THE MYTH OF BLACK JUROR NULLIFICATION: RACISM DRESSED UP IN JURISPRUDENTIAL CLOTHING*

Elissa Krauss† and Martha Schulman††

INTRODUCTION

In recent years, African-American (and other "minority") jurors have regularly been accused of judging cases on preconceived race-based notions about justice rather than on the evidence.[1] Anecdotal accounts of a handful of allegedly race-based acquittals are bolstered by statistics claiming to show higher rates of acquittal and hung juries in jurisdictions where African-Americans and other people of color have become the majority. Critics argue that people of color have transformed a color-blind system into one that is color-sensitive. The implication is that as juries have become more representative, race has been injected into the justice system where it was previously absent. Such claims strike at the very core of principles of fairness and justice. They are both a shield for racial prejudice and an attack on the American jury system itself. The message of such claims is that rather than following the law and protecting the innocent, the real job of juries is to convict.

This article looks first at changes in the way that courts have treated black participation in the jury system and then moves to an overview of fundamental legal principles underlying jury decision making. We then consider how African-American jurors' adherence to these principles has

---

† Elissa Krauss has been a trial consultant since 1975 with the National Jury Project, a professional firm of trial consultants with offices in New York, Minneapolis, and Oakland, California. Ms. Krauss has been instrumental in using social science research to understand juror attitudes and behavior. She has assisted trial litigators in assessing jurors. She has also conducted jury research in twenty-three states and twenty-six federal districts. She is the editor and a contributing author of *Jurywork: Systematic Techniques*, the leading practice manual for attorneys, covering the full range of jury trial practice issues. *See* JURYWORK: SYSTEMATIC TECHNIQUES (Elissa Krauss and Beth Bonora eds., 1996).

†† Martha Schulman is a researcher and writer based in New York City. The daughter of Jay Schulman, a founder of both the field of systematic jury work and the National Jury Project, she has a longstanding interest in juries and other legal issues.

The authors wish to thank Kara Davis, Elizabeth Bochnak, Anita Hargrove, and Harriet Grimm for their helpful insights and suggestions, and for their calmness and perseverance under pressure. In addition, Professor Kim Taylor-Thompson was kind enough to read the manuscript and provide helpful feedback.

[1] We use quotation marks on the term "minority," because minority groups as a whole are fast becoming the majority. *See* discussion *infra* notes 7-9 and accompanying text.

been wrongly characterized as a pattern of nullification that undermines the system. We go on to discuss differences between black and white experiences and attitudes, emphasizing that in a racially divided society only whites have the luxury of claiming to be color blind. In conclusion, we argue that the myth of black juror nullification is a racist attack on the jury system motivated in part by a desire to limit the impact of "minority" peoples' experiences on the justice system.

I. THE CHANGING ROLE OF "MINORITIES" IN THE JURY SYSTEM

This contemporary emergence of broad attacks on black jurors is ironic in light of this country's long history of excluding persons of color from juries.[2] The requirement that jury pools represent a fair cross-section of eligible jurors, though widely acknowledged as a bedrock principle today, is relatively recent. This principle was first articulated by the Supreme Court in the 1940s, and then federally codified in 1968.[3] Increased representativeness of jury pools, however, did not eliminate systematic discrimination, for prosecutors still used peremptory challenges to ensure that juries stayed mainly white.[4]

Only a decade ago, the Supreme Court in *Batson v. Kentucky*[5] prohibited the discriminatory use of peremptory challenges to accomplish the illegal exclusion of minorities already prohibited at other phases of the jury selection system.[6] *Batson* and its progeny forced those attempting to strip juries of cognizable classes to be more creative in efforts to

---

[2] In *Strauder v. West Virginia*, the Supreme Court declared as unconstitutional laws that prohibited black participation in the jury system. 100 U.S. 303 (1879). However, that opinion was readily sidestepped for many decades. Key man systems, blue ribbon juries, and source lists composed of those who had paid poll taxes and passed citizenship tests were all used to prevent black participation.

[3] *See* Thiel v. Southern Pac. Co., 328 U.S. 217 (1946); Jury Selection and Service Act, 28 U.S.C. § 1861.

[4] Prosecutors' purposeful and systematic use of peremptory challenges was recently highlighted by release of a 1986 audio tape of a training session where Philadelphia District Attorneys were told that "the blacks from the low-income areas are less likely to convict . . e . [Y]ou don't want those people on your jury." *Former Philadelphia Prosecutor Accused of Racial Bias: A Tape and Dispute in an Election Year*, N.Y. TIMES, Apr. 3, 1997, at A14. The same year, (just before the Supreme Court's *Batson* decision) one author of this article observed a Philadelphia D.A. use six of his seven peremptory challenges to eliminate African-American jurors. *See infra* notes 6, 8 and accompanying text.

[5] 476 U.S. 79 (1986), *modified by* Powers v. Ohio, 499 U.S. 400 (1991).

[6] *See Batson*, 476 U.S. at 93-96. The *Batson* Court reasoned that prosecutors should not be able to use peremptory challenges to accomplish the illegal discrimination already prohibited at other phases of the jury selection system. *See also supra* note 4 and accompanying text.

preserve the all white jury.[7] Despite these efforts, in some jurisdictions juries have become more representative.[8]

Blacks—along with Hispanics and Asians—now serve on juries in greater numbers than ever before. In some jurisdictions, "minorities" are the majority in the jury pool, as they are in the broader community.[9] Sometimes they are the majority on a specific jury. One such case was the O.J. Simpson criminal trial. As is well known, that jury's verdict was harshly criticized, and the jurors themselves were subjected to ad hominem attacks.

A groundswell of white public opinion accused the Simpson jurors (nine of whom are African-American) of reaching the wrong conclusion. Their relatively brief period of deliberation was often cited as proof that they had not really considered the evidence. Yet their accusers had themselves reached the opposite conclusion in the same short period of time and without any formal deliberation at all.[10]

The Simpson verdict unleashed a host of voices claiming that the jury system was in crisis. Articles in mass media sources, ranging from the *Wall Street Journal* to *The New Yorker* to *Readers Digest*, raised the specter of too many wrongful acquittals and too many hung juries caused by jurors whose narrow focus on their own experiences resulted in exces-

[7] Suspicious explanations for systematic use of peremptory challenges to eliminate African-American jurors have been routinely upheld. *See* Purkett v. Elem, 514 U.S. 265 (1995) (unkempt hair and suspicious mustaches and beards of two men); United States v. Harrell, 847 F.2d 138, 139 (4th Cir. 1988), *cert. denied*, 109 S. Ct. 371 (1988) (lack of secondary education); *see also* United States v. Ferguson, 935 F.2d 866 (9th Cir. 1991), *cert. denied*, 502 U.S. 1045 (1991) (youth and/or unemployment status); United States v. Nichols, 937 F.2d 1257 (7th Cir. 1991), *cert. denied*, 502 U.S. 1080 (1991) (young women who lived with partners and/or had children with no indication of being married). *See generally* Sheri Lynn Johnson, *Unconscious Racism and the Criminal Law*, 73 CORNELL L. REV. 1016, 1023-24 (1988).

