

Chicago-Kent College of Law

## Scholarly Commons @ IIT Chicago-Kent College of Law

---

All Faculty Scholarship

Faculty Scholarship

---

February 2002

### Juries, Drug Laws & Sentencing (symposium)

Nancy S. Marder

IIT Chicago-Kent College of Law, nmarder@kentlaw.iit.edu

Follow this and additional works at: [https://scholarship.kentlaw.iit.edu/fac\\_schol](https://scholarship.kentlaw.iit.edu/fac_schol)



Part of the [Courts Commons](#), [Criminal Law Commons](#), and the [Criminal Procedure Commons](#)

---

#### Recommended Citation

Nancy S. Marder, *Juries, Drug Laws & Sentencing (symposium)*, 6 J. Gender Race & Just. 337 (2002).  
Available at: [https://scholarship.kentlaw.iit.edu/fac\\_schol/399](https://scholarship.kentlaw.iit.edu/fac_schol/399)

This Article is brought to you for free and open access by the Faculty Scholarship at Scholarly Commons @ IIT Chicago-Kent College of Law. It has been accepted for inclusion in All Faculty Scholarship by an authorized administrator of Scholarly Commons @ IIT Chicago-Kent College of Law. For more information, please contact [jwenger@kentlaw.iit.edu](mailto:jwenger@kentlaw.iit.edu), [ebarney@kentlaw.iit.edu](mailto:ebarney@kentlaw.iit.edu).

# Juries, Drug Laws & Sentencing

Nancy S. Marder<sup>1</sup>

## I. INTRODUCTION

The institution of the jury continues to be under attack.<sup>2</sup> In the wake of criminal trials, such as O.J. Simpson,<sup>3</sup> in which the jury was portrayed as biased or incompetent,<sup>4</sup> and civil trials, such as the McDonald's coffee cup case,<sup>5</sup> in

---

1. Associate Professor of Law and Norman & Edna Freehling Scholar, Chicago-Kent College of Law. B.A. 1980, Yale University; M.Phil. 1982, Cambridge University; J.D. 1987, Yale Law School. I want to thank *The Journal of Gender, Race & Justice* at the University of Iowa College of Law for organizing a wonderful symposium entitled "The Law's Treatment of the Disadvantaged: The Politics of the American Drug War," and for inviting me to participate on a panel called "Testing the Structure of the American Drug War," for which this piece was written. I am also grateful for discussions with Erwin Chemerinsky, Jeremy Eden, Catherine Fisk, Nancy King, and Sheldon Nahmod, and comments from participants at the 2002 Association for the Study of Law, Culture, and the Humanities Fifth Annual Conference at the University of Pennsylvania Law School, the Law & Society Annual Meeting in Vancouver, British Columbia, the Sentencing & Society: Second International Conference at the University of Strathclyde in Glasgow, Scotland, as well as for the research assistance of Scott Paccagnini and the library assistance of Lucy Moss. My research was generously supported by the Norman & Edna Freehling Scholarship.

2. Judge William L. Dwyer, a Senior U.S. District Court Judge recently wrote a book in which he lamented the attacks on the jury and voiced concern for the fate of this institution. He wrote: "Yet now there is a serious risk that [juries] will disappear from our trials . . . not through any fault of theirs, but because of indifference, neglect, and misunderstanding about their work." Jeffrey White, Book Review, *TRIAL*, Feb. 2002, at 76 (reviewing WILLIAM L. DWYER, *IN THE HANDS OF THE PEOPLE* (2001)).

3. See *People v. Simpson*, No. BA097211 (Cal. Super. Ct. County, 1995).

4. See, e.g., Mona Charen, Editorial, *It's Foolish to Think Simpson Verdict Wasn't Racially Motivated*, *IDAHO STATESMAN*, Oct. 16, 1995, available at 1995 WL 10505829 ("The jury did not deliberate, it emoted."); Rosetta Miller-Perry, *From the Publisher's Desk: Simpson Case Reflection on Nation's Racial Climate*, *TENN. TRIB.* (Nashville), Oct. 19, 1995, at 3, available at 1995 WL 15505599 ("Many whites see the Simpson jury as rampant evidence that blacks are incapable of objective thought or rational analysis, and refuse to even consider the possibility that members of their race commit crimes."); *Rivera Live: Analysis: Judging the Jury; How Commentators and the Public Feel Toward the Jurors in the O.J. Simpson Trial and the Trial of Christopher Lynn Johnson* (CNBC television broadcast, Oct. 20, 1995), available at 1995 WL 2735950 ("In Los Angeles, jurors in the O.J. Simpson case continue to explain, defend and withstand criticism that second-guesses their not-guilty verdict and questions their intelligence.") (quoting fill-in host Sheila Stainback); *Unreasonable Doubt*, *NEW REPUBLIC*, Oct. 23, 1995, at 7, 8 ("One of the painful lessons of the Simpson verdict is that the representative jury is fatally undermined when jurors in criminal cases are selected by attorneys for their ignorance and credulity and hermetic isolation from civil society. . . . It's significant, and typical, that only two of the twelve jurors were college graduates."); Charles E. Williams, *George Will and the*

which the jury was portrayed as vindictive<sup>6</sup> and the award as outrageous,<sup>7</sup> the other branches of government have tried to limit juries' responsibilities. These efforts have taken the form of legislation to cap damage awards<sup>8</sup> and to eliminate the right to a jury trial in certain types of civil cases,<sup>9</sup> as well as legislative attempts to replace the unanimity requirement with a less stringent voting rule.<sup>10</sup> They have also taken the form of judicial decisions that limit the

---

*Incompetent O.J. Simpson Jury*, WASH. AFRO-AM., Dec. 9, 1995, at A5 (recounting and criticizing George Will's view that the jury was "'intellectually incapable' of following the 'evidentiary argument'").

5. See *Liebeck v. McDonald's Restaurants, P.T.S., Inc.*, No. CV 93-02419, 1995 WL 360309, at \*1 (D.N.M. Aug. 18, 1994).

6. See, e.g., Chi Chi Sileo & David Cogan, *Does Legal Debate Rely on Rhetoric Over Reason?*, INSIGHT ON THE NEWS, May 29, 1995, at 15 ("Advocates of legal reform immediately pointed to the [Liebeck] award as yet another instance of runaway litigation, 'frivolous' lawsuits and vindictive juries.").

7. See, e.g., Andrea Gerlin, *A Matter of Degree: How a Jury Decided That a Coffee Spill Is Worth \$2.9 Million*, WALL ST. J., Sept. 1, 1994, at A1 ("Public opinion is squarely on the side of McDonald's. Polls have shown a large majority of Americans—including many who typically support the little guy—to be outraged at the verdict."); Thomas Olson, *Spilled Coffee and Leaky Valves Spur Reform of Lawsuit Awards*, PITTSBURGH BUS. TIMES & J., Apr. 10, 1995, available at 1995 WL 7907075 ("Even if it was a truly outrageous result, our judicial system can throw out outrageous results, as [it] did in the McDonald's case.") (quoting John Gismondi, a plaintiffs' litigator with Gismondi & Margolis); Aric Press, *Are Lawyers Burning America?*, NEWSWEEK, Mar. 20, 1995, at 32, 35 ("The American Tort Reform Association bought radio ads in the Washington area using the Liebeck case as its key example of an 'outrageous' lawsuit."); John Taylor, *Coffee Ruling Spurs Popeye's To Halt Sales*, OMAHA WORLD-HERALD, Sept. 8, 1994, available at 1994 WL 8593317 ("I thought [the award] was outrageous.") (quoting Pat Kelley, treasurer for Rigel Corp., which holds the franchise for 14 Kentucky Fried Chicken restaurants and 66 Godfather's pizza restaurants).

8. See, e.g., Thomas Koenig & Michael Rustad, *His and Her Tort Reform: Gender Injustice in Disguise*, 70 WASH. L. REV. 1, 79 (1995) ("Twenty-one states have enacted some reform measure limiting non-economic damages in health care litigation . . . [T]ort reformers have succeeded in capping non-economic damages in medical malpractice cases in several states.") (footnote omitted); Mark Curriden, *Jury Awards Fall Under Weight of Obscure Law; Sometimes, Jurors' Desire To Mete Out Justice Is Outweighed by State's Limits on Amounts*, DALLAS MORNING NEWS, May 7, 2000, at 23A (describing Texas's law that caps punitive damages at \$200,000 to \$750,000 depending on the type of case); *id.* (noting that before Texas capped damages, "25 other states already had some type of damage caps" and "a few states have put ceilings on compensation for actual losses, pain and suffering and mental anguish as well").

9. See, e.g., Mark Curriden, *Tipping the Scales: Right to Trial by Jury Fades Under Court Rulings, New Laws*, DALLAS MORNING NEWS, May 7, 2000, at 1A ("Forty-two states have restricted the types of cases that juries can hear."); *id.* (listing types of cases now decided by judges rather than juries, such as consumer fraud in Illinois, infant injuries at birth in Virginia, and negative reactions to vaccines in North Carolina).

10. See Joan Biskupic, *Using the Jury Box as a Soap Box; Increasingly, Jurors Are Choosing To Ignore Judges' Instructions To Punish Those Who Break the Law Because They Don't Like the Laws or How the Laws Are Applied*, ORLANDO SENTINEL, Apr. 4, 1999, at G1 ("Some states have debated whether to permit non-unanimous verdicts in criminal cases as a way to shut down rebel jurors who create hung juries. The rationale is that if one or two jurors fail to consider the evidence, an agreement among the 10 or 11 others could seal a verdict."); Alexander Cockburn, *Jury Has Right To Give Verdict on Social Evils*, STAR TRIB. (Minneapolis, MN), Oct. 10, 1995, at 11A ("Once the armor of unanimity is pierced, the jury tends to become more docile in following the commandments of the judge. In effect, jurors know in advance they have been partially neutered, which is what state power always yearns for juries to be.").

kinds of issues that juries decide,<sup>11</sup> the information that jurors are given about their role,<sup>12</sup> and press accounts that support the view of runaway juries<sup>13</sup> that cannot be trusted.<sup>14</sup>

Against this backdrop of criticism and skepticism of the jury, I will argue that the jury still plays a vital role in the judicial system in a modern democracy. One way of explaining the jury's critical role is by comparing it to the "governor" in a steam engine. When the steam engine is operating at a safe speed, the governor does not seem to be serving any useful purpose; it appears to be an unnecessary mechanism. However, as the speed of the steam engine increases, the governor begins to block the power, so that the engine starts to slow itself down. In this way, the governor functions as a feedback mechanism. It enables the steam engine to regulate itself and to reduce its speed, thus averting an explosion.

The jury in a democracy functions in much the same way as the governor in a steam engine. The legislature passes laws, and for the most part, these laws are acceptable to the populace. These laws are regularly enforced by police and prosecutors and applied by juries and judges. At such times, the jury may seem like an extraneous institution. However, from time to time, there is widespread disagreement with a law or the way it is enforced. When such a situation arises, juries serve a governor-like function, indicating to the other branches of

11. See, e.g., *Markman v. Westview Instruments, Inc.*, 517 U.S. 370, 389-90 (1996) (holding that juries are no longer to interpret claim terms in patent cases, but rather that the construction of such terms is within the province of the judge).

12. For example, no federal circuit permits trial judges to instruct juries on their power to nullify. See Nancy S. Marder, *The Interplay of Race and False Claims of Jury Nullification*, 32 U. MICH. J.L. REFORM 285, 310 n.116 (1999) (providing cases from the federal circuits). Only two states, Indiana and Maryland, have constitutional provisions that permit judges to instruct jurors that they have the right to determine the law as well as the facts; however, the judiciary in both states has narrowed this right through case law. *Id.* (providing cases). Typically, trial judges instruct juries that their role is limited to finding facts and applying the law as the judge gives it to them. See, e.g., 1 THE COMM. ON STANDARD JURY INSTRUCTIONS, CRIM., SUPER. CT. OF LOS ANGELES COUNTY, CALIFORNIA JURY INSTRUCTIONS, CRIMINAL, (CALJIC), no. 1.00, at 10 (6th ed. 1996) [hereinafter CALIFORNIA JURY INSTRUCTIONS] (instructing jurors that they have a duty to "apply the law that I [the judge] state to you, to the facts, as you determine them").

13. See Herbert M. Kritzer, *Public Perceptions of Civil Jury Verdicts*, 85 JUDICATURE 79, 79 (2001) ("Two studies comparing verdicts reported in the media to actual populations or true random samples of jury verdicts more generally show that the typical (median) media-reported verdict is on the order of 10-20, or more, times the size of the typical actual verdict."); *id.* (describing a New York study that found that "the typical reported verdict was more than \$5 million while the typical verdict overall for 1988-1992 was about \$213,000 for New York state overall and \$252,000 for the New York metropolitan area").

14. Compare William Glaberson, *Juries, Their Powers Under Siege, Find Their Role Is Being Eroded*, N.Y. TIMES, Mar. 2, 2001, at A1 (noting that in a survey of 594 federal trial judges, 27.4% said "juries should decide fewer types of cases") with Mark Curriden, *'Runaway' No More: Despite Reputation, Juries Getting Less Likely To Give Big Awards or Buy Novel Defenses*, DALLAS MORNING NEWS, May 8, 2000, at 1A (examining the same study and instead noting that "[u]pward of 98 percent [of the polled judges] said that in general, juries do a good job of delivering just and fair verdicts").

government and to the rest of society that there is widespread disagreement, and that some modification of the law or its enforcement is required. Although the jury does not change the law, just as the governor does not change the speed of the steam engine, the jury signals to the other branches, just as the governor signals to the steam engine, that an adjustment is needed. The jury, in its governor-like role, serves as a mechanism that provides feedback to the other branches of government before outrage, particularly among the outnumbered or disenfranchised, becomes harmful, if not violent.

I focus on three examples in which the intersection of drug laws and sentencing schemes has led to a pattern of jury acquittals or hung juries. It is my contention that this pattern should signal to the legislative and executive branches that change is in order, and indeed, change has already occurred in some of the examples I have chosen. I focus on patterns of acquittals or hung juries because any single jury may disagree with a law, its enforcement, or a sentencing scheme, but that jury may simply be an anomaly. However, when jury after jury disagree with a particular law,<sup>15</sup> its enforcement, or a sentencing scheme, then their disagreement, as translated into verdicts of acquittal or hung juries, represents a depth of feeling in the community such that the issue must be addressed if the laws are not to be vitiated.

Admittedly, the jury verdict is a blunt instrument for communicating disagreement. In a criminal case, the jury can only communicate with a verdict of guilty, not-guilty, or a hung jury; moreover, a criminal jury does not decide a sentence except in some capital cases.<sup>16</sup> When juries wish to express their disagreement with a potential sentence about which they have not been told but often surmise, their only means is an acquittal or a hung jury. In a civil case, the jury can only communicate with a verdict of liable or not-liable, though the jury does have the damage award, and sometimes a punitive damage award, as a means of conveying the depth of its views. Undoubtedly, the jury verdict in both civil and criminal cases is susceptible to misinterpretation because it is such a blunt instrument. However, my contention is that a pattern of jury acquittals in case after case of the same type is less likely to be ambiguous and anomalous and more likely to signal the need for change, and has, in fact, been

---

15. For example, the National Prohibition Act, see National Prohibition Act of Oct. 28, 1919, ch. 85, 41 Stat. 305, amended by Supplement to National Prohibition Act, Nov. 23, 1921, ch. 134, 42 Stat. 222, amended by Jan. 15, 1931, ch. 29, 46 Stat. 1036, repealed by U.S. CONST. amend. XXI, § 1, initially enjoyed widespread public support. In 1919, Prohibition was passed by Congress and two-thirds of the states. See Sidney J. Spaeth, *The Twenty-First Amendment and State Control Over Intoxicating Liquor: Accommodating the Federal Interest*, 79 CAL. L. REV. 161, 175 (1991). Yet, when it came time to apply the law, many juries throughout the country refused. The law "was almost universally condemned and disregarded by the public." Joseph L. Sax, *Conscience and Anarchy: The Prosecution of War Resisters*, 57 YALE REV. 481, 490 (1968). In 1933, the Twenty-first Amendment repealed the law. See U.S. CONST. amend. XXI, § 1 ("The eighteenth article of amendment to the Constitution of the United States is hereby repealed.").

16. See Nancy S. Marder, *The Myth of the Nullifying Jury*, 93 NW. U. L. REV. 877, 891 n.62 (1999) (providing examples of states in which capital juries make sentencing decisions).

understood that way.

Part II of this paper focuses on three examples in which drug violations resulting in harsh mandatory sentences have produced jury acquittals; these include the "three-strikes" law in California, the Rockefeller drug laws in New York, and the so-called "Bronx juries" hearing drug cases. Part III identifies some of the jury's institutional features that make it particularly well-suited to perform its governor-like role. In Part IV, I argue that the passage (or near passage) of less harsh sentencing schemes in several states is a response by state legislatures to the feedback provided by jury acquittals in these drug cases. In the states in which the legislature has failed to respond, the executive or the citizenry through referenda has stepped in and responded to the jury acquittals. Thus, the jury acquittals do not indicate juries run amuck; nor do the legislative, executive, and referenda responses indicate that politicians or citizens are soft on crime. Rather, these institutional responses to jury verdicts are appropriate to a democracy and allow the laws and sentencing schemes to be as closely calibrated as possible to changing norms in society.

