criminal law, deadly force is justified for some reasons, but not for political causes. This seems overbroad and, in some cases, inconsistent with our moral intuitions. Was John Brown evil for raiding slaveholding plantations? Did the participants in the Warsaw Uprising act immorally, if they fought not to thwart an immediate attack but rather to end the Nazi occupation in Poland? Even those of us who would condemn most political violence might not condemn all of it.

137. DERRICK BELL, *RACE, RACISM AND AMERICAN LAW* 516 (4th ed. 2000).

138. MAIMONIDES, *supra* note 113.

139. DRESSLER, *supra* note 26, at 221.

140. *Id.* at 276. If the violence is performed by the state, as opposed to a private citizen, the law is more tolerant. *Id.* at 277. In the United States the government can kill for the purposes of war, law enforcement, and punishment of criminals.

141. *Id.* at 285–89.

142. *Id.* at 221, 287.

The philosopher Jan Narveson has listed six situations in which one might argue that violence is justified.¹⁴³ Ranked “from most to least plausible” they are: (1) self-defense (preventing immediate injury to oneself); (2) defense of others (preventing immediate injury to others; (3) preventing longer-range threats to life, to oneself, or to others; (4) preventing or rectifying loss of legitimate liberty by oneself or others; (5) providing conditions of a minimally acceptable life when no other means is possible; and (6) promoting a better life for oneself, or some favored group, beyond the “minimally acceptable” level mentioned in (5).¹⁴⁴ Narveson states that “(1)–(4) are basically acceptable, that (6) is definitely not acceptable, and that (5) is the hard case, but that fundamentally it must be considered marginally acceptable if at all.”¹⁴⁵

Narveson’s analysis, based on social contract theory, seems to correspond roughly with an intuitive sense of the relationship between morality and violence. People who kill in self-defense are justified under (1). People who kill to free slaves are justified under (4).

The hard case is (5), which might include violence to defeat extreme subordination. Violence to combat nonextreme subordination, however, is not justified under (6).

In Part IV, we shall consider whether race-based imprisonment and race-based execution constitute subordination extreme enough to warrant a violent response.

5. The Utility of Violence

It must be acknowledged that, if the object of violence is to take control of the government, no attempted American revolution has ever been successful. The United States is the most powerful nation in the world, with the mightiest military force. It is reasonable to expect that any minority group that sought to overthrow it would be summarily crushed.

Our race rebels, however, have objectives more modest than a wholesale overthrow of the government. The end they seek is “only” the abolition of certain discriminatory laws. If H. Rap Brown’s famous description of vio-

143. Jan Narveson, *Terrorism and Morality*, in *VIOLENCE, TERRORISM, AND JUSTICE* 116, 130 (R.G. Frey & Christopher W. Morris eds., 1991). Narveson defines morality as

a set of behavioral requirements and inducements that are (1) societywide: Everyone is to be subject to, to live up to the rules that are (2) (to be) universally reinforced: Everyone is also to participate in their reinforcement, by an assortment of (3) *informal* methods. No central, official agency defines and enforces them.

Id. at 127.

144. *Id.* at 130.

145. *Id.* at 131.

lence as “as American as apple pie”¹⁴⁶ is correct, the rebels might be speaking a language that lawmakers understand. Some historians have attributed President Richard Nixon’s progressive urban policies, and his embrace of affirmative action, to his fear of racial violence, based on the urban riots of the late 1960s.¹⁴⁷ More recently, in Cincinnati, African Americans successfully used civil disturbances to focus attention on their concerns.¹⁴⁸

Professor Alan Dershowitz predicts that “[t]errorism will persist because it often works, and success breeds repetition.”¹⁴⁹ To know whether terrorism is successful, one must know what its goals are. Neither terrorists nor scholars speak with one voice on this issue. Professor Loren E. Lamasky has written about two possible goals of terrorism:

First, one can hypothesize that terrorists typically act with the intention of bringing about those political ends to which they declare allegiance; they are, however, in the grip of mistaken beliefs about political causation Second, one can maintain that terrorists generally aim at *expressing support* for political outcomes without, however, intending thereby to *bring about* those outcomes. It is the second of these hypotheses that seems better to fit the data.¹⁵⁰

146. H. RAP BROWN, *DIE NIGGER DIE!* 144 (1969); see also Malcolm X, *supra* note 4, at ix (referring to racist hatred and violence in U.S. society and stating that the assassination of President John F. Kennedy was a case of “the chickens coming home to roost”).

147. See Richard Delgado & Jean Stefancic, *California’s Racial History and Constitutional Rationales for Race-Conscious Decision Making in Higher Education*, 47 UCLA L. REV. 1521, 1583 (2000). Sociologist Jerome Karabel theorized that the

“sharp rise [in Black and Latino entrants to law and medical school in California] was a direct product of the adoption—under the pressure of the riots that shook America’s cities in 1967 and 1968—of strong affirmative action policies.” Pointing out that these changes took place well over a decade after the Montgomery bus boycott, but shortly after the 1967 riots in Newark and Detroit and the 1968 riots that swept many American cities in the wake of Martin Luther King, Jr.’s assassination, Karabel hypothesized that it was not so much the civil rights movement’s moral claims as the palpable threat to existing order that produced the softening of official attitudes at the University of California.

Id. (quoting JEROME KARABEL, *THE RISE AND FALL OF AFFIRMATIVE ACTION AT THE UNIVERSITY OF CALIFORNIA* 3 (1999)). See also Deborah C. Malamud, *Values, Symbols, and Facts in the Affirmative Action Debate*, 95 MICH. L. REV. 1668, 1673 (1997). Deborah Malamud has noted that

The initial impetus for affirmative action was the urban racial unrest of the late 1960s and early 1970s. . . . The key here is that affirmative action was a white elite response to the urban riots, especially among leaders within the Johnson administration who, like Johnson himself, refused to see the use of overwhelming force as the solution.

Id.

148. *Unrest Lingers in Cincinnati*, L.A. TIMES, Sept. 24, 2001, at A1 (noting that “After the April riots, Mayor Charles Luken appointed a commission . . . to find ways to improve opportunities for blacks”).

