WE, THE JURY

The Jury System and the Ideal of Democracy

With a New Preface

Jeffrey Abramson

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For Sarah and Anna, that they should know

Preface, 2000

WE, THE JURY FIRST APPEARED in 1994, at a time of growing public cynicism about jury justice. Race everywhere seemed an insurmountable obstacle to impartiality. In Los Angeles Rodney King was the story. Many wondered how any jury could have acquitted four white police officers of beating an African-American man, after viewing videotape catching the officers in the act. The most likely explanation seemed to be the absence of any African Americans on the jury. South Central Los Angeles delivered its alternative verdict through riots in the street.

Miami experienced its own riots following a Hispanic officer's fatal shooting of an African-American man during a motorcycle chase. A local jury convicted the officer of manslaughter, but a state appeals court threw out the verdict because of prejudicial pretrial publicity. Florida authorities then went searching for a fair venue for a new trial. Tallahassee did not have enough Hispanics in its jury pool; Orlando lacked sufficient African Americans. After five shifts in the trial venue, the public had reason to wonder whether guilt in Tallahassee might turn into innocence in Orlando or vice versa: was jury justice so capricious?

Race was not the only factor confounding the search for impartial jurors. In child paternity suits, lawyers approached jury selection as a battle over whether women or men would predominate on the jury. In prosecutions of anti-abortion activists who blocked entrance to abortion clinics, district attorneys doubted that devout Catholics could enforce the law. In Texas, a

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district attorney's office concluded that Pentecostals were usually biased against convicting; prosecutors in Minnesota made the same complaint about Jehovah's Witnesses.

In Michigan, the vexing problem was not jury demographics but jury nullification, as juries in Wayne County refused to convict the notorious Dr. Jack Kevorkian of violating state law against assisted suicide, despite clear evidence of the doctor's guilt. In Washington, D.C., a federal judge thought the evidence that Mayor Marion Barry had violated cocaine laws so overwhelming that the jury's failure to convict him of any felony charges could be explained only as a protest vote against the FBI sting operation that caught the mayor using cocaine.

Even as *We, the Jury* first reached bookstores and libraries, O. J. Simpson was being charged with the murder of his ex-wife, Nicole Brown Simpson, and Ronald Goldman. The subsequent televised criminal trial turned jury watching into a consuming passion for millions of Americans. Few liked what they saw. Many of the themes of this book became threads in a national conversation about race and justice, the ethics and science of jury selection, the tactics of lawyers, and the competence of jurors.

At times, the Simpson trial seemed like Rodney King in reverse: a predominantly African-American jury (nine African Americans, one Hispanic, and two whites) acquitting a black man charged with murdering two whites. Of course, O. J. Simpson was not just any African-American defendant, but a celebrity with the finances to mount a vigorous defense. At the very least, the Simpson case exposed the difference that money makes to a criminal defense. Lamentably, an important opportunity to expose the puny defenses given to most criminally accused, by comparison with Simpson, was lost.

Ironically, even as Simpson's defense team was undermining the reliability of DNA evidence against their client, DNA was proving its worth nationally in a series of cases in which genetic tests established the innocence of death-row prisoners awaiting execution. Each of these innocent men condemned to death had received justice at the far end of the spectrum from Simpson. They went to trial as indigents with court-appointed attorneys who had little experience handling capital cases, less time to meet with the accused, and even less money to spend on independent investigation of the evidence.

Simpson was entitled to the best defense money could buy. Still, the sorry contrast between his lavish defense and the paltry resources afforded indigent defendants should have been one of the main stories out of the

trial. But the money story lost out to the race story, as if O. J. Simpson were just another black defendant reaping standard advantages black jurors give to all black defendants.

