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SCAPEGOATING THE JURY

Clay S. Conrad†

INTRODUCTION

The trouble with people is not that they don't know but that they know so much that ain't so.

— Josh Billings

There may be no feature more distinctive of American legal culture than the criminal trial by jury. The Sixth Amendment of the Constitution guarantees criminal defendants the right to be tried by a jury consisting of a “fair cross-section” of the community.¹ Jury deliberations are both private and protected.² The jury has been likened to a “black box”³ where private citizens carefully and conscientiously consider the facts of a case and see that justice is done.

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¹ See Ballard v. United States, 329 U.S. 187 (1946) (holding that the Constitution requires a jury to be selected from a representative cross-section of the community); Smith v. Texas, 311 U.S. 128, 130 (1940) (“It is part of the established tradition in the use of juries as instruments of public justice that the jury be a body truly representative of the community.”); U.S. CONST. amend. VI:

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defense.

İd.

² See HARRY KALVEN & HANS ZEISEL, THE AMERICAN JURY vi-vii (1966). Harry Kalven and Hans Zeisel noted that the Chicago Jury Project “at one point . . . generated a national scandal” by tape recording jury deliberations without the knowledge of the jurors. They were publicly censured by the U.S. Attorney General, investigated by the Sub-Committee on Internal Security of the Senate Judiciary Committee, and criticized in the press; the end result was that more than thirty states enacted laws prohibiting “jury-tapping.” İd.

At least once, however, the deliberations of an actual trial jury have been videotaped for public broadcast, with the consent of the jury, defendant, attorneys for both sides, and the judge. See Frontline: Inside the Jury Room, (WGBH-Boston public television broadcast, Nov. 17, 1987).

³ See Michael J. Saks, Blaming the Jury, 75 GEO. L.J. 693 (1986).
The criminal trial jury has been described as the “palladium of liberty” and the “conscience of the community.” For that conscience to operate in a way in which we, as a society, can be proud, we must be confident that the community is in fact a conscientious one. Unfortunately juries, like all elements of a complex society, may occasionally give us cause to question this assumption.

In America, juries have the irreviewable and absolute power to acquit a defendant for any reason or for no reason whatsoever. As Justice Oliver Wendell Holmes, Jr., wrote, “[t]he judge cannot direct a verdict it is true, and the jury has the power to bring in a verdict in the teeth of both law and facts.” When juries decide to veto the law, the term usually chosen to describe their action is “jury nullification.” Historically, this power has typically been used in ways most Americans can be proud of.

However, there remains one particularly odious charge against American juries: that they cannot be trusted to convict when a white defendant has victimized a black person. Juries have been charged with routinely acquitting whites who killed or otherwise victimized blacks.

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4 See Sir Patrick Devlin, Trial by Jury 164 (Fred B. Rothman & Co., 1988) (1956) (quoting William Blackstone, 4 Commentaries, at 349-50 (11th ed. 1791)) (“So that the liberties of England cannot but subsist, so long as this palladium remains sacred and inviolate; not only from all open attacks (which none will be so hardy as to make) but also from all secret machinations . . .”).


6 Jeffrey Abramson, We, The Jury: The Jury System and the Ideal of Democracy 62 (1994) (“Once we grant jurors the right to set conscience above law, we have to live with consciences we admire as well as those we despise.”).


The police officers involved in the arrest and beating of Rodney King are allegedly modern beneficiaries of this sort of jury independence. The murderers of lynching victims and civil rights workers allegedly went free also because white jurors refused to convict.

Recently, Medgar Evers’s assassin, Byron de la Beckwith, attempted to make a racist appeal to the community, distributing literature encouraging nullification in his third murder trial. Professor Alan Dershowitz has referred to jury nullification as “a redneck trick” due to the allegedly recurrent history of white juries acquitting lynch mobs. Jurors have been asked such blatantly racist questions as “Do you think it’s a crime to kill a nigger in Mississippi?”

While the allegedly widespread use of jury nullification in support of racist murderers seems to have diminished with the major civil rights advancements of the 1960s, the cases considered below cast a long shadow over the jury room even today. Advocates of independent juries find that fears of racist nullification are the most frequently raised objections to their proposals. However, these fears are based on an inaccurate, exaggerated or incomplete view of jury behavior in cases involving racial violence. There is very little concrete evidence or data with which one could conclude that jury nullification has ever been widely used in a racist or prejudicial manner. Historically, independent juries have more often been agents of change who oppose racism rather than tools used by racists.

I argue that the conventional wisdom has exaggerated the amount of racist nullification by jurors and implicitly exculpated the police, prose-

14 MARYANNE VOLLMERS, GHOSTS OF MISSISSIPPI 161 (1995). The question was asked during voir dire in the first murder trial of Byron de la Beckwith. See id.
15 See Scheffin, supra note 8 and accompanying text. It is highly questionable whether racist jury acquittals can properly be characterized as nullification verdicts. Nullification only occurs when (1) the jury has found that the defendant has met all elements of the offense, and therefore, is technically guilty, but then (2) decides to acquit based on conscientious grounds because they believe that the law is either unjust or misapplied. For purposes of this essay, however, I will refer to racist acquittals as nullification verdicts for the sake of simplicity.
16 See Interview with Dr. Larry Dodge, Co-Founder and former Field Coordinator, Fully Informed Jury Association, in Houston, Tex. (Mar. 2, 1997).
utors and judges who played as great or greater a role in exonerating lynching mobs and racist murderers. The cases we consider plainly represent miscarriages of justice. But why did justice miscarry? What parties must share in the responsibility? How widespread was racist nullification? And finally, what reforms may help eliminate similar miscarriages of justice in the future?

These questions are important because of the enormous power and responsibility bestowed upon juries. The power of juries to nullify the law, sub rosa, is granted in part on the assumption that the community as a whole is less oppressive than government. Additionally, it is important because allowing the common sense and logic of the jury to play a significant role in developing just results in individual cases provides the flexibility necessary for the criminal justice system to function effectively. Early in our Republic, jury nullification played a crucial role in ensuring that the law was justly administered. If American juries are ever to regain their discretionary role in American courtrooms, we must first attempt to better understand their role in those cases involving racist violence.

As Justice Byron White noted in Duncan v. Louisiana, "... when juries differ with the result at which the judge would have arrived, it is usually because they are serving some of the very purposes for which they were created and for which they are now employed." On the one hand, allowing the jury to circumnavigate the law in order to do justice merely accords with American tradition that dates back to pre-Colonial times. On the other hand, allowing the jury to circumnavigate justice in order to single out a segment of society as beneath the protec-

17 See discussion infra Parts II.A, B.
20 See supra notes 47-50, 61 and accompanying text.
21 391 U.S. at 145.
22 Id. at 156.
23 The history of the doctrine of jury nullification has been discussed in many books and law review articles, notably Andrew W. Alschuler and Albert G. Deiss, A Brief History of Criminal Jury in the United States, 61 U. CHI. L. REV. 867, 874-75 (1994).

For reasons of space, this essay does not delve deeply into British, Colonial or Revolutionary precedents or history. For a fuller historical picture see the above mentioned article as well as Van Dyke, supra note 8, at 224; William M. Kunster, Jury Nullification in Conscience Cases, 10 VA. J. INT'L L. 71 (1969); Joseph L. Six, Conscience and Anarchy: The Prosecution of War Resisters, 57 YALE L. J. 481 (1968); Mark DeWolfe Howe, Judges as Judges of Criminal Law, 52 HARV. L. REV. 582 (1939); Lyman Spooner, An Essay on the Trial by Jury 78-89 (1852); Moore, supra note 5 and accompanying text; Twelve Good Men and True (J.S. Cockburn & Thomas A. Green eds., 1988); Thomas Andrew Green, Verdict According to Conscience: Perspectives on the English Criminal Trial Jury 1200-1800 (1985); Van Dyke, supra note 8; James Bradley Thayer, A Preliminary Treatise on Evidence at the Common Law (1898).
tion of the law violates every principle on which America is founded. There are steps we can and should take to restrain the latter exercise of the discretionary powers of the jury, without unduly inhibiting the former.

In Part I, I present a brief history of jury nullification in America. As a general matter, jury nullification occurs when the jury refuses to apply the law either because they believe the law is unjust or is being unjustly applied to the case before them. Early in America's history, our Founding Fathers recognized that juries may judge the law as well as fact. But in 1895 the Supreme Court concluded that juries need only be charged with determining fact. The Court also recognized, however, that juries will always have the chance to act as the "conscience of the community." In Part II, we examine cases involving racial violence where juries appear to have nullified the law. However upon close scrutiny, I argue that jury nullification, though difficult to identify, played a rather minor role in setting violent criminals free when one considers the role played by other actors in the criminal trial by jury drama. I offer, in Part III, factors other than racist jury decision making that may contribute to what appear to be racially motivated verdicts. Here, I suggest that the present tools for jury selection create a real disadvantage for defendants of all races. In Part IV, we venture into the black box. Here, we consider why juries are so often wrongly blamed as the cause of creating injustice in our society. Finally I maintain that juries are often scapegoated for the racism and errors of prosecutors; judges and others in the legal profession should be held more accountable. Although we may disagree with a certain jury verdict, juries have on the whole performed honorably as the "conscience of society." History clearly demonstrates that we should trust juries when they exercise this power.

I. ABOVE THE LAW: A BRIEF HISTORY OF THE NULLIFICATION POWERS OF THE CRIMINAL TRIAL JURY

Laws that do not embody public opinion can never be enforced.

— Elbert Hubbard

Jurors usually are instructed that they are obligated to follow the charge of the judge presiding over the trial. For instance, the judge may charge that it is the duty of the judge to decide matters of law, while the jury is to decide matters of fact.24 Yet, such instructions are misleading.

24 See Edward James Devitt et al., Federal Jury Practice & Instruction §12.01 (1992). At one point Kansas judges drafted a jury instruction that would have informed jurors of their power to nullify. See Pattern Instructions for Kansas §51.03, reprinted in Jury
While jurors should pay close attention to judicial instructions, they are under no legal obligation to follow them.25 In cases where the law is unjust or misapplied, jurors may have a conscientious and historical duty to set their instructions aside.26 When these instructions are set aside, we usually say the jury has engaged in “jury nullification of the law,” or more simply, jury nullification.

The term jury nullification, as used to describe the discretionary powers of the jury, is both derisive and deceptive.27 When the jury decides not to enforce a particular law, the jury is said to nullify the law, that is, the law and not the jury is nullified. Juries nullify rarely and tend to do so either when the law involved lacks a broad consensus of popular support, or the community believes that a popular law is being misapplied.28 Jury nullification dates back to before the Magna Charta,29 although it has been urged with specificity only since the treason trial of the Leveller John Lilburne in 1649.30
The power of juries to judge the law was not controversial during the Colonial era or in the decades following the Revolution. Federalists and Anti-Federalists alike agreed on the virtues of trial by jury. For example, Federalist Alexander Hamilton wrote:

The friends and adversaries of the plan of the convention, if they agree on nothing else, concur at least in the value they set upon the trial by jury; or if there is any difference between them it consists of this: the former regard it as a valuable safeguard to liberty, the latter represent it as the very palladium of free government.  

John Adams, Thomas Jefferson, Benjamin Franklin, John Jay and other Founding Fathers of the new Republic spoke out on the topic of jury independence and unanimously agreed that the role of the jury consisted of judging both law and fact.  

Clearly early in America’s history, juries had the power to judge whether a certain law should or should not apply in a particular case. Furthermore, juries have frequently used this power in cases which involve racial issues. At least one American jurist, however, was concerned as to the prudence of juries having the power to judge both law and fact.

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jurers with responsibility for judging both law and fact, is possibly the first full explication of the doctrine. See Green, supra note 23, at 61-62.


32 See Letter of Jefferson to L’Abbe Armand, July 19, 1789, in 3 WORKS OF THOMAS JEFFERSON 81, 82 (Wash. ed. 1854) (quoted in Howe, Juries as Judges of Criminal Law, 52 HARV. L. REV. 582 (1939)). Thomas Jefferson placed more faith in the jury than in the legislature as a safeguard of liberty: "Were I called upon to decide, whether the people had best be omitted in the legislative or judiciary department, I would say it is better to leave them out of the legislative. The execution of laws is more important than the making of them." Id.

