

LORD BROUGHAM, THE DREAM TEAM, AND JURY NULLIFICATION OF THE THIRD KIND

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I. INTRODUCTION: THE SYSTEM WASN'T BROKEN AND THE LAWYERS WEREN'T UNETHICAL—FIX NOTHING!

One of the least controversial statements made by anyone in the aftermath of the O.J. Simpson case appears on the dust jacket of *Reasonable Doubts*,¹ defense team member Alan Dershowitz's book about the trial: many thoughtful people sincerely believe that the defendant actually killed Nicole Brown and Ronald Goldman and that the verdict of not guilty was therefore a miscarriage of justice. In his book, Professor Dershowitz attempts to convince those people that even if the defendant did "do it" as a matter of fact, the verdict was nonetheless sound as a

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This essay is an expanded version of a paper I delivered in Boulder, Colorado, on February 24, 1996, at the University of Colorado Law Review Symposium, *O.J. Simpson and the Criminal Justice System on Trial*.

I received considerable help writing this essay, but not through the usual medium of submitting early drafts to the scrutiny of colleagues and friends. Instead, I benefitted greatly from countless conversations and arguments—many of them in cyberspace—about the lawyers and the jurors in the O.J. Simpson case. My unwitting tutors included participants at an earlier forum on the Simpson case, held during the Association of American Law Schools Annual Meeting in San Antonio in January 1996: Myrna Raeder, Jonathan Koehler, and Simpson attorney Gerald Uelman. Of these, the first two also participated in the University of Colorado Symposium.

Other helpers included David Crump, Paul Hayden, Michael Heise, David Leonard, Laurie Levenson, and Elizabeth Rappaport. I should also add to the list the many thoughtful people whom I met for the first time in Boulder, whose ideas caused me to revise my remarks literally up to the moment of delivery, especially Ronald Allen, Reid Hastie, and William Thompson, the latter also a member of the Simpson defense team.

In the same vein, I would like to acknowledge the special debt I owe to Simpson defense team member Professor Alan Dershowitz. I read several of his books as preparation for a televised debate we had on the subject of criminal defense lawyers' ethics, and I continued to follow what he had to say, in print, in person, and on television, while preparing this essay for publication. As is obvious, the final version of this essay is in significant measure a response to his most recent book, *Reasonable Doubts*.

1. ALAN M. DERSHOWITZ, *REASONABLE DOUBTS* (1996).

matter of justice—so long as one takes a sufficiently broad and long-term view of justice (and of truth).² Indeed, he says, even if *the jurors* thought that the defendant had “done it,” a not-guilty verdict was still appropriate if it had the potential to promote justice over the long run.³

A large percentage of Dershowitz’s intended audience, however, will not accept the distinction he proposes and will continue to view the result in the Simpson case as powerful evidence of a breakdown of the criminal justice system. Furthermore, if asked to explain how such system failure could have occurred, many—if not most—would point the finger of blame back at Dershowitz and the other members of O.J. Simpson’s so-called “dream team” of defense lawyers, insisting that they acted “unethically” in securing his acquittal. Many, therefore, view “reform” of lawyer ethics—meaning hobbling defense lawyers by eliminating some of their most effective courtroom tactics—as a promising “magic bullet” that will help prevent future travesties of justice.⁴

2. *Id.* at 16 (the source for the material paraphrased on the dust jacket). In chapter 2, “Is the Criminal Trial a Search for Truth,” Professor Dershowitz distinguishes between objective truth and the truth that criminal trial jurors must deal with, which is qualified by legal rules that put a “thumb on the scale” in favor of a finding of not guilty. *Id.* at 34-48. These “barriers to absolute truth,” he says, may contribute to the search for truth “in the long run,” while “probably sacrificing truth in a particular case.” *Id.* at 41.

3. See *id.* at 95-96, where Professor Dershowitz discusses whether jurors ought to acquit or convict, if they become convinced *both* that a defendant is factually guilty *and* that the police have planted evidence. Surmising that most persons would vote to acquit under such circumstances, Dershowitz labels this a “genre of jury nullification”—a “genre,” it should be noted, that is virtually identical to what I am calling “jury nullification of the third kind” in this essay. See *infra* note 11 and accompanying text.

4. As Professor Ronald Allen points out in his contribution to the Symposium, *The Simpson Affair, Reform of the Criminal Justice Process, and Magic Bullets*, 67 U. COLO. L. REV. 989 (1996), politicians have tumbled over themselves in a mad dash to be the first to find the single “magic bullet” that will “cure” whatever it was that “went wrong” in the Simpson case.

Agreeing that many have identified the defense team’s supposedly unethical conduct as a worthy target for such a magic bullet, Allen predicts with some irony—and I believe with considerable accuracy—that the defense victory will prove to be a Pyrrhic one. “For every bill in the hopper designed to deal with police perjury and ineffective judges,” he says, “I suspect that there are at least ten designed to make it easier to convict defendants.” *Id.* at 991.

It is not clear whether Professor Dershowitz has taken account of this likely reality in his calculus of long and short-term “justice.” DERSHOWITZ, *supra* note 1. In other words, even accepting his postulate that the acquittal of a factually guilty person is a short-term injustice that can sometimes lead to long-term justice (because

Asked by the organizers of the University of Colorado Law Review Symposium to comment on such proposals for reform, I begin by rejecting the premise that the criminal justice system failed in the Simpson case. Although I was as appalled by the short-term injustice of the verdict as any of Professor Dershowitz's readers, and saddened by the racial divisions in our society that it both laid bare and deepened, I nonetheless believe that the system functioned more or less as it was designed. Furthermore, I agree with Dershowitz that the basic design of the adversary system is sound—that despite its nasty methods and sometimes unpalatable short-term results, it is generally productive of social good in the long run. Thus, American society as a whole—not just lawyers and their clients—would suffer from any knee-jerk, lawyer-bashing response to the Simpson verdict.

I also reject the popular diagnosis that the “dream team” lawyers acted unethically, and, *a fortiori*, I reject the commonly proffered cure of legal ethics “reform.” Instead, I contend that the lawyers did exactly what ethical lawyers are supposed to do—*rightly* supposed to do—in the rough-and-tumble world of hired-gun adversary ethics, pausing now to note *en passant* that I regard the label of “hired gun” as a badge of honor rather than an invitation to a fistfight, at least in the context of a seriously contested criminal trial.

What, then, did the ethical hired guns in the Simpson case actually do to carry out their assigned mission? First, although they plainly knew of Mr. Simpson's guilt,⁵ they quite properly

fewer wrongful convictions are likely to occur in the future), what discount should be applied to the even longer-term injustice of short-sighted reforms that may result in *more* wrongful convictions? (I am indebted not only to Professor Allen for this insight into the vagaries of utilitarian calculus, but to my colleague Michael Heise.)

5. Throughout this essay, I am speaking exclusively of *factual* guilt, but with that caveat noted, I do assert, without equivocation, that the “dream team” lawyers “knew” of Mr. Simpson's factual guilt. What it means to say that a lawyer “knows” something, and how such knowledge is proved, are two of the most vexing questions in all of legal ethics. See *infra* note 59 and accompanying text.

Whether O.J. Simpson's lawyers could be charged with “knowledge” of the uncomfortable fact of their client's guilt was at the heart of a short debate I had with Alan Dershowitz on the *Larry King Live* television program, August 28, 1995. During the course of the debate, we both agreed that it is perfectly proper for lawyers to *defend* clients whom they know are factually guilty and to employ a variety of aggressive trial tactics in doing so. *Larry King Live* (CNN television broadcast, Aug. 28, 1995). We further agreed that it is *improper* for a lawyer to allow such a client to take the witness stand, since under those circumstances the lawyer would also know that the ensuing testimony would be perjurious. *Id.* Where we disagreed, of

made themselves oblivious to it. Second, they zealously defended their client, but only "within the bounds of law,"⁶ for they merely exploited every prosecutorial miscue with gusto and took maximum advantage of the many features of the criminal justice system formally designed to tilt the playing field in the defendant's favor.⁷

course, was precisely whether Mr. Simpson's lawyers had the requisite "knowledge" to trigger the duty to silence the client. *Id.* As noted above, I maintain my position that the lawyers did know and that it is possible for third persons (such as myself) to know that they knew. It was in this context that I asserted during the debate that Professor Dershowitz was lying when he said that he believed his client's protestations of factual innocence, but I also made it clear—I hope—that under the circumstances it was appropriate and even mandatory for him not to tell the truth to a television audience.

6. Canon 7 of the Model Code of Professional Responsibility is entitled "A Lawyer Should Represent a Client Zealously Within the Bounds of the Law." MODEL CODE OF PROFESSIONAL RESPONSIBILITY Canon 7 (1980). For a discussion of this duty, its counterpart as stated in the Model Rules of Professional Conduct, and how "the bounds of law" are defined, see *infra* notes 19-33 and accompanying text.

7. Features favorable to the defendant include the obligation of the prosecution to prove every element of the crime beyond a reasonable doubt, *In re Winship*, 397 U.S. 358 (1970); the obligation of the court to suppress truthful and reliable evidence that was gathered in violation of the defendant's Fourth Amendment rights, *Mapp v. Ohio*, 367 U.S. 643 (1961); and the right of the defendant to refuse to take the stand, without fear that this failure will be commented upon negatively by either the prosecution or the court, *Griffin v. California*, 380 U.S. 609 (1965).

I specify in the text that these advantages are merely "formal" advantages. As several of the other Symposium participants have noted, in the vast majority of cases processed through the system, criminal defendants will *not* have access to the kind of aggressive lawyering that set O.J. Simpson free because they will not have access to the necessary financial resources. This means that they will not actually be able to take advantage of all that is "formally" available to them. See, e.g., Allen, *supra* note 4, at 993; Paul F. Campos, *The Color of Money*, 67 U. COLO. L. REV. 921 (1996); Robert J. Cottrol, *Through a Glass Diversely: The O.J. Simpson Trial as Racial Rorschach Test*, 67 U. COLO. L. REV. 909 (1996); Christopher B. Mueller, *Introduction: O.J. Simpson and the Criminal Justice System on Trial*, 67 U. COLO. L. REV. 727 (1996).