We, the Jury points out that juries do not generally split along racial lines and that race standing alone is a poor predictor of any one juror's verdict. Of course, race matters and often does tell us about a person's experience with, and attitudes toward, the law. Precisely because we all inevitably view the evidence at trial from perspectives shaped by the lives we live in America, diversity is important to the accuracy of jury verdicts. Representative juries are better able to "mix it up" during deliberation, the preconceptions of some calling into doubt the predisposition of others. Ideally jury deliberation is a dynamic process in which diversity forces jurors to put aside existing views as they confront people who bring different perspectives to the deliberations. Power goes to the persuasive people on a jury, *We, the Jury* likes to say. On a representative jury, persuasive people are those who make arguments capable of convincing across the traditional demographic divides.[1]

Perhaps the Simpson case was exceptional in that racial passions may have overwhelmed the ability of the jury to deliberate on the basis of the evidence. This is difficult to judge, not only because the two white members of the jury quickly voted not guilty, but also because all members of the jury who spoke afterward described their verdicts as rooted in reasonable doubts about the evidence. Certainly there were reasons to doubt—Mark Fuhrman, the detective who found the bloody glove and other incriminating evidence on Simpson's estate, was exposed during trial as holding racist views and lying about them on the stand. The defense called recognized experts who testified that the gathering and testing of the blood evidence were so sloppy that samples were contaminated and confused to a point where laboratory results could not be trusted.

Still, outside the juryroom, the American public cleaved sharply along racial lines from the moment of Simpson's arrest to his acquittal. It would be surprising if the jury entirely escaped the racially polarizing effects of the trial. The best interpretation of their verdicts may be that the defense gave this predominantly African-American jury, prone to doubt the work of the Los Angeles Police Department (LAPD), reasons to doubt. The key here was to disturb the jury with a story that begins with arresting officers jumping to the conclusion that Simpson must be guilty from the moment they learn the murdered woman is his ex-wife. So certain are the officers that they do not bother to conduct a thorough search. Maybe they make it easy on themselves by planting evidence to frame a man they presume guilty.

An overwhelming number of whites following the nationally televised trial thought the notion of a vast police conspiracy to frame Simpson preposterous, the shameless playing of a race card to distract the jury from the evidence. A correspondingly large percentage of African Americans surveyed supported the not-guilty verdicts, either as a legitimate expression of reasonable doubt or as a justifiable revolt by the jury against the LAPD's treatment of Simpson (and, by extension, the department's treatment of African-American suspects in other cases). Recent revelations about the perjuries and plantings of evidence committed by the anti-gang unit of the LAPD through the 1990s tell us why the minority community had reason to fear police misconduct.

The numerical divide over Simpson was telling, but even more significant was the emotional gulf. As the jury announced its not-guilty verdicts live on television, network cameras panned from Howard University law students celebrating the verdicts as if their candidate had just won an election, to mostly white students at another university mourning the verdicts as if Nicole Simpson and Ronald Goldman had just been judicially murdered. The juxtaposition of the cheers and tears showed that the trial of O. J. Simpson had ceased to be a murder case. Somewhere along the line, the trial turned into a political event mobilizing the national audience, and perhaps the jurors, to declare which side of the nation's racial divide they were on.

One interesting sidebar to the Simpson story has to do with jury selection. Not a single white male served on the final jury. This fits the pattern in protracted trials, in which financial-hardship excuses are liberally granted to self-employed people and people employed by private companies that do not pay the wages or salaries of employees on jury duty (California paid the Simpson jurors only five dollars a day). By contrast, most state and federal government agencies do continue to pay their employees while they are on jury duty. As a result of financial-hardship excuses, privately employed white males disappear in disproportionate numbers from juries in protracted trials. The initially selected Simpson jury fit this pattern, being both predominantly female (eight of twelve) and minority (eight African Americans, one Hispanic, and two people of mixed race).