Benjamin Franklin’s Philadelphia Gazette in 1737 said of jury nullification that “If it is not law, it is better than law, it ought to be law, and will always be law wherever justice prevails.” See VINCENT BURANELLI, THE TRIAL OF PETER ZENGER 51-52 (1975); Georgia v. Brailsford, 3 U.S. (3 Dall.) 1, 8 (1794) (in a rare jury trial before the United States Supreme Court, Chief Justice John Jay, speaking for a unanimous Court, instructed the jury that “[T]he jury has the right to judge both the law as well as the fact in controversy.”); Coffin v. Coffin, 4 Mass. 1 (1808) (Parsons, J).

Theophilus Parson, a member of the Massachusetts Constitutional Convention who later became the Chief Justice of the Massachusetts Supreme Court, endorsed the jury as a means of limiting legislative power:

But, Sir, the people have it in their power effectually to resist usurpation, without being driven to an appeal to arms. An act of usurpation is not obligatory; it is not law; and any man may be justified in his resistance. Let him be considered as a criminal by the general government, yet only his fellow-citizens can convict him; they are his jury, and if they pronounce him innocent, not all the powers of Congress can hurt him; and innocent they certainly will pronounce him, if the supposed law he resisted was an act of usurpation.

2 Elliot’s Debates 94 (1971).
United States v. Battiste, was the first federal case that questioned the juries use of this power. That case involved capital piracy charges against a sailor on a ship which transported slaves between ports in Africa. The then Massachusetts Judge, Joseph Story, who would later become a United States Supreme Court Justice, wrote the opinion. In dicta, he indicated less of a concern that juries would acquit out of sympathy or prejudice, and more of a concern that they would improperly convict. These concerns may have been prompted by the fact that Massachusetts was the first state to abolish slavery and remained the center for the abolitionist movement until the end of the Civil War. Such concerns seem misplaced, however. After all, it was Daniel Webster, for the defense, who urged that the jury in Battiste be charged with judging the law. Perhaps Battiste merely provided Story an opportunity to voice his views on an issue for which he “had a decided opinion during [his] whole professional life.” Although improper convictions are a valid concern, some judges were more concerned that the power would enable juries to effectively block enforcement of the law.

When, in 1783, a jury of white male property owners refused to grant property rights of slaves and Chief Justice William Cushing of the Massachusetts Supreme Court affirmed, slavery ended in Massachusetts. In general, Northern juries routinely refused to apply the Fugi-

33 24 F.Cas. 1042 (D. Mass. 1835).
34 See id. at 1043.
35 See id. at 1044.

If the jury were at liberty to settle the law for themselves, the effect would be, not only that the law itself would be most uncertain, from the different view, which different juries might take of it; but in case of error, there would be no remedy or redress by the injured party; for the court would not have any right to review the law as it had been settled by the jury.

Id.
38 24 F.Cas. at 1043. Fifteen years earlier, Story had foreshadowed Battiste when he excused two potential jurors on a sua sponte order because their Quaker religion would not permit them to impose the death penalty. See United States v. Cornell, 25 F.Cas. 650, 655-56 (C.C.D. R.I. 1820).
39 See Blaustein & Zangrando, supra note 36, at 44-45 (discussing the Quock Walker cases); Godfrey Lehman, We, the Jury: The Impact of Jurors on Our Basic Freedoms 209-23 (1997) (discussing the Quock Walker case and several related cases).
tive Slave Act to those who assisted escaping slaves. One source reports that "violence against slave-catchers and the refusal of jurors to convict persons who aided escaped slaves effectively nullified the federal fugitive slave law in several free states." Juries were instrumental in ending slavery in America, but there were instances where juries were warned not to disregard the law. Federal judges routinely admonished both grand and petit juries not to vote their consciences in Fugitive Slave cases. Even Supreme Court Justice McLean, the lone dissenter in Prigg v. Pennsylvania, refuted the right of jurors to nullify in at least six Fugitive Slave Act cases while riding circuit. The frequency of anti-nullification instructions was an indication of the willingness of juries to nullify in slavery cases.

Official approval of a jury's power to nullify came to an end when the issue finally reached the United States Supreme Court in Sparf v.

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40 See Robert M. Cover, Justice Accused: Antislavery and the Judicial Process 191 (1975). Justice Accused by Robert M. Cover is an excellent book about a fascinating historical and legal puzzle. In the years before the American Civil War a considerable number of able judges decided problematical lawsuits in such a way as to promote slavery, in spite of the fact that these judges were themselves opposed to that institution and in some cases passionately so. Most of these cases arose under the Fugitive Slave Acts. The Constitution, as part of the grand compromise between slave and free states, had provided if a "Person held to Service of Labour in one State" escapes to another, he shall not, in consequence of any law or regulation of the latter, be discharged from that service, "but shall be delivered up on Claim of the Party to whom such Service of Labour may be due." Congress, in 1793 and 1850, enacted procedures through which a slave who had escaped to a free state might be arrested by a slave-catcher without a warrant, brought before federal officials, and then returned to his master. See Ronald Dworkin, The Law of the Slave-Catcher, The Times Literary Supplement, London, Dec. 5, 1975, at 1437.


43 See United States v. Hanway, 26 F.Cas. 105 (C.C.E.D. Penn. 1851); Oliver v. Kauffman, 18 F.Cas. 657 (C.C.E.D. Penn. 1853); United States v. Morris, 26 F.Cas. 1323 (E.D. Mass. 1851); United States v. Cobb, 25 F.Cas. 481 (N.D.N.Y. 1857); Charge to Grand Jury—Fugitive Slave Act, 30 F.Cas. 1015 (D. Mass. 1851); United States v. Scott, 27 F.Cas. 990 (D. Mass. 1851); see also Charge to the Grand Jury—Treason, 30 F.Cas. 1047 (E.D. Penn. 1851).

44 41 U.S. (16 Pet.) 539 (1842).

45 See Cover, supra note 40 and accompanying text; Jones v. Van Zandt, 13 F.Cas. 1040 (C.C.D. Ohio 1843); Vaughn v. Williams, 28 F.Cas. 1115 (C.C.D. Ind. 1845); Gilmer v. Gorham, 10 F.Cas. 424 (C.C.D. Mich. 1848); Ray v. Donnel, 20 F.Cas. 325 (C.C.D. Ind. 1849); Norris v. Newton, 18 F.Cas. 322 (C.C.D. Ind. 1850); Miller v. McQuerry, 17 F. Cas. 335 (C.C.D. Ohio 1853).

46 Because juries refused to convict under the Fugitive Slave Act, courts turned to compelling suspects to answer interrogatories concerning the whereabouts of the escaped slaves. Failure to respond was contempt of court. Contemnors could receive an indefinite prison sentence, without an opportunity for a jury trial. See United States ex rel. Wheeler v. Williamson, 28 F.Cas. 682 (E. D. Penn. 1855).
There, Herman Sparf and Hans Hansen had been convicted of murder on board an American vessel at sea, which was a capital offense. One point of error was that the trial court had improperly interfered with the right of the jury to render an independent verdict and ameliorate the law. Justice John Harlan, writing for the majority, denied that juries have ever had the right to judge the law:

Public and private safety alike would be in peril if the principle be established that juries in criminal cases may, of right, disregard the law as expounded to them by the court, and become a law unto themselves. Under such a system, the principal function of the judge would be to preside and keep order while jurymen, untrained in the law, would determine questions affecting life, liberty or property according to such legal principles as, in their judgment, were applicable to the particular case being tried . . . .

The narrow holding in Sparf merely declared that refusing to inform jurors that they may nullify is not reversible error. Justice Harlan, however, never suggested a means for eliminating the jury’s power to nullify the law. Harlan specifically noted that the states could provide by statute or in their constitutions that jurors were the judges of the law. With this dicta, Harlan set aside any misconceptions that this decision was a matter of federal constitutional law.

This conclusion that juries could not judge the law had been one of the impeachment allegations levied against Supreme Court Justice Samuel Chase in 1805. Historically, the primary functions of a judge

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47 156 U.S. 51 (1895).
48 See id. at 78.
49 See id.
50 Id. at 101-02.
51 156 U.S. at 106 (asserting that defense attorneys could not inform jurors that they could judge the law as well as fact, and that judges did not have to instruct jurors of their power to do so).
52 See id. at 102 (“[L]ndoubtedly, in some jurisdictions, where juries in criminal cases have the right, in virtue of constitutional or statutory provisions, to decide both law and facts upon their own judgment . . .”).
53 See id. Since Sparf, the Court has repeatedly defended the sua sponte power of juries to nullify the law. See supra, notes 8-10, 15, 25-26 and accompanying text; Woodson v. North Carolina, 428 U.S. 280, 293 (1976); but see Chandler v. Florida, 449 U.S. 560, 574 (1981) (“Trial courts must be especially vigilant to guard against any impairment of the defendant’s right to a verdict based solely upon the evidence and the relevant law.”).
54 See United States v. Fries, 9 F.Cas. 924, 934 (D. Penn. 1800). Justice Samuel Chase was impeached in 1805 for, among other things, “endeavoring to wrest from the jury their indisputable right to hear argument, and determine upon the question of law, as well as the question of fact, involved in the verdict which they were required to give.” See JANE SHAFFER ELSMERE, JUSTICE SAMUEL CHASE 105 (1980).
were to maintain order and give the jury non-binding instructions on the law. But times have changed, and the revolutionary zeal for independence and citizen participation in the administration of justice gave way to efficiency, consistency and administrative concerns.

The make-up of juries has also changed. The rights of blacks to be free from discrimination by jury selection was recognized as early as 1879. The masses of late nineteenth-century immigrants were becoming citizens, and therefore, were eligible for jury duty. Eighteenth-century freeholder requirements had been eviscerated as the system sought to obtain an adequate supply of jurors. The jury, formerly an elite group of well-educated and affluent white males who could be relied upon to support the prevailing institutions and division of power, was gradually beginning to approach the hypothetical cross-section of society. When social pressure in the Colonial era had favored allowing jurors to veto the acts of a foreign Parliament by 1895, pressure was increasing to control the immigrants, blacks, manual laborers and other groups from all walks of life who found themselves sitting in judgment of their neighbors. The melting pot was spilling over into the jury pool.

During the close of the nineteenth century, American courts were filled with an unprecedented amount of labor cases. While perhaps the most famous case of this period, People v. Spies, ended in convicting the accused in the Haymarket Square bombing, prosecutors found it increasingly difficult to prevail in labor cases as the Twentieth century approached. Since the 1805 Philadelphia Cordwainers Case, charging union organizers and union members with criminal conspiracies in restraint of trade was an effective tool against labor unrest. Perhaps jury

55 See Amasa M. Eaton, The Development of the Judicial System in Rhode Island, 14 Yale L.J. 148, 153 (1905) (quoting the 1833 murder trial of Ephraim K. Avery, "[u]ntil the statute, passed within a few years, making it the duty of the presiding judge to charge the jury upon the law, no court in this state had adopted the practice of instructing the jury upon the application of the law to the facts.").
57 See Strauder v. West Virginia, 100 U.S. 303 (1879); see also Ex Parte Virginia, 100 U.S. 339 (1879) (applying the same rule to the selection of grand jurors).
58 See Gerry Spence, With Justice For None 87-88 (1989).
59 See Alscher & Deiss, supra note 23, at 868.
61 122 Ill. 1 (1887); see also Frederick Trevor Hill, Decisive Battles of the Law 240-67 (1906).
62 Commonwealth v. Pullis (Phila. Mayor's Court, 1806); see 3 Commons & Gilmore, Documentary History of American Industrial Society 59-248 (1910-11); see also Schwartz v. Laundry & Linen Supply Drivers' Union, Local 187, 339 Pa. 353, 374 (1940) (Maxey, J., dissenting).
63 See Friedman, supra note 41, at 52.
reluctance to convict in labor cases was one factor leading to the decision in *Sparf*.

That case presented an ideal opportunity for limiting the discomfiting tenacity of populist juries. Although the Supreme Court in *Sparf* concluded that juries need only be charged with judging fact, American juries did not immediately relent their law-judging powers. The Volstead Act was essentially unenforceable in large parts of the country, due to jury resistance to the law.

Prohibition has been described as a "crime category in which the jury was totally at war with the law." In some areas, as many as 60 percent of Volstead Act prosecutions ended in acquittals. Between 1929 and 1930, 26 percent of federal Volstead Act cases nationwide ended in acquittals.

