

January 2011

## Jury Nullification, Race, and The Wire

James M. Keneally  
*Kelley Drye & Warren LLP*

Follow this and additional works at: [https://digitalcommons.nyls.edu/nyls\\_law\\_review](https://digitalcommons.nyls.edu/nyls_law_review)



Part of the [Criminal Law Commons](#), [Criminal Procedure Commons](#), [Law and Race Commons](#), [Legal Remedies Commons](#), and the [Litigation Commons](#)

---

### Recommended Citation

James M. Keneally, *Jury Nullification, Race, and The Wire*, 55 N.Y.L. SCH. L. REV. 941 (2010-2011).

This Article is brought to you for free and open access by DigitalCommons@NYLS. It has been accepted for inclusion in NYLS Law Review by an authorized editor of DigitalCommons@NYLS.

JAMES M. KENEALLY

## Jury Nullification, Race, and *The Wire*

ABOUT THE AUTHOR: James M. Keneally is a partner in the firm of Kelley Drye & Warren LLP, specializing in white collar criminal defense. The author would like to thank Nydia Shahjahan, an associate at Kelley Drye & Warren LLP, for her invaluable assistance in the writing of this article.

## I. INTRODUCTION

Jury nullification has been a source of great debate in the legal arena, particularly when dealing with race.<sup>1</sup> There have been several episodes of alleged jury nullification due to race throughout the history of the criminal justice system, most notably the criminal trial of former football player O.J. Simpson, as well as the criminal trial of Stacey Koon and Laurence Powell, the police officers in the Rodney King beating.<sup>2</sup> Jury nullification has also appeared in the media, both observed by newspaper journalists and created by television series directors.<sup>3</sup> Many believe that juries that racially identify with the criminal defendant and deliver a not guilty verdict—where the evidence appears to overwhelmingly point to guilt—have engaged in jury nullification. But what if this is not the case? What if the juries were merely performing their civic duty responsibly? What if a guilty verdict was not possible due to objective factors, such as reasonable doubt?

Focusing on these questions and how they relate to the racial aspect of jury nullification, this article compares the fictional trial of Senator Clay Davis from the popular Home Box Office (HBO) television show *The Wire* to the real-life trial of former Baltimore Mayor Sheila Dixon. Davis's trial was a study in race- and class-based jury nullification, while Dixon's trial was perceived as a rejection of that practice. Part II outlines the history of jury nullification. Part III provides a brief description of *The Wire*. Part IV examines the fictional trial of Senator Clay Davis and the real-life trial of Sheila Dixon, and the reasons for their disparate results. Finally, Part V concludes briefly with what we can deduce from the two trials regarding jury nullification's role in the criminal justice system.

## II. JURY NULLIFICATION

### A. *A Brief History*

Jury nullification is a legal concept that typically becomes the topic of conversation and heated debate whenever an intensely publicized jury trial does not render the verdict that the public anticipates. Jury nullification is defined as:

A jury's knowing and deliberate rejection of the evidence or refusal to apply the law either because the jury wants to send a message about some social issue that is larger than the case itself or because the result dictated by law is contrary to the jury's sense of justice, morality, or fairness.<sup>4</sup>

- 
1. See Paul Butler, *Racially Based Jury Nullification: Black Power in the Criminal Justice System*, 105 *YALE L.J.* 677 (1995); Nancy S. Marder, *The Interplay of Race and False Claims of Jury Nullification*, 32 *U. MICH. J.L. REFORM* 285 (1999).
  2. Marder, *supra* note 1, at 285.
  3. See, e.g., *infra* Parts II, IV.
  4. *BLACK'S LAW DICTIONARY* 936 (9th ed. 2009); see also *United States v. Thomas*, 116 F.3d 606, 614 (2d Cir. 1997) (defining jury nullification as “a violation of a juror’s oath to apply the law as instructed by the court—in the words of the standard oath administered to jurors in the federal courts, to ‘render a true verdict according to the law and the evidence’” (quoting *FED. JUDICIAL CTR., BENCHMARK FOR U.S. DISTRICT COURT JUDGES* 225 (4th ed. 1996, rev. 2000))).

Nullification reflects the jury's power to acquit a culpable defendant when it concludes that the applicable law is immoral.<sup>5</sup> The story of jury nullification begins in England<sup>6</sup> and makes its way across the Atlantic Ocean with the establishment of the American colonies.<sup>7</sup> One of the most significant cases of jury nullification in colonial times was the acquittal of John Peter Zenger.<sup>8</sup> Zenger was tried for seditious libel for publishing statements that were critical of British colonial rule in America.<sup>9</sup> Ignoring the judge's instructions and following the advice of Zenger's attorney, Andrew Hamilton, "to see with their eyes, to hear with their own ears, and to make use of their own consciences and understandings, in judging the lives, liberties or estates of their fellow subjects,"<sup>10</sup> the jury famously voted to acquit Zenger.<sup>11</sup>

In *Sparf v. United States*, two sailors appealed their murder convictions, arguing that the trial court's refusal of the defendants' requested jury instructions improperly interfered with the jurors' discretion to convict the defendants of the lesser charge of manslaughter.<sup>12</sup> The U.S. Supreme Court held that the trial court did not "transcend[] its authority" in refusing the defendants' requested jury instruction and rejected the proposition that juries had the right to judge the law,<sup>13</sup> stating:

Indeed, if a jury may rightfully disregard the direction of the court in [a] matter of law, and determine for themselves what the law is in the particular

- 
5. See Jack B. Weinstein, *Considering Jury "Nullification": When May and Should a Jury Reject the Law to Do Justice?*, 30 AM. CRIM. L. REV. 239, 244 (1993).
  6. In the famous *Bushell's Case*, (1670) 124 Eng. Rep. 1006 (C.P.), a judge ordered the release of British jurors who had been imprisoned for ignoring a trial judge's instructions on the law and refusing to convict William Penn and Edward Mead of unlawful assembly.
  7. Paula L. Hannaford-Agor & Valerie P. Hans, *Nullification at Work? A Glimpse from the National Center for State Courts Study of Hung Juries*, 78 CHI.-KENT L. REV. 1249, 1256 (2003).
  8. Alan Schefflin & Jon Van Dyke, *Jury Nullification: The Contours of a Controversy*, 43 LAW & CONTEMP. PROBS. 51, 57 (1980).
  9. Butler, *supra* note 1, at 702. Andrew Hamilton, Zenger's defense attorney, argued that the jury should ignore the judge's instructions because the jury "had the right beyond all dispute to determine both the law and the facts." *Id.* (quoting Phillip B. Scott, *Jury Nullification: An Historical Perspective on a Modern Debate*, 91 W. VA. L. REV. 389, 414 (1989)) (internal quotation marks omitted); see also *John Peter Zenger and Freedom of the Press*, CONST. RTS. FOUND. (2006), <http://www.crf-usa.org/bill-of-rights-in-action/bria-22-3-b-john-peter-zenger-and-freedom-of-the-press.html>.
  10. Butler, *supra* note 1, at 702 (quoting JAMES ALEXANDER, A BRIEF NARRATIVE OF THE CASE AND TRIAL OF JOHN PETER ZENGER, PRINTER OF THE NEW YORK WEEKLY JOURNAL 93 (Stanley N. Katz ed., Belknap Press 1963) (1736)). Zenger's attorney used the reasoning from *Bushell's Case* to persuade the jurors to acquit Zenger. *Id.*
  11. Weinstein, *supra* note 5, at 241.
  12. 156 U.S. 51, 52, 62–63 (1985); CLAY S. CONRAD, JURY NULLIFICATION: THE EVOLUTION OF A DOCTRINE 102–03 (1998) ("The defense appealed, contending among other things that the trial court's instructions to the jury improperly controlled the jury and induced them to convict of murder, instead of manslaughter.")
  13. *Sparf*, 156 U.S. at 63–64; CONRAD, *supra* note 12, at 103 ("Justice Harlan denied that juries had the right to judge the law, or that they had ever had such a right.")

