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February 1999

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#### Recommended Citation

Nancy S. Marder, *The Interplay of Race and False Claims of Jury Nullification*, 32 U. Mich. J.L. Reform 285 (1999).

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## THE INTERPLAY OF RACE AND FALSE CLAIMS OF JURY NULLIFICATION

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Nancy S. Marder\*

*After the verdicts in the O.J. Simpson and Stacey Koon/Laurence Powell cases, many in the press explained the juries' acquittals as instances of jury nullification. However these were unlikely to have been instances of nullification, particularly because the jurors explained that their verdicts were based on reasonable doubt. One motivation for these false claims of jury nullification was the homogeneity of the juries—a largely African-American jury in the case of Simpson and a largely white jury in the case of Koon/Powell. Nullification became the term by which press and public attempted to discredit verdicts rendered by juries they distrusted. A false claim of nullification could also be used, as with the Simpson case, to perpetuate racial stereotypes. One step toward reducing false claims of nullification and their concomitant harms is to encourage diverse juries.*

### INTRODUCTION

In two recent high-profile cases, the criminal trial of O.J. Simpson for the murders of Nicole Brown Simpson and Ron Goldman<sup>1</sup> and the criminal trial of police officers Stacey Koon and Laurence Powell for the beating of motorist Rodney King,<sup>2</sup> many in the press and public labelled these verdicts as jury nullification.<sup>3</sup> Although they might have disagreed with these verdicts and harbored suspicions about the largely homogeneous juries that rendered them, it is unclear whether the verdicts really were instances of jury nullification.

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

2. See *People v. Powell*, No. BA035498 (Cal. Super. Ct. L.A. County 1991); Richard A. Serrano, *All 4 Acquitted in King Beating*, L.A. TIMES, Apr. 30, 1992, at A1.

3. See discussion *infra* Parts I.A.1, I.B.1.

Jury nullification occurs when jurors choose not to follow the law as it is given to them by the judge.<sup>4</sup> The jurors in these two cases claimed to be following the law. In a criminal case,<sup>5</sup> nullification occurs when the jury acquits a defendant even though it believes the defendant is guilty under the stated legal standard. In post-verdict interviews of the jurors in these two cases, however, many explained that they had reasonable doubt, and therefore, that the law obligated them to vote to acquit.<sup>6</sup> Even if the jurors were mistaken in their reasonable doubts, mistake and nullification are not synonymous, so one question is: Why did so many members of the press and public conclude that these juries had nullified? A second question, and the one I will consider first, is why false claims of nullification should be cause for concern.

False claims of nullification contribute to a sense that nullification happens frequently, and therefore is a problem that needs to be fixed. Judges and legislatures then feel the need to step in and figure out how to limit juries' opportunities to engage in nullification,<sup>7</sup> which usually results in limitations on jury power.<sup>8</sup> False claims of nullification can be used to undermine a verdict by questioning its legitimacy. Even more insidiously, false claims can be used to cast aspersions on the integrity and competence of the jury that rendered the verdict. In the Simpson case, false claims were used to perpetuate racial stereotypes about a largely African-American jury.<sup>9</sup>

It is my contention that false claims of nullification feed on homogeneous juries, and thus, one way to guard against false claims is to strive for diverse juries. When jurors are drawn from different backgrounds, the jury is less likely to be suspected of group partiality or animosity, and its verdict is more likely to be accepted. An array of other benefits also flow from diverse juries—from jurors who can evaluate the evidence from different perspectives to jurors who are likely to engage in thorough and rigorous deliberations. With much to gain from diverse juries and much to lose by allowing false claims of nullification to persist, reform efforts should be directed toward encouraging diverse juries.

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4. For a detailed definition of nullification and a delineation of different types of nullification, see Nancy S. Marder, *The Myth of the Nullifying Jury*, 93 NW. U. L. REV. (forthcoming Fall 1999) [hereinafter Marder, *Myth*].

5. Theoretically, nullification can occur in a civil or criminal case. *See id.*

6. *See* discussion *infra* Parts I.A.3.a–b, I.B.3.a–b (discussing ways in which both the Simpson verdict and the Koon/Powell verdicts could be seen as based on reasonable doubt or honest mistake).

7. *See* discussion *infra* Part II.C.1–2.

8. *See id.*

9. *See* discussion *infra* Part II.A.

I begin, in Part I, by describing the press coverage of the Simpson and Koon/Powell verdicts, and I explain why these verdicts were unlikely to have been instances of nullification. In Part II, I explore the dangers posed by false claims of nullification. Finally, in Part III, I identify the diverse jury as the strongest defense against such false claims, but I recognize that there are barriers to achieving this goal fully.

## I. TWO EXAMPLES OF FALSE CLAIMS OF NULLIFICATION

In the Simpson and Koon/Powell verdicts, a common explanation for the acquittals was jury nullification. Members of the press gave various reasons why they thought the cases were examples of nullification, but the underlying reason was that they disagreed with the verdicts. Although many in the press labelled these verdicts as nullification, there are other reasons, including ones given by the jurors, that suggest that these verdicts were not based on jury nullification.

### A. *O.J. Simpson Verdict*

Former football star O.J. Simpson was tried for the murders of his ex-wife Nicole Brown Simpson and her friend Ron Goldman<sup>10</sup> in what was described as “the trial of the century.”<sup>11</sup> Simpson was acquitted by a jury consisting of eight African-American women, one African-American man, two white women, and one Latino man.<sup>12</sup> As a result of the acquittal in this highly-publicized case, many members of the public were introduced to a new phrase: jury nullification. As one columnist remarked, prior to this case “‘jury nullification’ was just another obscure little doctrine that hardly anyone but lawyers cared about. No more. Barber shops and

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

11. Robert Marquand & Daniel B. Wood, *Lessons Drawn from Simpson in Black, White*, CHRISTIAN SCI. MONITOR, Oct. 5, 1995, at 1 (describing three lessons to be drawn from this “trial of the century”).

12. See Jeffrey Rosen, *The Bloods and the Crips: O.J. Simpson, Critical Race Theory, the Law, and the Triumph of Color in America*, NEW REPUBLIC, Dec. 9, 1996, at 27, 36 (describing the jury’s composition); Charles E. Williams, *George Will and the Incompetent O.J. Simpson Jury*, WASH. AFRO-AM., Dec. 9, 1995, at A5.

beauty parlors everywhere are all abuzz with talk of 'jury nullification,' whether they call it by its proper name or not."<sup>13</sup>

1. *Press Explanations for the Verdict*—Journalists and commentators attributed the Simpson verdict to jury nullification for a number of different reasons.<sup>14</sup> One writer was so convinced that Simpson had to be guilty that even before the verdict was reached that writer concluded that an acquittal could only be the result of jury nullification.<sup>15</sup> After the verdict, the press, often citing experts, explained that for the jury to reach the verdict that it did, in the face of so much evidence and after so little deliberation, the jury must have engaged in nullification.<sup>16</sup> Nullification was the explanation for why jurors needed so little time to reach a verdict because they were prepared to "disregard the facts of a case."<sup>17</sup> Some journalists suggested that the jurors engaged in nullification because they were guided by emotion, rather than reason.<sup>18</sup> Los Angeles District Attorney Gil Garcetti reinforced this view when he de-

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13. Clarence Page, *O.J. Verdict Rekindles an Old Jury Debate*, CINCINNATI POST, Nov. 16, 1995, at 21A, available in 1995 WL 9997665; see also *All Things Considered: Simpson Case Focuses Attention on Jury Nullification* (NPR radio broadcast, Oct. 16, 1995), available in 1995 WL 9892228 [hereinafter *All Things Considered: Simpson Case*] ("The acquittal of O.J. Simpson has renewed interest in the legal concept of jury nullification."); Marquand & Wood, *supra* note 11, at 1 ("Jury nullification" is the legal buzzword of the hour."); Michael Paul Williams, *Jury Nullification Question Is Fallout of Simpson Trial*, RICH. TIMES-DISPATCH, June 3, 1996, at B1, available in 1996 WL 2301517 ("Jury nullification became part of our national vocabulary after the verdict in the O.J. Simpson trial.").

14. Certainly, not all members of the press, or even of the mainstream press, concluded that the jury engaged in nullification or misused the term. However, many did, see *infra* notes 15–30 and accompanying text, and it is their use of the term that I will be describing.

15. See *'Nullification' Becomes Factor in Simpson Case*, ARIZ. REPUBLIC, Oct. 2, 1995, at A2, available in 1995 WL 2833747 (noting that most viewers of the Simpson trial were unfamiliar with the term "jury nullification" but that they "could become familiar [with it] if jurors who begin deliberations today decide to vote from their hearts instead of their minds").

16. See *id.* ("In jury-nullification verdicts, the panel rarely takes time to examine the evidence."); Mark Whitaker, *Whites v. Blacks*, NEWSWEEK, Oct. 16, 1995, at 28, 31 ("When the acquittal came back so swiftly, many commentators assumed that the largely black jury had engaged in what legal experts call 'jury nullification'—ignoring the evidence to send a broader message, in this case to the police."); see also Editorial, *The Simpson Case: Black and White Justice*, S.F. CHRON., Oct. 4, 1995, at A18, available in 1995 WL 5301366 ("Although Cochran denies it, many observers concluded that the skill and legal dexterity of the well-financed defense team led to a case of 'jury nullification,' in which jurors were able to dismiss overwhelming evidence of guilt.").

17. Tony Knight, *Debating Simpson Verdict: Opinion Split on Whether Acquittal Was Really Condemnation of System*, L.A. DAILY NEWS, Oct. 16, 1995, at N1, available in 1995 WL 5422994.

18. See, e.g., Mona Charen, Editorial, *It's Foolish to Think Simpson Verdict Wasn't Racially Motivated*, IDAHO STATESMAN, Oct. 16, 1995, available in 1995 WL 10505829 ("The jury did not deliberate, it emoted."); Marquand & Wood, *supra* note 11, at 1 ("Along with race, three major issues stand out in the aftermath of . . . [the verdict, including] 'jury nullification,' or a jury's response to emotions rather than evidence.").

scribed the verdict as one that “many people” would look at as jury nullification and that the jury had based its decision “on emotion. That overcame reason.”<sup>19</sup> Underlying this explanation was the view that jurors were swayed either by Simpson’s status or race and that they allowed such biases to determine their verdict.

Another explanation given by journalists for why the jurors had engaged in nullification in this case was that they had been led by defense attorney Johnnie Cochran to see Simpson as a victim of racist police actions and of the criminal justice system. Journalists engaged in debate about whether Cochran, in his closing argument, invited jurors to consider nullification.<sup>20</sup> Even if his plea for nullification was veiled, the press focused on it in their reports of his closing argument.<sup>21</sup> Thus, some writers concluded that the jurors had engaged in an act of protest or self-help at the behest of Cochran; they had heeded his advice to use the jury’s power of nullification to free Simpson and to send a message to the police.<sup>22</sup>

2. *Ways In Which the Press Misunderstood Nullification*—Although the prevailing view of many mainstream newspaper writers was that

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19. *Special Report/Newsblast: Members of O.J. Simpson’s Family, Defense Lawyers and Prosecution Representatives React to the Verdict* (CBS television broadcast, Oct. 3, 1995), available in 1995 WL 8371020; see also Julian Beltrame Vansun, *The O.J. Simpson Verdict: Not Guilty; Aftershocks of Simpson Acquittal Felt Beyond L.A.*, VANCOUVER SUN, Oct. 4, 1995, at A3, available in WESTLAW, Paperscan Database.

20. Compare Marquand & Wood, *supra* note 11, at 1 (“[S]cholars disagree whether Johnnie Cochran’s final arguments asking the jury to ‘send a message’ to the Los Angeles Police Department was nullification.”), with Robert J. Caldwell, Opinion, *O.J. Simpson Trial After the Verdict*, SAN DIEGO UNION-TRIB., Oct. 8, 1995, at G1, available in 1995 WL 10331706 (“Cochran’s evangelistic summation amounted to a thinly veiled invocation of the historic doctrine known as ‘jury nullification.’”), and *Special Report/Analysis: New York Judge Leslie Crocker Snyder Discusses the Issue of Cameras in Courtrooms and Judge Lance Ito’s Conduct of the O.J. Simpson Trial* (NBC television broadcast, Oct. 3, 1995), available in 1995 WL 2959486 (“One of the things that was very disturbing to many of us was the jury nullification argument by Johnnie Cochran, which certainly wouldn’t have been allowed in New York.”) (quoting Leslie Crocker Snyder, New York Supreme Court Justice).

21. According to one press account:

In his closing argument, Simpson lead attorney Johnnie Cochran made a thinly veiled appeal for jury nullification—that is, for jurors to look beyond the evidence of the case and to send a message to the Los Angeles Police Department and the district attorney through their verdict. And that is precisely what the jury did.

Editorial, *Jury in the Simpson Case Sent Resounding Message*, STATE J.-REG. (Springfield, Ill.), Oct. 5, 1995, at 6, available in 1995 WL 9354171.

22. See, e.g., Rosen, *supra* note 12, at 42 (“Cochran called on the jurors to refuse to apply a just law in order to punish the police and to express solidarity with the defendant. . . . This is racist nullification in its purest form.”); see also Michael E. Young & Marjorie Lambert, *Trial Seeped into Every Part of Life; Series: The Simpson Verdict*, SUN-SENTINEL (Ft. Lauderdale, Fla.), Oct. 3, 1995, at 4A, available in 1995 WL 8836189 (“The Simpson case, perhaps more than any other, focused attention on race-based jury nullification, a phenomenon few people outside the justice system even knew existed.”).

the jury had engaged in nullification,<sup>23</sup> several writers' descriptions of nullification suggest that they held mistaken views about what constitutes nullification. Some members of the press believed the jury nullified because it "disregard[ed] the facts."<sup>24</sup> It is unclear, however, what is meant by "disregard[ing] the facts."<sup>25</sup> It might mean that the jury misinterpreted the facts or focused on the wrong facts out of ignorance; however, that would not be nullification.<sup>26</sup> It might mean that the jury was set upon reaching a certain conclusion and did not let the facts get in the way of that conclusion. In other words, the jurors knew that the facts established guilt, but they did not care and voted not guilty, thus engaging in nullification.

Some members of the press also believed that the jury nullified because it was led by emotion rather than reason.<sup>27</sup> A nullifying jury could be swayed by emotion, such as prejudice, like the all-white, all-male Southern juries that refused to convict whites charged with crimes against African Americans.<sup>28</sup> However, a nullifying jury is not necessarily one that succumbs to emotion. A jury could decide to nullify through a well-reasoned and thoughtful analysis of the case.<sup>29</sup> Jurors could examine carefully all of the evidence and the standards they must apply and, after much deliberation, decide that the larger purposes of the law, such as reaching a just result, require nullification. Such was the case in a state court jury deliberation that was filmed and broadcast on television.<sup>30</sup> Thus, the dichotomy created by the press between rational juries that follow the law and emotional juries that nullify is a false one.

