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Survey

JURY NULLIFICATION: A SELECTIVE, ANNOTATED BIBLIOGRAPHY

Teresa L. Conaway,[*] Carol L. Mutz,[**] & Joann M. Ross[***]

I. INTRODUCTION

Juries are expected to look at the facts of a case as presented in court, weigh them against the law as it has been explained to them by the judge, and then pronounce the result: the defendant is guilty or not guilty, liable or not liable. Sometimes, however, juries look at the law and dislike what they see, at least with respect to the specific set of facts before them. When this happens, juries have been known to reach verdicts contrary to what logic dictates, which is known as "jury nullification."

There are any number of reasons why a jury might decide not to enforce a specific law against a specific defendant, some of them more noble than others. Depending on one's perspective, jury nullification is a courageous act of civil disobedience or the reprehensible act of an out-of-control jury. It ensures liberty or results in anarchy; it should be left unfettered or needs to be controlled.

The debate over jury nullification is multi-faceted. Indeed, many authors even disagree over the proper definition of jury nullification. Some approve of jury nullification in principle but do not believe juries should be informed of their ability to defy the law as explained to them by the judge. Others believe juries should be told outright of this ability. Still others decry the principle and seek ways to prevent jury nullification from ever happening. Others encourage its use, especially in certain types of cases.

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The purpose of this bibliography is to collect and summarize the scholarly writing to date on this controversial subject. It is selective in the sense that it excludes the copious body of newspaper and popular magazine articles on the subject. It also excludes most articles or books in which jury nullification is merely one small part of the overall discussion. The case law section attempts to include a representative case from each state and federal circuit rather than all cases on the subject. We hope that this approach will provide a launching point for further research in most jurisdictions.

The bibliography is organized into secondary sources and primary sources, respectively. The former includes articles and monographs. Articles are organized into the ten following categories: (1) General; (2) Offers Solutions; (3) Gender, Race, & Jury Nullification; (4) Jury Nullification in Political & Policy-making Contexts; (5) Death Penalty; (6) United States v. Thomas; (7) Civil Jury Nullification; (8) State-Specific; (9) The Fully Informed Jury Association; and (10) Dissertations, Theses, & Jury Studies. The primary sources include cases and constitutional provisions.

II. SECONDARY SOURCES

A. *Periodical Articles*

1. General

Jeffrey Abramson, *Two Ideals of Jury Deliberation*, 1998 *U. Chi. Legal F.* 125 (1998):

In this article, Abramson analyzes the following two competing theories of jury deliberation: impartialism (emphasis on individual impartiality) and pluralism (overall impartiality achieved by a cross-representation of the community). Impartialists oppose jury nullification as an anarchy of conscience. Pluralists are wary of jury nullification. Though they like the power the doctrine gives to juries to reflect community norms and values, they also fear this power can be discriminatory or undemocratic. Abramson also discusses whether there is any way to get the good of jury nullification without the bad. Lastly, he discusses Prof. Paul Butler's proposal that black jurors use the power of jury nullification in a race conscious manner to acquit black defendants charged with non-violent drug possession offenses.

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Dale W. Broeder, *The Functions of the Jury: Facts or Fictions?*, 21 *U. Chi. L. Rev.* 386 (1954):

Broeder examines the following three duties of the jury: (1) to declare the law in opposition to what the judge says the law is; (2) to decide whether a given type of conduct or group event falls within the legal rule as laid down by the court; and (3) to inject an element of community sentiment into its resolution of issues upon which reasonable men may differ.

W. Neil Brooks & Anthony N. Doob, *Justice & the Jury*, 31 *J. Soc. Sci.* 171 (1975):

In *Justice & the Jury*, the authors consider the kinds of extra-legal factors that appear to influence jury decisions.

Darryl K. Brown, *Jury Nullification Within the Rule of Law*, 81 *Minn. L. Rev.* 1149 (1997):

Brown disputes the prevailing assumption that nullification subverts the rule of law. He believes that three out of the four types of nullification cases can be reconciled with the rule of law. The fourth type—bias, such as racism—does not uphold the rule of law.

Sherman J. Clark, *The Courage of Our Convictions*, 97 *Mich. L. Rev.* 2381 (1999):

Clark believes criminal trial juries perform an important, but unappreciated, social function: providing a means through which the community takes responsibility for inherently problematic judgments regarding the blameworthiness or culpability of fellow citizens. Nullification is a risk that we ought to bear.

Clay S. Conrad, *Jury Nullification as a Defense Strategy*, 2 *Tex. F. on C.L. & C.R.* 1 (1995):

Clay Conrad argues that defense attorneys should aggressively seek nullification in cases where their technically guilty clients are morally blameless. He also says that juries are a source of feedback to the legislative process because laws that are regularly nullified should be changed. Lastly, he suggests strategies lawyers can use to get the jury to nullify.

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Judge Lawrence W. Crispo, et al., *Jury Nullification: Law Versus Anarchy*, 31 *Loy. L.A. L. Rev.* 1 (1997):

In this article, the authors argue that jury nullification threatens the integrity of our judicial system, and so suggest ways to protect against jury nullification.

Leo P. Dreyer, Comment, *Jury Nullification and the Pro Se Defense: The Impact of* Dougherty v. United States, 21 *U. Kan. L. Rev.* 47 (1972):

This note addresses the interrelationship between the doctrine of jury nullification and the right to defend pro se. In particular, it compares and contrasts Judge Bazelton's dissent in *Dougherty* with the majority's position.

James Joseph Duane, *Jury Nullification: The Top Secret Constitutional Right*, *Litig.*, Summer 1996, at 6-14, 59-60:

This author believes none of the arguments against a jury nullification instruction hold up to examination. He argues that because we refuse to be truthful with juries, they will continue making terrible choices based on a little knowledge gained from magazines and the Internet, and judges will lose their credibility.

David Farnham, *Jury Nullification: History Proves It's Not a New Idea*, *Crim. Just.*, Winter 1997, at 4-14:

In this article, Farnham argues that jury nullification is a power of the jury as a whole, not of an individual juror. When one juror refuses to listen to arguments, it is a frustration of justice, not jury nullification. Such jurors already sit on juries and do not need instruction. Failing to instruct keeps responsible jurors from exercising their full responsibility and does nothing to prevent the idiosyncratic juror from indulging in whim and prejudice.

Norman J. Finkel, *Commonsense Justice, Culpability, and Punishment*, 28 *Hofstra L. Rev.* 669 (2000):

Finkel contends that because jurors are lay people and are the ultimate arbiters of the law, we risk nullification or anarchy if the criminal law is not consistent from community sentiment. Finkel summarizes his jury research and shows that lay views can be sophisticated, even if at odds with the law. He concludes that Commonsense Justice "reaches for more ingredients than the law" and anchors itself by reasonableness.

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Joseph L. Galiber, et al., *Law, Justice, and Jury Nullification: A Debate*, 29 *Crim. L. Bull.* 40 (1993):

This article contains notes from a February 13, 1992, panel discussion on jury nullification at the John Jay College of Criminal Justice in New York City. The panel, made up of a legislator, a prosecutor, a criminal defense attorney, and two academics, questioned whether nullification is still a useful defense against governmental tyranny or rather, erodes the law.

W. Russel Gray, *Supralegal Justice: Are Real Juries Acting Like Fictional Detectives?*, 21 *J. Am. Culture* 1 (1998):

Gray suggests that jury nullification is similar to the vigilante tactics of many heroes of American popular fiction and film and claims that the heart of the issue is the possibility that true justice may transcend laws. He then examines the social context for jury nullification and the literary context for the fictional detective's pursuit of justice.

Matthew P. Harrington, *The Law-Finding Function of the American Jury*, 1999 *Wis. L. Rev.* 377 (1999):

In this article, Harrington examines jury nullification in the context of the recurring cycle between justice without law and a more formalized law-making process. He sees the jury's loss of its law-making function as an inevitable casualty in the march of time.

W. William Hodes, *Lord Broughham, the Dream Team, and Jury Nullification of the Third Kind*, 67 *U. Colo. L. Rev.* 1075 (1996):

Hodes distinguishes between three different kinds of jury nullification, which follow: (1) jury consideration of the justness of the applicable law; (2) juries who have no political or moral objections to the applicable law, but who find abuse in the invocation of the law; and (3) the jury has no qualms about the law or how it is being applied, but will acquit anyway to send a message. The acquittal of O.J. Simpson was an example of the third kind.

Mark DeWolfe Howe, *Juries as Judges of Criminal Law*, 52 *Harv. L. Rev.* 582 (1939):

Howe addresses the judiciary's response to the demand that the jury in criminal cases should judge the law. Howe, writing in the 1930s, saw a reversal by the judiciary, which earlier in our history had accepted the jury's right to decide the law.

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Major Bradley J. Huestis, *Jury Nullification: Calling for Candor from the Bench and Bar*, 173 *Mil. L. Rev.* 68 (2002):

This article addresses the circumstances under which jury nullification may be an issue in a military trial and reviews the history and competing policies behind the concept of jury nullification. It advocates allowing military counsel to argue the concept directly to the panel to prevent driving the argument "underground," leading to unpredictable administration of justice.

John D. Jackson, *Making Juries Accountable*, 50 *Am. J. Comp. L.* 477 (2002):

This article considers the following various ways in which common law juries might be made more accountable: (1) hard political accountability whereby decision-makers can be removed from their position when their actions or decisions are unacceptable; and (2) softer accountability measures that demands that decision-making is procedurally transparent and that decision-makers are representative or reflective of the community they serve. The article concludes that limitations on the way juries can be made accountable in the hard sense means that greater emphasis should be given to the ways in which they can be made more accountable in the softer sense.