Ironically, even where the government is obligated to narrow somewhat this gulf by providing counsel free of charge to indigent defendants, *Gideon v. Wainwright*, 372 U.S. 335 (1963), the actual right falls far short of the formal because the typical public defender rarely has the time and resources to spend more than a few hours on a case.

With these caveats duly noted, however, it is still appropriate to discuss and judge the system—and the lawyer's role in it—according to the system's own professed or idealized norms. The same caveat about the distinction between formal availability and actual availability applies with equal force to all that I will say with respect to the interaction between defense lawyers and jurors, including the possibility of inducing jury nullification. In the vast majority of cases there will be *no* such interaction because there will be no jurors: at least ninety percent of cases are disposed of through plea bargaining.

Despite the fact that the formal advantages granted to criminal defendants rarely

The defense offered no perjured testimony, fabricated or hid no evidence,⁸ but employed the common strategy of deflecting the jurors' attention away from what Professor Dershowitz calls "the ultimate truth" and onto certain "intermediate" truths.⁹ In the specific context of the Simpson case, this meant an overall game plan that would divert attention away from the defendant's obvious factual guilt and onto the actual and conjectured misconduct of government agents. From this platform, the defense lawyers were able to induce even the jurors who harbored no doubts—and certainly no reasonable doubts—about whether O.J. Simpson actually "did it," to vote for acquittal anyway, as a matter of long-term justice.¹⁰

Such a vote by a juror is a modern form of the age-old practice of jury nullification—a form that I call "jury nullification of the third kind" in order to distinguish it from what I will explain as jury nullification of the first and second kinds.¹¹ Jury

have an impact on the proceedings, these and other similar features of the American criminal justice system have come under frequent attack because they are nonetheless said to give the defendant too great an advantage and the government too great a burden. A notable recent example of such an attack is HAROLD J. ROTHWAX, *GUILTY: THE COLLAPSE OF CRIMINAL JUSTICE* (1996).

8. As Simpson attorney Gerald Uelmen described at the forum in San Antonio, *see supra* note *, and in his book about the trial, GERALD F. UELMEN, *LESSONS FROM THE TRIAL: THE PEOPLE V. O.J. SIMPSON* (1996), he found a knife that O.J. Simpson had earlier purchased, still in the medicine cabinet of his bathroom. Aware that inculpatory evidence must be turned over by the defense to the prosecution, *People v. Meredith*, 29 Cal.3d 682, 631 P.2d 46 (1981), and that conviction would almost certainly follow if the knife had any of the victims' blood on it, Professor Uelmen nonetheless arranged to have the knife tested.

9. DERSHOWITZ, *supra* note 1, at 35.

10. *See id.* at 43, where Professor Dershowitz makes this concession: Even in an individual case, there are different types—or layers—of truth. The defendant may have done it—ultimate truth!—but the police may have lied in securing the search warrant. Or the police may even have planted evidence against *guilty* defendants . . . as some jurors believed the police did in the Simpson case.

(Emphasis added.)

11. *See infra* notes 56-58 and accompanying text. Professor Dershowitz agrees with me that a nontraditional "form" of jury nullification may have been at work in the Simpson case, at least in the case of some of the jurors:

nullification (of all kinds) has deep roots in American legal history and is so thoroughly interwoven with the institution of the jury trial that it cannot be eliminated unless the jury itself is eliminated.¹² But if the possibility of some form of jury nullification is always legitimately in play whenever a jury is in the box, then coaxing a nullification vote from the jurors must also be counted as one of the criminal defense attorney's built-in arsenal of tactical weapons. Thus, the Simpson lawyers cannot be faulted or branded as "unethical" for making jury nullification (of the third kind) the centerpiece of their defense.¹³ Indeed, given the

It is, of course, possible that other jurors reached the same [not guilty] verdict by quite different reasoning [They believe instead] that the remaining [nontainted] evidence does prove Simpson's guilt beyond a reasonable doubt Despite their belief that the defendant is [factually] guilty, they refuse to convict, on the ground that it would be wrong to convict any defendant against whom the police deliberately planted evidence Such a decision would be a form of jury nullification, but *a very different form* than most of the commentators have been discussing. . . . It would be jury nullification of a kind that has legitimate roots deep in our history.

DERSHOWITZ, *supra* note 1, at 92-93 (emphasis in original). See also *id.* at 95, where the author speaks of a different "genre" of jury nullification.

12. The reason that jury nullification cannot be totally eliminated under the current jury system is that one or more jurors can always ignore the evidence or the court's instructions with complete impunity; furthermore, the government is powerless to appeal if jury nullification produces a verdict that is not supported by the evidence. See *infra* notes 44-46 and accompanying text.

In Andrew Leipold, *Rethinking Jury Nullification*, 82 VA. L. REV. 253 (1996), however, the author makes the provocative suggestion that jury nullification could be restricted by transforming it into an affirmative defense akin to duress or self-defense, available only to defendants who meet a burden of proving that they "deserve" the jury's mercy or special consideration, even if the case against them is proved beyond a reasonable doubt. If the jury did then "acquit against the evidence," the government would be permitted to appeal to demand a new trial. Professor Leipold concedes that his proposal is radically at odds with current doctrine, but he nevertheless makes a strong case that his regime would not violate any constitutional commands. *Id.*

Whether it is possible under current conditions to "reform" legal ethics to prevent lawyers from inducing jury nullification, without also effectively eliminating the jury trial, is a slightly different question. See *infra* notes 31-33 and accompanying text.

13. In a response to this essay, Rebecca Love Kourlis, *Not Jury Nullification; Not a Call for Ethical Reform; But Rather a Case for Judicial Control*, 67 U. COLO. L. REV. 1109 (1996), the author, a Justice of the Colorado Supreme Court, rejects my contention that jury nullification must explain most of the jurors' votes in the Simpson case. She argues that nullification is *not* an acceptable jury response and that it *would* accordingly be unethical for lawyers to attempt to induce it. *Id.* at 1109, 1112-14. However, she concludes by denying that that was the defense team's game plan or that chief trial counsel Johnnie Cochran did more than "flirt" with jury nullification in his closing argument. *Id.* at 1114-17.

In most of the rest of this essay, I take issue with Justice Kourlis on the

duty of zealous advocacy,¹⁴ it was *obligatory* for these ethical lawyers to make the attempt, once they concluded that doing so was tactically sound.

Of course, critics will continue to counter that the very notion of an "ethical lawyer" is a cruel oxymoron, that a system that not only countenances but *obligates* lawyers to "sacrifice truth"¹⁵ in order to benefit a client is a system that is already badly broken, and that a system without a level playing field is already morally bankrupt. The excuse that the lawyers were only doing their jobs will not resonate with those who protest that no one should have such a dishonorable job in the first place.¹⁶ Members of the

appropriateness of jury nullification, but I also disagree with her analysis of what actually happened at the trial. In my view, not only was most of the closing argument an overt call for a form of jury nullification, but the defense team used every opportunity during the trial to hammer home its view that racial bias colored the activities of the police officers who investigated the case, in particular by reminding the jurors that these officers were members of the same Los Angeles Police Department that was responsible for beating motorist Rodney King. See *infra* note 40.

For example, whenever a reference was made to videotaped evidence in the Simpson trial, the defense would remind the jurors that what appears on videotape is not always believed—a plain reference to the fact that the beating of Rodney King had been videotaped but that the police officers who administered the beating were nonetheless acquitted by an all-white jury from Simi Valley. And when the defense lawyers tried to retrace the movements of chief investigator Philip Vannatter after he took control of certain evidence, including a key blood sample from Mr. Simpson, they lost no opportunity to remind the jurors that the detective also lived in Simi Valley—a point on the map that carries as much baggage in Los Angeles as "the grassy knoll" does in Dallas!

Finally, as Jeffrey Toobin pointed out in a profile of Simpson attorney Robert Shapiro in the *New Yorker* magazine, Mr. Shapiro—who castigated his colleagues after the trial for "playing the race card from the bottom of the deck"—was not above currying favor with the largely black jury by emphasizing that among the credentials and employment history of forensic pathologist and defense expert Dr. Michael Baden was a period of service in a clinic in *Harlem*. See Jeffrey Toobin, *A Horrible Human Event*, *NEW YORKER*, Oct. 23, 1995, at 40.

14. See *infra* notes 19-33 and accompanying text.

15. DERSHOWITZ, *supra* note 1, at 41; see also *supra* note 2.

16. For one of the best known and most trenchant criticisms of what he calls "the adversary system excuse," see DAVID LUBAN, *LAWYERS AND JUSTICE: AN ETHICAL STUDY* (1988), especially *Introduction* at xvii-xxvi, and chapter 4, "Enter the Adversary System," at 50-66. For further discussion of whether actions may be justified on the basis that they fit into an existing social context, often described as "role differentiation," see *infra* notes 71-75 and accompanying text.

It should be noted that most critics of "overly aggressive" and role-differentiated adversary ethics—including Professor Luban—make an exception for criminal defenders. See, for example, David Luban, *Are Criminal Defenders Different?*, 91 *MICH. L. REV.* 1729 (1993), which was a response to William Simon, *The Ethics of Criminal Defense*, 91 *MICH. L. REV.* 1703 (1993), a rare dissenting view on this

Simpson defense team thus joined a long line of trial advocates who do battle in the courtroom on behalf of despised clients, only to become despised for it in return and to be held up as negative examples in the next lawyer-bashing attack on the criminal justice system.

As I will describe at the conclusion of this essay, the tradition of no-holds-barred advocacy is perhaps best exemplified by the great nineteenth-century barrister Henry, Lord Brougham, who, defending the Queen of England against a criminal charge of adultery, faced down King George IV with an implicit threat to reveal some discomfiting information that could have led to civil turmoil.¹⁷ Lord Brougham differentiated between his role as an advocate and his role as a patriot, but he no doubt understood that both roles could also be harmonized. After all, the society that Lord Brougham shocked with his aggressive advocacy was the same society that took pride in a rule of law that authorized use of those very tactics.