[8] This is due in part to widespread reforms designed to increase representativeness including use of multiple source lists and one-day one trial systems, elimination of exemptions, and increased pay for jurors. *See* G. Thomas Munsterman, *A Brief History of State Jury Reform Efforts*, 79 JUDICATURE 5 (1996).

[9] The number of such jurisdictions is very small. African-Americans are the majority in only fifteen U.S. cities with populations over one hundred thousand (Atlanta (GA), Baltimore (MD), Birmingham (AL), Detroit (MI), Gary (IN), Inglewood (CA), Jackson (MS), Macon (GA), Memphis (TN), Newark (NJ), New Orleans (LA), Richmond (VA), Savannah (GA), and Washington (D.C.)). In eleven other cities with over one hundred thousand inhabitants, the combined population of blacks, Asians, and Hispanics exceeds fifty percent (including New York City and Los Angeles). *See* BUREAU OF THE CENSUS, U.S. DEP'T OF COMMERCE, CITIES WITH 100,000 OR MORE INHABITANTS IN 1994, Table 46 (1996). We do not know how many of these cities are using jury selection procedures that assure representativeness of their jury pools. We do know, however, that in the United States today, most people who are not white live in places where they are the minority. For example, only one-third of African-Americans live in the twenty-six places mentioned here.

[10] We maintain that media consumers and commentators who accused the jurors of reaching the wrong conclusion too quickly had themselves concluded in the same period of time (more likely, earlier and without any formal deliberation at all) that Simpson was guilty.

sive skepticism of police and prosecutors.[11] Who are the jurors thought to be causing such havoc? The same ones who until recently were excluded from the process: African-Americans.

Black jurors (and sometimes other "minorities") have been accused of tainting justice by: (a) prejudging based on race; (b) expressing skepticism about police testimony that white jurors and white observers find credible; and, (c) empathizing with the troubled lives of some black defendants.[12] The critics imply that these attitudes result in the guilty going free, while the jury system goes to hell. The equation is quite simple: black defendant + black jurors + non-conviction = miscarriage of justice.

II. THE JURY'S ROLE AND RESPONSIBILITIES

The critique of African-American jurors is an attack on the most basic principles of the jury system. Black jurors are being condemned for doing exactly what jurors are supposed to do: demanding that the prosecution prove its case beyond a reasonable doubt. All jurors are expected to begin by presuming innocence. However, this hallmark of our system is by no means universally understood or followed. Our surveys, conducted by the National Jury Project in jurisdictions throughout the nation over the last twenty years, consistently find that between 15% and 45% of juror-eligible respondents believe that a person who is brought to trial is probably guilty; more than 50% typically expect defendants to prove their innocence despite judges' instructions to the contrary.[13] It is often difficult to find jurors who understand and will follow the two bedrock principles of our criminal justice system: (1) the defendant is presumed innocent; and, (2) the prosecution must prove guilt beyond a reasonable doubt. When jurors who abide by these principles appear on juries they should be applauded, not condemned.

A defendant remains cloaked in the presumption of innocence until the jury starts deliberations. The jury usually completes its work by finding the defendant either guilty or not guilty.[14] If jurors are not satisfied that the prosecution has met its burden, the jury must acquit. A "not guilty" verdict does not mean, however, that the jurors believe the defendant is innocent. A "not guilty" verdict means only that the state has not met its burden of proof.[15]

---

11 *See infra* notes 19, 21, 42, 50, 57, 72, 77, 91.

12 *See infra* notes 18, 19, 21, 40 and accompanying text.

13 *See* JURYWORK: SYSTEMATIC TECHNIQUES, Figures 2.1 and 2.2 (Elissa Krauss & Beth Bonora eds., 1996).

14 A hung jury is also a legitimate though much maligned trial outcome. *See infra* note 32 and accompanying text.

15 A Simpson criminal trial juror has pointed out that she never found Simpson innocent. *See* Nikol G. Alexander and Drucilla Cornell, *Dismissed or Banished? A Testament to the*

Post-trial juror interviews conducted by the National Jury Project over many years have shown that in most instances where jurors acquit, at least some of them had the "feeling" that the defendant probably "did it" or at least did "something" wrong, but the government's case did not stand up to reasonable doubt scrutiny.[16] These acquittals are not the result of juror error or bias, but rather the result of jurors' obedience to their sworn obligation.

Jurors are given a tremendous amount of power to evaluate evidence and judge credibility. Our system expects ordinary citizens to draw on their experiences and reach reasoned conclusions based in part on common sense. The system is organized around the principle that members of the community should decide whether or not a person should be deprived of liberty. This is because, as the Supreme Court has emphasized, "community participation" is "consistent with our democratic heritage" and is "critical to public confidence in the fairness of the criminal justice system."[17]

In a racially divided country like the U.S., it is not surprising that black and white jurors bring different experiences into the courtroom. One common difference is that black jurors' life experiences lead them to have an easier time imposing as high a standard of credibility on police as on other witnesses, and demanding that prosecutors prove guilt *beyond a reasonable doubt.* When they do so, they are accused of nullifying; that is, of deciding cases not on evidence, but on some predisposition or understanding of a higher law.[18] Today, nullification has become a catch phrase to explain the fact that some black jurors reach conclusions unlike those expected or desired by some whites.

III. PERPETUATING THE NULLIFICATION MYTH

It is rare that the source of a new and widely promoted myth can be pinpointed. In this instance, however, the genesis of the idea that a pattern of black jury nullification is eroding the jury system can be traced to a *Wall Street Journal* article the day after the Simpson criminal trial ver-

---

Reasonableness of the Simpson Jury, *in* BIRTH OF A NATION'HOOD 57, 71 (Morrison et al. eds., 1997).

16 The National Jury Project has conducted thousands of post-trial interviews with jurors. *See* JURYWORK, *supra* note 13, at §§13.01[01] and accompanying text.