### 3. *Why the Verdict May Not Have Been Based on Nullification*

a. *Reasonable Doubt*—The most compelling reason for concluding that the Simpson verdict was not the result of a nullifying jury is that the jurors who explained their reasoning said that they reached their verdict based on reasonable doubt.<sup>31</sup> All of the jurors

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23. See discussion *supra* Part I.A.1.

24. Knight, *supra* note 17, at N1.

25. *Id.*

26. See discussion *infra* Part I.A.3.b.

27. See *supra* notes 18–19 and accompanying text.

28. See Marder, *Myth*, *supra* note 4 (describing all-white, all-male Southern juries that nullified based on prejudice).

29. See *id.* (describing juries that nullify after careful and thoughtful deliberation).

30. See *Frontline: Inside the Jury Room* (PBS television broadcast, Apr. 8, 1986). The case involved Leroy Reed, a convicted felon charged with possessing a handgun. See *id.* For a more detailed discussion of this case, see Marder, *Myth*, *supra* note 4.

31. See, e.g., Knight, *supra* note 17, at N1 ("Things just didn't add up . . .") (quoting Juror No. 4, David Aldana); *id.* (describing the view of Juror No. 8, Sheila Woods, who said

who were interviewed after the verdict said that they voted for acquittal because they believed the prosecution had failed to establish its case beyond a reasonable doubt.<sup>32</sup> Of course, those jurors who agreed to be interviewed after the verdict did not speak for all of the jurors, but those who did speak were consistent about the basis for their verdict. Certainly, jurors can lie during post-verdict interviews and may do so to portray themselves in the best possible light. Jurors, however, do not suffer any legal consequence for having nullified,<sup>33</sup> so jurors would not need to conceal their true motivations, except perhaps to escape embarrassment. Ironically, while the press wildly sought post-verdict interviews with jurors (and rewarded some jurors with substantial amounts of money),<sup>34</sup> the mainstream press did not credit the jurors' explanation

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she "doubted the prosecution's theory of the crime"); *Rivera Live: Analysis: Judging the Jury; How Commentators and the Public Feel Towards the Jurors in the O.J. Simpson Trial and the Trial of Christopher Lynn Johnson* (CNBC television broadcast, Oct. 20, 1995), available in 1995 WL 2735950 [hereinafter *Rivera Live*] ("No one really thought [the evidence] was credible. You know, with Fuhrman, the collection of the evidence, the sock that had no blood then had blood—you know, these type of things.") (quoting Anise Aschenbach, Simpson juror).

32. See, e.g., *All Things Considered: Simpson Case*, *supra* note 13 ("Jurors insist that their verdict [in the Simpson case] was based on insufficient evidence to convict."); Knight, *supra* note 17, at N1 ("[J]urors on the predominantly African-American panel who have spoken publicly have . . . sa[id] their decision was based on reasonable doubt, not empathy with the race of the accused."); Tony Perry, *The Simpson Verdicts*, L.A. TIMES, Oct. 5, 1995, at A5 ("One by one, the jurors are surfacing to explain . . . that it was their doubt about the evidence that caused them to acquit O.J. Simpson, not Cochran's eloquence or any desire to make a social or political statement."); *Rivera Live*, *supra* note 31 ("I have heard nothing from any juror that suggests . . . that jury nullification was on their mind. . . . All of the jurors are saying pretty much the same thing. . . . [W]hat they're saying, pretty much, is the evidence.") (quoting L.A. Times reporter Andrea Ford); Whitaker, *supra* note 16, at 31 (describing the jurors as "insistent that they had called the case based on the evidence as they saw it"); Williams, *supra* note 12, at A5 ("We learned, during post-trial interviews, that jurors who had serious doubts about much of the prosecution's evidence fully complied with the instructions, and that Johnnie Cochran's seeming appeal for nullification and sending a message to corrupt police officers was disregarded as rhetoric."); *id.* ("The evidence fully supported the jury's finding that the time-line laid out by the prosecution was implausible.").

33. Ever since *Bushel's Case*, 124 Eng. Rep. 1006 (C.P. 1670), which freed a member of the jury arrested for voting to acquit William Penn and William Mead against the weight of the evidence, nullifying jurors have been protected from having to answer for their verdicts. For an excellent account of the development of the English criminal jury and the role of *Bushel's Case*, see THOMAS ANDREW GREEN, VERDICT ACCORDING TO CONSCIENCE: PERSPECTIVES ON THE ENGLISH CRIMINAL TRIAL JURY 1200–1800, at 236–49 (1985).

34. See, e.g., Timothy Egan, *With Spotlight Shifted to Them, Some Simpson Jurors Talk Freely*, N.Y. TIMES, Oct. 5, 1995, at 1 ("Shadowed by news helicopters, limousines bearing network celebrities and tabloid-television producers offering up to \$100,000 for exclusives, a few of the jurors in the O.J. Simpson murder trial emerged today to give insight into their celebrated verdicts."); Keith Stone, *Courtroom to Talk Circuit: Simpson Cast Cashing in*, L.A. DAILY NEWS, Oct. 7, 1995, at N1, available in 1995 WL 5421885 ("And among the jurors, several have hired lawyers to help them steer through a maze of interview and book deals paved in gold."); *id.* ("And if the experiences of dismissed jurors Michael Knox and Tracy Kennedy



that their verdict was based on reasonable doubt, as demonstrated by many writers' labelling of the verdict as nullification.<sup>35</sup>

However, some journalists,<sup>36</sup> including many African-American writers and those writing for a largely African-American audience, accepted the jurors' explanation of reasonable doubt as the basis for their verdict. Under their reading, the jury followed the law because the law required a certain standard of proof that the prosecution had failed to satisfy. The evidence that many in the mainstream press saw as overwhelming, such as DNA, took on much less significance in the African-American press in light of other gaps in the prosecution's case, such as the time-line, the glove that did not fit, the racism of Mark Fuhrman, and the view

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are any measure, the jurors can expect to be richly rewarded for completing their yearlong civic duty. Knox and Kennedy won six-figure book deals . . .").

35. See, e.g., Caldwell, *supra* note 20, at G1 ("Yet, Cochran's barely disguised plea for nullification worked, whatever the jurors now say about voting to acquit strictly on the evidence."); Charen, *supra* note 18 ("At least one juror is now fatuously claiming that the verdict was based on insufficient evidence of Simpson's guilt. But in light of the cascade of evidence produced by the prosecution, such a claim is preposterous.").

Jeffrey Rosen, for example, did not address the jurors' own accounts of how they reached their verdict; rather, he alluded to other signs that suggested, in his view, that the jurors had engaged in racially-based nullification. He wrote:

Darden recalls that early in the deliberations one juror heard another say: 'This is payback time!' The prosecution decided that it was a bad sign when another juror was seen carrying a copy of Nathan McCall's minor classic of black rage, *Makes Me Wanna Holler*, which begins with McCall's gleeful account of his brutal beating of a white boy who strayed into his neighborhood. . . . After the verdict was announced, Lon Cryer, juror number six, turned to Simpson and raised his fist in a black power salute. And as the jurors sat in silence in the eleventh-floor lounge, one of them, Carrie Bess, announced to no one in particular: 'We've got to protect our own.'

Rosen, *supra* note 12, at 41-42.

36. See, e.g., Curtis E. Bray, Letter to Editor, *Angry White Male*, S.F. CHRON., Oct. 19, 1995, at A27, available in 1995 WL 5303369 ("I'm writing this letter as an angry white male. . . . White American[s] should blame the LAPD and not the African American jury."); Stanley Crouch, *The Good News*, ESQUIRE, Dec. 1995, at 108, 114 ("[A] deeply disturbed Mario Cuomo observed, there was more than enough to raise a 'reasonable doubt,' but endless white Americans were distraught because the jury took that doubt's specifically instructed meaning so seriously."); *Morning Edition: O.J. Verdict Just as Creators Intended*, Professor Says (NPR radio broadcast, Oct. 10, 1995), available in 1995 WL 9486093 [hereinafter *Morning Edition*] ("It's possible that the jury honestly decided that the prosecution did not meet its burden of proof. . . .") (quoting commentator and sociology professor Richard Moran); William Raspberry, Editorial, *Guilty, but Not Guilty Accepting the O.J. Paradox*, PITTS. POST-GAZETTE, Oct. 6, 1995, at A19, available in 1995 WL 9536791 ("Maybe subsequent interviews with jury members will yet disclose an element of nullification . . . [b]ut until then, it seems plausible to me that the jury had doubts that Marcia Clark and Chris Darden, for all their closing-argument brilliance, couldn't overcome."); *Rivera Live*, *supra* note 31 ("What the jurors are saying is they believed there was reasonable doubt. . . . That's not jury nullification. We can disagree with whether they, in fact, were correct in finding reasonable doubt, but nonetheless it is not nullification we're talking about.") (quoting Loyola Law School Professor Stan Goldman).

that police officers may well have planted evidence.<sup>37</sup> As one writer explained: "Simpson was acquitted in a court of law, but convicted in the court of white public opinion. The jurors resent this. They insist that they acquitted Simpson on the evidence and testimony, not his color. They are probably right."<sup>38</sup> This view was echoed by a reporter who suggested that those outside the jury room should "listen to what these jurors are saying. . . . What they say repeatedly is the evidence, the evidence, the evidence; there was reasonable doubt."<sup>39</sup>

*b. Honest Mistake*—The jurors may have had reasonable doubt and may have been mistaken as to that determination, but that is quite different than intentionally engaging in nullification.<sup>40</sup> A jury can make a mistake for any number of reasons. Foremost is that juries, like judges, are fallible. There will be times when human decisionmakers reach erroneous conclusions. There are a number

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37. See, e.g., Paul Butler, Opinion, *O.J. Reckoning: Rage for a New Justice*, WASH. POST, Oct. 8, 1995, at C1 ("I think the reason the jurors did not look at O.J. when they announced their verdict was because, like me, they thought he *probably* did it. Nonetheless, like me, they also had reasonable doubt."); Editorial, *Not Guilty; The O.J. Simpson Case: Jury Decision, Will Not, Should Not, Eliminate Reasonable Doubts*, BALT. SUN, Oct. 4, 1995, at 18A, available in 1995 WL 2467016 [hereinafter Editorial, *Not Guilty*] ("[M]ore persuasively, perhaps, were the many flaws in the state's presentation: the sloppy handling of evidence, the racial bias of a key detective, the lack of a murder weapon."); *id.* ("This is a time to pause . . . and to give those 12 jurors the presumption that they did their honest best under difficult circumstances."); Carl Rowan, Opinion, *O.J. Simpson Jury Showed Courage*, SALT LAKE TRIB., Oct. 5, 1995, at A11, available in 1995 WL 3160390 ("I found the prosecution's 'ocean of evidence' against Simpson fatally poisoned by sloppiness, perjury, corruption and perhaps worse on the part of officers of the Los Angeles Police Department. So, apparently, did the jurors."); Williams, *supra* note 12, at A5 (describing evidence that supported the jury's verdict); Michael Paul Williams, *supra* note 13, at B1 ("[Y]ou had plenty of evidence that evidence had been planted, that police officers had lied, and the prosecution got caught trying to pass off (former Detective Mark) Fuhrman as a Boy Scout. I think the jury could reasonably conclude that they did not know what happened.") (quoting Rep. Robert C. Scott of Virginia); see also Randall Kennedy, *After the Cheers: The Justice System and Black America*, NEW REPUBLIC, Oct. 23, 1995, at 14, 16 (recognizing that "the prosecution did permit a reasonable juror to vote to acquit on the basis of the evidence presented" and "conced[ing] that [the verdict] . . . could be reached reasonably and in good faith," but also identifying other rationales that could lead to the verdict, such as a response to past racist acts by white juries in the South or the need to send the police a message).

38. Earl Ofari Hutchinson, *Why White America Won't Accept the Simpson Verdict*, NEW PITT. COURIER, Oct. 18, 1995, at A7, available in 1995 WL 15440556.

39. Rivera *Live*, *supra* note 31 (quoting *L.A. Times* reporter Andrea Ford). In an interview, Professor Lani Guinier recommended that those outside the jury room should try to "understand that the jur[ors] w[ere] dealing with the facts as they saw [them] from their experience and that their experience is a legitimate experience." *Face the Nation: Interview: Professor Lani Guinier of University of Pennsylvania Law School Discusses the Aftermath of the O.J. Simpson Verdict* (CBS television broadcast, Oct. 8, 1995), available in 1995 WL 7454909 [hereinafter *Face the Nation*].

40. I believe that nullification requires the subjective intent of the jurors, even if they do not use the exact word. Mere mistake is not nullification. See Marder, *Myth*, *supra* note 4.

of other factors that increase the chances that a jury might make a mistake. The Simpson case was rife with such possibilities, including the following: disparity in the skills of the lawyers for each side; complicated evidence that is difficult to understand and about which experts may disagree; a lengthy trial leading to a tired jury; jurors with similar perspectives who fail to challenge each other's assumptions; and sequestration that creates isolation. Reaching a possibly erroneous determination, however, is not synonymous with deliberately deciding not to follow the law.

### *B. Stacey Koon and Laurence Powell Verdicts*

Like the verdict in the O.J. Simpson case, the verdicts in the trial of Stacey Koon and Laurence Powell were greeted with disbelief by many<sup>41</sup> and accompanied by explanations of nullification by some.<sup>42</sup> Sergeant Stacey C. Koon and Officers Laurence M. Powell, Theodore J. Briseno, and Timothy E. Wind,<sup>43</sup> white police officers, were charged with using excessive force in the beating of black motorist Rodney King in an incident that was captured on videotape by an amateur photographer.<sup>44</sup> The case was transferred from Los Angeles County to Ventura County (Simi Valley) because of the pre-trial publicity<sup>45</sup> and was tried before a predominantly white jury.<sup>46</sup> After seven days of deliberation, the jury acquitted the four officers on all counts, except for one assault charge against Powell on which the jury deadlocked.<sup>47</sup> The verdicts were met with "shock,"<sup>48</sup>

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41. See *infra* notes 48–50 and accompanying text.