case before them, it is difficult to perceive any legal ground upon which a verdict of conviction can be set aside by the court as being against law.<sup>14</sup>

In the majority opinion, Justice Harlan stated that the duty of the court was to “expound the law” and the duty of the jury was to apply the expounded law to the facts before it.<sup>15</sup> Significantly, the Court implicitly acknowledged jury nullification as a feature of the criminal justice system. While it stated that a jury’s duty is to apply the law as instructed by the judge, it noted that judges have no recourse if jurors acquit a defendant despite overwhelming evidence supporting a guilty verdict.<sup>16</sup> Since the *Sparf* decision, the Supreme Court has characterized jury nullification as the assumption of a power which a jury has no right to exercise<sup>17</sup> and as the unreviewable power of a jury to return a verdict of not guilty for impermissible reasons.<sup>18</sup>

In *Sparf*, the Supreme Court specifically noted that the jury may be “expressly empower[ed]” to determine both the law and the facts where states have enacted constitutional or statutory provisions addressing the function of the jury.<sup>19</sup> Maryland is one of the few states to statutorily acknowledge the existence of jury nullification.<sup>20</sup> Article 23 of Maryland’s Constitution states: “In the trial of all criminal cases, the Jury shall be the Judges of Law, as well as of fact, except that the Court may pass upon the sufficiency of the evidence to sustain a conviction.”<sup>21</sup> This language appears to allow jurors to adjudicate questions of law as well as of fact; but Maryland legal precedent has indicated otherwise.<sup>22</sup>

The Supreme Court had an opportunity in *Brady v. Maryland* to review the specific state constitutional language that had been interpreted by Maryland courts to

14. *Sparf*, 156 U.S. at 101.

15. *Id.* at 106; see also Paul Mark Sandler with Matthew A.S. Esworthy, *Commentary: Jury Nullification: A Quixotic Theory Part I*, DAILY REC. (Balt.), May 19, 2006 [hereinafter Sandler, *Part I*], available at <http://www.shapirosher.com/news/JuryNullificationPartOne.htm> (“The decision provided that it is the duty of [federal] juries in criminal cases to take the law from the court and apply that law to the facts as they find them to be from the evidence.”).

16. See Sandler, *Part I*, *supra* note 15, at 80–81; Weinstein, *supra* note 5, at 241–42; Hannaford-Agor & Hans, *supra* note 7, at 1258.

17. *Dunn v. United States*, 284 U.S. 390, 393 (1932); see also Sandler, *Part I*, *supra* note 15.

18. *United States v. Powell*, 469 U.S. 57, 63 (1984); see also Sandler, *Part I*, *supra* note 15.

19. *Sparf*, 156 U.S. at 64; see also CONRAD, *supra* note 12, at 106 (“[W]here states so provided, either by statute or by constitutional provision, jurors would be considered judges of the law.”).

20. Sandler, *Part I*, *supra* note 15; Paul Mark Sandler with Matthew A.S. Esworthy, *Commentary: Jury Nullification: A Quixotic Theory Part II*, DAILY REC. (Balt.), Jun. 2, 2006 [hereinafter Sandler, *Part II*], available at <http://www.shapirosher.com/news/JuryNullificationPartTwo.htm>.

21. MD. CONST. art. 23.

22. *Blackwell v. Maryland*, 278 Md. 466, 479 (1976) (stating that the jury’s power to judge the law did not give them discretion to make new law or to ignore laws already enacted and currently in force); *Giles v. Maryland*, 229 Md. 370 (1962) (limiting the scope and breadth of Article 23); *Franklin v. Maryland*, 12 Md. 236, 245–46 (1858) (holding that the jury could not decide whether a law was constitutional); see also Sandler *Part II*, *supra* note 20.

explicitly allow for jury nullification.<sup>23</sup> On certiorari from the Maryland Court of Appeals, the Supreme Court held that suppression by the prosecution of evidence favorable to an accused violates due process “where the evidence is material either to guilt or to punishment.”<sup>24</sup> In its discussion, the Court noted that Maryland law, on its face, seems to allow juries in criminal cases to determine the admissibility of such evidence on the issue of innocence or guilt; however, the Court explained that the language of Article 23 “does not mean precisely what it seems to say.”<sup>25</sup> The Supreme Court recognized that the current effect of Article 23 had been restricted by several statutory exceptions and judicial construction of the language.<sup>26</sup> In *Brady*, the Supreme Court found that it was the trial court, not the jury, that reviewed the admissibility of evidence on the issue of the innocence or guilt of the accused.<sup>27</sup> The Supreme Court affirmed the Court of Appeals determination that the appellant’s due process rights had been violated and its remand to the trial court on the issue of punishment only.<sup>28</sup>

Despite the statutory and judicial restrictions placed upon it, jury nullification is always going to be a legitimate theory, regardless of whether or not it is an explicit state constitutional right. Juries will always issue verdicts that come from their individual evaluation of evidence and personal experience.<sup>29</sup> Juries are not charged with “blindly and mechanically applying the law,” but rather with “doing justice in light of the law, the evidence presented at trial, and their own knowledge of society and the world.”<sup>30</sup>

## B. Race and Jury Nullification

### 1. The Social Causes

Jury nullification is often attributed to juries that identify with and share the same characteristics as the defendant, such as the defendant’s racial or ethnic

---

23. *Brady v. Maryland*, 373 U.S. 83 (1963). In *Brady*, two defendants, Brady and Boblit, were prosecuted and convicted of murder. *Id.* at 84. Brady admitted being involved in the murder, but claimed that Boblit had done the actual killing. *Id.* During the trial, the prosecution withheld a written statement by Boblit confessing that he had performed the act of killing by himself, and Brady did not discover this evidence until after his conviction was affirmed. *Id.* Based on this newly discovered evidence, Brady moved for a new trial. *Id.* The Maryland Court of Appeals held that the suppressed confession denied Brady due process of law, but that it could not have reduced Brady’s offense to anything lower than murder in the first degree, and remanded the case for retrial on the issue of punishment only. *Id.* at 85.

24. *Id.* at 87.

25. *Id.* at 89.