## II. THE JURY SERVES AS GOVERNOR, INDICATING CITIZENS' DISSATISFACTION WITH CERTAIN DRUG LAWS, THEIR SENTENCES, OR THEIR ENFORCEMENT

This second part focuses on three examples in which the intersection of drug laws and sentencing schemes or their enforcement has produced a pattern of jury acquittals or hung juries. The examples are the "three-strikes" law in California, the Rockefeller drug laws in New York, and the so-called "Bronx juries." With all three examples, the legislative, executive, or popular response suggests that other governmental branches, or the citizenry acting in a governmental capacity, have responded or are beginning to respond to the juries' acquittals. Undoubtedly, there are other examples where the governmental branches have not yet responded to the juries' feedback. Although there are other factors that pressure governmental branches to initiate reforms, a pattern of jury acquittals or hung juries is an important indicator of a disjuncture between the laws or sentencing schemes and the community's view of them, and the other branches of government have interpreted these acquittals or hung juries in this way.

### A. "Three Strikes" in California

California is not the only state with a three-strikes law,<sup>17</sup> but unlike other states, California frequently invokes its law,<sup>18</sup> which is considered "the most

---

17. Twenty-two states and the federal government have a three-strikes law. David Schultz, *No Joy in Mudville Tonight: The Impact of "Three Strike" Laws on State and Federal Corrections Policy, Resources, and Crime Control*, 9 CORNELL J.L. & PUB. POL'Y 557, 573 (2000).

18. "In the vast majority of the twenty two states and the federal government that have adopted

punitive among some 20 similar state statutes and a Federal sentencing law."<sup>19</sup> The three-strikes law in California requires that any person who is convicted of a serious felony and has two prior felony convictions defined as "violent" or "serious" is to receive a sentence of twenty-five years to life imprisonment.<sup>20</sup> The California law also contains a provision that the second strike can result in a sentence twice as long as would ordinarily be given if the defendant's first conviction is for an offense on the state's list of offenses that count as "strikes."<sup>21</sup> Although California's three-strikes law is not specifically directed at drug offenders, it often affects them because "[a] third strike is most likely to be a drug offense."<sup>22</sup> According to one study, "application of 'three strikes' has occurred in far more cases involving marijuana users than in cases involving violent offenders."<sup>23</sup> This same study offered the following analysis of who is affected by the three-strikes law: "85% of those found guilty of third-strike offenses are convicted of non-violent crimes, most of which are for drug possession."<sup>24</sup> The Legislative Analyst's Office, the non-partisan research arm of the California State Legislature, examined the effect of the law on second- and third-strikes and reached a similar conclusion: "70 percent of all second- and third-strike cases filed in 1994 were for nonviolent offenses. The largest

---

three strikes, the law's effect on crime is arguably minimal since it is rarely used. The one exception is California where 4,468 offenders have been sentenced under the third strike provision and over 36,043 for a second strike offense." Schultz, *supra* note 17, at 573; see Laura Gatland, *Three Strikes a Soft Pitch: Most States Will Send Few to Prison Under New Laws*, A.B.A. J., Feb. 1998, at 29 ("The numbers are larger in California, which has convicted more offenders under a three-strikes statute than any other state."); Vincent J. Schodolski, *'3-Strikes' Laws Fail To Work, Study Says; Law May Have Little Effect on Curbing Crime*, CHI. TRIB., Sept. 10, 1996, at 1 ("With the exception of California, which has the nation's broadest and most widely used 'three-strikes' law, federal and state authorities employ such measures in only the most extreme circumstances, and six of the 21 states that have such laws in effect have yet to win a conviction under them.").

19. Carey Goldberg, *California Judges Ease 3-Strike Law*, N.Y. TIMES, June 21, 1996, at A1.

20. See CAL. PENAL CODE § 667 (West Supp. 1998). The statute took effect on March 7, 1994, which was the date on which the Governor signed Bill No. 971. The statute had been passed by both the Senate and Assembly on March 3, 1994. There was also a ballot initiative (Proposition 184), which was approved by voters on November 8, 1994, and took effect the next day, codified as CAL. PENAL CODE § 1170.12 (West Supp. 1998). The two statutes differ only in minor ways.

21. See John Clark et al., *'Three Strikes and You're Out': Are Repeat Offender Laws Having Their Anticipated Effects?*, 81 JUDICATURE 144, 146 (1998).

22. Greg Krikorian et al., *Front-Line Fights Over 3 Strikes; Angry Voters Sent a Simple Message—Get Tough on Repeat Offenders. But a Look at L.A. County's Courts Shows the Consequences Aren't Quite as Clear*, L.A. TIMES, July 1, 1996, at A1 ("A third strike is most likely to be a drug offense. Of the 4,927 cases filed from March 1994 to March 1996 in Los Angeles County, 28% were for drug crimes, according to figures from the district attorney's office.").

23. Michael Vitiello, *"Three Strikes" and the Romero Case: The Supreme Court Restores Democracy*, 30 LOY. L.A. L. REV. 1643, 1703 (1997); see Goldberg, *supra* note 19, at A1 ("Studies have found that since the law went into effect, twice as many defendants received tough new sentences for marijuana possession as for the types of crimes it was meant to prevent—rape, kidnapping and murder—combined.").

24. Vitiello, *supra* note 23, at 1703.

categories were for drug possession and burglary."<sup>25</sup> One point shared by these studies is that the "[e]vidence suggests that nonviolent offenders and drug offenses predominate as the major triggers implicating three strikes."<sup>26</sup>

The three-strikes law has led to some harsh results in California. There have been numerous newspaper accounts of its application for seemingly minor offenses,<sup>27</sup> including a person who was sentenced to life in prison after stealing a slice of pizza<sup>28</sup> and another who was similarly sentenced after the theft of cookies.<sup>29</sup> The Ninth Circuit recently held that a three-strikes sentence of fifty years' imprisonment for a shoplifter with a record of nonviolent, petty crimes and whose third strike was for stealing nine videotapes totalling \$153 from a Kmart store, violated the Eighth Amendment's prohibition of cruel and unusual

---

25. Fox Butterfield, '3 Strikes' Law in California Is Clogging Courts and Jails, N.Y. TIMES, Mar. 23, 1995, at A1; Tamar Lewin, 3-Strikes Law Is Overrated in California, Study Finds, N.Y. TIMES, Aug. 23, 2001, at A10 ("The majority of both second- and third-strike convictions in California are for property, drug or other nonviolent offenses . . .") (citing a study by the Sentencing Project, a nonprofit research group).

26. Schultz, *supra* note 17, at 574.

27. See, e.g., Jane Gross, *In the New Ball Game, These Two Would Have Struck Out*, N.Y. TIMES, Mar. 20, 1994, at 7 ("Among those already charged as a three-strikes offender is a Los Angeles man with a 52-page rap sheet whose latest crime was rolling an elderly Skid Row transient for 50 cents."); Krikorian et al., *supra* note 22, at A1 ("Before his arrest, Larry Olin did not realize a petty theft with a prior could count as a third strike. So he is dumbfounded that he got 25 years to life for stealing two pairs of pants from a store in Valencia."); see Lewin, *supra* note 25, at A10 (describing one man sentenced to 25 years to life under the three-strikes law for stealing a pair of sneakers, another for jimmying the kitchen door at a church where he had received food, and another for the theft of \$20 worth of instant coffee); Frank J. Murray, *Is a Pizza Worth 25 Years to Life?*, WASH. TIMES, Apr. 29, 1995, at A6 ("Carping questions also were heard when Keith Egly took a 12-pack of beer from a Sacramento convenience store, and Roosevelt Carlton McCowan stole 18 bottles of cologne in Ventura. Egly, 26, managed to get the beer at knifepoint, which is armed robbery. . . . McCowan, 52, also was cited as another example of too-tough sentencing despite his seven prior convictions for robbery, burglary and attempted murder."); Tony Perry & Maura Dolan, *Two Counties at Opposite Poles of '3 Strikes' Debate Crime: San Francisco Is Restrictive in Applying Law, San Diego Takes Hard Line, Approaches Reflect Will of Electorate*, L.A. TIMES, June 24, 1996, at A1 ("There have been cases of convictions in which the 'third strike' was the theft of bluejeans, a six-pack of beer or, in the case of one 60-year-old defendant, a pint of whiskey."); Eric Slater, *Pizza Thief Gets 25 Years to Life*, L.A. TIMES, Mar. 3, 1995, at B3 (describing the cases of Duane Silva, who has an IQ of 70 and suffers from manic depression, and who was "sentenced to 30 years to life for stealing a video recorder and a coin collection from his neighbors" and Michael Garcia, "whose 'strikes' are a nonviolent robbery and theft . . . [and who] could receive 25 years to life for stealing a \$5.62 package of meat").

28. See Murray, *supra* note 27, at A6 ("Opponents of California's 'three strikes and you're out' law . . . said it was excessive and absurd to invoke it against Jerry Dwayne Williams for taking a slice of pepperoni pizza from a group of children."); Slater, *supra* note 27, at B3 ("Jerry Dwayne Williams was sentenced to prison for 25 years to life Thursday under the state's 'three strikes' law for stealing a slice of pepperoni pizza").

29. See Ken Ellingwood, *Three-Time Loser Gets Life in Cookie Theft*, L.A. TIMES, Oct. 28, 1995, at B2 ("A homeless parolee convicted for breaking into a Santa Ana restaurant and stealing four cookies was sentenced to life in prison . . . after the judge said she had no choice under the state's 'three strikes' law.").



punishment.<sup>30</sup>

In another example, former Los Angeles District Attorney Gil Garcetti brought a three-strikes case against Michael Newhouse, a homeless man accused of possessing three-tenths of a gram of cocaine.<sup>31</sup> After the jury acquitted the defendant, Judge David Yaffe criticized Garcetti for his "gross abuse of prosecutorial discretion."<sup>32</sup> According to Judge Yaffe: "The evidence in this case [against Newhouse] . . . was so weak that to prosecute it at all was questionable. To make it a case involving life imprisonment was grotesque."<sup>33</sup> The judge said that he had just had another drug case like this one which had also ended in an acquittal and in which the defendants faced "severe" sentences for relatively minor felonies years after their earlier convictions.<sup>34</sup>

The three-strikes law in California also has had a disproportionate effect on racial minorities. According to one study, African Americans in California are convicted under the three-strikes law thirteen times more often than whites.<sup>35</sup> Although African Americans constitute only 7% of California's total population<sup>36</sup> and 20% of the state's felony arrestees, they constitute 43% of the third-strike inmates in California.<sup>37</sup> By comparison, Caucasians constitute 53% of the state's population and 33% of the state's felony arrestees, but less than 25% of those sentenced under three strikes.<sup>38</sup> Although the three-strikes law alone is not responsible for this disproportionate effect on racial minorities,<sup>39</sup> it has exacerbated the problem by putting more members of racial minorities into prison for longer amounts of time.

Several studies have suggested that California's three-strikes law has had

---

30. See *Andrade v. Att'y Gen. of Cal.*, 270 F.3d 743, 747 (9th Cir. 2001) (holding that California's three-strikes law, as applied to appellant Andrade, violated the Eighth Amendment's prohibition of cruel and unusual punishment because his sentence was "grossly disproportionate to his crimes"), *cert. granted sub nom. Lockyer v. Andrade*, 122 S.Ct. 1434 (2002); *Court Rejects 3-Strikes Term For Shoplifter*, N.Y. TIMES, Nov. 3, 2001, at A6; see also *Brown v. Mayle*, 283 F.3d 1019 (9th Cir. 2002) (holding that appellants' sentences of 25 years to life for petty theft violated the Eighth Amendment's prohibition of cruel and unusual punishment).

31. Greg Krikorian, *Judge Assails Garcetti for Treating Drug Charge as '3rd Strike' Case*, L.A. TIMES, Mar. 8, 1996, at B3.

32. *Id.*

33. *Id.*

34. *Id.*

35. Schodolski, *supra* note 18, at 1 (citing CAMPAIGN FOR AN EFFECTIVE CRIME POLICY, [THE IMPACT OF "THREE STRIKES AND YOU'RE OUT" LAWS: WHAT HAVE WE LEARNED? 7 (1996)]).

36. Schultz, *supra* note 17, at 581.

37. Schodolski, *supra* note 18, at 1.

38. Schultz, *supra* note 17, at 581.

39. Other factors include the enhanced penalty for selling crack cocaine and policing practices that target minorities. See *id.*

harsh<sup>40</sup> and disproportionate effects,<sup>41</sup> but has not accomplished its central goal, which is to reduce crime. Walter Dickey, a University of Wisconsin law professor and an author of a study of California's three-strikes law, concluded that there is no reliable evidence that the law is reducing crime.<sup>42</sup> Other studies supported this view.<sup>43</sup>

In light of the harshness of the sentence that follows a third strike, it is not surprising that juries began acquitting in cases that they surmised were three-strikes cases. Juries are not told that a case is a three-strikes case because considerations about sentencing are not supposed to enter into their decision about the defendant's guilt or innocence.<sup>44</sup> As a result, in some instances juries convict not knowing the case is a three-strikes case, and upon learning the sentence, they regret their verdict. One juror who had served on a jury that had convicted a woman for taking a five-dollar cut in a cocaine deal "felt deceived by the court" after learning that the defendant would go to prison for life under the three-strikes law.<sup>45</sup> Another jury that convicted a three-strikes defendant who had proceeded pro se<sup>46</sup> sent the judge a note on his behalf before his sentencing. It read: "'We . . . hereby request [that the defendant] receive leniency in sentencing due to the nonviolent nature of his offense and the demonstration of his ability to be a productive member of society by holding down a job for four years.'"<sup>47</sup>

---

40. See *supra* text accompanying notes 27-34 (describing harsh results).

41. See *supra* text accompanying notes 35-39 (describing disproportionate effects on racial minorities).

42. Schodolski, *supra* note 18, at 1.

43. See, e.g., Schultz, *supra* note 17, at 583 ("As a crime control policy, there is little evidence that three strikes has reduced violent crime or produced the social savings that its backers claimed."); Lewin, *supra* note 25, at A10 ("Seven years after its enactment, California's three-strikes law has increased the number and severity of sentences for nonviolent offenders—and contributed to the aging of the prison population—but has had no significant effect on the state's decline in crime, said a new study by the Sentencing Project, a nonprofit research group.").

44. This practice was affirmed by the First District Court of Appeal in California, which rejected defense attorneys' efforts to have the court inform the jury of the punishment with the hope that jurors would find it excessive and acquit. See *People v. Nichols*, 61 CRIM. L. 1097-98 (Cal. Ct. App. Apr. 30, 1997); Bob Egelko, *Lawyers Lose Bid for Juries To Weigh Sentence in Deliberations*, SAN DIEGO UNION-TRIB., Apr. 8, 1997, at A3. I leave for another article the question whether juries ought to be told that a case is a three-strikes case and the larger question whether juries ought to decide sentences in non-capital cases.

45. Rene Lynch & Anna Cekola, '3 Strikes' Law Causes Juror Unease in O.C., L.A. TIMES, Feb. 20, 1995, available at 1995 WL 2017381; see also Krikorian et al., *supra* note 22, at A1 ("And a troubled juror, after convicting an ex-felon of stealing a gardener's tool, tells the defense attorney: 'I'd be glad to talk to the judge and ask for a lighter sentence.'").

46. Some judges and public defenders have noted that under the three-strikes law, there has been an increase in the number of defendants who now represent themselves because they feel that so much is at stake. Krikorian et al., *supra* note 22, at A1.

47. *Id.*

In other instances, however, juries learn that a case is a three-strikes case before they begin their deliberations. This can occur if the judge allows a defense attorney to question prospective jurors during voir dire about their views on the three-strikes law,<sup>48</sup> or if the judge permits the defense attorney to disclose his client's criminal past<sup>49</sup> or the prosecutor to point out prior convictions,<sup>50</sup> or if the defense attorney has his client testify as to his prior convictions.<sup>51</sup> Even without the judge's permission, a defense attorney may be able to allude to the potential sentence, however indirectly, during argument.<sup>52</sup> Some of the more creative attempts have included a defense attorney who carried a folder with "three strikes" written across the top, another who used baseball analogies throughout the trial, and yet another who asked the jury: "In 25 years from now will you have an abiding conviction that justice was served?"<sup>53</sup>

In addition, a well-informed juror could suggest to his fellow jurors during deliberations that the case could be a three-strikes case.<sup>54</sup> For example, in the case of a man convicted of robbing a security guard and trying to steal his car, a

48. Lynch & Cekola, *supra* note 45, available at 1995 WL 2017381 ("In limited instances, however, such as the [burglary trial of Robert Eric] Parrish . . . , some judges allow attorneys to quiz potential jurors about their views on the controversial 'three strikes' law.").