42. See *infra* notes 55–56 and accompanying text.

43. I will refer to the verdicts collectively as "Koon/Powell."

44. See Serrano, *supra* note 2, at A1.

45. See Alan Dershowitz, *Once Again, Jury Errs on Defendants' Side*, BUFF. NEWS, May 5, 1992, at B2, available in 1992 WL 3632573 ("[B]ecause the videotape was played and re-played, especially in Los Angeles, the defendants demanded, and received, a change of venue from Los Angeles . . . to Simi Valley . . .").

46. The jury included 10 white jurors, 1 Latina, and 1 Asian-American juror. See Serrano, *supra* note 2, at A1. Six of the jurors were men and six were women. See *id.*

47. See Linda Deutsch, *Jury Reaches Partial Verdict; Hearing Set*, AP, Apr. 29, 1992, available in 1992 WL 5295423 (listing counts and jury's decision on each count); Serrano, *supra* note 2, at A1.

48. Leslie Berkman, *Verdict Shocks O.C. Chiefs, Black Leaders*, L.A. TIMES, Apr. 30, 1992, at A1 ("Shock and outrage were expressed by a number of Orange County police chiefs and leaders of the county's black community in the wake of the acquittal . . ."); William F. Gibson, *Flabbergasted on the Acquittal of the Four L.A. Police Officers*, NEW J. & GUIDE, May 13–19, 1992, at 2 ("When I heard the results of the acquittal of the four Los Angeles police officers, I was flabbergasted and shocked beyond belief.") (quoting Gibson, Chairman of the Na-

"astonishment,"<sup>49</sup> and "disgust and anger"<sup>50</sup> because almost everyone had seen the videotape of the officers beating Rodney King replayed on television and had assumed that the only possible outcome could be verdicts of guilty. Soon after, the outrage<sup>51</sup> turned

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tional Board of Directors, NAACP); Larry Gross & Justin Blum, *4 Cops Found Not Guilty in Rodney King Beating*, CHI. DEFENDER, Apr. 30, 1992, at 1 ("Local residents and community leaders expressed anger, shock, outrage and disbelief Wednesday after a California jury found four white Los Angeles police officers not guilty in the beating of Black motorist Rodney King."); Serrano, *supra* note 2, at A1 ("I am shocked, outraged, and frightened for our nation . . .") (quoting Dr. Joseph Lowery, President of the Southern Christian Leadership Conference); *id.* ("My reaction is shock first, then disappointment . . .") (quoting Deputy District Attorney Terry White, the lead prosecutor of the case); *id.* ("William Frio, spokesman for the LAPD, said he was shocked . . ."); Henry Weinstein & Paul Lieberman, *Location of Trial Played Major Role, Legal Experts Say*, L.A. TIMES, Apr. 30, 1992, at A18 ("I'm shocked because in this case you had the most compelling form of evidence in support of the charges—a videotape of the beating . . .") (quoting Laurie Levenson, a law professor at Loyola Law School); Ben Winton & Glen Creno, *Valley Blacks Angry, Frustrated, Say Justice Denied to Minorities*, ARIZ. REPUBLIC, Apr. 30, 1992, at A1, available in 1992 WL 8240037 ("Residents of Phoenix's white neighborhoods also were shocked by the verdict.").

49. Serrano, *supra* note 2, at A1 ("Throughout Los Angeles, residents who sat glued to their television sets to watch the delivering of the verdicts expressed outrage and astonishment.").

50. Berkman, *supra* note 48, at A1 ("I hope that we, as an African-American community, will be able to channel some of our disgust and anger to effect a change in the way our community is policed.") (quoting Thomas Parham, Director of the Counseling and Career Center at the University of California—Irvine); see also Jorge Casuso, *L.A. Cops Acquitted in Beating: Video Failed to Sway Jurors*, CHI. TRIB., Apr. 30, 1992, at C1 ("I'm really angry this has happened because it shows the system doesn't work.") (quoting Councilman Michael Woo); Haya El Nasser & Sally Ann Stewart, *In Fear of 'AmeriKKKan' Justice*, USA TODAY, Apr. 30, 1992, at 3A, available in 1992 WL 8395559 ("I'm just disgusted [with the verdict]. . . . It's sick.") (quoting Harriett Mack, wife of John Mack, President of the Los Angeles Urban League).

51. See, e.g., Robert W. Bogle, *Philadelphia Tribune Head Angry*, NEW J. & GUIDE, May 13–19, 1992, at 2 ("I am outraged and appalled that 12 human beings—regardless of race or cultural background—could witness a brutal and savage beating of another human being, yet fully exonerate the attackers.") (quoting Bogle, President, National Newspaper Publishers Association); Earlean Collins, *King Verdict Leaves Us with Much Work*, CHI. DEFENDER, May 5, 1992, at 10 ("[L]ike millions of other Americans, I was outraged at the result [after the beating of Rodney King].") (quoting Collins, Illinois State Senator); Linda Deutsch, *L.A. Police Acquitted in Beating Video Doesn't Sway Jury; NAACP Denounces Verdict*, NEW ORLEANS TIMES-PICAYUNE, Apr. 30, 1992, at A1, available in 1992 WL 4826542 ("My client and I are just outraged," King's attorney, Steve Lerman, said after the verdict.); Lenora Fulani, *American Voters Need to Riot!*, NEW J. & GUIDE, May 13–19, 1992, at 2 ("The acquittal of the four Los Angeles police officers who beat Rodney King with such savagery and sadism is an outrage.") (quoting Fulani, Chairperson of the New Alliance Party); Marshall Mitchell, *In Los Angeles: Business as Usual? Not Quite*, AFRO-AM., May 9, 1992, at A1 ("The community was outraged after the 'not guilty' verdicts were announced and what started out as a peaceful demonstration quickly degenerated to a racial melee."); *Nation Voices Outrage, Shock, Despair Over King Verdict*, JET, May 18, 1992, at 13 ("As outrage over the Rodney King verdict exploded in violence throughout the streets of Los Angeles, national leaders . . . vocalized their alarm over the jury's finding and dread of the ensuing fury."); Joy M. Tyler, *Baltimore Escapes Violence?*, AFRO-AM., May 9, 1992, at A1 ("Through the rally, we hope to bring together . . . people . . . from all racial and ethnic groups who have turned to the NAACP to ask what can they do to express their outrage at the King verdict in a constructive way and to

to violence as riots erupted in Los Angeles<sup>52</sup> and in other cities throughout the country.<sup>53</sup>

1. *Press Explanations for the Verdict*—As newspaper writers and commentators tried to help the public make sense of the verdicts,<sup>54</sup> jury nullification was one of several explanations offered.<sup>55</sup> Some writers reasoned that if jurors nullified, they did so because they

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move toward the elimination of this type of conduct in the future . . . .” (quoting then-NAACP Director and CEO, Benjamin L. Hooks); Olive Vassell, *Leaders Condemn King Verdict*, WASH. AFRO-AM., May 2, 1992, at A1 (quoting L.A. Mayor Tom Bradley, who urged citizens to “‘focus our outrage’ and demand the firing of the officers”); Amy Wallace & David Ferrell, *Verdicts Greeted with Outrage and Disbelief*, L.A. TIMES, Apr. 30, 1992, at A1 (“Outrage and indignation swept the city Wednesday as citizens rich and poor, black and white, struggled to reconcile the acquittals of four Los Angeles Police Department officers with the alarming, violent images captured on a late-night videotape.”); *id.* (“At Cal State Los Angeles, about 40 students watched the verdict announcement at the Student Union. For most, including black student Kim Williams, the acquittals provoked outrage.”); Winton & Creno, *supra* note 48, at A1 (“Outrage about the verdict appeared nearly uniform.”).

52. See Richard A. Serrano & Tracy Wilkinson, *All 4 in King Beating Acquitted; Violence Follows Verdicts*, L.A. TIMES, Apr. 30, 1992, at A1 (“It was the largest rioting to erupt in Los Angeles since the Watts riots of 1965.”).

53. See, e.g., Mitchell Landsberg, *Verdict Sparks Protests Around Nation; Some Turn Ugly*, AP, Apr. 30, 1992, available in 1992 WL 5295544 (“Protesters rallied nationwide . . . , and blacks attacked whites in Atlanta. Rioting in San Francisco prompted the mayor to declare a state of emergency.”); *id.* (“Few court decisions have prompted such nationwide outpourings.”); Charles Whitaker, *The Rodney King Wake-Up Call: Which Way America?*, EBONY, July 1992, at 116, available in LEXIS, Market Library, Ebony File (describing the verdict as “sparking the biggest urban riot of this century”).

54. See, e.g., Dennis Wagner, *Now Explain to Children How ‘The System’ Works for Them*, PHOENIX GAZETTE, Apr. 30, 1992, at A1, available in WESTLAW, ARPG Database (struggling for explanations, but concluding that “[t]he search for reasonable explanations proved futile”).

55. See Gail Appleson, *King Verdict Shakes Faith in Jury System*, Reuters N. Am. Wire, May 3, 1992, available in LEXIS, News Library, TXTNWS File (“Legal experts said the King verdict points out one of the most difficult problems to overcome with jurors—a problem they call ‘nullification.’”); Jason Berry, *Crime Punishment; Why Do Some Juries Condone Criminal Behavior?*, DALLAS MORNING NEWS, Feb. 27, 1994, at 1J, available in 1994 WL 6848006 (“The nullification factor in these cases [including Simi Valley] stemmed from a parochial protectiveness layered in denial.”); Alan W. Bock, Editorial, *Criminal Justice: King Beating Started a Cycle of Violence*, ORANGE COUNTY REG. (Cal.), May 1, 1992, available in 1992 WL 6349907 (“[W]hat we saw in Simi Valley . . . was a case of surreptitious jury nullification. The jury simply decided, in this case, to ignore the law, although it’s unlikely any of them would admit it.”); Dershowitz, *supra* note 45, at B2 (“[T]he most common manifestation of what has come to be called ‘jury nullification’ has always been in cases where policemen were charged with the use of excessive force, especially when that force was directed against so-called ‘undesirable elements.’”); Richard Lacayo, *Anatomy of an Acquittal*, TIME, May 11, 1992, at 30 (“In the eyes of many people, both white and black, it appears that the jury simply chose to nullify the evidence—to put it aside in making their decision—which American law allows.”); Michael W. Rosen, *Juries Should Have to Follow the Law*, COLO. SPRINGS GAZETTE TELEGRAPH, May 17, 1992, at G2, available in 1992 WL 9888895 (“If you liked the Rodney King verdict, you’ll love jury nullification.”); Jerome H. Skolnick, *The Jury Was Never Meant to Be Rational*, L.A. TIMES, May 1, 1992, at B7 (“The independence of juries is so valued that they are allowed to nullify the evidence and fail to convict, when it is perfectly clear, as in the King trial, that the defendants are guilty.”).

shared a similar background and outlook with the defendant police officers.<sup>56</sup> They may have had “pre-existing attitudes that favor police officers and fear crime.”<sup>57</sup> The press gave another reason that supported nullification: The change in venue from Los Angeles to Simi Valley meant that those in the jury pool, and those who eventually served on the jury, were from a fairly homogeneous group.<sup>58</sup> Many residents of Simi Valley had moved there from Los Angeles to escape crime, gangs, and other urban ills, and they shared a respect for police officers and the difficulties their jobs entailed.<sup>59</sup>

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56. See Appleson, *supra* note 55 (describing nullification as when the jurors, “because of their backgrounds, sympathize or identify so closely with a defendant that they ignore the law or fail to see obvious facts in a case”); Berry, *supra* note 55, at 1J (explaining nullification in Simi Valley as follows: “[T]he jury saw the police officers as gladiators in a crime war and affirmed the officers’ brutal behavior.”); Dershowitz, *supra* note 45, at B2 (“[J]urors viewed the evidence through the prism of their own experiences. Jurors are more likely to sympathize with the arguments of those with whom they most closely identify.”); Eleanor Holmes Norton, Op-Ed, *Time to Turn to the Backup System; The Federal Criminal Civil Rights Statutes Can Serve Justice and Restore Confidence*, WASH. POST, May 1, 1992, at A27 (“The jury nullification in this case came not only because the suburban jury identified with the police. The jury bought the defense, as one juror has said in an interview, that the officers were doing what the L.A. Police Department expected them to do.”).

57. Serrano, *supra* note 2, at A1; see Weinstein & Lieberman, *supra* note 48, at A18 (“Several experts . . . said the verdicts clearly reflected pre-existing attitudes—support of police, fear of street crime, perhaps racism—held by the jury . . .”); see also Charles G. Adams, Opinion, *Video, Verdict and Violence*, MICH. CHRON., May 13–19, 1992, at 7A (“It is not to be expected that an all-white jury in the community of Simi Valley, where the Ronald Reagan Presidential Library is located, was going to find White policemen [g]uilty of criminal behavior in the process of subduing a young Black male.”); Brenda H. Andrews, *Rodney King Verdict, Law and Order Mandate*, NEW J. & GUIDE, May 13–19, 1992, at 2 (“The verdict in the Rodney King case comes from a group of all-American jurors who bought into the prevailing mandate that Black men are likely to be criminals, and that crime and criminal elements can be controlled by any means necessary.”); Kathleen O’Toole, *An Imbalance of Justice: The Simi Valley Verdict*, ABOUT . . . TIME, June 1992, at 29 (“The verdict . . . may reflect a growing sentiment for law and order at all costs.”) (paraphrasing Stanford Law School Professor Gerald Gunther).

58. See, e.g., Larry Aubry, *Shameful Decision, Prophetic Aftermath*, L.A. SENTINEL, May 7, 1992, at A6 (“[T]he change of venue sealed the outcome of the case by ensuring a non-sympathetic, exclusively White perspective.”); Linda Deutsch, *Jurors Accepted Argument that King Was Asking for It*, AP, Apr. 29, 1992, available in 1992 WL 5295333 (“Moving the trial out of Los Angeles to suburban Simi Valley clearly had an effect. The hysteria that surrounded the case was gone, and instead of the racially mixed jury expected in Los Angeles, the panel was predominantly white.”); Benjamin L. Hooks, *NAACP National Office Speaks Out on Rodney King Verdict*, CRISIS, Apr.–May 1992, at 2 (“We are convinced that the change of venue that produced an all-white jury, and Mr. King’s race were major factors in the acquittals.”).