But this was not the whole story of how the Simpson jury came to be mainly female and African American. The district attorney could have slated the case for trial in the Santa Monica courthouse, closest to where the crimes occurred. But that courthouse was still scarred from an earlier earthquake, and its security systems were not up-to-date. Once the trial venue was set for the downtown courthouse, the jury pool became far more diverse than it

would have been in the Santa Monica area. Still, African Americans are a decided minority in the twenty-mile radius surrounding the central courthouse from which jurors are summoned for downtown trials. And the initial pool of nine hundred people from which the Simpson jury was selected was 40 percent white, 28 percent African American, 17 percent Hispanic, and 15 percent Asian. Given these initial percentages, the seating of eight African Americans on the original twelve-person jury (with African Americans being seven of the twelve alternates selected) was surprising.

From the beginning, jury consultants on both sides considered a person's race to be an important indicator of preconceptions about the case. The defense expert Jo-Ellan Dimitrius compiled survey results showing that the Rodney King episode had increased distrust of the police among all demographic groups in Los Angeles, but that African Americans were off the chart. "In the life experience of an African American, I don't think any of us understand the problems they face on a daily basis," she told the *Washington Post* by way of explaining defense strategy during jury selection. "So are [African Americans] predisposed to distrust law enforcement? You bet they are. There are a lot of other groups that have that [attitude but] not to that extent."[2]

Working pro-bono for the prosecution, jury consultants traveled to Phoenix to test a focus group's reactions to videotape of Marcia Clark, the scheduled lead prosecutor. The consultants reported back that African-American women regarded Simpson as a symbol of black male success and Marcia Clark as a brash white woman out to bring him down. Apparently, the prosecution ignored this advice (although Christopher Darden, a young African-American district attorney, was added to the prosecution team).

Under modern ethical rules governing use of peremptory challenges, both prosecution and defense were barred from striking potential jurors solely because of their race. Still, jury consultants on both sides factored race into their overall profiles of the "favorable" versus "unfavorable" juror. The defense consultant Dimitrius says it was never part of her strategy to "deselect" whites in particular but only to prefer people most likely to be receptive to a defense taking aim at police misconduct and incompetence. While African-American jurors were more likely than white jurors to respond to such a defense, so too were people without a college degree (only two members of the eventual jury had one) or individuals whose major news source was tabloid television (not one of the original twelve members of the jury answered yes to a question about reading a newspaper regularly). Or consider Question #213 on the seventy-five-

page questionnaire prospective jurors filled out: "Have you or anyone else close to you undergone an amniocentesis?" Strictly speaking, this question is irrelevant—what difference does it make to a juror's impartiality in a murder case whether he or she is close to a pregnant woman who had an amniocentesis to test the fetus for prenatal birth defects? But the question permitted the defense to screen the jury for those with favorable experiences with genetic testing and those with no experiences or unfavorable ones. The latter fit the profile of the pro-defense juror most receptive to doubting the reliability of DNA evidence against Simpson. Follow-up questions delved into experience with blood tests, urine analysis, and a whole array of modern medical testing procedures. Insofar as the defense used answers to these questions to weed out those most familiar with standard medical laboratory tests, their suspicions fell disproportionately on individuals in high-income brackets with education through college or beyond.[3]

The cumulative way in which jury selection diminished diversity on the Simpson jury was troubling. It may be that the defense did not need fancy scientific-style jury selection to know what to look for in a juror's race, income, and educational level. But it was possible to guess wrong. Marcia Clark plausibly thought the domestic violence story would trump the race card and that women of any race would favor the prosecution once they heard the evidence.

Would a more diverse jury have decided the Simpson case differently? If the polls accurately reported the rift between white and black America on this case, the best the prosecution ever could have hoped for was a hung jury. But one thing we do know is that the actual jury, unlike the wider public, found little need to debate the evidence at all. They delivered their not-guilty verdicts in less than four hours, despite the fact that the trial transcript totaled more than 45,000 pages of testimony taken over nine months. Whatever one thought of the verdicts, this virtual refusal of the jury to deliberate over the details of the evidence was shocking.