49. *See id.* ("A judge allowed [defense attorney Michael J.] Cassidy to take a gamble and effectively put the 'three strikes' law on trial by disclosing his client's criminal past.").

50. Harriet Chiang, *Some Jurors Revolt Over 3 Strikes/Penalty Prospects Sway Their Verdicts*, S.F. CHRON., Sept. 24, 1996, at A1 ("[J]udges say that it is not hard for [juries] to catch on [about a third strike] when the prosecutor points out the prior burglary convictions of a defendant.").

51. *Id.*; Krikorian et al., *supra* note 22, at A1 ("Increasingly, defense lawyers are finding ways to let a jury know about a client's prior convictions, hoping jurors will figure out that the case is a third strike. . . . [L]awyer John Tyre puts [Louis] Martinez on the stand to acknowledge his record.").

52. *See* Chiang, *supra* note 50, at A1 (describing the case of Anthony Ortiz, caught with \$8 of methamphetamine when stopped for riding a bicycle without a headlight, whose attorneys "were able to let the jurors indirectly know that Ortiz was facing his third strike"). Though not a California three-strikes case, the following case illustrates how a jury can become aware of a mandatory sentence. In a drug case in Arizona state court, in which the jury deliberations were filmed by CBS as part of a two-hour special on the jury system, jurors were able to infer that the defendant before them was likely to receive a lengthy prison sentence if convicted of drug charges. The defense was able to introduce a chart showing various sentence ranges in order to explain the sentence received by the defendant's co-conspirator. The co-conspirator, who had cooperated with the government, had received a light sentence in exchange for his cooperation. During deliberations, the lengthy prison sentence figured heavily in one juror's mind. *See CBS Reports: Enter the Jury Room* (CBS television broadcast, Apr. 16, 1997) (transcript at 40, 48). He and another juror voted to acquit; as a result, there was a hung jury of six to two. *See id.* at 49.

53. Chiang, *supra* note 50, at A1.

54. One jury sent a note to the judge asking if the case was covered by the three-strikes law. *See* Egelko, *supra* note 44, at A3. The judge said he could not answer that question and reminded the jurors not to consider the punishment during their deliberations; clearly, however, the jury was aware of the possibility that the three-strikes law might apply. *Id.* This jury convicted, but "several cases have come to light in which jurors learned of the potential punishment, found it excessive and refused to convict despite strong prosecution evidence." *Id.*

juror "became agitated and started to cry when she realized it was a 'three strikes' case."<sup>55</sup> When she and other jurors objected to the proceeding, the judge was forced to declare a mistrial.<sup>56</sup> In another example, described by Silicon Valley Public Defender Edward Niño, Joe Louis Lugo was stopped by San Jose police for driving with bald tires.<sup>57</sup> The police found a small amount of crack cocaine under Lugo's cap, and Lugo later confessed to drug possession.<sup>58</sup> Lugo, who had two prior felony convictions, would, if convicted, have received a twenty-five year prison sentence.<sup>59</sup> However, the jury acquitted, "in part, on reasonable doubt, because the police never produced Lugo's cap, and because they didn't agree with the 'three strikes and you're out' law."<sup>60</sup> As one judge explained, sometimes juries just "smell" that a case is a three-strikes case.<sup>61</sup>

Finally, even if juries do not sense a three-strikes case, the defendant may blurt out to the jury the nature of the case, as one unrestrained defendant did. The defendant, who had been charged with possessing a rock of cocaine, told the jurors when they returned a guilty verdict: "I want you all to know you put me away for 25 to life!"<sup>62</sup> When the judge polled the jury to confirm its verdict, two jurors, including the foreperson, changed their votes.<sup>63</sup> The trial ended in a hung jury.<sup>64</sup>

Although the pattern of jury acquittals in three-strikes cases has not been documented empirically, it has been observed anecdotally.<sup>65</sup> According to Superior Court Judge J. Richard Couzens of Placer County, a member of the Judicial Council who travels throughout California teaching judges about the three-strikes law: "It's a phenomenon that's happening up and down the

---

55. Perry & Dolan, *supra* note 27, at A1.

56. *Id.*

57. See *All Things Considered: Simpson Case Focuses Attention on Jury Nullification* (NPR radio broadcast, Oct. 16, 1995), available at 1995 WL 9892228 [hereinafter *All Things Considered*].

58. See *id.*

59. See *id.*

60. *Id.* (quoting Edward Niño).

61. Perry & Dolan, *supra* note 27, at A1 (quoting Judge Alex Saldamando).

62. Chiang, *supra* note 50, at A1.

63. *Id.*

64. *Id.* The defendant was eventually retried and convicted. *Some Jurors Are Rebelling Against '3 Strikes' Law; Courts: There Have Been Hung Juries, Outright Acquittals and Requests for Mercy*, ORANGE COUNTY REG., Sept. 25, 1996, at B6.

65. Chiang, *supra* note 50, at A1 ("There are no numbers or surveys, but anecdotes are being told from Los Angeles County, where several defendants have been set free, to Santa Clara County, where jurors have shown up at sentencing hearings to plead for leniency for felons they have convicted. In some cases, juries have ignored the evidence and returned hung verdicts and sometimes even acquittals.").

state . . . . [I]t's enough of a problem that it's being spoken of rather openly in judicial and legal circles."<sup>66</sup> According to another article, "lawyers across the country are convinced that jurors are rejecting the law . . . in trials that lead to 'three strikes, you're out' or other stiff mandatory sentences."<sup>67</sup>

The pattern has become more pronounced in some parts of the state than in others. One pattern that has emerged is that juries in San Francisco are likely to acquit when they believe the case is a three-strikes case that will send a person to jail for the rest of his life for the commission of a seemingly minor third strike.<sup>68</sup> In contrast, San Diego juries are likely to convict even in three-strikes cases.<sup>69</sup>

The jury acquittals were striking enough to change prosecutorial behavior in San Francisco. Prosecutors in San Francisco said they have been very careful about which cases they now bring as three-strikes cases, knowing that they are likely to obtain convictions only in the most egregious cases.<sup>70</sup> District Attorney Terence Hallinan instructed his deputies that "drug crimes are never to be regarded as a third strike unless the defendant has a violent history."<sup>71</sup> Hallinan established a panel of four prosecutors to review all cases that involve a third felony conviction and would require a twenty-five year to life sentence if brought as a third strike.<sup>72</sup> Paul Cummins, the head of the panel, explained that the panel would not seek twenty-five years to life for a person who had committed an auto burglary or had stolen a car radio. He explained: "We tried it a couple of times and got kicked in the teeth by the jury."<sup>73</sup>

In contrast, in San Diego, juries are less likely to acquit in three-strikes cases, and as a result, prosecutors are less exacting in the cases they choose to bring as three-strikes cases.<sup>74</sup> San Diego District Attorney Paul Pfingst named Gregg McClain, who is "even more hard-nosed about 'three-strikes'" than

---

66. *Id.*; see Robert B. Gunnison, *Measure To Boost '3 Strikes' Defeated, Republicans Lose Bid To Undo Court Ruling*, S.F. CHRON., July 17, 1996, at A1 ("Los Angeles County Superior Court Judge J. Steven Czuleger . . . noted that he and his colleagues have seen a larger number of hung juries and acquittals because jurors are more reluctant to convict in 'three-strikes' cases.").

67. Joan Biskupic, *In Jury Rooms, a Form of Civil Protest Grows; Activists Registering Disdain For Laws With a 'Not Guilty,'* WASH. POST, Feb. 8, 1999, at A1.

68. Butterfield, *supra* note 25, at A1 ("[J]uries in San Francisco have refused to convict people when they learn it will make the defendants third-time felons."); Perry & Dolan, *supra* note 27, at A1.

69. See Perry & Dolan, *supra* note 27, at A1.

70. See *id.* ("San Francisco Dist. Atty. Arlo Smith, aware that liberal San Francisco juries would not convict, frequently declined to prosecute nonviolent crimes as 'three strikes' cases. His more liberal successor, Terence Hallinan . . . has been even more restrictive.").

71. *Id.*

72. See *id.*

73. *Id.*

74. See *id.*

Pfingst, as the head of the office's "three-strikes unit."<sup>75</sup> The office takes a "streamlined" approach to three-strikes cases,<sup>76</sup> which allows it to process a lot of cases. San Diego prosecutors and juries have sent "more 'three strikes' defendants to prison per capita than any urban or suburban county in the state."<sup>77</sup>

Los Angeles has a backlog of cases due in large part to the three-strikes law.<sup>78</sup> Steve Cooley, who replaced Gil Garcetti as Los Angeles District Attorney, has since re-written his office's policy toward the three-strikes law.<sup>79</sup> Under his new policy, "most nonviolent, nonserious third felonies will be handled as second-strike cases."<sup>80</sup> This means that prosecutors will have one of the defendant's strikes removed. "Only the more serious crimes, such as those involving weapons, large quantities of drugs or violence will be pursued as third-strike cases."<sup>81</sup> Although this prosecutorial change in policy is in part the result of a change in personnel and the electorate having expressed its views in the voting booth, it is also in part the result of how juries have responded to three-strikes cases in Los Angeles. They have signalled the need for justice and commonsense so that those convicted of small crimes do not spend the rest of their lives in prison. Cooley heard this message and incorporated it into his office's enforcement policy so that the law would no longer be "unjust, and lacking basic common sense."<sup>82</sup>

The jury acquittals in three-strikes cases signal a more widespread change in view, which can also be found in judicial interpretations of certain aspects of

---

75. Perry & Dolan, *supra* note 27, at A1.

76. *Id.*

77. *Id.*

78. Gatland, *supra* note 18, at 29 ("Case backlogs are one fallout from the California law . . . . A review of 12,600 two- and three-strikes cases in Los Angeles revealed they were three times more likely to go to trial than felonies that aren't considered strikes."); *id.* ("Three-strikes cases lingered in the courts 41 percent longer than non-strike cases."); Butterfield, *supra* note 25, at A1 ("Most defendants in felony cases are now refusing to accept plea bargains, since three convictions mandate a sentence of 25 years to life. As a result, courts in many areas are clogged, county jails are overcrowded and nonviolent inmates are being released early."); *id.* ("The backlog of criminal cases is growing so large, said Judge James Bascue, the supervising judge of the criminal courts of Los Angeles County, that 'civil trials are at risk . . . .'"); Krikorian et al., *supra* note 22, at A1 ("In demanding the toughest prosecutions ever, three strikes has overwhelmed Los Angeles County's justice system like no law before it, cramming thousands of cases into an already taxed institution."); *id.* ("Three-strikes cases seldom go that fast. In addition to the decrease in plea bargains, it also takes longer to get the cases ready for trial because of the higher stakes . . . . The sheer numbers have overloaded the [L.A.] Criminal Courts Building.").

79. Twila Decker, *New Policy Established on 3 Strikes*, L.A. TIMES, Dec. 20, 2000, at B1.

80. *Id.*

81. *Id.*

82. *Id.*

the three-strikes law. In *People v. Romero*,<sup>83</sup> the California Supreme Court held that the judiciary may sua sponte strike prior felony convictions in cases arising under the three-strikes law.<sup>84</sup> The case arose when Jesus Romero was charged with possessing .13 grams of cocaine; he had two prior serious felony convictions, one for burglary and one for attempted burglary.<sup>85</sup> The trial court was willing to consider striking the prior felony conviction if the defendant was willing to change his plea of not-guilty to guilty.<sup>86</sup> The prosecutor objected, arguing that the court had no power to dismiss prior felony convictions in a three-strikes case unless the prosecutor requested the court to do so.<sup>87</sup> The trial court disagreed and struck the prior felony conviction allegations.<sup>88</sup> The Court of Appeal reversed, and was in turn reversed in part by the California Supreme Court.<sup>89</sup> The California Supreme Court concluded that a trial court may dismiss prior felony convictions in furtherance of justice on its own motion, as provided by Penal Code section 1385, subdivision (a),<sup>90</sup> and that this power extends to cases brought under the three-strikes law. The court reasoned that if the legislature had intended to eliminate the court's power to impose a lesser punishment by striking a sentencing allegation, then it would have given a clear legislative directive to that effect.<sup>91</sup>

Although proponents of the three-strikes law criticized *Romero* as an effort by judges to retain power over sentencing<sup>92</sup> and to water down the three-strikes law,<sup>93</sup> opponents of the law saw the judicial decision as an effort to curb the law's excesses. According to one Los Angeles public defender, *Romero* "allows the resources of the system to be focused more on the hard-core, the people who should be taken away, not the pizza thieves or the person who has

---

83. 917 P.2d 628 (Cal. 1996).

84. *Id.* at 630, 647.

85. *Id.* at 631.

86. *Id.* at 632.

87. *Id.*

88. *Id.*

89. *Romero*, 917 P.2d at 649.

90. Sec. 1385 provides in relevant part: "(a) The judge or magistrate may, either of his or her own motion or upon the application of the prosecuting attorney, and in the furtherance of justice, order an action to be dismissed." *Id.* at 632.

91. *Id.* at 646-47.

92. See Goldberg, *supra* note 19, at A1 ("The justices showed they are more interested in protecting the turf of the bench than they are about protecting the safety of Californians.") (quoting Secretary of State Bill Jones, who wrote the three-strikes law).

93. See *id.* (reporting that after *Romero*, Secretary of State Bill Jones and Assembly Speaker Curt Pringle "immediately announced plans to find a legislative way to plug the newly opened hole in the law"); Gunnison, *supra* note 66, at A1 ("Detractors [of the *Romero* ruling] said it undermined what had been a tough anti-crime measure.").

one rock of cocaine on their person."<sup>94</sup> Los Angeles Superior Court Judge William Pounders saw "the jury response as a justification for allowing judges to step in and reduce a sentence in the right case."<sup>95</sup> He explained: "The public is telling us in their votes in the jury room how they feel about the law[.] They're saying: 'I do not want this penalty for a minor offense.'"<sup>96</sup> Grass-roots activists, seeking signatures for a petition to amend the three-strikes law, encountered a similar response. One citizen who signed the petition explained: "It's just common sense . . . . People want violent criminals off the streets. We don't care about minor drug offenders."<sup>97</sup>

The jury acquittals signalled a more widespread change in view, as seen by the recent passage of Proposition 36, which provides for drug treatment rather than incarceration for some drug violators in California.<sup>98</sup> Proposition 36, a voter-backed initiative, took effect on July 1, 2001.<sup>99</sup> It mandates treatment instead of prison for first- and second-time offenders who use or possess drugs and are not charged with any related crime, such as assault or robbery.<sup>100</sup> Supporters of the initiative think "the political winds are shifting their way after a 20-year trend toward ever-tougher criminal laws."<sup>101</sup> One goal of the new law is to secure treatment for drug addicts; another goal is to reduce the number of inmates in California prisons at a time of budgetary constraints.<sup>102</sup> On the one hand, the law has not created excessive demand for treatment centers, as feared by some; on the other hand, those defendants who have opted for the treatment centers thus far are more seriously addicted than anticipated.<sup>103</sup> The passage of this voter-backed initiative suggests a broadly-based skepticism that

---

94. Goldberg, *supra* note 19, at A1 (quoting Alex Ricciardulli, a Los Angeles County public defender and consultant on three-strikes issues).

95. Chiang, *supra* note 50, at A1.

96. *Id.*

97. Greg Hernandez, *Group Advocates Change in Three-Strikes Law*, L.A. TIMES, May 27, 1997, at B3 (quoting Costa Mesa resident Bud Owen).

98. See Naftali Bendavid, *1 in 32 Adults in Criminal Justice System*, CHI. TRIB., Aug. 27, 2001, at 8 (noting that California is "beginning to emphasize treatment rather than imprisonment for drug offenders, and that may presage a drop in the correctional population").

99. See Fox Butterfield, *New Drug-Offender Program Draws Unexpected Clients*, N.Y. TIMES, Sept. 29, 2001, at A6.

100. *Id.*

101. *Id.*

102. *Id.* However, Proposition 36 will send offenders to prison after three violations of the program. See Flynn McRoberts, *Citizen 'Judges' Soften Sting at Drug Courts*, CHI. TRIB., Aug. 27, 2001, at A1.

103. Butterfield, *supra* note 99, at A6; Monte Morin, *Failure Rate High for Pilot Program in O.C.*, L.A. TIMES, July 15, 2001, at B1 ("The biggest thing we saw was that a lot of people eligible for Proposition 36 were pretty heavily addicted and have been for many years . . . . I didn't realize it would be so severe.") (quoting Orange County Superior Court Judge Ronald Kreber).



the three-strikes approach of twenty-five years to life imprisonment for drug offenders is the best approach. The pattern of jury acquittals seen in drug offender cases charged under the three-strikes law presaged this shift in community attitude.