More recent cases that involve jury nullification include: the trials of Vietnam War protesters, euthanasia cases, the medical use of marijuana, spousal abuse defenses, draconian mandatory minimum sen-

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64 See Barkan, supra note 41, at 26, 33.

65 The Volstead Act is now a repealed Federal law prohibiting the manufacture, sale, or transportation of liquor. The law was passed under the Eighteenth Amendment to the U.S. Constitution which was repealed by the Twenty-First Amendment.

66 Kalven & Zeisel, supra note 2, at 291 ("The Prohibition era provided the most intense example of jury revolt in recent history."). The cases Kalven and Zeisel researched are all for production, sales and transportation of alcoholic beverages. The National Prohibition Act did not criminalize consumption, purchase or possession. If it had, it is likely the conviction rate would have been even lower than it was.

67 See id.

68 See id, at 292 n.10.

69 See United States v. Moylan, 417 F.2d 1002 (4th Cir. 1969); United States v. Dougherty, 473 F.2d 1113 (D.C. Cir. 1972); United States v. Dellinger, 472 F.2d 340 (7th Cir. 1972), cert. denied 410 U.S. 970 (1973). Although jury nullification arose often in trials of Vietnam War protesters, courts rarely allowed the defense to raise the issue directly. One exception was United States v. Anderson et al., Crim. No. 602-71 (D.N.J. 1973), which is discussed at length in Van Dyke, supra note 8, at 238-40; see also Roger Park, *The Entrapment Defense*, 60 Minn. L. Rev. 163, 188 (1976).


tencing laws, and selective prosecution. Unpopular and misapplied laws are still subject to the veto power of an independently minded juror, and a growing movement in this country has informed several million Americans of their power to judge the law when sitting as a juror. Juries still have, and probably always will have, occasions to act as the “conscience of the community” and refuse to convict for conscientious reasons.

II. THE BIGOTED JURY: ACQUITTALS IN LYNCHING AND CIVIL RIGHTS MURDER CASES

A fox should not be of the jury at a goose’s trial.
— Thomas Fuller

In addition to those cases that may be considered “proper” or “benevolent” uses of jury nullification are parallel instances in which all-white juries acquitted those who participated in lynch mobs or in the murders of civil rights activists. These latter cases have been used as an argument against jury nullification. The extent and continuing relevance of this history is unclear, however, for several reasons.

73 Some modern judges have allowed defendants to argue the injustice of federal minimum sentences to the jury, possibly as a protest against harsh sentencing guidelines. See United States v. Datcher, 830 F.Supp 411 (M.D. Tenn. 1993). Judge Thomas Wiseman in Datcher did not allow an explicit plea for jury nullification, but thought that the jury should have the information necessary for them to make an informed decision to nullify, should they be so inclined. See also Kristen K. Sauer, Note, Informed Conviction: Instructing the Jury about Mandatory Sentencing Consequences, 95 COLUM. L. REV. 1232 (1995).

74 See Bob Dart, North is Guilty, Alternate Juror Claims: Sequestered Panel to Spend its Saturday at Work, ATLANTA CONSTITUTION, Apr. 22, 1989, at A07:

An innocent verdict could hinge on jury nullification “rather than the jurors, dispassionately applying laws to the facts of the wrongdoing,” predicted John F. Banzhaf, a professor at George Washington University’s National Law Center who has observed the trial. As Judge Gesell’s instructions to the jury indicated, a defendant cannot justify illegal acts by claiming he was obeying orders from his superiors, Mr. Banzhaf said. But these arguments could sway jurors to use their inherent powers to acquit a defendant if they think a conviction would be unfair or not in the public interest.

Id. Notably, the only charges North was convicted of were those where he could not show that he was obeying orders from his superiors.

75 Fully Informed Jury Association volunteers have distributed over a million “True or False” brochures informing jurors of their power to judge the law, with an unknown number being received by members of jury pools. See THE FIJACTIVIST, June 7, 1993, at 4. They have also been the subject of over 1200 newspaper and magazine articles, and a large number of television and radio broadcasts. See THE FIJACTIVIST, Nov. 4, 1995, at 26-39. Organizations such as the National Organization for Reform of Marijuana Laws, Operation Rescue, and Gun Owners of America have printed an unknown number of their own brochures for similar distribution.

First, since juries do not issue written opinions, it is often difficult to say why they decided to acquit in a given case.\textsuperscript{77} Although we have data where all-white juries acquit white defendants of murdering blacks, we cannot determine whether such acquittals are due to jury nullification. There may be cases attributed to racist nullification where the jury did in fact have a reasonable doubt. Even a subsequent jury conviction on federal civil rights charges would not preclude reasonable doubts concerning the state’s case. The evidence, sincerity of the prosecution, and quality of the investigation may all be different in the federal case than in a state run case.

Second, the lack of written opinions means that these cases are unpublished. This systematic lack of publication makes much of the history anecdotal. Therefore, any attempt at thoroughness merely results in the collection of more anecdotal evidence. Nonetheless, several private agencies have compiled lists of these cases. Such lists, however, are inconsistent with each other. For example, in 1927, Byron Reuter, a professor of sociology, noted that:

\textit{The number of persons done to death in the United States each year by mobs and self-appointed discipline committees can be stated with only approximate accuracy. The statistics are based chiefly upon newspaper reports and it cannot be known how many such occurrences escape the news gatherers or, if known to the reporters, fail of publication. Certainly some illegal killings escape publicity in the press. And of such happenings reported, we may not be certain that all come to the attention of reporters.}\textsuperscript{78}

Third, we do not know what improper influences such as fear of the Ku Klux Klan and pressures from the judge, prosecutor or police, may have induced the jury to acquit in cases where nullification did occur.\textsuperscript{79} Racial oppression by the same police charged with investigating the crime was often rampant in areas where racist nullification reportedly was widespread.\textsuperscript{80}


\textsuperscript{77} See United States v. Moylan, 417 F.2d 1002, 1006 (1969) (that “the courts cannot search the minds of the jurors to find the basis upon which they judge”).

\textsuperscript{78} See Byron Reuter, \textit{The Race Problem} 366 (1927).

\textsuperscript{79} See Moore v. Dempsey, 261 U.S. 86, 89 (1923). Lynch mobs occasionally posed a threat to jurors; Justice Holmes remarked in one case involving a black defendant that “no juryman could have voted for an acquittal and continued to live in Phillips County. . . .” Id. The same logic may apply to jurors voting to convict a member of a lynch mob. Most Southern states have elected judges and prosecutors.

\textsuperscript{80} See VOLLERS, \textit{supra} note 14, at 81-82, 113, 118-23, 141-45, 182-83.
Finally, we can never know to what extent improper jury selection methods may have influenced individual cases. A trial before a racially gerrymandered jury is not the trial by jury guaranteed by the Sixth Amendment.\textsuperscript{81} All-white, all-male juries was the rule before the late 1960s. The likelihood of such a jury sitting in the deep South is significantly less today than in 1965.\textsuperscript{82} To the extent that we fear jury nullification because we believe such powers allow vicious racism to vent, we must investigate whether better jury selection procedures will result in more responsible jury verdicts.

Repeated references to purportedly racist jury verdicts have shed more heat than light on this problem. At best, the few cases referenced, are merely repeated without analysis and presented as “typical.”\textsuperscript{83} The idea that white Southern juries routinely nullified the law to acquit both lynch mobs and the killers of civil rights activists has passed into conventional wisdom without justification. Therefore, we should examine carefully the extent to which this idea is exaggerated or erroneous.\textsuperscript{84}

\section*{A. THE LYING CASES}

Although in the United States lynchings have occurred since the Revolutionary War, the practice did not take on purportedly racial overtones until after the 1880s, by which time almost 80 percent of lynching victims were black.\textsuperscript{85} After the 1900s, economic conditions seem to have caused a slow but noticeable decline in the lynchings of blacks.\textsuperscript{86} However, Southern lynchings of blacks still accounted for over 90 percent of all lynchings.\textsuperscript{87} When the NAACP highly publicized Claude Neal’s brutal lynching\textsuperscript{88} and Congress debated federal anti-lynching legislation,\textsuperscript{89} the number of lynchings sharply dropped. Although such anti-

\begin{footnotes}
\item[81] See supra text accompanying note 1.
\item[82] See Schmidt, supra note 9, at 1406-14 (1983); Van Dyke, supra note 8, at 152-60.
\item[84] See discussion infra Parts II.A, II.B, III.
\item[87] See McGovern, supra note 86, at 13; Cutler, supra note 85, at 13-89.
\item[88] See infra notes 124-45 and accompanying text.
\item[89] Congress attempted to pass a series of anti-lynching laws. For instance, the House of Representatives did pass the Dryer Bill in 1922. See McGovern, supra note 86, at 11-14. Congressman Dryer, when debating the constitutionality of the anti-lynching legislation, said:
\begin{quote}
It has seemed to me a very doubtful question whether legislation by Congress against lynching in the States is constitutional, but I am very clearly of the opinion that it ought to be tried. I think the South expects it, and many of our Southern citizens who are opposed to lynching will welcome it... A murder, in the ordinary
\end{quote}
\end{footnotes}
lynching legislation was never enacted, Congress's merely discussing the need for such legislation may have been much more effective in reducing lynching than actual passage of the bill.\textsuperscript{90} By the late 1930s, lynchings were rare. "Although acts of terror against blacks in the South continued, most of them might better be described as murders, because of the small number of persons involved in their concealment, rather than as lynchings with their public participation and public rituals."\textsuperscript{91}

Although the steady decline of lynchings is not a startling statistic, the scarcity of jury verdicts in lynching prosecutions surely must be. Only a few lynch murderers were ever brought to justice in the United States.\textsuperscript{92} Between the 1900s and the 1930s, only 0.8 percent of all lynchings were followed by a criminal conviction of one or more members of the lynching mob.\textsuperscript{93} According to Claude Shillady, then Secretary of the National Association for the Advancement of Colored People, "[s]ixty-three Negroes, five of them women, and four white men fell victims to mob violence during 1918 and in no case was any member of the mob convicted in any court and in only two instances were trials held."\textsuperscript{94} Although such statistics are sketchy, they do show that the legal system...
was not burning with an overwhelming desire to bring lynch mobs to justice.95

Therefore, given the clear discrepancy between the number of lynch murders against the number of prosecutions, we should not ask whether lynchers were brought to justice, but why they were not brought to justice. We will briefly focus on two factors which both greatly affected either directly or indirectly the "conscience of the community" and may account for the scarcity of lynching prosecutions. First, we will consider the nature of the lynch mob, and second, the expectations of success prosecutors had in bringing such a murder case to trial.

Given the nature and circumstances that surrounded a lynch mob, on the one hand, juries would probably more often have nullified in these cases than in the civil rights murder cases. Lynch mobs occasionally numbered as many as fifteen thousand members.96 Moreover, lynchings were concentrated in the poor and backwood areas of the South.97 Therefore, finding a jury member who neither was a witness to, participated in, nor was related to anyone involved with the lynching was a difficult task for the prosecution. The size of the mob, however, suggests that lynching was not condemned by the "conscience of the community," and would probably not have been punished by a local jury.

On the other hand, the prosecutor's belief that conviction would be impossible to obtain may have also contributed to the scarcity of lynching prosecutions.98 This sort of preemptive nullification, refusing to prosecute based on a belief that juries would refuse to convict, merely exacerbated the problem. Failure to prosecute gave the appearance that the lynch mob was presumptively legitimate. Thus, with no real threat of prosecution, no real crime had transpired. This attitude tended to justify

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95 See McGovern, supra note 86, at 15 and accompanying text. McGovern noted that "Since it is unlikely that historians will ever be able to analyze the phenomenon of lynching comprehensively because of a dearth of valid empirical data, they will have to rely on theories and on those case studies where information is unusually abundant." Id. These problems are multiplied when attempting to research those cases where jury nullification and lynching were joined.