149. ALAN M. DERSHOWITZ, *WHY TERRORISM WORKS* 6 (2002).

150. Loren E. Lamasky, *The Political Significance of Terrorism*, in *VIOLENCE, TERRORISM, AND JUSTICE*, *supra* note 143, at 86, 90.

Professor Lamasky's second thesis seems applicable to race rebels. It would be impractical to think that a legislature or court would act in favor of the rebels in response to a violent attack. To the extent that their violence was part of a larger campaign that included the old ways of lobbying and litigation, perhaps the violence would encourage the power brokers to act more quickly.¹⁵¹ We would have to surmise, because no lawmaker is likely to admit that he was motivated by the threat of violence to reach a certain result.

Violence is certainly, for the cause of the race rebels, a high-risk undertaking. Even if they have the limited goal of supporting more traditional methods, the specter of a powerful political backlash seems likely.

Does the fact that race rebels might fail make their cause less morally justifiable? If, by contrast, the crit jurors are likely to succeed, is their cause more morally justifiable? In the next part I consider a construct of morality, based upon international human rights law, that suggests answers to these difficult questions.

IV. MORAL LIMITATIONS ON CHANGING UNJUST LAW

A. Heroic Black Outlaws

Imagine that some racial critics are considering either subversion or violence to accomplish abolition of the death penalty and the end of the sentencing disparities in cocaine offenses. Should their exclusive concerns be utilitarian, or does morality matter? If morality does matter, how can it be determined?

It seems clear that the most formal expression of American social morality—the criminal law—is an insufficient guide, at least for minorities. After all, some of the most revered figures in African American history were outlaws, in the service of their vision of racial justice. Aboard the *Amistad*, Cinque and other Africans killed their kidnappers.¹⁵² Harriet Tubman

151. Violence might also have a salutary effect on the way that the crit jurors are received. The race rebels would make the crit jurors seem less extreme, in the same way that Malcolm X and the Black Panther Party lessened Martin Luther King's radicalism. See JAMES H. CONE, MARTIN & MALCOLM & AMERICA: A DREAM OR A NIGHTMARE 270–71 (1991); August Meier, *On the Role of Martin Luther King*, in CONFLICT AND COMPETITION: STUDIES IN THE RECENT BLACK PROTEST MOVEMENT 88 (John H. Bracey, Jr. et al. eds., 1971) (“[Without the black militants], King would have appeared radical and irresponsible rather than moderate and respectable.”); Merle H. Weiner, “Civilizing” the Next Generation: A Response to Civility: Manners, Morals, and the Etiquette of Democracy by Stephen L. Carter, 42 HOW. L.J. 241, 318 (1999) (“[W]ithout the more militant component of the [civil rights] movement, White America would not have acquiesced to the movement's goals.”).

152. BONTEMPS, *supra* note 101, at 150–51.

helped slaves escape.¹⁵³ Rosa Parks violated the peace ordinances of Montgomery, Alabama.¹⁵⁴ Martin Luther King, Jr. led marches without legal permits.¹⁵⁵ Muhammad Ali refused to be conscripted to fight in the Vietnam War.¹⁵⁶

Some critical race theorists, the "racial realists," have urged minorities not to respect the values held by the majority, or its law. Racism, they argue, is deeply and inevitably embedded in every aspect of American culture, including law.¹⁵⁷ Racial realists believe that minorities, cognizant of their subordinate status, should have limited expectations of the law and of the majority. Racial realists would be suspicious of any shared precepts of morality between the majority and the minority. The tactics they recommend for minorities are absolutely instrumentalist.¹⁵⁸

Racial realism would empower racial critics to break the law by committing perjury or sedition because the only question realists ask about a law is whether it serves the interests of minorities. A criminal sanction has no independent moral force when it undermines minority interests, as it does when it prevents lying to thwart the racist application of a law.

153. MOLEFI K. ASANTE & MARK T. MATTSON, HISTORICAL AND CULTURAL ATLAS OF AFRICAN AMERICANS 72 (1991).

154. LUKER, *supra* note 20, at 207–08.

155. *Id.* at 149–51.

156. John Gennari, *Ali, Muhammad*, in AFRICANA, *supra* note 14, at 73, 75 (quoting Muhammad Ali as stating, "I ain't got no quarrel with them Viet Cong.").

157. Other critical race theorists place more faith in the ability of the majority to conquer its bias and of the law to facilitate this process. Mari Matsuda speaks of the "inevitability of humane social progress" that can "lead to a just world free of existing conditions of domination." Mari J. Matsuda, *Public Response to Racist Speech: Considering the Victim's Story*, 87 MICH. L. REV. 2320, 2325 (1989). Perhaps because they believe that social progress is inevitable, these theorists are more likely to emphasize the utility of "ratchet[s]"—legal tools that have progressive effect." *Id.* Ratchets include affirmative action, desegregation, and reparations. Importantly, "such measures are best implemented through formal rules, formal procedures and formal concepts of rights, for informality and oppression are frequent fellow travelers." *Id.*

158. Richard Delgado has suggested that racial critics "look upon law as we would any other social institution, a tool that is useful for certain purposes and at certain times, but less so for other purposes or at different times." Richard Delgado, *Rodrigo's Ninth Chronicle: Race, Legal Instrumentalism, and the Rule of Law*, 143 U. PA. L. REV. 379, 388 (1994); see also David Ray Papke, *The Black Panther Party's Narratives of Resistance*, 18 VT. L. REV. 645, 670 (1994) (noting that the Black Panthers had "no deep respect for [the] law . . . [T]he poor, unrepresented, and oppressed had the right to rewrite unjust laws"). Similarly, as noted in Part III, *supra*, Giradeau Spann recommends that minorities practice "pure politics," which he defines as "nothing more than the process of casting and counting votes." Spann, *supra* note 80, at 1992. In pure politics,

Outcomes cannot be right or wrong, nor can they be just or unjust. . . . Minority participation can also take the form of demonstrations, boycotts and riots. Although such activities may be independently illegal, for purposes of positive politics their significance is limited to their potential for increasing or decreasing political strength.

Id. at 1992–93.