17 Taylor v. Louisiana, 419 U.S. 522, 530 (1975).

18 The power to nullify has been subject to debate throughout the history of American jurisprudence. It is both feared and venerated. Despite this ambivalence, the jury's right to decide a case by its own lights without fear of outside coercion or pressure remains a hallmark of Anglo-American jurisprudence. *See* Irwin A. Horowitz & Thomas E. Williging, *Changing Views of Jury Power: The Nullification Debate, 1787-1988*, 15 LAW & HUM. BEHAV. 165, 166 (1991). This issue has been discussed most recently in *United States v. Thomas*, 116 F.3d 606 (2d Cir. 1997).

dict.[19] In that article, the authors opine that the justice system is in crisis.[20] They support their claim with statistics and anecdotal reports of individual trials; neither stands up to close scrutiny. The statistics are inaccurate and highly misleading.[21] The trial anecdotes are incomplete and slanted towards the prosecution. The *Wall Street Journal* article juxtaposes a supposed national acquittal rate of 17%, with trial outcome statistics from three jurisdictions. They report that in the Bronx, juries acquit in 47.6% of felony trials; in Washington D.C., 28.7% of defendants are acquitted; and in Wayne County, jurors acquit 30% of the time.[22]

The statistics simply do not support the authors' position. Roger Parloff carefully reviewed the available data and concluded that a national acquittal rate of 17% is neither accepted by experts, nor is it verifiable.[23] An acquittal rate of about 28% is more realistic.[24] Hence, Wayne County and Washington, D.C. are right in line with the national average.[25] The "Bronx jury," a phenomenon well-known in New York legal circles, apparently do acquit at a rate above the national average.[26]

To examine the causes and implications of the Bronx statistics, Parloff wisely followed two investigative paths. First, he asked those who practice in Bronx courtrooms what they have to say about acquittal rates. Second, he tested the black racism hypothesis by comparing the rates of acquittal for black, Hispanic and white defendants in the Bronx.[27] Parloff found that judges and lawyers who practice in the Bronx do not feel there is a race-based crisis.[28] In fact, practitioners from the bench and from both sides of the bar reported that, in their experience, Bronx jurors are skeptical about police testimony and hold the government to the required high burden of proof.[29] One Bronx District Attorney with twenty-four years of experience told Parloff, "Basically the quality of the prosecution will determine whether you get a

---

19 *See* Benjamin Holden et al., *Color Blinded? Race Seems to Play an Increasing Role in Many Jury Verdicts*, WALL ST. J., Oct. 4, 1995, at A1.

20 *See id.*

21 *See* Roger Parloff, *Race and Juries: If It Ain't Broke .e. . .*, THE AMERICAN LAWYER, June 1997, at 5.

22 *See* Holden et al., *supra* note 19, at A1. But note that Washington, D.C. and Wayne County, Michigan are predominantly black; the Bronx majority is black and Hispanic.

23 Parloff, *supra* note 21, at 6.

24 *See id.*

25 *See id.*

26 *See id.* at 6-7.

27 *See id.* at 7.

28 Neither do those in Wayne County. Parloff talked to the Chief of Administration there, who expressed surprise that his acquittal rate was considered high, since his convictions are up from ten or fifteen years ago. A Wayne County prosecutor has a simple explanation for acquittals: "the People simply fail to sustain the burden of proving guilt." *Id.*

29 *See id.*

verdict in a case."[30] Parloff also found virtually identical rates of acquittal by Bronx juries of white, black and Hispanic defendants.[31]

Thus, the acquittal rate in the Bronx is apparently caused by a combination of two factors: (1) jurors who are doing their jobs well, (2) prosecutors who are *not* doing their jobs so well. There is no reason to believe that the Bronx D.A.'s office is any less competent or efficient than any other urban prosecutor's office. Therefore, if the Bronx example teaches us anything, it is that there is a dangerously high conviction rate elsewhere.

If the national acquittal rate is around 28%, then the conviction rate is around 72%.[32] Approximately, three out of every four of the very few arrests that actually lead to trial result in conviction.[33] As any seasoned litigator knows, the cases that go to trial are usually the ones where the evidence is not clear cut. Each side reasonably thinks it has a chance of winning. In most jurisdictions, however, the prosecution routinely does better than the odds.[34] The Bronx outcomes are closer to what would be expected, if both sides actually did start out equally. Therefore, the conviction rates elsewhere most likely reflect the pro-prosecution biases held by many jurors.[35]

If the statistics in the *Wall Street Journal* article do not stand up to scrutiny, then we can only rely on the trial anecdotes. However, they too wilt under close scrutiny. The cases are presented as if guilt was proven. No information has been given about the police investigation, the credibility or self-interest of police or other witnesses, or on what the defense case was based—surely an incomplete picture of any criminal trial. With such a skewed picture, the reader is led blindly to believe that black jurors are choosing to "disregard the evidence, however powerful."[36]

Only enough information is given to reinforce the race-based equation. One case that has become ubiquitous involved the Baltimore trial

---

30 *Id.*

31 *See id.*

32 *See supra* note 21 and text accompanying note 24.

33 According to the Department of Justice, Bureau of Justice Statistics, which tracks felony arrests in forty counties, only six percent of thirteen thousand such arrests in a given year go to trial—including both judge and jury trials.

34 *See generally* BUREAU OF JUSTICE STATISTICS, U.S. DEP'T OF JUSTICE, COMMENDIUM OF FEDERAL JUSTICE STATISTICS (1993) (providing statistics encompassing all aspects of processing in the federal justice system, including the number of persons prosecuted in federal criminal cases and post-conviction rates); William J. Stuntz, *The Uneasy Relation Between Criminal Procedure and Criminal Justice*, 107 YALE L.J. 1, 23, 76 (1997); Anne Bowen Poulin, *Prosecution Discretion and Selective Prosecution: Enforcing Prosecution After* United States v. Armstrong, 34 AM. CRIM. L. REV. 1071, 1125 (1996); Elizabeth T. Lear, *Contemplating the Successive Prosecution Phenomena in the Federal System*, 85 J. CRIM. L. & CRIMINOLOGY 625 (1995).

35 *See* JURYWORK, *supra* note 13, at §2.04.

36 Holden et al., *supra* note 19, at A1.

of a black man accused of murdering a white man.[37] Other than a broad outline of the case, the only thing the reader learns is that prior to an acquittal, the sole non-black juror, a Pakistani-American, sent a note to the judge indicating that race "may be playing a part" in the deliberations.[38] We are told that several eyewitnesses testified at the trial. No reference is made to questions raised or arguments made by the defense about the eyewitnesses or any other evidence in the case. Nor is there any mention of the widespread understanding today that eyewitness testimony to a crime is extremely unreliable.[39] The reader of the article knows only that a white was killed, a black was charged, there were 11 black jurors, a Pakistani-American juror wrote a note, and the case failed to end in conviction. Black defendant + black jurors + non-conviction = miscarriage of justice.