26. *Id.* (citing *Giles v. Maryland*, 183 A.2d 359 (Md. 1962), *appeal dismissed*, 373 U.S. 767 (1963)).

27. *Id.* Similarly, in *Stevenson v. Maryland*, 423 A.2d 558, 564 (Md. 1980), the Maryland Court of Appeals clarified the jury’s responsibility to only determine the equity and justice in applying the law of a crime to the facts presented and not whether evidence should be admitted, whether witnesses are competent to testify, whether the court has jurisdiction, or whether the statutes are constitutional. *Id.*

28. *Brady*, 373 U.S. at 90–91.

29. See Weinstein, *supra* note 5, at 244.

30. *Id.* at 244–45.

background, socioeconomic status, or value system.<sup>31</sup> The occurrence of this type of nullification has been attributed to a potential response to social conditions, including the perception that the criminal justice system targets minorities.<sup>32</sup> One example is the “Bronx jury.”<sup>33</sup> This term originally described a jury consisting mostly of minorities in the Bronx, New York, that refuses to convict minority defendants.<sup>34</sup> Today, “Bronx juries” are not limited to the Bronx but extend to other cities with large minority populations, such as Baltimore, Maryland.<sup>35</sup>

Two explanations—which are not mutually exclusive of one another—have been posited for this phenomenon. One explanation asserts that jurors are making a statement to focus attention on racism in the criminal justice system and police conduct towards minorities.<sup>36</sup> The second contends that juries are not nullifying, but are instead actually focusing on reasonable doubt, which is drawn from the minority juror’s experiences with police misconduct and a belief among minorities that police are often willing to lie on the stand.<sup>37</sup> In cities with large minority populations such as Baltimore, many citizens have first-hand experience with police harassment—such as aggressive zero-tolerance drug policies and stereotypical “stop and frisk” searches<sup>38</sup>—that makes jurors distrustful of police testimony.<sup>39</sup>

Professor Paul Butler raises the issues of race and jury nullification in his thought-provoking essay, *Racially Based Jury Nullification: Black Power in the Criminal Justice System*.<sup>40</sup> Professor Butler argues that race is sometimes a legally and morally appropriate factor for jurors to consider when deliberating on a guilty verdict.<sup>41</sup> Professor Butler asserts that African American jurors may, and should, wield jury nullification as a sword to combat a racist criminal justice system.<sup>42</sup> Professor Butler urges African American jurors to approach jury duty by being aware of its political

---

31. Hannaford-Agor & Hans, *supra* note 7, at 1264.

32. Nancy S. Marder, *The Myth of the Nullifying Jury*, 93 Nw. U. L. REV. 877, 900 (1999).

33. *Id.* at 899.

34. *Id.* at 899–900.

35. *See id.* at 900 n.114, 901.

36. *Id.* at 900.

37. *Id.* at 901.

38. SHAWN M. FLOWER, DISPARITIES IN JURY OUTCOMES: BALTIMORE CITY V. THREE SURROUNDING JURISDICTIONS—AN EMPIRICAL EXAMINATION 22 (2008), available at [www.abell.org/pubsitem/Disparities-cj.908.pdf](http://www.abell.org/pubsitem/Disparities-cj.908.pdf).

39. *Id.*; see also Art Buist, *The Reasons Behind “Jury Nullification,”* YOUR PUB. RADIO, [http://www.publicbroadcasting.net/wypr/news.newsmain?action=article&ARTICLE\\_ID=1132465&sectionID=276](http://www.publicbroadcasting.net/wypr/news.newsmain?action=article&ARTICLE_ID=1132465&sectionID=276) (last updated Aug. 20, 2008).

40. Butler, *supra* note 1, at 677.

41. *Id.* at 679.

42. *See id.* at 695–97.

nature and their right to exercise their jury nullification power “in the interest of the black community.”<sup>43</sup>

Professor Andrew Leipold responds to Professor Butler’s essay by stating that frequent race-based nullification would only help solidify and institutionalize racism within the criminal justice system.<sup>44</sup> Professor Leipold acknowledges that African Americans comprise a hugely disproportionate percentage of criminal defendants and the prison population;<sup>45</sup> to do otherwise would be to turn a blind eye to the exponential growth of minorities in the prison system.<sup>46</sup> However, he warns that deliberately engaging in a course of race-based nullification is “foolish and dangerous.”<sup>47</sup> According to Professor Leipold, Professor Butler’s proposal is “foolish” because of various false assumptions and flawed logic.<sup>48</sup> Professor Butler’s proposal rests on the assumptions that black jurors are alienated from the justice system, lack political means for redressing their issues, and will only nullify nonviolent, victimless crimes.<sup>49</sup> Further, Professor Leipold argues that Professor Butler’s proposal is “dangerous” because the proposal would more likely harm African Americans than help them. Professor Leipold asserts that race-based decision making would inevitably perpetuate harmful stereotypes of African Americans, polarize a society already struggling with racial division, and sadly give up on the fight for equal treatment.<sup>50</sup>

Similarly, Professor Nancy Marder—who has researched and written extensively on the subject of juries and jury nullification—strongly asserts that false claims of jury nullification perpetuate racial stereotypes, particularly of a majority African American jury.<sup>51</sup> Marder notes that after the acquittal of O.J. Simpson, the press maintained that jury nullification was responsible for the verdict, and frequently attacked the jurors’ reasoning capabilities.<sup>52</sup> Jurors’ explanations of reasonable doubt as a reason for the verdict were largely ignored by the press, which seemed to prefer the nullification theory.<sup>53</sup>

---

43. *Id.* at 715.

44. Andrew D. Leipold, *The Dangers of Race-Based Jury Nullification: A Response to Professor Butler*, 44 UCLA L. REV. 109, 112 (1996).

45. *Id.* at 111.

46. *Id.*

47. *Id.*

48. *Id.*

49. *Id.* at 128.

50. *Id.* at 139. It should be noted that Professor Butler responds to Professor Leipold’s critique with an equally passionate article, *The Evil of American Criminal Justice: A Reply*, 44 UCLA L. REV. 143 (1996). Butler emphasizes that race-based jury nullification has two objectives: first, to further “black self help” by reducing the number of African Americans under criminal supervision, and second, to send a political message that African Americans “no longer will tolerate the criminal solutions to problems like racism and poverty.” *Id.* at 149.

51. Marder, *supra* note 1, at 303.

52. *Id.* at 302.

53. *Id.*

Professor Marder posits that both reasonable doubt and the making of an honest mistake are often confused with jurors deliberately nullifying the law<sup>54</sup> and that “mere mistake is not nullification.”<sup>55</sup> Nullification requires a juror to have subjective intent, while mistake does not—even though the end result, an acquittal, is the same.<sup>56</sup> Professor Marder notes that a jury is composed of human decision makers who are fallible.<sup>57</sup> It is possible for a juror to make an honest mistake about any number of things during the trial process, despite the judicial system’s best efforts to help jurors avoid these mistakes.<sup>58</sup> Additionally, a person’s view about whether a jury rendered the correct verdict and employed a logical line of reasoning will depend on a combination of factors, such as that person’s age, gender, religion, and employment, among others.<sup>59</sup> Thus, an individual (such as a reporter) judging from outside the trial experience cannot definitively state that the jury engaged in nullification without the benefit of all the evidence, testimony, and arguments, as well as actually participating in jury deliberations.