The problem, though, with such an instrumentalist approach is similar to its utility: Anything goes.¹⁵⁹ There are no moral limits. I think this concedes too much. All of the important, and successful, struggles for racial justice for African Americans have been inspired by strong moral claims. These claims were an important element in garnering the political support that was necessary to convert discriminatory laws.¹⁶⁰

So, what should an advocate for racist justice do, when instrumentalism provides the most diverse arsenal, but when morality also matters (for its own sake, and for utilitarian reasons)? The next part recommends that, to choose her weapons, the advocate consult the doctrine of just war. This theory, a construct from Judeo-Christian theology and international human rights law, allows governments to use extreme methods, but within moral limits. As I explain below, the doctrine is undertheorized with regard to the use of force by nongovernmental actors. I recommend a construct of the doctrine for insurgents, generally, and our crit jurors and race rebels, specifically.

B. The Doctrine of "Just War"

A moral theory exists to guide "citizens who must decide what is worth fighting for and how to fight for it—whatever others may think."¹⁶¹ It is the doctrine of "just war." Its "principle intention . . . is to serve as a source for guidelines in making relative moral decisions."¹⁶² One reason that the doctrine may serve as a useful moral guide for race critics is that it is rooted in the same Judeo-Christian theology that inspired earlier race reformers, including abolitionists and twentieth-century civil rights protestors.¹⁶³

159. There is an interesting correspondence between my critique of instrumentalist tactics and some philosophical critiques of utilitarianism in American criminal justice. Many of the harsh criminal sanctions (especially for drug crimes) are utilitarian: They are justified on grounds of incapacitation and deterrence. Retributivists believe that utilitarian justifications of punishment are immoral because they are not premised on the "just deserts" of the criminal. The theoretical compromise that American criminal law has made between retribution and deterrence is that the law can promote utilitarian objectives, but punishment must be limited by the individual desert of the criminal. I think this compromise is similar to the kind of "moral instrumentalism" that I hope to recommend: Racial advocates can avail themselves of instrumentalist tactics, but these tactics must have moral restraints (so it might be acceptable, in a criminal case, to lie to prevent the racist application of a law, but it would not be acceptable to lie to convict an innocent person). For an argument that racial equality in American criminal justice would be advanced by a return to retributive justifications of punishment, see Paul Butler, *Retribution, for Liberals*, 46 UCLA L. REV. 1873, 1880 (1999).

160. I concede that this is more of a utilitarian argument than a "moral" one.

161. JAMES TURNER JOHNSON, *JUST WAR TRADITION AND THE RESTRAINT OF WAR: A MORAL AND HISTORICAL INQUIRY* 289 (1981).

162. *Id.* at 204.

163. MARTIN LUTHER KING, JR., *THE AUTOBIOGRAPHY OF MARTIN LUTHER KING, JR.* 188–204 (Clayborne Carson ed., 1998). Martin Luther King's letter from Birmingham Jail was

Just war doctrine was the product of efforts by early Christians to reconcile their religion with their perceived need to go to war.¹⁶⁴ St. Augustine's theory was that "once the cause was just, any means to achieve the end was permissible."¹⁶⁵ This construct is identical to Malcolm X's formula of "any means necessary." The doctrine has evolved, however, so that, in addition to justifying war, it limits the ways it can be waged. The morality of war is judged in two ways: first by the reasons for fighting (*jus ad bellum*) and then by how the war is fought (*jus in bello*). The war is either just or unjust, and it is fought either justly or unjustly.¹⁶⁶

To determine whether the reasons for fighting the war are just, five criteria are employed: (1) whether war is the last resort; (2) whether the cause is just; (3) whether war is waged with the right intention; (4) whether success is reasonably likely; and (5) whether war is waged by a legitimate authority. For a war to be fought in a just manner, two conditions must be satisfied: The means must be proportionate, and the targets must be military, and not civilian.

Just war doctrine has been incorporated into international human rights law.¹⁶⁷ It provides a framework for analysis of the permissible use of force in international conflicts, including the need for humanitarian intervention when citizens within a country are being oppressed by their own government. The doctrine also serves as an analogy to evaluate conflicts outside of traditional warfare. Legal scholars have used the doctrine to analyze the morality of such disparate subjects as the "war" on drugs,¹⁶⁸ the death penalty,¹⁶⁹ and military intervention designed to avert an environmental disaster.¹⁷⁰

In this part I use the doctrine to evaluate the morally permissible range of tactics of racial critics in changing unjust criminal law. The two principal issues are these: Is the racial critics' cause—reforming the death penalty and

written in response to eight clergymen who criticized demonstrations led by King. King's letter utilized lessons taught in the Bible and explained the reasons for the tactics used at that time. *Id.*; King, *supra* note 96.

164. For a description of Islamic and Christian norms regarding "just war," see Adam L. Silverman, *Just War, Jihad, and Terrorism: A Comparison of Western and Islamic Norms for the Use of Political Violence*, 44 J. CHURCH & ST. 73, 75–77 (2002).

165. Judith Gail Gardam, *Proportionality and Force in International Law*, 87 AM. J. INT'L L. 391, 395 (1993).

166. See MICHAEL WALZER, *JUST AND UNJUST WARS* 21 (1977). It is possible for a just war to be fought unjustly, and vice versa. *Id.*

167. SEAN D. MURPHY, *HUMANITARIAN INTERVENTION: THE UNITED NATIONS IN AN EVOLVING WORLD ORDER* 47–82 (1996).

168. Edward McGlynn Gaffney, Jr., *On Ending the War on Drugs*, 31 VAL. U. L. REV. at xvii, xxiv (1997).

169. Robert W. Tuttle, *Death's Casuistry*, 81 MARQ. L. REV. 371, 375 (1998).

170. Michael K. Murphy, *Achieving Economic Security with Swords as Ploughshares: The Modern Use of Force to Combat Environmental Degradation*, 39 VA. J. INT'L L. 1181, 1218 (1999).

cocaine sentencing laws—just? Are their tactics—subversion and violence—just? Each question must be answered in the affirmative before we can say that the crits' extremism is morally justifiable.

First, however, we must confront the central problem of applying just war doctrine to the racial critics: They are not soldiers in the traditional sense; indeed, the war they would wage is against their own country. In the next part I recommend an application of just war doctrine to nonmilitary actors.