### B. Rockefeller Drug Laws

The Rockefeller drug laws are "notoriously tough"<sup>104</sup> statutes that were enacted in 1973 in the State of New York.<sup>105</sup> They mandate long prison terms, even for minor first-time offenses.<sup>106</sup> They require a fifteen-year to life sentence for the top class of drug offenders, which includes those convicted of possessing at least four ounces of cocaine or heroin or of selling at least two ounces.<sup>107</sup> Most low-level offenders enter into a plea agreement, rather than risk trial. According to one study, 98.5% of all first-offenders indicted for drug felonies in the period from 1990 to 1995, were convicted by a plea.<sup>108</sup> As of 2001, more than 21,000 people were serving time for drug convictions in New York.<sup>109</sup> This represented about thirty percent of the state's prison population.<sup>110</sup>

Like the three-strikes law in California, the Rockefeller drug laws in New York have been faulted for having a disproportionate effect on racial minorities. Many of those serving long sentences are African American or Latino, and many argue that the laws, as enforced, are discriminatory. Of the 21,000 people serving time for drug convictions in New York, about 95% are African American or Latino,<sup>111</sup> and about 70% were convicted of non-violent

---

104. Fox Butterfield, *States Ease Laws on Time in Prison*, N.Y. TIMES, Sept. 2, 2001, at A1.

105. See 1972 N.Y. Laws 878; see also John Caher, *Reform of Rockefeller Drug Laws Unlikely*, N.Y.L.J., June 8, 2000, at 1.

106. See N.Y. Penal Law §§ 220.00-220.65 (McKinney 2000).

107. See N.Y. Penal Law §70 (McKinney 1998) (providing sentences of imprisonment); see also James C. McKinley Jr., *Proposals for Overhaul of New York Drug Laws*, N.Y. TIMES, Sept. 2, 2001, at A16.

108. Human Rights Watch, *Human Rights Violations in the United States; Cruel and Usual; Disproportionate Sentences for New York Drug Offenders* 9 (Mar. 1997), available at <http://www.hrw.org/summaries/s.us973.html>.

109. Austin Fenner, *Prosecutors Rip Plan To Ease Drug Laws; Stiff Terms Necessary, They Say*, DAILY NEWS (New York), Feb. 11, 2001, at 1; McKinley, *supra* note 107, at A16.

110. Fenner, *supra* note 109, at 1.

111. Deborah Small, *The War on Drugs Is a War on Racial Justice*, 68 SOC. RES. 896, 897 (2001) ("In New York, over 94 percent of inmates incarcerated for drug offenses are Black or Latino."); John R. Dunne, *When Will New York Correct Its Mistake?*, N.Y. TIMES, May 10, 2002, at A33 ("Despite the consistency of drug use among all races and at all socioeconomic levels, over 94 percent of incarcerated drug offenders in New York prisons are African-American and Latino. The majority of them, not surprisingly, come from New York's poorest and most underserved communities."); James C. McKinley Jr., *In Effort To Change Drug Laws, Some See Too Little Change*, N.Y. TIMES, June 18, 2002,

crimes.<sup>112</sup> Some judges in New York believe that these laws, as they now stand, are aimed "mainly at poor minorities."<sup>113</sup> One judge who takes this view is retired State Supreme Court Justice Jerome V. Marks, who "'spent years putting people in jail, and now [is] trying to get some of them out of jail.'"<sup>114</sup> According to another report, not only are "more than 90 percent of the state's drug prisoners . . . black or Hispanic," but also "drug offenses are . . . the leading reason for imprisonment of women."<sup>115</sup>

Other criticisms of the Rockefeller drug laws, voiced by defense attorneys in particular, are that they provide severe punishments for minor offenses<sup>116</sup> and that they do not allow for case-by-case sentencing.<sup>117</sup> Judges, too, often express the view that they are simply applying the law and that the law does not give them any discretion. A common refrain of judges who sent defendants to prison for lengthy, mandatory terms under the Rockefeller drug laws is that they "'had no choice.'"<sup>118</sup>

However, many prosecutors defend the laws and argue against change. They contend that the Rockefeller drug laws are an important vehicle for removing repeat offenders from society. They believe, as expressed by one prosecutor, that "'[m]ost drug offenders are in prison today not because they possessed a small amount of drugs and have been swept up by the Rockefeller drug laws, but because they repeatedly sold drugs intended for distribution to local communities, or because they have prior convictions for violent

---

at A21 ("Nine in 10 of the 19,000 men and women serving mandatory sentences for drug offenses are black or Latino.").

112. McKinley, *supra* note 107, at A16; see also Small, *supra* note 111, at 896 ("[R]esearch tells us that drug law offenders are overwhelmingly nonviolent: almost 80 percent of drug offenders sent to prison in New York in 1999 had never been convicted of a violent crime.") (citation omitted).

113. Dennis Duggan, *Commentary: Change of Heart Needed*, *NEWSDAY*, Mar. 1, 2001, at A8; Fenner, *supra* note 109, at 1 ("[Critics] also say the Rockefeller drug laws . . . disproportionately target blacks and Latinos . . ."); *id.* ("African-Americans are jailed at much higher rates than whites, even though five times as many whites use drugs . . .") (citing a Human Rights Watch report).

114. Duggan, *supra* note 113, at A8.

115. John Riley, *1 Strike, 15 Years / Opposition Growing to State's Stiff Minimum Drug Sentences*, *NEWSDAY*, May 2, 1999, at A7.

116. Fenner, *supra* note 109, at 1.

117. *Id.* ("[T]he Rockefeller drug laws are flawed because they mandate tough sentences for all offenders. Judges don't get to differentiate between first-time or small-time offenders and repeat felons . . ."); *id.* ("[Defense attorneys Russell Morea and Jonathan Latimer] said the mandatory minimum sentences outlined in the laws handcuff judges from dispensing justice on a case-by-case basis.").

118. Duggan, *supra* note 113, at A8 (quoting former State Supreme Court Justice Ann B. Dufficy); see Bob Herbert, *The Quality of Mercy*, *N.Y. TIMES*, Nov. 27, 1997, at A39 ("The trial judge in Ms. Thompson's case, Juanita Bing Newton, tried unsuccessfully to impose a lesser sentence, but her effort was overturned on appeal. The judge wrote, 'This case is bringing me to tears, literally.'"); Riley, *supra* note 115, at A7 ("The problem is the law doesn't give the judge a lot of discretion.") (quoting Judge Budd Goodman on the Rockefeller drug laws).

felonies."<sup>119</sup> Some argue that even small-time drug-dealing has a deleterious effect on the community and should be halted; it is a business that is supported by guns and violence.<sup>120</sup>

With respect to juror response to the Rockefeller drug laws, any well-informed juror hearing a drug case in New York knows that a conviction carries a harsh mandatory sentence. Unlike California's three-strikes law, about which jurors cannot be certain whether a given case is a three-strikes case, New York's Rockefeller drug laws entail no such uncertainty for jurors.<sup>121</sup> Juror response, however, has been less well documented with respect to the Rockefeller drug laws than it has with respect to the three-strikes law.

Anecdotal evidence is all that is available to show that juries have balked at returning convictions in some drug cases, knowing that the sentences meted out will be harsh. Some experts have noted not only that "tension in the deliberation room is particularly high in cases involving controversial statutes, like . . . California's 'three strikes' law for repeat offenders and New York's Rockefeller-era drug laws, which mandate long prison terms," but also that some jurors are "refus[ing] to convict in cases where they believe the punishment exceeds the crime."<sup>122</sup> For example, in the case of Calvin Baker, who faced a sentence of four to nine years in prison if convicted as a repeat drug seller, one of the jurors, Paula Thomson, became a hold-out.<sup>123</sup> As a result, a mistrial was declared.<sup>124</sup> She posted bail for the defendant, retained another lawyer for him, and took him to rallies to protest the Rockefeller drug laws.<sup>125</sup> Her vote in the jury room was based on her view that the drug laws were not equally enforced along racial lines.<sup>126</sup>

In another case involving multiple defendants charged with drug possession and distribution, Juror #5, the only African-American juror, was dismissed in the midst of jury deliberations.<sup>127</sup> Several fellow jurors had sent a

---

119. Fenner, *supra* note 109, at 1 (quoting Queens District Attorney Richard Brown).

120. *Id.* ("We need to think in terms of what if the drug dealer wasn't caught and all that cocaine was on the streets . . . Drugs plus guns makes violence.") (quoting Democratic Councilwoman Juanita Watkins of southeast Queens, New York).

121. Although jurors are not told about sentencing, well-informed jurors who hear a case in which the defendant is charged with violation of the Rockefeller drug laws know that all such violations carry harsh, mandatory sentences even if they do not know the precise number of years that any given defendant may receive in prison.

122. Katherine E. Finkelstein, *Tempers Seem To Be Growing Shorter in Many Jury Rooms*, N.Y. TIMES, Aug. 3, 2001, at B1.

123. *Id.*

124. *Id.*

125. *Id.*

126. *Id.*

127. *United States v. Thomas*, 116 F.3d 606 (2d Cir. 1997).

note to the judge, explaining that Juror #5 had a fixed view and was failing to deliberate;<sup>128</sup> earlier, they had complained to the judge that he had engaged in disruptive behavior.<sup>129</sup> The judge, after several colloquies with Juror #5 as well as with the other jurors, decided that Juror #5 would not vote to convict under any circumstances because of his opposition to the drug laws.<sup>130</sup> At some points, however, Juror #5 had suggested that he just required sufficient evidence in order to convict. As he explained to the judge:

When I make a decision to send someone to prison or whatever, because I know about these mandatory sentences, I want substantive evidence against them, you know, and I want to know that it's clear in my mind beyond a reasonable doubt. You know as well as I do the number of people who are in jail and the complexion of those people in prisons, more than 50 percent being black; and the deal is, being poor, you see them a lot more than I do, I am sure, and it's a hard decision for me to make.<sup>131</sup>

The Second Circuit, while holding that a judge could remove a juror who engaged in nullification, concluded that this juror should not have been removed without a more searching inquiry by the trial judge to see whether he was motivated by reasonable doubt or nullification.<sup>132</sup> Although the remaining eleven jurors convicted the defendants before them, the Second Circuit vacated the judgments because the record raised "a possibility that the [dismissed] juror was simply unpersuaded by the Government's case against the defendants."<sup>133</sup> This case led one writer to note: "As happened during alcohol Prohibition, more and more jurors are suffering moral qualms about enforcing Draconian antidrug laws and are refusing to convict. The case the Appeals Court ruled on grew out of such a drug case."<sup>134</sup>

A shift appears to be imminent with respect to New York's Rockefeller drug laws and their harsh mandatory sentences; the jury acquittals and hung juries have presaged this shift and the "tide of public opinion going against the

---

128. *Id.* at 611.

129. *Id.* at 610.

130. *Id.* at 614 ("Here, Chief Judge McAvoy identified a different form of bias as the primary ground for dismissing Juror No. 5—one arising . . . from a more general opposition to the application of the criminal narcotics laws to the defendants' conduct.").

131. *United States v. Thomas*, No. 94-CR-181 (N.D.N.Y. Feb. 24, 1995) (Transcript at 4029).

132. *Thomas*, 116 F.3d at 623-24.

133. *Id.* at 624.

134. Aaron D. Wilson, Letter to the Editor, *Drug Laws Help Foster Juror Rebellions*, N.Y. TIMES, June 3, 1997, at A16.

28-year-old Rockefeller drug laws."<sup>135</sup> Although politics, such as a Democratic-controlled State Assembly and the re-election campaign of Governor Pataki, will determine whether reform takes place, the juries' verdicts, like the steam engine's governor, indicate a problem with the laws; however, it remains for the other branches, like the steam engine, to address the problem.

Even though some members of the judiciary acknowledged that they do not agree with the Rockefeller drug laws, it is the Legislature's responsibility to reform the laws. In *People v. Broadie*,<sup>136</sup> then Chief Judge Charles Brietel noted that even if the court "does not necessarily approve or concur in the Legislature's judgment in adopting these sanctions," the court "does not pass on the wisdom of the Legislature's acts."<sup>137</sup> When the court upheld the Rockefeller drug laws in *People v. Thompson*,<sup>138</sup> Judge Levine criticized the statutes because they did not deter drug traffic and they incarcerated rather than rehabilitated drug offenders. However, Judge Levine recognized that reform "lies with the legislative, not the judicial, branch."<sup>139</sup>

Although the legislature has not yet managed to act, it is engaged in a *pas de deux* with the Governor over reform of the Rockefeller drug laws. Governor Pataki has expressed the hope that the laws could be revised so that they are based on "more common sense" and are less "severe."<sup>140</sup> Governor Pataki's initial bill was rejected by the State Assembly because even though it reduced the length of the mandatory sentence from fifteen to ten years and gave prosecutors<sup>141</sup> and judges greater discretion,<sup>142</sup> it did not permit judges to send

135. Duggan, *supra* note 113, at A8.

136. 332 N.E.2d 338 (N.Y. 1975) (holding that the mandatory drug sanctions did not violate state and federal constitutional prohibitions of cruel and unusual punishment).

137. *Id.* at 346.

138. 633 N.E.2d 1074 (N.Y. 1994) (reversing a trial court sentence of less than the mandatory minimum because the case did not meet the "rare" exception, carved out in *People v. Broadie*, 332 N.E.2d 338, 347 (N.Y. 1975), for cases in which the statute was unconstitutionally applied).

139. *Id.* at 1081.

140. Fenner, *supra* note 109, at 1; see Adam Nagourney, *The Postpartisan Governor: Defying a Democratic Tide, Pataki Seeks a Third Term*, N.Y. TIMES, Apr. 3, 2002, at A17 ("[Gov. Pataki] urged a rollback of the Rockefeller drug laws that, he said . . . , were too tough on first-time drug users.").

141. John Caher, *Governor Proposes Drug Law Reforms; Lower Minimum Sentences, Crackdown on Kingpins Sought*, N.Y.L.J., Jan. 18, 2001, at 1 (describing provisions in the Governor's package to reform the Rockefeller drug laws that include an "[e]xpansion of a prosecutor-sponsored diversion program for repeat substance abusers" and "prosecutorial consent" for judicial decisions to sentence "a first-time-A-1 drug offender as a Class B convict with a minimum determinate sentence of 14 months").

142. *Id.* (describing the Governor's plan as "vest[ing] greater discretion in the Appellate Divisions than the trial judges to ensure more uniformity") (quoting James McGuire, counsel to Governor Pataki); *id.* (describing the Governor's plan as "introduc[ing] an element of judicial and prosecutorial flexibility that had been lacking" in the Rockefeller drug laws) (quoting Lieutenant Governor Mary O. Donohue).

offenders to treatment without a prosecutor's consent.<sup>143</sup> The Assembly responded with a bill that would have given trial judges complete discretion over the nonviolent Class B offenders, but would have garnered no support in a Republican-controlled Senate.<sup>144</sup> The Governor returned with a bill that would allow some diversion of offenders to treatment programs, but only after a specially-trained judge had made that decision.<sup>145</sup> The Democratic-led Assembly rejected this as well.<sup>146</sup> Most recently, in negotiations with the Assembly Speaker, the Governor has offered to increase the number of offenders who would be eligible for sentence reductions and to make drug treatment programs more readily available as an alternative to prison.<sup>147</sup> These compromises, however, fall short of repeal of the Rockefeller drug laws, which some groups advocate.<sup>148</sup> Although the legislature and executive still have not come to agreement, many on both sides of the issue of the Rockefeller drug laws remain hopeful; they see this as "a rare opportunity" for change.<sup>149</sup> The jury acquittals signal dissatisfaction with the law; however, it remains for the legislature, supported in this case by the executive,<sup>150</sup> to revise the law.

### C. "Bronx Juries"

The so-called "Bronx jury" is a term that has been used to describe the high acquittal rate among largely minority juries in the Bronx, a borough of New York, and in other cities with large minority populations.<sup>151</sup> Many of these

---

143. McKinley, *supra* note 107, at A16.

144. *Id.*

145. *Id.*

146. *Id.*

147. Bob Herbert, *Dancing with Reform*, N.Y. TIMES, July 22, 2002, at A17.

148. See *id.* (describing the Correctional Association of New York's "Drop the Rock" campaign, which calls for the repeal of the mandatory minimum sentences of the Rockefeller drug laws); see also Robert Gangi, Letter to the Editor, *Pataki's Drug Reform*, N.Y. TIMES, Apr. 10, 2002, at A24 ("Unless the Legislature fully repeals the Rockefeller drug laws, district attorneys will be able to undermine the good intentions of any reform plan.") (quoting Gangi, Executive Director, Correctional Association).

149. McKinley, *supra* note 107, at A16. But see James C. McKinley Jr., *New York Bill on Gay Rights Is Set for Vote: Long-Stalled Measure Is Now Likely To Pass*, N.Y. TIMES, Oct. 23, 2002, at A1 ("[Sheldon Silver, the Assembly speaker also laughed at the notion that he and Mr. [Joseph L.] Bruno, the Senate majority leader,] were any closer to agreement on issues like changing the state's mandatory drug sentences . . .").