Frank A. Kaufman, *The Right of Self-Representation and the Power of Jury Nullification*, 28 *Case W. Res. L. Rev.* 269 (1978):

Kaufman examines the relationship between the criminal defendant's right to self-representation and the jury's nullification power. In a political trial, the pro se defendant has a unique opportunity to seek jury nullification. Fairness and candor demand that judges should be able to instruct the jury on nullification in appropriate cases.

Lieutenant Commander Robert E. Korroch & Major Michael J. Davidson, *Jury Nullification: A Call for Justice or an Invitation to Anarchy?*, 139 *Mil. L. Rev.* 131 (1993):

This article reviews the history of jury nullification, and concludes that neither nullification instructions by judges nor nullification arguments by defense counsel should be foreclosed completely, because to do so might overshadow the rendition of justice.

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Justice 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):

Justice Kourlis disputes Professor Hodes's conclusions by arguing that jury nullification is akin to anarchy. Kourlis also argues that ethical standards prohibit a criminal defense attorney from urging a jury to disregard the law and that it is the ultimate responsibility of the presiding judge to prevent such an argument. For example, Johnnie Cochran flirted with jury nullification in the O.J. Simpson case but less so than the press or Professor Hodes have inferred.

Stanton D. Krauss, *An Inquiry into the Right of Criminal Juries to Determine the Law in Colonial America*, 89 *J. Crim. L. & Criminology* 111 (1999):

Krauss examines the doctrinal history of jury nullification in the colonial period concluding that the published records studied prove that the jury's right in any real sense was firmly established in only one colony, Rhode Island. There is some evidence that criminal juries may have had some form of lawfinding authority at times in colonial Pennsylvania and New York, and a strong indicator that there was no such right for much of the colonial era in Georgia, Maryland, and Massachusetts.

Stephan Landsman, *Of Mushrooms & Nullifiers: Rules of Evidence and the American Jury*, 21 *St. Louis U. Pub. L. Rev.* 65 (2002):

Landsman discusses jury "blindfolding" in the context of the rules of evidence and argues that juries must be fully informed.

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

Marder argues that the jury has an interpretive role whenever it finds facts or applies a legal standard that is vague or ambiguous, and that the jury plays a political role by providing feedback to the government. The conventional view that jury nullification is always harmful is a myth; jury nullification provides more benefits than harm.

Richard H. Menard, Jr., Note, *Ten Reasonable Men*, 38 *Am. Crim. L. Rev.* 179 (2001):

Menard argues that the two-way unanimity rule in criminal jury trials serves no identifiable public interest. He proposes that the rule be replaced by a one-way ten to two rule: ten or more votes to convict, with

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fewer than ten resulting in acquittal. In this note, Menard also discusses the jury's role as a political institution and as an evidentiary device.

Harris G. Mirkin, *Judicial Review, Jury Review & the Right of Revolution Against Despotism*, 6 *Polity* 38 (1973):

Mirkin discusses the judicial and jury powers of revolution by nullification in an historical context, which sees jury nullification as the populist counterpart to the aristocratic institution of judicial review. Mirkin suggests that juries are an alternative to revolution because they prevent the enforcement of laws that would give rise to a right of revolution.

Aaron T. Oliver, *Jury Nullification: Should the Type of Case Matter?*, 6 *Kan. J. L. & Pub. Pol'y*, Winter 1997, at 49:

Oliver believes nullification should never be allowed when a violent crime is involved. Some nullification will occur in other types of cases, but no jury instruction regarding nullification should be given. Generally, he believes that jury nullification undermines our system of justice.

James Ostrowski, *The Rise and Fall of Jury Nullification*, 15. *J. of Libertar. St.* 89 (2001):

Ostrowski believes the United States is no longer a republic but has become a democracy. As a result, jury nullification has evolved from a practice, to a right, to a power subject to no judicial review, to a power about which the court and lawyers may not inform jurors, to a practice which subjects jurors to punishment by the court. He sees this evolution as taking our jury system back to medieval England.

David A. Pepper, *Nullifying History: Modern-Day Misuse of the Right to Decide the Law*, 50 *Case W. Res. L. Rev.* 599 (2000):

Pepper contends that pro-nullification scholars have misapplied the historical record in concluding that jurors have the "right," as opposed to merely the power to nullify at will. The modern proponents of the right to nullify will have to find another argument to support their position.

Todd E. Pettys, *Evidentiary Relevance, Morally Reasonable Verdicts, and Jury Nullification*, 86 *Iowa L. Rev.* 467 (2001):

Pettys discusses the United States Supreme Court's ruling in *Old Chief v. United States* that evidence offered by the government in a criminal case has "'fair and legitimate weight' if it tends to show that a guilty verdict would be morally reasonable." He argues that adopting

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Old Chief's conception of relevance makes necessary significant changes in the rules related to jury nullification, such as permitting the defense to offer evidence that a guilty verdict would be morally unreasonable, to argue jury nullification in closing argument, and to have a jury nullification instruction.

Roscoe Pound, *Law in Books and Law in Action*, 44 *Am. L. Rev.* 12 (1910):

Roscoe Pound believes "jury lawlessness" is one of the ways we attempt to adjust the letter of the law to the demands of administration in concrete cases while apparently preserving the law unaltered.

Dianah L. Pressley, *Jury Nullification: The Inchoate Power*, 20 *Am. J. Trial Adv.* 451 (1997):

This article explains recent developments in the area of jury nullification.

Proceedings of the Fifty-Third Judicial Conference of the District of Columbia Circuit, Williamsburg, Virginia, 145 *F.R.D.* 149 (1993):

This publication documents the proceedings of a panel discussion at a judicial conference in which Federal Judge Jack B. Weinstein, defense attorney Ken Munch, and law professors Richard Uviller and Steve Saltzburg participated.

John T. Reed, Comment, *Penn, Zenger and O.J.: Jury Nullification–Justice or the "Wacko Fringe's" Attempt to Further Its Anti-Government Agenda?*, 34 *Duq. L. Rev.* 1125 (1996):

This note discusses what jury nullification means, reviews its history, and discusses arguments against it. The note argues that jury nullification should be allowed.

Michael J. Saks, *Judicial Nullification*, 68 *Ind. L.J.* 1281 (1993):

This symposium participant briefly discusses jury nullification in the context of the routine nullification of the law by judges who render it meaningless by giving bewildering instructions. Comments on the irony of judicial opposition to jury nullification are given; specifically, if judges were really concerned with the jurors following the law, they would communicate the law to the jury so that the law could be understood.

Alan W. Scheflin, *Jury Nullification: The Right to Say No*, 45 *S. Cal. L. Rev.* 168 (1972):

Scheflin views jury nullification as an exercise of discretion in the administration of law and justice, which serves as a useful check on prosecutorial indiscretion. He also sees jury nullification as critical to the stability of democracy.

Alan W. Scheflin & Jon Van Dyke, *Jury Nullification: The Contours of a Controversy*, *Law and Contemp. Probs.*, Autumn 1980, at 51:

Scheflin and Van Dyke review the historical development of the "acquit as a matter of conscience" theory of nullification. They also examine recent judicial attitudes toward jury nullification and the lawmaking power of juries in other contexts, specifically, how jury nullification works in practice today in Indiana and Maryland, where juries are candidly instructed in their power to nullify. Lastly, they examine the current arguments for and against nullification and conclude that jurors should be instructed that they have this important power.

Robert F. Schopp, *Verdicts of Conscience: Nullification and Necessity as Jury Responses to Crimes of Conscience*, 69 *S. Cal. L. Rev.* 2039 (1996):

In this article, Schopp takes an analytical and normative approach to examining the roles of jury nullification and the necessity defense within the criminal justice system. Analytically, the article examines the role of jury nullification in response to crimes of conscience. Normatively, it addresses the question of whether jury nullification is a legitimate component of the criminal justice system, and if so, how it may be distinguished from the defense of necessity.

Phillip B. Scott, *Jury Nullification: An Historical Perspective on a Modern Debate*, 91 *W. Va. L. Rev.* 389 (1988):

Scott asserts that English law has never recognized the jury's right to nullification on the basis of conscience; it existed in America only as a drastic reaction to an unrepresentative government. The real motivation behind the nullification debate is to transform criminal prosecutions into vehicles for political change.

Steve J. Shone, *Lysander Spooner, Jury Nullification, and Magna Carta*, 22 *Quinnipiac L. Rev.* 651 (2004):

Shone is concerned with the current scholarly analysis of jury nullification, and argues that Lysander Spooner's theory of jury nullification offers a more satisfying justification that is based on the

Magna Carta and the common law that the United States inherited from England. In the article, Shone focuses on Spooner's work, *Trial By Jury*, in which Spooner presented six theoretical arguments supporting jury nullification.

Rita Simon, *Jury Nullification, or Prejudice and Ignorance in the Marion Barry Trial*, 20 *J. Crim. Just.* 261 (1992):
This article examines the legal lore and social science data about jurors' performance and considers the factors that allowed the jury to exonerate Mayor Marion Barry. It questions whether the hung jury in the case was an example of "partial" jury nullification or an illustration of prejudice and ignorance winning out over facts and law.