The "lessons" of the *Journal* article can be found subsequently in *Reader's Digest*, the *ABA Journal*, and elsewhere with the same statistics and similar anecdotal reporting.[40] The anecdotes and statistics are reinforced by references to Professor Paul Butler's thoughtful and provocative argument, that in a country where so many young black men are under supervision by the criminal justice system, nullifying in some cases is a moral choice.[41] Mere reference by white commentators to Professor Butler's thesis does not, however, tell us if jurors are acting in accordance with his recommendations. In fact, close scrutiny of some published anecdotal accounts reveals that rather than a pattern of "nullification," there is a pattern of law abiding jurors doing their jobs who are being attacked because the authors do not like the resulting outcomes.

The myth of black juror nullification has been perpetuated in other articles that rely primarily on prosecution-biased anecdotal accounts.[42] Clyde Haberman's *New York Times* column describing the outcome of a trial of two Hispanic defendants is illustrative.[43] After two days of acrimonious deliberations, a multi-racial, multi-ethnic Manhattan jury remained divided 7 to 5 for acquittal. The minority voting to convict,

---

37 *See* Daniel Levine, *Race Over Reason in the Jury Box*, READER'S DIGEST, June 1996.

38 Holden et al., *supra* note 19, at A1.

39 *See* ELIZABETH F. LOFTUS, EYEWITNESS TESTIMONY 78 (1979); *see also* Elizabeth F. Loftus, *Powerful Eyewitness Testimony; Lessons From the Research*, 24 TRIAL 64 (Apr. 1988); *see generally* L. CRAIG PARKER, EYE WITNESS TESTIMONY: JURY BEHAVIOR (1980).

40 *See* Henry Reske, *Critics Claiming Race Affects Verdicts: Statistics Show Higher Acquittal Rates for Primarily Black Juries in Some Areas*, A.B.A. J., Jan. 1996, at 26 (here the statistics are reported uncritically); *see also* Lerner, *supra* note 32, *in* RACE AND THE CRIMINAL JUSTICE SYSTEM: HOW RACE AFFECTS JURY TRIALS 85, 91-96 (Gerald A. Reynolds ed., 1996).

41 *See* Paul Butler, *Racially Based Jury Nullification: Black Power in the Criminal Justice System*, 105 YALE L. J. 677, 690-91 (1995).

42 *See* Clyde Haberman, *Color Blind? Justice, Maybe, But Not Juries*, N.Y. TIMES, Nov. 26, 1995, at B39; Jeffrey Rosen, *One Angry Woman*, THE NEW YORKER, Feb. 24/Mar. 3, 1997, at 54-64.

43 Haberman, *supra* note 42.

made up of three non-Hispanic whites and two Asians, is characterized as having accepted "on faith" the principle that the system can be "color-blind."[44] The black and Hispanic majority voting to acquit, in contrast, is alleged to have "taken out their social frustrations in deliberations" and to have concluded "right off" that the defendants were "victims of false prosecution."[45]

Lost in Haberman's vignette is any understanding of where the burden of proof lies. The burden is first on the prosecutor and then it is on those favoring conviction. It is never on those advocating for acquittal. Nevertheless, Haberman depicts the jurors who voted to acquit as intransigent and obstructionist. The reality is that by having accepted the presumption of innocence and deciding that the state failed to meet its burden, the jurors fulfilled their obligation. This acquitting majority was, in fact, silenced by an intransigent, conviction-oriented minority which failed to fulfill its burden of persuading the others.

Apparently, the 7 to 5 division began with the first vote. It is well-established that in 9 out of 10 cases, a jury's final verdict accords with the verdict supported initially by the majority of jurors.[46] But Haberman is quick to convict the minority jurors, who were the majority on this jury, for preventing deliberation. Their crime appears to be a refusal to go along with the minority who agreed with the prosecution.[47]

IV. "COLOR-BLINDNESS" AS A PROP FOR THE NULLIFICATION MYTH

The African-American and Hispanic jurors in Haberman's vignette were attacked on the ground that their actions were color-sensitive when they ought to have been color-blind. Thus, Haberman joins a parade of recent commentators holding up color-blindness as the ideal for jurors and as a salient feature of the justice system in the days before black jurors injected their race-based perspective.[48] White jurors are assumed

---

44 *Id.*

45 *Id.*

46 *See* HARRY KALVIN JR. & HANS ZEISEL, THE AMERICAN JURY 488 (1966). Although reported thirty years ago, no published research since has replaced these findings. National Jury Project post-trial juror interviews confirm this pattern.

47 That the convicting minority was intransigent is reinforced by the comment that "some of those who voted guilty now say they are not convinced the state built an airtight case." Haberman, *supra* notes 42-45 and accompanying text. If they had attempted to deliberate and persuade based on evidence, perhaps they would have reached this realization earlier.

48 This formulation can be found in the use of the phrase in titles of articles about black jurors, starting with the source article in the *Wall Street Journal*. *See* Holden, *supra* note 19; Jeffrey Abramson, *After the O.J. Trial: The Quest to Create a Color-Blind Jury*, THE CHRONICLE OF HIGHER EDUCATION, Nov. 3, 1995, at B1; Michael Meyers, *The Racial Divide: Color-blinded Jurors*, *in* RACE AND THE CRIMINAL JUSTICE SYSTEM: HOW RACE AFFECTS JURY TRIALS 41-45 (Gerald Reynolds ed., 1996); *see also* Haberman, *supra* notes 43-44, 46 and accompanying text.

to be color-blind. The true history of race-based wrongful convictions (and acquittals) wrought by white supremacy is ignored.

In the past, the concept that color-blindness was the desirable way to organize society was inextricably linked to the goal of racial equality. Today, the dream that children would be judged for the content of their character rather than the color of their skin[49] has been co-opted. Color-blindness has come to stand for a denial of the existence of race as a factor in American social relations and in Americans' perceptions. This new understanding can be found in many sources, including Republican rhetoric about affirmative action[50] and in Supreme Court opinions.[51]

---

49 Dr. Martin Luther King delivered the *I Have a Dream* speech on 28 August 1963. [Editor's comment] This is, perhaps, the most well-known and most quoted address Dr. King delivered. He gave the speech before Lincoln Memorial as the keynote address of the *March on Washington, D.C., for Civil Rights*. The television cameras allowed the entire nation to hear and see him plead for justice and freedom. Mrs. Coretta King once commented, "At that moment it seemed as if the Kingdom of God appeared. But it only lasted for a moment." The following is an excerpt from this moving *I Have a Dream* speech:

> I have a dream that one day on the red hills of Georgia, sons of former slaves and sons of former slave-owners will be able to sit down together at the table of brotherhood.
>
> I have a dream that one day, even the state of Mississippi, a states weltering with the heat of injustice, sweltering with the heat of oppression, will be transformed into an oasis of freedom and justice.
>
> I have a dream that one day, down in Alabama, with its vicious racists, with its governors having his lips dripping with the words of interposition and nullification, that one day, right there in Alabama, little black boys and black girls will be able to join hands with little white boys and white girls as sisters and brothers. I have a dream today!
>
> I have a dream that one day every valley shall be exalted, every hill and mountain shall be made low, the rough places shall be made plain, and the crooked places shall be made straight and the glory of the Lord will be revealed and all flesh shall see it together.
>
> This is our hope. This is the faith that I go back to the South with. With this faith we will be able to transform the jangling discords of our nation into a beautiful symphony of brotherhood.
>
> With this faith we will be able to work together, to pray together, to struggle together, to go to jail together, to stand up for freedom together, knowing that we will be free one day. This will be the day when all of God's children will be able to sing with new meaning—"my country 'tis of thee; sweet land of liberty; of thee I sing; land where my father died, land of the pilgrim's pride; from every mountain side, let freedom ring"—and if America is to be a great nation, this must become true. . . .

Martin Luther King, Jr., *I Have a Dream*, *in* A TESTAMENT OF HOPE 217, 219-20 (James Melvin Washington ed., 1986).

50 *See* Newt Gingrich & Ward Connerly, *Face the Failure of Racial Preferences*, N.Y. TIMES, June 15, 1997, at E15.

51 *See* Fullilove v. Klutznick, 448 U.S. 448, 522 (1980); Minnick v. California Department of Corrections, 452 U.S. 105, 128 (1981) (Stewart, J., dissenting); City of Richmond v. J.A. Croson Co., 488 U.S. 469 (1989); Metro Broadcasting v. FCC, 497 U.S. 547, 564 (1990) (O'Connor, J., dissenting); Edmonson v. Leesville Concrete Co., 500 U.S. 614 (1981); *see also* Meyers, *supra* note 48, *in* RACE AND THE CRIMINAL JUSTICE SYSTEM: HOW RACE AFFECTS

Exalting color-blindness as the goal of a multi-racial society is deeply problematic. Color-blindness is impossible because everyone notices racial differences both in daily life and in the courtroom. Contemporary advocates of color-blindness seem to hope that upon noticing racial differences, everyone will immediately ignore them.[52] But the reality is that as soon as race is noticed, people attach their pre-existing beliefs and assumptions to it.[53] Therefore, calls for color-blindness obscure prejudice and become a prop for existing racial injustice. Such calls begin with the premise that race can be ignored. That race affects attitudes and behavior is well-established in social science research which has shown, over and over again, that Americans are not color-blind.[54] For more than fifty years, researchers have found that the facts of race and racial difference affect attitudes and behavior in measurable and sometimes disturbing ways.[55]

Most interesting are "unobtrusive studies" in which research subjects are not told that racial attitudes or prejudice is being studied.[56] Subjects are led to believe that researchers are studying some attitude or behavior not related to race—such as effectiveness of punishment as a teaching tool, helping behavior, or the ways in which jurors interpret different types of evidence. The findings consistently show that both attitudinal and behavioral responses vary in response to the sole change of race.[57] Such variations indicate that bias and prejudice (which often exist below the conscious level) are affecting attitudes and actions.

JURY TRIALS 85 41 (Gerald A. Reynolds ed., 1996); *see generally* Neil Gotanda, *A Critique of "Our Constitution is Color-Blind,"* 44 STAN. L. REV. 1 (1991).

52 *See* Gotanda, *supra* note 51, at 18.

53 *See id.*

54 *See* Reske, *supra* note 40, at 26 and accompanying text; Lerner, *supra* note 32, *in* RACE AND THE CRIMINAL JUSTICE SYSTEM: HOW RACE AFFECTS JURY TRIALS 85 96 (Gerald A. Reynolds ed., 1996).

55 Fifty years ago Allport and Postman, while studying rumor, found that fifty percent of the time, whites shown a picture of a well-dressed black man conversing with a white man who was holding a razor blade, transposed the races of the two men when asked to describe the picture to another person. In some cases, the black man was even reported to be brandishing the razor threateningly. *See* GORDON W. ALLPORT & LEO POSTMAN, THE PSYCHOLOGY OF RUMOR 56-64, 89-94 (1947).

56 *See* Faye Crosby et al., *Recent Unobtrusive Studies of Black White Discrimination and Prejudice*, 87 PSYCHOLOGICAL BULLETIN 546 (1980). In these studies all factors are kept constant except the race of research targets (the object of the behavior being explored) or other parties relevant to the study.

57 One such study sheds light on reactions of some whites to the Simpson trial outcomes. White male subjects were led to believe they were inflicting electric shocks on research targets. The race of the man to be shocked was varied. The subject was also led to believe that the man was romantically involved with a woman whose race was also varied. The subjects consistently inflicted the highest level of electric shock on the black targets who they believed were romantically involved with a white woman. *See* Gary I. Schulman, *Race, Sex, and Violence: A Laboratory Test*, 79 AM. J. SOC. 1260, 1270-71 (1974).

Studies of the influence of race in jury decision making echo these results. All have found that, in most cases, race has some influence on both black and white research participants.[58] In many instances, racial prejudice is the only explanation for disparities in white jurors' readiness to convict, impose harsher sentences, predict recidivism, or take into account evidence that they have been told to ignore when considering the fate of minority-race defendants.[59] Race and racism, therefore, affect outcomes even when they are not asked about, not explicitly mentioned, and would probably be denied.

Denying that race or racism exists is possible only for whites whose majority status allows them to assume that they do not have a race.[60] Since whiteness is the norm, whites can ignore race until it intrudes, disrupting the fantasy of a color-blind world.[61] It is our experience that because race and the reality of being of minority status are facts of life for people who are not white, they are more willing than whites to name it.

V. NO TALKING ABOUT RACISM, PLEASE

National Jury Project post-trial interviews and mock trial research show that minority people are more willing than are whites to discuss race.[62] For an extraordinary example of whites' desire to avoid race and

---

This study may provide a clue to the visceral outpouring of glee celebrating the civil trial outcome. For example, on the day following the civil trial verdict, *The New York Times* ran a photo of a group of white men in a bar with glasses raised in a toast, as jubilant over the news of the verdict as if it were a personal victory. *See* Carey Goldberg, *Subdued Pandemonium, Color-Coded Responses*, N.Y. TIMES, Feb. 5, 1997, at A1.