The Simpson case did not so much die as give birth to ongoing debate about whether the trial was an aberration or part of an emerging trend among jurors to follow the passions and politics of race rather than the discipline of the evidence. Anticipating that the Simpson jury might deadlock along racial lines, the California legislature considered bills calling for abolition of the unanimous verdict in noncapital cases. One proposed law would have permitted juries to return verdicts by a margin of eleven to one. An alternative bill authorized ten-to-two split verdicts.[4] In support of the

legislation, the California District Attorneys Association (CDAA) issued a report claiming that about 14 percent of criminal trials end in hung juries in California's nine most populous counties. Comparing this figure with the 5.5 percent national hung-jury rate found by Harry Kalven and Hans Zeisel in their classic study of the American jury in the 1950s, the CDAA suggested that California hung juries were increasing in epidemic proportions.[5]

Reliable data on hung juries are hard to come by. As Roger Parloff of the *American Lawyer* notes, Kalven and Zeisel had warned that their 5.5 percent figure might well underestimate the rate at which juries deadlock in the United States.[6] Indeed, the limited data they had on hung juries in Los Angeles in 1956 already showed juries deadlocking 13 percent of the time.[7] This finding is important because the CDAA's case for a dramatic recent rise in hung juries depends on treating the 5.5 percent estimate as more reliable than Kalven and Zeisel themselves did. Moreover, the CDAA's own report shows that the rate at which Los Angeles juries hang has not increased in more than a decade. Finally, in making its case for a sudden spike in hung juries, the CDAA report simply put aside counties such as Santa Clara, where the hung jury rate is around 6 percent.[8]

Despite these problems, opponents of unanimity seized on the CDAA report to document their case that the criminal jury trial could no longer afford the nearly seven-hundred-year-old requirement of total agreement. Some state legislators suggested that the most likely explanation for the presumed spike in hung juries was the increasing minority representation on juries since the 1950s.[9] Their complaints about unanimity betrayed a deeper disquiet with the consequences of modern reforms that require juries to be selected from a cross section of the entire community. However democratic "cross-sectional" jury selection sounds, critics bemoaned the power minorities have to veto the will of the majority so long as the unanimous-verdict requirement remains.

Claims that increasing diversity on juries increases the hung jury rate have an intuitive plausibility. But there remains no hard evidence documenting the presumed correlation.[10] Indeed, throughout the 1990s, counties in other states with diverse jury pools continued to report relatively low rates of hung juries in comparison with California. For instance, Dade County, Florida, recorded an annual hung jury rate of less than 2 percent, and New York's Manhattan borough was similar with about 2.3 percent.[11] In the neighboring borough of Queens, the district attorney reports that the percentage of hung juries has been low historically, although in the wake of two sensational trials of New York City police officers accused of

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brutalizing or killing African-American men, a sudden surge is occurring in 2000.[12] Federal data show that only 2.6 percent of federal juries hang annually in felony criminal trials, although federal juries in California hang at nearly twice that rate.

These data do suggest that hung juries are more of a problem in California than elsewhere. But even if we were to assume that the state's relatively high rate of hung juries is related to the demographic diversity of its jury pools, we would still need to debate the significance of any such correlation. Arguably, democratic reforms requiring juries to be selected from a cross section of the community might be working as intended, by blocking prejudiced verdicts and by drawing out deliberations long enough to consider new but reasonably argued views on the evidence. From the democratic point of view, hung juries are not necessarily a sign of dysfunction. After all, rational people may and do disagree about the evidence. But the positive functions of hung juries were lost amid a barrage of criticisms of the supposedly unreasonable behavior of holdout jurors. Critics of the unanimous verdict at times implied that African Americans, not whites, were the unruly jurors causing deadlocks and that the problem was one or two misfits clinging to racial loyalties and refusing to engage in rational deliberation at all. Even the usually cautious *New Yorker* magazine echoed this point of view. In an article entitled "One Angry Woman," the author used a few anecdotes about Washington, D.C., juries hung by a solitary juror to sketch a portrait of the hanging juror as an African-American woman with religious scruples against judging her fellow man.[13]