Gary J. Simson, *Jury Nullification in the American System: A Skeptical View*, 54 *Tex. L. Rev.* 488 (1976):
This article examines the arguments in favor of the jury's *right* to nullify and finds them wanting. However, the article points out that this does not imply that changes in existing practices for the purposes of limiting a jury's *power* to nullify are in order. Instead, it demonstrates that any such attempts would have unacceptable repercussions on the system as a whole.

Ralph Slovenko, *Jury Nullification*, 22 *J. Psychol. & L.* 165 (1994):
Slovenko briefly surveys the history and philosophy of jury nullification in light of the acquittals of Dr. Jack Kevorkian.

Robert J. Stolt, Note, *Jury Nullification: The Forgotten Right*, 7 *New Eng. L. Rev.* 105 (1971):
This note examines the history of jury nullification in the United States in the context of the Vietnam War and the Pentagon Papers case against Dr. Ellsberg.

Simon Stern, Note, *Between Local Knowledge and National Politics: Debating Rationales for Jury Nullification After* Bushell's Case, 111 *Yale L.J.* 1815 (2002):
Stern believes previous discussions of *Bushell's Case* have underestimated its impact on the jury nullification debate. This note explores the process by which the defense of jury independence in *Bushell's Case* was translated into a defense of jury nullification in the early 1680s. Stern asserts that an historical understanding of the nature of jury nullification in the seventeenth and eighteenth centuries must consider not only the language of the decision but also the debates that

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follow. He concludes that there is a much stronger foundation for the law-finding right of the jury in the legal and rhetorical battles that *Bushell's Case* engendered.

Richard St. John, Note, *License to Nullify: The Democratic and Constitutional Deficiencies of Authorized Jury Lawmaking*, 106 *Yale L.J.* 2563 (1997):

This note addresses the question of whether a jury could legitimately be given the right to nullify by legislative enactment or a state's constitution. The conclusion in the note is that the legitimacy problems inherent in jury nullification are too great to be cured by legislative enactment and that a jury's power to nullify becomes more problematic when it is elevated to the status of a "right."

Robert S. Summers, *Formal Legal Truth and Substantive Truth in Judical Fact-Finding—Their Justified Divergence in Some Particular Cases*, 18 *Law & Phil.* 497 (1999):

This article defines substantive truth as actual truth, while formal legal truth is whatever is found to be fact by either the judge or jury, regardless of whether it coincides with substantive truth. The article explains that in a well-designed legal system, "substantive" and "formal legal" truth will usually coincide. However, several factors may prevent the finder of fact from reaching the actual truth. Among these factors is jury nullfication, which permits juries to refuse to "find" certain facts where they believe the underlying law to be unjust, even when the evidence clearly supports such a factual finding.

Eleanor Tavris, *The Law of an Unwritten Law: A Common Sense View of Jury Nullification*, 11 *W. St. U. L. Rev.* 97 (1983):

Tavris believes theoretical arguments in support of jury nullification, centered around the issue of power versus right, fail to clearly resolve the issue. Instead, pragmatic considerations might resolve the issue entirely. Tavris addresses some of the "inescapable practicalities" of the issue, such as nullification abuse by bigoted jurors, the possibility of nullification convictions, and the burden on the jurors.

Jon M. Van Dyke, *The Jury as a Political Institution*, 16 *Cath. Law.* 224 (1970):

Van Dyke believes American jurors have become a docile and well-regimented group. He says justice would be better served if jurors were told that they have the power to act mercifully if they decide that applying the law to the defendant's act would lead to an unjust act. He

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argues that the only justification for having juries is as an additional safeguard against government power.

Steven M. Warshawsky, Note, *Opposing Jury Nullification: Law, Policy, and Prosecutorial Strategy*, 85 *Geo. L.J.* 119 (1996):

This note argues that jury nullification should be discouraged by preventing criminal defendants from informing juries at trial of their nullification power. The note highlights some legal strategies prosecutors can employ to prevent nullification during jury selection, pretrial motions, jury instructions, and closing arguments.

Chaya Weinberg-Brodt, Note, *Jury Nullification and Jury Control Procedures*, 65 *N.Y.U. L. Rev.* 825 (1990):

Weinberg-Brodt believes any analysis of jury nullification using a "jury-centered framework" is seriously flawed. The note explains that a jury-centered framework is one which fails to recognize that all "jury rights" are instruments to protect the defendant's rights, stemming initially from the Sixth Amendment right to be tried by a jury. Weinberg-Brodt argues that the practical effect of this flawed framework is the imposition of prophylactic procedural rules that impact a defendant's Sixth Amendment right to an independent jury. Instead, Weinberg-Brodt proposes a "defendant-centered framework" that focuses on the defendant's right to be tried by an independent jury. With respect to a jury nullification instruction, the author concludes that the "defendant-centered framework" would not necessarily require an instruction and may even permit an "anti-nullification" instruction under some circumstances.

Honorable Jack B. Weinstein, *Considering Jury 'Nullification': When May and Should a Jury Reject the Law to Do Justice?*, 30 *Am. Crim. L. Rev.* 239 (1993):

The author, a federal District Court judge, is concerned that distress about jury nullification reflects disturbing trends in society. Nullification is a legitimate result of our constitutional process and government should not attempt to prevent it through strict controls. However, he opposes instructing juries that they have the power to nullify, preferring that judges exercise their discretion to allow nullification by flexibly applying the concepts of relevancy and prejudice and by admitting evidence bearing on moral issues. He proposes a model for the exercise of that discretion. Jury nullification "arising from idealism is good for the American Soul."

Honorable Jack B. Weinstein, *The Many Dimensions of Jury Nullification*, 81 *Judicature* 169 (1998):

Weinstein believes jury nullification is not a serious problem. He believes that jurors nullify to be fair—not out of disaffection—when society treats them properly. Weinstein argues that the critical factor in avoiding nullification along ethnic and other structural schisms is to heal ourselves of the cancerous inequality of real opportunity and respect that pervades so much of our society.

2. Offers Solutions

David C. Brody, Sparf *and* Dougherty *Revisited: Why the Court Should Instruct the Jury of Its Nullification Right*, 33 *Am. Crim. L. Rev.* 89 (1995):

This article argues that courts have overstated the likelihood that fully informed juries will acquit and understated the harm produced by failing to inform jurors of their nullification power. The article proposes a procedure for informing the jury, including a model instruction and a list of steps a trial court can take when it believes nullification may be an issue.

M. Kristine Creagan, Note, *Jury Nullification: Assessing Recent Legislative Developments*, 43 *Case W. Res. L. Rev.* 1101 (1993):

This note analyzes the benefits and drawbacks of various legislative and constitutional proposals, including why they have all failed to be enacted. It proposes language for legislation or a constitutional amendment that will encompass the benefits of the proposals but none of their drawbacks.

David N. Dorfman & Chris K. Iijima, *Fictions, Fault, and Forgiveness: Jury Nullification in a New Context*, 28 *U. Mich. J.L. Reform* 861 (1995):

The authors believe that a jury nullification instruction would provide "a more rational basis for jury deliberation and decision making" and empower estranged communities. The authors propose a specific jury nullification instruction and other adjustments to trial procedures that would solve current problems with the way juries exercise their nullification power.

Robert T. Hall, *Legal Toleration of Civil Disobedience*, 81 *Ethics* 128 (1971):

This article considers four suggestions for the accommodation of civil disobedience by society, one of which is jury nullification. The article argues that jury nullification is the best of the four suggestions,

but the legal machinery necessary for putting it into practice is lacking. Finally, it proposes a "Conscientious Disobedience" defense which, if raised, would permit a jury nullification instruction and argument.

Nancy J. King, *Silencing Nullification Advocacy Inside the Jury Room and Outside the Courtroom*, 65 *U. Chi. L. Rev.* 433 (1998):

King assesses the constitutionality of the following two means of controlling nullification: (1) excluding nullifiers from juries; and (2) restricting nullification advocacy outside the courtroom. She concludes that these controls can withstand constitutional attack.

Andrew D. Leipold, *Rethinking Jury Nullification*, 82 *Va. L. Rev.* 253 (1996):

This article proposes that legislatures establish a "nullification defense," allowing juries in certain circumstances to acquit, despite evidence of guilt beyond a reasonable doubt, but also authorizing certain "error-correcting procedures," such as appeals from acquittals.

R. Alex Morgan, Note, *Jury Nullification Should Be Made a Routine Part of the Criminal Justice System, but It Won't Be*, 29 *Ariz. St. L.J.* 1127 (1997):

Morgan argues that nullification should be incorporated as a routine aspect of criminal jurisprudence by (1) allowing defense counsel to argue for nullification; (2) notifying the prosecution that a nullification strategy is contemplated, giving the prosecutor time to prepare an opposing argument; and (3) giving a jury instruction that the jurors should follow the judge's instructions on the law unless finding the defendant guilty is repugnant to their sense of justice.

Anne Bowen Poulin, *The Jury: The Criminal Justice System's Different Voice*, 62 *U. Cin. L. Rev.* 1377 (1994):

Poulin fears we risk silencing the jury's "different voice" when we restrict the evidence and refuse to inform the jury of its power to nullify. She, then, proposes the three following ways to adjust procedures to recognize the jury's power to speak with a different voice: (1) inform the jury that it is free to speak with a different voice and to act as the conscience of the community; (2) give the jury greater guidance on the law and facts; and (3) give greater care to the selection of jurors free from traits that risk tainting their decision.