58 *See* Denis Chimaeze E. Ugwuegbu, *Racial and Evidential Factors in Juror Attribution of Legal Responsibility*, 15 J. EXPERIMENTAL SOC. PSYCHOL. 133, 140 (1979); John L. Bernard, *Interactions Between the Race of the Defendant and That of Jurors in Determining Verdicts*, 5 LAW & PSYCHOL. REV. 103, 109 (1979).

59 *See* Randall A. Gordon et al., *Perceptions of Blue-collar and White-collar Crime: the Effect of Defendant Race on Simulated Juror Decisions*, 128 J. SOC. PSYCHOL. 191, 195 (1988) (discussing expected recidivism); James D. Johnson et al., *Justice is Still Not Color-blind: Differential Racial Effects of Exposure to Inadmissible Evidence*, 21 PERSONALITY & SOC. PSYCHOL. BULL. 893, 896 (1995); *see also* Laura T. Sweeney & Craig Haney, *The Influence of Race on Sentencing: A Meta-analytic Review of Experimental Studies*, 10 BEHAV. SCI. & L. 179, 190 (1992); *see generally* Sherry Lynn Johnson, *Black Innocence and the White Jury*, *in* CRITICAL RACE THEORY: THE CUTTING EDGE 180-90 (Richard Delgado ed., 1995).

60 *See* Tina Grillo and Stephanie M. Wildman, *Obscuring the Importance of Race: The Implication of Making Comparisons between Racism and Sexism (or Other-isms)*, *in* CRITICAL RACE THEORY: THE CUTTING EDGE 564-72 (Richard Delgado ed., 1995).

61 *See id.* at 569.

62 National Jury Project mock trial research is conducted in connection with trial preparation. Mock jurors are carefully selected to reflect the demographic characteristics in the trial jurisdiction. Balanced summary arguments of each side of a case being prepared for trial are presented. Mock jurors then deliberate. Though the research is sponsored by one side, careful attention is paid to having balanced presentations. This is because the research goal is to improve presentation and test for juror comprehension and questions. National Jury Project

African-Americans' willingness to discuss it, consider the case of a white woman suing her employer for wrongful termination.[63] She had a number of claims, including a claim of race discrimination (based on documented expressions of bias by an African-American supervisor). In two different mock juries, white jurors ignored her race discrimination claim, reaching verdicts in her favor on the other issues in the case. In each jury, an African-American juror reminded the others of the race discrimination claim, spoke of its credibility in light of his experience, and persuaded the others to find in the plaintiff's favor on the race discrimination claim as they had on her other claims.[64]

The extreme hesitation whites have about mentioning race and racism can result in disapproval of whites who are willing to address these issues head on. A wrongful termination claim by two men, an African-American and his white supervisor, is illustrative.[65] The two were fired after the white supervisor refused to follow a directive to fire the African-American man. The white supervisor told his boss he believed the termination order was motivated by racism. Rather than being viewed as a hero, the white man was seen by white jurors in two mock juries as having brought his termination upon himself by bringing up an issue that did not affect him. The jurors were sympathetic to the black man "who had no choice" and were critical of the white man who, they felt, could have simply avoided the problem.

Whites do not like to talk about race, and overt expressions of racism have become socially unacceptable. But racism, although more covert, is alive and well.[66] One "litmus test" question that has been shown over many decades to successfully uncover racial bias, even in subjects who claim to be free of such attitudes, has been willingness to accept interracial marriage.[67] A 1997 Gallup Poll found that 61% of

---

trial consultants conduct and analyze the research. Elissa Krauss conducted the mock jury research described in this article. National Jury Project research results are shared with counsel and presented in summary form for educational purposes. Work product, privilege and other rules requiring confidentiality are strictly adhered to in reporting results.

63 *See supra* text accompanying note 62.

64 *See supra* text accompanying note 62.

65 *See supra* text accompanying note 62.

66 Johnson cites a host of studies of "aversive racism," the kind that is largely hidden, denied, and often even unconscious. *See* Johnson, *supra* note 7, at 1027 and accompanying text; *see also* Charles R. Lawrence III, *The Id, the Ego, and Equal Protection: Reckoning with Unconscious Racism*, 39 STAN. L. REV. 317 (1987) (discussing the property of the doctrine of discriminatory purpose).

67 One reason why the question about interracial marriage is effective is that it asks respondents to imagine elimination of social distance between the races. *See* John C. Brigham et al., *Dimensions of Racial Attitudes: Interracial Marriage and Approaches to Equality*, 32 J. SOC. ISSUES 9 (1976). As a general matter, no single question can uncover racial bias. *See generally* John J. Woodmansee & Stuart W. Cook, *Dimensions of Verbal Racial Attitudes: Their Identification and Measurement*, 7 J. PERSONALITY & SOC. PSYCHOL. 240 (1967).

whites approve of marriage between blacks and whites as compared to only 25% in 1972.[68]

While the 1997 poll suggests an improvement, the ramifications of the continuing disapproval among 39% are worth examining. Our National Jury Project research in several different jurisdictions has found that whites who disapprove of interracial marriage are also less open to a black person's claim that he has been discriminated against, and more likely to acquit a white police officer accused of brutalizing a black person.[69] Thus, whites' negative views of interracial marriage continue to be indicators of other racially biased predispositions.

VI. WHEN THE POLICE ARE NOT YOUR FRIENDS: BLACK EXPERIENCE WITH THE JUSTICE SYSTEM

Research reminds us what reasonable people, regardless of their race, should already know. Race affects how you see what you see. People are not color-blind. What a person living in the U.S. knows about the world is shaped in part by that person's race. It is as preposterous to expect black jurors to leave their experience of race at the courthouse door as it is preposterous to believe that white jurors have left theirs outside.[70] It is similarly absurd to presume that race blinds black jurors when, as all jurors are supposed to do, they rely on their lived experience to evaluate evidence. One set of experiences pervasive among black jurors and unusual for whites is a history of unjust treatment by police.[71] Numerous polls and studies have shown widespread suspicion of police among minorities in general, and blacks in particular.[72] This should not be surprising; internal and independent investigations confirm that racial bias and police misconduct go hand-in-hand in urban police departments.[73] The most recent nationwide poll confirms that 60% of blacks surveyed think blacks are treated less fairly than whites by police.[74]

---

[68] *See Black/White Relations in the United States,* Gallup Poll Social Audit, PR Newswire, June 10, 1997 *available in* WESTLAW, Allsnews database.

[69] *See supra* text accompanying note 62.

[70] *See* Karen Jo Koonan & Paul Harris, *Confronting Racial Stereotypes in Jury Trials, in* CIVIL RIGHTS LITIGATION AND ATTORNEY FEES ANNUAL HANDBOOK 9, 302-16 (1993).