59. See, e.g., *All Things Considered: Rodney King Verdict Due to Many Factors* (NPR radio broadcast, Apr. 30, 1992), available in LEXIS, News Library, NPR File [hereinafter *All Things Considered: Rodney King*] (“The city of Simi Valley where the trial was held has one of the very lowest crime rates in California. Lots of Los Angeles Police officers and retired officers live there.”) (quoting NPR reporter Wendy Kaufman); Sharon LaFrugier & Lynne Duke, *Juries Often Forgive Police, Legal Experts Say*, TORONTO STAR, Apr. 30, 1992, at A2, available in 1992 WL 6541020 (“Most [criminal defense specialists’ explanations of the verdict] focused on

The press offered a variety of other explanations. One explanation faulted the prosecution for failing to have King testify.<sup>60</sup> King did not testify because he had a criminal record,<sup>61</sup> but if he had testified he might have made the beating seem more real to the jurors.<sup>62</sup> According to another explanation, the videotape, which was played repeatedly at trial, often in slow motion, and analyzed frame by frame, might have de-sensitized the jurors to the violence on the screen.<sup>63</sup> Relatedly, the public saw only the videotape, but the jurors saw and heard much additional evidence,<sup>64</sup> including the testimony of fifty-six witnesses,<sup>65</sup> many of whom were experts in law enforcement.<sup>66</sup> Yet another explanation was that there had been competing expert testimony, which led some to suggest that the

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the defence attorneys' success in moving the trial to a bedroom community of retired police officers and firefighters with few minorities."); Dawn Webber, *Prosecution Strategies Criticized; No Testimony by King Viewed as Major Flaw*, L.A. DAILY NEWS, Apr. 30, 1992, at N1, available in 1992 WL 8167304 (describing Ventura County as follows: "where the majority of the population is white and known to be pro-law enforcement").

60. See Linda Deutsch, *The Jury, the Media—and the Riot; Jurors Toe 'The Thin Blue Line'*, CHI. TRIB., Apr. 30, 1992, at C8 [hereinafter Deutsch, *The Jury*] ("The lack of testimony from King . . . may have tipped the scales toward the defense."); *id.* ("Had King been able to talk to us, the video might have been looked at differently . . .") (quoting an anonymous juror on ABC's *Nightline*); Webber, *supra* note 59, at N1 ("The decision by the Los Angeles County District Attorney's Office not to call Rodney King as a witness was cited . . . as the critical flaw that led to the acquittal of four LAPD officers charged with beating the black motorist."); Weinstein & Lieberman, *supra* note 48, at A18 (quoting Los Angeles defense attorney Howard Weitzman, who explained that if he were a juror he "would have liked to have heard from Rodney King, what he felt, why he continued to move and what was going through his mind").

61. See Weinstein & Lieberman, *supra* note 48, at A18 ("Whatever might have been gained by King's description of his suffering, [experts] said, could have been outweighed by the opportunity it would have given the defense to highlight King's criminal record, in effect putting him on trial").

62. See, e.g., *Juror: Verdicts Might Have Been Different if King Had Testified*, AP, Apr. 30, 1992, available in 1992 WL 5295571 [hereinafter *Juror*] ("Had King been able to talk to us, the video might have been looked at differently.") (quoting juror on ABC's *Nightline*).

63. See *All Things Considered: Rodney King*, *supra* note 59 ("Again and again, [defense attorneys] just undermined the credibility of—of the videotape and . . . it became almost obsolete and . . . worth very little.") (quoting unidentified Juror #2); Deutsch, *The Jury*, *supra* note 60, at C8 ("Defense lawyers played the tape so many times at so many different speeds that its impact may have been blunted."); Webber, *supra* note 59, at N1 ("Looking at that videotape over and over again could have led the jury to forget the significance of what was done to Rodney King . . .") (quoting UCLA School of Law Professor Peter Arenella); Weinstein & Lieberman, *supra* note 48, at A18 ("[W]hen you see that videotape over and over and over and you don't have any feeling for the individual, I have to surmise that the jurors got desensitized to the video . . .") (quoting Southwestern University School of Law Professor Myrna Raeder).

64. See Eric W. Rose & Steven S. Lucas, *The Jury Saw All of the Evidence; System Overcame Political Hysteria and Media Hype*, L.A. TIMES, Apr. 30, 1992, at B7 ("For the jury, the videotape was one of many pieces of evidence to evaluate and weigh in a complex case. For the public, the videotape was the sole piece of evidence.")

65. See *id.* ("In this trial, no fewer than 56 witnesses were called to the stand.")

66. See *id.*

jurors reached their verdict based on reasonable doubt.<sup>67</sup> In others' view, the verdict showed how hard it is to convict police officers given the difficult job they are required to perform.<sup>68</sup> For many, however, especially for many African Americans, there was no explanation for the verdict other than the racism of the jurors and the police.<sup>69</sup>

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67. See Weinstein & Lieberman, *supra* note 48, at A18 ("When you have experts testifying on both sides of a case, you create reasonable doubt . . .") (quoting New York attorney Harvey Weitz); *id.* ("[The verdict] was just 12 people who had a reasonable doubt.") (quoting New York University Law School Professor Burt Neuborne); see also Deutsch, *The Jury*, *supra* note 60, at C8 ("The defense offered several explanations to provide the reasonable doubt needed to acquit, including officers' fears that they were dealing with an intoxicated, potentially deadly individual.").

68. See, e.g., Pamela Kramer & Christopher H. Schmitt, *Evidence and Outcome of King Case at Odds; Stunned Experts Grope for Reasons Why Jurors Cleared L.A. Officers*, BUFF. NEWS, Apr. 30, 1992, at A5, available in 1992 WL 3631440 ("Ordinary citizens have, by virtue of life experience, been taught to trust police officers. They can't put those pro-police biases behind them.") (quoting attorney Tom Beck); Anthony Sommer & Russ Hemphill, *Verdict Surprises Some Valley Police, Law Experts*, PHOENIX GAZETTE, Apr. 30, 1992, at A2, available in WESTLAW, ARPG Database ("[C]riminal misconduct cases against police officers are extremely rare because the burden of proof beyond a reasonable doubt is so heavy on the prosecutor.") (citing Arizona State University Law School Professor David Kaye, who offered this information to help explain the Koon/Powell verdicts); Sheryl Stolberg, *Videotape Doesn't Sway the Panel*, DET. NEWS, Apr. 30, 1992, at 8A ("The jury's verdict proved to be a resounding endorsement of the police officers' conduct. There was no wavering, and no discussion of reasonable doubt."); *id.* ("Some criminal justice specialists said the verdict is a dramatic illustration of how difficult it is to convict law enforcement officers.").

69. See, e.g., Andrews, *supra* note 57, at 2 ("[A]t least two logical factors commonly are cited as contributing to the riots[, o]ne is the poverty . . . of the rioters; the second is middle class racism that marks the lives of the jurors who made the decision that sparked the turmoil."); Collins, *supra* note 51, at 10 ("[T]he verdicts remind me of the days when there was no such thing as a fair trial for Blacks in this country. . . . [A] white person who committed a crime against a Black person, no matter how atrocious, could be assured of getting away with it."); Michael Datcher, *The April 1992 Uprising: Learning to Deal with Anger*, L.A. SENTINEL, Apr. 25, 1996, at A1, available in 1996 WL 15757697 ("The jury was blinded by their own racism. They didn't see a black life on that television nearly being destroyed, they saw something less than human.") (quoting Milton Grimes, Rodney King's former attorney for the civil rights trial); Gross & Blum, *supra* note 48, at 1 ("[The verdict] proves that racism is alive and well and it says that a police officer in California, Chicago or around the country can do whatever he wants to an African American or minority.") (quoting Chicago Alderman Robert Shaw); Hooks, *supra* note 58, at 2 ("We are convinced that the change of venue that produced an all-white jury, and Mr. King's race were major factors in the acquittals."); Kramer & Schmitt, *supra* note 68, at A5 ("But simmering not far below the surface was an uglier explanation [for the verdict] many didn't want to include but nevertheless seemed drawn to: racism, pure and simple."); *id.* ("Did race play a role? One would have to be naive not to think so . . .") (quoting Stanford Law School Professor Miguel Mendez); Vassell, *supra* note 51, at A1 ("African Americans and many others are grieved by this inexplicable miscarriage of justice, that will reinforce the belie[f] there is a double standard of justice when race enters the picture.") (quoting NAACP Executive Director Benjamin Hooks); Wagner, *supra* note 54, at A1 ("I started thinking of it as a black-white thing . . . I know if it was five black men beating on some white guy . . . [t]hey would have been guilty.") (quoting teenager Serj McLean); *id.* (interviewing Jarlean Milton, who said she could offer no other explanation to her children but that "It's prejudice . . ."); Winton & Creno,



2. *Ways In Which the Press Misunderstood Nullification*—The press used the term “nullification” as a way of explaining a verdict that seemed inexplicable. When journalists did not know how to make sense of the verdicts because they seemed at odds with the videotape of the beating, they resorted to nullification as an explanation. Thus, nullification became a catch-all phrase to explain the irrational; however, nullification is not synonymous with irrational decisionmaking. Although a nullifying jury can reach an irrational result, it can also reach a rational one. Thus, nullification should not be equated automatically with inexplicable verdicts. Indeed, the jurors on the Koon/Powell jury had reasons for their decision and believed they were following the law as given to them by the judge, thus suggesting that they believed not only that they acted rationally, but also that they acted in accordance with the law.<sup>70</sup>

### 3. *Why the Verdict May Not Have Been Based on Nullification*

a. *Reasonable Doubt*—In post-verdict interviews, jurors explained that they reached their verdict based on reasonable doubt.<sup>71</sup> Immediately after the verdict, the jurors were escorted away in a van.<sup>72</sup> They declined to speak to reporters<sup>73</sup> and left a written statement to be read by a court official, which said: “‘This experience has been an extremely difficult and stressful one, one that we have all agonized over a great deal. . . . We feel we have done the best job we could have done.’”<sup>74</sup> Only later did individual jurors speak to the press, including one who expressed the view that the fault was with Rodney King for failing to comply with orders, “continu[ing] to fight,” and “controlling the whole show with his actions.”<sup>75</sup> Another juror felt constrained by the precise terms of the instructions: “‘I believe there was excessive use of force, but under the law as it was explained to us we had to identify specific “hits” that would show specific use of force. It had to be beyond a rea-

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*supra* note 48, at A1 (interviewing African-American men “who say they feel the jury’s verdict perpetuates decades of racial injustice”).

70. See discussion *infra* Part I.B.3.a.

71. See *infra* notes 74–76 and accompanying text.

72. See Casuso, *supra* note 50, at C1 (describing jurors’ exit from the courthouse); Serrano, *supra* note 2, at A1 (describing the same).

73. See Deutsch, *The Jury*, *supra* note 60, at C8 (“Jurors left the courthouse without explaining the verdicts. Some fled their homes rather than face reporters.”).

74. Serrano, *supra* note 2, at A1.

75. *Id.*; see *All Things Considered: Rodney King*, *supra* note 59 (“[Rodney King]’s the one that was controlling the action all the way through. He continued to make motions to get away, to escape, he kicked at the officers, etc. So there was nothing else the officers could do, in our opinion.”) (quoting unidentified Juror #1).

sonable doubt, and I just couldn't do that.'"<sup>76</sup> Thus, some jurors described a deliberation process in which they were trying to follow the law. They burrowed deep into the language of the instructions,<sup>77</sup> which is contrary to flouting the instructions describing the law, as nullification requires.<sup>78</sup>

*b. Honest Mistake*—The Koon/Powell verdicts even if incorrect, could have been reached through honest mistake. The jurors viewed the evidence and testimony through the lens of citizens who have much faith in police officers and who are willing to grant them a great deal of leeway in the performance of their jobs. They might have been mistaken in their understanding of the judge's instructions and what meaning to give to "excessive force." Or they might have been mistaken in their understanding of the standard of reasonable doubt. Or they might have burrowed too deeply into the videotape of the beating and the instructions of the judge and lost the forest for the trees. All of these were possibilities, and some were considered by the press, but ultimately they failed to persuade.

## II. WHY FALSE CLAIMS MATTER

### *A. False Claims Perpetuate Racial Stereotypes*

With both the Simpson and Koon/Powell verdicts, the mainstream press misapplied the term jury nullification. It did so, however, in different ways. With the Koon/Powell verdicts, the press gave nullification as one possible explanation, even though those jurors who were interviewed indicated that they were persuaded by the defense attorneys' explanation that the police officers were merely doing their job and that Rodney King was

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76. Lacayo, *supra* note 55, at 32.

77. The jurors, by burrowing deeper and deeper into the minutia of the instructions, could also have been attempting to avoid responsibility for their decision. They could have been using a close reading of the instructions as a way of justifying that the law compelled them to reach the decision they reached. Researchers who have examined jury deliberations in death penalty cases have noted a tendency among jurors to believe that the law is compelling them to recommend a sentence of death so that they are absolved of responsibility: They "want to see the law as more responsible than they themselves for the defendant's punishment. Significantly, this tendency to deny full responsibility for the defendant's punishment appears to make it easier for jurors to vote for death." William J. Bowers, *The Capital Jury: Is It Tilted Toward Death?*, 79 JUDICATURE 220, 223 (1996) (citation omitted).

78. See *supra* text accompanying note 4.

resisting arrest.<sup>79</sup> However, the press reported nullification as one of several explanations, and at the very least, attempted to understand how the verdict might have been based on the jurors' honest beliefs that an acquittal was appropriate or that there was reasonable doubt.<sup>80</sup>

In contrast, in the Simpson case, not only were charges of nullification more common, at least by many in the mainstream press, but also there were frequent attacks on the jurors' reasoning capacity. Although the press noted errors by the prosecution, it attributed fault largely to the jury. After the Simpson verdict, the jurors offered reasonable doubt as an explanation;<sup>81</sup> however, that explanation was largely ignored by the mainstream press in favor of the nullification rationale.<sup>82</sup> After the Koon/Powell verdicts, the jurors also offered reasonable doubt as an explanation;<sup>83</sup> analysts and commentators in the mainstream press were more willing to consider that explanation than in the Simpson case.<sup>84</sup> Moreover, even those who explained the Koon/Powell verdicts as nullification possibly arising out of racial bias did not question the intelligence and reasoning ability of the jurors. In contrast, in the Simpson case, there were frequent assertions that the jurors were emotional, unthinking, and otherwise incompetent.<sup>85</sup> With the Simpson verdict, it remained unspoken that the charge of incompetence was linked to the jurors' race: Either the jurors were incapable of engaging in reasoned decisionmaking because of their race or because they were blinded by their racial connection to Simpson.

The characteristics attributed to the act of nullification in the Simpson case—lack of juror competence and reasoning capacity and a tendency to rely on emotions—are stereotypes that have

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79. See, e.g., Stolberg, *supra* note 68, at 8A ("Jurors also felt that the officers acted within the scope of police department regulations and were justifiably in fear as they attempted to arrest King.").