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3. Gender/Race & Jury Nullification

Elisabeth Ayyildiz, *When Battered Woman's Syndrome Does Not Go Far Enough: The Battered Woman as Vigilante*, 4 *Am. U. J. Gender Soc. Pol'y & L.* 141 (1995):

Ayyildiz urges jury nullification for battered women who kill their abusers. She believes juries should be informed of their nullification power, either through instruction or argument.

Paul Butler, *Racially Based Jury Nullification: Black Power in the Criminal Justice System*, 105 *Yale L.J.* 677 (1995):

Butler urges black jurors to nullify some prosecutions of black defendants for non-violent crimes.

Paul Butler, *The Evil of American Criminal Justice: A Reply*, 44 *UCLA L. Rev.* 143 (1996):

This article refutes Professor Leipold's reply to Bulter's original article regarding jury nullification by black jurors. The article asks whether the solution to the problem of racism in the criminal justice system can be color blind when the problem is not.

Paul Butler, *By Any Means Necessary: Using Violence and Subversion to Change Unjust Law*, 50 *UCLA L. Rev.* 721 (2003):

In this article, Butler evaluates the use of subversion and violence to change contemporary law perceived as discriminatory, when traditional methods are ineffective or too slow. As an example of subversion, potential jurors could lie in voir dire about their concerns about racism in the criminal justice system to avoid being removed for cause. They could then prevent a racist outcome by refusing to comply with the court's instructions on the law. But they should go a step further, too, and announce after the fact, that they have done so. This risks prosecution for perjury but is a form of civil disobedience that could change the system. The author analogizes this subversion to the fugitive slave law cases where jurors refused to convict, despite the facts, because the law was unjust.

Clay S. Conrad, *Scapegoating the Jury*, 7 *Cornell J.L. & Pub. Pol'y* 7 (1997):

Conrad believes the conventional wisdom exaggerates the amount of racist nullification by jurors and exonerates the police, prosecutors, and judges who play as great or greater a role in exonerating lynch mobs and racists murderers. He also examines cases involving racial violence

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where juries appeared to nullify the law and argues that jury nullification played a minor role when one considers the party played by actors in the criminal trials.

Long X. Do, Comment, *Jury Nullification and Race-Conscious Reasonable Doubt: Overlapping Reifications of Commonsense Justice and the Potential Voir Dire Mistake*, 47 *UCLA L. Rev.* 1843 (2000):

This note examines the proposal to dismiss potential jurors who, during voir dire questioning, indicate a propensity to nullify. The author stresses the fear that indirect questions asked by judges to elicit the venireman's general opinions about racial bias in the criminal justice system will lead to dismissal for cause and undermine the role of the jury.

Hihoshi Fukurai, *Is the O.J. Simpson Verdict an Example of Jury Nullification?: Jury Verdicts, Legal Concepts, and Jury Performance in a Racially Sensitive Criminal Case*, 22 *Intl. J. Comp. & Appl. Crim. Just.* 185 (1998):

Fukurai examines the jury's deliberative performance in racially sensitive criminal trials and concludes that in a highly publicized criminal trial involving a member of racial and ethnic minorities, minority jurors are more likely to adhere to the strict application of criminal legal standards in their deliberative process.

Elissa Krauss & Martha Schulman, *The Myth of Black Juror Nullification: Racism Dressed Up in Jurisprudential Clothing*, 7 *Cornell J.L. & Pub. Pol`y* 57 (1997):

The authors in this article consider how the adherence of African-American jurors to fundamental legal principles underlying jury decision-making has been wrongly characterized as a pattern of nullification that undermines the jury system. They argue that the myth of black juror nullification is a racist attack on the jury system.

Andrew D. Leipold, *The Dangers of Race-Based Jury Nullification: A Response to Professor Butler*, 44 *UCLA L. Rev.* 108 (1996):

Leipold calls Butler's position "understandable" but also "foolish and dangerous." He argues that the factual assumptions underlying Butler's plan are wrong and that he misconstrues the lessons history teaches about jury nullification; Butler's plan would fail on its own terms even if his assumptions were correct. Leipold concludes that Butler's plan would solidify and constitutionalize racism and leave African Americans as a group worse off.

Nancy S. Marder, *The Interplay of Race and False Claims of Jury Nullification*, 32 *U. Mich. J.L. Reform* 285 (1999):

In this article, Marder questions why the press sometimes characterizes a jury's decision as a case of jury nullification when, in fact, the jury's decision was based on reasonable doubt. Marder concludes that false nullification claims occur when there is disagreement with the verdict and distrust of the jury that reached it. She asserts that false claims are harmful as they perpetuate racial stereotypes, cast doubts on jury decisions and invite the government to step in and "fix" the problem. To reduce the false claims of nullification, Marder argues that juries should be made as diverse as possible by eliminating efforts to skew jury composition and create homogeneous juries.

John P. Relman, *Overcoming Obstacles to Federal Fair Housing Enforcement in the South: A Case Study in Jury Nullification*, 61 *Miss. L.J.* 579 (1991):

This article examines the use of jury nullification in civil trials to reach patently unjust verdicts. The article examines *United States v. Schay*, a fair housing case in which an all-white southern jury found for the white defendant against overwhelming evidence to the contrary. It also discusses motions for new trials and motions for judgments not on the verdict as bulwarks against jury nullification. Lastly, it suggests ways in which a new trial standard might be crafted to prevent such injustices without unduly interfering with the functions and province of the jury.

Symposium, *The Role of Race-Based Jury Nullification in American Criminal Justice*, 30 *J. Marshall L. Rev.* 907 (1997):

This citation provides the adaptation of a transcript of a program held April 7, 1996, at the John Marshall Law School in Chicago featuring Paul Butler, Andrew Leipold, and Judge Charles P. Kocoras with a foreword by Timothy P. O'Neill. The symposium consists of the case-in-chief by Butler, rebuttals by Leipold and Kocoras, and a surebuttal by Butler.

4. Jury Nullification in Political & Policy-Making Contexts

Steven E. Barkan, *Jury Nullification in Political Trials*, 31 *Soc. Probs.* 28 (1983):

Barkan believes that the refusal of many judges to give jury nullification instructions in trials of Vietnam War protestors helped

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ensure convictions, which in turn frustrated antiwar goals and protected the government from many repercussions that acquittals or hung juries would have brought.

Gary J. Jacobsohn, *Citizen Participation in Policy Making: The Role of the Jury*, 39 *J. Pol.* 73 (1977):

This article briefly discusses jury nullification in the context of policy-making. Jurors engage in policy-making when they (1) refuse to convict because they object to the substance of the law or the severity of the punishment attached to it, and (2) serve as the voice of the "reasonable man." This article asks the following two questions regarding the jury as a policy-making institution: (1) should policy be made by an institution lacking in accountability, and (2) is a public institution that is engaged in a policy-making role an appropriate forum for the ventilation of matters of conscience.

William M. Kunstler, *Jury Nullification in Conscience Cases*, 10 *Va. J. Int'l L.* 71 (1970):

Kuntsler argues that the jury is a "safety valve" that must exist. Juries must be informed that they are the consciences of their communities and free to acquit those who have broken the law in the context of the *Catonsville Nine* (Father Berrigan) case.

Philip Lynch, *Juries as Communities of Resistence: Eureka and the Power of the Rabble*, 27 *Alternative L.J.* 83 (2002):

The author argues that jurors can, do, and should commit acts of "civil disobedience" when they believe the law is unjust or that exigent circumstances justify the defendant's actions. The author examines jury nullification in the context of the Eureka Stockade in 1854 and the trials and acquittals that followed.

Nancy S. Marder, *Juries, Drug Laws & Sentencing*, 6 *J. Gender Race & Just.* 337 (2002):

Marder sees the jury as a mechanism to provide feedback to the other branches of government before outrage over unpopular/unjust laws can become harmful. She also argues that the passage of less harsh sentencing schemes in several states were in response to jury acquittals in drug cases. Marder says these institutional responses to jury nullification are appropriate to democracy.

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Joseph L. Sax, *Conscience & Anarchy: The Prosecution of War Resisters*, 57 *Yale Rev.* 481 (1968):

This author sees jury nullification as useful because it it is a compromise between anarchy and despotism. The article says that jury nullification allows the legal system to "accommodate itself to situations in which violations of the law should be viewed as justifiable."

5. Death Penalty

Susie Cho, Comment, *Capital Confusion: The Effect of Jury Instructions on the Decision to Impose Death*, 85 *J. Crim. L. & Criminology* 532 (1994):

This note discusses jury nullification in the context of death penalty cases, concluding that juries must confine their decisions within the given instructions. Permitting jury nullification instructions in capital cases, the note argues, would "promote arbitrary decision-making in an area of law where . . . the defendant deserves 'super due process' rights."

Brian Galle, Note, *Free Exercise Rights of Capital Jurors*, 101 *Colum. L. Rev.* 569 (2001):

This note discusses jury nullification in the context of "death qualification" in capital cases and suggests a revised formulation of the present standard, which provides more protection for the religious liberty of prospective jurors.

Bruce McCall, Comment, *Sentencing by Death Qualified Juries and the Right to Jury Nullification*, 22 *Harv. J. on Legis.* 289 (1985):

McCall argues that the use of death-qualified juries to determine the sentence in a capital case violates a defendant's right to jury nullification.