## 2. *Vigilantism*

Jury nullification can also be the result of juries that do not apply the law to a defendant whom they perceive as having honorable motives. In Detroit, Michigan, neighbors took matters into their own hands against drug dealers who had converted a once-peaceful neighborhood of working-class families into a dangerous environment where children could not play outdoors because drug dealers would shoot at each other in broad daylight.<sup>60</sup> The focal point of the violence was a crack house where drug dealers would sell their contraband.<sup>61</sup> Calls to the police became routine and had no effect on the drug activity and violence.<sup>62</sup> Finally, two neighbors had enough and burned down the crack house, which effectively wiped out the violence.<sup>63</sup>

---

54. *See id.* at 293.

55. Marder, *supra* note 32, at 882. Professor Marder stresses that even unreasonable mistakes such as misunderstanding the law, misjudging the credibility of a witness, or overlooking an important piece of evidence are not the same as jury nullification. *Id.* at 883.

56. *See id.* at 883.

57. Marder, *supra* note 1, at 293.

58. *See* Marder, *supra* note 32, at 883–84. To avoid jury mistakes, “courts have experimented with changes in procedure, such as allowing jurors to take notes, to submit written questions to the judge, to receive preliminary instructions, to take written instructions into the jury room, and to be instructed in plain language that laypersons can understand.” *Id.* at 884 (footnotes omitted).

59. Marder, *supra* note 1, at 304.

60. Isabel Wilkerson, ‘Crack House’ Fire: Justice or Vigilantism?, N.Y. TIMES, Oct. 22, 1988, § 1, at 1.

61. *Id.*

62. *See id.*

63. *Id.*

The two men freely admitted in open court that they were guilty of arson.<sup>64</sup> The jury deliberated for two and a half hours before acquitting them.<sup>65</sup> One juror even stated that he would have burned the house down too, or, maybe worse: “I would have been more violent.”<sup>66</sup> The social conditions and lack of response from law enforcement officials triggered the neighbors to take drastic action; the jury recognized that and even approved.<sup>67</sup> Further, at the time, many neighborhoods around the nation were taking matters into their own hands because they were receiving little or no assistance from the police.<sup>68</sup> The acquittal of the two men who had burned down the crack house reflected a nationwide reaction of families that would no longer live in neighborhoods where violence and crime had taken over.<sup>69</sup>

### 3. *Countervailing Factors*

Before one assumes that race provides a direct corollary to jury nullification, it is important to consider that juries are also motivated by values and core beliefs.<sup>70</sup> Indeed, demographics by themselves have little predictive value on jury decision making.<sup>71</sup> For example, the fact that a person is a Caucasian female will have little predictive implication regarding her opinion toward abortion.<sup>72</sup> Rather, the values that the woman embraces—women’s rights versus the rights, if any, of the fetus—will determine her opinion.<sup>73</sup> An analogous example in criminal law would be the relationship between a person’s background versus her opinion on the fairness of a legal outcome.<sup>74</sup> One’s trust in the courts, ambiguity in the evidence, and other variables are significant predictors of a juror’s perception of outcome fairness.<sup>75</sup> Race, a factor often directly associated with jury nullification, loses statistical significance when several variables are considered simultaneously.<sup>76</sup>

In addition to being motivated by values and core beliefs, a jury is often the last entity in the judicial process that the public can blame for an unpopular and

---

64. *Id.*

65. *Id.*

66. *Id.*

67. *Id.*

68. *Id.*

69. *Id.*

70. SAMUEL H. SOLOMON, DOAR LITIG. CONSULTING, HOW JURORS MAKE DECISIONS: A PRACTICAL AND SYSTEMATIC APPROACH TO UNDERSTANDING JURY BEHAVIOR 3 (2002), available at [http://www.doar.com/apps/uploads/literature62\\_HowJurorsMakeDecisions.pdf](http://www.doar.com/apps/uploads/literature62_HowJurorsMakeDecisions.pdf).

71. *Id.* at 6.

72. *Id.*

73. *See id.*

74. *See* Hannaford-Agor & Hans, *supra* note 7, at 1268–70.

75. *See id.* at 1270.

76. *See id.*

supposedly nullified verdict. Despite mistakes in jury deliberations and legitimate occasions for reasonable doubt, juries tend to become a convenient scapegoat.<sup>77</sup> However, to claim that a jury nullified because it racially identified with the defendant does not take into account the evidence the jury heard and why the jurors chose to deliver the verdict they did.<sup>78</sup> If the prosecution has not proven its case beyond a reasonable doubt, then it is a lack of evidence, not nullification, that has led to acquittal.<sup>79</sup> “Juries do not judge guilt in the abstract, but only as proven by the prosecution in a court of law.”<sup>80</sup> A jury accused of delivering the wrong verdict by the public may be delivering the only verdict supportable by the facts at trial.<sup>81</sup>

#### 4. *The Media's Role*

The media exacerbate the perceived occurrence of jury nullification. Print and television press coverage of high-profile cases tends to focus on the juries, especially if the possibility of nullification exists. For example, some commentators viewed the O.J. Simpson case as nullification in response to social conditions.<sup>82</sup> In their view, the majority African American jury engaged in nullification to send a variety of messages of protest to white America, including

telling white America that they were tired of being singled out for prosecution, for having a disproportionate number of African-American men sent to prison, for allowing police officers to engage in misconduct and racism, and for maintaining a system of justice that had a long history of discriminating against African Americans.<sup>83</sup>

To the press, nullification seemed the only plausible rationale possible, in light of weighty evidence against Simpson and after so little time spent in deliberation.<sup>84</sup> Professor Marder believes that many of the mainstream newspaper article writers were misinterpreting jury nullification.<sup>85</sup> For example, some journalists thought that the jury based its verdict on emotion, rather than reason, and that this led to nullification.<sup>86</sup> Professor Marder rejects this theory and argues that emotion is not a hallmark of nullification; rather, a jury can and will decide to nullify after reaching a verdict in a well reasoned and thoughtful manner.<sup>87</sup> Citing legitimate counterarguments,

---

77. See CONRAD, *supra* note 12, at 203.

78. *See id.*

79. *Id.* at 203.

80. *Id.*

81. *Id.*

82. See Marder, *supra* note 32, at 901.

83. *Id.*

84. Marder, *supra* note 1, at 288.

85. *See id.* at 289–90.

86. *Id.* at 290.

87. *See id.*

which the jurors themselves attempted to make, Professor Marder underscores the importance of these objective factors in the face of the subjective intent needed to engage in jury nullification.<sup>88</sup>

### III. THE WIRE

*The Wire* was a popular HBO television series that received critical acclaim for its realistic portrayal of urban life in Baltimore.<sup>89</sup> The events portrayed in *The Wire*'s final season closely reflect the main points of contention within the jury nullification debate and serve as an excellent conversational springboard for this topic.