C. Just War and Insurgents

In the United States, the most notorious contemporary examples of insurgents are the terrorists who attacked the World Trade Center and the Pentagon on September 11, 2001. To think of terrorists as moral agents may be difficult for anyone affected by the events of that day. The problem, though, is that our moral analysis of terrorism now seems inconsistent. We play favorites: We approve of anti-slavery rebels but not Palestinian suicide bombers. A coherent way of thinking about the morality of private actors who use violence to achieve political objectives seems key to understanding, and perhaps preventing, that violence. It may be naive to think that terrorists are concerned about the morality of their work, but it is morality—strong religious, spiritual, or political convictions—that inspires terrorism in the first place.

Traditionally just war doctrine applies to state and not private actors. This aspect of the doctrine seems undertheorized and likely to lead to anomalies. For example, if a state practices genocide against a minority group of its citizens, some just war theorists would allow "humanitarian intervention" by foreign nations.¹⁷¹ The minority group itself, however, would not be permitted to use force on its own behalf, because it is not a state actor. This is a flaw in the doctrine, and in this part, I propose a corrective.¹⁷²

St. Thomas Aquinas, the thirteenth-century theologian and philosopher, "expanded the 'defensive' just-war theory between states to include defensive action within the state. He allowed that, under some circumstances, action against the state was not sinful."¹⁷³ According to Aquinas, action against the state is not sinful where the government is tyrannical and not directed at the common good; in this case, action against the state is not

171. Just war theorists disagree about whether humanitarian intervention is ever just. For a description of the debate, see MURPHY, *supra* note 167, at 40–47.

172. I think it is a flaw because, as discussed *infra*, it seems inconsistent with prevailing concepts of morality, including the concept of morality that underlies just war doctrine itself.

173. L. Christian Marlin, *A Lesson Unlearned: The Unjust Revolution in Rwanda, 1959–1961*, 12 EMORY INT'L L. REV. 1271, 1299 (1998).

sedition unless it results in less common good than existed under the tyrannical government.¹⁷⁴ As one scholar has noted, however, in this context “tyranny” is hard to define.¹⁷⁵

Almost none of the legal scholarship on just war doctrine explores in detail the question of how the doctrine applies to insurgents. Michael Walzer, the leading scholarly expert on the doctrine, notes that “guerilla fighters” can occasionally be justified in using force, but with certain limits—for example, if they kill civilians, “they are able to make distinctions: they aim at well-known officials, notorious collaborators, and so on.”¹⁷⁶ Walzer also notes that “to be eligible for the war rights of soldiers, guerrilla fighters must wear ‘a fixed distinctive sign visible at a distance’ and must ‘carry their arms openly.’”¹⁷⁷

Professor Walzer’s description of insurgents focuses more on the way they should fight than on how they should determine the justice of their cause. When is a state so oppressive that a minority of its citizens is entitled to go to war against it?

If we accept Aquinas’s thesis that it is morally justifiable to use violence to remove a tyrannical government, we must face the difficulty of defining tyranny. In Part III, we looked to American criminal law doctrine for instruction on justifications of private violence. It permits an individual actor to use violence in some situations, including to defend herself or others from unlawful force. Private violence is also sometimes allowed to protect property or to prevent crimes. If we apply this view of morality to insurgents, they would be justified in acting whenever the state threatens the lives of its citizens on the basis of some impermissible criterion, including race, gender, or religion.

The concept of humanitarian intervention offers a more expansive approach to the issue of insurgents and just war, at least by analogy. Humanitarian intervention is “the threat or use of force by a state, group of states, or international organization primarily for the purpose of protecting the nationals of the target state from widespread deprivations of internationally recognized human rights.”¹⁷⁸ Its supporters emphasize that such intervention is justified in limited contexts—for example, when a state threatens its own citizens with genocide or deprivations of basic human rights.¹⁷⁹

174. *Id.* at 1301.

175. *Id.* at 1304.

176. See WALZER, *supra* note 166, at 176–96.

177. *Id.* at 182 (quoting G.I.A.D. Draper, *The Status of Combatants and the Question of Guerilla War Warfare*, 45 BRIT. Y.B. INT’L L. 173, 202–04 (1971)).

178. MURPHY, *supra* note 167, at 11–12.

179. See FERNANDO R. TESÓN, *HUMANITARIAN INTERVENTION: AN INQUIRY INTO LAW AND MORALITY* (1988); see also Fernando R. Tesón, *Collective Humanitarian Intervention*, 17 MICH. J. INT’L L. 323 (1996).

By its very terms, the doctrine contemplates intervention only by state actors. If applied to insurgents, however, the standard for intervention could remain the same. In other words, insurgents would be permitted to use force to combat their “deprivation[] of internationally recognized human rights.” The other conditions of just war would remain, including that the insurgents are legitimate representatives of the minority group and that they have a reasonable chance of success.¹⁸⁰

Just war doctrine, applied to insurgents, would limit violence more than it would authorize it. *Jus in bello* requires that there be no injury to civilians. If the usual definitions of “terrorism” and “civilians” are invoked, this requirement seems to rule out virtually all terrorism, for terrorism is commonly thought of as politically motivated violence against civilians. Sometimes terrorists argue that, in their particular conflict, there are no “noncombatants.” An example of this argument is the claim that even nonmilitary citizens of Israel are permissible targets for Palestinian protestors because all Israelis benefit from and help maintain the subordination of Palestinians.¹⁸¹

The problem with this argument is the same as the problem with most terrorism: It is indiscriminate. It grants insufficient weight to the value of human life when it does not acknowledge that there are degrees of culpability. Surely, for example, children are not as responsible as adults, and surely a poor laborer is not as responsible as a high government official.

On the other hand, it is possible to defend a construct of “combatants,” that is, permissible targets of violence, that includes nonmilitary actors. The objective of just war is to change the regime, or the way that it operates. To attack the foot soldiers, but to ignore the authorities responsible for creating and implementing the oppressive policies, seems inefficient. The suggestion that insurgents should distinguish among civilians and limit their targets to “well-known officials, notorious collaborators, and so on,” seems reasonable.¹⁸² Thus, just war applied to insurgents would not eliminate the “combatant” restriction but would broaden the concept, in the manner described by Professor Walzer. “Combatant” could be defined as any person directly responsible for creating, administering, or defending the human rights violations, including genocide or race discrimination, that are the subject of the conflict. As discussed below, in the context of the “war” against race-based capital punishment, combatants would include those directly responsible for

180. In Parts IV.D and IV.E, *infra*, I apply these standards to the insurgent crit jurors and race rebels.

181. David Rudge, *Revised Hamas Tactics a Cause for Concern*, JERUSALEM POST, Aug. 25, 1998, at 4 (quoting Dr. Menachem Klein, professor at Bar-Ilan University and Palestinian affairs expert, as saying that “[m]any Palestinians, including Hamas, view settlers as soldiers, because they are occupying Palestinian territory, and they are therefore considered legitimate targets in a war of liberation”).