96 See NAACP, supra note 94, at 25-26. Ell Person, an African-American, was arrested for first degree murder for beheading a sixteen-year-old white girl outside of Memphis during the spring of 1917. Two deputies delivered Person to the mob, which reportedly consisted of fifteen thousand men, women and little children. After pouring gasoline on Person and setting him afire, the crowd complained that "they burned him too quick!" Id. A mob of equal size, including the Mayor, Chief of Police, and many women and children, "witnessed the burning of a defective charged with the murder of his employer at Waco, Texas in 1916." See White, supra note 89, at 38; see also Frank Shay, Judge Lynch: His First Hundred Years 131-32 (1938).

97 See McGovern, supra note 86, at 3-5 and accompanying text; see also Arthur Raper, The Tragedy of Lynching 15 (1933) (a classic sociological treatment of the role of lynching in society).

98 See McGovern, supra note 86, at 3-5 and accompanying text
a pattern of shoddy investigation, lackadaisical prosecution, and acquittal in future cases.

While it is possible that the juries may have refused to convict a lynchener if he was put on trial, we cannot honestly criticize such juries for verdicts which they never had an opportunity to deliver. Prosecution of lynch mobs would send a clear public message that lynching was not acceptable. Further, it would tell the public that the normal legal channels had continued to function, removing one justification for lynching. Moreover, the lack of prosecutions shielded the community from the scrutiny necessary to ensure more equitable proceedings in the future. The communities, where an acquittal would have occurred, would have been ridiculed in the national press. Such reported news stories often proved an embarrassment to the South, especially for the communities where lynchings occurred. A popular topic among Northern cartoonists was the drunken jury, ignorant judge and bigoted prosecutor making a mockery of law and justice in race cases.

In one of the few cases where attempts were made to convict a member of a lynch mob for murder, the prosecution failed to secure a conviction even after several successive jury trials. On August 13, 1911, a lynch mob abducted and brutally killed Zachariah Walker, a black, who lived in Coatesville, Pennsylvania. Walker had killed a police officer in a drunken stupor and was hospitalized for injuries resulting from his attempt at suicide after he was captured. Walker claimed it was self-defense, yet boasted “I killed him easy.” The local sheriff, Charles E. Umsted, and the deputy responsible for guarding the hospital told the crowd that they would not stand in the way of a lynch mob. “It would be the devil if somebody should happen to go after that fellow . . . . Gentlemen, allow me to say that I am not going to get hurt,” Umsted remarked. After a mob of over four thousand people abducted Walker

99 See W. Fitzhugh Brundage, Lynching in the New South: Georgia and Virginia, 1880-1930 27-28, 98 (1993). Lynching was often a response to a belief that the law was either too slow, too lenient, or otherwise inadequate. Fear that failure of normal legal channels to operate properly encouraged lynching is reflected in Supreme Court Justice Brewer’s proposal that lynching would be reduced if the justice system were made swifter and more certain by eliminating appeals entirely in criminal cases. See Cutler, supra note 85, at 260-61.

100 See McGovern, supra note 86, at 95-114.

101 See Reuter, supra note 78, at 367 and accompanying text.


103 See McGovern, supra note 86, at 107; Downey & Hyser, supra note 85, at 2-7, 32-34.

104 See Downey & Hyser, supra note 85, at 1, 13, 16-19.

105 Id. at 15-19.

106 Id. at 54, 140-44, 146-47.
from the hospital, Sheriff Umsted calmly inspected the hospital's locks and doors while Walker's screams could be heard off in the distance.\(^\text{107}\)

The Coatesville lynching was a national scandal.\(^\text{108}\) W.E.B. DuBois, in *The Crisis*, a journal of the National Association for the Advancement of Colored People, wrote "some foolish people talk of punishing the heroic mob . . . . There may be a few arrests, but the men will promptly be released by the mob sitting as a jury—perhaps even as judge."\(^\text{109}\) Nevertheless, District Attorney Robert Gawthrop almost immediately promised to prosecute, and Governor John K. Tener ordered the state attorney general's office to participate in the investigation and prosecution.\(^\text{110}\)

As a result, a series of over a dozen trials began on October 2, 1911.\(^\text{111}\) Yet, even with the public outcry, all of the trials ended in acquittals.\(^\text{112}\) In one case, the defendant, who had agreed to testify against other lynchers, was acquitted at the prosecution's request.\(^\text{113}\) Another case, *Commonwealth of Pennsylvania v. Joseph Swartz*,\(^\text{114}\) proceeded to a jury trial. Only one witness, another accused lynch, could identify Swartz as having been present.\(^\text{115}\) Although Swartz was allegedly one of the leaders responsible for abducting Walker, evidence was scarce, for even the deputy assigned as a guard was unable or unwilling to identify him.\(^\text{116}\) In the end, all the prosecution's case consisted of—which Deputy Attorney General Jesse B. Cunningham characterized as "the strongest of them all"—was a recanted confession and the questionable identification of another accused lynch.\(^\text{117}\)

Juries cannot convict merely because they believe the defendant is guilty. The state must prove the defendant's guilt beyond a reasonable doubt. The prosecutions related to the murder of Zachariah Walker were flimsy. Apparently, the local prosecutor was only partially sincere in seeking a conviction.\(^\text{118}\) If a prosecutor in central Pennsylvania was un-

\(^{107}\) See id. at 21-24, 30-34.

\(^{108}\) See id. at 47.

\(^{109}\) Id. at 49-50.

\(^{110}\) See id. at 44-47.

\(^{111}\) See id. at 71.

\(^{112}\) See id. at 71-97.

\(^{113}\) See id.

\(^{114}\) See id. at 82-86.

\(^{115}\) See id. at 83.

\(^{116}\) See id.

\(^{117}\) See id. at 71-76, 81. Another account of this lynching appears in Shay, *Judge Lynch*, and disagrees with this account in many essentials, yet appears to be scantily researched and probably inaccurate. See Shay, supra note 96, at 149.

\(^{118}\) Downey and Hyser note that, in the trial of one of the lynchers:

At the conclusion of testimony, Robert Gawthrop surprised the court when he rose to ask Judge Butler if there was enough substantial evidence for the trial to continue.

... Turning to the jury, the judge declared: "... The weight of the Commonwealth's
willing to commit himself to obtaining a conviction against a mob that murdered a black man in 1911, it seems highly unlikely that prosecutors in the deep South would have shown greater enthusiasm in a similar case.

Southern prosecutors never had a chance to prosecute Claude Neal, a black man who was brutally murdered and then lynched in Greenwood, Florida, October 26, 1934.\footnote{Southern prosecutors never had a chance to prosecute Claude Neal, a black man who was brutally murdered and then lynched in Greenwood, Florida, October 26, 1934.} On October 19, Neal allegedly raped and assisted in the murder of nineteen year old Miss Lola Cannidy, a white girl of Jackson County.\footnote{See McGover, supra note 86, at ix.} After a short police investigation Neal was arrested and later confessed.\footnote{See id. at 66.} In an attempt to avoid a lynching, the testimony tends to but suspicion. I believe that the investigation has been conducted most properly, but I would ask of you that you render a verdict of 'Not Guilty' from your seats.”

\textbf{Confession of Claude Neals}

\begin{quote}
My name is Claude Neals. I am 23 years old and have lived at Malone, Fla., for all my life.

On Wednesday night, October 17, 1934, I spent the night with my wife and came back to Mr. Cannidy's on my wagon. My wife was with me and we went to my mother's when we left Mr. Cannidy. I had been at Mr. Cannidy's that morning helping him to break a mule to the plow. We plowed up to about twelve o'clock and then went to my mother's.

When we got to my mother's, we went out in the field to hunt a sow and I met Herbert Smith out in the field. We went up alongside of the fence to a pump on the edge of Mr. Cannidy's field. When Herbert and I got to the pump, Miss Lola Cannidy was sitting by the pump cleaning out the hog trough.

She asked me if I would clean it out and I said that I would. I sat down and washed out the trough and then pumped it full of water for Miss Lola.

When Miss Lola turned to go to the house, Herbert walked up and caught her by the arm. Herbert told her: "How about me being with you?" She said, "You must be a fool." Herbert said, "No, won't nobody know nothing about it." She told him to go ahead and go on, but Herbert pulled her by the arm and she started calling her brother, Mr. Willford. Herbert pulled her over the fence about four or five steps away and asked me to help him put her over the fence and she stopped calling her brother. I helped him put her over the fence and when we got over all three of us went on down by the East and West fence to another fence running North and South and went down by the North and South fence.

When we got to the corner of the woods, about the width of 6 acres, Miss Lola said: "This is far enough." Herbert said, "Come on," and she said, "I don't want to go into the woods for snakes will bite me. I am not going any farther."

Herbert told her, "Lay down, then." She laid down with Herbert holding to her. Herbert told me to catch both of her arms and hold her and I did that. She caught my watch. Herbert pulled up Miss Lola's clothes while I held her arms and he had intercourse with her one time. She was fighting me with her hands and trying to kick Herbert off.
Florida police secretly transferred Neal to an Alabama jail to await trial. At various stops during Neal’s traveling from Florida to Brewton, Alabama, a few lynchers attempted to obtain information as to his exact whereabouts. When Neal’s location was finally discovered (it is rumored that the Florida police tipped them off), Neal’s abductors, dressed in the garb of Florida police officers, entered, without raising suspicion, the Brewton jail house capturing Neal. They effectively returned Neal to Jackson County (the district where the murder allegedly took place). Neal’s abductors publicly invited all “concerned white citizens” to join in lynching Neal on the farm belonging to the parents of the murdered girl. Thousands of men, women and children from several states accepted this invitation.

During the day of October 26, 1934, a mob of seven to ten thousand waited to lynch Neal. When the mob became too rambunctious, however, his abductors feared a melee so they privately tortured and murdered him before they dragged his body behind a car to the parents’

After he got through, Herbert said, “Come on, Claude and get yours.” I told him I didn’t want to do that. Then Herbert held her and I had intercourse with her. When I got through, Herbert said: “I will fix her where she won’t tell it.” I told him I had been working for her brother for two years and I didn’t want to do anything else to her. He said, “You are just scared as hell.” I said, “Yes, I know and you do, too, what will be the consequences if this is known.” Herbert said, “I’ll fix her where she won’t tell nobody.”

Herbert then broke down a little dead oak tree and broke off a piece about 3 or 3 1/2 feet long and hit her in the head with it. She hadn’t said anything from the time we made her lie down, and she breathed a few times after Herbert hit her in the head. Herbert dragged a piece of log about five feet long and as big as my thigh up side of her and I dragged up another smaller piece and we laid them on her, or by the side of her. She just was breathing when we left her; she was not quite dead at that time.

We left her and went back to the edge of the field down to the big hedgerow. Herbert walked down by the hedgerow and I haven’t seen him since. I went to my mother’s house and from there to my wife’s aunt’s place at Miss Rose Lewis’s. I came back by Justice of the Peace Edgar Anderson’s and talked to him. I went back to my mother’s and from there to Mr. John Daniel’s. I was at Mr. Dave Daniels’ house picking peas when the Sheriff came and got me. This confession, made at Brewton, Alabama, on the 22nd day of October, 1934, in the presence of G.S. Byrne, Sheriff of Escambia County, Alabama, and W.E. Brooks, County Solicitor of Escambia County, Alabama, is made of my own free will and accord and without any threats, promises of reward, or hope of reward, and is entirely voluntary on my part.

Id. at 57-58.

122 See id. at 76.
123 See id.
124 See id.
125 See id. at 67.
126 See id.
127 See id. at 42, 57-66, 74-77; see also SHAY, supra note 96, at 182-83.
128 See McGOVERN, supra note 86, at 76-77.

//S// Claude X Neals. (mark)
There, the mob attacked the body, even with children stabbing at it with sharpened sticks. Later, Neal's mutilated body was hung from a tree by the Jackson County Courthouse. The crowd then began to riot near the courthouse and were not calmed until the National Guard arrived. Sheriff W. Flake Chambliss earlier rejected any assistance from the National Guard to help in averting the lynching. A local deputy sheriff even voiced an opinion that "the mob will not be bothered, either before or after the lynching." But when the crowd gathered in front of the local courthouse, things got too out of control. So the sheriff disregarding any constitutional formalities (only the Governor could legally call out the Guard) called out the National Guard personally.