150. In his annual address on January 9, 2002, Governor Pataki "called again for lessening the state's harsh mandatory sentences for drug crimes," which, as the article noted, is "a hot issue among minority voters." James C. McKinley Jr., *In Annual Address, Pataki Vows To Limit Spending Without Disturbing Tax Cuts*, N.Y. TIMES, Jan. 10, 2002, at A23. Gov. Pataki is particularly sensitive to such issues as he prepares to run for re-election in the fall of 2002. *Id.*

151. See Benjamin A. Holden et al., *Racism on Trial*, MONTREAL GAZETTE, Oct. 7, 1995, (Weekly Review), at B1 (describing a pattern of acquittals that includes not only the Bronx, N.Y., but

juries appear to be acquitting, particularly in drug cases.<sup>152</sup> The Bronx jury acquittals, unlike the three-strikes and Rockefeller drug law acquittals, have been the focus of statistical inquiry, with those on both sides of the political spectrum debating the numbers, as well as the meaning of the numbers. However, while the meaning of the three-strikes and Rockefeller drug law acquittals are clear, the meaning of the Bronx juries' acquittals is more ambiguous.

There is much debate about the acquittal rates of Bronx juries. According to one article, Bronx juries, which are more than 80% African American and Latino, had an acquittal rate in felony cases for African-American defendants of 47.6% in 1994.<sup>153</sup> This acquittal rate was "three times the national rate of 17% for all races."<sup>154</sup> According to another article, for eleven years, Bronx juries have had the lowest conviction rates among the five boroughs in New York<sup>155</sup> (or, in other words, the highest acquittal rates). For example, in 1998, the conviction rate in the Bronx was 55%, compared to 78% in Brooklyn and 75% in Manhattan.<sup>156</sup> In the first five months of 2000, the acquittal rate for the Bronx was reported as 50% for the 175 felony cases heard by Bronx juries.<sup>157</sup>

There are, however, a number of articles disputing these figures about Bronx juries. One judge, using figures from the annual reports of the Judicial Conference, found that the average conviction rate in New York City was 64% in 1960 and 66.8% in 1992.<sup>158</sup> During this period, conviction rates ranged from a low of 64% to a high of 71%.<sup>159</sup> He found that there was "no significant statistical difference between the performance of juries over the past 30 years."<sup>160</sup> He argued that this pattern held true for the Bronx as well. The conviction rate in the Bronx was 70% in 1960, when only forty-five trials went to verdict; its conviction rate was 59% in 1992, when 493 trials went to

---

also Washington, D.C., Wayne County, Michigan, and other "heavily black urban areas").

152. According to Burton B. Roberts, a former Chief Administrative Justice of the Bronx, "Bronx juries seemed to acquit more frequently on gun and drug charges, which usually rely on police officers' testimony." Amy Waldman, *A Lawyer's Legal Victory Goes Against an Old Haunt*, N.Y. TIMES, Dec. 18, 1999, at B2.

153. Michael O. Allen et al., *Tremor Hits Racial Divide*, DAILY NEWS (New York), Oct. 8, 1995, at 8.

154. *Id.*

155. Larry McShane, *Bronx Jurors Skeptical*, DAYTON DAILY NEWS, Dec. 27, 1999, at 2A.

156. *Id.*

157. Tara George, *Bronx Justice a Coin Toss; Boro [sic] Juries Acquit Suspects Half the Time as Conviction Rate Sinks*, DAILY NEWS (New York), July 11, 2000, at 22.

158. Lewis L. Douglass, *The Fiction about Minority Jurors*, N.Y.L.J., Oct. 6, 1993, at 2.

159. *Id.*

160. *Id.*

verdict.<sup>161</sup>

According to journalist Roger Parloff, Bronx juries are not acquitting at unusually high rates, but are merely at the high end of the norm.<sup>162</sup> Parloff concluded that the Bronx jury acquittal rates for trials of African-American defendants charged with felonies was 43.6% in 1995 and 39.1% in 1996.<sup>163</sup> Parloff also challenged the figure first reported in *The Wall Street Journal* that the national average was 17%;<sup>164</sup> he relied on other studies suggesting it was closer to 28%.<sup>165</sup> Although disputing the claim that Bronx acquittal rates are "nearly triple" those of the national average, he did acknowledge that the figures he offered indicate that the rates of acquittals in the Bronx "are high for state courts in New York, and probably for state courts nationwide."<sup>166</sup>

Parloff supplemented his statistical analysis with interviews with Bronx judges, prosecutors, and defense attorneys.<sup>167</sup> His interviews with prosecutors and defense attorneys confirmed what *The Wall Street Journal* article had also suggested, "that minority jurors, because of their differing experiences in the world, are likely to be less trusting of law enforcement than white jurors."<sup>168</sup> According to many of the judges Parloff interviewed, Bronx jurors "are far more skeptical of police officers' testimony than suburban jurors probably would be, since the qualities of their experiences with the police are so different."<sup>169</sup> Parloff concluded that the high acquittal rate in the Bronx does not appear to be hampering law enforcement efforts.<sup>170</sup> However, one judge

161. *Id.*

162. See Roger Parloff, *Race and Juries: If It Ain't Broke . . .*, A.B.A. J., June 1997, at 5, 6.

163. *Id.* at 6.

164. Benjamin A. Holden et al., *Color Blinded? Race Seems To Play an Increasing Role in Many Jury Verdicts*, WALL ST. J., Oct. 4, 1995, at A1 (claiming that in the Bronx, "black defendants are acquitted in felony cases 47.6 percent of the time—nearly three times the national acquittal rate of 17 per cent for all races.").

165. Parloff, *supra* note 162, at 6 (describing a study by Robert Roper and Victor Flango of the National Center for State Courts, drawing upon 15,040 jury trials from six states and D.C. in the late 1970s, unfortunately using data gathered some time ago, and finding an average felony acquittal rate of 28%); *id.* (describing a study by James Levine, Professor of Government at John Jay College of Criminal Justice, who found that New York's average acquittal rate in 37,157 jury trials during 1986-1995 was 27.7%).

166. *Id.*

167. *Id.* at 7.

168. *Id.* at 6-7.

169. *Id.* at 7. One lawyer, Michael Raskin of the Legal Aid Society, made a similar point: "Bronx juries hold police to the same standard as a civilian witness. They don't give police testimony any additional weight." Cerisse Anderson, *Jury Nullification Suspected in Bronx Case*, N.Y.L.J., Aug. 28, 1998, at 1. Raskin also pointed to Bronx residents' "different life experience," which may account for "a more skeptical view of a police officer's testimony." *Id.*

170. Parloff, *supra* note 162, at 7.



noted that while Bronx juries do not acquit in every case, "they are very demanding. . . . If there is anything wrong with one part of the case, they're going to acquit."<sup>171</sup>

The figures, though contested, are supplemented by anecdotal evidence, which is, of course, merely anecdotal. For example, there is the case of Kevin Cruz, the so-called Robin Hood of Rite Aid.<sup>172</sup> He was charged with grand larceny for allegedly stealing more than \$171,000 in AIDS drugs from the pharmacy where he worked for \$12 per hour and selling the drugs to those who could not afford their co-payments.<sup>173</sup> He was found with a luxury car and an attaché case containing \$7,740 in cash, but no witnesses testified that they saw Cruz walk away with the drugs. He was acquitted by a Bronx jury.<sup>174</sup> In a 1988 case, a Bronx jury acquitted Larry Davis of attempted murder of a police officer and aggravated assault, stemming from a shootout that wounded six police officers.<sup>175</sup> The defense contended that Davis was trying to escape from corrupt officers intent on assassinating him; the jury was persuaded.<sup>176</sup> Davis was also acquitted of killing and robbing four drug dealers, and was convicted only on weapons charges.<sup>177</sup>

What do the acquittal rates and anecdotes signal? Part of the problem is that the signalling is not clear, and part of the problem is that those on both sides of the political spectrum want to use the figures and anecdotes to bolster their respective positions. There are those who argue that the high acquittal rates suggest that Bronx juries engage in race-based nullification, in which they refuse to follow the law.<sup>178</sup> However, the broad use of the term nullification,

171. *Id.*

172. Tara George, *Drug Store 'Robin Hood' Not Guilty*, DAILY NEWS (New York), June 22, 1999, at 1.

173. *Id.*

174. *Id.*

175. Dan Morrison, *Odds on Rumble in the Bronx*, NEWSDAY, Mar. 22, 1996, at A26.

176. *Id.*

177. *Id.*

178. See, e.g., *All Things Considered*, *supra* note 57, available at 1995 WL 9892228 ("[C]ases in Baltimore, New York, and Los Angeles have been cited as anecdotal evidence that African-American juries are engaging in jury nullification. Furthermore, there is evidence of a gradual increase in acquittal rates in some predominantly black cities and regions.") (quoting correspondent Richard Gonzales); Mark Curriden, *Juries That Circumvent, Ignore Law Have Precedent; But Experts Disagree on Whether Legal Trend is Healthy*, DALLAS MORNING NEWS, June 25, 2000, at 19A ("Court officials suspect nullification is common in parts of Los Angeles, New York City and Washington, D.C. Largely minority, lower-income juries in those places frequently acquit defendants when the primary witness is a police officer."); Jerome H. Skolnick, *Racial Grievances Won O.J. Acquittal*, NEWSDAY, Oct. 4, 1995, at A33, available at 1995 WL 5123199 ("Lately, predominantly black juries in Washington, D.C. have been reluctant to convict obviously guilty young African-American men. . . . But these are mostly drug cases, and perhaps jury nullification here is more understandable."); Michael E. Young & Margorie Lambert, *Trial Seeped into Every Part of Life Series: The Simpson Verdict*, SUN-SENTINEL (Ft. Lauderdale), Oct. 3,

particularly in cases in which nullification was unlikely, may be a code word for questioning the competence of largely-minority juries, as I have argued elsewhere.<sup>179</sup> There are others who argue that the high acquittal rates are a result of legitimate reasonable doubt based on Bronx jurors' very different experiences with the police, the criminal justice system, and a society that judges people based on their race.<sup>180</sup> Bronx jurors' skepticism of the police comes from their own experience with police misconduct or harassment.<sup>181</sup> Their reticence to convict in drug cases may come not only from distrusting police testimony,<sup>182</sup> but also from witnessing the devastating effect that incarcerating large numbers of African-American men for many years has had on their communities.<sup>183</sup>

One problem with the jury's governor-like role in the context of Bronx juries is that the jury's pattern of acquittals does not signal a need for a particular change in law, but rather signals the need for a change in the way a number of laws, and in particular the drug laws, are enforced against racial minorities. Another problem is that this particular pattern of acquittals is linked to race and raises fears that have long characterized any debate about race in this society. While the debate rages on—about acquittal rates, whether the acquittals are based on reasonable doubt or nullification, whether minority jurors are flouting the law and undermining the justice system, or whether minority jurors are trying to correct for a justice system that treats minority

---

1995, at 4A ("[L]egal scholars believe [race-based nullification] is on the rise in the United States, particularly in cases involving non-violent crimes in minority communities.").

179. Marder, *supra* note 12, at 301-03.

180. See *supra* text accompanying notes 162-71.

181. See generally Richard Goldstein, *O.J. Can You See It?*, VILLAGE VOICE, Oct. 17, 1995, at 18 ("[T]he papers have been full of harrowing tales of false arrest perpetrated against blacks in Philadelphia by a police force so corrupt that hundreds of convictions may be thrown out."); Holden et al., *supra* note 164, at A1 ("It's not just race. It's life experiences. Blacks are more likely to have been jacked by the police, and less likely to view police testimony with quite the same pristine validity as a white male from the suburbs.") (quoting Robert E. Kalunian, Assistant Public Defender for Los Angeles County); see also HENRY LOUIS GATES, JR., THIRTEEN WAYS OF LOOKING AT A BLACK MAN 109 (1997) ("Blacks—in particular, black men—swap their experiences of police encounters like war stories, and there are few who don't have more than one story to tell.").

182. See Waldman, *supra* note 152, at B2 ("Bronx juries seemed to acquit more frequently on gun and drug charges, which usually rely on police officers' testimony, which suggests 'there is maybe a feeling against police officers.'") (quoting Burton B. Roberts, former Chief Administrative Justice of the Bronx). Others have noted that drug cases rely heavily on police testimony, see George, *supra* note 157, at 22 (noting that "prosecutors are forced to rely on the trust of police officers more than ever because narcotics cases—which depend heavily on cop testimony—are on the rise") and that Bronx jurors are skeptical of police testimony given their own experiences with the police. See Anderson, *supra* note 169, at 1 (citing a "different life experience" that many Bronx residents have had which may account for a more skeptical view of a police officer's testimony") (quoting Legal Aid Society lawyer Michael Raskin).

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

defendants unfairly—what is less clear are the messages of the acquittals. The messages of Bronx juries are multiple and therefore difficult to discern. At the very least, however, these acquittals indicate a need for change both in the way some laws and their enforcement affect racial minorities. The Rockefeller drug laws have had a disproportionate effect on minorities.<sup>184</sup> Bronx juries' high rate of acquittals (whatever the exact percentage may be) is one way minority members signal their disapproval of the Rockefeller drug laws, with their mandatory minimum sentences that have a disproportionate effect on minority communities. Governor Pataki, faced with re-election in New York, has understood this message and has proposed modifications to the Rockefeller drug laws, though not to the way they are enforced. Governor Pataki hopes these modifications will appeal to minority voters in general,<sup>185</sup> and to Latino voters in particular.<sup>186</sup>

### III. THE JURY SHOULD SERVE AS "GOVERNOR"

My argument is both descriptive and prescriptive. Not only do I think the jury does play this role as governor, signalling dissatisfaction to the other branches of government, but I think that the jury ought to play this role. In addition, the jury's role needs to be understood more broadly and courts need to instruct jurors on their role more fully. If courts fail to act, other individuals and groups will assume the task and they are likely to do so in ways that suit their purposes and in language that divides jurors and diminishes respect for the institution rather than in terms that legitimize, and even extol, this function of the jury.

---

184. See *supra* text accompanying notes 111-15.

185. McKinley, *supra* note 150, at A23 ("[Governor Pataki] called again for lessening the state's harsh mandatory sentences for drug crimes, a hot issue among minority voters.").

186. See Joyce Purnick, *Reform of Rockefeller Drug Laws Requires Overcoming the Habits of Politics*, N.Y. TIMES, July 11, 2002, at A23 ("Mr. Pataki has made a campaign issue, particularly among Hispanic voters, of reforming the strict laws that can subject even nonviolent drug offenders to long minimum mandatory sentences."). Yet, as one City Council member and one Assembly member lamented, Governor Pataki's reforms do not go far enough for many Latino voters:

Gov. George E. Pataki is strongly courting the Latino vote in his re-election campaign. Yet he has a longstanding tradition of blocking meaningful reform of the Rockefeller drug laws. When so many Latino families have an incarcerated relative on a drug arrest, it's lucky for the governor that inmates aren't allowed to vote.

Hiram Monserrate & Roger L. Green, Letter to the Editor, *Cruel Rockefeller Laws*, N.Y. TIMES, July 25, 2002, at A18; see Purnick, *supra*, at A23 ("Latino elected officials and community leaders want sweeping changes in the laws. They argue that the governor's proposal doesn't go far enough and accuse him of caving in to pressure from prosecutors . . .").

*A. The Jury Is Well-Suited To Provide Feedback*

## 1. The Jurors

The jurors are particularly well-suited to provide feedback to the other branches of government because they are ordinary citizens summoned and selected at random<sup>187</sup> with no stake in the dispute and no connection to the parties. As ordinary citizens, typically untutored in the law, jurors bring their everyday judgment to their decisionmaking. Whereas the laws are written by professional legislators and interpreted by professional judges, jurors can introduce a common-sense understanding into a case and tailor the law's application so that it accords with the jurors' common-sense judgment. Jurors serve in one case only and then return to their lives as private citizens. Their temporary service allows them to avoid the weaknesses to which a professional might succumb. They do not grow inured to certain kinds of cases, as a professional might.<sup>188</sup> Nor are jurors likely to consider how a particular outcome might enhance their reputation or increase their power, as a professional might.<sup>189</sup>

Jurors are summoned to serve from a fair cross section of the community.<sup>190</sup> Although prospective jurors can be precluded from serving on a particular jury by a lawyer's exercise of peremptory challenges,<sup>191</sup> they cannot be precluded by virtue of their group membership, such as their race, gender, and ethnicity.<sup>192</sup> Any particular petit jury might not be representative of the

---

187. See 28 U.S.C. §§ 1863, 1864 & 1866 (1989) (describing the "random" selection of jurors).

188. Justice White warned of this danger in *Duncan v. Louisiana*, 391 U.S. 145 (1968), and explained that this is one of the reasons that juries are so highly valued, particularly in the criminal justice system: "Providing an accused with the right to be tried by a jury of his peers gave him an inestimable safeguard against the corrupt or overzealous prosecutor and against the compliant, biased, or eccentric judge." *Id.* at 156.

