

# University of Chicago Legal Forum

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Volume 1998

Article 8

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1998

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### Recommended Citation

Rosen, Jeffrey (1998) "After 'One Angry Woman,'" *University of Chicago Legal Forum*: Vol. 1998, Article 8.  
Available at: <http://chicagounbound.uchicago.edu/uclf/vol1998/iss1/8>

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## After 'One Angry Woman'

Jeffrey Rosen†

In 1996, I set out to test a widely accepted hypothesis about race and juries: namely, that race-based jury nullification was on the rise. In the wake of the O.J. Simpson trials, the question of whether white and black jurors were capable of transracial agreement had created something of a civic crisis. The stark contrast in the ways that white and black citizens evaluated Simpson's guilt seemed to challenge one of the basic premises of the American jury: that citizens from different ethnic backgrounds can deliberate and then converge on a common truth. And when a mostly white civil jury found Simpson liable after a mostly black criminal jury had acquitted him, the contrast threatened to confirm what had become conventional wisdom. As *New York Times* columnist Bob Herbert put it after the Simpson criminal trial, "A society rent along racial lines, in an overheated atmosphere in which both sides lack confidence in the justice system, is a society headed for catastrophe."<sup>1</sup>

In Washington, D.C., where I decided to focus my inquiry, more than 70 percent of the jurors are African American, as are more than 50 percent of the police officers and 95 percent of the defendants.<sup>2</sup> Many believe that the nation's capital has been stricken by an epidemic of race-based jury nullification. In *Race and the Criminal Justice System: How Race Affects Jury Trial*, a collection of essays published by the Center for Equal Opportunity in Washington, D.C., several of the authors cited statistics originally published in the *Wall Street Journal* indicating that acquittal rates in the Bronx, in the District of Columbia, and in the county surrounding Detroit are much higher than the purported "national acquittal rate of 17 percent."<sup>3</sup> Moreover, in the

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<sup>1</sup> Bob Herbert, *Madness, Not Justice*, NY Times A31 (Oct 6, 1995).

<sup>2</sup> Jeffrey Rosen, *One Angry Woman*, New Yorker 55 (Feb 24 & March 3, 1997).

<sup>3</sup> See Michael D. Weiss and Karl Zinsmeister, *When Race Trumps Truth in the Courtroom*, in *Race and the Criminal Justice System: How Race Affects Jury Trials* 63 (Center for Equal Opportunity 1997). For an argument that the 17 percent figure is inflated, and that actual acquittal rate from the small group of jury trials sampled by the *Wall Street Journal* is 21 percent, a number not noticeably different than the acquittal

wake of my colleague Paul Butler's controversial *Yale Law Journal* article calling on black jurors to acquit guilty black defendants in non-violent drug crimes,<sup>4</sup> District of Columbia judges now give prospective jurors what attorneys call an "anti-Butler instruction."<sup>5</sup>

After conducting a series of initial interviews with about a dozen African American federal judges and prosecutors in Washington, however, I was persuaded that the conventional wisdom about race and juries is wrong. (This was one of those rare instances where a working hypothesis had to be abandoned in light of the evidence.) Prosecutors could supply few anecdotal examples of classic nullification according to the Butler model: that is, trials in which a mostly black jury acquitted a black defendant despite their belief in his guilt beyond reasonable doubt, because they didn't want to send another young black man to jail. Instead, the prosecutors suggested that they had observed a rise in hung juries, in which a lone hold out — often an African American woman — refused to convict over the furious objections of eleven black and white fellow jurors who were convinced of guilt beyond reasonable doubt. Eric Holder, former United States Attorney for the District of Columbia, who is now the Deputy Attorney General, estimated that during the five years that he served as a judge on the D.C. Superior Court, he presided over at least ten trials that ended in 11-1 or 10-2 hung juries, despite overwhelming evidence of guilt.<sup>6</sup> On the basis of these initial interviews, I then sought out former jurors, and in relatively short order, I was able to reconstruct in some detail the deliberations in four trials that ultimately deadlocked 11-1. The results were published as *One Angry Woman*.<sup>7</sup>

In the four trials I discussed, I was struck by the following: although African American judges and prosecutors spoke anecdotally about their impression that black District of Columbia juries were increasingly hanging or nullifying because they were reluctant to send young black men to jail, I found no case in which the

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rate in the Bronx, in the District of Columbia, and in Wayne County, Michigan, see Roger Parloff, *Race and Juries: If It Ain't Broke . . .*, *American Lawyer* 72 (June 1997).