80. See discussion *supra* Part I.B.1.

81. See discussion *supra* Part I.A.3.a.

82. See discussion *supra* Part I.A.1.

83. See discussion *supra* Part I.B.3.a.

84. See discussion *supra* Part I.B.1.

85. One commentator summarized the situation of the Simpson jurors as follows: "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." *Rivera Live*, *supra* note 31 (quoting fill-in host Sheila Stainback); see, e.g., *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."); Williams, *supra* note 12, at A5 (recounting and criticizing George Will's view that the jury was "intellectually incapable" of following the 'evidentiary argument').

long been used to depict African Americans.<sup>86</sup> In this sense, then, nullification was used as a code word to express stereotypical views that the mainstream press might not otherwise voice about this largely African-American jury.<sup>87</sup> By describing the jury as nullifying, but re-defining nullification to include stereotypes used to denigrate African Americans, such as lack of reasoning capacity, the press was able to use the language of law to denigrate the jury based largely on its race.<sup>88</sup>

### *B. False Claims Unnecessarily Challenge a Community's Judgment*

A jury verdict is a judgment by the community. In a criminal case, it is a judgment about the defendant's guilt or innocence. If, while reaching a verdict of not guilty, an act of actual nullification occurs, questions are raised about the jury's judgment: Did the jury

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86. Such stereotypes have a long history in this country. As Dorothy Roberts explained:

The men who crafted the nation's government, such as Thomas Jefferson, claimed that Blacks lacked the capacity for rational thought, independence, and self-control that was essential for self-governance. Racist thinking dictates that Black bodies, intellect, character, and culture are all inherently vulgar. It reflects a pattern of oppositional categories in which whites are associated with positive characteristics (industrious, intelligent, responsible), while Blacks are associated with the opposite, negative qualities (lazy, ignorant, shiftless).

DOROTHY ROBERTS, *KILLING THE BLACK BODY: RACE, REPRODUCTION, AND THE MEANING OF LIBERTY* 8-9 (1997) (citations omitted).

According to Henry Louis Gates, in the eighteenth century, when "*reason* was privileged . . . above all other human characteristics," and writing "was taken to be the *visible* sign of reason," blacks would be considered "reasonable," and therefore, human beings, only if they could demonstrate mastery of "the arts and sciences." Henry Louis Gates, Jr., *Editor's Introduction: Writing "Race" and the Difference It Makes*, in "RACE," WRITING, AND DIFFERENCE 1, 8 (Henry Louis Gates, Jr. ed., 1986).

87. See 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 in 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. There were cries of '[jury] nullification . . .'"); Williams, *supra* note 12, at A5 ("George Will dares to insinuate that inner city Blacks are intellectually incapable of performing credi[ble] jury service.").

88. See, e.g., Knight, *supra* note 17, at N1 ("I don't think the verdict was racially motivated, but I think the criticism of this jury is racially motivated.") (quoting Robert B. Hirschhorn of Cathy E. Bennett & Associates Inc., a jury consulting firm in Galveston, Texas); Harvey A. Silverglate, *Simpson Jury Sends a Subtle Message on Race*, NAT'L L.J., Oct. 16, 1995, at A21 ("Many of those attacking the verdict as a product of 'racial politics' rather than reason and evidence are themselves guilty of making assumptions not based on the evidence.").

act justly? Was it swayed by impermissible biases? Did the jury overstep its bounds? A false claim of nullification raises additional questions, including questions about those making the false claim: Why are they claiming that the jury nullified? Why do they distrust the jury? Why do they seek to challenge its judgment? The community's divisions are further exacerbated when the jury is seen as consisting largely of one group and those casting doubt on the verdict, through false claims of nullification, belong to another group.

Thus, a false claim of nullification can heighten animosity between groups who might see a verdict very differently.<sup>89</sup> In the Simpson and Koon/Powell verdicts, one's view about whether each verdict was correct, and about which line of reasoning the jury relied on to reach that verdict, depend on one's own situation in society.<sup>90</sup> Depending on one's race, gender, religion, age, and a variety of other factors, one is likely to have had certain experiences or certain ways of being perceived or treated by others.<sup>91</sup>

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89. As one interviewer observed: "I think, for many white people, [the Simpson verdict] . . . came as something of a shock, that there is such a racial divide in this country and such a difference in how two groups of people view this . . . situation." *Face the Nation*, *supra* note 39 (quoting host Bob Schieffer); see Caldwell, *supra* note 20, at G1 ("Public reaction to the Simpson verdict revealed a shocking polarization. Most black Americans approved. Most white Americans disapproved."); Miller-Perry, *supra* note 87, at 3 ("The so-called 'case of the century' is over, and about the only thing that's crystal clear about its impact and outcome is the racial chasm within this nation.").

90. See Catharine Pierce Wells, *Tort Law as Corrective Justice: A Pragmatic Justification for Jury Adjudication*, 88 MICH. L. REV. 2348, 2395 (1990) (explaining that jurors offer "viewpoint-dependent narrative[s]," which may be conflicting, but from which they develop "an authoritative legal judgment").

91. See, e.g., Martha L. Fineman, *Challenging Law, Establishing Differences: The Future of Feminist Legal Scholarship*, 42 FLA. L. REV. 25, 39-40 (1990) ("[I]n addition to race, class, and sexual preference, . . . age, physical characteristics . . . , religion, marital status, the level of male identification . . . , birth order, motherhood, grandmotherhood, intelligence, rural or urban existence, . . . sources of income (self, spouse, or state), degree of poverty or wealth, and substance dependency . . . shape how individual women experience the world.") (citation omitted); Nancy S. Marder, *Beyond Gender: Peremptory Challenges and the Roles of the Jury*, 73 TEX. L. REV. 1041, 1130 (1995) [hereinafter Marder, *Peremptory Challenges*] ("[J]urors have different experiences and perspectives that shape the way in which they view the world.") (citation omitted); Nancy S. Marder, Note, *Gender Dynamics and Jury Deliberations*, 96 YALE L.J. 593, 604 (1987) [hereinafter Marder, *Gender Dynamics*] ("Gender, like age and race, informs one's relations with others and one's experiences and position in society.") (citation omitted); see also David Kairys et al., *Jury Representativeness: A Mandate for Multiple Source Lists*, 65 CAL. L. REV. 776, 782 n.44 (1977) ("No one is without attitudes and preferences concerning various social, political, economic, cultural and religious issues, and such attitudes and preferences affect one's judgment and perception regarding factual and legal questions and the credibility of witnesses."); Craig L. Jackson, *Simpson v. the System/Can't We Accept That Our Perceptions Differ?*, Hous. CHRON., Oct. 8, 1995, at 1, available in 1995 WL 9408324 ("Perceptions may differ by geography, socioeconomic status, gender, life experiences and, believe it or not, race."); Perry, *supra* note 32, at A5 ("Everybody brings to the jury box his life experiences and attitudes . . . . Those things affect how they evaluate the

These experiences become, in effect, a lens through which one judges others, including how much weight one gives to the testimony of police officers or how to balance other credibility assessments that are made during a trial.<sup>92</sup> Thus, it is not surprising that jurors with very different life experiences might view the same evidence very differently.<sup>93</sup> The Simi Valley and Los Angeles juries in the Koon/Powell and Simpson trials, respectively, are likely to see the world quite differently, as are the communities from which these jurors were drawn.<sup>94</sup> This view, which I will call “different

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evidence, the witnesses and even the jury instructions.’”) (quoting Beth Bonora, founder of the Oakland-based National Jury Project); Silverglate, *supra* note 88, at A21 (“[A]ll jurors bring their experience to bear in deciding which witnesses and evidence to believe or disbelieve—and this is as it should be—but such weighing of credibility is normally done in complete good faith and in a genuine search for the truth . . .”).

92. See, e.g., Butler, *supra* note 37, at C1 (“What is reasonable to a black person may not be reasonable to a white person, especially in matters involving the police.”); Knight, *supra* note 17, at N1 (explaining the Simpson verdict by pointing out that the African-American jurors’ “real experiences made them more skeptical of police testimony than white people, and . . . white prosecutors . . . didn’t understand that that would happen”) (paraphrasing George Washington University Law School Professor Paul Butler); *Morning Edition*, *supra* note 36 (“Jurors bring their own life experiences to the evaluation of courtroom evidence. . . . Blacks and whites have different life experiences, especially when it comes to the police. . . . Whites tend to trust the police and believe the prosecution, while blacks tend to be much more skeptical of law enforcement.”) (quoting commentator and sociology professor Richard Moran); Stolberg, *supra* note 68, at 8A (“The juror said the panel [in the beating of Rodney King] found the officers’ testimony credible.”); *Talk Live: Interview: Guests Discuss the Impact on the Police Department and the Judiciary as a Result of the O.J. Simpson Trial* (CNBC television broadcast, Oct. 23, 1995), available in 1995 WL 2870696 (“[W]hen you put . . . black jurors in the jury box and they bring their own lifetime experiences into that box, and you’re going to tell them about police brutality, they know it much more than a white juror knows it.”) (quoting former California Superior Court Judge Jack Tenner).

93. See, e.g., Caldwell, *supra* note 20, at G1 (“How is it that we could all have watched the same events yet come to such diametrically opposed interpretations? Widely divergent life experiences are obviously part of the answer.”); Benjamin A. Holden et al., *Racism on Trial*, MONTREAL GAZETTE, Oct. 7, 1995, at B1, available in WESTLAW, Paperscan Database (noting a “greater tendency of many blacks to believe that police will falsify evidence and lie on the witness stand” and in this way “concentrating on the evidence, but filtering it, as any juror must, through their own perspectives”); *id.* (“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).

94. See, e.g., Jackson, *supra* note 91, at 1 (“So why should it surprise anyone, black or white, that blacks and whites, who have such different life experiences, would have a different view of reasonable doubt in a case involving what many consider to be such overwhelming evidence of guilt, but also such disturbing evidence and/or suggestions of either police ineptitude or misconduct?”); Paul Richter, *Million Man March; Clinton Calls for End to Racism; Speech: Racial Gulf Exposed by Simpson Trial Demands Individual Remedy*, He Says, L.A. TIMES, Oct. 17, 1995, at A1 (reporting that President Clinton, in his first major speech on racial issues since the Simpson trial, said that “the Simpson trial had made Americans aware that whites and blacks see the world in vastly different ways”).

realities/same values,"<sup>95</sup> assumes that people from different backgrounds may have different life experiences, and therefore see the world in very different ways, but will still share core values. For example, they will agree that murder is wrong ("same value"), but may disagree about whether particular police conduct in a case is excessive or part of the job depending on their own experiences with police officers and whether they see them as harassers or protectors ("different realities").

When people from different backgrounds or communities interpret a verdict quite differently, the verdict becomes a lightning rod for existing societal divisions. Of course, not everyone in a community might agree on how to interpret a verdict, and people are likely to see themselves as belonging to multiple communities.<sup>96</sup> Nonetheless, race seemed to be the predominant lens through which many viewed these verdicts, or at least it was the predominant lens through which journalists and pollsters reported the cases.<sup>97</sup> At least as expressed in polls, many whites viewed the

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95. Although I think these categories are useful, I do not mean to suggest that they are entirely distinct. I believe one's values can shape how one perceives the world and how one perceives the world can shape one's values.

96. See, e.g., Kimberle Crenshaw, *Demarginalizing the Intersection of Race and Sex: A Black Feminist Critique of Antidiscrimination Doctrine, Feminist Theory and Antiracist Politics* 1989 U. CHI. LEGAL F. 139, 139 (contrasting the "multidimensionality of Black women's experience with the single-axis analysis that distorts these experiences" and that perpetuates "the tendency to treat race and gender as mutually exclusive categories of experience and analysis") (citation omitted); Angela P. Harris, *Race and Essentialism in Feminist Legal Theory*, 42 STAN. L. REV. 581, 608 (1990) (arguing that African-American women should not have to choose whether they are African Americans first or women first, but should be able to recognize themselves as "multiplicitous").

97. Race, of course, is not limited to just black and white, see, e.g., Brian Chin, Letter to the Editor, L.A. TIMES, Oct. 8, 1995, at M4 ("The media is so focused on black and white opinions on O.J. Why haven't the media polled Southern Californians who are neither?"), but with these verdicts, the divide, as reported in polls and by the press, seemed to be black and white.

Public opinion polls showed "blacks overwhelmingly thought Mr. Simpson was not guilty and whites thought he was." Editorial, *Not Guilty*, *supra* note 37, at 18A; see Julian Beltrame & Scott Shepard, *O.J. Simpson Verdict Divides Americans; Not Guilty: Blacks Cheer, Whites Lament Jury Decision*, OTTAWA CITIZEN, Oct. 4, 1995, at A1, available in WESTLAW, Paperscan Database ("A poll taken by CBS News immediately after the verdict found that about 6 in 10 whites believed the wrong verdict was reached, while 9 in 10 blacks said the jury had come to the right conclusion."); Editorial, *Simpson Jury Reached a Verdict; That's Progress*, ATLANTA J.-CONST., Oct. 4, 1995, at A12, available in 1995 WL 6554412 ("[M]ost whites believ[e] Simpson guilty and most blacks believ[e] him innocent."); Editorial, *The Simpson Case: Black and White Justice*, S.F. CHRON., Oct. 4, 1995, at A18, available in 1995 WL 5301366 ("According to polls, 77 percent of whites were certain Simpson was guilty, while 72 percent of blacks believed him an innocent victim of a frame-up by the Los Angeles Police Department, in the person of the racist detective Mark Fuhrman."); Ambrose Evans-Pritchard, *Focus After the O.J. Trial*, SUNDAY TELEGRAPH (London), Oct. 8, 1995, at 36, available in LEXIS, News Library, Telegr File ("According to the latest Time/CNN poll, 62 per cent of whites think that OJ got away with murder, compared to only 14 per cent of blacks."); Vin-

Simpson verdict as the result of nullification,<sup>98</sup> whereas many African Americans viewed it as the result of reasonable doubt.<sup>99</sup> After the Koon/Powell trial, the verdicts were criticized by both whites and African Americans,<sup>100</sup> but whites seemed far more willing to believe that the jury was acting in good faith,<sup>101</sup> whereas African Americans rejected the verdict as racist.<sup>102</sup>

The newspaper coverage of both the Simpson and Koon/Powell verdicts assumed an alternative view to the "different realities/same values" view described above; the press coverage assumed a view I will call "same reality/different values." In other words, the press assumed that jurors and those outside the jury room saw the same facts ("same reality") in both the Simpson and Koon/Powell trials, but that jurors chose to reach a result contrary to the facts because of "different values." With the Simpson verdict, the mainstream press assumed the jurors chose to let a murderer go free in order to send a message to the police or to white America ("different values"), and with the Koon/Powell verdict, the mainstream press assumed the jurors chose to let the police officers go free because of the trust they had in the police and the disdain they had for the victim ("different values").