6. United States v. Thomas

Frank A. Bacelli, Note, United States v. Thomas*: When the Preservation of Juror Secrecy During Deliberations Outweighs the Ability to Dismiss a Juror for Nullification*, 48 *Cath. U. L. Rev.* 125 (1998):

This note analyzes the Second Circuit's decision in *United States v. Thomas* in light of the Federal Rule of Civil Procedure 23(b)'s purpose and concludes that the evidentiary standard used by the court was warranted to maintain jury secrecy.

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David C. Brody, *Balancing Jury Secrecy and the Rule of Law: The Second Circuit's Guide to Removing Nullifying Jurors*, 20 *Just. Sys. J.* 113 (1998):

Brody concludes that the opinion in *United States v. Thomas* is logically sound and on its face quite limited, but sets a dangerous precedent. Brody argues that close scrutiny should be used.

James H. Gold, *Voir Dire: Questioning Prospective Jurors on Their Willingness to Follow the Law*, 60 *Ind. L.J.* 163 (1984-85):

Written before *United States v. Thomas*, this article addresses whether prospective jurors should be questioned regarding their willingness to nullify. This article finds that the reasons offered for prohibiting nullification questions during voir dire do not justify a blanket prohibition.

Elizabeth I. Haynes, Note, United States v. Thomas: *Pulling the Jury Apart*, 30 *Conn. L. Rev.* 731 (1998):

Haynes sees jury nullification as a struggle between those who distrust the government (and thus advocate jury nullification) and those who distrust the masses (and thus oppose jury nullification). Haynes explains that in *United States v. Thomas*, the Second Circuit tried to strike a compromise between the two, rejecting popular control but establishing a high evidentiary standard for the removal of nullifying jurors. However, Haynes expects continued polarization.

Patrick M. Pericak, Casenote, *Using Rule 23(b) as a Means of Preventing Juror Nullification,* United States v. Thomas, *116 F.3d 606 (2d Cir. 1997)*, 23 *S. Ill. U. L.J.* 173 (1998):

Pericak argues that the Second Circuit should not have established such a high standard to determine whether a juror intends to nullify. He argues that federal courts should use Rule 23(b) to dismiss a juror if the court believes the evidence shows beyond a reasonable doubt that the juror intends to nullify.

Ran Zev Schijanovich, Note, *The Second Circuit's Attack on Jury Nullification in* United States v. Thomas*: In Disregard of the Law and the Evidence*, 20 *Cardozo L. Rev.* 1275 (1999):

In this note, the author argues that *United States v. Thomas* is the "most far-reaching action taken by the federal courts" to suppress jury nullification, an erroneous application of Federal Rule of Civil Procedure 23(b), and a departure from precedent and the spirit of the jury's role.

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7. Civil Jury Nullification

Steven M. Fernandes, Comment, *Jury Nullification and Tort Reform in California: Eviscerating the Power of the Civil Jury by Keeping Citizens Ignorant of the Law*, 27 *Sw. U. L. Rev.* 99 (1997):

Fernandes concludes that the California court—unable to eliminate the jury's nullification power—is content to keep jurors ignorant of the law and eviscerate their power to nullify the law in civil cases. He proposes the adoption of a model jury instruction to restore the right of the jury to reject the statutory ceiling.

Noel Fidel, *Preeminently a Political Institution: The Right of Arizona Juries to Nullify the Law of Contributory Negligence*, 23 *Ariz. St. L.J.* 1 (1991):

This article discusses the origins and evolving interpretation of the Arizona constitutional provision that makes contributory negligence and assumption of risk questions of facts left to the jury. It considers the utility of jury nullification in the civil setting of negligence law and whether juries should retain this power after Arizona's statutory adoption of comparative negligence in 1984.

Lars Noah, *Civil Jury Nullification*, 86 *Iowa L. Rev.* 1601 (2001):

Noah attempts to construct historical, structural, and normative claims that might support the recognition of a law-dispensing power for civil juries.

Kaimipono David Wenger & David A. Hoffman, *Nullificatory Juries*, 2003 *Wis. L. Rev.* 1115 (2003):

This article explains that understanding why and how jury nullification has become delegitimized helps explain what is currently happening in the punitive damages debate. It states that a "nullificatory jury" is one that "acts outside of its normal role as a finder of established fact and instead plays a part in the construction of social policy." The article concludes that if the power to award punitive damages is taken from juries and given to judges or bureaucrats instead, that juries will continue to award "punitive damages" through higher compensatory awards, which would lead anti-jury activists to strengthen their call for the elimination of juries.

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8. State Specific

John F. Bodle, Note, *Indiana Juries in Criminal Cases as Judges of Law Under Constitutional Relic*, 24 *Notre Dame L. Rev.* 365 (1948):

Bodle argues that jury nullification—pursuant to the Indiana Constitutional provision—is dangerous to the defendant and the public alike, and detrimental to the orderly administration of justice.

Samuel K. Dennis, *Maryland's Antique Constitutional Thorn*, 92 *U. Pa. L. Rev.* 34 (1943):

Dennis discusses the history and application of Maryland's constitutional provision granting juries the power of nullification.

Honorable Oliver A. Harker, *The Illinois Juror in the Trial of Criminal Cases*, 5 *Ill. L. Rev.* 468 (1911):

Harker examines the history of the then Illinois constitutional provision making juries the judges of law and fact in criminal cases. The author, a judge and law school dean, concludes that jury nullification is fraught with danger and liable to abuse.

Deirdre A. Harris, Note, *Jury Nullification in Historical Perspective: Massachusetts as a Case Study*, 12 *Suffolk U. L. Rev.* 968 (1978):

This note examines the extent of the jury's right to determine the law in Massachusetts, and it concludes that the courts must preserve the jury's power to nullify the law without informing juries that they have this power.

Gary J. Jacobson, *The Right to Disagree: Judges, Juries, and the Administration of Criminal Justice in Maryland*, 1976 *Wash. U. L.Q.* 571 (1976):

Jacobson examines jury nullification in context of the Maryland constitutional provision that grants juries the power to determine the law. He concludes that the provision serves a useful, if not critical, purpose in the administration of criminal justice in Maryland and should be retained.

Mike Reck, Note, *A Community with No Conscience: The Further Reduction of a Jury's Right to Nullify in* People v. Sanchez, 21 *Whittier L. Rev.* 285 (1999):

This note explains a California Court of Appeals decision, which held that a trial judge may instruct a jury that it cannot nullify and may threaten to remove any juror who would nullify. The author argues that

the court went too far by authorizing the removal of jurors who would nullify, because if the courts are allowed to rule on the thought processes used by jurors, then the right to trial by an impartial jury is under severe attack.

Note, *The Changing Role of the Jury in the 19th Century*, 74 *Yale L.J.* 170 (1964):

This note examines the evolution in the way people conceived the purpose and competence of the jury and its role in the process of government. It especially concentrates on the procedural changes underlying the change in Massachusetts.

Honorable Robert D. Rucker, *The Right to Ignore the Law: Constitutional Entitlement Versus Judicial Interpretation*, 33 *Val. U. L. Rev.* 449 (1999):

Rucker explores the Indiana Constitutional Provision giving juries the right to determine the law and facts, which current judicial interpretations severely restrict. He proposes an alternate interpretation that preserves to the jury a right likely intended by the framers.

Carolyn White Spenglar, Note, *The Jury's Role Under the Indiana Constitution*, 52 *Ind. L.J.* 793 (1977):

This note examines the history of nullification in Indiana where the state constitution provides that the jury has the right to determine law as well as facts. It proposes a model for implementation of the constitutional provision in an orderly manner with initiative and creativity.

9. The Fully Informed Jury Association ("FIJA")

Robert C. Black, *FIJA: Monkeywrenching the Justice System?*, 66 *UMKC L. Rev.* 11 (1997):

Black examines the Fully Informed Jury Association movement and suggests what effect its success might have on the criminal trial process. Black concludes that giving of jury nullification instruction would not be the beginning of anarchy, but rather, would authorize juries to take the purposes of laws and punishment into account.

Erick J. Haynie, *Populism, Free Speech, and the Rule of Law: The "Fully Informed" Jury Movement and Its Implications*, 88 *J. Crim. L. & Criminology* 343 (1997):

Haynie discusses the challenge FIJA poses to the impartial administration of criminal justice. He examines the nature and scope of FIJA advocacy, considers the dangers it poses to due process, and discusses possible remedies, suggesting that current limits on FIJA's lobbying may not be enough to stop it from reaching its goal.

Honorable Frederick B. Rodgers, *The Jury in Revolt?: A "Heads Up" on the Fully Informed Jury Association Coming Soon to a Courthouse in Your Area*, *Judges' J.*, Summer 1996, at 10-12:

A state judge warns against the activities of FIJA. Rodgers recommends voir dire commentary that includes a threat of prosecution for perjury for violating the jury oath.

Alan W. Scheflin & Jon M. Van Dyke, *Merciful Juries: The Resilience of Jury Nullification (Protest and Resistance: Civil Disobedience in the 1990s)*, 48 *Wash. & Lee L. Rev.* 165 (1991):

This article examines the grass roots movement to inform juries of their nullification power, analyzes some recent court decisions, and reports some of the recent significant developments related to nullification. It concludes that the judicial system would be better served if judges instructed jurors of their true powers.

10. Dissertations, Theses, & Jury Studies

Frank A. Bacelli, *The Mad-Hatter Tea Party: How the American Criminal Justice System Has Turned the Jury's Function on Its Head* (2001) (unpublished master's thesis, on file with Regent University):

Bacelli believes the legitimate justification for jury nullification—to provide public checks on oppressive government action—still exists today. He proposes changing the definition of the debate from the perjorative term, "jury nullification," to one that reflects the true nature of the tradition, such as "jury conscientiousness" or "moral discernment."