<sup>4</sup> Paul Butler, *Racially Based Nullification: Black Power in the Criminal Justice System*, 105 *Yale L J* 677, 715 (1995).

<sup>5</sup> See Nkechi Taiifa, *Jury Nullification: Problem or Panacea* (unpublished manuscript on file with author).

<sup>6</sup> Interview with Eric Holder, United States Attorney for the District of Columbia. [Editor's Note: Interviews discussed in this Article were verified by the *New Yorker*. The *University of Chicago Legal Forum* does not verify interviews.]

<sup>7</sup> Rosen, *New Yorker* at 55-64 (cited in note 2).

nullifying impulse expressed itself unambiguously. Instead, the hanging jurors in the trials I described conformed to a model that I called “unreasonable doubt” — that is, jurors were overcome by religious scruples or conspiracy theories, or their mistrust of the police, and as a result they expressed irrational doubts that struck their fellow jurors as unreasonable.

It might be argued, of course, that when hanging jurors vote to acquit because of their distrust of the police, they are, in fact, engaging in nullification. But nullification, according to the Butler model requires a self-conscious decision to free an African American defendant whom the jury believes is guilty as a form of racial payback. By contrast, the hanging jurors I encountered continued to express doubt about the defendant’s guilt, rather than about the justness of the laws in question. Moreover, the Federal Public Defender’s Office in Washington, D.C. reports that black jurors vote to acquit roughly the same percentage of Hispanic and white defendants as black ones.<sup>8</sup>

What I would like to do in this Article is to review and categorize the hanging jurors in several of the trials I discussed in *One Angry Woman* and in others that I did not. Let me begin by apologizing for and defending the anecdotal quality of my presentation. Journalism should never be confused with scholarship; but the lack of reliable empirical data on the subject and the elusiveness of the phenomenon being described force me to rely on anecdotes.<sup>9</sup> As I will argue in Part I, the anecdotal evidence suggests that nullification is a phenomenon that rarely speaks its name: hanging jurors almost always defend their position in terms of reasonable doubts. In Part II, I will examine and respond to criticisms of the *One Angry Woman* thesis, focusing on statistical arguments that neither hung juries nor race-based acquittals are, in fact, on the rise. Finally, I will conclude by reexamining proposals for jury reform — in particular allowing nonunanimous verdicts and eliminating peremptory challenges — in light of the anecdotal evidence I surveyed.

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<sup>8</sup> Jeffrey Rosen, *Jurymandering: A Case Against Peremptory Challenges*, New Republic 15 (Nov 30, 1992).

<sup>9</sup> All quotations and references to jurors and prosecutors in these articles are taken from background interviews conducted as research for *One Angry Woman* and are on file with the author. Unless named, none of the interview subjects consented to identification; to protect their identities, case citations are omitted.

## I. UNREACHABLE JURORS AND UNREASONABLE DOUBTS

I will begin with the anecdotes. Eric Holder has identified three categories of what he called “unreachable” jurors: those overcome by religious scruples, by mistrust of the police, or by irrational conspiracy theories.<sup>10</sup> I will discuss each in turn.

## A. Religious Scruples

In two of the trials I described, jurors were overcome at the last minute by their religious scruples. In the first trial, the suspect fired at members of a rival gang as an off-duty policeman observed him.<sup>11</sup> After the police officer saw the suspect get into a parked car, he approached and found a gun under the front seat. A trial followed several months later; it was so straightforward that it lasted only an afternoon. The prosecutor, a young white woman, examined the African American police officer who had made the arrest. The defense attorney, who was from Nigeria, argued a case of mistaken identity. The jury looked like America, or at least like the District of Columbia. There were five black men, ranging from an oncologist to a native of Jamaica who cleaned hospitals. There were three white men, including a gay Jewish social service worker — who was quickly elected foreman — and a liberal lawyer for the Environmental Protection Agency. There were three white women, including a journalist and a publisher. And there was one black woman, in her early twenties, who was studying to be a law librarian.