*The Wire* is a story about “the America left behind.”<sup>90</sup> David Simon and Ed Burns, its co-creators, brought a uniquely intimate perspective to the series by virtue of their past lives as a part of Baltimore’s work force. Simon is a former reporter for *The Baltimore Sun* and Burns is a retired Baltimore homicide detective.<sup>91</sup> The writing staff consisted of individuals who had direct knowledge and experience with the various themes of *The Wire*'s five seasons: public housing, unions, politics, schools, and the drug war.<sup>92</sup> The writers included William F. Zorzi, who covered the backrooms of Baltimore politics for years before joining the writing staff.<sup>93</sup> A “bleak yet accurate portrait of social realities in Baltimore’s inner city,”<sup>94</sup> co-creator David Simon has said in interviews that the show was structured as “a political provocation.”<sup>95</sup>

*The Wire* was also about race. Race was a constant undercurrent on the show, regardless of the context. Baltimore is a largely African American city.<sup>96</sup> Most of its citizens are black.<sup>97</sup> Most of its politicians, police officers, students, and criminals are black.<sup>98</sup> And on *The Wire*, Baltimore was presided over by a white mayor, Tommy Carcetti—a character modeled in part after a former white Baltimore politician

---

88. See *id.* at 290–91 (“The most compelling reason for concluding that the Simpson verdict was not the result of a nullifying jury is that the jurors who explained their reasoning said that they reached their verdict based on reasonable doubt. All the jurors who were interviewed after the verdict said that they voted for acquittal because they believed the prosecution had failed to establish its case beyond a reasonable doubt.”).

89. See Jacob Weisberg, *The Wire on Fire*, SLATE (Sept. 13, 2006, 5:44 AM), <http://www.slate.com/id/2149566>.

90. David Simon, *Prologue* to RAFAEL ALVAREZ, *THE WIRE: TRUTH BE TOLD* 9 (2009).

91. See *id.* at 9–10; ALVAREZ, *supra* note 90, at 48.

92. See Simon, *supra* note 90, at 10.

93. *Id.*

94. Meghan O'Rourke, *Behind The Wire*, SLATE (Dec. 1, 2006, 2:27 PM), <http://www.slate.com/id/2154694/nav/tap1/>.

95. See *id.*

96. See *Demographic Statistics for Baltimore City, Maryland*, FEDSTATS, <http://www.fedstats.gov/qf/states/24/24510.html> (last visited Feb. 2, 2011).

97. *Id.*

98. See *id.*

whose ascension to mayor was particularly intriguing in a majority black city.<sup>99</sup> In its fifth and final season, *The Wire* portrayed the indictment, trial, and acquittal of the fictional Maryland State Senator Clay Davis, the “shamelessly larcenous” politician who is also African American.<sup>100</sup> By boldly aligning himself as someone who empathizes with the West Baltimore jurors’ racial background, socio-economic status, and value system, Davis was acquitted despite the weighty evidence against him and his own admission of the facts underlying the charges against him.

#### IV. A TALE OF TWO WEST BALTIMORE POLITICIANS AND THEIR TRIALS

##### A. *The Wire: Senator Clay Davis*

In the third season of *The Wire*, the show began to focus on political figures in Baltimore. One character, State Senator Clay Davis, was “[a] savvy and charismatic hustler” whose “only agenda was to raise money for himself and his political allies.”<sup>101</sup> Davis came from the streets of West Baltimore—a neighborhood where poverty and crime have been a part of everyday life<sup>102</sup>—and he was beloved by his constituents. He had connections with drug dealers and a reputation for taking bribes—regardless of their source—in exchange for loyalty and favors.<sup>103</sup> In season three, we see Davis accepting \$25,000 from Stringer Bell, a drug kingpin who is branching out into real estate development, in return for obtaining building permits for Bell’s project.<sup>104</sup>

In season five, State’s Attorney Rupert Bond targeted Davis for prosecution.<sup>105</sup> Davis was indicted for siphoning money earmarked for community activities, such as a neighborhood basketball facility called the West Baltimore Hoops Charity.<sup>106</sup> At the press conference announcing Davis’s indictment, State’s Attorney Bond accused Davis of creating “a network of charitable and non-profit organizations whose purpose was to accumulate cash for his private use.”<sup>107</sup> The Davis trial in *The Wire* was a study in racial and class conflict, and Clay Davis was the primary vehicle for highlighting that conflict.

---

99. See Clarence Page, *O'Malley's Win Helps Bridge Racial Divide*, BALT. SUN, Sept. 27, 1999, at 11A. Carcetti’s character was based in large part on a real-life Mayor of Baltimore, and later Governor of Maryland, Martin O’Malley. See ALVAREZ, *supra* note 90, at 277.

100. ALVAREZ, *supra* note 90, at 272.

101. *State Senator R. Clayton “Clay” Davis Character Biography*, HBO, <http://www.hbo.com/the-wire/cast-and-crew/r-clayton-clay-davis/index.html> (last visited Feb. 2, 2011).

102. See Justin Fenton, *As Police Grieve, 5 People Killed in Less Than a Day*, BALT. SUN, Oct. 27, 2010, at 1A; *Baltimore Crime Numbers Continue Climbing*, WBAL-TV 11 (Balt.), Apr. 25, 2006, <http://www.wbaltv.com/t/8995257/detail.html>; Annie Linskey, *20-Year Life Gap Separates City's Poorest, Wealthy*, BALT. SUN, Oct. 16, 2008, at 1A (Telegraph).

103. See ALVAREZ, *supra* note 90, at 87; *The Wire: Lessons* (HBO broadcast July 28, 2002).

104. ALVAREZ, *supra* note 90, at 238; *The Wire: Homecoming* (HBO broadcast Oct. 31, 2004).

105. ALVAREZ, *supra* note 90, at 447; *The Wire: React Quotes* (HBO broadcast Feb. 3, 2008).

106. *The Wire: Took* (HBO broadcast Feb. 17, 2008).

107. *The Wire: React Quotes*, *supra* note 105, at 5:55.

At the trial, the prosecution's major witness was Senator Davis's driver, Day-Day.<sup>108</sup> Day-Day testified that the entire \$40,000 he received as the executive director of the West Baltimore Hoops Charity went back to Davis, in cash.<sup>109</sup> On cross examination, Day-Day, a convicted felon who testified in return for a grant of immunity, admitted that there was no proof, other than his own testimony, that Davis ever received that cash.<sup>110</sup>