Mary B. Beganyi, *Moral Authority of Juries: A Forgotten Aspect of Citizenship* (1995) (unpublished master's thesis, on file with the University of Nevada, Las Vegas):

Beganyi examines the ethical and historical foundations for a "Fully Informed Jury Amendment." She focuses on the dual role of the jury

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deliberation process paralleling the distinction between natural law and legalism. She also advocates for legal protection of the jury's right to nullify.

David Charles Brody, *The Interaction of Jury Nullification and Abortion Attitudes: Measuring the Effects of a Nullification Instruction on Juror Behavior Using the Trail Simulation Paradigm* (1997) (unpublished Ph.D. dissertation, on file with the State University of New York at Albany):

The author found that whether jurors received a jury nullification instruction had a direct effect on several variables and was strongly associated with a finding of guilt in a scenario involving a clearly innocent defendant.

David C. Brody & Craig Rivera, *Examining the* Dougherty *"All-Knowing Assumption": Do Jurors Know About Their Jury Nullification Power?*, 33 *Crim. L. Bull.* 151 (1997):

The authors of this article test the assumption of *United States v. Dougherty* that jurors do not need to be instructed about jury nullification because they already know about their nullification powers. Two telephone surveys showed that a vast majority of individuals did not have an accurate knowledge of jury nullification.

John Clark, *The Social Psychology of Jury Nullification*, 24 *Law & Psychol. Rev.* 39 (2000):

Clark concludes that the social psychology of each juror, not the merits of the case, may ultimately determine the verdict.

John Patrick Davis, *When Jurors Ignore the Law and the Evidence to Do Justice* (1998) (unpublished Ph.D. dissertation, on file with the University of Washington):

In this dissertation, Davis explains how he found that jurors who received a nullification instruction acquitted a defendant more often in an ambiguous murder case but not in a sympathy-inducing euthanasia case.

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 (2003):

This article reports the research findings of a National Center for State Courts study related to jury nullification and discusses the policy implications of those findings for the criminal justice community. The article also identifies the difficulty identifying instances of nullification

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and concludes that juror concerns about legal fairness and outcome fairness are present to some extent in hung and acquittal juries, but they are not the only factors that lead these juries to be hung or to acquit. It also concludes that the presence of so many variables makes it unlikely that jury nullification plays a dominant role in the majority of cases.

Erick L. Hill & Jeffrey E. Pfeifer, *Nullification Instructions and Juror Guilt Ratings: An Examination of Modern Racism*, 16 *Contemp. Soc. Psychol.* 6 (1992):

The authors of this article found that subjects tended to lessen the values of their guilt ratings for the white defendant, as compared to the black defendant, when they had received no instruction or a strong nullification instruction.

Irwin A. Horowitz, *The Effect of Jury Nullification Instruction on Verdicts and Jury Functioning in Criminal Trials*, 9 *Law & Hum. Behav.* 25 (1985):

Horowitz concluded that juries that received nullification instructions spent less time deliberating the evidence and more on defendant characteristics, attributions, and personal experiences.

Irwin A. Horowitz, *Jury Nullification: The Impact of Judicial Instructions, Arguments, and Challenges on Jury Decision Making*, 12 *Law & Hum. Behav.* 439 (1988):

Horowitz found that juries are more likely to acquit a sympathetic defendant and to judge a dangerous defendant more harshly when they receive jury nullification information than when they do not or when challenges are made to nullification arguments.

Irwin A. Horowitz, et al., *Jury Nullification and Psychological Perspectives*, 66 *Brook. L. Rev.* 1207 (2001):

This article raises a number of empirical questions relevant to the legal debate on nullification, reviews some of the empirical research bearing on these questions, and identifies questions needing further research.

Irwin A. Horowitz & Thomas E. Willgins, *Changing Views of Jury Power*, 15 *Law & Hum. Behav.* 165 (1991):

Horowitz and Willgins tracked the history of two views of trust in the jury system: (1) Juries lack predictability and rationality and are moved by emotional concerns; (2) juries reflect an historical competence at applying common sense notions of equity and rationality to conflicted

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and ambiguous cases. They review the empirical research on the jury's competence.

Ilana Ariella Kaufman, *Jury Nullification and Racism: The Effect of Nullification Instructions and Racial Prejudice on Jurors' Verdicts* (1997) (unpublished master's thesis, on file with the University of Windsor, Canada):

Kaufman explains that results of a mock jury study repeatedly showed that radical nullification instructions produced responses that were nearly identical to presenting potential jurors with no instructions.

Jeffrey Kerwin & David R. Shaffer, *The Effects of Jury Dogmatism on Reactions to Jury Nullification Instructions*, 17 *Personality & Soc. Psychol. Bull.* 140 (1991):

In a jury simulation, dogmatic and nondogmatic juries were given either standard or nullification instructions by the judge after hearing a euthanasia trial. The simulation showed that dogmatic jurors were more influenced by the judge's instructions than the nondogmatic jurors.

William Harold Moore, *Effects of Nullification Instruction and Testimony Type on Mock Jurors' Decisions* (1992) (unpublished master's thesis, on file with Carleton University, Canada):

Moore studied the effects of nullification instructions on the verdicts of mock jurors in a simulated sexual assault trial. Moore explains that the results showed that nullification instructions had no effect on the overall jury verdicts. Manipulation of variables suggested that conflicting testimonies result in more not guilty verdicts.

Christian A. Meissner, et al., *Jury Nullification: The Influence of Judicial Instruction on the Relationship Between Attitudes and Juridic Decision-Making*, 25 *Basic & Applied Soc. Psychol.* 243 (2003):

These authors studied the effects of nullification instruction on mock jurors in cases involving non-physician-assisted euthanasia of varying facts. The results indicate that the mock jurors were more likely to view the defendant as innocent (i.e., to nullify) when they held pro-euthanasia attitudes and the defendant used a mild form of euthanasia. The results also show that participants given a standard jury instruction were influenced more by evidence and law, whereas those receiving nullification instructions were more likely to reply on their perceptions of the defendant's action and their own attitudes toward euthanasia. The article discusses the implications of the study for the use of nullification instructions.

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Martha A. Myers, *Rule Departures & Making Law: Juries and Their Verdicts*, 13 *Law & Soc'y Rev.* 781 (1979):

Myers analyzed data from a sample of jury trials. She concluded that departures from rules were limited. The results reflect a concern with the defendant per se, and also with his choice of victim and the seriousness of the prosecution's charge against him. Myers concluded that the jury role is neither clerklike nor discretionary. Rather, rule departures occur only under certain circumstances.

Kieth E. Niedermeier, et al., *Informing Jurors of Their Nullification Power: A Route to a Just Verdict or Judicial Chaos?*, 23 *Law & Hum. Behav.* 331 (1999):

This article describes four studies that examined juror biases and jury nullification instructions. The results of the studies suggest that nullification instructions simply encourage jurors to nullify when the strict application of the law would result in an unjust verdict.

Kristin L. Sommer, et al., *When Juries Fail to Comply with the Law: Biased Evidence Processing in Individual and Group Decision Making*, 27 *Personality & Soc. Psychol.* 309 (2001):

The authors of this article studied mock jurors to determine whether unfair negligence rules would bias their decision-making strategies individually and at the group level. They found that noncompliant jurors biased their determinations of negligence to award damages when the decision criteria prohibited an award and when the decision criteria required an excessive award. They also found that noncompliant juries were marked by the advent of a "trigger" person who raised justice concerns.

Richard L. Wiener, et al., *The Social Psychology of Jury Nullification: Predicting When Jurors Disobey the Law*, 21 *J. Applied Soc. Psychol.* 1379 (1991):

The authors studied the assumption that juries obey the law as it is charged to them in the trial judge's instructions. They also concluded that comprehension alone cannot predict the likelihood that jurors will comply with the law.

B. Monographs

Jeffrey Abramson, *We, the Jury: The Jury System and the Ideal of Democracy* (1994):

Abramson sees the jury as a deliberative body, one intended to make law. He traces the decline of the deliberative ideal and the rise of distrust in juries. He also argues for allowing juries to nullify the law and for instructing juries that they have this power. Abramson believes the benefits of jury nullification outweigh its risks.

Clay S. Conrad, *Jury Nullification: The Evolution of a Doctrine* (1998):

Conrad prefers the term "jury independence," which is defined as when jurors in a criminal trial acquit because they believe conviction would be unjust. Conrad discusses the history and modern day view of jury nullification, including the belief that nullification results in racist verdicts. He also attempts to show that jury nullification is about citizen oversight of the legislature and of the criminal sanction. Conrad believes jury nullification can "reduce social intolerance and divisiveness, reduce unnecessary incarceration, and redirect our criminal justice system to social protection, as opposed to social engineering."

William L. Dwyer, *In the Hands of the People: The Trial Jury's Origins, Triumphs, Troubles, and Future in American Democracy* (2001):

Dwyer takes a popular (i.e., non-scholarly), anecdotal look at the jury system. In chapter four (*The Jury Breaks Free*) Dwyer tells the story of William Penn's trial and *Bushell's Case*. Chapter five (*Juries and Liberty in the United States*) tells the story of the *Zenger* trial.