The initial vote, taken anonymously, was eight for conviction, two undecided, and two for acquittal. It quickly emerged that the Jamaican hospital worker and the aspiring law librarian had voted to acquit. The Jamaican man confessed that he lived in the neighborhood where the shooting had taken place. “I’m raising kids and I hear gun shots every night,” he said. “If I had the money to get out I would, but I can’t put this guy away.” One of the retired black men challenged him strongly. “That kid shot off a pistol,” he said. “There’s no doubt he did it. The gun was under the seat; his story doesn’t make any sense; there are eyewitnesses. What more do you want? I’m sick of this going on in my city.”

The aspiring law librarian expressed more serious doubts. Her cousin had been killed by a police officer, she said, and she

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<sup>10</sup> Interview with Eric Holder (cited in note 6).

<sup>11</sup> See note 9.

couldn't trust the police. At this point, the black oncologist became incensed. "If the cop who arrested this kid was white," he said, "I might agree with you, but we're talking nigger to nigger here. There's no doubt about what happened." At the end of the day, a Friday, the jurors took another vote. It was eleven to one. The librarian then confessed she was the holdout. "I just don't know," she said repeatedly.

On Monday morning, the holdout juror said she needed to speak. "It was my birthday this weekend. My husband bought a cake and invited friends, but I sent them home and went to church on Sunday. I said, 'Why, God? Why me? Why can't I find him guilty?' God told me, 'I have forgiven him.'" Her voice was shaking with emotion as she confessed that she could never vote to convict. At this point, the young African American security guard turned to her. "Sister," he said, "the judge asked you before you sat on the jury if you couldn't pass judgment on someone to stand up. You didn't stand up. Why?" The holdout murmured her apologies, but she had nothing to say. The jury filed out in anger.

In another case, three African American men were robbed at knifepoint in Malcolm X Park, not far from the trendy restaurants of Adams Morgan.<sup>12</sup> All three immediately identified the defendant, a twenty-three-year-old African American named Tyrone Gordon. The holdout juror in the Gordon trial seemed to be concerned about the plight of young black men. "We're losing so many of our young brothers these days," the African American man who had changed his vote lamented to the grandmotherly holdout. "I know it, I know it," she agreed.

But religious scruples were what she invoked publicly to justify her decision. When deliberations started again, the white woman confronted the holdout directly. "I recognize there are too many African American young men in prison," she said, "and that bothers me. But I look at these victims, who are also African American men, and they did everything right. We need to support them." Some of the other African American jurors murmured their agreement, but the holdout remained unmoved. "This defendant is no brother of mine," she said. "I don't trust anybody. The only person I trust is myself and the Lord above." Pressed to explain herself, the holdout confessed, "I have a hard time sitting in judgment of someone else. I have to sleep and look at myself in the mirror at night."

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<sup>12</sup> Id.

Interviewed after the Gordon trial, the presiding judge, Eric T. Washington, said that he asks all prospective jurors during voir dire whether they have religious or moral objections to conviction. Those who confess that they do are dismissed for cause. Why does he think the holdout juror didn't confess her religious objections in advance? "I've seen the emotion in people's eyes, when they've voted unanimously to convict somebody," said Judge Washington, "and perhaps in the cold, pre-trial environment of questions and answers, they're not aware of how they might feel about the matter of punishment."<sup>13</sup>

### B. Mistrust of the Police

In several of the trials I described, the holdout jurors' mistrust of the police led to doubts that the rest of the jury considered unreasonable. One case involved a defendant who was carrying a gun, and who dropped a plastic bag full of crack as soon as he was approached by two police officers in an open-air drug market.<sup>14</sup> The holdout juror, whom I referred to by the pseudonym Michelle Thompson, was a graduate of Mount Holyoke and Yale Law School, born about forty years ago to a stable, two-parent working class black family in southeast Washington, D.C.

"I have to admit, my personal experience growing up in Washington has put me in a situation where I don't trust the police," she said. "I've seen them lie." She recalls that when she was a teenager growing up in Washington, "you didn't ride in your mama's car with a bunch of black teenagers, because you knew you were going to be stopped." Since graduating from Yale Law School, she says, when she has driven with another attorney or doctor who is also African American, "the cops have stopped us and really humiliated the guy."