Although the lynch mob made no attempt to disguise themselves or cover their license plates, no witness could later identify any of them. The grand jury investigating the lynching issued no indictments but instead justified the mobs actions, reporting that:

> we have not been able to get much direct or positive evidence with reference to this matter; practically all of our evidence and information being in the nature of hearsay and rumors. However, we find that Miss Cannidy was brutally raped and murdered in this county on the 18th day of October, 1934, by Claud Neal, a Negro and that Claud Neal came to his death at the hands of a small group of persons unknown to us; after being forcibly removed from the jail at Brewton, Alabama, about 175 miles from here, by persons unknown to us.

Although NAACP Secretary William White urged United States Attorney General Homer Cummings to investigate and prosecute under federal kidnapping laws, the United States Attorney General responded that those laws only covered kidnappings for ransom or hire. Florida's

\[129 \text{ See id. at 79-81.} \\
130 \text{ See id. at 82. Informants who were at the lynching reported that many people subjected the body to other indignities. Several kicked it and others drove cars over it. Perhaps the most terrifying account they made was that} \\
\text{It is reported from reliable sources that the little children, some of them mere tots, who lived in the Greenwood neighborhood, waited with sharpened sticks for the return of Neal's body and that when it rolled in the dust on the road that awful night these little children drove their weapons deep into the flesh of the dead man.} \\
\text{Id.} \\
131 \text{ See id.} \\
132 \text{ See id. at 79-94; see also Shay, supra note 96, at 184-85.} \\
133 \text{ See id.} \\
134 \text{ See McGovern, supra note 86, at 87.} \\
135 \text{ See id. at 75.} \\
136 \text{ Id. at 112.} \\
137 \text{ See id. at 115-21.} \]
efforts to prosecute produced no results and no prosecution ever took place.\textsuperscript{138} The local officials blamed the riots and lynching on the work of "outsiders," primarily Alabamians.\textsuperscript{139}

These and other cases\textsuperscript{140} show that the failure to bring lynchers to justice was the result of a myriad of forces. Jury nullification played at most a marginal role because only a few lynching cases ever went to trial. The reluctance of officials to prosecute, protect, or investigate was certainly a greater factor. Where attempts were made to prosecute, they could fairly be described as half-hearted—if not as outright shams. While the jury was implicated, it simply was not the primary engine of racial injustice that conventional wisdom would have us envision.

\textbf{B. THE CIVIL RIGHTS MURDERS}

The murders of civil rights activists during the 1950s and 1960s were probably more notorious, although less numerous, than lynchings. Few state court cases ever resulted in convictions.\textsuperscript{141} Unlike lynchings, which usually involved unknown victims in some backwoods location, the murders of civil rights activists such as Lemuel Penn, Viola Liuzzo, Jonathan Daniels, Medgar Evers, Vernon Dahmer, Andrew Goodman, James Earl Chaney and Michael Henry Schwerner occurred in cities and involved relatively high-profile victims.\textsuperscript{142} Consequently, more information is available on these cases.

Several of the most notorious civil rights murders occurred in Mississippi.\textsuperscript{143} On May 7, 1955, the local NAACP representative, Reverend George Washington Lee, who struggled to register ninety-two blacks as voters, was shot twice in the face while he drove on a downtown street in Belzoni, Mississippi.\textsuperscript{144} The local sheriff, Ike Shelton, never made an arrest and said that the lead pellets in his mouth and face were dislodged

\begin{itemize}
  \item \textsuperscript{138} See id.
  \item \textsuperscript{139} Id. at 95-98.
  \item \textsuperscript{140} See Howard Smead, Blood Justice: The Lynching of Mack Charles Parker 24-56 (1986); George C. Wright, Racial Violence in Kentucky, 1865-1940: Lynchings, Mob Rule and "Legal Lynchings" 23, 34-37 (1990); see generally Brundage, supra note 99 and accompanying text.
  \item \textsuperscript{141} Some of the killers, such as those who killed Viola Liuzzo in Alabama and Michael Schwerner, James Chaney and Andrew Goodman in Mississippi, were tried and convicted in Federal court for violations of civil rights.
  \item \textsuperscript{142} See Vollers, supra note 14; Adam Nossiter, Of Long Memory: Mississippi and the Murder of Medgar Evers 5 (1994).
  \item \textsuperscript{143} See Vollers, supra note 14, at 64. By the end of 1955, the NAACP would put out a concise pamphlet chronicling the state-sanctioned campaign of terror inflicted on civil rights leaders. And once that little booklet was published, Mississippi became a place name linked with an atrocity, like Waterloo, Pearl Harbor, Dachau. For decades to come, "M" would stand for Mississippi and murder. Id. at 65.
  \item \textsuperscript{144} See Nossiter, supra note 142, at 44.
\end{itemize}
dent dental fillings. However, upon further police investigation, perhaps prompted by newspaper reports of this "odd incident," a bullet was found in one of the tires of Lee's car. Sheriff Shelton now changed his initial story and said instead that Lee might have been "shot by jealous niggers." In another murder case, no one was arrested when Lamar Smith was killed on the courthouse lawn in Brookhaven, Mississippi three months later. Smith was in the midst of organizing a campaign to get blacks to vote by absentee ballot. The NAACP Field Secretary, Medgar Evers, was assigned to investigate these cases. In the early morning hours of June 12, 1963, Evers in turn was killed when Byron de la Beckwith shot him in the back.

Evers's national reputation in the civil rights movement, coupled with the cowardly shot in the back, made his murder a national "cause célèbre." Beckwith was twice tried for the murder during 1964 but both trials ended in hung juries. Nonetheless, he was convicted in a third trial conducted in 1994. Conventional wisdom was and remains that no Mississippi jury in 1964 would convict a white man for killing Evers.

Whatever conventional wisdom is, Beckwith's defense attorney worked hard to procure mistrials. Despite Beckwith's braggadocio it does not appear that the results were ever assured. Nor was the state's case against Beckwith clearly compelling. Several witnesses—including police officers—claimed they had seen Beckwith elsewhere that night, there were even questions about Beckwith's ownership of the murder weapon, and defense witnesses controverted claims that Beckwith's

145 See id.
146 See id.
147 Id. Though no black in Belzoni could believe it, the police also hinted that there was another "woman involved." Vollers, supra note 14, at 61
148 See Vollers, supra note 14, at 61.
149 See id. at 63-64.
150 See id. at 3.
151 President John F. Kennedy issued a statement from the White House saying that he was "appalled by the barbarity of the act." Id. at 138.
152 See id. at 160-84, 203-08.
153 See id. at 304-55.
154 See Nosssiter, supra note 142, at 13 ("The mystery did not revolve around Beckwith's guilt: the evidence against him had always been overwhelming. Most people accepted that only the hold of white supremacy had allowed him to escape punishment twenty-six years before.").
155 See Vollers, supra note 14, at 171, 175. Beckwith was known for his antics during his trials, handling evidence, slipping cigars into Waller's pocket, patting him on the back, and chatting with jurors during recesses.
156 See id. at 190-91.
157 See id. at 172-78.
car was parked at a nearby restaurant. As one juror claimed, "[t]here were too many contradictions in the thing."

Most telling, perhaps, was the state's active participation in Beckwith's defense. Mississippi maintained a "Sovereignty Commission," responsible for preserving Jim Crow and independence from federal civil rights law. This Commission secretly investigated prospective jurors for Beckwith's defense. While District Attorney Bill Waller has generally been credited with a sincere prosecution in spite of his own segregationist views, it is obvious that his superiors in the state had mixed feelings. Moreover, Waller's own political ambitions may have constrained his enthusiasm for the prosecution. Waller did not have much of an incentive to appeal to black voters since there were few Mississippi blacks who were registered to vote in 1964. While racists tolerated the district attorney for "doing his job," they probably took a dim view of any real enthusiasm in this particular case.

We should also note that not all civil rights murders involved black victims. In Lowndes County, Alabama, Viola Liuzzo and Jonathan Daniels, two white civil rights activists, were killed. Liuzzo was a housewife from Detroit, Michigan, who was shot and killed while shuttling civil rights workers between Selma and Montgomery on March 25, 1965. An FBI informer was present when three Ku Klux Klan members shot Liuzzo while she was driving to Montgomery to pick up passengers. Collie Leroy Wilkins, who fired the fatal shots, was acquitted by an Alabama jury in his second trial, which followed an earlier mistrial.

Jonathan Daniels, a devoted civil rights activist, was a visiting Episcopalian seminarian from Keene, New Hampshire who was killed in Hayneville, Alabama. In the August heat, Daniels and other religious activists were released after spending six days in jail for political protests. The rumor that these protestors would be freed put Tom Cole-

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158 See id. at 186-87.
159 See Nossiter, supra note 142, at xi.
160 See Vollers, supra note 14, at 264.
161 See id.
162 See Nossiter, supra note 142, at 145-47; see also Reed Massengill, Portrait of a Racist 180-81 (1991).
163 See id. at 237.
164 See id. at 145-71 (he was elected Governor of Mississippi in 1971).
165 See Vollers, supra note 14, at 32, 59-60, 247, 259, 293.
166 See id. at 59-60.
167 See id.
168 See Eagles, supra note 102, at 114-15, 254.
169 See id. at 255.
170 See id. at 177. [Editor's comment] Eagles writes that Daniels was released from jail on September 11, 1965. However, Coleman shot Daniels August 20, 1965. Since in the very
man, a local employee of the state, and others on guard.\textsuperscript{171} After their release, Daniels, accompanied by a Catholic priest, Richard Morrisroe and two black women, decided to go to a local country store to get something to eat and drink.\textsuperscript{172} With a shotgun in hand, Coleman met them at the store.\textsuperscript{173} He stood only a few feet away from Daniels when he abruptly fired his twelve-gauge shotgun at the seminarian.\textsuperscript{174} Coleman fired once at Daniels’s chest, and then again into Morrisroe’s side.\textsuperscript{175} Daniels died instantly but Morrisroe survived.\textsuperscript{176} Coleman’s unlikely defense was that the clerics had threatened him.\textsuperscript{177} Although the weapons were never found, Coleman claimed that two black teenagers took the weapons away before police arrived.\textsuperscript{178}

Tom Coleman was the son of a county sheriff, the father of a state trooper, and his sister was the school superintendent.\textsuperscript{179} Many in Hayneville spoke well of Coleman, including his friend Colonel Albert Lingo, Alabama’s Public Safety Commissioner, himself known for his violently racist views.\textsuperscript{180} Lingo stood firmly by Coleman and had no problem in refusing to cooperate with the State Attorney General Richmond Flowers or the FBI in their investigation of this case.\textsuperscript{181}

When the grand jury indicted Coleman for manslaughter, Attorney General Flowers was incensed and attempted to postpone the trial in order to seek a murder indictment.\textsuperscript{182} However, Judge T. Werth Thagard denied the motion, refusing to continue the case because the prosecution was not ready or because Morrisroe was not well enough to testify, or to allow the prosecution to dismiss \textit{nolle prosequi}.\textsuperscript{183} Assistant Attorney General Joseph Gantt refused to proceed under these conditions and turned the case over to local District Attorney Arthur “Bubba” Gambles, who was assisted by County Solicitor Carlton Perdue.\textsuperscript{184}

\textsuperscript{171} See id. at 248-49. The demonstration was later found to have been legal.
\textsuperscript{172} See id.
\textsuperscript{173} See id.
\textsuperscript{174} See id. at 179.
\textsuperscript{175} See id.
\textsuperscript{176} See id.
\textsuperscript{177} See id.
\textsuperscript{178} See id. at 178-79, 237.
\textsuperscript{179} See id.
\textsuperscript{180} See id. at 176.
\textsuperscript{181} See id. at 186-96, 216. This is significant because had Coleman been acting in his official capacity, he would have violated federal law and been tried in federal court. See id. at 196, 205.
\textsuperscript{182} See id. at 196, 200-01, 203-05, 209-10, 214-16.
\textsuperscript{183} See id. at 200-01.
\textsuperscript{184} See id. at 203-05, 209-11, 214-18.
Perdue and Gambles were less than aggressive at trial, "conced[ing] important points that not even defense witnesses had made," including a false allegation that Daniels had brandished a knife.\(^{185}\) During his closing argument, Gambles even apologized to the jury for taking the case to trial.\(^{186}\) After deliberating less than two hours, the jury of twelve white men delivered the anticipated verdict, acquitting Coleman of manslaughter.\(^{187}\) While leaving the courthouse, a juror reportedly asked Coleman "[w]e gonna be able to make that dove shoot now, ain't we?"\(^{188}\)

Just as in the lynching cases, we should question the sincerity of the prosecution and the impartiality of the tribunals in these civil rights murder cases. Coleman was never prosecuted for murder. For that matter, he was never really prosecuted for manslaughter.\(^{189}\) The case was a sham. The weapons that Daniels and Morrisroe allegedly carried were transparently fabricated; moreover, Coleman's closing apology and the \textit{voir dire} that left Coleman's hunting buddies on the jury made a complete mockery of the entire proceedings.\(^{190}\) That sort of familiarity with the defendant is a sick parody of what we look for in an impartial jury.