Norman J. Finkel, *Commonsense Justice: Jurors' Notions of the Law* (1995):

Finkel addresses the relationship between the law and "commonsense justice." He asks whether the law should follow the path laid by community sentiment or whether the community should follow the path the law has laid. He discusses jury nullification and judicial nullification as symptoms of the law's failure to produce commonsense justice. Finkel concludes that only by listening to nullifying juries can we begin to understand the community's sense of justice and fairness.

Thomas Andrew Green, *Verdict According to Conscience: Perspectives on the English Criminal Trial Jury*, 1200-1800 (1985):

Green provides a social and intellectual history of jury nullification, highlighting the impact of nullification on procedural and substantive

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law, the administration of law, and English perceptions regarding the role juries played in the criminal justice system. Nullification was used to challenge laws proscribing certain behavior, to prevent excessive punishment, and to employ ad hoc sentencing that reflected the personal characteristics of defendants.

Mortimer R. Kadish & Sanford H. Kadish, Discretion to Disobey: A Study of Lawful Departures from Legal Rules (1973):

The authors, a lawyer and a philosopher, discuss jury nullification in terms of the age-old dichotomy between conforming one's behavior to the law and following one's conscience by doing that which seems to be morally correct. The law, they explain, "affects people's decisions not only by threatening violators with sanctions, but also by offering people a framework for justifying their action." Clearly, however, the laws comprising the legal system are not absolute. *Discretion to Disobey* explores the manner by which officials depart from the rules. It then focuses on justified rule departures by members of the public. It is this later section that is the most interesting, in that the authors suggest that jury nullification is not only sanctioned by the legal system but is in fact a viable part of the legal process.

Godfrey D. Lehman, We the Jury: The Impact of Jurors on Our Basic Freedoms (1997):

Lehman offers twelve chapters, each illustrating a trial in which juries stood for individual rights against great pressure from the judiciary. Lehman believes these trials demonstrate how "fully informed juries represent our greatest single defense of freedom and are the essence of [our] constitutional republican government."

Lysander Spooner, *An Essay on the Trial by Jury* (Project Gutenberg 1998) (1852), *available at* http://onlinebooks.library.upenn.edu/webbin/gutbook/lookup?num=1201:

This essay, written by an eccentric lawyer/anarchist/pamphleteer, is often cited as the classic argument for the doctrine of jury nullification.

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III. PRIMARY SOURCES

A. *Judicial Cases & Decisions*

1. Historically Significant Cases

Bushell's Case, 124 Eng. Rep. 1006 (C.P. 1670):
This is the case that started it all. When an English jury acquitted Quakers William Penn and William Mead against the evidence, the judge issued a fine against each juror for contravening his orders. Bushell refused to pay the fines and was imprisoned. In this historic decision, Chief Justice Vaughan ruled that jurors cannot be fined or imprisoned for their verdicts.

The Trial of John Peter Zenger, *at* http://www.law.umkc.edu/faculty/projects/ftrials/zenger/zenger.html:
In this famous 1735 trial pitting free speech against the law of seditious libel, a colonial jury found the defendant "not guilty" in direct contradiction with the facts and applicable law.

United States v. Battiste, 24 F. Cas. 1042 (C.C.D. Mass. 1835) (No. 14,545):
Justice Story began the erosion of the jury's right to decide the law as well as the facts in this early case involving the transportation of slaves. Sitting as a trial judge, Justice Story instructed the jury that although it had the physical power to disregard the law as given them by the court, they did not have the moral right to do so.

2. United States Supreme Court

Sparf v. United States, 156 U.S. 51 (1895):
The Court held that in criminal cases the jury has the duty to apply the law as given to it by the court to the evidence in the case. The Court also held that counsel had no right to dispute the law as the court instructed it.

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3. Representative Federal Circuit Court Cases

D.C. Circuit

United States v. Dougherty, 473 F.2d 1113 (D.C. Cir. 1972):

The court in *Dougherty* found that there is no right to a jury instruction on nullification. The doctrine historically was associated with questions of important moral values, such as seditious libel or the fugitive slave cases. Juries have a tendency to ignore the judge's instructions when the defendant's position is one with which the jury could empathize, or where the jurors felt the defendant's conduct was generally consistent with social standards, even though it might be technically criminal. An instruction on jury nullification would incorrectly imply judicial approval of the practice.

First Circuit

United States v. Spock, 416 F.2d 165 (1st Cir. 1969):

The court held that the use of special findings in a jury verdict form constitutes reversible error as it has the potential for interfering with the jury's traditional role in criminal cases. The court reasoned that the jury must be free from both control and pressure from the judge in reaching its verdict. The court concluded that a jury represents "the conscience of the community" and, therefore, must be permitted to consider more than logic when reaching its decisions, especially where the question of free speech is at issue.

Second Circuit

United States v. Thomas, 116 F.3d 606 (2d Cir. 1997):

The court held that jury nullification constitutes a violation of the juror's oath to apply the law as the court instructs. The court also held that courts must not permit nullification to occur when they have the power to prevent it. Therefore, a juror who intends to nullify the law is subject to dismissal. While nullification may sometimes succeed because jurors cannot be held liable for their actions in nullifying after they reach a verdict, the court held that a judge has a duty to take appropriate action where he or she becomes aware that a juror intends to violate the oath to follow the law. The fact that the juror's motive for nullifying is based on racial or ethnic considerations does not alter this rule. Such a juror may be dismissed during deliberations.

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Third Circuit

United States v. Desmond, 670 F.2d 414 (3d Cir. 1982):

The Third Circuit held that absent a defense objection at trial, the use of special interrogatories in a simple criminal case did not constitute plain error. The court noted that the disapproval accorded special interrogatories in criminal cases stemmed in part from the jury's historic power to acquit in spite of the law and the evidence. Courts have denied the existence of a right for such an instruction.

Fourth Circuit

United States v. Moylan, 417 F.2d 1002 (4th Cir. 1969):

The Fourth Circuit held that juries will have the power to acquit despite the law and the facts as long as the courts adhere to a general verdict in criminal cases. Therefore, a jury may acquit a defendant if it feels that the law under which he is accused is unjust. However, the defendant is not entitled to an instruction on the nullification power.

Fifth Circuit

Washington v. Watkins, 655 F.2d 1346 (5th Cir. 1981):

The court concluded that the almost universal position of courts is that a defendant is not entitled to a jury instruction advising the jury of its power to nullify.

United States v. Leach, 632 F.2d 1337 (5th Cir. 1980):

The Fifth Circuit ruled that the jury's right to acquit for any reason, even where the evidence supports conviction, is an important part of the jury system.

Sixth Circuit

United States v. Avery, 717 F.2d 1020 (6th Cir. 1983):

The sixth circuit found that the trial court properly refused to instruct the jury that it could acquit the defendant if it had no sympathy for the position of the government. The court held that although a jury has the power to ignore the law, it has a duty to apply the law and should be so instructed.

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United States v. Krzyske, 836 F.2d 1013 (6th Cir. 1988):

The court noted that no federal court has permitted a jury instruction on nullification, and few permit counsel to mention it in arguing to the jury. The court affirmed the trial judge's advice to the jury, which was given in response to a question based on a reference made to nullification in defense counsel's closing argument, that there was no such thing as valid jury nullification.

Seventh Circuit

United States v. Brown, 548 F.2d 204 (7th Cir. 1977):

The Seventh Circuit held that there was no error in refusing to permit defense counsel to argue in closing that the jury was historically the conscience of the community, because such an argument would have invited the jury to disregard the court's instructions, which was clearly improper.

Eighth Circuit

United States v. Wiley, 503 F.2d 106 (8th Cir. 1974):

The Eighth Circuit held that the trial court correctly refused to give defendant's requested instruction advising the jury that they had the right to disregard the evidence, and the court's instructions and to acquit the defendant if they found his actions did not shock the conscience of the community. The court affirmed the rule that defendants do not have the right to an instruction on jury nullification. It noted that permitting individuals to decide which laws they will obey would be to invite chaos.

Ninth Circuit

United States v. Simpson, 460 F.2d 515 (9th Cir. 1972):

The Ninth Circuit disagreed with the defendant's position that justice would be better served by instructing jurors on their ability to nullify and opening the way for more "conscience verdicts." It found that the existing safeguards are adequate to permit jurors to reach verdicts of conscience without a jury nullification instruction.

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Tenth Circuit

United States v. Grismore, 546 F.2d 844 (10th Cir. 1976):

The Tenth Circuit determined that the defendant was not entitled to a jury instruction advising the jury that it could decide the law as well as the facts and that it was free to disregard the law. It held that it is a well established rule that the jury should only apply the law to the facts as the law is given to it by the court.

United States v. Sealander, 91 F.3d 160 (10th Cir. 1996) (unpublished disposition) (Nos. 95-6002, 95-6017, & 95-6018, 1996 WL 408368):

The court objected to allowing the pro se defendant to advise the jury of his right to nullify and to urge them to judge both the law and the facts during his closing argument. The court held that neither the judge nor the parties may encourage the jury to disregard the law.

Eleventh Circuit

United States v. Trujillo, 714 F.2d 102 (11th Cir. 1983):

The Eleventh Circuit held that the jury has the power to render a verdict that does not comport with the evidence or the law. However, counsel may not be permitted to encourage jurors to violate their oath by arguing jury nullification during closing argument.

United States v. Funches, 135 F.3d 1405 (11th Cir. 1998):

The court held that the defendant was not entitled to either an instruction on the jury's power to nullify nor to argue jury nullification to the jury. Therefore, the court found there was no error in the trial court's refusal to admit irrelevant evidence for the sole purpose of encouraging jury nullification.