182. See WALZER, *supra* note 166, at 180.

creating and implementing it. These people are culpable in a way that the ordinary civilian is not. Even then, violence against them is not necessarily moral: The other conditions of just war must also be satisfied.

I want to emphasize the purpose of applying just war doctrine to insurgents, because I understand that any moral construct that tolerates political violence by nongovernmental entities is controversial. Just war doctrine accepts that violence—killing people—can be morally justified, if certain conditions are satisfied. One of the necessary conditions is that the targets must be military. This condition seems inconsistent with other common constructs of morality, including those found in criminal and international law, and in popular culture. The heroic status that many now accord those who led slave revolts is evidence of that view of morality. Yet definitions of combatants proffered by terrorists are overly broad when they include those who are not directly responsible for the oppression of others (even if they benefit from that oppression). This view of combatants discounts the sanctity of human life that must underlie any construct of morality (even if that construct allows for the taking of life in certain cases). The proposed application of just war doctrine to “terrorists” assumes that they, like nation-states, are open to persuasion about their methods. Their embrace of violence does not mean they have abandoned their claim to morality. If just war doctrine is to remain relevant in the twenty-first century, it should be applied to every actor—not just governments—that uses violence to accomplish political objectives.

D. The Death Penalty and Cocaine Laws: Just Cause?

The first component of just war analysis—*jus ad bellum*—requires analysis of whether there is a moral reason for war. In this part I analyze whether, under the five criteria of *jus ad bellum*, the racial critic’s causes—ending discriminatory administration of the death penalty and cocaine laws—justify extreme methods.

1. Last Resort

The first requirement is that extreme tactics be the last resort. In the case of changing the death penalty and cocaine laws, the critical tactics come “last” in the sense that the old ways of changing the law have been tried and they have not (yet) worked. How much time should one give them, especially when the cost of that time is race-based incarceration and death? A requirement that “legal” methods be invoked first seems reasonable, but morality cannot require infinite patience (otherwise no war would ever be just, because there might always be a possibility that nonlethal

means would achieve the same objective). In the cases of both the death penalty and the cocaine sentencing disparity, both the courts and the legislatures have been petitioned for relief, and those bodies of government have failed to grant it. The critical tactics, then, are ones of last resort.

2. Just Cause

The next factor requires consideration of the war's goal. What is the goal of the crits? The answer is simple, for unlike the wars on drugs or terrorism, this war has clear and attainable goals. The crit tactics will be halted—peace will be declared—when the discriminatory provisions in the complained-of laws are corrected, by equalizing the punishment for powder and crack cocaine offenses and by abolishing the death penalty (based on the presumption that it cannot be made nondiscriminatory). The racial critics act not out of personal aggrandizement, or anarchist sympathies, but rather from the good faith intention to repair the criminal justice system. If, in a democracy, dissent is an act of faith, the racial critics are true patriots. There is no reason to believe that their extremist tactics would persist when their complained-of racial inequities are repaired. Although the analogy is not perfect, the crit tactics are more like self-defense than acts of aggression.

3. Right Intention

A just war can be fought only to redress a substantial injury. This should be an easy requirement for the race rebels to meet. The whole point of their battle is redress of discrimination. They are not waging “war” with grandiose goals of acquisition; they merely want African Americans to be free of certain official kinds of oppression from the government. “Self-defense” is the paradigmatic example of an injury that war can morally redress. Civil rights advocates, both moderate and radical, have often invoked this concept as a metaphor to justify the use of radical tactics in the struggle for racial justice. Their argument is that discrimination is a malign evil that is analogous to an attack by the discriminator. Just war doctrine allows a proportionate response.

4. Reasonable Success

The next factor requires consideration of whether there is a realistic chance of success for the crit jurors and the race rebels. How optimistic should advocates for racial justice be about achieving their goals?

Whether optimism for racial justice—no matter what the tactics—is justified is an issue that has perplexed students of race in America for centu-

ries. Martin Luther King, Jr. was optimistic, but only in the long run, and mainly, apparently, for spiritual reasons. "[T]he arm of the moral universe is long," he explained, "but it bends towards justice."¹⁸³ Derrick Bell, on the other hand, believes that racism is a permanent affliction of life in the United States, and that the law therefore is of limited efficacy in improving the lives of minorities.¹⁸⁴

Civil rights advocates have achieved the end of some kinds of de jure discrimination, most notably the Jim Crow laws that required "separate but equal" public accommodations for whites and Negroes. Professor Kimberlé Crenshaw has observed that African Americans have successfully used the law "to their benefit against symbolic oppression through formal inequality and, to some extent, against material deprivation."¹⁸⁵ Crenshaw predicts, however, that civil rights discourse "will do little to alter the hierarchical relationship between Blacks and whites."¹⁸⁶

In this view, the law is more likely to require the removal of "White Only" signs than, say, to redistribute wealth. The discrimination that our racial critics are concerned about, however, is more akin to symbolic than material subordination. They are not so ambitious as to seek the end of racism in the United States. Rather the critics seek the conversion of two laws that they perceive as discriminatory.

The main legal hurdle the racial critics face is that their measure of discrimination is effects-based, as opposed to the intent-based standard endorsed by current Supreme Court jurisprudence.¹⁸⁷ Can the racial critics reform the law at least to the extent of eliminating the current death penalty and cocaine sentencing laws? There is, the evidence suggests, a reasonable chance that the answer is "yes."