Thompson says that although she feels unfairly treated by the police because of her race, she mistrusts black officers as well as white ones. "Both of these officers were black, but I didn't believe them." Because the two police officers disagreed about whether the defendant had thrown the drugs or dropped them, Thompson says, "I didn't believe either of them saw anything." The other jurors, however, were unsympathetic to Thompson's claim that because *some* policemen lie, *these* policemen could not be trusted. She recalled that several black jurors called the de-

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<sup>13</sup> Interview with Judge Eric T. Washington, Superior Court for the District of Columbia.

<sup>14</sup> See note 9.

fendant, who was on probation for stealing, a “low-life scum.” “I grew up with people who were bad guys,” Thompson retorted, “but they were still somebody’s brother, and son. I saw them as human beings, not as low-lives.”

At this point, class tensions bubbled to the surface. An older black woman said: “You’re just one of those highfalutin liberals. We have to live with this crime, while you probably live in the suburbs. I hope he turns up at the door and terrorizes you, and robs you.” Another woman said: “I’m on the front line, and you’re off having a cute life, with your degrees and your money.” Thompson was shaken: “I didn’t know what to say.” At the end of the second day, Thompson told her fellow jurors:

I cannot, in good conscience, do this. I really can’t. If I do this simply to go along with you guys, and to get you to stop saying stuff like ‘I hope he robs you next,’ I will simply be capitulating to improve my personal situation, not because I think he’s guilty.

After she forced a mistrial, Thompson said,

I went home for two nights and cried and cried and cried. I still don’t know if I did the right thing. He could have been guilty. You know what I mean? I felt the same way I felt at the end of the Simpson prosecution, where I think they left the jury very little reason to do anything but not convict.

Thompson felt even worse when one of her friends, a black prosecutor who now works for Eric Holder, told her that the police know who the local drug dealers are, and that the reason they hadn’t dusted the drugs for fingerprints — one of her central concerns — was that plastic bags don’t hold fingerprints very well. But reliving the experience several years later, Thompson was not contrite.

What he was really telling me is that you need to trust whatever the police say, and I *don’t*. I have seen the police lie up close and personal about things I was involved in my whole life. And it has not stopped. It still happens, even since I’ve become an attorney and have this middle-class facade.

In several cases, jurors’ mistrust of the police led them to



construct elaborate conspiracy theories. One holdout juror suggested that the police had not dusted a gun for fingerprints because they had planted it, prompting Eric Holder to remark: "We've got to the point now where the police dust guns in situations where it doesn't make sense to dust, because one juror out of twelve will say, 'Well, maybe it wasn't his gun.'"<sup>15</sup> The holdout juror in the trial of Tyrone Gordon made clear that she thought the police had framed the defendant.<sup>16</sup> "How could they lose the knife if there really was a knife?" she asked. She was skeptical of a blurry photograph of the knife, taken at the scene of the crime, that had been introduced as evidence. "I think this picture is bogus," she said. "My mind is made up and it's not going to change."

I found no examples of cases where jurors said openly that their mistrust of the police led them to nullify laws because they refused to send another young black man to jail on principle. Instead, jurors said that their mistrust of the police led them to have reasonable doubts, even doubts that their fellow jurors considered unreasonable. Nevertheless, the specter of payback hung over several of the trials I described. "It's not like the way it used to be in this city," one African American holdout juror told Bernadette Sergeant, a black prosecutor. "In the old days, a man could walk the street and not be afraid of being held by the police for an ID."<sup>17</sup>

Rather than glorifying jurors who express mistrust for the police, Eric Holder suggests that "as painful as it is to say," some "unreachable" jurors, like some "seventeen year old black criminals, are *beyond help*."<sup>18</sup> "There are some folks who have been so seared by racism, who are so affected by what has happened to them because they are black, that even if you're the most credible, up-front, black man or woman in law enforcement, you're never going to be able to reach them," says Holder. "There are other people who are simply misinformed and perhaps intellectually lazy, or intellectually dishonest, and you're never going to reach them either. These are the people who get into the jury rooms and then simply don't deliberate, or simply say, 'All cops lie.'"

Like the search for legislative intent in cases where legisla-

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<sup>15</sup> Interview with Eric Holder (cited in note 6).

<sup>16</sup> See note 9.

<sup>17</sup> Interview with Bernadette Sergeant, Assistant United States Attorney for the District of Columbia.