Here was another myth, a tale in which most hung juries are the work of one or two rogues whose views need not be taken seriously. In fact, the Los Angeles County Public Defender's Office estimates that 55 percent of all hung juries in that county are split 6–6, 7–5, 8–4, or 9–3.[14]

In the end, the political will to abolish unanimous verdicts simply evaporated when the Simpson jury failed to hang. The more lasting debate spawned by the Simpson trial turned out to be over jury nullification. The day after the Simpson verdict, the *Wall Street Journal* ran a front-page article purporting to show that Simpson's acquittal fit into a national pattern of minority jurors refusing to convict minority defendants, no matter how strong the evidence of guilt. Gathering statistics from three jurisdictions in which most jurors are black or Hispanic—the Bronx, Washington, D.C., and Wayne County (Detroit)—the article's authors claimed that juries in these areas acquit minority defendants at nearly three times the national

acquittal average. For instance, Bronx juries were said to acquit some 47 percent of African-American defendants and 37 percent of Hispanic defendants. The acquittal rate for minority defendants in Washington, D.C., was 28 percent. In Wayne County, Michigan, it was 30 percent. By contrast, according to the *Journal*, nationally juries acquit only 17 percent of all defendants. The most likely explanation for the high rate of acquittals in inner-city trials, the *Journal* concluded, was that minority jurors in highly impoverished counties must be nullifying the law and disregarding evidence of guilt in particular cases to express their general alienation from the criminal justice system.[15]

The *Journal*'s numbers were questionable. The national acquittal rate is difficult to estimate, but the *American Lawyer*'s Parloff found that at least in New York, the average annual jury acquittal rate was close to 28 percent for a ten-year period ending in 1995.[16] Compared with this benchmark, the rate of acquittals in Washington, D.C., and Wayne County hardly seems out of line. Bronx juries do acquit a higher percentage of defendants than do juries in other New York counties, but this need not mean that juries there are nullifying. The more likely explanation is that the experiences of many African Americans with police in the Bronx give them good reason to be skeptical about the testimony of police officers. In 1999, four white officers killed Amadou Diallo in the Bronx, firing forty-one shots at the unarmed black immigrant they said they thought was reaching into his pocket for a gun. Citing prejudicial pretrial publicity, the officers moved for a change of venue. They made it clear that if they were forced to go on trial in the Bronx, they would choose a bench trial, since Bronx juries in their judgment would never give them a fair trial. In the end, the trial was moved to Albany, where a jury of four African Americans and eight whites acquitted the officers of all charges. Residents of the Bronx took to the streets to protest the verdict, convinced more than ever that police officers lie on the stand and get away with murder. These beliefs certainly show why the police officers might have been found guilty before a Bronx jury, but they do not show that Bronx jurors deliberately disregard the evidence to deliver racial protests.

The *Journal*'s speculations about jury nullification were given academic cover by an article in the prestigious *Yale Law Journal* openly calling upon African-American jurors to nullify.[17] The article's author, the former federal prosecutor and George Washington University law professor Paul Butler, detailed instances from his own practice in which he thought African-American jurors were simply unwilling to convict a same-race defendant,

no matter what the evidence. Butler thought such race-conscious nullification was justifiable when the underlying crime was nonviolent, especially when it was a drug offense.

Butler did not dispute that the overwhelming number of defendants tried on drug charges were in fact guilty. But he encouraged African-American jurors to consider whether their communities really benefited from sending large numbers of nonviolent young men to prison. He prodded jurors to protest the hypocrisy of a war on drugs fought mostly in inner-city neighborhoods and to right the wrong of laws that mandated prison time for mere possession of crack cocaine, a drug prevalent in the inner city, but permitted probation as punishment for possession of powder cocaine, the drug of choice for white suburban users. It would be nice, said Butler, if legislatures would redress these problems, but the majority of (white) representatives were unlikely to vote to repeal popular crack cocaine laws whose punitive force fell only on minorities they did not represent.[18]

What followed was a sudden media firestorm over jury nullification. Network television shows such as *60 Minutes* and *Nightline* featured stories connecting the Simpson verdict to the alleged far-flung jury revolt going on in minority communities.[19] Perhaps more Americans heard of jury nullification through these programs than had heard of the doctrine in the previous two hundred years. But it was a sensationalized version, pandering to white mistrust of African-American jurors, forgetful of the long history of all-white juries' refusal to convict white defendants of violence against blacks, and entirely uninterested in exploring the merits or demerits of particular instances of nullification.