Perhaps O.J. Simpson's "dream team" of criminal defense lawyers will be able to take similar solace.¹⁸ If they acted zealously, within the bounds of law—as I argue that they did—then they fulfilled their ethical obligation not only to their client but to society as well, for it was society that assigned them the role of fighting without quarter for their client and at the same time sustaining a criminal system that is at least capable of producing long-term justice, no matter what happens in any particular case.

subject. At the same time, most defenders of hardball tactics in turn limit their most passionate defenses of the adversary system to the criminal context. See, e.g., Monroe H. Freedman, *Professional Responsibility of the Criminal Defense Lawyer: The Three Hardest Questions*, 64 MICH. L. REV. 1469 (1966).

As intimated above, however, Professor Simon has argued that the most aggressive tactics are equally questionable in both civil and criminal cases. See also Fred Zacharias, *The Civil-Criminal Distinction in Professional Responsibility*, 7 J. CONTEMP. LEGAL ISSUES (forthcoming 1996), where the author argues that the "acceptable" level of adversariness ought not to be measured with respect to the difference between criminal and civil litigation—a difference he claims is often overstated—but to the resources available to both sides.

17. For a discussion of Lord Brougham's famous statement in the House of Lords, and of the context in which it was made, see *infra* notes 76-77 and accompanying text.

18. Interestingly, Simpson attorney Gerald Uelman invokes Lord Brougham as early as the second page of his book about the trial. See *supra* note 8.

II. ZEALOUS DEFENSE OF THE FACTUALLY GUILTY, WITHIN THE BOUNDS OF LAW

According to the professional conduct rules applicable to American lawyers, once defense counsel enter a case, they must represent their clients "zealously, within the bounds of law."¹⁹ This means that defense counsel must attempt to secure the acquittal of the accused, whether or not he is factually guilty, and even if the lawyers know that he is. It is not the obligation of defense counsel to seek the truth—indeed, as Alan Dershowitz pointedly notes in his book about the Simpson trial, exactly the *opposite* is required when the defendant is known by his lawyers to be factually guilty!²⁰ Furthermore, almost everyone agrees that such situations—where zealous representation is synonymous with obfuscating and distorting the truth—are common.

Certainly, Professor Dershowitz agrees. In his earlier book *The Best Defense*,²¹ for example, he provided a list of somewhat sardonic "Rules of the Justice Game," the first two of which were:

- Rule I. Almost all criminal defendants are, in fact, guilty.
- Rule II. All criminal defense lawyers, prosecutors and judges understand and believe Rule I.²²

19. This phraseology is taken from Canon 7 of the Model Code of Professional Responsibility: "A Lawyer Should Represent a Client Zealously Within the Bounds of the Law." The Model Code was promulgated by the American Bar Association (ABA) in 1969, and very quickly adopted, virtually verbatim, in almost all states.

In 1983, the ABA substituted the Model Rules of Professional Conduct for the Model Code, and over 35 jurisdictions have followed suit, although often with significant amendments. Model Rule 1.3 speaks more tepidly of "reasonable diligence and promptness in representing a client," but the Official Comment to the Rule resurrects some sense of the older language: "A lawyer should act with commitment and dedication to the interests of the client and with zeal in advocacy upon the client's behalf." MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.3 cmt. 1 (1983).

20. See DERSHOWITZ, *supra* note 1, at 166: "[A] criminal trial is anything but a pure search for truth. When defense attorneys represent guilty clients—as most do, most of the time—their responsibility is to try, by all fair and ethical means, to prevent the truth about their client's guilt from emerging." (Emphasis in original.)

Of course, Dershowitz is here neither admitting nor denying that he personally knew of O.J. Simpson's guilt, but his point is that he and the other defense lawyers would have been obligated to take the same action regardless of their knowledge. I *am* claiming that the lawyers knew about Simpson's guilt, but I am also agreeing that the defense tactics were "within the bounds of law" without regard to that knowledge.

21. ALAN M. DERSHOWITZ, *THE BEST DEFENSE* (Vintage Books 1983) (1982).

22. *Id.* at xxi. To be fair to Professor Dershowitz, it should be noted that his Rule IV states that "almost all" police officers lie about search-and-seizure issues, and

Furthermore, earlier in the Introduction to the same book, Dershowitz stated that almost all of his *own* clients have been factually guilty.²³ In a similar vein, John Mitchell, a practicing criminal defense lawyer and consultant, began an important article in the *Stanford Law Review* about the role of defense counsel with the confession that he shared responsibility for putting many dangerous people back on the streets whom he *knew* were guilty of serious crimes.²⁴

In an often-quoted musing on the adversary system, Supreme Court Justice Byron White also accepted the underlying premise that the task of defense attorneys is to impede the prosecution even of *guilty* defendants, with very little thought for the immediate justice of the situation. Although dissenting from the Court's holding that criminal defendants have a constitutional right to counsel at a pretrial identification line-up,²⁵ Justice White nonetheless celebrated the role of defense counsel as follows, and

that his Rule V is that "all prosecutors, judges, and defense attorneys are aware of Rule IV." *Id.* at xxi-ii. In Christopher Slobogin, *Testilying: Police Perjury and What to Do About It*, 67 U. COLO. L. REV. 1037 (1996), another paper delivered at the University of Colorado Law Review Symposium, the author accepts (as I do) that both of these claims are essentially sound, even if somewhat exaggerated.

23. DERSHOWITZ, *supra* note 21, at xiv. There is irony in Professor Dershowitz's assertion that so many actors in the drama of a criminal trial commonly "know" where the truth lies. Defense lawyers know when their clients are factually guilty, he says; judges and prosecutors know when the police are lying, and scholar-lawyers know when judges and prosecutors are covering up for the police. *Id.* at xxi-ii.

While I completely agree with Professor Dershowitz that it is not difficult to discern when someone else "knows" something of substance, it is ironic to find him thus lending support to my key contention that it is possible to state with some confidence that virtually everyone involved in the O.J. Simpson case—including the lawyers and the jurors—"knew" of the defendant's factual guilt. See *infra* notes 59-70 and accompanying text.

24. John B. Mitchell, *The Ethics of the Criminal Defense Attorney—New Answers to Old Questions*, 32 STAN. L. REV. 293 (1980). As discussed further at *infra* note 59, I believe that Mr. Mitchell uses an unacceptably narrow definition of "knowing" when he makes this claim, for he limits "knowledge" to situations in which his client has confidentially (and reliably) admitted his factual guilt to his lawyer. Even with that narrow standard in play, however, Mr. Mitchell still claims that it was common for him to "know" of his clients' guilt. *Id.* at 296-98 n.12.

Two other well known "confessionals" are KENNETH MANN, *DEFENDING WHITE COLLAR CRIME: A PORTRAIT OF ATTORNEYS AT WORK* (1985), and JAMES KUNEN, "HOW CAN YOU DEFEND THOSE PEOPLE?": THE MAKING OF A CRIMINAL LAWYER (1983). See also Barbara Allen Babcock, *Defending the Guilty*, 32 CLEV. ST. L. REV. 175 (1983-84).

25. *United States v. Wade*, 388 U.S. 218 (1967).

began to move beyond description of adversary ethics to justification:

But defense counsel has no . . . obligation to ascertain or present the truth. Our system assigns him a different mission. . . . [W]e . . . insist that he defend his client whether he is innocent or guilty. . . . If he can confuse a witness, even a truthful one, or make him appear at a disadvantage, unsure or indecisive, that will be his normal course. . . . [M]ore often than not, defense counsel will cross-examine a prosecution witness, and impeach him if he can, even if he thinks the witness is telling the truth, just as he will attempt to destroy a witness who he thinks is lying. In this respect, as part of our modified adversary system and as part of the duty imposed on the most honorable defense counsel, we countenance or require conduct which in many instances has little, if any, relation to the search for truth.²⁶

Even more powerful defenses of defending the guilty not only accept the underlying assumption that the practice is common but hinge their whole defense on it. A notable example of this approach was provided by Jethro Lieberman, the legal affairs editor of *Business Week Magazine*:

[T]he singular strength of the adversary system is measured by a central fact that is usually deplored: The overwhelming

26. *Id.* at 256-58 (White, J., dissenting in part and concurring in part) (footnotes omitted).

Building on Justice White's phraseology, Professor Harry Subin initiated a spirited exchange on whether cross-examination of a truthful witness ought to be considered within or without "the bounds of law." See Harry I. Subin, *The Criminal Lawyer's "Different Mission": Reflections on the "Right" to Present a False Case*, 1 GEO. J. LEGAL ETHICS 125 (1987); John B. Mitchell, *Reasonable Doubts Are Where You Find Them: A Response to Professor Subin's Position on the Criminal Lawyer's "Different Mission"*, 1 GEO. J. LEGAL ETHICS 339 (1987); Harry I. Subin, *Is This Lie Necessary? Further Reflections on the Right to Present a False Defense*, 1 GEO. J. LEGAL ETHICS 689 (1988).

Other notable contributions to this debate include MONROE H. FREEDMAN, *UNDERSTANDING LAWYERS' ETHICS* (1990), chapter 8, "Cross-Examining to Discredit the Truthful Witness," and Murray L. Schwartz, *On Making the True Look False and the False Look True*, 41 SW. L.J. 1135 (1988). Significantly, in the third (1993) edition of the American Bar Association's Standards for Criminal Justice, Defense Function Standard 4-7.6 states without equivocation that "defense counsel's belief or knowledge that the witness is telling the truth does not preclude cross-examination," whereas in earlier editions, defense counsel were enjoined to "take into consideration, if possible," such belief or knowledge. ABA STANDARDS FOR CRIMINAL JUSTICE, PROSECUTION FUNCTION AND DEFENSE FUNCTION, Standard 4-7.6 (3d ed. 1993).

majority of those accused in American courts are guilty. Why is this strength? . . . [T]he strength of the adversary system is not so much that it permits the innocent to defend themselves meaningfully, but that in the main *it prevents them from having to do so*. . . .