189. See 1 ALEXIS DE TOCQUEVILLE, *DEMOCRACY IN AMERICA* 250 n.4 (Jacob Peter Mayer & Max Lerner eds., 1966) (13th ed. 1850).

190. See *Taylor v. Louisiana*, 419 U.S. 522 (1975) (holding that a defendant's Sixth Amendment right includes a venire drawn from a fair cross section of the community, and that the systematic exclusion of women from the venire denied defendant his Sixth Amendment right). Although the Sixth Amendment is limited to criminal cases, Congress has provided for a venire drawn from a fair cross section of the community in both civil and criminal cases in federal courts. See 28 U.S.C. § 1861 (1989) ("It is the policy of the United States that all litigants in Federal courts entitled to trial by jury shall have the right to grand and petit juries selected at random from a fair cross section of the community in the district or division wherein the court convenes.").

191. See 28 U.S.C. § 1870 (1989); FED. R. CIV. P. 46(b); FED. R. CRIM. P. 24(b).

192. See, e.g., *J.E.B. v. Alabama ex rel. T.B.*, 511 U.S. 127 (1994) (holding that the exercise of peremptory challenges based on gender violates the Equal Protection Clause of the Fourteenth Amendment); *Georgia v. McCollum*, 505 U.S. 42 (1992) (holding that defendants are bound by the same rules as prosecutors with respect to the exercise of race-based peremptory challenges); *Edmonson v.*

community at large<sup>193</sup> because America is a melting pot and the jury has at most twelve jurors;<sup>194</sup> however, the goal is that prospective jurors are summoned randomly for the venire<sup>195</sup> and no groups are systematically excluded. Ideally, the petit jury will consist of jurors who are diverse in terms of background.<sup>196</sup> Diversity will ensure that jurors can offer each other different perspectives from which to view the case and can challenge each other's preconceptions. Diverse juries also ensure that the feedback juries provide to the other branches of government was reached after consideration of a broad range of perspectives and points of view.

---

Leesville Concrete Co., 500 U.S. 614 (1991) (holding that private litigants in a civil suit cannot use peremptory challenges to exclude jurors based on their race); *Powers v. Ohio*, 499 U.S. 400 (1991) (holding that white defendants can challenge a prosecutor's use of a race-based peremptory challenge); *Batson v. Kentucky*, 476 U.S. 79 (1986) (holding that the Equal Protection Clause of the Fourteenth Amendment prohibits a prosecutor from using peremptory challenges to strike prospective jurors on the basis of race).

193. See *Holland v. Illinois*, 493 U.S. 474 (1990) (holding that the Sixth Amendment's requirement that the venire be drawn from a fair cross section of the community need not be applied to the petit jury); *Batson v. Kentucky*, 476 U.S. 79, 85 n.6 (1986) ("[I]t would be impossible to apply a concept of proportional representation to the petit jury in view of the heterogeneous nature of our society."); *Taylor v. Louisiana*, 419 U.S. 522, 538 (1975) ("[I]n holding that petit juries must be drawn from a source fairly representative of the community we impose no requirement that petit juries actually chosen must mirror the community and reflect the various distinctive groups in the population.").

194. In criminal cases in federal court, the jury usually consists of twelve jurors, but can consist of eleven jurors if need be. See FED. R. CRIM. P. 23(b) ("Juries shall be of 12 but . . . a valid verdict may be returned by a jury of less than 12 should the court find it necessary . . ."). The number of jurors required on a state court criminal jury varies from state to state, but a state court criminal jury must consist of no fewer than six jurors. See *Ballew v. Georgia*, 435 U.S. 223, 232-39 (1978) (holding that in a state court criminal trial, a five-person jury violates the defendant's right to a jury as guaranteed by the Sixth and Fourteenth Amendments); *Williams v. Florida*, 399 U.S. 78, 86 (1970) (holding that a six-person jury in a state criminal trial is constitutional).

Juries in civil cases in federal court can consist of six jurors. See *Colgrove v. Battin*, 413 U.S. 149, 158 (1973) ("[W]e conclude that a jury of six satisfies the Seventh Amendment's guarantee of trial by jury in civil cases."). *The Federal Rules of Civil Procedure* provide that civil juries in federal court consist of at most twelve jurors and no fewer than six jurors. FED. R. CIV. P. 48 ("The court shall seat a jury of not fewer than six members and not more than twelve members . . ."). The Supreme Court has never held that the Seventh Amendment is applicable to the states, and thus, jury size in civil cases in state courts remains for each state to decide.

195. See *supra* note 187 (listing statutes that provide for random selection of prospective jurors for the venire).

196. See Nancy S. Marder, *Juries, Justice & Multiculturalism*, 75 S. CAL. L. REV. 659, 663, 687-700, 702-07 (2002) (providing some empirical evidence that juries that are diverse by gender and sometimes age produce deliberations that are more harmonious and thorough and lead to greater juror satisfaction with the deliberation, verdict, and jury experience than non-diverse juries); Marder, *supra* note 16, at 918 ("A key feature of the process view of the jury is that the jury should be as diverse as possible, and this feature also assists the jury in performing an interpretive role."); Marder, *supra* note 12, at 314-19 (describing the virtues of diverse juries).

## 2. The Structure of the Jury

The jury is structured so that it is well-suited to provide feedback to the other branches. During the trial, the jurors have no assigned tasks other than to attend the proceedings, to observe the evidence and the witnesses' demeanor, and to listen to the lawyers' arguments. Unlike the judge, they do not have to control the proceedings or to issue rulings. Their key task during the trial is to observe. In some courtrooms, jurors are permitted to take notes<sup>197</sup> and to ask questions<sup>198</sup> so that their powers of observation and understanding are enhanced.

The jury offers feedback that is the result of a deliberative process. Foremost, the jury is a collective body that reaches a decision only after it has deliberated. As a group, it can draw upon the recollections, assessments, and analyses of twelve individuals,<sup>199</sup> each of whom will view the case through the prism of his or her own background and life experiences.<sup>200</sup> Ideally, the differences among jurors enable them to challenge each other's assumptions and to correct each other's mistakes.<sup>201</sup> Although the jurors might view the case differently at the outset, they must deliberate until they reach a consensus or an impasse. In criminal cases in federal court<sup>202</sup> and in many state courts,<sup>203</sup> the

---

197. Juror note-taking, though still not permitted in all courtrooms, has become more prevalent in the past decade. As of 1988, according to an estimate by the Administrative Office of the U.S. Courts, "90 percent of the federal judges d[id] not permit jurors to take notes." SAUL KASSIN & LAWRENCE WRIGHTSMAN, *THE AMERICAN JURY ON TRIAL* 128 (1988). As of 1997, note-taking was described as "a widespread technique." *JURY TRIAL INNOVATIONS* 141 (G. Thomas Munsterman et al. eds., 1997). In most jurisdictions, the trial judge has discretion, provided by statute or rule, to permit jurors to take notes. *See id.* In jurisdictions in which the judge does not have that discretion, the parties can still stipulate to note-taking. *See id.*

198. *See, e.g.,* B. Michael Dann & George Logan III, *Jury Reform: The Arizona Experience*, 79 JUDICATURE 280, 281 (1996) (describing several structural changes, including jurors' submission of written questions to the judge, that were recommended by Arizona's committee to study its jury system).

199. *See* REID HASTIE ET AL., *INSIDE THE JURY* 236 (1983) ("The group memory advantage over the typical or even the exceptional individual is one of the major determinants of the superiority of the jury as a legal decision mechanism."); JAMES P. LEVINE, *JURIES AND POLITICS* 182 (1992) ("Remembering what was said is no small part of competent fact finding, and the collective memory of twelve jurors (over even six) is likely to be better than that of one individual."); Harry Kalven, *The Dignity of the Civil Jury*, 50 VA. L. REV. 1055, 1067 (1964) ("Different jurors remember, and make available to all, different items of the trial so that the jury as a group remembers far more than most of its members could as individuals.").

200. *See* Alan Schefflin & Jon Van Dyke, *Jury Nullification: The Contours of a Controversy*, LAW & CONTEMP. PROBS., Autumn 1980, at 51, 68 ("Jurors bring a variety of perspectives to their deliberations that enable[s] them to see beyond the single viewpoint of the judge.").

201. *See* *Ballew v. Georgia*, 435 U.S. 223, 233 (1978) ("When individual and group decisionmaking were compared, it was seen that groups performed better because prejudices of individuals were frequently counterbalanced . . ."); VALERIE P. HANS & NEIL VIDMAR, *JUDGING THE JURY* 50 (1986) ("The jury's heterogeneous makeup may also lessen the power of prejudice.").

202. *See* FED. R. CRIM. P. 31(a) ("The verdict shall be unanimous.").

verdict must be unanimous.

The deliberative process is central to the jury's feedback function. Any one juror can hold aberrational views (in spite of a voir dire process designed to winnow out such jurors) and cause the jury to reach an impasse and be declared a hung jury.<sup>204</sup> No individual juror's view determines a jury's verdict unless the other eleven jurors are persuaded to that point of view.<sup>205</sup> Assuming jurors come from diverse backgrounds, no matter how varied their views are initially, they must still reach the same point of view in the end if there is to be a unanimous verdict. Such diversity serves as a check on the jury. Only a verdict that has support from all of the jurors, even though they may come from very different walks of life and begin the deliberations with very different perspectives, will become the verdict of the jury. Thus, the deliberative process transforms the jury into a more reliable feedback mechanism than any one individual can provide.

The deliberative process, so central to the jury's feedback function, is protected from outside taint or influence. The jury deliberates in secret; no other individuals, including the judge, the bailiff, or the alternate jurors, are permitted to be present during the deliberations. In federal court, a federal statute prohibits jury deliberations from being taped or recorded.<sup>206</sup> Many state courts have similar provisions.<sup>207</sup> If the jury wishes to communicate with the judge, it can do so by way of a note sent through the bailiff. From the moment the jurors are impanelled, they are protected from communications with those outside the jury, including the parties, the press, and the attorneys. In some cases, particularly in high-profile cases that attract media attention, the jury is sequestered to reduce the chance that any outsiders might influence the jury's deliberations.

When the jury renders its verdict, it does so as a collective body, rather

---

203. See Marder, *supra* note 12, at 319 n.160 (indicating states that require unanimous verdicts in criminal cases).

204. *Id.* at 319.

205. Research has shown that the "[p]ressures to conform to the group are strong," and "[i]t is only when a minority juror has initial support, in the form of other jurors with similar views, that the probability that a juror will sway the majority or hang the jury improves." HANS & VIDMAR, *supra* note 201, at 110; see HARRY KALVEN, JR. & HANS ZEISEL, *THE AMERICAN JURY* 462 (1966); KASSIN & WRIGHTSMAN, *supra* note 197, at 182 ("The majority almost always wins."); Rita J. Simon, *Jury Nullification, or Prejudice and Ignorance in the Marion Barry Trial?*, 20 J. CRIM. JUST. 261, 263 (1992) ("There were no instances [in data from the University of Chicago Experimental Jury Project] in which one juror or even two held out against the other ten or eleven and then succeeded in persuading them to adopt their position.").

206. 18 U.S.C. § 1508 (1995) (making it illegal to knowingly record, listen to, or observe any grand or petit juries while they deliberate or vote).

207. See, e.g., CAL. PENAL CODE § 167 (West 1988); 705 ILL. COMP. STAT. 315/1-1 (1994); LA. REV. STAT. ANN. § 129.2 (WEST 1986); MASS. GEN. LAWS ch. 272, § 99A (1994); MICH. COMP. LAWS § 750.120b (1996); N.C. GEN. STAT. § 14-227.2 (1994); N.D. CENT. CODE § 12.1-09-05 (1997); 18 PA. CONS. STAT. § 5103 (1996); VA. CODE ANN. § 18.2-468 (Michie 1988).

than as disparate individuals. Although deliberations might have entailed much individual give-and-take, leading up to the verdict, once the verdict has been reached, the individual disagreements are put aside, and all that is presented to the parties, the public, and the other branches of government, is a single verdict. The verdict, announced in open court by the foreperson, is the group's collective decision. No individual juror shoulders responsibility for the verdict alone; it is a group effort. Although the individual jurors can be polled in open court after the announcement of the verdict,<sup>208</sup> they are simply asked whether they are in accord with the verdict and whether it represents their view. If the jury's feedback is to inform the other branches of government of broad disagreement with a law, its enforcement, or a presumed sentence, then it is important that the feedback represents the collective views of a group of citizens who have engaged in thorough deliberations.

Although the collective jury verdict, reached after careful deliberation, is a useful way for a group of citizens to give feedback to the other branches of government, the strongly-held views of a few individual jurors still have a role to play in this process. Should a jury be unable to reach a verdict, the jury can be declared a hung jury. Although the jury's task is to render a verdict, if it is unable to do so, then the views of individual jurors are respected. Agreement is not coerced.<sup>209</sup> The possibility of a hung jury represents an effort to balance the need for a group decision against the need for individuals to vote consistent with their own strongly-held views. If individual jurors are neither able to go along with the views of the other jurors nor able to persuade them to their point of view, then the judge, after urging the jury to try to reach a verdict,<sup>210</sup> can declare a hung jury.

The hung jury allows individual jurors to act in a way that is consistent with their personal views, even when they are unable to persuade others to share those views. Ideally, the hung jury is an infrequent occurrence. If too many

---

208. See FED. R. CRIM. P. 31(d) ("After a verdict is returned but before the jury is discharged, the court shall, on a party's request, or may on its own motion, poll the jurors individually.").

209. See KASSIN & WRIGHTSMAN, *supra* note 197, at 173-76 (distinguishing between persuading fellow jurors through "informational social influence" so that there is both "private acceptance" of and "public compliance" with the verdict versus coercing fellow jurors through "normative social influence" so that there is "public compliance" with but not "private acceptance" of the verdict, and encouraging the former rather than the latter).

210. Typically, the judge delivers an "Allen charge," which is "a sharp punch to the jury, reminding [the jurors] of the nature of their duty and the time and expense of a trial, and urging them to try again to reach a verdict." *United States v. Anderton*, 679 F.2d 1199, 1203 (5th Cir. 1982) (citations omitted). In Arizona, judges confronted with a jury that has reached an impasse can talk with the jury to see whether additional arguments by the attorneys would provide the jury with information it needs to reach a decision. See, e.g., Dann & Logan, *supra* note 198, at 280 (describing some of Arizona's more controversial reforms to its jury system, including having the judge and jury engage in a dialogue if the jury has reached an impasse). See generally B. Michael Dann, "Learning Lessons" and "Speaking Rights": Creating Educated and Democratic Juries, 68 IND. L.J. 1229, 1262-77 (1993) (urging judges to see if further dialogue would be helpful to juries that have reached an impasse in their deliberations).



juries were hung juries,<sup>211</sup> they would burden the justice system.<sup>212</sup> Yet, the hung jury plays an important role as a feedback mechanism. Though not delivering a view as widely held as an acquitting jury, a hung jury provides feedback to the other branches about the strongly-held views of a limited number of jurors. Although these jurors do not determine the verdict, their feedback can still play a role. If the number of hung juries increases, particularly in certain kinds of cases, the other branches should take notice. Meanwhile, these dissenting jurors do not determine the verdict; indeed, the case can be re-tried if the prosecutor so chooses.

### B. Limitations on the Jury's Role as Governor

Although acquitting juries, and to a lesser extent hung juries, provide feedback to the other branches, and therefore, play an essential governor-like role in a democracy, this role is nevertheless a limited one. It is not intended to usurp the roles of the other branches.

One way in which the jury's role is limited is that its verdict applies to only one case. Thus, a jury cannot change the law for the community at large; only the legislature can do that. A jury decides only a single case. If the jury reaches an aberrational decision—one that does not reflect the views of the wider community—then the harm from that aberrational jury verdict will not reach beyond the parties before it. If, on the other hand, the jury reaches a verdict that reflects the views of the community at large, and those views are at odds with the law, its enforcement, or its sentencing scheme, then presumably other juries will reach similar verdicts. After a pattern of such verdicts emerges, the other branches should take their cue from this response and reform the law or the way it is applied.<sup>213</sup>

---

211. Of course, there is debate over how many hung juries constitute "too many" hung juries. Los Angeles has been the site for such debate as well as for a study of its hung-jury rates. See Paula L. Hannaford-Agor et al., *Are Hung Juries a Problem?* (Sept. 30, 2002), available at [http://www.ncsconline.org/WC/Publications/Res\\_Juries\\_HungJuriesPub.pdf](http://www.ncsconline.org/WC/Publications/Res_Juries_HungJuriesPub.pdf). Although the study seeks to answer the question how many juries in Los Angeles and elsewhere end up as hung juries, the question whether that number is "too many" depends on where on the political spectrum one is situated.

212. Hans Zeisel has described the hung jury as a "treasured paradoxical phenomenon." Hans Zeisel, . . . *And Then There Were None: The Diminution of the Federal Jury*, 38 U. CHI. L. REV. 710, 719 (1971). The hung jury is "treasured because it represents the legal system's respect for the minority viewpoint that is held strongly enough to thwart the will of the majority," and it is paradoxical because the hung jury can only be tolerated in "moderation"—"too many hung juries would impede the effective functioning of the courts." *Id.* at 719 n.42.