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cent F.A. Golphin, *The 'Juice' Is Loose: But O.J. Might Never Be Free*, ABOUT . . . TIME, Oct. 31, 1995, at 44, available in 1995 WL 15265571 (noting that "as many as 81 percent of whites polled disagree" with the Simpson verdict); Miller-Perry, *supra* note 87, at 3 ("[M]ore than three-quarters of all whites interviewed in various polls, regardless of gender, income or educational levels, felt Simpson was guilty and had gotten a break from a predominantly black jury. Over 90 percent of all blacks interviewed felt Simpson was innocent . . ."); Rosen, *supra* note 12, at 35 ("After the trial, polls of the general public revealed that up to 80 percent of African Americans thought that Simpson was innocent."); Silverglate, *supra* note 88, at A21 ("[P]re-verdict polls indicated that the overwhelming number of black citizens thought Mr. Simpson innocent (or at least felt that he should be acquitted) while a like percentage of whites felt to the contrary . . ."); Jeffrey Toobin, *Putting It in Black and White*, NEW YORKER, July 17, 1995, at 31 ("A recent Harris poll found that sixty per cent of whites believe Simpson is guilty, compared with only twelve per cent of African-Americans."); *Unreasonable Doubt*, *supra* note 85, at 8 ("[W]e need not repeat the polls that show overwhelming differences between how whites and blacks viewed the [Simpson] case."). But see Rosen, *supra* note 12, at 35 ("[T]he essentialism of race was shown to be diversified by gender and class. . . . [C]lass envy, rather than shared experiences of racial and gender oppression, turned out to be the most important predictor of juror sympathies.").

98. See, e.g., Williams, *supra* note 13, at B1 ("I guarantee you in the white households in this country, [the Simpson verdict] is seen very clearly as jury nullification.") (quoting Toby Vick, Henrico County's Commonwealth's Attorney, discussing racism and gender bias in Virginia courtrooms).

99. See, e.g., Betsy Streisand et al., *The Verdict's Aftermath*, U.S. NEWS & WORLD REP., Oct. 16, 1995, at 34 (noting that a U.S. News survey by pollsters Celinda Lake and Ed Goeas "found that 7 out of 10 blacks felt the jury acquitted Simpson on the basis of facts and law, while 53 percent of whites thought 'other factors' were involved in its decision").

100. See *supra* notes 48–50.

101. See *supra* text accompanying notes 60–68.

102. See *supra* note 69.



If the mainstream press had espoused a “different realities/same values” view, it would have devoted coverage to exploring how another group saw a different reality based upon its different experiences. Instead, the mainstream press believed that jurors saw the same reality but simply held different values, and therefore, the press used nullification as a way of explaining what otherwise seemed to be untenable jury decisions. Under the “same reality/different values” view, other groups are seen not just as “different,” as the “different realities/same values” view holds, but as dangerous because there are no common values. Thus, this view not only leads to claims of false nullification, but also threatens the jury system itself, because if there are no shared values then it is difficult to see how a diverse jury can deliberate and reach common ground or how the verdict of a non-diverse jury will ever achieve acceptance by groups other than the one represented on the jury.

### *C. False Claims Encourage Intervention*

1. *Judicial Intervention*—As the press and public criticize jury verdicts for being instances of nullification in cases that do not actually involve nullification, judges have begun to respond to a growing fear that nullification is increasingly prevalent. Their response entails greater judicial control of the jury in an attempt to reduce instances of nullification, which they view as a threat to the judicial system.<sup>103</sup>

Recently, the Second Circuit created new procedures for trial judges to follow in an effort to limit instances of jury nullification. In *United States v. Thomas*,<sup>104</sup> the court placed the trial judge in the position of judging the juror’s intention to nullify, at least in cases in which such intent is brought to the judge’s attention.<sup>105</sup> In such

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103. See, e.g., 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 C3, available in 1990 WL 3813582 (“The jury is not a minidemocracy or a mini-legislature. They are not to go back and do right as they see fit. That’s anarchy. They are supposed to follow the law.”) (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).

104. 116 F.3d 606 (2d Cir. 1997).

105. See *id.* at 617 (“[A] presiding judge possesses both the responsibility and the authority to dismiss a juror whose refusal or unwillingness to follow the applicable law becomes known to the judge during the course of trial.”).

cases, the trial judge is to question the juror to determine if that juror is truly intent upon nullifying.<sup>106</sup> If so, that juror is to be dismissed from the jury, even if the jury is in the midst of deliberations.<sup>107</sup>

Although the appellate court briefly acknowledged that jurors may nullify for a variety of reasons and that nullification may not always be harmful,<sup>108</sup> overall it was highly critical of nullification. Because nullification represents a "violation of a juror's oath to apply the law as instructed by the court," the appellate court "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."<sup>109</sup>

In *People v. Sanchez*,<sup>110</sup> a California appellate court also supported a trial judge's efforts to limit a jury's opportunity to nullify.<sup>111</sup> The jury had asked the trial judge whether it could consider a lesser offense;<sup>112</sup> the trial judge informed the jury that it could not.<sup>113</sup> The

106. See *id.* (explaining that a court has "inherent authority to conduct inquiries in response to reports of improper juror conduct and to determine whether a juror is unwilling to carry out his duties faithfully and impartially").

107. See *id.* at 618 ("[T]he need to safeguard the secrecy of jury deliberations requires the use of a high evidentiary standard for the dismissal of a *deliberating* juror for purposeful disobedience of a court's instructions . . ."). For a fuller discussion of the dangers posed by the Second Circuit's approach in *Thomas*, see Marder, *Myth*, *supra* note 4.

108. See *Thomas*, 116 F.3d at 614-16 (recognizing "that nullification may at times manifest itself as a form of civil disobedience that some may regard as tolerable" and mentioning the case of John Peter Zenger, acquitted of criminal libel in 1735, and the nineteenth century acquittals of fugitive slaves as "perhaps our country's most renowned examples of 'benevolent' nullification").

109. *Id.* at 614. The Second Circuit is not alone in its condemnation of jury nullification; other federal circuits have taken a similar view. See *United States v. Perez*, 86 F.3d 735, 736 (7th Cir. 1996) ("An unreasonable jury verdict, although unreviewable if it is an acquittal, is lawless, and the defendant has no right to invite the jury to act lawlessly."); *United States v. Washington*, 705 F.2d 489, 494 (D.C. Cir. 1983) (*per curiam*). The court in *Washington* stated:

A jury has no more '*right*' to find a 'guilty' defendant 'not guilty' than it has to find a 'not guilty' defendant 'guilty,' and the fact that the former cannot be corrected by a court, while the latter can be, does not create a right out of the power to misapply the law. Such verdicts are lawless, a denial of due process and constitute an exercise of erroneously seized power.

*Id.*

110. 69 Cal. Rptr. 2d 16 (Cal. Ct. App. 1997).

111. See *id.* at 20-22.

112. See Tr. at 763-67, *People v. Sanchez*, No. B104533 (Cal. Super. Ct. L.A. County 1997). The jury asked the judge: "Can we arrive at a verdict where we find the defendant guilty of robbery/second degree murder?" and the judge responded: "The answer to that is no. To begin with, robbery is not charged. . . . The only issue is whether the defendant is guilty of murder . . . ." *Id.* at 763-64.

113. See *id.*

trial judge went further, however, and explicitly instructed the jury that not only did it have to follow the law, but also that any juror who felt unable to do so would be excused by the judge even though the jury was already in the midst of deliberations.<sup>114</sup> The trial judge's response to the jury was upheld on appeal.<sup>115</sup> Typically, trial judges remain silent on the jury's power to nullify;<sup>116</sup> in this

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114. See *id.* at 767. The judge instructed the jury:

Now I've explained the reason for the felony murder rule and if after thinking about it any of you feel that if you did find the defendant committed a robbery and in the commission or attempted commission of it he committed a murder and are reluctant to follow the law that says that's first degree murder, I want you to tell me, and I'll excuse you from jury service because you're not following the law.

*Id.*

115. See *Sanchez*, 69 Cal. Rptr. 2d at 22 ("Accordingly, we are bound to conclude the trial court was not required to instruct the jurors on their power of nullification and permit them to disregard the law." (citation omitted)).

116. The federal circuits do not permit an instruction on nullification. See *United States v. Thomas*, 116 F.3d at 606, 616 n.9 (2d Cir. 1997) ("Accordingly, criminal defendants have no right to a jury instruction alerting jurors to this power to act in contravention of their duty." (citations omitted)); *United States v. Sepulveda*, 15 F.3d 1161, 1190 (1st Cir. 1993) ("Though jury nullification has a long and sometimes storied past the case law makes plain that a judge may not instruct anent its history, vitality, or use." (citations omitted)); *United States v. Powell*, 955 F.2d 1206, 1213 (9th Cir. 1991) ("Our circuit's precedent indicates that the [defendants] are not entitled to jury nullification instructions." (citation omitted)); *United States v. Krzyske*, 836 F.2d 1013, 1021 (6th Cir. 1988) ("[W]e are compelled to approve the district court's refusal to discuss jury nullification with the jury. To have given an instruction on nullification would have undermined the impartial determination of justice based on law."); *United States v. Anderson*, 716 F.2d 446, 450 (7th Cir. 1983) ("We agree with Judge Lev[e]nthal's capsulization of the necessary historical tension which is not to be collapsed by explicit nullification instructions . . ."); *United States v. Trujillo*, 714 F.2d 102, 106 (11th Cir. 1983) ("While we recognize that a jury may render a verdict at odds with the evidence or the law, neither the court nor counsel should encourage jurors to violate their oath."); *United States v. Washington*, 705 F.2d 489, 494 (D.C. Cir. 1983) ("[T]he district court's absolute refusal to instruct the jury [on nullification] as requested was entirely proper."); *United States v. Desmond*, 670 F.2d 414, 417 (3d Cir. 1982) ("Thus, although acknowledging the existence of the jury's prerogative and its beneficial role in acting as a 'safety valve,' the courts do not encourage exercise of the right."); *United States v. Buttorff*, 572 F.2d 619, 627 (8th Cir. 1978) ("A defendant is not entitled to a jury nullification instruction." (citation omitted)); *United States v. Moylan*, 417 F.2d 1002, 1006 (4th Cir. 1969) ("[B]y clearly stating to the jury that they may disregard the law, . . . we would indeed be negating the rule of law in favor of the rule of lawlessness."); see also *Washington v. Watkins*, 655 F.2d 1346, 1374 (5th Cir. Unit A Sept. 1981) ("The courts that have considered the question, however, have almost uniformly held that a criminal defendant is not entitled to an instruction that points up the existence of that practical power [to nullify] to his jury." (citations omitted)).

Only two states, Indiana and Maryland, permit judges to instruct jurors that they have the right to determine the law as well as the facts. These two states' respective constitutions provide for this right. See IND. CONST. art. I, § 19 ("In all criminal cases whatsoever, the jury shall have the right to determine the law and the facts."); MD. CONST. DECLARATION OF RIGHTS art. 23 ("In the trial of all criminal cases, the Jury shall be the Judges of Law, as well as of fact, except that the Court may pass upon the sufficiency of the evidence to sustain a conviction."). However, in both states, the judiciary has narrowed this right through case

instance, the judge took a more proactive stance and asserted that the power did not exist.

2. *Proposed Legislative Intervention*—Labeling a verdict as an instance of nullification, even if it is not actual nullification, also can contribute to a public sense of despair about the jury and fuel legislative efforts to limit the jury's power. After the Koon/Powell and Simpson verdicts, there were legislative proposals to constrain the jury and to make convictions easier to obtain. One proposal debated in the California state legislature<sup>117</sup> and the press<sup>118</sup> called for abandoning the unanimity requirement in criminal trials<sup>119</sup> and switching to an 11–1 or 10–2 decision rule.<sup>120</sup> The intent was to make it easier for juries to convict<sup>121</sup> and more difficult for one or

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law. See, e.g., *Beavers v. State*, 141 N.E.2d 118, 125 (Ind. 1957) (“Although the constitution gives the jury the right to determine the law in criminal cases, it does not follow . . . that it is an ‘exclusive’ right. . . . Neither does it follow . . . that the jury is the judge of the law at every step in the proceedings.”); *Montgomery v. State*, 437 A.2d 654, 656 (Md. 1981) (“[T]he jury’s role in judging the law under Article 23 is confined ‘to resol[ving] conflicting interpretations of the law [of the crime] and to decid[ing] whether th[at] law should be applied in dubious factual situations,’ and nothing more.” (quoting *Stevenson v. State*, 423 A.2d 558, 564 (Md. 1980); *Dillon v. State*, 357 A.2d 360, 367 (Md. 1976))).

117. See, e.g., Assembly Const. Amend. 18, 1995 Cal. Sess. (“This measure would provide that in a criminal action in which either a felony or misdemeanor is charged, 5/6 of the jury may render a verdict, but if the death penalty is sought, only a unanimous jury may render a verdict.”); Senate Const. Amend. 24, 1995 Cal. Sess. (“This measure would provide that 11/12 of the jury may render a verdict in any criminal action except an action in which the death penalty is sought or in which a defendant may be sentenced to a term of imprisonment for life without the possibility of parole.”).

118. See, e.g., *California Blue Ribbon Panel Urges Wide Range of Jury Reforms*, WEST’S LEGAL NEWS, May 3, 1996, available in 1996 WL 260677 (announcing the Judicial Council’s Blue Ribbon Commission proposals for jury reform, which included a recommendation for nonunanimous verdicts); Greg Krikorian, *Committee Hearing a Trial by Fire for the Jury System*, L.A. TIMES, July 28, 1995, at 3 (describing a proposal by State Senator Charles Calderon, Chair of the Senate Judiciary Committee, which “would allow 11–1 verdicts in all but capital cases”); Jason L. Riley, *Rule of Law: Should a Jury Verdict Be Unanimous?*, WALL ST. J., Nov. 22, 1995, at A11 (recounting California District Attorneys Association’s proposal to amend the state’s constitution to allow for nonunanimous juries); *Wilson Touts Jury Reform, Cites Simpson Trial*, L.A. DAILY NEWS, July 18, 1995, at N4, available in 1995 WL 5411715 (“[Governor Pete] Wilson told a group of prosecuting attorneys . . . that he supports a bill . . . that would allow criminal convictions on a 10–2 vote of jurors in all but death penalty cases.”).

119. See CAL. CONST. art. I, § 16 (“Trial by jury is an inviolate right and shall be secured to all, but in a civil cause three-fourths of the jury may render a verdict.”).