. . . Only because defense lawyers . . . defend fiercely and partisanly do we ensure that the state will be loath to indict those whom it knows to be innocent. This result . . . is largely invisible. We rarely see who is *not* indicted, we never see those whom a prosecutor, or even a governor or president might like to prosecute *but cannot*.²⁷

Defense attorney Mitchell made the same point by postulating that the criminal justice system is less a device for discovering the truth than it is a series of "screens" designed to make it exceedingly difficult for the innocent to be convicted.²⁸ Furthermore, in Mitchell's account, as in Mr. Lieberman's, it is the mere existence of the last and most exacting screen—a jury trial in which a single juror can prevent a conviction without having to give a reason—that most heavily influences which cases will be permitted to pass through the earlier screens. Concretely, this means that if the prosecution knows that it will have an especially hard time proving its case at trial—in *large part because defense counsel are ready and able to employ the full measure of obscurantist tactics*—then the prosecution will only take the most compelling cases to trial and will abort other cases at an earlier stage or "screen" by electing not to prosecute at all, or by being especially generous during plea bargaining.

These lines of argument are very persuasive to most lawyers and legal scholars, even those who express some misgivings about the excesses of adversary ethics.²⁹ But much of the public cannot

27. Jethro K. Lieberman, Book Review, 27 N.Y.L. SCH. L. REV. 695, 695 (1981) (reviewing MARVIN E. FRANKEL, *PARTISAN JUSTICE* (1980)) (emphasis added). Judge Frankel's book is a well-known criticism of some of the excesses of defense tactics, but far from a simplistic exercise in lawyer-bashing.

28. Mitchell, *supra* note 24, at 299-313.

29. See, for example, the last article in the Subin-Mitchell-Subin exchange noted in *supra* note 26, in which Professor Subin grudgingly concedes that he would countenance most of the tactics proposed by Mr. Mitchell.

As noted at *supra* note 16, Professor David Luban is sharply critical of much of adversary ethics, yet he makes almost a blanket exception for criminal defense lawyers. Luban is in effect echoing both Professor Dershowitz and Justice White when he says that "[t]he political argument for zealous criminal defense does not claim that the adversary system is the best way of obtaining justice. It claims just the opposite, that this process is the best way of *impeding* justice in the name of more

so readily accept the fact that the stock-in-trade of criminal defenders is to *frustrate* the search for truth in the short run, in order to serve longer-term goals. That is, after all, precisely what prompted demands for legal ethics "reforms" that would prevent a repeat of what so many people thought was the breakdown of the system in the Simpson case.

If the public becomes sufficiently incensed, it can indeed insist that the bounds of law be moved inward to *exclude* from the lawyer's repertoire truth-defying tactics that it can no longer stomach. The public can have its way by lobbying for specific legislation regulating the conduct of lawyers or by putting pressure on bar associations and courts to amend the codes of ethics. But if I am right that the chief defense tactic of the Simpson defense team—right from the start—was to induce a form of jury nullification masquerading as reasonable doubt,³⁰ then the only truly effective and *responsive* reform would be to remove defense counsel's target audience by abolishing jury trials altogether.³¹ That, of course, would require constitutional amendment, eliminating the jury trial clause of the Sixth Amendment.

Society is not ready to prescribe such strong medicine, however, even in today's climate of lawyer-bashing and "throw-away-the-key" penology. In the American tradition, the institution of the criminal jury trial is virtually synonymous with justice and with the rule of law itself. Moreover, I believe that the reason that the criminal jury trial has achieved its exalted status as an icon of democracy and irreducible core of the criminal justice system is precisely *because* it has always included the

fundamental political ends, namely keeping the government's hands off people." LUBAN, *supra* note 16, at 63 (emphasis added).

30. See *supra* note 13.

31. As described at *supra* note 12, it is difficult to imagine a contemporary American jury trial in which jury nullification could reliably be eliminated or even severely restricted. As further described at *infra* notes 44-46 and accompanying text, there are at present no procedural devices available to police such restrictions.

My colleague Michael Heise pointed out to me that even granting this relationship, it would be literally possible to preserve the jury trial, preserve the possibility of jury nullification, but to make it essentially impossible for *lawyers* to induce or encourage it. Jury trials could be required to go forward without any opening or closing arguments, for example. Or cross-examination could be limited to a set of questions preapproved by the court for each witness. Proceedings so cleansed of lawyers' input, however, would cease to deserve the name of "jury trial," at least as that institution is understood in the American tradition.

express or implied possibility of "tailored justice" in the form of jury nullification.

No segment of society—from militant leftists to right-wing militiamen to antiabortion protesters to "establishment" figures accused of campaign-finance violations or lying to Congress—can risk the abolition of the criminal jury trial, precisely because no segment of society can risk a perilous journey through the criminal justice system without even the possibility that some form of jury nullification might be availing.³² It is similar to the dilemma of nuclear disarmament—no one dares disarm first. Furthermore, the need for all in society to preserve the possibility of cloaking themselves in the protective blanket of a friendly jury has become all the more critical, as race continues to dominate both the political landscape and the day-to-day reality of the criminal justice system.³³

III. THE CRIMINAL JURY AS DEMOCRATIC INSTITUTION, AND JURY NULLIFICATION OF THE FIRST KIND

Even before the founding of our Republic, the American jury had—and was instructed that it had—the explicit power and right to decide the law as well as the facts in a criminal case. To the colonists, this power was considered to be an essential democratic check on the excesses of our British rulers and their representatives. Furthermore, throughout the revolutionary period leading to the adoption of the United States Constitution, there was virtually unanimous agreement that both the institution of the jury trial *and* the right of jurors to judge the law had to be maintained as a further check on the possible future excesses of our home-grown governments. Service on a criminal jury was one of the chief ways in which Americans—propertied white male Americans only in those days, of course—exercised the power of self-rule through democratic deliberation, and that deliberation *included* deliberation about the justness of the applicable law.

Under such a regime, it was easy for "classical" jury nullification—"jury nullification of the first kind"—to flourish. In

32. This perception, and much of the historical material that follows, are taken from JEFFREY ABRAMSON, *WE, THE JURY: THE JURY SYSTEM AND THE IDEAL OF DEMOCRACY* (1994), an excellent, but ultimately overly optimistic, book.

33. See *infra* notes 49-50, 60, 70 and accompanying text.

the glorious 1735 seditious libel trial of John Peter Zenger, for example, the law was clear that merely publishing an item that held up public officials to ridicule *was* the crime, regardless of the truth of what had been said. The defendant was "obviously guilty" of the crime as so defined, since the material published was sharply critical of government officials in New York state, but the jury acquitted the defendant anyway, to the accompaniment of loud cheers in the courtroom.³⁴ Or consider the 1851 case of *United States v. Morris*,³⁵ where Boston abolitionists who had in broad daylight stormed into a proceeding before a federal magistrate under the Fugitive Slave Law and spirited a former slave away to Canada before he could be returned to captivity in Virginia were acquitted of federal criminal charges of aiding and abetting escape, after their lawyer urged the jurors to find the law unconstitutional!³⁶

No later than the turn of the twentieth century, however, the courts had formally imposed a rigid separation between law and fact,³⁷ and jurors today are routinely instructed that they are *not* free to vote their consciences and *must* accept the law as given to them by the court in its instructions.³⁸ A major point of this radical rethinking of the role of jurors was the recognition that the ennobling and empowering ideal of democratic control could

34. Brief modern accounts of the Peter Zenger trial may be found in ABRAMSON, *supra* note 32, at 73-75, and Vincent Blasi, *The Checking Value in First Amendment Theory*, 1977 AM. BAR FOUND. RES. J. 521.

Zenger, it is often forgotten, was merely the *printer* of the *New York Weekly Journal*, a newspaper published by a faction bitterly opposed to the then administration of New York state. The *publisher* of the newspaper was James Alexander, a lawyer and editorialist. His contemporaneous account of the trial was re-issued in modern times: JAMES ALEXANDER, A BRIEF NARRATIVE OF THE CASE AND TRIAL OF JOHN PETER ZENGER: PRINTER OF THE NEW YORK WEEKLY JOURNAL (Stanley Nider Katz ed., 1963).

35. 26 F. Cas. 1323 (C.C.D. Mass. 1851).

36. This argument, and its apparent acceptance by the jury, was all the more remarkable because the United States Supreme Court had previously upheld similar statutes against a variety of constitutional challenges in *Prigg v. Pennsylvania*, 41 U.S. (16 Pet.) 539 (1842). The *Morris* case is discussed in ABRAMSON, *supra* note 32, at 80-82.

37. The most often cited case is *Sparf & Hanson v. United States*, 156 U.S. 51 (1895).

38. As Justice Rebecca Love Kourlis quite properly points out in her response to this essay, even in the two states, Indiana and Maryland, that today still retain constitutional provisions making the jurors the judges of the law, standard jury instructions effectively remove the right of jurors to set aside and ignore laws with which they do not agree. Kourlis, *supra* note 13, at 1111.

also degenerate into undisciplined "mob rule," even if the mob was only twelve people. We may justly celebrate the great victory of Peter Zenger, but which day on the calendar do we set aside to honor the juries that freed the killers of Emmett Till, Viola Liuzzo, Herbert Lee, and Medgar Evers,³⁹ or the stalwarts from Simi Valley who failed to see *any* excess force on the infamous Rodney King videotape?⁴⁰

In her response to this essay, Colorado Supreme Court Justice Rebecca Love Kourlis launches an almost identical attack on jury nullification of the first kind: it leads to anarchy, she says, and "[leaves] the fate of both society and a defendant . . . to the arbitrary and capricious notions of at most twelve individuals."⁴¹ She also juxtaposes the Peter Zenger case with modern, odious examples of jury nullification to show its double-edged character.⁴² From this point of agreement with me, Justice Kourlis then proceeds to argue that it is unethical for lawyers to invite jury nullification and improper for jurors to accept the invitation.

I respectfully disagree, for two distinct reasons. First, although I am just as troubled as is Justice Kourlis by "improper"

39. These are only four of the most notorious cases in which all-white Southern juries quickly acquitted (or could not agree on convicting) white men accused of murdering blacks or civil rights workers. In each case, the evidence of factual guilt was virtually irresistible, often including either the testimony of eyewitnesses or evidence that the defendant had publicly bragged about the killings.