Would a racially mixed jury have convicted in either the Beckwith or Coleman cases? Would a mixed jury have resulted in a hung jury in Coleman's case, so that Coleman could have shared Beckwith's fate, being retried before another jury thirty years after his crime? Obviously, these questions can never be authoritatively answered.

But we do know that Coleman's defense attorneys were concerned that a mixed race jury would not acquit.\(^{191}\) While Coleman's case was making its way to Judge Thagard's court, another case, \textit{White v. Crooks}\(^{192}\) was pending in federal court that would have required an Alabama court to include in the jury pool eligible blacks and females.\(^{193}\) While in federal court, the Crooks prosecution attempted to enjoin Lowndes County from conducting any jury trials until they cured their persistent racial discrimination in jury selection.\(^{194}\) Although the Crooks's prosecution was unsuccessful, Coleman's defense voiced concerns that the real reason that Crooks's prosecution was seeking an in-

\(^{185}\) \textit{See id.} at 239-42.
\(^{186}\) \textit{See id.} at 241.
\(^{187}\) \textit{See id.} at 243.
\(^{188}\) \textit{See id.} at 244.
\(^{189}\) \textit{See id.}
\(^{190}\) \textit{See id.}
\(^{191}\) \textit{See id.} at 199-200, 205, 210-212, 253-54.
\(^{193}\) \textit{See EAGLES, supra} note 102, at 114-15, 254.
\(^{194}\) \textit{See id.} at 255.
junction was to delay and force a racially mixed jury in the Coleman case.\textsuperscript{195}

However, we still cannot conclude that an all-white jury would necessarily have refused to apply the law and convict, even if the judge, police and prosecutor applied the law evenhandedly. When Andrew Goodman, James Earl Chaney and Michael Henry Schwerner were murdered by the Ku Klux Klan outside of Philadelphia, Mississippi on June 16, 1964, the killers were never prosecuted for their murders in a Mississippi court.\textsuperscript{196} A federal prosecution, for conspiracy to deprive the victims of their civil rights, resulted in federal convictions in front of an all-white Mississippi jury.\textsuperscript{197} Possibly the reasons for the different result lie in the nature of the court. At trial, the defense attorney Laurel Weir asked a black minister “Now, let me ask you if you and Mr. Schwerner didn’t advocate and try to get young male Negroes to sign statements agreeing to rape a white woman once a week during the hot summer of 1964?”\textsuperscript{198} However, the presiding Federal Judge Cox, himself a Mississippian who was less than enthusiastic about civil rights litigation,\textsuperscript{199} interrupted:

I’m not going to allow a farce to be made of this trial and everybody might as well get that through their heads right now. I don’t understand such a question as that, and I don’t appreciate it, and I’m going to say so before I get through with the trial of this.\textsuperscript{200}

Similarly, the Klan members who were acquitted of murdering Viola Liuzzo in an Alabama state court were tried and convicted of civil rights violations by an all-white Alabama jury in a federal court.\textsuperscript{201} Southern juries were evidently willing to convict, given sincere prosecutions and impartial judges such as Judge Cox. The fire-bomb killing of Vernon Dahmer was followed by Mississippi state court convictions of the Klansmen responsible.\textsuperscript{202} Although the jury has taken the brunt of public condemnation for acquitals in the civil rights murder cases, it is informative to note that the successful federal and failed state prosecutions shared a common jury pool.

\textsuperscript{195} See id. at 199-200, 210-11.
\textsuperscript{197} See id.
\textsuperscript{198} See id.
\textsuperscript{199} See id. at 228-35.
\textsuperscript{200} See id. at 151.
\textsuperscript{202} See Wilson v. Mississippi, 234 So.2d 303 (Miss. 1970); Byrd v. Mississippi, 228 So.2d 874 (Miss. 1969); Smith v. Mississippi, 223 So.2d 657 (Miss. 1969); Sessum v. Mississippi, 221 So.2d 368 (Miss. 1969).
C. CAN RACIST NULLIFICATION BE DISCOURAGED OR CONTROLLED?

It is unrealistic to claim that racist juries have never existed, or to deny the risk of racist nullification in occasional cases. Racist nullification has occurred and will occur in the future, whether by bench or jury. However, statistics and history fail to substantiate claims of widespread use of nullification in trials of racial violence. Nor do they show the jury as being more racist than other participants in the criminal justice system, such as prosecutors, judges, police, and attorneys. Instances of unalloyed racist nullification are extremely rare, and even these low numbers can be further reduced without affecting the jury's power to nullify in an appropriate case. In this section, we consider primary measures used by the prosecution, judge, or defense that may discourage or control racist nullification.

Jury instructions have traditionally been the primary tool used by judges and attorneys to guide jury decision-making. We should remember that the cases we have been discussing did not involve either jury argument or instructions about the jury's nullification power. Thus, they cannot be viewed as evidence against such instructions. Appropriate instructions on the jury's nullification power could reduce the incidence of its inappropriate use. We should not assume that informing jurors about their powers would encourage irresponsible nullification, just as we do not assume that informing teenagers about sex would encourage irresponsible fornication. Proper instructions may channel the discretion of juries towards cases where convictions would be conscientiously untenable, thereby, narrowing the class of cases where nullification is considered.

As we noted in the last section, the differences between the federal and state court verdicts in the civil rights cases emphasize the importance of voir dire in controversial proceedings. While defense attorneys have often been in the forefront of pushing the envelope for more exten-

203 See text accompanying note 15.
204 See King, supra note 10, at 63, 83.
205 Note the words of Professor Steve Herzberg given at the Annual Judicial Conference:
Let me just make one more point, and that is that the cases that people always use, the cases that are always used against the jurors, are always the same cases. And they are the civil rights cases in the South, where people who were charged with murdering civil rights workers were acquitted. They were acquitted with no instruction.
207 See supra note 193-206 and accompanying text.
sive and thorough voir dire,²⁰⁸ prosecutors may require incisive voir dire which would ensure a jury that is willing to convict in racial violence cases. The Supreme Court has stated that "where the circumstances of the case indicate that there is a reasonable possibility that racial or ethnic prejudice might have influenced the jury," the defense attorney should be allowed to question prospective jurors regarding their racial or ethnic prejudice.²⁰⁹ Disallowing such questioning in such circumstances could be a violation of due process of law.²¹⁰

However, the Supreme Court has severely limited the application of the above rule as a tool for the defense.²¹¹ To further complicate matters, prosecution objections would have to be litigated on interlocutory appeal, as the prosecution has no appeal from an acquittal. Whether courts would find the prosecution’s interest in conducting voir dire on issues of racial or ethnic prejudice to outweigh the defendant’s interest in the swift resolution of his case may depend on the skills of the advocates and on the specific facts of the case.

Clearly, courts have authority to address this issue on interlocutory appeal.²¹² When dealing with such issues, courts should consider the racial atmosphere, history of racial violence, and racial composition of the community. The prosecution would have to show that a significant segment of the community may approve of racial violence. This shown, appellate courts should protect the prosecutor’s right to whatever voir dire is necessary to reach the prejudice and bias of the jurors.

Another measure courts may take is to allow change of venue on the motion of the prosecution when public sentiment would not allow the state a fair trial. Approximately one quarter of the states currently allow for a change of venue in limited circumstances on the request of the prosecution. Primarily, the prosecution needs to show that local bias is such that the state cannot anticipate a fair trial.²¹³ In other cases, however, this provision might be used to deprive the defendant of a trial by the "conscience of the community." Should this provision be available in an obscenity prosecution, thereby moving the trial away from a liberal

²⁰⁸ See Cathy E. Bennett, Orientation-Voir Dire 11-16 (1982).
²¹¹ See Ristaino v. Ross, 424 U.S. 589 (1976) (the mere fact that the victim was white and the defendant black is not sufficient to invoke a requirement that the trial court allow defense questioning into racial or ethnic prejudice); Dukes v. Waitkevitch, 536 F.2d 469 (1st. Cir. 1976) (where prejudice inheres in the identities of the parties and victims and not in the specific issues, denial of defendant’s request to have various questions regarding racial prejudice posed to the prospective jurors does not violate defendant’s constitutional rights.).
jurisdiction to a more strictly religious one? With a sufficiently high burden on the prosecution to show an articulable risk that the jury will be influenced by unconstitutional factors, the law should be able to separate marginal cases where a change of venue is merely used for advantage from those cases involving mob law or grossly prejudicial pre-trial publicity.

A trial may have to be moved a considerable distance in order for change of venue to have a sufficient effect. The Sixth Amendment prohibits venue to be transferred out of the federal district wherein the crime was committed. However, in a case involving lynching or other incidents of mass violence, the government could have a compelling interest in prosecuting the case a considerable distance from the district wherein the crime was committed. A defendant's venue right is not absolute and may be forced to accommodate a sufficient state interest in trying the case in another district. While the days of mass lynchings are over, such a case would certainly present a sufficiently compelling state interest.

One of the most important measures for reducing racist nullification is to ensure that the promise of racially neutral jury selection, made in 1789, is kept. Although that promise has never been made with jury nullification in mind, it is evident that a racially mixed jury is extremely unlikely to condone racial violence. Professor Jeffrey Abramson claims that ensuring a diverse jury will empower arguments that persuade across group lines while weakening arguments persuasive only to a select group. Thus, racist arguments are unlikely to sway a mixed jury, whether these arguments are based on facts or a misguided appeal to a racist conscience. The need to ensure representative panels is no less urgent in nullification cases than in cases presenting a fact-based defense.

The primary current means for ensuring a racially neutral jury selection process was laid down by the Supreme Court in Batson v. Kentucky, which is discussed in detail in the next section. Batson prohibited the state from using its peremptory challenges in a racially

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214 One can imagine a case where a defendant suffering with AIDS moves to a relatively liberal community where he believes his medical use of marijuana will be tolerated by a local jury, only to have venue changed to a neighboring community markedly intolerant of both homosexuality and marijuana.


217 See Strauder v. West Virginia, 100 U.S. 303 (1879).

218 See ABRAMSON, supra note 6, at 39.

219 See id., at 39-141.

While that case has been broadly expanded, the Court has also made it nearly unenforceable by allowing almost any justification for peremptory challenges, however arbitrary or irrational, while ignoring evidence that such challenges were exercised in a racially discriminatory manner.

Fears that increased discretion in the hands of juries will make it impossible to control racist violence are clearly misplaced. I have found no commentator to show any case where a jury had acquitted a defendant charged with a racially motivated crime of violence in the face of a compelling case by the prosecution and an impartial tribunal. Although it would be unrealistic to claim this has never occurred, such cases are apparently few and far between, if they occur at all. And it is also true that the numbers could have been lower still, had courts taken certain reasonable and prudent precautions to guarantee that both the state and the defendant have a fair trial. Such steps were available in the past and are available today. Courts willing to employ such precautions have never been faced with widespread jury nullification in cases of racial violence.

III. THE IMPARTIAL JURY: BLACK VICTIMS, BLACK DEFENDANTS, AND BLACK JURORS

If we desire respect for the law, we must first make the law respectable.

— Louis D. Brandeis

In dissent, Justice Sandra Day O'Connor has noted that "[i]t is by now clear that conscious and unconscious racism can affect the way white jurors perceive minority defendants and the facts presented at their trials, perhaps determining the verdict of guilt or innocence." It is no less clear that conscious and unconscious racism can affect the way black jurors, and black or white judges, police, and prosecutors, perceive minority and majority race defendants. Race does matter in American society and not just in the limited context to which Justice O'Connor has alluded. Before we are to take any action based on Justice O'Connor's seemingly offhand remark, we have to put whatever racism that motivates jurors into some contextual framework.