<sup>18</sup> Interview with Eric Holder (cited in note 6).

tive motives are mixed, it is hard to know what really motivates the jurors whose mistrust of the police leads them to claim that they have reasonable doubts about guilt. Perhaps their real goal is to keep young black men out of jail, and they are trying to conceal or justify their nullifying impulses by claiming that they are guided by more legally acceptable reasonable doubts. In the Simpson criminal trial, after all, the jurors claimed to be guided by reasonable doubts, despite extensive circumstantial evidence that the verdict was really an expression of nullification.<sup>19</sup> All of this anecdotal evidence suggests to me that nullification remains controversial enough that jurors rarely acknowledge their nullifying urges as such. Instead, they justify their position by invoking the language of reasonable doubt, even when their doubts are, to other jurors, unreasonable.

### C. Eccentric, Disengaged, and Undeliberative Jurors

In *We, the Jury*, Professor Jeffrey Abramson suggests that nonunanimous juries might damage the quality of jury deliberations, because mock jury studies have found that jurors in the majority are less likely to try to persuade dissenters when verdicts can be nonunanimous.<sup>20</sup> Nevertheless, the unreachable jurors I described are surprisingly disinclined to deliberate in the first place. One initial holdout clipped discount coupons instead of deliberating with her peers. "I don't want to be here. This is a waste of my time. I've got other things to do," she said.<sup>21</sup> On the second day of trial, however, she changed her vote, more as a result of indifference and peer pressure than of having grappled with the evidence. Another initial holdout was known to other jurors as the "rock star," because instead of deliberating, she would put on earphones and listen to her Walkman. She, too, changed her vote after being convinced that two verdicts could be announced separately so she would not have to face the families of both defendants at the same time.<sup>22</sup> While I do not doubt that nonunanimous verdicts reduce the incentives to deliberate, the profiles of undeliberative jurors should make us resist the temptation to paint hanging jurors as epigones of Henry Fonda in the

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<sup>19</sup> Jeffrey Rosen, *The Bloods and The Crits*, New Republic 27 (Dec 9, 1996).

<sup>20</sup> Jeffrey Abramson, *We, the Jury: The Jury System and the Ideal of Democracy* 199–200 (Basic 1994) (citing Charlan Nemeth, *Interactions Between Jurors as a Function of Majority vs. Unanimity Decision Rules* in Lawrence S. Wrightsman, Saul M. Kassen, and Cynthia E. Willis, eds, *In the Jury Box: Controversies In the Courtroom* 250 (Sage 1987).

<sup>21</sup> See note 9.

<sup>22</sup> Interview with Eric Holder (cited in note 6).

*Twelve Angry Men* model, trying to sway their skeptical fellow jurors through reasoned persuasion.

Two trials that I left out of *One Angry Woman* are worth considering here. In one of the trials, the hanging juror was a white woman, and in the other, an African American man. Both trials were omitted, frankly, for aesthetic reasons, to preserve the conceit of the piece. But the omitted examples remind us that unreachable jurors are not always African American women; indeed, the predominance of African American women among the pool of hanging jurors in Washington may reflect nothing more than the demographics of the jury pool itself.

One prosecutor told me about a second-degree murder case that hung 11-1. The hanging juror was an elderly white woman whose father was a police officer; she had recently fallen victim to a crime. The black prosecutor expected she would be a perfect juror, but the woman wanted a motive in a case where there really was no motive, despite the furious objections of black and white jurors who wanted to convict. The prosecutor attributed the juror's doubt to "a combination of watching TV and expecting airtight evidence. Maybe it was just a quirk with her," he said.

Another case involved a youth who beat up a woman and took her purse.<sup>23</sup> The jury consisted of one white man, a journalist, and eleven African Americans, including working-class people, retired federal workers, professionals, and a woman who worked at the White House. The police for the Washington Metro, on the lookout for a robber who stalked women late at night and took their purses, had staked out the Metro Center subway stop downtown. They were in a van with tinted windows and saw a woman being dropped off by a driver. A young black man followed her into the station, and the police actually saw him rubbing his hands together in anticipation of the assault. According to the testimony of two Howard University students, twenty seconds after the young man got onto the down escalator, he passed the heavy-set white woman whom he was following. The students turned the corner and then heard screaming. Turning around, they ran to the foot of the escalator and saw the suspect fighting with the woman, grabbing her purse, punching her with his fist, slamming her head against the floor, and then running up the stairs. The victim corroborated the testimony of the two women, although they had never seen each other before. The metro police intercepted the suspect at the top of the stairs

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<sup>23</sup> See note 9.

with the purse. He was spread-eagled when the two witnesses and the victim arrived, and all three immediately identified him as the attacker. Later, the Metro police interrogated the suspect and he signed a confession, saying he needed the money.