213. Indeed, the other branches have taken their cue from juries in the past. For example, in England juries acquitted or found facts in a way to avoid capital punishment in certain cases until the creation of alternative sentencing schemes. See, e.g., THOMAS ANDREW GREEN, *VERDICT ACCORDING TO CONSCIENCE: PERSPECTIVES ON THE ENGLISH CRIMINAL TRIAL JURY 1200-1800*, at 159-60 (1985). In America, the legislature eventually took its cue from juries which had declined to find contributory negligence long before the legislature and judges had eliminated contributory negligence as a defense. See Stephen C. Yeazell, *The New Jury and the Ancient Jury Conflict*, 1990 U. CHI. LEGAL F. 87, 113.

The jury's verdict is intended to signal a problem with the existing law, but not to fix it. Fixing the law remains the task of the legislature, working in conjunction with the executive, and this is as it should be. The jury is not an effective policymaker over time, particularly when uniformity and consistency are required. The jury sees only the individual case and must rely on only the information that the parties choose to present. Therefore, the jury cannot take a big-picture perspective and balance competing needs, as a policymaker must do. Moreover, the jury cannot seek additional information that it believes would be useful to its decision, as a policymaker also can do. The jury, even in performing its governor-like role, is not a substitute for the legislature or the executive.

The jury, as governor, performs a limited, but quite critical, role. It allows ordinary citizens to express disagreement with the law, its enforcement, or its sentencing scheme, and it makes this feedback available to the other branches of government. The other branches can then respond to avert crisis. Without this official venue in which to be heard, ordinary citizens might have no other means of registering their disagreement but through riots or other forms of violence.

#### IV. NECESSARY STEPS

There are at least two steps that need to be taken if juries are to fulfil their governor-like role and provide feedback to the other branches of government. First, there needs to be a shift in the way the jury's role is conceived and described. Second, juries need to be informed more accurately of their role by the courts.

##### *A. The Need for a Change in Conception and Language*

One difficulty with the jury's governor-like role is that it is viewed as an expansion of the jury's traditional role. Judges instruct juries that their role is to find facts and apply the law, and nothing more.<sup>214</sup> Even if judges do not actually believe that the jury's role is quite so limited,<sup>215</sup> their public position, at least as they explain it to jurors, is that the jury's role is narrow and confined to fact-finding. As a result, any time the jury performs another role, judges fear

---

Jury verdicts led to new legislative schemes in other areas as well. *Id.* at 114 (describing jury-inspired transformations in the law of products liability and wrongful discharge).

214. See, e.g., 1 CALIFORNIA JURY INSTRUCTIONS, *supra* note 12, no. 1.00, at 10 (providing instruction that jurors must "apply the law as I [the judge] state to you, to the facts, as you determine them").

215. See, e.g., *CBS Reports: Enter the Jury Room*, *supra* note 52, (transcript at 49) (interviewing Judge Ryan, after he had watched a film of the jury deliberating in the case of Modesta Solano, over which he had presided, and having him acknowledge that he thought there might possibly be a benefit to the nullifying juror who votes consistent with his conscience).

that the jury is exceeding its proper scope.

There needs to be a change in how the jury's role is conceived. If the starting-point is that the jury is simply a fact-finder, then any other function will be viewed as an expansion of the jury's role. With an expansion, there is the concomitant fear that the jury is usurping other branches' proper roles. However, if the starting-point is that the jury's governor-like role is essential to a democracy because it provides feedback to other branches so that they can perform their respective roles more effectively, then when the jury plays this role, it is less likely to give rise to fears.

The language used to describe the jury's governor-like role contributes to whether the role is seen as legitimate or overreaching. If the jury is described as simply a fact-finder and the governor-like role is described as "nullification," in which the jury is flouting or disregarding the law, then it is not surprising that this is seen as a departure from the jury's proper role, and a departure with negative consequences. If juries flout the law, then they will be viewed with distrust.

Judges who have written about nullification contribute to this distrust of the jury. They use the term "nullification" and they conclude that it is not to be condoned, much less encouraged,<sup>216</sup> because it is likely to lead to "anarchy" and "chaos."<sup>217</sup> Interestingly, when officials, such as police or prosecutors, choose not to pursue a case, that decision is described as within their "discretion."<sup>218</sup> When state court judges<sup>219</sup> decide to give a lesser sentence,

---

216. See, e.g., *United States v. Thomas*, 116 F.3d 606, 614 (2d Cir. 1997) (explaining that the Second Circuit "categorically reject[ed] the idea that, in a society committed to the rule of law, jury nullification is desirable or that courts may permit it to occur when it is within their authority to prevent").

217. See, e.g., *United States v. Dougherty*, 473 F.2d 1113, 1133 (D.C. Cir. 1972) ("This so-called right of jury nullification is put forward in the name of liberty and democracy, but its explicit avowal risks the ultimate logic of anarchy."); Stephen J. Adler, *Courtroom Putsch? Jurors Should Reject Laws They Don't Like, Activist Group Argues*, WALL ST. J., Jan. 4, 1991, at A1 (quoting Federal Judge William Schwarzer, then Director of the Federal Judicial Center, who described nullification as producing "chaos and lawlessness"); Bruce Fein, *Judge, Jury . . . and the Sixth*, WASH. TIMES, Nov. 8, 1990, at G3 ("The jury is not a minidemocracy or a minilegislature. They are not to go back and do right as they see fit. That's anarchy. They are supposed to follow the law.") (quoting Judge Thomas Penfield Jackson, commenting on the jury verdict in the trial of former Washington, D.C. Mayor Marion Barry, in which he was acquitted of the most serious charges).

218. See MORTIMER R. KADISH & SANFORD H. KADISH, *DISCRETION TO DISOBEY* 73-76, 81-83, 85-91 (1973) (describing the ways in which those in official positions have discretion and can decide whether to pursue a case or not); Jon M. Van Dyke, *The Jury as a Political Institution*, 16 CATH. LAW. 224, 240 (1970) ("Whenever a criminal act occurs, the policeman investigating the matter has discretion whether to make an arrest. If an arrest is made, the prosecutor has discretion to bring the matter to court or not. The trial judge then has discretion to allow the matter to be brought into his court or not.").

219. The introduction of the *Federal Sentencing Guidelines* meant that federal judges no longer retained discretion in sentencing decisions. See, e.g., Terry J. Hatter, Jr., *Drugs and the Law: "War Games"*, 29 LOY. L.A. L. REV. 89, 90 (1995) ("[H]ow can one justify the so-called sentencing guidelines and mandatory minimums that effectively take the discretion from federal judges—those historically charged with the task of balancing the protection of society with the proper punishment of the convicted

that decision is also described as within their "discretion." However, when juries choose to acquit because of dissatisfaction with the law or its application, they are described as "nullifying," and this act is viewed as leading inexorably to "anarchy" and "chaos." It is difficult to account for the different ways in which these acts of discretion are viewed. Perhaps one reason that jurors' discretion is regarded negatively is that jurors are ordinary citizens who assume their role on a temporary basis whereas these other actors are professionals who assume their positions permanently. Police and prosecutors are presumed to be competent because they are professionals; jurors do not have the benefit of that presumption.

My argument is that both the starting-point for conceptualizing the jury's role and the language used to describe that role matter. In other contexts, psychologists and law professors have written about the importance of "framing," which refers "to the fact that the very same choice can be perceived as a gain or a loss based purely on its formal presentation."<sup>220</sup> In one study, the framing of instructions for pain and suffering damages—either from a "seller's" perspective (how much a plaintiff should be paid to have subjected herself to the injury in the first place) or from a "making whole" perspective (how much a plaintiff should be paid to be made whole after the injury has occurred)—"matter[s] a great deal."<sup>221</sup> The study found that damage awards were likely to be twice as high when participants were instructed to approach the case from the former rather than from the latter perspective, even though the injury was the same in both instances.<sup>222</sup> Perhaps there is a similar effect with the jury's role. If the starting-point for describing the jury's governor-like role includes terms such as "nullification," "lawlessness," and causing "chaos" and "anarchy," as has been used by several judges,<sup>223</sup> then when the jury plays this role it will be judged in a negative light. If, however, the role is understood as integral to a democracy, and the terms used to describe it include "regulator," "governor," providing "feedback," and "signalling," then when the same institution performs this role, it will be perceived more favorably.

---

criminal?"); Jack B. Weinstein, *A Trial Judge's Second Impression of the Federal Sentencing Guidelines*, 66 S. CAL. L. REV. 357, 364 (1992) ("Whereas sentencing once called for hours spent reflecting on the offense and the person, we judges are becoming rubber-stamp bureaucrats. When we come to see ourselves as judicial accountants, freed from the awful responsibility of imposing a sentence, we will have abdicated our judicial role entirely."). The *Federal Sentencing Guidelines* has led to discretion in sentencing effectively residing with prosecutors who decide how a crime is to be charged.

220. Edward J. McCaffery et al., *Framing the Jury: Cognitive Perspectives on Pain and Suffering Awards*, 81 VA. L. REV. 1341, 1353 (1995).

221. *Id.* at 1372, 1342.

222. *Id.* at 1358, 1372, 1388, 1408.

223. *See supra* note 217.

*B. The Need To Inform Juries of Their Role, or Others Will*

Currently, courts do not inform juries of their governor-like role; instead, they tell juries that their job is simply to find the facts and to apply the law as the judge gives it to them.<sup>224</sup> When juries choose to play a governor-like function—signalling to other branches that the law or sentence seems too harsh or the enforcement too unfair—they come to this view on their own, *sua sponte*. Judges have said that this is as it should be because if they told juries that they played a broader role, then juries would either abuse that new-found power or feel overwhelmed by it.<sup>225</sup> I have argued before that unless courts educate juries about the full panoply of their powers, other groups or individuals will do so, and will do so for their own purposes.<sup>226</sup> They will do so in less nuanced language than courts would choose. Here, I briefly sketch some of the "educational" efforts undertaken by others, particularly by those who disagree with the drug laws, their sentences, and their enforcement. Their efforts should serve as a catalyst to judges to alter their stance and to instruct juries about their governor-like role.

1. Fully Informed Jury Association

One group committed to informing jurors that they do not have to follow the laws is the Fully Informed Jury Association (FIJA). FIJA, a Montana-based group with at least 6,000 members,<sup>227</sup> tries to reach prospective jurors through a variety of grassroots methods, from publishing a newspaper,<sup>228</sup> handbook,<sup>229</sup> and catalogue and maintaining a Web site<sup>230</sup> to distributing leaflets outside of

---

224. See *supra* note 12 (providing California's pattern jury instruction on the jury's role as fact-finder).

225. See *Dougherty*, 473 F.2d at 1136-37.

226. Marder, *supra* note 16, at 937-38, 942-43.

227. Biskupic, *supra* note 10, at G1 (noting in 1999 that FIJA "claim[ed] 6,000 devotees nationwide who help[ed] spread the word—through the Internet, mass mailings and courthouse leafletting—that jurors should act on their own morality").

228. See generally FIJA ACTIVIST.

229. THE FULLY INFORMED JURY ASS'N, JURORS' HANDBOOK: A CITIZEN[']S GUIDE TO JURY DUTY, at <http://www.fija.org/juror-handbook.htm> (last visited Nov. 4, 2002) ("YOU, as a juror armed with the knowledge of the purpose of a jury trial, and the knowledge of what your Rights, powers, and duties really are, can with your single vote of not guilty nullify or invalidate any law involved in that case.").

230. According to FIJA's Web site, FIJA "was founded in 1989 in Helmsville, Montana by Larry Dodge and Don Doig" and is "dedicated to education of all Americans about their rights, powers and responsibilities as trial jurors." *The Fully Informed Jury Association (FIJA)*, at <http://www.fija.org/fijafact.htm> (last visited Nov. 4, 2002). In particular, "FIJA believes that the jury is not only a dispenser of justice for the accused, but also a crucial check and balance in our system of government." *Id.*

the courthouse door.<sup>231</sup> FIJA has a largely libertarian bent,<sup>232</sup> with its members opposing laws that prohibit drugs and regulate the use of guns, seat-belts, and motorcycle helmets.<sup>233</sup> FIJA not only informs prospective jurors of their power to oppose laws, but also advises them that they might have to lie about this knowledge during voir dire if they want to be selected for a jury.<sup>234</sup>

In some extreme cases, such as *Turney v. Alaska*,<sup>235</sup> FIJA members have gone too far in their efforts to inform jurors of their power and have violated state statutes. Turney, a FIJA member with a propensity for stationing himself near the Fairbanks courthouse and using signs, bullhorns, and other techniques to inform prospective jurors of their nullification power, created sufficient disturbance and noise as to constitute disorderly conduct.<sup>236</sup> During the jury selection and trial of Merle Hall, a friend, Turney communicated both with prospective, and eventually impanelled, jurors.<sup>237</sup> In particular, he advertised the FIJA hotline, 1-800-Tel-Jury, which informed callers of their powers as jurors and advised them that courts would provide them with a much more limited description of their role.<sup>238</sup> The jury, including several jurors who had switched their votes after contacting the FIJA hotline, eventually deadlocked and the judge declared a mistrial.<sup>239</sup> Turney was indicted for jury tampering and criminal trespass.<sup>240</sup>

Although Turney's case may be extreme, FIJA's efforts to inform prospective jurors of their nullification powers extend to many states<sup>241</sup> and

231. See, e.g., Thom Marshall, *Separating Jurors From Their Peers*, HOUSTON CHRON., Mar. 3, 2000, at A33 ("[M]any jurors have joined grass-roots movements such as the Fully Informed Jury Association . . . and in recent years have helped to distribute millions of brochures 'informing potential jurors of their power to judge the law.'") (quoting criminal defense attorney Clay Conrad).

232. Joe Lambe, *Bill Would Let Juries Decide Law in Cases; Legal Establishment Reacts to Measure with Shock, Dread*, KAN. CITY STAR, Apr. 8, 1996, at A1 ("Doug Doig, the national coordinator and co-founder [of FIJA] . . . said . . . he is a Libertarian. . . . Libertarians want to reduce needless laws, he said, such as drug laws and others that involve victimless crimes.").

233. See Curriden, *supra* note 178, at 19A ("Believers come in all political stripes. Some may support the legalization of drugs or oppose gun-control, seat-belt or motorcycle-helmet laws.").

234. Biskupic, *supra* note 10, at G1 ("[Larry] Dodge urges callers to his [FIJA] hot line not to reveal any ideological bent if they are called to serve. 'Lying is sometimes the right thing to do,' he says, 'because judges shouldn't be asking prying questions in the first place.'").

235. 936 P.2d 533 (Alaska 1997).

236. *Turney v. Alaska*, 922 P.2d 283, 285 (Alaska Ct. App. 1996) (upholding Turney's conviction for disorderly conduct, but reversing his conviction for trespass).

237. *Turney*, 936 P.2d at 536; Brief for the State of Alaska at 3-6, *Turney v. Alaska*, 936 P.2d 533 (Alaska 1997) (No. S-6932).

238. Brief for the State of Alaska at 4-5, *Turney* (No. S-6932).

239. *Turney*, 936 P.2d at 537.

240. *Id.* at 538.

241. See Erick J. Haynie, *Comment: Populism, Free Speech, and the Rule of Law: The "Fully*

include a variety of methods, such as leaflets, billboards, merchandise, and the Internet, to reach many prospective jurors. FIJA also has conducted an extensive lobbying effort so that a number of state legislatures have considered passage of a statute requiring jurors to be informed of their power "to judge the law as well as the evidence, and to vote on the verdict according to conscience."<sup>242</sup> To date, no state has passed such a statute.<sup>243</sup> FIJA has also circulated petitions for ballot initiatives in Arkansas, California, Colorado, Florida, Idaho, Montana, Utah, Washington,<sup>244</sup> and most recently in South Dakota.<sup>245</sup> FIJA's lobbying efforts have been unsuccessful thus far, but the organization has undoubtedly informed legislators and the public about nullification in the process. Although FIJA's members, such as Turney, have argued that they have a First Amendment right to express their political message,<sup>246</sup> their efforts are constrained by states' jury-tampering statutes, by a defendant's Sixth Amendment right to a fair trial, and by a court's supervisory powers to maintain order in courtrooms and courthouses.

FIJA's activities should prompt courts to change their current approach, which assumes juror ignorance as to the jury's broad role in a democracy. As a growing number of prospective jurors enter the courthouse with information about the jury's broad power, courts should counter with their own, more complete, balanced instruction. Otherwise, jurors will either believe that courts are deceiving them or feel confused after having received conflicting information. As one commentator noted,

With the rise of FIJA, judges are no longer the sole gate keepers of that secret and powerful message. Consequently, as the FIJA movement continues to grow it will become necessary for the

---

*Informed" Jury Movement and Its Implications*, 88 J. CRIM. L. & CRIMINOLOGY 343, 350 (1997) ("With outposts in over forty states, FIJA advocates picket literally hundreds of criminal cases every year and distribute hundreds of thousands of pamphlets to jurors and other courthouse passersby.") (footnotes omitted).