However, the real star of the trial was Clay Davis himself. Speaking to a jury that consisted of nine African Americans, one Asian woman, and two white males, Davis spun a tale of life in "my neck of the woods"<sup>111</sup> in West Baltimore, and claimed to be a modern day Jimmy Walker, if not Robin Hood.<sup>112</sup> Under a direct exam by his attorney, which is best described as a faux cross-examination, Davis freely admitted to taking the money from his charities: "You bet it all went into my account. It made it easier to do my job. And at the end of the day, not one penny stayed with me."<sup>113</sup> When his lawyer asked what he did with an \$11,000 check he had cashed the previous January, Davis answered, "Some went to pay everyone's BGE, 'cause half my district was gonna have the heat turned off. And some went for puff jackets for them that's got children in need."<sup>114</sup> Life in West Baltimore was "strictly cash and carry,"<sup>115</sup> meaning that there is a simple exchange of money for necessities. As Davis spoke, some in the gallery murmured in agreement.<sup>116</sup> Further, Davis pointed out the class differences between himself (and, by extension, his constituents in West Baltimore) and State's Attorney Bond, who was also African American, saying, "I don't know how they do things out in Roland Park [an upscale Baltimore neighborhood]<sup>117</sup>—maybe Prosecutor 'O-Bond-a' can enlighten me on that."<sup>118</sup>

Davis was unapologetic, and even indignant, about using charity dollars to fill the needs of his constituents. "You give me \$20,000 for a basketball and an air pump, I am pulling goodly on that for whatever and whoever comes at me," he declared.<sup>119</sup> That "whatever and whoever" included constituents who needed money to pay for a funeral, bail a child out from jail, buy clothing for a job interview, or pay for a child's

---

108. *The Wire: Took*, *supra* note 106.

109. *Id.*; ALVAREZ, *supra* note 90, at 466.

110. *The Wire: Took*, *supra* note 106.

111. *Id.* at 49:36.

112. See ALVAREZ, *supra* note 90, at 468.

113. *The Wire: Took*, *supra* note 106, at 49:01.

114. *Id.* at 49:23.

115. *Id.* at 50:18.

116. *Id.*

117. See Linskey, *supra* note 102.

118. *The Wire: Took*, *supra* note 106, at 50:09.

119. *Id.* at 50:56.

asthma medicine.<sup>120</sup> “And excuse me if I didn’t ask that old arthur-itis woman for a receipt, or that young mother who needed the Similac to sign some damn piece of paper so I don’t have to be up in this box explaining to people who’ve never been in our neck of the woods how things truly are.”<sup>121</sup>

Davis then concluded his soliloquy by tearfully and blatantly playing the nullification card:

And if a jury of my peers—you all—deem it right and true for me to walk out of here an upright and justified man, well I ain’t gonna lie to you. I’m gonna do the same damn thing tomorrow, and the day after that, and the day after that, until they lay me out at March’s Funeral Home and truck me off to Mt. Auburn.<sup>122</sup>

With that, the gallery burst into applause, and the prosecutors slumped in their chairs, already knowing the trial’s outcome.<sup>123</sup> *The Wire* concluded this vignette by showing Davis addressing his supporters on the same courthouse steps where State’s Attorney Bond had announced Davis’s indictment.<sup>124</sup> When Bond, watching this scene unfold, asked his fellow prosecutor, Assistant State’s Attorney Rhonda Pearlman, “What the fuck just happened?” she replied, “Whatever it was, they don’t teach it in law school.”<sup>125</sup>

Davis’s acquittal could be viewed as a classic example of jury nullification. A predominantly African American jury reacted negatively to the prosecution of one of its own—whom they had elected to serve them—for using the system to help his constituents when it was clear the system would not have done that itself. Professor Butler writes that, when African Americans commit jury nullification, it is not a “betrayal of democracy,” as some might argue, because “‘democracy,’ as practiced in the United States, has betrayed African Americans far more than they could ever betray it.”<sup>126</sup> Here, as claimed by Clay Davis, democracy betrayed West Baltimore by giving his community money for basketballs and pumps instead of clothing, medicine, or decent shelter for those who need it. By acquitting Davis, the jury reversed that betrayal.

The writers of *The Wire* inserted an interesting coda to the Clay Davis saga. After Davis’s acquittal, he was approached by a detective, Lester Freamon, who confronted him with false statements Davis had made on a mortgage application.<sup>127</sup> Freamon threatened to take the application to the U.S. Attorney’s Office and pointed out to Davis that a federal jury would not have the same racial composition as a Baltimore

120. *Id.* at 51:08.

121. *Id.* at 51:21.

122. *Id.* at 51:39.

123. *Id.*

124. *Id.*

125. *Id.* at 53:33.

126. Butler, *supra* note 1, at 706.

127. *The Wire: Clarifications* (HBO broadcast Feb. 24, 2008); see also ALVAREZ, *supra* note 90, at 469.

jury, an obvious reference to the nullification that occurred at Davis's trial.<sup>128</sup> Davis, sensing that his fortunes had turned, began to cooperate and provided information about drug dealers and their corrupt counsel.<sup>129</sup>

### B. *Baltimore Mayor Sheila Ann Dixon*

Sheila Ann Dixon was Baltimore's first African American woman mayor, elected in November 2007 for a four-year term.<sup>130</sup> Like the fictional Clay Davis, Sheila Dixon was one of West Baltimore's own.<sup>131</sup> Dixon was a teacher by training, with degrees from Towson University and Johns Hopkins University.<sup>132</sup> When Dixon entered politics, she rose through the ranks of City Council to become the first African American woman elected as president of the City Council.<sup>133</sup>

Dixon had been under intense investigation by the Maryland State Prosecutor's Office as part of a long-running corruption probe into City Hall finances.<sup>134</sup> The investigation was triggered by Dixon's romantic involvement with Ronald Lipscomb, a real estate developer who conducted business with the city.<sup>135</sup> Lipscomb gave Dixon gifts that she failed to report to the Baltimore City Ethics Board. This nondisclosure violated Baltimore ethics law, requiring the mayor and other officials to file an ethics form under penalty of perjury reporting all gifts received from individuals doing business with the city of Baltimore.<sup>136</sup> In June 2008, pursuant to a search warrant, Dixon's home was searched and documents were seized by agents of the Maryland

128. *The Wire: Clarifications* (HBO broadcast Feb. 24, 2008); ALVAREZ, *supra* note 90, at 469. A federal jury would have been drawn from Baltimore City's neighboring suburbs, populating a more affluent and predominantly white jury pool—one that would not lead to jury nullification for Davis. See FLOWER, *supra* note 38, at 20.

129. *The Wire: Late Editions* (HBO broadcast Mar. 9, 2008); ALVAREZ, *supra* note 90, at 477. Of course, Freamon's threat to go to the U.S. Attorney was a ruse, since that office had already declined to prosecute Davis in light of his prior acquittal. See *The Wire: Late Editions* (HBO broadcast Mar. 9, 2008).

130. See *Sheila Dixon*, N.Y. TIMES, Jan. 6, 2010, [http://topics.nytimes.com/top/reference/timestopics/people/d/sheila\\_dixon/index.html?scp=1-spot&sq=sheila%20dixon&st=cse](http://topics.nytimes.com/top/reference/timestopics/people/d/sheila_dixon/index.html?scp=1-spot&sq=sheila%20dixon&st=cse); Annie Linskey & Julie Bykowitz, *Dixon Indicted*, BALT. SUN, Jan. 10, 2009, at 9A (Local).

131. See Christina Antoniadis, *The Unsinkable Sheila Dixon*, BALT. MAG., Nov. 2008, available at <http://www.baltimoremagazine.net/people/2008/11/the-unsinkable-sheila-dixon>.