Justice was eventually achieved in the Medgar Evers case; Byron de la Beckwith, whose two 1963 trials for the murder both ended with hung juries, was convicted by a racially mixed jury in February 1994.

40. As is well known, ex-convict Rodney King was arrested by officers of the Los Angeles Police Department after a high-speed automobile chase on March 3, 1991. The officers, claiming that King was resisting arrest upon his removal from the car, subjected him to a savage beating that was captured on videotape by a bystander. The footage was broadcast repeatedly on television, and it was played numerous times for jurors when four of the police officers were tried in state court on assault charges in the Simi Valley area near Los Angeles.

The jury—all-white except for one Asian man and a Hispanic woman who held out for at least one conviction for a number of days—acquitted the officers on April 29, 1992, immediately touching off one of the most violent riots in American history. Subsequently, the four officers were tried in federal court in Los Angeles on charges of violating Rodney King's civil rights, and a racially mixed jury convicted two of the officers on April 17, 1993.

41. Kourlis, *supra* note 13, at 1112.

42. As will be seen, the modern examples cited by both Justice Kourlis and me are actually examples of jury nullification of the *third* kind. See *infra* notes 56-58 and accompanying text. The contrast to the Zenger case, however, is still sound and lies mainly in the offensiveness of the results.

uses of classic jury nullification, I would be even more troubled if she or I or anyone else were empowered to “rule” authoritatively on which instances of jury nullification are “proper” and which are not. That is the trouble with democracy: if ordinary people are given the vote—whether at the polls or in the jury room—they will not always vote in accord with the preferences of elite law professors and judges. But as Winston Churchill famously said: “[I]t has been said that democracy is the worst form of Government—except all those others that have been tried from time to time.”⁴³

Second, and more important for purposes of this essay, the doubts that Justice Kourlis and I share about the wisdom of jury nullification of the first kind do not apply with the same intensity to the other forms of jury nullification that have developed in more recent times. While the results produced under jury nullification of the second and third kinds may be just as odious as those produced under classical jury nullification of the first kind, at least the jury does not purport to overthrow the law itself. In modern jury nullification, it might be said, the jurors are not nullifying the law “on its face,” so much as they are finding fault with the law “as applied” to the facts of a particular case.

IV. A NEW UNDERSTANDING OF THE CRIMINAL JURY, AND JURY NULLIFICATION OF THE SECOND AND THIRD KINDS

Although, as previously described, the *right* of juries to engage in classical jury nullification had been formally eliminated in the United States by the turn of the twentieth century, their *power* to do so remained intact. The actual practice of jury nullification was not eliminated, merely driven underground—but it remained so close to the surface that it easily reappeared in the new forms that I call jury nullification of the second and third kinds. Jurors were able to retain their power, and to exercise it freely (albeit somewhat covertly), *because the government can exact no penalties and pursue no remedies* in response to this unusual kind of “cost-free” civil disobedience.

43. Winston S. Churchill, Speech Before the House of Commons (Nov. 11, 1947), in 7 WINSTON S. CHURCHILL: HIS COMPLETE SPEECHES, 1897-1963, at 7566 (Robert Rhodes ed., 1974).

Jurors who ignore the court's instructions about the law cannot be held in contempt or put in jail.⁴⁴ The Double Jeopardy Clause of the Fifth Amendment prevents retrial of an acquitted defendant, even where the jury was obviously biased against the government.⁴⁵ Furthermore, *none* of the many ways that judges have to control "runaway" civil juries or to correct "unreasonable" civil verdicts are applicable in criminal cases. Even where there are no reasonable doubts about the defendant's factual guilt, there can be no directed verdict in favor of the government, no judgment notwithstanding the verdict in the case of an unjust acquittal, and no new trial on the ground that the verdict was against the weight of the evidence.⁴⁶

But the development of new forms of jury nullification in the twentieth century cannot be ascribed solely to the lack of a checking force against them. The United States Supreme Court actively contributed by transforming the simple Sixth Amendment requirement of an "impartial" jury into a rule that the jury be drawn from a "representative cross-section of the community."⁴⁷ This line of cases led to juries that were more democrati-

44. That much has been clear since *Bushell's Case*, 124 Eng. Rep. 1006 (P.C. 1670), an English case well known and much admired by the framers of the United States Constitution.

Bushell was the foreman of the jury that acquitted William Penn of the charge of congregating for the purpose of discussing religious matters—which was illegal in seventeenth-century England, which of course had no First Amendment. He was held in contempt and jailed for returning a verdict that the trial judge found unacceptable, but eventually his petition for *habeas corpus* was granted.

45. See *Green v. United States*, 355 U.S. 184, 187-88 (1957), citing *United States v. Ball*, 163 U.S. 662 (1896). Cf. *Burks v. United States*, 437 U.S. 1, 16 (1978) (where conviction is reversed on appeal *because of insufficiency of the evidence*, judgment is tantamount to acquittal at trial, and retrial is prohibited).

In *Andrew Leipold*, *supra* note 12, at 267-76, the author argues that the Double Jeopardy Clause alone cannot explain the prohibition against governmental appeals and consequent retrials, since retrials are commonly allowed when the defendant has successfully appealed a conviction on grounds other than insufficiency of evidence. Professor Leipold is no doubt correct that the government is barred from appealing because of the *additional* impetus in the law to put a wall of protection around jury nullification, but he has not fully sorted out which is the chicken and which is the egg. Compare Peter Westen, *The Three Faces of Double Jeopardy: Reflections on Government Appeals of Criminal Sentences*, 78 MICH. L. REV. 1001 (1980) with George Thomas, *An Elegant Theory of Double Jeopardy*, 1988 U. ILL. L. REV. 827.

46. These are yet more manifestations of the fact that criminal trials in the United States are waged upon a playing field that is deliberately tilted in favor of the defendant, at least formally. See *supra* note 7.

47. The relevant text of the Sixth Amendment is as follows: "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an

cally constituted, but also more likely to engage in jury nullification of the second and third kinds.

While the Court's rhetoric in the jury composition cases has included concern for the citizenship rights of excluded classes of jurors—particularly women and racial minorities—the chief stated rationale for the “representative cross-section” requirement has been that criminal defendants are entitled to “the benefit of the common-sense judgment of the community.”⁴⁸ But since members of formerly excluded groups do not have more (or less) common sense than other citizens, and are not better (or worse) at reasoning to a judgment, this rationale has always struck me as implausible. It is much more likely that the true rationale for the “cross-section” requirement is to ensure that defendants who are themselves members of formerly excluded groups have an opportunity to seek special compassion or understanding *from their counterparts on the jury*.⁴⁹ Democratizing juries, in other words, inevitably evolved into the equivalent of a regime of “equal opportunity jury nullification.”

Once the Supreme Court—whatever its true motivation—broadened the jury venire by eliminating the most overt kinds of group discrimination, lawyers turned their attention to selecting the specific jurors who would sit on a particular jury (or, more precisely, designating through peremptory challenges which jurors would *not* sit). Since defense counsel are generally hoping that the jurors will *not* discover the truth,⁵⁰ the main tactical goal

impartial jury of the State and district wherein the crime shall have been committed.” U.S. CONST. amend. VI.

The leading case establishing the “representative cross-section” requirement is *Taylor v. Louisiana*, 419 U.S. 522 (1975), holding that a male defendant had standing to challenge the systematic exclusion of women from the jury venire, even though he himself could show no harm.

48. See, e.g., *Lockhart v. McCree*, 476 U.S. 162, 175 (1986). *Lockhart* held that the “cross-section” requirement only applies to distinctive groups in society, not to groups of people who merely share certain ideas or attitudes (such as opposition to the death penalty, as in the *Lockhart* case). *Id.*

49. There are occasional cases in which male defendants seek to have more women sit on the jury trying them, or blacks seek more white jurors, and so on, but everyone understands that the *predominant* thrust of the “representative cross-section of the community” cases is to ensure that defendant members of each group in society will be able to have a reasonable chance of seating members of the *same* group on the particular jury trying the case. That, of course, was the sober and somber point of another contribution to the Symposium. Bryan Morgan, *The Jury's View*, 67 U. COLO. L. REV. 983 (1996).

50. See *supra* notes 20-29 and accompanying text.

is not to seat fair-minded and clear-eyed jurors but rather to seat jurors who will provide the most fertile ground for planting the seeds of jury nullification.

It is true that the Supreme Court has tried to restrict the ability of both prosecutors and defense counsel to deploy their peremptory challenges in an overtly race- or gender-based manner,⁵¹ but this has only prompted lawyers to expend more creative energy concocting race- and gender-neutral explanations for what are in fact race- and gender-based challenges.⁵²

New forms of jury nullification readily took root and flourished under the new ground rules generated by the Supreme Court's decisions and lawyers' constant attempts to push the envelope of jury selection: in a system that values diversity of experience over disinterestedness in its jurors, lawyers have little difficulty convincing jurors to see themselves as interest group representatives or lobbyists working out a "political" solution to a problem on behalf of their "constituencies."⁵³

In some situations, jurors will have no political or moral objections to the law itself, as the jurors surely did in the dramatic examples of classical jury nullification described earlier—the Peter Zenger case, for example, or the Fugitive Slave Law cases.⁵⁴ Instead, the jurors may find abuse in the invocation

51. *Batson v. Kentucky*, 476 U.S. 79 (1986) (prosecutor may not make race-based peremptory challenges); *Georgia v. McCollum*, 505 U.S. 42 (1992) (*Batson* extended to defense counsel); *J.E.B. v. Alabama ex. rel. T.B.*, 511 U.S. 127 (1994) (*Batson* extended to peremptory challenges based on gender).

52. See *Morgan*, *supra* note 49. It became much easier for lawyers to engage in this kind of gamesmanship after *Purkett v. Elem*, 115 S. Ct. 1769 (1995), where the Supreme Court summarily held that an initial explanation of a peremptory strike challenged on *Batson* grounds need only be race-neutral, not plausible. It is only at the later credibility stage that a finding of pretext may be made—on which issue the party challenging the strike bears the burden of proof.