The trial lasted three days. The initial vote was 10-2 for conviction, and very quickly after that 11-1. As one juror told me,

The holdout was a retired African American man, who throughout the trial read a book called *Masonry and Its Symbols*. It emerged within minutes that he was not going to be persuaded. His reasons for being against conviction were varied and really imaginative. He objected to the confession, in which the suspect had said "I saw her exit the vehicle." "No black young man uses words like vehicle," he said, "those were words that were put in his mouth by the cops, we don't know what went on in that room to get him to sign that. The cop lied when he said that those were the young man's words, so therefore, everything he said is a lie." The holdout said that the Howard students were arrogant and snippy and unreliable. There was a very slight discrepancy between the written reports and the testimony of the two metro cops, about the hours they had been observing the kid, and the holdout said: "They're lying. I'm going to throw out everything the police said."

These statements emerged over three or four days; he didn't state them as a soliloquy.

The reaction of all eleven of us was great dismay. The other eleven had been absolutely convinced of this kid's guilt and were shocked at his evasions and partisanship, [so we] just argued with him vehemently. A couple of times, a couple of the other jurors, not me, said to him, 'look man, we know what you're doing here, you're just not going to convict a black man, are you? You wouldn't convict him no matter what they said, regardless of the evidence.' 'Don't you be bringing in irrelevant stuff like that,' he said, denying the accusations. He was a very smart guy, and I think that he recalled that when he was a youth somewhere down South he had been stopped by police for something he hadn't done. At various moments, each of the ten others lost their temper with him because they

found him impossible. Ultimately, the judge declared a mistrial, and the prosecutor asked the holdout why he had refused to convict. The holdout stayed to talk and he offered a rambling plea for justice. 'Your honor, we just need to have justice in the courthouse,' he said. I think he was scrambling for justification but couldn't say it in the judge's presence, he couldn't come up with the words.

## II. OBJECTIONS

Let me now consider objections to the *One Angry Woman* thesis. The most powerful, it seems to me, comes from critics who have expressed skepticism that race-based jury nullification really is on the rise. A recent article in *Judicature* argues that "[c]ontrary to the assumption of jury critics, the data show that conviction rates in federal jury trials have increased, both across the board and in drug cases."<sup>24</sup> And Roger Parloff of *The American Lawyer* suggested that my sample of hung juries was too small to be reliable.<sup>25</sup>

What, on reflection, do the data suggest? In addition to the anecdotal impressions of prosecutors and trial judges in the District of Columbia, I noted in *One Angry Woman* that in 1966, when Harry Kalven, Jr. and Hans Zeisel published their classic study *The American Jury*, they estimated that about 5.5 percent of all criminal jury trials resulted in hung juries.<sup>26</sup> In contrast, I wrote, between 1992 and 1994, the average hung jury rate in the nine most diverse California counties, including Los Angeles, was 13 percent.<sup>27</sup> In Washington, D.C., based on numbers supplied by the United States Attorney's Office, I reported that an average of 13 percent of all federal criminal trials ended in hung juries compared with only five percent in 1991.<sup>28</sup>

The D.C. statistics are based on a small sample of trials, and in the interest of full disclosure, I should take this opportunity to reveal the numbers more fully:<sup>29</sup>

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<sup>24</sup> Neil Vidmar, Sara Sun Beale, Mary Rose and Laura F. Donnely, *Should We Rush to Reform the Criminal Jury?* 80 *Judicature* 286, 287 (May-June 1997).

<sup>25</sup> Roger Parloff, *American Lawyer* at 73-74 (cited in note 3).

<sup>26</sup> Harry Kalven, Jr. and Hans Zeisel, *The American Jury* 56-57 (Chicago 1971).

<sup>27</sup> Rosen, *New Yorker* at 55 (cited in note 2).

<sup>28</sup> *Id.*

<sup>29</sup> At my request, the office of Eric Holder generated this data.