An effects-based concept of discrimination is already contained in international law.¹⁸⁸ Thus, civil rights advocates have argued that the United States is in violation of international human rights law because of the death penalty and drug sentencing disparities.¹⁸⁹ Racial critics have had limited success in marketing an effects-based construct of discrimination even to

183. See, e.g., Martin Luther King, Jr., *Our God Is Marching On!*, Address at the Alabama State Capitol at the Conclusion of the March from Selma to Montgomery (Mar. 25, 1965), in *THE EYES ON THE PRIZE: CIVIL RIGHTS READER* 224, 227 (Clayborne Carson et al. eds., 1991).

184. See Derrick Bell, *The Racism Is Permanent Thesis: Courageous Revelation or Unconscious Denial of Racial Genocide*, 22 *CAP. U. L. REV.* 571, 573 (1993).

185. Crenshaw, *supra* note 116, at 1382.

186. *Id.* at 1384.

187. *Washington v. Davis*, 426 U.S. 229, 248 (1976).

188. International Convention on the Elimination of All Forms of Racial Discrimination, opened for signature Mar. 7, 1966, 660 U.N.T.S. 195 (entered into force Jan. 4, 1967; adopted by the U.S. Nov. 20, 1994).

189. Sheryl McCarthy, *Let's Take a Whack at Racism Any Way We Can*, *NEWSDAY*, Aug. 6, 2001, at A20.

conservatives. President George W. Bush has described the cocaine sentencing disparity as “discrimination.”¹⁹⁰ Illinois’s former governor, a Republican, commuted the death sentence of every inmate on the state’s death row, in part because of concerns about race discrimination in these cases.¹⁹¹ These advances have not translated into systemic legal reform. They evidence, however, that the racial critics’ goals, including their advocacy of a progressive construct of discrimination, are not so radical as to be unattainable, or even unlikely.¹⁹²

5. Legitimate Authority

The final issue is whether crit jurors and race rebels are “legitimate authorities.” The formal answer is “no.” As usually interpreted, just war doctrine limits fighting to state actors, not insurgents. In Part IV.C, *supra*, I critiqued this aspect of the doctrine as undertheorized.

If just war doctrine is to apply to insurgent soldiers, one of the first tasks is to define what “legitimate” means in this context. At minimum, there should be a consensus, among members of the affected group, that the law is unjust. Such a consensus seems to exist among African Americans with regard to racial bias in the death penalty and the crack laws. Regarding the latter, every major civil rights organization that has spoken on the disparity opposes it; the U.S. Sentencing Commission, the “expert” on federal punishment issues, has also advised against it.¹⁹³ While public opinion polls indicate significant support for capital punishment among African Americans, it is doubtful that they are in favor of its discriminatory administration; the Racial Justice Act, for example, was supported by every member of the Congressional Black Caucus.¹⁹⁴

In summary, our racial critics probably have selected a just cause.¹⁹⁵ This is hardly a surprise, for few Americans would now suggest that race discrimination is just (the issue of how “discrimination” is defined is obviously more controversial, including in the cases of the death penalty and crack sentencing laws). The more difficult determination is whether the

190. See discussion in Part II.B, *supra*.

191. Maurice Possley & Steve Mills, *Clemency for All; Ryan Commutes 164 Death Sentences to Life in Prison Without Parole; ‘There Is No Honorable Way to Kill,’ He Says*, CHI. TRIB., Jan. 12, 2003, at 1 (reporting Governor Ryan’s concern about race discrimination in death sentences).

192. In some ways, affirmative action is more “radical” than the reforms that the racial critics seek, because affirmative action requires actual race preferences for minorities, whereas the racial critics merely seek the end of discrimination.

193. U.S. SENTENCING COMMISSION, *supra* note 61, at ch.8(D).

194. See *supra* Part II.A.

195. The most difficult issue is whether the race crits are “legitimate authorities.” In Part IV.E, *infra*, I comment on limitations of just war doctrine as applied to insurgents.

tactics employed by the racial critics are just. The next part examines that issue.

E. The Rules of Engagement

The second component of just war doctrine—*jus in bello*—has two requirements: (1) proportionality and (2) noncombatant immunity.

1. Proportionality

The first requirement is that the violence used in the war be proportionate to the injury suffered. Proportionality means that “[e]ven if the intended object of an attack is legitimate, the attack still may be unjust if its overall costs outweigh the benefits achieved by the attack.”¹⁹⁶

Will radical tactics do more harm than good? The “good” each tactic seeks to achieve is the end of the discriminatory cocaine and death penalty laws. Are subversion and violence permissible, if they will lead to the abolition of race discrimination in the death penalty and cocaine sentencing laws?

2. The Costs and Benefits of Subversion

The crit jurors risk two harms in lying to get on juries: (1) punishment for breaking the law and (2) white backlash. The harm of breaking the law, in turn, has both a private and a public component. The private harm is that the crit jurors may be punished (indeed, they may even invite punishment, as do other practitioners of civil disobedience). Because no one would be forced to be a crit juror, anyone who engaged in this form of protest must have decided that for her the benefit of the protest is worth the risk of punishment. The public harm of the critical jurors is that their willful violations of the law may breed disrespect for it. I do not think that this harm outweighs the good, because it is too vague (most theories of criminal law assume, for example, that people obey it not out of respect, but to avoid punishment). Moreover, crit jurors could take care to emphasize the justice of their cause, and their willingness to suffer punishment for violating the law.¹⁹⁷ They would demonstrate that they reject only a part of the law, not the rule of law wholesale. This may lessen the net effect of public disap-

196. Tuttle, *supra* note 169, at 375.

197. KING, *supra* note 163, at 188–204. Martin Luther King’s letter from Birmingham Jail was written in response to eight clergymen who criticized demonstrations led by King. King’s letter in response utilized lessons taught in the Bible and explained the reasons for the tactics used at that time.

proval for breaking specific laws (one does not hear credible arguments, for example, that the tactics employed by civil rights protestors of the 1950s and 1960s encouraged disrespect for the law).