[71] *See* Henry Louis Gates, Jr., *Driving While Black, in* THIRTEEN WAYS OF LOOKING AT A BLACK MAN 110 (1997).

[72] *See* Maria Puente, *Poll: Blacks' Confidence in Police Plummets*, USA TODAY, Mar. 21, 1995, at A3; *supra* note 68, at 9.

[73] Independent studies confirming the almost universal experiences of blacks with police include the Christopher Commission which studied the LAPD in the aftermath of the 1992 riots.

[74] *See supra* note 68, at 9. By contrast, our studies indicate that only thirty percent of whites think police treat African-Americans unfairly.

Being stopped by police for no reason other than race is virtually a universal experience for African-Americans.[75] New stories are constantly reported. In June 1997, Harvard Law School Professor Patricia Williams recounted the tale of a forty-year old black woman lawyer arrested and held in a Manhattan jail for twenty-one hours for having a suspended license and "resisting arrest."[76]

When some black jurors' experiences with police leave them skeptical of police claims, that does not make them nullifiers or racists. Such skepticism can enhance deliberations. Though there are few articles describing positive white response to black jurors' skeptical scrutiny of police in the jury room, one such post-O.J. experience was reported by Joan Biskupic in the *Washington Post.* She was a member of a mixed-race jury which could not reach unanimity. She came to agree with the questions about eyewitness testimony and police procedure raised by the black jurors.[77]

All jurors are supposed to treat police as they would other witnesses, making individual decisions on their credibility. More whites than blacks find it difficult to hold police to a stringent standard.[78] In fact, our research has found that potential jurors excused for cause, because they would lend greater weight to police testimony than to that of other witnesses, are almost always white.

Many African-Americans also have a heightened awareness of racial inequities in the criminal justice system. According to a Gallup Poll, 72% believe that blacks are treated more harshly than whites by the criminal justice system.[79]

Careful observers have documented how race, as well as national origin and gender, permeates the justice system, from initial law enforce-

---

75 *See* Gates, *supra* note 71, at 151-53.

76 *See* Patricia Williams, *The Climates of Disbelief*, THE NATION, June 16, 1997, at 10.

77 *See* Joan Biskupic, *I, the Juror: Color-conscious Justice in a Post-O.J. Trial*, WASHINGTON POST, Nov. 26, 1995, at C3. *See also* Joan Biskupic, *Jury Verdicts Aren't Always So Black and White*, *in* RACE AND THE CRIMINAL JUSTICE SYSTEM: HOW RACE AFFECTS JURY TRIALS 46 (Gerald A. Reynolds ed., 1996).

78 A USA Today poll, *'Gulf' Separates Races in Dealings with Police,* found that white Americans are more willing than non-whites to presume that police and prosecutors are truthful. *See* USA TODAY, Mar. 21, 1995, at A3; Bryan A. Stevenson and Ruth E. Friedman, *Deliberate Indifference: Judicial Tolerance of Racial Bias in Criminal Justice*, 51 WASH. & LEE L. REV. 509, n.68 (1994). The effects of these differences in attitudes and behavior are routinely seen in courtrooms.

79 *See supra* note 68, at 13 and accompanying text. By contrast, our studies indicate that only 46% of whites believe that blacks are treated more harshly; *see also* Peggy C. Davis, *Law as Microagression*, *in* CRITICAL RACE THEORY: THE CUTTING EDGE 169 (Richard Delgado ed., 1995) (discussing a New York State court system study which found that blacks had good reason to mistrust the system).

ment decisions to sentencing.[80] Race and ethnicity remain a potent determinant in sentencing. In some cases, non-whites are likely to receive longer sentences than whites.[81] The disparity in sentencing between blacks and whites actually increased from 1984 to 1990.[82] Today, all sources agree that the U.S. prison population is over 45% black.[83]

Racial disparity in sentencing is starkest in the imposition of the death penalty. Numerous studies have found that blacks are disproportionately sentenced to death.[84] The most widely known study of this pattern found overwhelming evidence of racial bias in death penalty sentencing in Georgia and formed the basis for black death row inmate Warren McCleskey's appeal.[85] As is well-known and widely deplored, in *McCleskey* the Supreme Court accepted the validity of research findings that grave racial disparities did exist,[86] but they refused to overturn the sentence, concluding that since "apparent" disparities are "inevitable," they are tolerable.[87] Is it any wonder that many blacks feel that the death penalty is itself a form of discrimination, and that every national poll examining the question has found that, while whites overwhelmingly approve of the death penalty, the majority of blacks oppose it?[88]

Under these circumstances, Professor Butler's suggestion that, in some instances, nullification is the moral choice is by no means farfetched.[89] He proposes nullification as a mechanism whereby jurors can affirm their understanding that the actions of some black defendants are "a predictable reaction to oppression" or "a reasonable response to the

---

80 *See* Hon. Arthur L. Burnett Sr., *Permeation of Race, National Origin and Gender Issues from Initial Law Enforcement Contact through Sentencing: The Need for Sensitivity, Equality, and Vigilance in the Criminal Justice System*, 31 AM. CRIM. L. REV. 1153 (1994). For an overview of the interplay of race, racism, and crime in the justice system see Kennedy, *supra* note 75 and accompanying text.

81 *See* Marjorie S. Zatz, *The Changing Forms of Racial/Ethnic Biases in Sentencing*, 24 J. RES. CRIME & DELINQUENCY 69, 85 (1987). The pattern is consistent in studies conducted from the 1960s, 1970s and 1980s despite variation in definitions of discrimination and control of variables.

82 *See* Barbara R. Meirhoefer, FEDERAL JUDICIAL CENTER, THE GENERAL EFFECT OF MANDATORY MINIMUM PRISON TERMS (1992). In fact, mandatory minimum sentences are more likely imposed on non-white than on white offenders. *See* Barbara S. Vincent & Paul J. Hofer, FEDERAL JUDICIAL CENTER, THE CONSEQUENCES OF MANDATORY MINIMUM PRISON TERMS: A SUMMARY OF RECENT FINDINGS 112, 117-21 (1994).

83 *See* Ian Fisher, *Black Soldiers Wrestle With Tangled Notions of Race and Justice in the Military*, N.Y. TIMES, June 17, 1997, at A12 (reporting 45%); THE SENTENCING PROJECT, FACTS ABOUT PRISONS AND PRISONERS (1997) (reporting 50% in 1993).

84 *See* Angela Dorn et al., *Too Much Justice: A Legislative Response to* McCleskey v. Kemp, 24 HARV. C.R.-C.L. L. REV. 437, 447 n.9 (1989).