Year	Number of Trials	Hung Juries	Percent
1991	345	17	4.9%
1992	235	34	14.5%
1993	159	16	10%
1994	127	23	18%
1995	132	10	8%
1996	88	13	14.8%

Given the small numbers of trials involved, and the relatively large fluctuation from year to year, it may seem questionable to average the years from 1992 to 1996, and to compare them with 1991. Furthermore, because misdemeanors are no longer eligible for jury trials, the total number of jury trials in the District of Columbia Superior Court has declined dramatically in recent years.<sup>30</sup> This casts doubt on the validity of comparing jury results in the years before and after the change. Roger Parloff takes issue with my use of statistics along these lines. First, he notes that the overall number of 11-1 hung juries is exceedingly small.<sup>31</sup> He cites a study by the Los Angeles County public defender. The study analyzes hung juries that occurred in Los Angeles County between July 1994 and March 1997, where about one-third of California's criminal jury trials are tried each year. Parloff notes that the study found that only about 1.6 percent of all felony jury trials and only 0.075 percent of all felony dispositions actually hang 11-1 for conviction. "If there are 10,000 jury trials a year in California," Parloff writes,

that means there might be 160 jury trials (including misdemeanor trials) that are hung 11 to 1 for conviction statewide each year. Only 34 percent of those cases are actually retried, according to the public defender's study, meaning about 54 retrials (0.34 x 160). Among those 11-to-1 hung-jury cases that *are* retried, juries convict only 58 percent of the time, hanging again or acquitting in 42 percent of the cases — i.e., in our hypothetical example, in 23 of the 54 retrials. (Of the 77 actual Los Angeles cases that were hung 11-1 in favor of guilt between July 1, 1994, and April 3, 1997, 26 were retried, resulting in 15 guilty ver-

<sup>30</sup> Sam Skolnik, *The Jury is Out*, Legal Times 1 (Nov 3, 1997).

<sup>31</sup> Parloff, *American Lawyer* at 73-74 (cited in note 3).

dicts [58 percent], five acquittals [19 percent], and six hung juries [23 percent]).<sup>32</sup>

Parloff goes on to argue that hung jury rates between 12 and 15 percent have been common at least for the past decade. “[T]here is no evidence,” he writes,

that hung-jury rates in Los Angeles have risen one iota in more than a decade. According to Los Angeles superior court figures, hung-jury rates in 1985 were 15 percent, and have stayed fairly steady ever since, ranging from a high of 16.1 percent in 1987 to lows of 12 percent in 1991, 1993, and 1994.<sup>33</sup>

Finally, Parloff notes that Kalven and Zeisel were never confident about their 5.5 percent estimate, which they based on information provided by state court judges around the country. Parloff points to Kalven and Zeisel’s appendix, which notes that only four jurisdictions kept any data at all on hung juries. One of the jurisdictions, serendipitously, was Los Angeles, which reported to Kalven and Zeisel in 1956 that for every 100 criminal jury trials that reached a unanimous verdict in Los Angeles, another 15 ended in hung juries — a rate of roughly 13 percent.<sup>34</sup> Parloff calls these statistics “*completely consistent with the numbers being recorded today.*”<sup>35</sup>

How can the anecdotal impression of prosecutors and judges that 11-1 hung juries are on the rise be reconciled with the statistics which, viewed skeptically, may not suggest dramatic changes in hung jury rates, at least in the past decade? One possibility is that 11-1 hung jury rates are, indeed, on the rise, especially in cases involving African American defendants in urban jurisdictions, but that they have been counterbalanced by a rise in convictions for other types of crimes. Another possibility is that hung jury rates have not changed dramatically, but that the profile of the typical hanging juror in Washington — namely, an African American woman expressing doubts that seem to prosecutors, judges, and fellow jurors to be unreasonable — has changed since discriminatory barriers to jury service by women and minorities were eliminated.

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<sup>32</sup> Id.

<sup>33</sup> Id at 72.

<sup>34</sup> Kalven and Zeisel, *The American Jury* at 56 (cited in note 29).

<sup>35</sup> Parloff, *American Lawyer* at 72 (cited in note 3).