Before the trial began, lead Simpson attorney Johnnie Cochran allegedly boasted that he needed to seat but one black juror to hang the jury. Stuart Goldman, *Heeere's Johnnie!*, HETERODOXY, Mar.-Apr. 1995, at 11. If this allegation is true, it is clear that Mr. Cochran must have had in mind both the tactical use of peremptory challenges and the notion of appealing to fellow members of a group.

53. Throughout ABRAMSON, *supra* note 32, the author decries the ascendancy of what he calls the "representational" model of jury decision making over the "deliberative" model. See especially *id.* at 115-27, where he notes with some bitterness that the Supreme Court itself has celebrated the representative character of the jury as contributing to its "political function" of legitimating the eventual verdict. Abramson's critique sharpened my long-held view that the Supreme Court's jury composition and peremptory challenge cases are internally inconsistent in the ways described immediately above in the text.

54. See *supra* notes 34-36 and accompanying text.

or application of the law. That is what I call "jury nullification of the second kind," where the jury is in effect nullifying *the prosecution*, not the law itself.

Examples of jury nullification of the second kind in action are not hard to find. Suppose that as a protest against the Vietnam War, demonstrators publicly poured blood on Selective Service records and were later charged with destruction of government property. Virtually no one has a moral objection to such a law, but a jury might nonetheless acquit the "obviously guilty" defendants, reasoning that the law was intended to address such social problems as graffiti and aimless mischief-making, not political protests. Some jurors might reason, in other words, that the government had artificially "trumped up" charges that did not really fit the situation, in an attempt to punish the demonstrators for their political beliefs. Other jurors might acquit because of sympathy with the defendants' actions, but this would also be a reaction to the specific prosecution, not a rejection of the noncontroversial law itself.

Further examples might arise when people who are "obviously guilty" of violating ordinary trespass statutes are nonetheless acquitted. Suppose protesters have deliberately blocked access to an abortion clinic, or students have refused to leave the office of a university president during a dispute over a tuition hike. Here again, the jury would presumably have no quarrel with neutral trespass laws of longstanding, but might either believe that prosecution should be limited to situations involving private homes or businesses, or that the prosecutions were unjustified because they singled out certain kinds of trespassers. Furthermore, some jurors might again choose to express their agreement with the political views of the defendants by their not-guilty votes.

As these examples demonstrate, jury nullification of the second kind is neither an attack on the law nor a reproach to the government generally. Rather, the censure is of prosecutorial misconduct in particular, *especially misconduct in the charging decision*. Thus, other prime cases for this form of jury nullification are those that the jury perceives as involving selective enforcement or entrapment, even where the technical and quite stringent legal requirements for those defenses cannot be met.⁵⁵

55. It is probable that the jury's 1984 acquittal of John DeLorean on charges of

Jury nullification of the third kind presents a subtly different variation. In these situations, the jury will have no qualms about the law or about how it is being applied, but will acquit anyway in order to send some more important "message" to someone. That message may be political, ideological or racial, and it may—but need not—involve a reprimand of the police or the prosecutors.⁵⁶

According to this definition, many of the abhorrent verdicts of all-white Southern juries that both Justice Kourlis and I contrasted with much earlier historical examples are actually examples of jury nullification of the third kind, not classical jury nullification. When Herbert Lee was murdered in Mississippi in

cocaine trafficking, and the lenient treatment accorded Marion Barry in 1990 on a variety of charges involving drug use, can both be attributed, at least in part, to jury nullification of the second kind.

DeLorean was an automobile executive who desperately needed money to rescue a failed automaking venture. He was approached with a money-laundering and drug-dealing scheme both by a real drug dealer cooperating with the authorities and by federal agents posing as drug dealers and was eventually videotaped with an open suitcase full of cocaine. Barry was the Mayor of Washington, D.C., and was seen on videotape cavorting and using drugs with a woman friend the authorities had encouraged to lure him to a tryst in a local hotel room. It is hard to imagine that the jurors thought that the activity they saw on tape should be immune from criminal sanction on the ground that the applicable laws were themselves immoral or invalid. Much more likely is the explanation given by some of the jurors at the time that they were responding to what they thought were overzealous prosecution efforts.

If this explanation is correct, the jurors would thus be enforcing their own notions of what *ought* to be sufficient to constitute the defense of entrapment or selective enforcement. Note, however, that Professor Paul Butler, who was a Special Assistant United States Attorney in the District of Columbia at the time that his office was prosecuting Mayor Barry, argues in *Racially Based Jury Nullification: Black Power in the Criminal Justice System*, 105 YALE L.J. 677 (1995), that the jurors in that case treated the defendant leniently because he was of their race, and that more black jurors should do likewise in future cases, as a matter of political principle that will lead to "subversion" of an inherently "racist" criminal justice system.

I return to Professor Butler's disturbing article at *infra* notes 60, 70. In the present context, it is sufficient to note that if his reading of the jurors' mindset is accurate, then they were not engaged in jury nullification of the second kind, but what I am calling jury nullification of the third kind, described immediately below in the text.

56. When the message is a rebuke of the prosecutor, this form of jury nullification is similar to jury nullification of the second kind, as described immediately above in the text. There is still a difference, however, for in the latter case the reproach will typically be with respect to the decision to arrest and charge or the election of which violations to prosecute. Under jury nullification of the third kind, the jury's message is more likely to be disapproval of the prosecution's conduct of the case itself—such as presenting perjured testimony or dealing too harshly with a witness on cross-examination.

1961 soon after registering to vote, for example, and his killer openly bragged about it in the town square,⁵⁷ the jurors who were assembled to hear the case surely had no objection to laws against murder and presumably had no complaint that the government was selectively enforcing the law, framing anyone, or overcharging anyone. Instead, the jurors quickly acquitted, in order to send a message *to the black citizens of Mississippi* that those who registered to vote not only were at risk of being murdered but that their killers would not be punished.

Another outstanding example of jury nullification of the third kind occurred during the first trial, in Simi Valley, of the police officers who used excess force to subdue the fleeing motorist Rodney King in Los Angeles.⁵⁸ Even though the defendants and many other police officers lived in Simi Valley, the jurors chosen from that area presumably did not disagree that assault and battery should be a criminal offense, even if perpetrated by police officers. Nor is it likely that the jurors were perturbed to find that other police officers had arrested the defendants and that the authorities had charged these particular officers with the crime, since the officers were clearly identifiable on the infamous videotape shot by a passer-by. But the defendants were acquitted nonetheless, almost certainly because most of the jurors had what they thought was a more important message to send: "in order to provide maximum protection to the community, police officers must be free to respond to developing situations with vigor, and must not be 'chilled' by the fear of criminal prosecution *even if they overreact.*"

57. Herbert Lee, a black farmer with a large family, was shot to death in Liberty, Mississippi on September 25, 1961, in front of several witnesses, by State Representative E. H. Hurst. Hurst claimed that Lee had attacked him with a tire-iron and that he killed in self-defense, but the physical evidence was to the contrary. A coroner's jury summarily dismissed the charges.

Subsequently, as the federal Justice Department was considering whether to prosecute Hurst for a civil rights violation, witnesses who would have testified that Hurst had killed Lee without provocation and from a distance were intimidated, and one, Louis Allen, was himself murdered early in 1994, one day before he was to leave the state.

58. *See supra* note 40.

V. THE VERDICT IN THE O.J. SIMPSON CASE: NOT BASED ON REASONABLE DOUBTS, NOT IRRATIONAL—BUT RATHER JURY NULLIFICATION OF THE THIRD KIND

I have asserted throughout this essay and argued elsewhere that O.J. Simpson was factually guilty of the double homicide with which he was charged and that his “dream team” of defense lawyers knew it.⁵⁹ Furthermore, I have suggested—beginning

59. See *supra* notes 5-10 and accompanying text. See also, W. William Hodes, *Ethics of Defending Guilty Clients*, NAT'L L.J., May 29, 1995, at A19; *Larry King Live*, *supra* note 5. As the Symposium was going to press, a respected journalist covering the case for the *New Yorker* magazine alleged in his book about the trial that several of the defense attorneys made private statements during the trial that they knew that their client was factually guilty of the killings. JEFFREY TOOBIN, *THE RUN OF HIS LIFE* (1996).

The questions of what a lawyer “knows” about an ongoing case, and how others can prove what he or she knows, are foundational issues in legal ethics. For example, since the codes of ethics in every state prohibit lawyers from “knowingly” offering perjured testimony, it becomes critical to define that term. A few authorities hold that a lawyer can only be charged with knowledge of what a client has “confessed” to in confidence. See, e.g., Mitchell, *supra* note 24, at 296 n.12. But this cannot be—and is not—the rule, for if it were, clients could lie to a lawyer about the facts of a case and then demand that the lawyer call the client to repeat the lie to the jury under oath, since the lawyer would not “know” that the testimony was perjurious.

The Terminology Section of the Model Rules of Professional Conduct defines “knowingly” as denoting “actual knowledge of the fact in question,” but then adds that “a person’s knowledge may be inferred from circumstances.” MODEL RULES OF PROFESSIONAL CONDUCT Terminology (1995). Proving a lawyer’s scienter under this standard is no less—but also no more—difficult than it is to prove “knowing” possession of stolen goods or narcotics.

Beyond this legal standard, the claim that lawyers can know *only* what their clients tell them has been denounced by most authorities as a sophistic attempt at self-delusion. An outstanding and significant example of such an attack comes from the pen of Professor Monroe Freedman, who is justly known as one of the most uncompromising proponents of the adversary system. See MONROE FREEDMAN, *LAWYERS’ ETHICS IN AN ADVERSARY SYSTEM* 52-55, 71-76 (1975). See also, GEOFFREY HAZARD & WILLIAM HODES, *THE LAW OF LAWYERING* § 403 (2d ed. 1990 & Supp. 1996): “Although his professional role may require a lawyer to take a detached attitude of unbelief, the law of lawyering does not permit a lawyer to escape all accountability by suspending as well his intelligence and common sense.” And as a further example, recall that Alan Dershowitz himself has seldom reported having any difficulty “knowing” the truth about his own clients’ guilt. See *supra* notes 20-23 and accompanying text.