The harm of white backlash is much less speculative; indeed, it is likely that crit jurors would provoke some kind of negative reaction. The problem of white backlash is a persistent one in African American history.¹⁹⁸ There is backlash to virtually every minority demand for rights. In this context, the backlash could range from prosecutors attempting to exclude African Americans from juries, to other actors in the trial process, including witnesses and judges, also using subversion to achieve outcomes in criminal trials that they desire. The prospect of crit jurors probably would encourage prosecutors to strike African Americans from jury pools (the prosecutors would use blackness as a proxy for being a crit juror, although nonblacks could be crit jurors as well). There is, however, considerable evidence that many prosecutors already attempt to remove blacks from juries.¹⁹⁹

It is impossible to know whether crit jurors would encourage more of other kinds of false testimony than already exists in criminal trials. While the harm of backlash is real, Professor Randall Kennedy has noted that "given the apparent inevitability of white resistance and the uncertain efficacy of containment, proponents of racial justice should be wary of allowing fear of white backlash to limit the range of reforms pursued."²⁰⁰

3. The Costs and Benefits of Violence

Whether violence is a proportionate response to discrimination depends on the kind of discrimination. Just war doctrine, as codified in international human rights law, allows the use of violence to end or to deter greater violence. The use of military force to prevent the carnage in the Nazi concentration camps is a prototypical example of a just war.

According to the Baldus study, the state of Georgia kills some of its citizens on the basis of their race. Is violence an appropriate response to this race-based discrimination if the violence would help end the discrimination? Under cost-benefit analysis, the answer might be "yes," if the killing takes the same or fewer lives than it saves. As a practical matter, this requirement would rule out indiscriminate terrorist attacks by race rebels, because they could not limit their destruction. If the race rebels can carefully calibrate

198. See Michael J. Klarman, *How Brown Changed Race Relations: The Backlash Thesis*, 81 J. AM. HIST. 81, 82 (1994).

199. See, e.g., Neely Tucker, *In Moore's Trials, Excluded Jurors Fit Racial Pattern*, WASH. POST, April 2, 2001, at A1.

200. Randall Kennedy, *Persuasion and Distrust: A Comment on the Affirmative Action Debate*, 99 HARV. L. REV. 1327, 1330 (1986).

their violence in such a way that it did not exceed the number of race-based executions, and if the violence reasonably could facilitate the end of capital punishment, then the race rebels' violence would be moral.

What about violence to end the disparate punishment for cocaine offenses? It cannot be persuasively argued that the taking of life, even the lives of those responsible for the discriminatory law, is proportionate to the injury. Race-based incarceration is horrible, but it is not a horror that warrants the death penalty for its perpetrators. Just war doctrine would not allow the use of violence to end the crack sentencing regime.

In summary, lying is a proportionate response to race discrimination. Violence can be either a proportionate or a disproportionate response, depending on the discrimination. If the discrimination is "only" race-based incarceration, violence is disproportionate. If the discrimination is race-based killing, limited violence is a proportionate response.

4. Noncombatants

The second rule of engagement is that an attack cannot intentionally target noncombatants.²⁰¹ Those waging war must try to distinguish between combatants and noncombatants. Civilian deaths are justified only if they are the unavoidable consequence of destroying an offensive military target, not a means to an end.

Who are the combatants in the metaphorical war on discrimination? The people who discriminate seems the obvious answer. This group could include legislators and law enforcement officials. The criminal justice system writ large is a combatant in a different sense. To the extent that extreme tactics are viewed as an attack on the legitimacy of the criminal justice system, the system itself is an appropriate enemy. The tactic of lying to get on a jury may injure the system in some sense, but war is, after all, hell. As long as it is only a combatant who is intentionally injured, the war may still be considered just.

Is it possible for race rebels to employ forms of violence that limit intended injuries to the "soldiers" on the other side? For this analysis, reconsider the hypothetical introduced earlier in this Article. Some racial critics "read" the Baldus study to mean that the government, through its use of capital punishment, kills some criminals because they are black (these criminals are not killed because they committed crimes, because white criminals guilty of the same crimes are not sentenced to death). Imagine that, in response, race rebels announce that for every two black people who are executed when a nonblack would not have been executed, they will kill

201. Tuttle, *supra* note 169, at 375.

one responsible government actor, for example an executioner or a lawmaker who supports the death penalty, in the same state. The race rebels will continue their campaign of violence until the death penalty is abolished in that state.

Under the theory of just war explained in this Article, this crit tactic is morally justified. The cause, the end of race-based killing by the government, is just. The violence is proportionate and directed exclusively at combatants. It is an ugly prospect, but it is not as ugly as race-based killing by the state.

F. Summary

The crit jurors and the race rebels have selected just causes—ending the race-based punishment regimes inherent in the crack cocaine and death penalty laws. The radical tactics of the crit jurors—subversive jury service—is morally justified as well. Violence is an immoral response to discrimination if it harms those who are not directly responsible. Violence is also outside the rules of engagement if its objective is to change the cocaine sentencing laws; it is a disproportionate remedy. Violence directed against the people who implement race-based capital punishment is justified under the just war construct, if the violence does not take more lives than it saves, and if it is reasonably likely to help end discriminatory killing by the government.

V. RADICAL TACTICS VERSUS THE “POLITICS OF RESPECTABILITY”

In *Race, Crime, and the Law*,²⁰² Professor Randall Kennedy advises African Americans who wish to reform the criminal justice system to practice “the politics of respectability.”²⁰³ The basic tenet of this politics is that it is important for blacks to prove that they “are capable of meeting the established moral standards of white middle-class Americans.”²⁰⁴ Kennedy notes that “for a stigmatized racial minority, successful efforts to move upward in society must be accompanied at every step by a keen attentiveness to the morality of means, the reputation of the group, and the need to be extra-careful in order to avoid the derogatory charges lying in wait in a hostile environment.”²⁰⁵ *Race, Crime, and the Law* recounts how the politics of respectability have been practiced by a number of mainstream civil rights orga-

202. KENNEDY, *supra* note 97.

203. *Id.* at 17.

204. *Id.*

205. *Id.* at 20.

nizations, and credits the politics with the political successes of those organizations.

A practitioner of the politics of respectability would counsel a minority group against radical methods, based on the fear that these methods would harm the racial reputation of the group and encourage white backlash. As a descriptive matter, this counsel is entirely accurate. Racial reputation exists, and African Americans, among others, have a bad one.²⁰⁶ White backlash exists, and minorities, especially blacks, have experienced its full brunt.

The prescriptive part of Kennedy's scholarship—the proposal that concern about their racial reputation and white backlash should constrain the political activities of minorities—is less persuasive. Do racial reputation and white backlash matter enough that people of color should avoid radical tactics based on concern for how whites will react?