132. *Id.*

133. Ian Urbina, *Trial Begins for Baltimore Mayor*, N.Y. TIMES, Nov. 9, 2009, at A16.

134. *Dixon Indicted on Corruption Charges*, WBAL-TV 11 (Balt.), Jan. 10, 2009, <http://www.wbal.com/politics/18445702/detail.html>; see also Henri E. Cauvin, *On Other Side of Courtroom, Still High Profile; After Decades as a Prosecutor, Lawyer Jumps to Defense of Md. Politicians*, WASH. POST, Aug. 19, 2008, at B01 (Metro).

135. Scott Dance, *Baltimore Mayor Sheila Dixon Indicted*, BALT. BUS. J., Jan. 9, 2009, available at <http://baltimore.bizjournals.com/baltimore/stories/2009/01/05/daily65.html>; Byron Warnken, *Baltimore Mayor Sheila Dixon Indicted on Twelve Counts*, WARNKEN, LLC ATTORNEYS AT LAW (Jan. 10, 2009), <http://www.findmarylandlawyer.com/Baltimore-Mayor-Sheila-Dixon-Indicted-on-Twelve-Counts>.

136. *Indictment of Baltimore Mayor Sheila A. Dixon, Perjury Counts, Press Releases & Official Reports*, OFF. OF THE MD. STATE PROSECUTOR, <http://www.ospmd.org> (last visited Mar. 18, 2011); Warnken, *supra* note 135.

State Prosecutor's Office.<sup>137</sup> During the search, agents seized several gift cards, an "X-Box" video game console, and other electronics that had been purchased at Best Buy with gift cards.<sup>138</sup> A Baltimore grand jury originally indicted Dixon in January 2009; however, some of the counts were dismissed due to impermissible testimony about Dixon's alleged actions that was protected by Dixon's legislative privilege.<sup>139</sup> In July 2009, two new indictments were filed against Dixon on nine counts, including two counts of perjury, three counts of theft, three counts of fraudulent misappropriation by fiduciary, and one count of misconduct in office.<sup>140</sup> The factual underpinning of the State's case was that Dixon had solicited and obtained gift cards from real estate developers with whom she was connected under the guise of giving the cards to the needy, but instead kept the gift cards for her own personal use—that is, Dixon was Clay Davis, but on a smaller scale.<sup>141</sup>

Dixon's real-life trial on the theft charges differed from Davis's fictional trial in two respects. First, Dixon's jury was more diverse than Davis's jury. Seven jurors were African American, three were white, one was Asian American, and one identified herself as Native American/Hispanic.<sup>142</sup> Nine of the jurors were women.<sup>143</sup> Secondly, as discussed below, Dixon's defense strategy did not include an invitation for jury nullification.

These two factors ran counter to what experts had predicted. News articles quoted prominent defense attorneys and jury experts who explained that Baltimore juries tended to show sympathy for African American defendants.<sup>144</sup> As one defense attorney, Warren A. Brown, told the *Associated Press* when describing Baltimore juries: "To hell with the law, to hell with the facts, they will render a verdict they think is fair, is right."<sup>145</sup> Statistics seemed to bear this out. A study conducted by the Abell Foundation found that juries in Baltimore City were less likely to convict

---

137. Ryan Sharrow & Heather Harlan Warnack, *Investigators Seize Documents in Raid of Mayor Sheila Dixon's Home*, BALT. BUS. J., June 17, 2008, available at <http://www.bizjournals.com/baltimore/stories/2008/06/16/daily14.html>.

138. Urbina, *supra* note 133.

139. Press Release, State of Md. Office of State Prosecutor, Baltimore City Mayor Sheila A. Dixon Re-Charged (July 29, 2009), <http://www.ospmd.org/DynaContent/PressReleases/DixonPressRelease072909.pdf>.

140. Perjury Indictment at paras. 38, 46, Maryland v. Dixon, No. 109210016 (Md. Cir. Ct. July 29, 2009), available at <http://www.ospmd.org/DynaContent/PressReleases/DixonIndictmentPerjury072909.pdf>; Theft Indictment at paras. 54–66, Maryland v. Dixon, Case No. 109210016 (Md. Cir. Ct. July 29, 2009), available at <http://www.ospmd.org/DynaContent/PressReleases/DixonIndictmentTheft072909.pdf>.

141. Urbina, *supra* note 133.

142. Statement of Judge Dennis M. Sweeney at the Sentencing of Defendant Sheila Ann Dixon at 6, Maryland v. Dixon, Nos. 109210015 & 109210016 (Md. Cir. Ct. Feb. 4, 2010), available at [http://www.baltocts.state.md.us/highlighted\\_trials/Statement%20of%20Judge%20Sweeney.pdf](http://www.baltocts.state.md.us/highlighted_trials/Statement%20of%20Judge%20Sweeney.pdf).

143. Brendan Kearney, *Jury for Baltimore Mayor Sheila Dixon's Trial Mostly Black, Female*, DAILY REC. (Balt.), Nov. 10, 2009, at News.

144. Ben Nuckols, Editorial, *Dixon May Count on Sympathetic Jurors*, BALT. SUN, Jan. 15, 2009, at 3B.

145. *Id.*

defendants than those in the surrounding suburban areas.<sup>146</sup> Compared to the suburbs, the Baltimore jury pool was two-thirds black and 92% of the defendants were non-white.<sup>147</sup>

At Dixon's trial on the theft charges, one of the prosecution's key witnesses was Patrick Turner, one of the real estate developers who gave Dixon the gift cards.<sup>148</sup> Turner testified that the cards were meant for needy families and not the mayor herself.<sup>149</sup> In another instance of life imitating (or at least paraphrasing) art, Randall Finney, a driver for another real estate developer, Ronald Lipscomb, played the part of Day-Day. Finney testified that he purchased thirty to forty gift cards from at least four different stores, and, pursuant to Mayor Dixon's instructions, delivered the cards on two separate occasions to Dixon's driver in an East Baltimore parking lot.<sup>150</sup> The prosecutors also presented evidence showing that Dixon herself used some of the cards she received.<sup>151</sup>

However, Mayor Dixon's defense diverged markedly from that of Clay Davis. Dixon did not testify and had four witnesses, one of whom was her pastor, who testified as a character witness.<sup>152</sup> Dixon's defense team argued that the case against her was thin and that the prosecution never proved the requisite intent on her part.<sup>153</sup>

The media anticipated an acquittal.<sup>154</sup> Law professors, law enforcement officials, defense attorneys, and even a jury-consulting firm all commented on the likelihood that a minority jury would be sympathetic to a minority defendant.<sup>155</sup> If life imitates art, then *The Wire's* acquittal of Senator Davis was also a prediction of Dixon's verdict.

That prediction was wrong. Out of the seven theft counts from the indictment, Dixon was found guilty of one misdemeanor count of fraudulent misappropriation by a fiduciary, involving gift cards from Patrick Turner.<sup>156</sup> Two counts related to developer Ronald Lipscomb—the felony theft of gift cards and the fraudulent

---

146. FLOWER, *supra* note 38, at 4.

147. *Id.* at iii.