Immediately below in the text, I argue that the jurors in the O.J. Simpson case must have known of the defendant’s factual guilt because there is no rational theory to support the view that someone else actually killed the victims and the jurors appeared to be rational people. If that is correct, then it must be true *a fortiori* that the lawyers knew the truth about their client’s factual guilt, since they were in possession of much more information than was presented to the jurors, and they had had considerably more experience than any of the jurors working through chains of

with the title of this essay—that the lawyers were able to secure their client's acquittal only by inducing the jurors to engage in jury nullification of the third kind. This means that I am also asserting that even the *jurors* knew that Mr. Simpson was factually guilty, but elected to use their not-guilty verdicts to send a variety of "messages"—some odious, some not.

As is common with jury nullification of the third kind, the intended recipients of these messages may have included law enforcement and other governmental personnel, but also segments of the local and national communities. Furthermore, given the complexity of the case and the cross-cutting ideas and emotions that it produced, it is likely that there were as many messages as jurors, and probably more. The messages no doubt ran the gamut from racial solidarity to white guilt, from punishment of the Los Angeles Police Department for the Rodney King beating, to an attempt to avoid another riot.⁶⁰ Or perhaps Dean Mimi Wesson is correct in suggesting in her contribution to the Symposium that some of the jurors may have wanted to send nothing more than a contrarian message, simply to assert their own autonomy: I am not a computer, I am not a cog in the government's meat grinder.⁶¹

logical inference to a conclusion. That is one of the key "circumstances" from which the lawyers' knowledge may be inferred.

60. As indicated at *supra* note 55, Professor Paul Butler has argued that it is appropriate for black—but not white—jurors to engage in overtly race-based jury nullification in favor of black—but not white—defendants. Specifically, he argues that because (in his view) blacks have essentially no power in the political system to affect the criminal justice system, it is "just" for them routinely to "opt out of American criminal law," Butler, *supra* note 55, at 714, and to commit civil disobedience from the jury box as a matter of self-help. Although I agree that jurors have the legal power and ability to engage in jury nullification of the third kind to "send a message" of racial solidarity, I do not accept the moral legitimacy or the political wisdom of sending this particular message.

In Professor Butler's regime, which he styles as "radical," black jurors should ask themselves whether sending one more black man to prison is or is not, roughly, "just." *Id.* at 714, 725. Giving examples of how he hopes black jurors would vote in typical cases, Professor Butler finds violent crimes such as murder easy cases to *withhold* jury nullification, possession of crack cocaine as an easy case for virtually automatic *acquittal*, and sale of drugs or nonviolent theft from a rich white person somewhere in between. *Id.* at 718-22.

For purposes of this essay, it is sufficient to note that although I believe that most of the jurors in the Simpson case employed jury nullification of the third kind to "send a message," I do not believe that many of them assigned these crude reasons for their votes. See *infra* notes 69-70 and accompanying text.

61. Marianne Wesson, *That's My Story and I'm Stickin' to It: The Jury as Fifth Business in the Trial of O.J. Simpson and Other Matters*, 67 U. COLO. L. REV. 949, 954 (1996).

If the Simpson case jurors knew that the defendant was factually guilty, then by definition they could not have had reasonable doubts *about the facts*. After many months of trial and several days of closing arguments and instructions, however, they were savvy enough to know that whatever message they wanted to send in their post-verdict interviews and books had to fly the banner and talk the talk of "reasonable doubts." Alan Dershowitz includes a number of these comments in his book of the same title,⁶² but in *Reasonable Doubts* he often slips without warning from showing that the jurors might have had such doubts about some aspect of the case, to the conclusion that the jurors could also have had reasonable doubts about whether O.J. Simpson had actually killed the two victims.⁶³ But the one does not follow from the other, *unless jury nullification of the third kind is in play*.

Suppose, for example, that the jurors thought that the police might have planted evidence, but that the jurors were also certain beyond a reasonable doubt that Simpson was guilty in fact. (Professor Dershowitz accepts this as a plausible scenario, referring to it—as did many wags during and after the trial—as a belief that the police might have tried to "frame a guilty man.")⁶⁴ According to a strict interpretation of the law and of the instructions of the court, the proper response under those circumstances would be to convict O.J. Simpson of the homicides, but then perhaps to join with other citizens in pressing for the arrest and conviction of the guilty police officers. Under jury nullification of the third kind, however, it would be quite appro-

62. DERSHOWITZ, *supra* note 1. In particular, Dershowitz relied on the comments of a middle-aged white juror, Anise Aschenbach, who stated that she thought Simpson was probably guilty, but that the "reasonable doubt" standard had not been met. *Id.* at 38, 85. There are eight references to Ms. Aschenbach in the index of *Reasonable Doubts*.

63. A dramatic example of this elision appears at page 135: "In fact, neither side's case is open-and-shut; both have evidentiary foundations and speculative elements. But the prosecution bears the burden of proving the defendant's guilt, while the defendant need only raise reasonable doubts about whether blood was planted on the socks [found in Mr. Simpson's bedroom]." *Id.* at 135.

The statement about the government's burden is entirely correct, but the statement about the defendant's burden is a non sequitur. As demonstrated immediately below in the text, even if it were shown conclusively that that particular blood stain was planted, that would *not* constitute reasonable doubt about the facts of the killings, although it would surely constitute a powerful reason to vote for acquittal under jury nullification of the third kind (in order to punish the prosecution and deter future police misconduct).

64. *See, e.g., id.* at 43, 92, 94, 98.

priate for some of the jurors to vote for acquittal in order send a more direct message that police misconduct of this kind not only is intolerable, but is ineffective, since the intended purpose of more surely convicting the guilty will be frustrated.

This kind of prophylactic message, removing the profit—and hence the incentive—from official misconduct, is similar to the message embodied in the Fourth Amendment exclusionary rule of *Mapp v. Ohio*:⁶⁵ if the constable stumbles, even a guilty defendant must go free. Thus, as Alan Dershowitz recognized at other points in his book, a vote for acquittal is consistent with *not* having reasonable doubts, so long as one accepts the validity of jury nullification (of the third kind):

The form of jury nullification that may have been employed by some jurors in the Simpson case—the refusal to convict a defendant who they believed guilty but who had also been “framed” by the police—draws some support, as well, from judicial authority. This form of nullification is related to the exclusionary rule, the “shock the conscience” test, and the “outrageous governmental misconduct” defense, all of which require the release of guilty defendants in order to send an important message to the police. . . .

[Some] jurors may have refused to convict *even though they had no reasonable doubt about Simpson’s guilt*, because they believed that the police may have tried to “frame” a guilty man.⁶⁶

From the above, it appears that there is very little difference between my analysis of the jurors’ verdicts and that of Professor Dershowitz: he concedes that what I call jury nullification of the third kind may explain some of the votes, while I claim that it must explain virtually all.

My rejection of the possibility that more than a juror or two thought that O.J. Simpson was actually innocent, or had reasonable doubts on that score, rests on two grounds. First, only irrational speculation could lead to the conclusion that the defendant was factually innocent. Second, I *reject* the often-heard accusation that the jurors were irrational and blinded by prejudice.

65. 367 U.S. 643 (1961).

66. DERSHOWITZ, *supra* note 1, at 94, 98 (emphasis added).

This is not the place for a detailed rehearsal of the evidence presented at the trial. Suffice it to say that my first claim—that the defendant was obviously guilty and that only the irrational could think otherwise—does *not* depend upon the astronomical figures that the prosecution presented, purportedly showing the unlikelihood of coincidental DNA “matches.” Jonathan Koehler’s presentation at the University of Colorado Law Review Symposium amply demonstrated that those figures—considered in isolation—are simply fatuous.⁶⁷ Nor does my claim depend upon the impossibility that some or even most of the physical evidence was fraudulently planted by two or more corrupt police officers, or that some or even most of the blood samples were contaminated with O.J. Simpson’s reference sample within minutes of arriving at the police lab in Los Angeles. William Thompson’s impressive exposition at the Symposium shows that these cannot be ruled out as irrational fantasies.⁶⁸

What can nonetheless be ruled out, however, based on the totality of the evidence, is that some individual other than O.J. Simpson committed the crimes. In order for the theory of an unknown killer to be true, a very long series of independent events—each quite improbable—would have to have taken place. Furthermore, all would have to have taken place on the same night that O.J. Simpson had no alibi, and the true killer would have to have not only chosen to kill (with no apparent motive), but would have to have left an enormous amount of physical evidence behind—none of which was inconsistent with Simpson’s guilt or even suggested the guilt of someone else.

My second claim—that the jurors had no reasonable doubts but instead acted reasonably in exercising the power of jury nullification—is also based on the lack of contrary evidence—here, evidence that the jurors were irrational. Many lay persons and right-wing critics have insisted that the jurors acted irrationally and in the throes of racial bigotry because they came to an “irrational” decision. But this is both circular and unsupported. The verdict itself was not irrational *unless* it was based upon a finding of actual innocence, or doubts about factual guilt,

67. Jonathan J. Koehler, *On Conveying the Probative Value of DNA Evidence: Frequencies, Likelihood Ratios, and Error Rates*, 67 U. COLO. L. REV. 859 (1996).

68. William Thompson, *DNA Evidence in the O.J. Simpson Trial*, 67 U. COLO. L. REV. 827 (1996).

but virtually none of the jurors have stated that that was the basis for their vote.⁶⁹

A more troublesome attack on the jurors has come from liberal intellectuals and some elite black lawyers, who claim to be *defending* the jurors from the “charge” that they engaged in jury nullification. In my view, however, to reject the explanation of jury nullification of the third kind, and to insist instead that the jurors had actual reasonable doubts, can only be accomplished by indulging the false and demeaning assumption that the jurors were too dumb, too superstitious, or too emotional to appreciate the difference between “reasonable” doubt and irrational fantasy or groundless wishful thinking.