120. See *supra* notes 117–18.

121. One jury scholar, Professor Valerie Hans, has noted that public dissatisfaction with juries may stem from a “very strong” belief that “courts are not doing enough to punish wrongdoers.” Laura Mansnerus, *Under Fire, Jury System Faces Overhaul*, N.Y. TIMES, Nov. 4, 1995, at A9 (quoting Hans). Recent cases that incensed the public, such as “Rodney King, Bobbitt, Menendez, [and] Simpson” were all “prodefendant decision[s],” and in Professor Hans’ view, would not have been as controversial “if these juries were convicting.” *Id.*; see also Mark Curriden, *Jury Reform*, A.B.A. J., Nov. 1995, at 72 (“‘When people are acquitted in criminal cases, there is a tendency to say that the system is broke and needs fixing.’” (quoting Victor “Tory” Johnson, Vice President of the National District Attorneys Association));

two jurors, who may be advocating nullification or some other outsider position, to create a hung jury,<sup>122</sup> which adds costs and delays. Although this proposal would affect the jury where one or two jurors were holding out and urging nullification, it would not affect the jury where all of the jurors believed that nullification was appropriate. Ironically, this proposal would not have affected the very jury that inspired it, the Simpson jury,<sup>123</sup> which was unanimous in its verdict of acquittal.<sup>124</sup> Nor is there any indication that hung juries, which comprise a small percentage of all tried cases in California,<sup>125</sup> are really a problem that needs to be addressed. What seemed to motivate proponents of this proposal was an underlying distrust of jurors in general and, perhaps, an underlying distrust of minority jurors or those who might come from a different background and offer a different perspective in particular.<sup>126</sup> If all

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Christopher Johns, Opinion, *Jury Overhaul Needed, Now More Than Ever*, ARIZ. REPUBLIC, Apr. 12, 1995, at B5, available in 1995 WL 2784405 ("Sensational cases seem to cause most of the public's frustration with the jury system . . .").

122. California was considering moving from a unanimity requirement in criminal cases to 10-2 or 11-1 juries, in part to save money and in part to "lessen the number of hung juries" in criminal cases. Riley, *supra* note 118, at A11.

123. See Jan Crawford Greenburg & Ginger Orr, *Simpson Trial Yields a Verdict Against the System*, NEWS TRIB. (Tacoma, Wash.), Oct. 8, 1995, at F1 ("State legislators in California have responded to the [Simpson] trial by introducing legislation to change the jury system. . . . [One change] would do away with the requirement that juries be unanimous in their decisions."); Editorial, *The O.J. Simpson Case: A Legal Aberration*, S.F. CHRON., Oct. 7, 1995, at A18, available in 1995 WL 5301997 ("The Simpson trial and verdict ha[ve] given rise to a host of quick-fix proposals to reform the courts, including one particularly misguided notion to replace unanimous jury verdicts with 10-to-2 decisions."); Whitaker, *supra* note 16, at 34 ("[D]isgust over the Simpson outcome might simply leave whites determined to make it more difficult for black juries to acquit black defendants. Prospects suddenly brightened for a California amendment that would allow 'non-majority' verdicts of 10-2 . . .").

124. In an initial vote, the jury in O.J. Simpson's trial was 10-2 for an acquittal; soon after, it took a second vote, in which it was unanimous for acquittal. See Lorraine Adams, *Simpson Jurors Cite Weak Case, Not 'Race Card'*, WASH. POST, Oct. 5, 1995, at A1; Edward J. Boyer & Elaine Woo, *Case Had Many Holes, Juror Says*, L.A. TIMES, Oct. 4, 1995, at A1; Julia Campbell, *At First Shy of Publicity, Juror No. 4 Speaks Out*, N.Y. TIMES, Oct. 10, 1995, at A15; Egan, *supra* note 34 A1; Jim Newton, *Simpson Not Guilty*, L.A. TIMES, Oct. 4, 1995, at A10.

125. See, e.g., Roger Parloff, *Race and Juries: If It Ain't Broke . . .*, A.B.A. J., June 1997, at 5 ("[T]here is no evidence that hung-jury rates in Los Angeles have risen one iota in more than a decade."). Parloff notes that, according to Los Angeles superior court figures, hung jury rates were about 15 percent in 1985, and have remained fairly steady since, with a low of 12 percent in 1991, 1993, and 1994. See *id.* Parloff, re-examining data collected by Kalven and Zeisel in 1956, concludes that Los Angeles' hung jury rate in that year was 13 percent, which is consistent with today's figures. See *id.* But see CALIFORNIA DIST. ATTORNEYS, NON-UNANIMOUS JURY VERDICTS: A NECESSARY CRIMINAL JUSTICE REFORM i, ii (1995) (reporting California hung jury rates of approximately 10%). This publication also reported hung jury rates for Los Angeles County of 13-14% between 1992 and 1994, see *id.* at 7, and of rates for five large California counties ranging from 13% to 8%. See *id.* at 12.

126. This view would certainly be consistent with other signs of hostility toward minorities in California, including Proposition 187 (visited Feb. 22, 1999) <<http://ca94.election.digital.com/e/prop/187/txt.html>> (ending government services to

jurors have to listen to each other and reach consensus during deliberations, there is a greater risk that convictions would not follow in the numbers that the press, public, and legislature demanded.<sup>127</sup> This proposal reflected an underlying view of jurors that was both belittling and cynical—belittling in that all of the jurors could not be trusted to deliberate responsibly and should not have to listen to each other or spend additional time trying to persuade those among them who might have reasonable doubts, and cynical because, just as efforts have been made to make juries more diverse—from multiple venire lists<sup>128</sup> to nondiscriminatory peremptories<sup>129</sup>—this was an effort to minimize, if not undermine, the

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those who could not establish that they were in this country legally) and Proposition 209 (visited Feb. 22, 1999) <<http://vote96.ss.ca.gov/BP/209text.htm>> (ending affirmative action in schools). According to former Democratic Assemblyman Phillip Isenberg, California's recent "anti-immigrant and . . . anti-affirmative action assaults are the most ignoble and, tragically, will probably caricature [Pete Wilson's] administration." Cathleen Decker, *The Wilson Paradox: Little Political Gain from Success*, L.A. TIMES, Dec. 29, 1998, at A1.

127. See *supra* note 121.

128. Some commentators have noted that when venire lists are drawn only from voter registration lists, the representativeness of the venire is compromised. See, e.g., Kairys et. al, *supra* note 91, at 803–11. To overcome this problem, commentators have suggested supplementing voter registration lists with multiple lists, such as lists of those who have driver's licenses or receive unemployment compensation. See *id.*; Dennis Bilecki, *Program Improves Minority Group Representation on Federal Juries*, 77 JUDICATURE 221, 222 (1994) (recommending the use of driver's license and identification card registration records as a supplement to voter registration records to expand jury pools to include minority groups that have been underrepresented in the past). Other commentators have explored "stratified selection" in which prospective jurors for the venire are summoned proportionally "to obtain a qualified list with racial demographics identical to that of the population." Nancy J. King & G. Thomas Munsterman, *Stratified Juror Selection: Cross-Section by Design*, 79 JUDICATURE 273, 276 (1996). But see *United States v. Ovalle*, 136 F.3d 1092, 1109 (6th Cir. 1998) (holding the practice violative of 28 U.S.C. § 1862 and the equal protection component of the Fifth Amendment).

129. This is the goal of the Supreme Court's decisions in *Batson v. Kentucky*, 476 U.S. 79 (1986) (holding that a prosecutor's use of peremptories to strike African Americans from the jury violated the Equal Protection Clause), and its progeny, see *J.E.B. v. Alabama ex rel. T.B.*, 511 U.S. 127 (1994) (holding that peremptories exercised on the basis of gender violate the Equal Protection Clause); *Georgia v. McCollum*, 505 U.S. 42 (1992) (holding that *Batson* applies to defendants as well as to the prosecution); *Edmonson v. Leesville Concrete Co.*, 500 U.S. 614 (1991) (holding that *Batson* applies to civil suits); *Powers v. Ohio*, 499 U.S. 400 (1991) (holding that peremptories exercised on the basis of race violate the Equal Protection Clause), even though the Court seems to have done some backsliding since then. See *Purkett v. Elem*, 514 U.S. 765, 768 (1995) (per curiam) (holding that a neutral explanation given in response to a *Batson* challenge need not be "related to the particular case to be tried" (quoting *Batson*, 476 U.S. at 98)).

The Court's earlier efforts notwithstanding, discriminatory peremptories continue to be prevalent. See *Developments in the Law—The Civil Jury*, 110 HARV. L. REV. 1408, 1462 & nn.177–78 (1997). As a result, some have called for the elimination of the peremptory, see, e.g., *Batson*, 476 U.S. at 107–08 (Marshall, J., concurring) (suggesting that the Court "ban[] the use of peremptory challenges by prosecutors and . . . allow[] the States to eliminate the defendant's peremptories as well"); *Minetos v. City Univ.*, 925 F. Supp. 177, 185 (S.D.N.Y. 1996) ("It is time to put an end to this charade. We have now had enough judicial experience with the *Batson*

effects of diversity in the jury room.<sup>130</sup> Other reforms that were discussed in the wake of the Simpson verdict included changing jury selection<sup>131</sup> and, in the case of trials with complicated evidence, eliminating the jury.<sup>132</sup> According to one writer, "[t]he net effect . . . would make it harder to win acquittal."<sup>133</sup>

What these judicial and legislative responses reveal is a distrust of the jury in general and of nullification in particular. False claims of nullification contribute to that distrust. False claims make nullification appear far more prevalent than it is, and thus, make nullification appear to be a problem that needs to be addressed by these other governmental actors. False claims also heighten misgivings about the jury, spurring judges and legislators to consider ways that jury power may be reduced. Although false claims alone are not responsible for these responses to the jury, they contribute to a growing sense that reforms are required.

### III. FALSE CLAIMS AND DIVERSE JURIES

#### A. Past Steps Taken to Achieve Diverse Juries

False claims of nullification are a means of discrediting verdicts, at least in the public's view, and ultimately they may also be a way of wresting power from juries. This effort to undermine a verdict may be linked to who can now serve on a jury. At one point in this country's history, only white men with property were eligible to

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test to know that it does not truly unmask discrimination."); JEFFREY ABRAMSON, *WE, THE JURY* 137-39 (1994); Morris B. Hoffman, *Peremptory Challenges Should Be Abolished: A Trial Judge's Perspective*, 64 U. CHI. L. REV. 809, 810, 850 (1997); Marder, *Peremptory Challenges*, *supra* note 91, at 1044-47, 1052-86, 1095-99. Others have recommended a reduction in the number of peremptories, see Jean Montoya, *The Future of the Post-Batson Peremptory Challenge: Voir Dire by Questionnaire and the "Blind" Peremptory*, 29 U. MICH. J.L. REFORM 981, 1011 & n.144 (citing scholars and commentators who have made this proposal) (1996), or at least peremptories that are exercised by questionnaire, rather than voir dire, so that attorneys will not have access to information that is likely to lead to discriminatory peremptories. See *id.* at 1015-16.

130. See, e.g., Parloff, *supra* note 125, at 74 ("[Some] critics would charge, in fact, that the nonunanimous system had been designed . . . in deference to white fears that black jurors could not be trusted to exercise their civic duty, and to white intuitions that their own assessments of police credibility were intrinsically [sic] superior to black jurors' assessments of police credibility.").

131. See Richard Goldstein, *O.J. Can You See?*, VILLAGE VOICE, Oct. 17, 1995, at 18.

132. See *id.*

133. *Id.*

serve as jurors.<sup>134</sup> In 1880, in *Strauder v. West Virginia*,<sup>135</sup> the Supreme Court held that a statute excluding African-American men from jury service on the basis of their race violated the Fourteenth Amendment to the United States Constitution,<sup>136</sup> and in 1975, in *Taylor v. Louisiana*,<sup>137</sup> the Court held that automatic exemption of women from juries because of their gender violated a defendant's Sixth Amendment right to a venire drawn from a fair cross section of the community.<sup>138</sup> Although there is no constitutional right to a petit jury that mirrors the community,<sup>139</sup> prospective jurors can no longer be excluded from the venire because of their race or gender. At least since 1986, in *Batson v. Kentucky*<sup>140</sup> and its progeny,<sup>141</sup> race and gender can no longer be used as the basis for the exercise of a peremptory challenge,<sup>142</sup> past use of which had served as a bar to placement on a petit jury. The Supreme Court has tried to ensure, albeit with questionable success,<sup>143</sup> that peremptory challenges are not used as an alternate route to exclude prospective jurors from jury service based on race or gender.<sup>144</sup> On a more local level, courts have tried to identify eligible jurors from multiple venire lists,<sup>145</sup> so that failure to register to vote, for example, is

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134. See Marder, *Peremptory Challenges*, *supra* note 91, at 1094 (citation omitted). As one writer has noted, "the racially mixed deliberative body in 'Voir Dire' [a 1995 play by Joe Sutton] (four whites, one black and one Latino) epitomizes the demise of the all-white, all-male urban jury depicted in 'Twelve Angry Men.'" Misha Berson, *Trial by Jury: Seattle Rep Play Takes a Timely Look at Justice, O.J.-Style*, SEATTLE TIMES, Oct. 8, 1995, at M1, available in WESTLAW, SH-Times Database.

135. 100 U.S. 303 (1880).

136. *See id.* at 310.

137. 419 U.S. 522 (1975).

138. *See id.* at 533.

139. *See Holland v. Illinois*, 493 U.S. 474, 494 (1990).

140. 476 U.S. 79 (1986) (holding that a prosecutorial peremptory challenge based on race was a violation of the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution).

141. *See cases cited supra* note 129.

142. *See id.*

143. *See discussion supra* note 129; *see also* Marder, *Peremptory Challenges*, *supra* note 91, at 1095, 1098-99 (arguing that discriminatory peremptories will not be eliminated until all peremptories are eliminated).

144. *See generally* *J.E.B. v. Alabama ex rel. T.B.*, 511 U.S. 127 (1994); *Georgia v. McCollum*, 505 U.S. 42 (1992); *Edmonson v. Leesville Concrete Co.*, 500 U.S. 614 (1991); *Powers v. Ohio*, 499 U.S. 400 (1991); *Batson*, 476 U.S. at 79. *But see* *Purkett v. Elem*, 514 U.S. 765, 768 (1995) (per curiam) (allowing a prosecutor to satisfy step two of the *Batson* inquiry—of providing a race-neutral explanation for a peremptory—with an explanation that is "silly or superstitious").