The answer, based on African American history, must be “no.” The reason is that the reputation of blacks has seldom been based on reality, as opposed to stereotypes and racism. Because the actual conduct of Negroes has only tangentially been related to their reputation, it is naive to think that different conduct could improve their reputation. Indeed, if racial reputation were based on facts, African Americans, given their history and triumphs in the United States of America, would presumably have one of the best of any group.

White backlash, similarly, has shown little relationship to reason. It ignites in response to almost every effort by blacks to make progress, whether the progress be desegregation of the public schools, or the quest for affirmative action in employment. In a review of Kennedy's book, I noted that “if African Americans adapted their political and self-help strategies in order to avert white backlash, they would scarcely achieve any progress at all.”²⁰⁷ Likewise, in an earlier writing, Professor Kennedy himself observed that “given the apparent inevitability of white resistance and the uncertain efficacy of containment, proponents of racial justice should be wary of allowing fear of white backlash to limit the range of reforms pursued.”²⁰⁸

The radical tactics that this Article describes do not court the sympathy of the white majority and are not likely to inspire it. They are designed to move the majority, but probably more through inspiring fear (for self and for country) than sympathy.

206. *Id.* at 21.

207. *(Color) Blind Faith*, *supra* note 97, at 1285.

208. Kennedy, *supra* note 200, at 1330.

CONCLUSION

The issue is not whether people will suffer and die. African Americans suffer and die now, because of race-based punishment. The issues, then, are whether and how that discrimination should end, and whether it matters if others suffer and die, in the service of ending the discrimination. If subversion and violence can alleviate “legal” race discrimination, are those tactics worth engaging, if the injury they cause is less than the injury they defeat?

In this Article I have considered two radical tactics that could help change discriminatory laws in the United States. My conclusion is that the politics of respectability should not limit the tactics that minorities choose in their quest for racial justice, but morality should. Because morality matters, people of color, in seeking reform of the law, should not deploy all of the weapons in their arsenal. Malcolm X’s famous proposal of justice “by any means necessary” is immoral.

Thus, under the “just war” construct, people who believe that some criminals in the United States are executed on the basis of their race should not attempt to overthrow the government. They would almost certainly lose, and this makes their radical method immoral. They should not commit random acts of terrorism, even if these acts might be successful at persuading legislators to end the death penalty. The fact that innocent people would be harmed means that this kind of indiscriminate violence is immoral.

For the same reasons, racial critics of the federal cocaine sentencing laws must not engage in rebellion against the government or commit terrorist acts that risk injury to innocent civilians. Critics of the cocaine laws must observe the additional limitation that they may not use any tactic that would cause physical harm or death.

Just war doctrine allows the use of some radical tactics that minorities now do not commonly employ. In death penalty and crack cocaine cases, racial critics may lie to get on juries so that they can thwart the discriminatory application of those laws. In death cases exclusively, just war doctrine would allow racial critics to use targeted violence against officials who implement race-based capital punishment. Although any construct of morality that allows violence may strike some as odd, the objective of just war doctrine is to identify those cases in which violence is permissible to accomplish an important end.²⁰⁹

209. There is an interesting recent example of the U.S. government making a utilitarian decision to take some innocent lives in the service of a greater good. After the September 11, 2001, terrorist attacks, it was revealed that President Bush had authorized the military to shoot down commercial airliners, if there was compelling evidence that those airliners were going to be used to bomb an important target. See Todd S. Purdum, *After the Attacks: The White House; Bush Warns of a Wrathful, Shadowy and Inventive War*, N.Y. TIMES, Sept. 17, 2001, at A2.

The application of just war doctrine to the problem of race discrimination in the United States results in a construct of morality that is apt to trouble both moderates and extremists. Moderates will be concerned about the radical tactics that the just war doctrine allows, and extremists will protest the restraints imposed on "any means necessary." Moderates will claim that I am exaggerating the injury to people of color because it is black criminals, and not law-abiding African Americans, who are benefited most directly by the critical tactics I endorse. To extremists, on the other hand, I may seem a victim of white hegemony because I accept that some blacks are punished and killed for racial reasons, but even so I impose limits on what can be done to remedy this discrimination.

Here is the imperfect compromise I have drawn. Every life matters, including the life of every African American who has been convicted of a crime. Every life, and especially every African American life, is diminished when some blacks—even the "least" among us—are incarcerated or killed because they are black. The situation is desperate. It has not, however, reached the state that Michael Walzer describes as "the supreme emergency," in which any means necessary is morally justified to defeat extreme subordination.²¹⁰ I believe that slavery was a supreme emergency. The incarceration of the majority of African Americans would be another. We have not gone back to the former, and we have not yet reached the latter. In either of these events, Malcolm X's formula would be morally justified. I hope that it never is.

The result of pursuing justice in a moral way is that minorities must tolerate some race-based discrimination. Even when their cause is just, they are not allowed to achieve it by any means necessary. They must be patient, even when impatience might win them quicker relief. This is a high cost. One wonders whether any construct of morality that counsels minorities to tolerate discrimination is too majoritarian. Would whites ever adhere to a philosophy that required, even in the short term, their subordination to people of color? Perhaps not.

The moral aspirations of people of color, however, can be higher than the standard set by the majority. Why their aspirations should be higher is a difficult question. Perhaps virtue is its own reward. Perhaps the obligation to act morally is based more on spiritual than on human-made laws. At any rate, morality does not require that minorities tolerate discrimination with infinite patience. It does not even require that people of color respond to discrimination with moderation.

210. WALZER, *supra* note 166, at 251–68. Michael Walzer argues that the Allied bombing of German cities was justified during World War II at the point in which it was likely that the Nazis would triumph. *Id.* at 255–63. The likelihood of a Nazi victory created a supreme emergency that justified the targeting of innocent civilians, if that was the only way the war could be won. *Id.*

Race-based discrimination is evil. There is no overestimating the hardship it causes. As long as racial subordination exists, its victims will be tempted to seek relief in any way they can. In this sense, the protestor's familiar chant "no justice, no peace" is not a threat. It is just a description of the world. Understanding this should inspire us to end all race-based discrimination quickly, and through the simplest means. War, even when it is just, is hell.