Confronted with this paradox, some commentators have tried to deflect its thrust by further suggesting that blacks have a different understanding of reasonableness and truth itself, an understanding based on the healthy skepticism that comes with the turf of growing up black in America.⁷⁰ But that only makes matters worse, it seems to me, for it either relativizes truth (which is an extraordinarily dangerous proposition for any minority to embrace), or it relativizes rationality and wrongfully presumes that blacks have lost the capacity for logical thought,

69. As has been well reported in the press, many members of the public, both black and white, profess a belief in Mr. Simpson's innocence. It is impossible to know, however, what percentage of these people are merely expressing satisfaction *with the verdict* and not adverting to factual innocence at all. Furthermore, even with respect to people who make that distinction and then specifically tell pollsters or reporters that they do believe in factual innocence, it is impossible to judge how many are sincere and how many are attempting to disguise other notions about the trial.

There are, no doubt, people who sincerely believe in O.J. Simpson's factual innocence. I continue to insist that such people are irrational, no different from people who not only claim to believe, but actually believe, that Elvis is still alive or that AIDS was invented by Jewish doctors for the purpose of committing genocide against blacks. The point of the text, however, is that very few of the jurors in the Simpson case gave any indication that they fell into this category.

70. A striking example of this approach appears in Butler, *supra* note 55, at 721 n.225: “While this essay [by Butler] makes an argument for racially based jury nullification, reasonable doubt—the other legal justification for acquittal—may be racially based as well. *What is reasonable to an African-American may not be reasonable to a white person.*” (Emphasis added.)

As intimated in the text, this kind of statement sometimes can be read merely to mean that most black people have different experiences from those of most white people and therefore “process” the same information differently. Professor Butler, however, seems to have gone out of his way to distance himself from that obvious and noncontroversial proposition. He appears to be saying that black people and white people have different views about which logical progressions are reasonable and which are not.

leaving them to fall back on mysticism and the intuitions of victimhood.

VI. CONCLUSION: LORD BROUGHAM, JOHNNIE COCHRAN, AND THE RIDDLE OF ROLE DIFFERENTIATION—HOW A GOOD LAWYER CAN ALSO BE A GOOD CITIZEN

Throughout this essay, I have tried to show that O.J. Simpson's "dream team" of defense lawyers acted in accord with the applicable norms of professional ethics—zealousness within the bounds of law—when they successfully induced the jurors to engage in jury nullification of the third kind, even on behalf of a client they knew to be guilty. And I have tried to show why defending the guilty serves the long-term interests of society, and therefore *ought* to be considered ethical, despite the undeniable short-term anguish of an unjust acquittal.

The public, however, is often impatient with such abstractions and insists that the practice is *immoral* and should be stopped. Indeed, the public often equates morals with ethics and generally believes that much of what lawyers do for a living—like achieving the acquittal of factually guilty defendants—is itself immoral *and therefore unethical*. In this view, the terms "legal ethics" or "ethical lawyer" are inevitably oxymoronic, for the more faithfully lawyers follow the dictates of the profession, the more immoral they must become. The public's instinct, in other words, is to answer "no" to the question whether a good lawyer can be a good person and vice versa.⁷¹

When the *National Law Journal* named Johnnie Cochran its "Lawyer of the Year" for 1995, it asked parenthetically whether he "stoked the fires of racism to free a client," and whether his job "require[d] him to stoke the fires."⁷² I answer "yes" to both, meaning that I accept not only that a good lawyer can be a good

71. Many variations on this question have been posed in the literature, beginning with Charles Fried, *The Lawyer as Friend: The Moral Foundations of the Lawyer-Client Relationship*, 85 YALE L.J. 1060 (1976). See also Monroe Freedman, *Personal Responsibility in a Professional System*, 27 CATH. U. L. REV. 191 (1978); Stephen Pepper, *The Lawyer's Amoral Ethical Role: A Defense, a Problem, and Some Possibilities*, 1986 AM. BAR FOUND. RES. J. 613. THE GOOD LAWYER (David Luban ed., 1983), takes its title from this puzzle, as does the play on words evident in Stephen Gillers, *Can a Good Lawyer be a Bad Person?*, 84 MICH. L. REV. 1011 (1986).

72. *Lawyer of the Year: Johnnie L. Cochran Jr.: A No-Holds-Barred Victory*, NAT'L L.J., Dec. 25, 1995-Jan. 1, 1996, at C4.

person, *but that he may be bound to do bad things*. My answer thus differs from that of a New York City police lieutenant, Michael Gorman—possibly himself a lawyer—who later wrote to the Editors of the *Journal*, indignantly demanding to know whether Mr. Cochran was not morally culpable and whether we are not all “accountable for our own actions, *regardless* of job requirements and other outside pressures?”⁷³

These different answers highlight what moral philosophers call “role differentiation,” a theory that is critical to understanding the symbiotic relationship between lawyers and the criminal justice system, and why (therefore) any attempt at radical reform of lawyers and legal ethics would instead destroy the system itself.

Role differentiation theory accepts the challenge of Lieutenant Gorman and holds that people occupying certain roles in a social setting *will* behave according to the dictates of those roles, even though they would almost certainly act differently in some other situation when they were not “in role.”⁷⁴ Thus, defense lawyers will work tirelessly to free a guilty child pornographer, even though in their “off-duty” hours they are just as disgusted by child pornographers as the rest of us.

It is tempting to dismiss invocation of role differentiation as mere self-serving salt to the wound, confirming to the public that lawyers are not only amoral or immoral but unusually brazen about it. Role differentiation, however, is not limited to lawyers and is in fact an essential starting place in most people’s moral judgment about a situation.

A person occupying the role of “parent,” for example, will without hesitation violate the “ordinary” moral imperative of equal treatment, and feed his or her own children before providing charity to a stranger, even if the stranger is another helpless child. An army general who coaches Little League on Saturday and sings in the church choir on Sunday will order air strikes on Monday if that is what the situation demands, even though this violates an “ordinary” moral taboo against killing people.

Role differentiation is an analytic tool that is especially useful in shifting the debate from the specific acts of a specific

73. Michael J. Gorman, *There Were Better Candidates than Cochran Who Didn't Pose a Moral Quandary*, NAT'L L.J., Jan. 8, 1996, at A18 (letter to the editors) (emphasis added).

74. See, e.g., LUBAN, *supra* note 16; Pepper, *supra* note 71.

person—Johnnie Cochran, for example—to the general nature of the role itself—defending people who are known to be factually guilty of serious crimes, for example. If we were to conclude that society ought not to assign *anyone* a particular role, such as the role of Nazi concentration camp guard, then we would be removing—as we did at Nuremberg—the justification that a “good” camp guard must follow orders and put people in gas chambers.

By the same token, if working against the truth to free the guilty was deemed by society to be so odious a role that the role itself ought to be abolished, then defense counsel could no longer justify what they do by reference to that role. But to effectively abolish the “hired gun” role of the defense lawyer by radically curtailing counsel’s freedom of action would essentially be to dismantle entirely the criminal justice system. As I have already noted, however, society is not willing to go this far because everyone in society has a vested interest in having the system—and lawyers—available in an unforeseen time of need. Too few know, and too many who once knew have forgotten, that the titillating exhortation “the first thing we do, let’s kill all the lawyers” was proposed by one of Shakespeare’s great villains as a prefatory step to toppling the rule of law and establishing tyranny.⁷⁵

In criminal law, the best and most famous statement of the role differentiation principle was provided by Henry, Lord Brougham, in connection with his 1820 defense of Queen Caroline of England, who was being prosecuted for adultery (of which she was guilty) so that King George IV might be rid of her. Lord Brougham did not propose to assassinate a witness, forge a document, or present perjured testimony. Instead, he played hardball according to the rules and put pressure on the prosecution to drop the case by implicitly threatening to introduce (truthful) evidence that the King not only had had affairs of his own, but had secretly married a Catholic, which under applicable law would have meant his giving up the Crown—perhaps with his head still attached to it.

Lord Brougham’s statement to the House of Lords was as follows, but consider how it would sound coming from the mouth

75. WILLIAM SHAKESPEARE, *THE SECOND PART OF KING HENRY THE SIXTH* act 4, sc. 2.

of Johnnie Cochran, whom George Will called a “good lawyer but a bad citizen” in a column immediately after the verdict:⁷⁶

[A]n advocate, in the discharge of his duty, knows but one person in all the world, and that person is his client. To save that client by all means and expedients, and at all hazards and costs to other persons, and, among them, to himself, is his first and only duty; and in performing this duty he must not regard the alarm, the torments, the destruction which he may bring upon others. Separating the duty of a patriot from that of an advocate, he must go on reckless of consequences, though it should be his unhappy fate to involve his country in confusion.⁷⁷

Johnnie Cochran did indeed “involve his country in confusion,” and he did indeed bring “torment and destruction” on others. (The victims’ families, of course, but more so ordinary black citizens who will spend years paying O.J. Simpson’s debt to society in the currency of heightened intolerance and more overt “tit-for-tat” justice.) Furthermore, in adding up the social costs of the defense effort, it would be wrong to leave out the fresh attacks on lawyers and on the legal system itself that the “trial of the century” spawned.

But is it possible that Cochran acted not only as an advocate but as a patriot as well, despite this sour assessment of what he left in his wake? That he was a good lawyer but *also* a good person and a good citizen? The point of role differentiation—and my main point in this essay—is that one may act immorally and antisocially, but still ethically, in carrying out one’s assigned role, so long as that role itself makes some positive contribution to society (like the Army General, for example, but unlike the Nazi camp guard).

But if playing such a role, “zealously, within the bounds of law,” does contribute to society, at least in the long-run sense that it helps sustain an imperfect but morally justifiable system of trial by jury, warts and all, jury nullification and all, then perhaps we ought to conclude that what the defense lawyers did

76. George F. Will, *Jury Fell Short of Even Lowest Expectations*, CHICAGO SUN-TIMES, Oct. 5, 1995, at 41.

77. Trial of Queen Caroline 8 (1821), reported in MONROE FREEDMAN, UNDERSTANDING LEGAL ETHICS 65-66 (1990).

in the O.J. Simpson case was not only ethical, but may actually have been moral after all!