Butler's race-conscious version of nullification helped to give the doctrine a bad name. He openly urged African-American jurors to decide a case before they had heard an iota of evidence, making up their minds to acquit simply because they were the same race as the defendant in a drug prosecution. But when nullification is divorced from color-blind, case-specific justifications, the jury system becomes perilously politicized. Jurors are too quickly encouraged to act as if they were to right social wrongs, not to render verdicts one case at a time. Were jurors of any race to take up Butler's version, the ideal of impartial deliberation would be undermined and the jury's future put in jeopardy. Moreover, Butler's proposals were inherently self-defeating. The more African-American jurors were to start nullifying as an act of racial solidarity, the more judges would respond by disqualifying African Americans during voir dire, the less white jurors would feel obliged to weigh the not-guilty arguments of minority jurors seriously.[20]

Further trivializing recent discussion of jury nullification are the guerrilla tactics of the Fully Informed Jury Association (FIJA), a lobbying group devoted to spreading word of jury nullification to potential jurors.[21] FIJA operates as if it were conducting a covert information campaign in a totalitarian country, dropping leaflets about jury nullification throughout courtroom corridors, sometimes even placing them on the windshields of cars parked by reporting jurors in the court parking lots. Not surprisingly, judges prefer to consider FIJA literature misinformation, and they order court officers to discard it and to prevent its distribution in and around their courtrooms.[22]

FIJA members differ widely in their politics, from those on the left opposed to the criminalization of marijuana to militia members on the right opposed to federal gun control laws. But they share attraction to nullification because it permits them, as jurors, to pursue their social and political agendas. The problem with such openly partisan, single-issue, politics-style nullification is similar to the problem with race-based jury nullification. FIJA encourages jurors to go into cases with their minds already made up, prepared here to vote their politics as members of the AntiHemp League, there the pro-life views of Operation Rescue.[23] To make matters worse, FIJA literature instructs people on the guerrilla-warfare tactics they must use to slip onto juries unnoticed. These tactics include disguising one's views on nullification during voir dire, even lying about them if necessary. Evidently, perjury is justified in service to the cause of nullification.

With friends like FIJA, nullification hardly needs enemies. A generation ago, many sitting judges, though unwilling to instruct jurors about the power of nullification lest they encourage its use, nevertheless voiced grudging respect for uninstructed juries that took it upon themselves to nullify.[24] But that respect is gone, the image of the virgin jury spontaneously stumbling into a decision to nullify replaced by the image of jaded jurors privy to and primed by all sorts of nullification propaganda. Since the cat is out of the bag, so to speak, the trial judge can no longer hope to control jury nullification merely by withholding information about it. Consequently, many judges mount an offensive during voir dire, questioning jury candidates about what they have heard about nullification, eliminating those who confess sympathy for the doctrine and sometimes even those who simply have been exposed to pro-nullification literature. In Dayton, Ohio, a trial judge automatically disqualified the entire jury pool appearing in court one day upon learning that a man was distributing pro-nullification pamphlets

outside the courthouse. Similarly, in Colorado one prospective juror in a pool of seventy passed around a copy of a FIJA brochure; the judge disqualified all seventy.[25]