148. *See Developer, Others Testify in Dixon Trial*, WBAL-TV 11 (Balt.), Nov. 16, 2009, <http://www.wbal.com/news/21625873/detail.html>.

149. *Id.*

150. *Witness Testimony Begins in Dixon Trial*, WBAL-TV 11 (Balt.), Nov. 13, 2009, <http://www.wbal.com/news/21605309/detail.html>.

151. *See id.*

152. *See Baltimore Mayor Sheila Dixon Convicted of Taking Gift Cards Meant for City's Poor*, N.Y. DAILY NEWS, Dec. 1, 2009, [http://www.nydailynews.com/news/national/2009/12/01/2009-12-01\\_baltimore\\_mayor-sheila\\_dixon\\_convicted\\_of\\_taking\\_gift\\_cards\\_meant\\_for\\_citys\\_poor.html](http://www.nydailynews.com/news/national/2009/12/01/2009-12-01_baltimore_mayor-sheila_dixon_convicted_of_taking_gift_cards_meant_for_citys_poor.html).

153. *See* Julie Bykowicz & Annie Linskey, *Dixon's Fate in Jurors' Hands*, BALT. SUN, Nov. 20, 2009, at 1A.

154. *See* Nuckols, *supra* note 144.

155. *Id.*

156. Plea Agreement at 1–2, *Maryland v. Dixon*, Nos. 109210015 & 109210016 (Md. Cir. Ct. Baltimore City Jan. 6, 2010), available at <http://www.ospmd.org/DynaContent/PressReleases/Dixon%20plea.pdf>; *Baltimore Mayor Guilty of Embezzlement*, CNN.COM, Dec. 2, 2009, <http://www.cnn.com/2009/CRIME/12/01/baltimore.mayor.crime/index.html>.

misappropriation by a fiduciary of gift cards—were thrown out because the prosecution did not call Lipscomb to testify.<sup>157</sup> Dixon was acquitted of two counts of felony theft and one count of misconduct in office, and the jury failed to reach a verdict on the count of fraudulent misappropriation by a fiduciary.<sup>158</sup> Dixon also ultimately reached a plea agreement on a misdemeanor perjury charge, was given a probationary sentence, and agreed to resign.<sup>159</sup>

It was not lost on either the jurors or the judge that the media and the public had anticipated a different outcome, and one not necessarily based on the facts. In obvious response to what had been written in the press, both the jurors and the judge went to significant, if not extraordinary, lengths to declare the Dixon verdict a triumph of the jury system. The jury's foreperson wrote a letter to the presiding judge in the case, Judge Dennis M. Sweeney, which Judge Sweeney read into the record as part of a larger statement at Dixon's sentencing hearing.<sup>160</sup> The foreperson presented the letter "with a sense of accomplishment and pride."<sup>161</sup> She stated that the twelve jurors represented the diversity of the city of Baltimore and came together to "fulfill a civic duty,"<sup>162</sup> and that "it has been an education, a privilege, and an honor to serve our judicial system."<sup>163</sup>

Judge Sweeney himself noted that the jurors were a "true cross-section of the city," with diversity of age, background, and occupation.<sup>164</sup> Judge Sweeney also felt compelled to comment on the objectivity and hard work of the jury:

---

157. *Prosecution Rests; Lipscomb-Related Charges Thrown Out: Developer Considered Key Witness For Prosecution Didn't Testify*, WBAL-TV 11 (Balt.), Nov. 17, 2009, <http://www.wbal.com/politics/21638512/detail.html>.

158. Because the prosecution used different legal theories in charging Dixon, out of the seven theft-related counts that Dixon was indicted on, she could have been convicted of a maximum of three counts. In other words, if Dixon was charged with one count of theft occurring in 2005, she could not also be charged with one count of fraudulent misappropriation by a fiduciary occurring in 2005. See *Jury Verdict Sheet, Maryland v. Dixon*, No. 109210015 (Md. Cir. Ct. Baltimore City 2010), available at <http://www.baltimoresun.com/media/acrobat/2009-11/50594355.pdf>; see also Julie Bykowicz & Annie Linskey, *Dixon Convicted of Embezzlement*, BALTIMORE SUN, Dec. 1, 2009, [http://articles.baltimoresun.com/2009-12-01/news/bal-dixon-trial1201\\_1\\_felony-theft-partial-verdict-count-of-fraudulent-misappropriation](http://articles.baltimoresun.com/2009-12-01/news/bal-dixon-trial1201_1_felony-theft-partial-verdict-count-of-fraudulent-misappropriation).

159. *Baltimore Mayor Sheila Dixon Pleads Guilty to Perjury Charges, Resigns*, N.Y. DAILY NEWS, Jan. 7, 2010, [http://www.nydailynews.com/news/national/2010/01/07/2010-01-07\\_baltimore\\_mayor\\_sheila\\_dixon\\_pleads\\_guilty\\_to\\_corruption\\_charges\\_resigns.html](http://www.nydailynews.com/news/national/2010/01/07/2010-01-07_baltimore_mayor_sheila_dixon_pleads_guilty_to_corruption_charges_resigns.html).

160. Statement of Judge Dennis M. Sweeney at the Sentencing of Defendant Sheila Ann Dixon at 7–9, *Maryland v. Dixon*, Nos. 109210015 & 109210016 (Md. Cir. Ct. Feb. 4, 2010), available at [http://www.baltocts.state.md.us/highlighted\\_trials/Statement%20of%20Judge%20Sweeney.pdf](http://www.baltocts.state.md.us/highlighted_trials/Statement%20of%20Judge%20Sweeney.pdf).

161. *Id.* at 7.

162. *Id.* at 8.

163. *Id.*

164. *Id.* at 6.

Many commentators glibly predicted even before jury selection began that a hung jury split along lines of race, sex or income would be the result. In contrast, from what I saw in this case all of the jurors took the case very seriously put aside their personal biases and worked very hard together as a team to resolve the case based on the evidence in the case and the law.<sup>165</sup>

## V. CONCLUSION

The fact that jury nullification never played a role in the Dixon trial was obviously significant to the press, the jury, and the judge. However, looking back, it should not have surprised anyone. Unlike Clay Davis, Sheila Dixon never claimed to be a populist Robin Hood, stealing from ill-designed bureaucratic coffers to give the poor what they really needed and were not receiving. Nor, as the facts disclosed, could she. Instead, the evidence was rather clear that she stole from the poor (i.e., by taking the gift cards intended for them) and gave to herself (e.g., the X-Box 360). Regardless of demographics, no jury's core values could have been expected to condone Mayor Dixon's conduct.

In Sheila Dixon's trial, life could not imitate art. The facts of Mayor Dixon's case got in the way, and, in any event, she could never have provided the performance Clay Davis did on *The Wire*. Further, Mayor Dixon's jury was more diverse than Senator Davis's jury. However, *The Wire* and the public's pretrial perception of the real-life Dixon trial illustrate an unavoidable fact: race is perceived—by real and televised society alike—as playing an overarching role in our justice system.

---

165. *Id.* at 6–7.