Although it is unrealistic to expect any broad social reality in a complex society to be completely free of racial disparities, it does not appear

221 See id.
222 See discussion infra Part III.
that juries are exceptionally racist or biased when compared to other participants in the criminal justice system. For example, the decisions of prosecutors—and sometimes judges—seem to inject more racial disparity into capital cases than the decisions of jurors. Criticizing the jury for being less than perfect is intellectually dishonest, at best, without also considering whether the alternatives may be worse.

While the jury has been frequently and popularly criticized for treating black and white defendants unequally, social science studies have shown that the verdicts of juries show less racial disparities than the decisions of judges. Professor Nancy J. King has surveyed the large number of articles written on race and juries, which came to many conclusions. King concluded, however, that no article she surveyed found widespread racist nullification. Black and white jurors may process information differently, filtering that information through their own life experiences. Thus, King found that "the race of jurors can and does affect jury decisions." Black jurors may be more defense-oriented than white jurors, and they may even trust the police less. They may also be inclined to believe that black defendants are more likely than white defendants to suffer the results of police dishonesty.

225 See ABRAMSON, supra note 6, at 209:

Although the jury is implicated in the bias, it is nowhere near primarily responsible for the race-specific ways capital punishment works. Studies consistently show that prosecutorial discretion—including the initial charging decision, the offer of a plea bargain that will permit a defendant to avoid risk of a death penalty, and the decision to seek the death penalty after a conviction—are the major points at which racial disparities skew the death sentencing process. By comparison, the jury's effect on the death penalty's racial pattern is secondary.

Id.

226 See Bernard Grofman, The Ideal of the Impartial Jury: Something More than Barstool Justice, But How Much More?, Seminar paper, Georgetown University Law Center Conference on the Role of the Jury in a Democratic Society, Oct. 28, 1995, at 51 (on file with author) ("Yet, in Florida, where trial judges can impose a death penalty in murder cases even when juries have opted for a life sentence, judges appear even more disproportionately prone to impose a death penalty when the victim is white than are juries.").

227 See, e.g., Sheri Lynn Johnson, Black Innocence and the White Jury, 83 Mich. L. Rev. 1611, 1620-1 (1985). Although Johnson does not reach this conclusion, she notes that "[b]oth black and white judges convicted black defendants more often than white defendants but the interracial disparity was greater for white judges than for black judges." Id. at 1621. Four white judges had disparities over 40 percent; two of those had disparities over 70 percent. As a much greater number of cases are disposed of by bench trial than by jury trial, it would appear that jury verdicts either failed to exacerbate or lessened the overall disparity between conviction rates for black and white defendants, which was 3.9 percent. Johnson also fails to address other issues which may have contributed to this disparity. A 3.9 percent disparity is small enough that if a portion of that disparity is attributable to sources other than bias, it rapidly loses significance.

228 King, supra note 10, at 63.

229 Id. at 99.

230 See id. at 84, 88.

231 See id.
Professor Douglas L. Colbert found, relying on Professor Sheri Lynn Johnson’s work, that “a substantial body of empirical evidence has developed which shows that all-white juries are not impartial when deciding cases involving interracial crimes.” Colbert, however, does not define what he means by “impartial,” and the data he uses does not address impartiality but only disparities between acquittal rates for white and black defendants. Neither Colbert nor Johnson accounted for factors that may cause impartial juries to have racially skewed verdicts. For example, an all-white jury may not be able to understand black slang in a trial where there are a number of black witnesses, or where a black defendant takes the stand. A failure to comprehend cultural differences does not equal a lack of impartiality, even though the consequences for the defendant may be identical.

Still, factors other than race may be contributing to a statistical aberration between white and black conviction rates before juries. There are four such factors we note here. First, black and white conviction rates might be affected by whether the defendant’s attorney is either court appointed or privately retained. This is significant for two reasons. Overall, defendants represented by court appointed attorneys may have a higher conviction rate than defendants similarly charged yet privately represented. Black defendants may be disproportionately represented by court appointed attorneys. Second, the conviction rate may be affected by whether the black defendants were as likely to be out on bail while awaiting trial as the white defendants. This is significant because as a general matter defendants released on bail are more able to assist with their own defense. Third, whether prosecutorial treatment of black

232 See Abramson, supra note 6, at 141 and accompanying text.
234 See Benjamin A. Holden et al., Color Blinded? Race Seems to Play An Increasing Role In Many Jury Verdicts, Wall St. J., Oct. 4, 1995, at A1. A recent example was reported in the Wall Street Journal recently involving a Black defendant, Byron Carter, on trial for possession of a gun. Two police officers testified that Carter had confessed possession of the weapon by saying, “I’d rather be caught in this neighborhood by the police with a gun than caught otherwise without one.” Carter testified that he had said “Everybody and their mama in this neighborhood got a gun,” and that he denied that the weapon was his. Black jurors believed that a young black male would not have chosen the words the police quoted, and after short discussion, convinced the other jurors (three hispanics, two whites and two Asian-Americans) to acquit. Id.
235 In 1944, Gunnar Myrdal noted:

The strength of the counsel a man can provide depends in general upon his wealth, and Negroes, as a poor group, suffer together with lower class whites... It is true that, in criminal cases, the court will appoint a lawyer for anybody who cannot afford to provide himself with proper legal aid. The court-appointed lawyer, however, in many cases, performs only perfunctory duties. Often the court will appoint some young lawyer without much experience...
defendants was the same as prosecutorial treatment of white defendants may also affect such conviction rates. Finally, whether judges were impartial in their rulings and evidentiary decisions may also influence the different conviction rates of black and white defendants.

Because the discrepancies are so small (3.9 percent), any one of these factors could account for the real world observations Colbert contends prove that white juries are not impartial. It is not necessary for white jurors to be partial for all-white juries to be problematic. There are many areas in which white and black jurors do tend, in the aggregate, to analyze evidence differently. For the defendant to be tried by a jury truly representative of the community, it would be unfair to arbitrarily exclude those perspectives ordinarily associated with either black or white jurors, regardless of the race of the defendant, victim, or counsel in the case.

If black jurors tend to be more skeptical of the police and more sympathetic toward defendants than white jurors, then white defendants would have as much of an interest as black defendants in having black jurors try their case. In 1991, the Supreme Court applied Batson to a case involving a white defendant, where the prosecution had peremptorily challenged black jurors without being able to give a race-neutral explanation. The fact that the prosecutor chose to strike blacks from the jury in the trial of a white defendant where race was not an issue demonstrates that he recognized that there are racial disparities in the way jurors evaluate evidence.

If black jurors are more skeptical of the police and the prosecution than white jurors, then we may be prompted to ask if Batson was wrongly decided. Should not the prosecution have the right to strike black jurors for that reason alone, namely, that they tend (in the aggregate) to be defense-oriented? This analysis would deprive the defendant of a trial by a jury representative of the community. Reasonable doubt is a subjective standard. Therefore, excluding from the jury a segment of society with a particularly strict standard of reasonable doubt would mean to try the defendant by a "hanging jury."

Perhaps Justice Thurgood Marshall was correct in saying that ending the racially discriminatory use of peremptory challenges "can be accomplished only by eliminating peremptory challenges entirely."
Justice Marshall maintains that "[m]erely allowing defendants the opportunity to challenge the racially discriminatory use of peremptory challenges in individual cases will not end the illegitimate use of the peremptory challenge."240 He believed Batson "left [prosecutors] free to discriminate against blacks in jury selection, provided that they hold that discrimination to an ‘acceptable’ level."241

Unfortunately, Justice Marshall’s fears appear to have been warranted. Practicing attorneys need only show minimal creativity in order to survive a Batson challenge.242 Instead of setting standards for trial courts to follow in enforcing Batson, the Court has decided that is an unattainable goal. The Court has extended the original ruling in Batson to include not only racially-based challenges by the state in cases with black criminal defendants, but also gender-based challenges,243 cases involving white defendants,244 civil litigants245 and peremptory challenges made by the defense.246 However, the Court has simultaneously taken away any substantial possibility for Batson to be enforced.

Batson has proven unenforceable due to the misconception that the Batson rule is intended to protect the rights of jurors and not the rights of defendants.247 Not even discussing the issue of standing, this ignores the very real disadvantage that criminal defendants of all races are under when a cognizable group is excluded from jury service precisely because they would hold the government to its burden of proof more rigorously than the majority. As one commentator has pointed out, “all ‘jury rights’ are, in actuality, instruments to protect the defendant’s rights.”248 Those rights are not protected when a significant segment of the population is arbitrarily excluded from jury duty.

Courts are reluctant to reverse convictions for reasons that impact solely on the rights of jurors. Allowing a guilty defendant to invoke these rights as a surrogate is understandably offensive. Justice demands that guilty people be punished by a justly administered sentence, not merely litigated to death. For courts to see Batson as undermining a conviction requires that Batson challenges be understood in terms of in-

240 See id. at 105.
241 See id.
242 See Purkett v. Elem, 512 U.S. 265, 271 (1995) ("[Batson] does not demand an explanation that is persuasive, or even plausible.... Unless a discriminatory intent is inherent in the prosecutor’s explanation, the reason offered will be deemed race neutral.").
justice to the defendant, not merely unfairness to the jurors. This re-
quires not doctrinaire color-blindness, but a recognition that, in the
aggregate, racial differences do exist and do matter. The attorneys exer-
cising their peremptory challenges in a racially selective manner have
recognized this; it is time courts do so as well.

Although recognizing the importance of a representative panel, the
Court has never guaranteed the seating of a racially mixed jury249 nor is
it likely to do so. Even if guaranteeing a mixed jury, the Court may not
extend this guarantee to the prosecution as well as to the defense.250
Although some scholars have argued that merely guaranteeing racially
mixed venires is a hollow gesture,251 the Court has not been willing to
make the attributions with regards to jurors and race that would justify
racial quotas in the jury box.252

Whether we believe white jurors are partial or that jurors with dif-
ferent experiences and cultures process information differently, it is clear
that who sits in the jury box matters. Although the Supreme Court has
failed to enunciate a cogent analysis of why this should be an issue of
constitutional dimensions, a Court majority has remained convinced that
it is such an issue, although not always for any single reason.253

The Court's jury selection jurisprudence has been designed with
fact-based defenses in mind.254 In confronting jury nullification, who
sits in the jury box can be important as well. Perhaps more important
because values are involved directly and such values are likely to be
viewed differently by different segments of the community. Abramson
has argued that diverse jury panels enrich jury deliberations on questions
of fact.255 But these needs for diversity and enrichment are even greater
when the jury is making a decision on questions of conscience. The con-
science of the community must be the conscience of the entire commu-
nity, and not merely one segment thereof. While one individual juror

249 See Taylor v. Louisiana, 419 U.S. 522, 538 (1974) (defendants are not entitled to a
jury of any particular composition, but the jury wheels, pools of names, panels, or venires from
which juries are drawn must not systematically exclude distinctive groups in the community
and thereby fail to be reasonably representative thereof) (citations omitted); see also Virginia
v. Rives, 100 U.S. 313 (1880).

250 Contrast this with Georgia v. McCullom, 505 U.S. 42, which was based on the Equal
Protection Clause, and gave the prosecution the right to object to the defense's discriminatory
use of peremptory challenges as a surrogate for the excluded juror. Arguments that juries must
be racially mixed are more likely to be made on Sixth Amendment grounds, and to be
grounded in the rights of the defendant. There is no reason to apply such arguments to the
prosecution.

251 See Johnson, supra note 227, at 1621.

252 See id.

253 See Underwood, supra note 247 and accompanying text.

254 See id.

255 See Abramson, supra note 6, at 139-41.
will always have the power to hang,\textsuperscript{256} deliberation significantly dampens the willingness of one—or even a small number—of stubborn jurors to hang for unconscientious reasons condemned by the rest of the panel.\textsuperscript{257} The prevailing arguments should be those capable of forging a broad consensus of agreement across group lines.

Moreover, the entire community is entitled to an assurance that the jury is acting responsibly, especially when the jury decides to return a nullification verdict. The law is not respectable when filtered through the prejudices of an unconstitutionally selected racist jury. If we allow a segment of society to be arbitrarily excluded from jury duty because of their race, then those who are inclined to nullify may do so without having to justify that decision to a fair cross section of the community, as participants within a representative jury. This is inherently untrustworthy.