145. *See, e.g.,* Bilecki, *supra* note 128, at 220-21; Kairys et al., *supra* note 91, at 780; G. Thomas Munsterman & Paula L. Hannaford, *Reshaping the Bedrock of Democracy: American Jury Reform During the Last 30 Years*, JUDGES' J., Fall 1997, at 6 ("A widely used technique was to supplement voter registration lists with lists of licensed drivers. More recently, states have added unemployment compensation[] recipients, welfare recipients, and state and local income tax filers as supplemental source lists." (citation omitted)); Berson, *supra* note 134,



no longer a basis for exclusion from jury service. The relatively recent removal of these legal and practical impediments has meant that, for the first time in our country's history, juries can be truly diverse.

### *B. False Claims as a Response to Backsliding*

With this potential for diversity, it would not be surprising to find a concomitant readiness to make false claims of nullification whenever juries appear to fall short of this ideal. If a jury does not look diverse, then those outside the jury room become increasingly wary about trusting that jury's judgment. One way to discredit the judgment is to label it as nullification, whether actual or false. This may help to explain the use of nullification in the Simpson verdict.

Whereas the Simpson jury was discredited because it consisted largely of African Americans,<sup>146</sup> the Koon/Powell jury was discredited because it consisted largely of whites.<sup>147</sup> When a particular jury is not diverse, those who are members of the excluded groups are likely to make false claims of nullification or to reject the criminal justice system altogether. The Koon/Powell verdict was also rejected by many whites who distrusted a verdict reached by a homogeneous jury drawn from an insulated community. Thus, a verdict is likely to be questioned, and the claim of nullification made, even falsely, when a verdict is arrived at by a jury that is not seen as drawn from a fair cross section of the community. This was true of both the Koon/Powell and Simpson verdicts, though for each verdict different communities were included and excluded.<sup>148</sup> False claims of nullification, then, can serve as a means of discrediting the jury by those objecting to its homogeneity and suspecting that it reached its judgment through impermissible group considerations.<sup>149</sup>

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at M1 (noting that, in the State of Washington, "any adult licensed by the Department of Motor Vehicles is eligible to receive a jury summons—representing a far wider cross-section of the public").

146. See *supra* text accompanying note 12.

147. See *supra* note 46.

148. Compare *supra* text accompanying note 12 with *supra* note 46.

149. After the Koon/Powell verdicts, one attorney described the exclusion of African Americans from juries as follows:

'In terms of jury selection, Blacks are clearly losing ground when it comes to being allowed to sit as the factual judges of innocence or guilt. We are at a point when justice is still peeping from under the blindfold that she is supposed to be wearing, and

### C. Diverse Juries as a Deterrent to False Claims

A diverse jury is needed to guard against false claims of nullification. With a diverse jury, those outside the jury room will have more faith in the verdict rendered by that jury and will have less reason to resort to false claims of nullification. They will harbor fewer suspicions that perhaps jurors succumbed to impermissible biases, such as sympathy for the defendant if they belong to the same group or animosity toward the defendant if they belong to a different group. If the jury is diverse, and its members are drawn from an array of different groups and backgrounds, then the verdict is more likely to be trusted. Those outside the jury room may still disagree with a verdict, and voice that disagreement, but they will be less likely to make claims of false nullification in an attempt to discredit the verdict. Rather, they are more likely to say that the jury reached a verdict that they would not have reached, but they are willing to believe that the jury reached it in good faith, and therefore, to accept it.

### D. Additional Virtues of Diverse Juries

A diverse jury provides additional benefits to the justice system as well.<sup>150</sup> With diversity, a variety of perspectives are represented on the jury.<sup>151</sup> When jurors come from different backgrounds and have different life experiences, they bring to the jury room different perspectives through which to view the evidence and to assess the credibility of witnesses. They bring to the jury room their "different realities" which they are able to share with their fellow jurors. To take a fictional illustration, consider *12 Angry Men*.<sup>152</sup>

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unfortunately what she is seeing is a system that still shuts the door of opportunity for Blacks to be involved in this great experiment called a trial by jury.'

Charles Whitaker, *Is There a Conspiracy to Keep Blacks Off Juries?*, EBONY, Sept. 1992, at 54, available in LEXIS, Market Library, Ebony File (quoting Miami attorney H.P. Smith).

150. Although at this time I am not making an empirical claim about the benefits of diverse juries, I will be able to do so when I complete an empirical study entitled "The Ideal of the Diverse Jury."

151. See, e.g., Hans Zeisel, . . . *And Then There Were None: The Diminution of the Federal Jury*, 38 U. CHI. L. REV. 710, 715 (1971); Marder, *Gender Dynamics*, *supra* note 91, at 604; see also 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.").

152. See *12 ANGRY MEN* (Metro-Goldwyn-Mayer/United Artists 1957).

Although the jury portrayed in that 1957 movie<sup>153</sup> consisted of white men only, at the very least, it included white men from different economic strata. As a result, one juror, who had grown up in poverty much like the defendant, was able to explain to the other jurors, who came from more well-to-do backgrounds, how a switchblade was properly held and handled.<sup>154</sup>

A diverse jury is also likely to engage in a more thorough and searching deliberation.<sup>155</sup> This is so not only because jurors will have different perspectives that will be available for group consideration, but also because assumptions and biases are more likely to be challenged by jurors who do not share them.<sup>156</sup> Jurors who reveal group-based stereotypes will find their views challenged by jurors who belong to those groups and who do not share those stereotypes.<sup>157</sup> In contrast, with a homogeneous jury, stereotypical

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153. The movie was recently remade, and in the updated version, the jury was far more diverse than in the original. See *12 ANGRY MEN* (Metro-Goldwyn-Mayer/United Artists 1997). In the updated version, the jury consisted of seven white men, four African-American men, and one man of Mediterranean descent. In addition, the foreperson was African American. The dynamic of a deliberating jury was also explored in a play entitled *Voir Dire* by Joe Sutton, in which the six-person jury consisted of four whites, one black and one Latino. This jury included both men and women. See Berson, *supra* note 134, at M1.

154. The jury deliberations portrayed in *12 Angry Men* are far from ideal, as the title suggests. The jury engaged in "verdict-driven" deliberations, in which the jurors voted prior to discussion, rather than "evidence-driven" deliberations, in which jurors consider all of the evidence before taking an initial vote. See HASTIE ET AL., *INSIDE THE JURY* 163-65 (1983). One result was that coalitions formed early in the process and the coalitions were antagonistic. The jurors bullied each other and engaged in personal taunts. Even the juror portrayed by Henry Fonda, who came closest to being the ideal juror, by taking the presumption of innocence and the need to deliberate seriously, nonetheless brought into the jury room a switchblade he had purchased in a store, thus introducing "extraneous," albeit exculpatory, evidence to the jury. See FED. R. EVID. 606(b) (providing that jurors may be questioned by the judge after the verdict on "the question whether extraneous prejudicial information was improperly brought to the jury's attention").

155. See VALERIE P. HANS & NEIL VIDMAR, *JUDGING THE JURY* 50 (1986) ("[A] jury composed of individuals with a wide range of experiences, backgrounds, and knowledge is more likely to perceive the facts from different perspectives and thus engage in a vigorous and thorough debate.").

156. See *id.* ("The jury's heterogeneous makeup may also lessen the power of prejudice.").

157. Samuel Paz, a criminal defense attorney, described the difference a diverse jury could make in challenging stereotypes:

Racism is permitted when no one speaks about it. In other words, . . . it's OK to make those inferences if no one will call you on the carpet. If you have one person who says, 'Wait a minute now. I don't think you're being fair,' and—or 'Maybe you're being racist' about a particular issue, then most of us will think about that and say . . . maybe that's true. Maybe I am. And that's the difference between when you have an all-white jury and . . . even a small mix within the jury.

*All Things Considered: Rodney King*, *supra* note 59 (quoting Paz).

assumptions are more likely to be shared and voiced and less likely to be challenged.<sup>158</sup>

### *E. Challenges Posed by Diverse Juries*

A diverse jury, while a deterrent to false claims of nullification, is not without its challenges, one of which will be to reach consensus.<sup>159</sup> In criminal cases, in federal and in many state courts, the jury must reach a unanimous decision.<sup>160</sup> The challenge for the diverse jury is to reach consensus. With jurors coming from different backgrounds and holding different views of a case, it may be more difficult for them to agree on a verdict. Deliberations may be more trying as jurors with different experiences and backgrounds attempt to convince each other to see the case from their point of view. One downside of the diverse jury may be a rise in hung juries, but at this time there is no empirical evidence to support this hypothesis.<sup>161</sup> The upside, however, is that if a diverse jury can reach a

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158. If jurors receive reinforcement from each other for racist or sexist comments made during deliberations, then they are likely to feel free to engage in such comments. For example, see *Powell v. Allstate Ins. Co.*, 652 So.2d 354 (Fla. 1995), where jurors were alleged to have made racist remarks and jokes. The court found that such actions would constitute a violation of "both the federal and state constitutions which ensure[] all litigants a fair and impartial jury and equal protection of the law." *Id.* at 358.

159. See *infra* note 161.

160. Federal criminal juries and many state criminal juries are required to reach a unanimous verdict. See, e.g., ARIZ. CONST. art. II, § 23 ("In all criminal cases the unanimous consent of the jurors shall be necessary to render a verdict."); OKLA. CONST. art. II, § 19 ("In all other cases [other than civil and criminal misdemeanors] the entire number of jurors must concur to render a verdict."); FED. R. CRIM. P. 31(a) ("The verdict shall be unanimous."); COLO. REV. STAT. § 16-10-108 (1996) ("The verdict of the jury shall be unanimous."); HAW. REV. STAT. § 83 (1993) ("No person shall be convicted in any criminal case except by unanimous verdict of the jury."); 725 ILL. COMP. STAT. 5/115-4(o) (West 1996) ("A defendant tried by the court and jury shall only be found guilty . . . upon the unanimous verdict of the jury."); KY. REV. STAT. ANN. § 29A.280 (Michie 1992) ("A unanimous verdict is required in all criminal trials by jury."); MINN. STAT. § 480.059(7)(i) (1982) ("The supreme court shall not have the power to adopt or promulgate any rule requiring less than unanimous verdicts in criminal cases."); MONT. CODE ANN. § 46-16-603 (1997) ("The verdict must be unanimous in all criminal actions."); N.C. GEN. STAT. § 15A-1201 (1997) ("In all criminal cases the defendant has the right to be tried by a jury of 12 whose verdict must be unanimous."); OR. REV. STAT. § 221.349(1) (1997) ("The verdict of the jury shall be unanimous."); W. VA. CODE § 50-5-8 (1994) ("Any defendant in any criminal action shall be entitled to a trial by jury, and any such verdict must be unanimous."); WYO. STAT. ANN. § 7-11-501 (Michie 1997) ("In all criminal cases the verdict shall be unanimous."); N.M. R. CRIM. P. 5-611(A) (Michie 1999) ("The verdict shall be unanimous . . .").

161. One study is currently underway to determine hung jury rates in Los Angeles. See *Is It Time to Replicate The American Jury?*, Ass'n of Am. L. Sch. Panel Discussion (Jan. 9, 1998) (author's notes on file with the *University of Michigan Journal of Law Reform*). Meanwhile, at least one writer, relying on anecdotal evidence, has surmised that minority jurors,

unanimous decision, then that decision is likely to be widely accepted and respected.

Although the diverse jury can guard against false claims of nullification, there is no guarantee that every petit jury will be diverse,<sup>162</sup> and thus false claims will remain a risk, though a reduced one as efforts are taken to strive for diverse juries. The only way to guarantee a diverse jury in every case is to impose quotas on the petit jury. Although some commentators have advocated a modified quota system,<sup>163</sup> it is not one that I embrace.<sup>164</sup> I think the better approach is to eliminate, or at least to reduce, all practices that limit who can serve, such as peremptory challenges, and to expand all practices that draw jurors from as broad a segment of the community as possible, such as relying on multiple sources from which venire lists are created. The goal should be to avoid skewing jury composition wherever possible and to strive for a process that approaches random selection of as broad a swath of the community as possible. In this way, the jury is likely to be diverse, though there is no guarantee that every jury will be diverse. In the ideal world, every jury would be diverse; in the real world, however, the politics required to achieve that goal would tarnish the jury.

### CONCLUSION

The Simpson and Koon/Powell verdicts teach many lessons, one of which is how easy it is to engage in false claims of jury nullification, and another of which is how destructive this can be. The temptation to claim false nullification strikes when there is not only disagreement with the verdict, but also when there is distrust of the jury that reached it. One reason there might be distrust is because that jury falls far short of the ideal of the diverse jury. As a result, those outside the jury room are suspicious and wonder whether "different values," such as sympathies or animosities based

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particularly African-American women, are refusing to convict under any circumstances and are leading to a growing number of hung juries. See Jeffrey Rosen, *One Angry Woman*, NEW YORKER, Feb. 24 & Mar. 3, 1997, at 54, 55.

162. See *Holland v. Illinois*, 493 U.S. 474, 494 (1990) (concluding that there is no constitutional right to a petit jury that mirrors the community).

163. See Nancy J. King, *Racial Jurymantering: Cancer or Cure? A Contemporary Review of Affirmative Action in Jury Selection*, 68 N.Y.U. L. REV. 707, 768 (1993) (suggesting that "courts analyze which race-conscious reforms are reasonably necessary to maintain public confidence in the impartiality of jury proceedings by considering . . . six circumstances").

164. See Marder, *Peremptory Challenges*, *supra* note 91, at 1104-07.

on race, gender, ethnicity, or some other impermissible characteristic, played a role in the decisionmaking.

False claims of nullification are harmful in several ways. They may serve as a way of perpetuating racial stereotypes without members of the press or public having to admit it. They also serve as a way of calling into question a decision made by a jury. When that jury does not look representative of the community, its verdict is likely to be suspect and false claims of nullification are more likely to follow. When a false claim is made, it is likely to elicit very different reactions from those who trust the jury and those who do not, and that trust may depend on how diverse the jury appears to be. Finally, false claims are an invitation to other branches of government to step in and "fix" the problem by intruding upon the jury's deliberations, as the judiciary would do, or by eliminating the importance of dissenting jurors, as the legislature would do.

One way to reduce false claims of nullification and to increase public acceptance of jury verdicts is to allow juries to be as diverse as possible. This should be done, not through mandating quotas, which would be divisive, but through eliminating efforts by lawyers and others to skew jury composition and to create homogeneous juries. Juries have the potential to be diverse, and to the extent they fall short of that ideal they arouse suspicion and invite attack, which has most recently taken the form of false claims of jury nullification.