85 *See* McCleskey v. Kemp, 481 U.S. 279 (1987).

86 *See* Johnson, *supra* note 7, at 1017; *see also* Dorn, *supra* note 84, at 437-38.

87 *See McCleskey*, 481 U.S. at 312.

88 *See, e.g.*, Craig Haney et. al., *"Modern" Death Qualification: New Data on its Biasing Effects*, 18 LAW & HUM. BEHAV. 619, 629 (1994).

89 *See* Butler, *supra* note 41, at 690-91.

racial and economic subordination every African-American faces every day."[90] His recommendation, however, tells us little about the analysis applied by black jurors who are accused of nullifying. Careful scrutiny of the anecdotes reported in media sources reveals that the jurors in question are not nullifying; instead, they are properly applying the rules. One exploration of the supposed pattern of black juror nullification focuses on cases in Washington, D.C.[91] Prosecutors and judges there report an increase in the number of juries ending in 11 to 1 votes for conviction with the lone acquitting holdout being an African-American woman.[92] While the author Jeffrey Rosen decries a pattern of "angry woman" nullifiers, he actually describes black jurors demanding high quality police work.[93]

Three cases are described. The holdouts are characterized as being "irrational, eccentric, or simply angry . . . refusing to listen or to persuade."[94] Each holdout is quoted directly, however, and what she says about the evidence belies these characterizations. One juror rejected the prosecution's case because the police lost the crime weapon.[95] She asked: "How could they lose the knife if there was really a knife?"[96] Rosen would have us believe that since the prosecutor acknowledged that police "messed up," their ineptitude should be excused.

The second, a law school graduate who agonized about her decision to acquit, was castigated for being "uncontrite" because she rejected the credibility of police who told two different stories in describing the same event.[97] Rosen says that "nothing of consequence turned on the discrepancy."[98] He ignores the typical instruction that jurors carefully scrutinize all the evidence including the witness's words, demeanor, or behavior in

---

[90] *Id.* at 680. Professor Butler mentions preliminarily that nullification has been associated with individuals and groups that have "objectives quite contrary" to his own. *Id.* at 680, n.11. However, the power to nullify has a long and honorable history in the interest of political activism and social change. In the mid-19th century some defendants successfully appealed directly to jurors to ignore the Fugitive Slave Act. This led to a finding that while the jury had the power to nullify, they should not be told to do so. *See* United States v. Morris, 26 F.Cas. 1323 (C.C.D. Mass. 1851) (No.15,815). In the more recent past, opponents of the Vietnam War, peace activists and draft resisters have appealed to the jury's power to nullify—sometimes with success. The D.C. Circuit Court considered the question whether jurors should be instructed on the power to nullify, and a divided court decided once again that though the power exists, jurors should not be told of it. *See* United States v. Dougherty, 475 F.2d. 1117 (D.C. Cir. 1972).

[91] *See* Rosen, *supra* note 42, at 54-64.

[92] *See* Rosen, *supra* note 42, at 55.

[93] *Id.*

[94] *Id.* at 56. In a clear distortion of the law, Rosen suggests that such jurors are being seated because of limits imposed on the exercise of peremptory challenges under *Batson*. *See also supra* notes 4-6 and accompanying text.

[95] *See* Rosen, *supra* note 42, at 58 and accompanying text.

[96] *Id.*

[97] *See id.* at 62-63.

[98] *See id.* at 62.

judging the truthfulness, accuracy, and weight of testimony.[99] Jurors are supposed to do this when evaluating any witness's credibility, including police witnesses. If two lay witnesses disagreed about the same event, would it not be appropriate to question their credibility?

In the third case, the prosecution bias is apparent in the case description: A police officer, after hearing a shot, obtained a description of the car from which the shot was believed to have been fired and "pulled it over and found packets of crack and *the gun*."[100] The holdout advocating acquittal is dismissed as a conspiracy theorist because she asked "why didn't they dust for fingerprints? Maybe because he hadn't even touched that gun."[101]

One of Rosen's "angry" women felt that she was being asked to "trust whatever the police say."[102] She explicitly rejected this suggestion, as all jurors should. The message in this article, as in others decrying the sorry state of the newly color-sensitive jury system, is that the job of jurors is to convict. Witness the very different treatment of a juror who argued for conviction because, as he said, he was "sick of this going on in my city."[103] This juror is not criticized for bringing extraneous bias to bear in reaching his conclusion. There is, moreover, no reference to the possibility that his comment might reveal a true case of nullification—reaching a decision based on moral outrage at broader social conditions rather than on evidence.

Jurors who resist the moral panic response to crime and insist on closely scrutinizing the prosecutor's case are treated as extremists. Why is it irrational to expect the police to be able to hold onto the crime weapon? What is eccentric about expecting two police officers who say they observed the same event to tell the same story? (Unlike other people, police are trained as observers and witnesses.) Why shouldn't the police and prosecutor have to prove that the gun the police found is actually the one that was fired? Why should blacks be pilloried for acting on their skepticism of a legal system that has been accused by a member of its highest court of harboring "a fear of too much justice"?[104]

CONCLUSION

Black jurors are being attacked by white commentators for drawing on their own experiences, even while the commentators endorse, in the-

---

99 *See, e.g.*, SUGGESTED STANDARD JURY INSTRUCTIONS, CRIMINAL, PENNSYLVANIA BAR INSTITUTE § 2.02 (1979).

100 Rosen, *supra* note 42, at 63 (emphasis added).

101 *Id.*

102 *Id.*

103 *Id.* at 54.

104 *See McCleskey*, 481 U.S. at 339 (Brennan, J., dissenting).

ory, the principle that diversity of experience belongs in the jury box. No serious commentator today would suggest that the clock be turned back on community participation in jury panels. Instead, the attacks on black jurors betray an expectation that blacks should deny their own experiences and adopt those of whites.

Surely this is racism—not the old fashioned kind, but the new-fashioned kind. The kind where whites provide seemingly non-racial reasons (e.g., "these jurors are not following the law") as the basis for racist opinions. No doubt, the authors of each article criticized here would deny believing that blacks are inferior and whites superior.[105] But how else can we understand the demand that black jurors leave their experiences at the courthouse door?

Jury trial remains a cornerstone of the U.S. justice system. Representative juries, as the Supreme Court has repeatedly emphasized, are a requirement for public confidence in the system. Attacks on black jurors who bring their experiences into this system are attacks on representativeness. These attacks undermine public confidence in the system, erode fundamental rules of the justice system, and pose threats to fairness in future trials.

---

105 Denial of racism is a key psychological factor in its continued existence. *See* Johnson, *supra* note 7, at 1029-30.