242. Lambe, *supra* note 232, at A1 (quoting bill). As of 1991, FIJA had persuaded legislators in Alaska, Arizona, Georgia, Louisiana, Massachusetts, New York, Oklahoma, Tennessee, and Wyoming to introduce bills that would inform jurors of their power to nullify. See Alan W. Schefflin & Jon M. Van Dyke, *Merciful Juries: The Resilience of Jury Nullification*, 48 WASH. & LEE L. REV. 165, 177 (1991). In 1994, FIJA's proposal to inform jurors of nullification was part of a bill that reached the Iowa House floor. See Frank Santiago, *A Red-Hot Subject for Judges, Lawyers*, DES MOINES REG., Dec. 17, 1995, at 1. "Similar bills have appeared in 25 states since 1991." Lambe, *supra* note 232, at A1.

243. The bills were ultimately unsuccessful: "One failed [in 1996] in Kansas. One passed the Oklahoma House [in 1995] but died in the Senate. Others have passed the Arizona Senate and Legislative committees in Utah, Montana and Iowa before failing in those states." Lambe, *supra* note 232, at A1.

244. See Schefflin & Van Dyke, *supra* note 242, at 178.

245. See, e.g., Adam Liptak, *A State Weighs Allowing Juries To Judge Laws*, N.Y. TIMES, Sept. 22, 2002, at A1 (describing South Dakota's Amendment A which, if passed, would add an amendment to the state's constitution requiring jurors to be informed of their power to nullify).

246. See, e.g., Turney, 936 P.2d at 533, 538-41.

jurisdictions to develop new approaches to the nullification problem that are more mindful of juror awareness of jury nullification.<sup>247</sup>

## 2. Butler's Call for Race-Based Nullification

Paul Butler, an African-American law professor, has advocated that African-American jurors use their power to nullify in the case of African-American defendants charged with non-violent, victimless crimes,<sup>248</sup> which, for the most part, are violations of the drug laws.<sup>249</sup> He has disseminated his ideas through articles in law reviews<sup>250</sup> and newspapers<sup>251</sup> and in interviews on talk shows and other broadcasts.<sup>252</sup> In his article in *The Yale Law Journal*,<sup>253</sup> he also suggested that the church would provide another vehicle by which to reach the African-American community and to advocate race-based nullification.<sup>254</sup>

Butler's main justification for his proposal, and the reason that he directed it to African-American jurors and not to jurors of all races, is that he believes that African-American men have been, and are still being, treated unfairly by the criminal justice system.<sup>255</sup> In his view, it is a racist system<sup>256</sup> and one that keeps too many African-American men in prison rather than in their

247. Haynie, *supra* note 241, at 364.

248. Butler, *supra* note 183, at 715 ("Finally, in cases involving nonviolent, *malum prohibitum* offenses, including 'victimless' crimes like narcotics offenses, there should be a presumption in favor of nullification.").

249. See *ABC Nightline: America in Black and White (Part I)* (ABC television broadcast, Aug. 26, 1997) (transcript # 97082601-j07 on file with author) [hereinafter *ABC Nightline*] ("[T]he drug laws are enforced in the United States in a racially discriminatory way.") (quoting Professor Paul Butler); *id.* ("I don't think that jurors should support laws that are unjust. And, unfortunately, the way that our drug laws are prosecuted, especially drug possession laws, is unjust. African-Americans are selectively prosecuted.") (quoting Professor Butler).

250. See, e.g., Butler, *supra* note 183, at 677.

251. See Paul Butler, *Black Jurors: Right to Acquit? (Jury Nullification)*, HARPER'S MAG., Dec. 1, 1995, at 11 (providing an abridged version of the *Yale Law Journal* article); *Crime and Punishment? Jury Nullification Is a Clear Signal That Blacks Are Losing Confidence in the Criminal Justice System*, CHI. TRIB., Nov. 15, 1995, at 21 ("Paul Butler . . . writes in the December issue of *The Yale Law Journal* (excerpted in the December issue of *Harper's*) that it often is entirely appropriate for black jurors to take race into account."); Jeffrey Rosen, *Journey to Justice*, NEW REPUBLIC, Dec. 9, 1996, at 27 (book reviews) ("Accepting the idea of legal instrumentalism—that blacks should use power, when they have it, to serve the interests of the black community—Butler called on African American jurors to use their power to free guilty black defendants accused of nonviolent drug crimes.").

252. See *ABC Nightline*, *supra* note 249 (interviewing Butler and examining his views on jury nullification).

253. Butler, *supra* note 183, at 677.

254. *Id.* at 723.

255. *Id.* at 690-91.

256. *Id.* at 692, 693, 695-96 (describing the criminal justice system as racist).



community, where they are sorely needed.<sup>257</sup> Because African Americans are in a minority, they cannot hope to change the criminal justice system through electoral politics.<sup>258</sup> Instead, they need to make use of the jury, the one forum that does not require a majority to affect change.<sup>259</sup> A single juror voting to acquit can produce a hung jury; several persuasive jurors may be able to move the rest of the jury to reach a unanimous verdict of acquittal.

Butler advocated that African-American jurors use the power of the jury box to decide whether the African-American community is better served by acquitting an African-American defendant even if he has committed the crime charged.<sup>260</sup> Butler trusts the judgment of African-American jurors to make this individualized determination, though he did provide some parameters. He suggested that African-American jurors resort to the jury's power to nullify in cases in which an African-American defendant has committed a victimless, nonviolent crime.<sup>261</sup> Although he acknowledged that this category would largely consist of drug crimes, there might be other crimes that are encompassed by it as well.

If Butler is successful in broadly advertising his proposal, then it behooves courts to counter his message with an instruction to all jurors on the full range of the jury's powers. Without court instructions, African-American jurors will enter the jury room with information that jurors of other races will not have. In addition, African-American jurors will view the nullification power of the jury only from the perspective of race, whereas the court could place the power in the broader context of the jury's role in a democratic system.

I have suggested elsewhere<sup>262</sup> that a middle-ground approach is for courts to inform jurors of the jury's broad power, but to do so in general terms.<sup>263</sup> Courts also could explain to juries that their broad powers should be exercised only in extraordinary cases. In my view, this approach strikes the proper balance: it allows courts to be more honest with jurors than they currently are, yet it enables courts to counsel juries that this power is to be exercised only in

---

257. *Id.* at 679.

258. *See id.* at 709-12 ("African-Americans should embrace the antidemocratic nature of jury nullification because it provides them with the power to determine justice in a way that majority rule does not.").

259. *See* Butler, *supra* note 183, at 709-12 (describing how other avenues for democratic change are closed to African Americans, leaving the jury as the only vehicle available).

260. *Id.* at 714.

261. *Id.* at 715.

262. Marder, *supra* note 16, at 956-58.

263. Courts could borrow language from part of an instruction suggested by John Adams: "It is not only [a juror's] right, but his [or her] duty . . . to find the verdict according to his [or her] own best understanding, judgment and conscience." Mark DeWolfe Howe, *Juries as Judges of Criminal Law*, 52 HARV. L. REV. 582, 605 (1939) (quoting 2 LIFE AND WORKS OF JOHN ADAMS 253-55 (C.F. Adams ed., 1856)).

rare cases. If courts fail to educate jurors as to the role of the jury in a democracy, then jurors may later decide that the court has deceived them. For example, if courts continue to instruct jurors that they have no choice but to find the facts and apply the law as given to them by the judge,<sup>264</sup> they are likely to feel resentment when they discover after their jury service that they had other options. In addition, if they are told by activists that they have extensive power, and are told by the judge that their power is limited to finding the facts, they are likely to feel both confused during deliberations and resentful afterward. Moreover, the message of the activists is less benign than that jurors have broad power; it is also that they should lie about their knowledge of this power, as well as about any fixed views they have about particular laws in order to be selected to serve on a specific jury.<sup>265</sup>

## V. ENCOURAGING SIGNS

There are at least two encouraging signs that the jury's role as governor in a democracy is gaining recognition. The first is that other branches are responding to patterns of jury acquittals by changing the laws, their enforcement, or their sentencing schemes. The second is that juries are being used in innovative ways to provide judges with the common sense of the community even in cases that do not require juries.

### *A. Other Branches' Responses*

In each of the examples described in Part II, other branches have taken steps to respond to jury acquittals and hung juries. In the case of California's three-strikes law, the state's citizenry, acting in its law-making capacity, passed Proposition 36, a voter-backed initiative that created an alternative to incarceration for drug offenders.<sup>266</sup> Proposition 36 allows judges to send some first- or second-time drug offenders to drug treatment programs rather than to prison.<sup>267</sup> It creates an alternative to the harsh penalties imposed on drug offenders by the three-strikes law. According to one report, voters in other states, including Florida, Ohio, and Michigan, are likely to see similar initiatives on their ballots in the next election.<sup>268</sup>

---

264. See *supra* note 12 (providing California instruction).

265. See *supra* note 234 (describing FJA founder's belief that jurors should lie in order to be selected); Jury Reform: Making Juries Work, Conference at the University of Michigan Law School (Mar. 1998) (including comments by Paul Butler acknowledging that jurors might have to lie during voir dire and not reveal their intent to engage in race-based nullification).

266. See, e.g., Butterfield, *supra* note 99, at A6.

267. *Id.*

268. *Id.*

Even before the passage of Proposition 36, which was a state-wide referendum, prosecutors in certain parts of the state had already modified their practices in response to jury acquittals and hung juries. As noted earlier,<sup>269</sup> prosecutors in San Francisco did not bring drug offenses as second- or third-strike cases because they knew such efforts would be rebuffed by San Francisco juries. Similarly, in Los Angeles, prosecutors, attuned to jury responses, have been selective about which cases to pursue as second- and third-strike cases.<sup>270</sup>

The legislative and executive branches in New York also have begun to respond to juries' rejection of the harsh mandatory sentences imposed by the Rockefeller drug laws and to their resistance to the discriminatory enforcement of these laws, as indicated by the Bronx juries. New York's legislature and governor are struggling to create a bill that would reduce the harsh mandatory sentences for drug offenders. Although both the legislature and executive still disagree about the terms of the bill, "many on both sides of the issue predict that a compromise bill will pass."<sup>271</sup>

### B. Advisory Juries

Advisory juries can provide judges with the common-sense judgment of the community even in certain civil cases when the parties have no right to a jury trial. A recent example that received attention in the Chicago press involved Kathryn "Kate" Kaniff, who was suspected of carrying drugs and was strip-searched at Chicago's O'Hare International Airport.<sup>272</sup> Kaniff, returning from a four-day camping trip in Jamaica, triggered a response from the drug-sniffing dogs and fit several characteristics of the drug-courier profile.<sup>273</sup> Inspectors at O'Hare patted down Kaniff, strip-searched her, and sent her to a hospital for x-rays.<sup>274</sup> No drugs were found.<sup>275</sup> Kaniff sued the U.S. Customs Service inspectors under the Federal Tort Claims Act (FTCA),<sup>276</sup> contending that they intentionally inflicted emotional distress.

---

269. See *supra* text accompanying notes 68-77.

270. See *supra* text accompanying notes 78-82.

271. Butterfield, *supra* note 104, at A1.

272. See, e.g., Matt O'Connor, *Federal Jury Backs Woman Strip-Searches at O'Hare*, CHI. TRIB., Aug. 22, 2001, § 2, at 1; Steve Warmbir & Julie Patel, *Ex-Chicago Woman Seeks \$2 Million; Just Doing Our Job, Says Customs Service*, CHI. SUN-TIMES, Aug. 14, 2001, at 12; Steve Warmbir, *These People Intended To Hurt Me*, CHI. SUN-TIMES, Aug. 22, 2001, at 1.

273. Kaniff bought her ticket with cash, travelled to a drug-source city, made several inconsistent statements, and had not made arrangements beforehand to be picked up at the airport. Warmbir, *supra* note 272, at 1.

274. *Id.*

275. *Id.*

276. 28 U.S.C. §§ 2671-2680 (1989 & Supp. 2002).

Although there is no right to a jury trial under the FTCA, U.S. District Court Judge Rebecca Pallmeyer, to whom the case was assigned, tried the case before an advisory jury.<sup>277</sup> The advisory jury found for Kaniff on her claims, including the following: the inspectors lacked reasonable suspicion to conduct a strip-search; their conduct was willful and wanton; they subjected Kaniff to false imprisonment; and they intentionally caused her emotional distress.<sup>278</sup> The jury awarded Kaniff \$129,750 in damages.<sup>279</sup> Although the advisory jury's verdict and damage award are not binding on the judge, which the jury did not know until after it had rendered both, the judge told the jury that "she would consider their verdict 'very seriously' in reaching her own decision."<sup>280</sup>

Judge Pallmeyer's use of an advisory jury in this case enabled her to gauge the sense of the community even when the parties were not entitled to a jury trial. On one level, the jury was simply finding facts and applying the law, and not playing a governor-like role; on another level, this advisory jury was convened to provide some indication of community judgment in a case in which the plaintiff had charged government officials with government overreaching. In this case, the advisory jury's verdict was not a judgment against the drug laws, but rather, a criticism of how they had been enforced. The judgment of this jury was that officials had gone too far in their efforts to enforce the drug laws, and in the process, had infringed on the rights of a private citizen. The jurors could readily put themselves in the place of Kathryn Kaniff, a traveller arriving at O'Hare International Airport, who was questioned by customs officials, and eventually patted down, strip-searched, and x-rayed for drugs, even though there seemed to be little basis for doing so. According to one male juror, the women on the jury thought the strip search was unduly intrusive.<sup>281</sup>

This use of an advisory jury can be lauded as an example of the jury performing a governor-like role—being asked for and giving its sense of the community's judgment about the laws or their enforcement to the judiciary—even when a jury is not actually required. One limitation to an advisory jury is

---

277. Rule 39 of *The Federal Rules of Civil Procedure* provides in relevant part:

In all actions not triable of right by a jury the court upon motion or of its own initiative may try any issue with an advisory jury, or, except in actions against the United States when a statute of the United States provides for trial without a jury, the court, with the consent of both parties, may order a trial with a jury whose verdict has the same effect as if trial by jury had been a matter of right.

FED. R. CIV. P. 39(c); see *Kaniff v. United States*, No. 99C 3882, 2002 U.S. Dist. LEXIS 3831, at \*1, \*2 (N.D. Ill. Mar. 8, 2002).

278. O'Connor, *supra* note 272, at 1.

279. *Id.*

280. *Id.* (quoting Judge Pallmeyer).

281. *Id.* (interviewing one juror, Roger Smith, Sr., who described the women on the panel as "upset that inspectors made Kathryn 'Kate' Kaniff strip and bend over to see whether she had hidden narcotics in her body").

that the judge need not follow its verdict,<sup>282</sup> which could reduce the pressure on other branches to respond. However, if advisory jury after advisory jury decided cases of the same type, such as the type that Kaniff's jury decided, in the same way, other branches are likely to respond to the advisory juries' non-binding, but politically meaningful, verdicts in spite of the course taken by judges.

## VI. CONCLUSION

The jury, like the governor in the steam engine, provides essential feedback to the other branches of government. It signals to the other branches when there is growing dissatisfaction with the laws, their enforcement, or their sentencing schemes, and when there is a need for the other branches to modify them. The jury, acting in its role as governor, does not usurp the other branches' functions; rather, it merely signals to the other branches that there is a need for them to act.

In the three examples that I have focused on there has been a pattern of jury acquittals or hung juries that has led the other branches of government to respond. Juries' responses to California's three-strikes law as applied to drug offenders have led to changes in prosecutorial practice as well as to the passage of Proposition 36, which provides a drug treatment alternative to incarceration for drug offenders. Juries' responses to New York's Rockefeller drug laws have led to efforts by the legislature and executive to modify the laws, and in particular, to make the sentences less severe. The Bronx juries' responses have contributed to these reform efforts; however, the legislature and governor have not yet addressed the way in which the drug laws are enforced against minorities.

The jury's governor-like role may seem subversive to those who view the jury simply as a fact-finder or who remain suspicious of a governmental institution consisting of ordinary citizens. It is nevertheless essential that courts recognize the jury as serving this governor-like role in a democracy, that they describe this role in positive terms, and that they inform juries of their broad role in carefully drafted instructions. I have tried to show that the jury already performs this governor-like role as a descriptive matter; even more important, I have tried to make the case that the jury ought to perform this role as a prescriptive matter, that it is well-suited to do so, and that it is incumbent upon courts to instruct juries as to this role before activists take this mission as their own.

---

282. Indeed, Judge Pallmeyer did not rule in a manner consistent with the jury's verdict in this case. See *Kaniff*, 2002 U.S. Dist. LEXIS 3831, at \* 2 ("[T]he court respectfully declines to follow the advisory jury's verdict here.").