Sometimes, the escalating judicial offensive against nullification continues even after voir dire, aimed at nullifiers who escape detection and make it onto the jury. In Colorado, when a trial judge learned that a juror had expressed nullification views to a jury in a drug case that eventually hung and that the juror had allegedly lied about her views during voir dire, he ordered her arrested and charged with contempt of court. The judge who subsequently convicted her found that the juror had deliberately failed to disclose her own drug conviction history (she had been charged with possession of LSD and received a deferred judgment) as well as her views on drug laws (she was a founder of a local group in favor of legalizing marijuana). Although the juror was never asked directly about these matters during voir dire, the judge found her behavior "contemptuous" because she knew that she "should have revealed any opinions or strong feelings" about a jury's duty to apply existing drug laws. Subsequently, the Colorado Court of Appeals overturned the juror's contempt convictions.[26]

In the new offensive against nullification, even the traditional confidentiality of remarks jurors make during deliberations is breachable. In a federal crack cocaine trial, the jury was in the midst of considering its verdict when jurors sent the judge a note complaining that the lone holdout for acquittal, also the only African American on the panel, had a "predisposed disposition" against convicting. After interviewing the suspected juror and listening to other jurors, the judge removed the juror because "I believe [his] motives are immoral, that he believes that these folks have a right to deal drugs, because they don't have any money, they are in a disadvantaged situation and probably that's the thing to do. And I don't think he would convict them no matter what the evidence was." The remaining eleven jurors shortly returned convictions against all defendants on all or some of the charges against them.[27]

Some of these new judicial controls should give pause even to nullification's sworn enemies. While it is one matter to dismiss potential jurors who acknowledge a belief in nullification, it is another to purge people merely for knowing (correctly) that nullification is within the jury's power. Moreover, consider the high stakes between judge and jury in the federal crack cocaine case. Although the judge thought the evidence sufficient to dismiss the holdout juror as a closet nullifier, the United States Court of

Appeals disagreed, ruling that the evidence failed to eliminate "beyond doubt" the possibility that the juror's holdout was legitimately based on the evidence.[28]

By setting the evidentiary bar high in hearings to dismiss a deliberating juror, the appellate court hoped to balance protection of the jury's independence with the judge's duty to prevent misconduct from occurring during deliberations. But, in agreeing with the trial judge that nullification is a form of misconduct, the appellate court accepted that the privacy of the jury room can be invaded when necessary to investigate reports that specific jurors are bent on nullifying.

It is difficult to see how as a practical matter judges can conduct such investigations. Suspected jurors may not themselves understand where reasonable doubt stops and nullification begins. Other jurors are hardly neutral sources and may well have incentives to rid themselves of any holdouts by describing them too quickly and loosely as nullifiers. The majority bloc may also find the mere threat of reporting the holdouts to the judge sufficient to turn them around. Certainly, once a judge removes any one juror for basing an interim vote to acquit improperly on nullification, other undecided jurors might be chilled from voicing even legitimate grounds for acquittal. By contrast, the majority bloc most likely will take the judge's intervention as a sign of approval of their intent to convict. In sum, as a practical matter, the very threat of judicial review of the content of ongoing jury deliberations compromises the independence of juries and may chill jurors from voicing doubts about the evidence lest they be suspected of nullification.[29]

Consider also the contempt-of-court conviction of the Colorado juror, reversed on appeal. In theory, a juror can be prosecuted for lying during voir dire, regardless of whether she goes on to convict or to acquit. But surely the juror was right when she complained that she would never have been prosecuted had she voted guilty.[30]

We, the Jury put forward an argument in favor of jury nullification before the latest bout between its popularizers and its detractors began. That argument was the book's most controversial one, and recent developments make it even more provocative today. Yet I remain convinced that jurors must be granted some leeway to nullify if the jury is to survive as an important institution of democracy. Trial by jury calls upon ordinary people to put the law into action, figuring out in concrete cases how to interpret legal standards such as "reasonable doubt" or "reckless disregard" or "malice." Just as jurors cannot avoid these interpretive moments no matter how often they are told merely to follow the judge's instructions on the law, so too questions

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