Although jury nullification in cases of racial violence was never as widespread as conventionally believed, an effective \textit{Batson} rule may be the strongest tool against racist nullification. The lynching and civil rights murder cases are not impressive arguments against providing jurors with accurate information about their power to nullify. Jurors in past race cases received no more instructions or arguments on the doctrine of nullification than they would receive today. There is no evidence that such instructions or arguments would have increased whatever racist nullification did occur. The best defense against racist nullification is to have a fair jury. A fair jury is one that represents a broad cross-section of the community and is both willing and empowered to honestly and conscientiously evaluate the facts, the law and the equities of the case to be decided.

IV. INSIDE THE BLACK BOX

\textit{It is not what a lawyer tells me I may do; but what humanity, reason, and justice tell me I ought to do.}

— Edmund Burke

Any first-year law student has probably grown accustomed to hearing law professors condescendingly criticize the jury. “And do you think the jury pays attention to instructions or merely disregards them?” “Can a jury possibly understand DNA evidence?” “Could a jury of laymen conceivably comprehend this contract?”\textsuperscript{258} Given the nature of the jury

\textsuperscript{256} Except in Oregon and Louisiana, which do not require unanimous verdicts. See Apodaca v. Oregon, 406 U.S. 404 (1972); Johnson v. Louisiana, 406 U.S. 356 (1972).

\textsuperscript{257} See \textit{Kalven & Zeisel}, supra note 2, at 462-63; see also \textit{Abramson}, supra note 6, at 88-95.

\textsuperscript{258} All of these examples are culled from the author’s personal experience in law school.
system, neither professors nor practicing lawyers find it necessary to substantiate such criticisms. Some law students may even find that to put themselves above the jury sounds witty and superior. But such arrogant pretensions, however, do not long survive close examination.

Despite that fact, the internal culture of the legal profession seems to accept these attitudes unquestioningly. We can draw some hypotheses as to why these attitudes may have developed and for what purposes they serve. Obviously, in almost every trial, there is a winning and a losing side. It is understandable, human nature being what it is, that the losing attorney would rarely wish to admit that he lost because he failed to prove his case. Instead, he will attempt to find other reasons for his loss. I suggest that there are a few recurring themes present when the losing attorney attempts to pass blame.

In general, the losing attorney may claim that the judge corrupted his case. The losing attorney may argue that the judge was biased against his client, or on appeal that the judge made blatantly incorrect rulings on evidence. Although these excuses seem reasonable to the losing side, few losing attorneys, who expect to practice before that same judge again, will care to make such accusations in public. Prosecutors, who routinely appear in front of the same judge, have even more incentive to maintain good relations with the bench. Unlike the losing defense attorney, the losing prosecutor will almost never have grounds to raise such complaints on appeal, for an acquittal is final and irreviewable.

Besides faulting the judge, the attorney may blame his loss on the tactics of the opposing counsel. He may claim that the other attorney "cheated," made objectionable arguments, or introduced irrelevant or inadmissible evidence only to get the jury to hear it (even if they were instructed to disregard). These arguments, however, also blame the jury, for usually the focus of the complaint is that jurors could not disregard information according to instructions. These arguments also blame the judge since they imply that she has failed to control the opposing lawyer or respond adequately to objections.

Further, faulting the other attorney may be a poor career move, destroying the sense of fraternity between “learned members of the bar.” Prosecutors and defense attorneys are repeat players in the criminal jus-
tice arena. On the one hand, when the defense attorney strongly criticizes prosecutors, she is likely to be faced with equally strong resistance on discovery requests, plea bargains or some other valid motion. On the other hand, prosecutors who fault defense attorneys for tactical decisions may find themselves resisted or mistrusted in plea bargaining. Consequently, this lack of trust may result in an increased cost of their caseload, and in more time consuming trials by jury. Even more important, prosecutors may find well-financed campaigns opposing their future political ambitions.

Next, as the losing attorney attempts to find a reason for his blunder, he may look to the jury itself. The losing side may claim that the jury was too stupid or ignorant to understand the evidence. As a result, we are hearing renewed calls for special juries, juries of experts, and juries composed of legal professionals, especially in complex cases. Those least likely to make these complaints appear to be judges. One counter-argument to this claim of inadequate juries, however, is that lawyers must communicate the significance of the evidence more effectively to the jury. For the lawyer to blame the jury for not understanding or using the evidence he introduced properly is far easier than faulting himself for his lack of skill as an effective communicator. Finally, the losing attorney may even charge that the jury was biased, ideological or emotional, and disregarded the law, in which case there is nothing he could have done to win his case.

Juries are uniquely available for scapegoating, because they are uniquely unavailable to defend themselves. Jurors scatter after a trial is

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262 See John D. Gorby, J.D., Viewing the "Draft Guidelines for State Court Decision Making In Authorizing or Withdrawing Life Sustaining Medical Treatment" from the Perspective of Related Areas of Law And Economics: A Critique, 7 Issues L. & Med. 477, 506 (1992) ("A most common example would be the medical malpractice and personal injury suits being tried every day throughout the land. Perhaps decision-making could be improved by using "blue ribbon" juries of experts in cases such as this."); Rita Sutton, Note, A More Rational Approach to Complex Civil Litigation in the Federal Courts: The Special Jury, 1990 U. Chi. Legal F. 575 (special juries, chosen for their particular knowledge or experience, could reduce problems of jury competence in complex cases); see also Peter Meijes Tiersma, Reforming the Language of Jury Instructions, 22 Hofstra L. Rev. 37, 78, n.37 (1993).

263 See also Morris S. Arnold, A Historical Inquiry into the Right to Trial by Jury in Complex Civil Litigation, 128 U. Pa. L. Rev. 829 (1980). Eighth Circuit Judge Morris Arnold publicly stated during his remarks at the Georgetown University Law Center Conference on the Role of the Jury in a Democratic Society, October 28, 1995, that in his several years on the bench, he never ran into a case so complex a normal jury was unable to understand it; he added that he did occasionally run into lawyers who were not capable of explaining the complexities of their case to the jury.

264 See In Wake of Simpson Trial, Garcetti Talks About Judicial Reform, Seattle Post-Intelligencer, Nov. 8, 1995, at A13. Los Angeles District Attorney Gilbert Garcetti, in his office's press conference following O.J. Simpson's acquittal on murder charges, told the press that "It was clear this was an emotional trial. Apparently (the jury's) verdict was based on emotion that overcame their reason. This was not, in our opinion, a close case." Id.
over. Rarely would, or could, jurors publicly defend themselves from such attack. 265 We are usually safe in criticizing the jury because the jury never need, and rarely even can, respond. Because the law guarantees the sanctity of jury deliberations, nobody can prove them wrong. Further, due to the ephemeral nature of the jury itself, nobody is likely to defend the jury after the trial is over.

Given this, the public rarely knows what goes on in the jury room. Much of what we do know is due to statements of jurors, examinations of trial records, history, and in the end, informed speculation. It would be unrealistic to claim that no jury has ever nullified the law in any case. Yet there is no single case where we can be absolutely sure the jury did nullify. Statements by jurors that they nullified are hearsay and not exceptionally reliable (a juror may not want to admit that he did not think police were telling the truth or may think that claiming to have nullified will make him seem heroic.) We make our best efforts to understand what juries do, and hope that in the aggregate our answers will be roughly reliable, understanding that in any individual case we may be wrong.

We cannot evaluate the job juries have done without taking into account those other participants of a court case who we usually exempt from careful scrutiny for the reasons mentioned above. Juries cannot nullify where the prosecution has failed to prove its case beyond the requisite reasonable doubt. At the very least, we cannot be sure that the prosecution has proven its case without examining the trial transcripts and the jury instructions. We can, however, examine those other factors which may give us reasons to trust or to suspect the sincerity of the prosecution and investigation, or the impartiality of the bench, in particular cases.

With the difficulties associated in the investigation of nullification, it is somewhat surprising that a myriad of sources have reported widespread racist nullification, both currently266 and in the recent past. We

265 See Benedict D. LaRosa, The Branch Davidian Trial Jury: An Interview with Sarah Bain, Forewoman, THE FL ACTIVIST June 8, 1994 at 14, 15, 18, 21; Tony Knight, Debating Simpson Verdict: Opinion Split on Whether Acquittal Was Really Condemnation of System, L.A. DAILY NEWS, Oct. 16, 1995, at N1 (quoting several of the jurors explaining the reasons for their verdict); Leonard Greene, Jury's Paying the Price for Abiding by the Rules, BOSTON HERALD, Oct. 5, 1995, at 006 (quoting Simpson jurors Lionel Cryer and Brenda Moran). While some jurors may speak out about their verdicts in sensational trials, in most cases jurors will have no access to the media after the verdict has been returned. There is simply no mechanism to give jurors the same sophisticated press relations that prosecutors or defense lawyers have; nor do jurors normally have much incentive to be heard after the close of the trial.

should not be surprised, however, for the jury is an "easy mark" for those inclined to search for one. We should look skeptically at these reports due to their anecdotal nature and their failure to adequately take other explanations for statistical disparities into account. We do not really know what juries do, and we are ambivalent over what they should do.\textsuperscript{267} But when they disagree with what we think is the "right" verdict, we are certain that whatever they have done is wrong. That certainty may be a more emotional "verdict" than any a jury has ever rendered.

Violently racist communities cannot help but seat racist juries. It would be unrealistic to expect otherwise. That, however, is only part of the story. Violently racist communities cannot help but elect racist sheriffs, judges, and prosecutors. There is no reason to expect the jury to be any worse than the other actors in the system.

However, there are reasons to believe juries may be better. Juries drawn from the community at large should include members representing minority views, who do not approve of racist violence. Their presence may help constrain the majority and lead to more responsible deliberations.

Studies indicate that many people find jury duty to be an experience that heightens their sense of responsibility.\textsuperscript{268} Given a diverse jury, that sense of responsibility makes it difficult to support a racist verdict through deliberations. At worst, the most stubborn of such jurors will succeed only in hanging the jury. Such hung juries, however, will unlikely be so common that retrial would be pointless.\textsuperscript{269} The experience of federal prosecutions for violations of civil rights shows that a committed prosecution, with an impartial judge, can reliably obtain criminal convictions even out of all-white juries operating in a racist environment.\textsuperscript{270}

And those cases show that the jury, while perhaps not blameless, has largely been the victim of scapegoating.\textsuperscript{271} Whatever part the racist actions on the part of judges, police or prosecutors may have played in determining the verdict, the jury is responsible and ultimately decides the final verdict. Therefore, the jury takes the blame. But we cannot honestly blame the jury without knowing what evidence they heard and why

\textit{Troubling Rise in Racial "Nullification,"} News & Observer, Oct. 12, 1995, at A21. Current reports are primarily about black jurors supposedly acquitting black defendants for purely racial reasons, and are outside the scope of this essay.

\textsuperscript{267} See Grofman, supra note 226.


\textsuperscript{269} See Kalven & Zeisel, supra note 2, at 453-62.

\textsuperscript{270} See id.

\textsuperscript{271} See id.
they came to the verdict they did. Where the crime has not been proven at trial, even later confessions by the accused do not establish that the jury nullified, or even that they were wrong. Juries do not judge guilt in the abstract, only guilt proven at trial. In many cases where juries have been accused of delivering the “wrong” verdict, they may well have been delivering the only verdict consistent with the facts as proven at trial, and the only verdict consistent with the doctrine of jury nullification, which forbids convictions by a jury based on anything other than the evidence.272

CONCLUSION

The idea that the jury delivered the “wrong” verdict implies that we know what the “right” verdict would have been. If we could have that knowledge, why bother with a trial at all? But we do insist on a trial, because we recognize that our “knowledge” of what the correct verdict is may be seriously mistaken. We should remember to be this humble when the verdict which the jury returns surprises or angers us. Jury nullification is a tool which, like any other, can be misused. That we have exaggerated the extent of misuse does not negate the fact that there has been misuse, and that it is wrong when it occurs. Instead of disparaging the tool, we should be working to reduce the likelihood of misuse through stronger Batson-type rules, better and more honest guidance concerning the jury’s powers, and more thorough voir dire. We should respect our juries for the difficult work they do. We should trust them to exercise their powers, duties and discretion as responsibly, conscientiously and honorably as they have done—with remarkably few exceptions—for the past eight hundred years.

272 See Schefflin, supra note 8, at 168.