It would be irresponsible, in short, to make any bold pronouncements about the increase in hung juries since the 1950s. But given the empirical gaps in our knowledge, a research project collecting more reliable data is clearly needed. To that end, I was heartened to learn after the *New Yorker* article was published that Chief Judge Judith S. Kaye of the State Court of Appeals of New York has called for better data on precisely these points.

### III. REFORMS

#### A. Nonunanimous Verdicts

At the end of *One Angry Woman*, I tentatively endorsed nonunanimous verdicts as a reform precisely tailored to cure the ills that stemmed from the “unreasonable doubt” phenomenon. If most jurors are able to deliberate rationally, if the holdouts refuse to deliberate, and if nullification is widespread in 11-1 or 10-2 votes, then, I suggested, “[t]he elimination of the unanimity requirement . . . might be seen as the fulfillment of our new ideal of the multicultural jury: deliberative and representative at the same time.”<sup>36</sup>

In *We, the Jury*, Professor Jeffrey Abramson expresses skepticism on this score. He writes that “nonunanimous juries damage the quality of deliberations and the legitimacy that jury verdicts command in the eye of the public.”<sup>37</sup> Parloff expresses concerns along the same lines:

Studies using mock juries have found — obviously — that jurors in the majority have less incentive to persuade dissenters when verdicts can be nonunanimous. Consequently, when a nonunanimous verdict will suffice, jurors’ conflicting memories of evidence may not be ironed out, and their differing interpretations of evidence may not be debated. The deliberations are swifter, but less civil and more superficial.<sup>38</sup>

My interviews do not support this idealized vision of jury debates. I found little deliberation occurring: the initial votes were 10-2 or at most 9-3, and positions hardened very quickly at 11-1. Holdout jurors refused to deliberate; instead, they merely dug in

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<sup>36</sup> Rosen, *New Yorker* at 64 (cited in note 2).

<sup>37</sup> Abramson, *We, the Jury* at 200 (cited in note 20).

<sup>38</sup> Parloff, *American Lawyer* at 74 (cited in note 3).



their heels. If these descriptions are accurate, they suggest that nonunanimous juries, *pace* Professor Abramson, might not substantially reduce deliberation.

On the other hand, if the numbers are as small as Parloff suggests, if 11-1 hung juries are not a national epidemic, and if 42 percent of the 11-1 hung juries that are tried result in another hung jury or an acquittal, then the reform may not be worth the candle.

### B. Eliminating Peremptory Challenges

The usual objection to eliminating peremptory challenges is that random jury selection would make it impossible to screen out irrational jurors. If Eric Holder's anatomy of the "unreachable" juror is correct, however, peremptory challenges are likely to be ineffective in screening out nondeliberative jurors who come from all races and classes, many of whom lie to get on juries. Since the numbers of unreachable jurors appear to be low — one or two in each petit jury — then the elimination of peremptories, combined with nonunanimous verdicts, would be an effective way of ensuring that non-deliberative jurors were outvoted.

One might, of course, go to the other extreme, expanding the use of peremptory challenges, and resurrecting the nineteenth century vision of jury service as a political right that can be denied on religious, if not racial, grounds.<sup>39</sup> But permitting prospective jurors to be struck on the basis of their religious beliefs would surely be an over-inclusive way of screening out unreachable jurors, because only a small minority of religious jurors refuse to deliberate. To the extent that unreachable jurors come from all classes and educational backgrounds, strikes on these grounds are likely to be ineffective as well.

### C. Do Nothing

Perhaps the hung jury crisis, like the nullification crisis, is nothing more than journalistic exaggeration. If so, as Vidmar and his colleagues suggest in their *Judicature* article, the best alternative is to stay the course. Given the extensive anecdotal

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<sup>39</sup> An early draft of the Fifteenth Amendment would have prohibited discrimination in voting rights on religious as well as racial grounds, but it was abandoned because of lack of support. See William Gillette, *The Right to Vote: Politics and the Passage of the Fifteenth Amendment* (Johns Hopkins 1965). If jury service, like voting, is viewed as a core political right, then the right to vote on juries, according to the original understanding of the Fifteenth Amendment, presumably could be denied on religious grounds.

evidence that a problem does indeed exist, at least in certain jurisdictions, I'm looking forward to more systematic empirical surveys of precisely how widespread the unreasonable doubt phenomenon is. But more than a year after the publication of *One Angry Woman*, I am increasingly agnostic about whether or not the cure might be worse than the disease.