4. Representative State Cases

Alabama

Smith v. Schulte, 671 So. 2d 1334 (Ala. 1995) (civil case):

The dissent, which denied the request for rehearing, opined that it is regrettable that jury nullification is selectively permitted in civil cases.

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Alaska

Hartley v. State, 653 P.2d 1052 (Alaska Ct. App. 1982):

The court held that the jury's duty to decide a case based on the law and the evidence is unenforceable. However, when the evidence does not support a lesser-included offense charge, a defendant is not entitled to such an instruction. The court concluded that refusing to give such an instruction does not amount to directing a verdict against the defendant.

Arizona

Williams v. Thude, 934 P.2d 1349 (Ariz. 1997) (civil case):

The Arizona Supreme Court found that jury nullification is permitted in a civil case involving comparative negligence. The court held that both state statutes and the state constitution give a jury the right to determine the facts and to apply contributory negligence as a defense or not as they see fit.

Arkansas

Jones v. City of Little Rock, 862 S.W.2d 273 (Ark. 1993):

The Arkansas Supreme Court found that a refusal to instruct the jury that it had the power to judge both the law and the facts was proper. The court held that the jury is bound by the judge's decision as to all matters of law.

California

People v. Williams, 21 P.3d 1209 (Cal. 2001):

The Supreme Court of California held that a jury has the right to acquit a defendant against the weight of the evidence. However, an individual juror has no right to disregard the law. The court reasoned that the fact that a prosecutor is powerless to challenge a jury verdict does not decrease a juror's obligation to follow the law as it is instructed. The California statute provides that the jury is to decide questions of fact, and the court is to decide questions of law. Therefore, it was not error to discharge a juror based on his intent to nullify.

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Colorado

People v. Wilson, 972 P.2d 701 (Colo. Ct. App. 1998):

The Colorado Court of Appeals found that jury nullification should be avoided. It held that the prosecutor's argument on rebuttal that the jury was not free to acquit the defendant against the evidence simply reminded the jurors that they were required to follow the court's instructions and apply the evidence to the instructions to determine whether the defendant was guilty.

Connecticut

State v. DelValle, 736 A.2d 125 (Conn. 1999):

The Supreme Court of Connecticut held that the trial court's language in the jury instruction on the presumption of innocence, stating that the jury "must keep in mind that this rule of law is made to protect the innocent and not the guilty," did not constitute reversible error. However, the court noted that similar language had been disapproved in other cases. The court recognized that although such a statement would serve the "legitimate purpose of deterring jury nullification," use of more appropriate language would serve this end equally well.

Delaware

Simonsen v. State, No. 50,1987, 1988 WL 61567 (Del. Super. Ct. 1988):

The court held that a refusal to admit evidence as to the defendant's addiction was proper, because it was introduced only for the purpose of jury nullification.

District of Columbia

Reale v. United States, 573 A.2d 13 (D.C. 1990):

The court held that the jury's exercise of its power to nullify should not be encouraged. Therefore, courts should not use a standardized jury instruction advising a jury that it "must find" a defendant not guilty if the government fails to prove every element of an offense beyond a reasonable doubt, but instructing the jury as to its duty when the government proves every element of an offense. A more appropriate alternative advises the jury that if it found that the government had proven every element of the offense beyond a reasonable doubt it was required to find the defendant guilty.

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Farina v. United States, 622 A.2d 50 (D.C. 1993):

The court found that the trial court's refusal to instruct the jury as to its ability to acquit the defendant even if the government proved all elements of guilt beyond a reasonable doubt was correct. The court held that the trial court correctly permitted the prosecution to advise the jury that it had a duty to decline the defense's invitation to become a law unto themselves after the defense counsel hinted at the jury's power to nullify in the closing argument.

Florida

Harding v. State, 736 So. 2d 1230 (Fla. Dist. Ct. App. 1999):

The court determined that jury nullification cannot be argued by counsel during closing argument because jury nullification encourages jurors to ignore the jury instructions. The court concluded that although a jury is entitled to render a verdict that does not comport with the evidence or the law, this practice amounts to a violation of jurors' oath and should not be encouraged.

Dougan v. State, 595 So. 2d 1 (Fla. 1992):

The court held that a jury has the discretion to grant a "jury pardon" with regard to a defendant's guilt. However, where the jury is to decide whether a defendant is to receive the death penalty, it is an imperative that its discretion be limited to prevent arbitrary and capricious decisions. Furthermore, a jury may not disregard the aggravating and mitigating circumstances provided in the standard jury instruction and recommend life imprisonment, and the trial court did not err in instructing the jury of its duty to follow the instruction.

Georgia

Andrews v. State, 473 S.E.2d 247 (Ga. Ct. App. 1996):

The court held that where the evidence proves that the defendant is guilty beyond a reasonable doubt, the jury has a duty to convict. Therefore, a judge may refuse to give a nullification instruction to the jury. The court explained that a trial judge may exercise discretion to preclude defense counsel from arguing nullification because such an apparent conflict with the jurors' duty to convict upon sufficient evidence could potentially confuse them.

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Bryant v. State, 296 S.E.2d 168 (Ga. Ct. App. 1982):

The court held that the Georgia Constitution and statutes provide that the jury is the judge of both the law and the facts in criminal cases. However, the court recognized that the "jury nullification" concept has been modified by the courts. The rule in Georgia now is that the court's duty is to construe the law in a criminal case, while the jury's role is to apply the facts to the law. Older cases, which authorized the court to instruct the jury that it could decide that the law was different from the judge's instructions, have been overruled. However, a jury has the power to independently construe the law in acquitting the defendant. The court held that even though the defendant admitted every element needed to convict him, the trial court's ruling that this testimony was equivalent to a guilty plea exceeded its authority, and it was reversible error to withdraw the question of guilt from the jury.

Hawaii

State v. Hatori, 990 P.2d 115 (Haw. Ct. App. 1999):

The court held that the jury instructions that the jurors must follow the law "notwithstanding their personal opinions" correctly advised the jury that it had a duty to follow the law as given by the court; the jurors should avoid allowing their personal opinions about the law to influence their decisions. The court concluded that the court's instructions, as well as questions during voir dire in which jurors were asked if they could "bind themselves" to the law, did not deny the jury its right of nullification.

Illinois

People v. Moore, 662 N.E.2d 1215 (Ill. 1996):

The Supreme Court of Illinois found that a refusal to permit defense counsel to argue that the jury could refuse to impose the death penalty if it believed the death penalty statute to be unconstitutional was correct. The court held that jury nullification is only a power, not a right, and the defense, therefore, did not have the right to argue nullification to the jury.

People v. Douglas, 567 N.E.2d 544 (Ill. App. Ct. 1991):

The court held that the defense is not entitled to a jury instruction on its power to nullify. Therefore, the trial judge's response to a question from the jury, which instructed it that it was to reach its verdict by

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applying the law to the facts as reflected by the evidence, was not reversible error.

Indiana

Beavers v. State, 141 N.E.2d 118 (Ind. 1957):
The Supreme Court of Indiana held that the right conferred on the jury by the state constitution to determine the law in criminal cases is not an exclusive right but must be exercised with that of the court. A jury must be instructed that the best source of the law is the court, and it must not lightly disregard its instructions. However, the jury retains the power to determine the law in spite of such instructions when it renders its verdict.

Denson v. State, 330 N.E.2d 734 (Ind. 1975):
The court noted that Indiana is one of three states whose Constitution provides that the jury has the right to determine both the law and the facts in a criminal case. This provision of the Constitution means that jurors have the duty to apply the law to the facts, and in order to do so they have to be the judge of the law and the facts. However, the jury must confine itself to the law of the State as defined by the legislature.

Holden v. State, 788 N.E.2d 1253 (Ind. 2003):
The court held that the Indiana Constitution, in granting to juries in all criminal cases the right to determine the law and the facts, does not allow the jury the latitude to refuse to enforce the law's harshness when justice so requires. It ruled that a jury cannot ignore either the law or the facts in a case.

Iowa

State v. Hendrickson, 444 N.W.2d 468 (Iowa 1989):
The Supreme Court of Iowa held that nullification "exalts the goal of particularized justice above the ideal of the rule of law." Therefore, the court found that the trial court correctly instructed the jury that its verdict must be based on the evidence and the law contained in the instructions. However, the defendant had contended that this instruction deprived the jury of the right to nullification in that it can acquit a defendant even when the acquittal is contrary to the law or the evidence.

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Kansas

State v. McClanahan, 510 P.2d 153 (Kan. 1973):

The Supreme Court of Kansas affirmed the rejection of an alternative pattern jury instruction that advised jurors that they were "entitled to act upon your conscientious feeling about what is a fair result in this case and acquit the defendant if you believe that justice requires such a result." The court held that although the jury has the "raw physical power to disregard the law," its duty is to accept the law as pronounced by the court.

Kentucky

Medley v. Commonwealth, 704 S.W.2d 190 (Ky. 1985):

The Supreme Court of Kentucky found that the defense counsel had no right to advise the jury that it could find the defendant not guilty on a second offense if it believed his sentence on the principal conviction was enough to punish him. The court determined that while a jury may always disbelieve the evidence and find the defendant not guilty, that right is not equivalent to a right to disregard the law. Therefore, it was improper to instruct the jury on its power to nullify, and equally improper to permit the defense attorney to argue for jury nullification.

Louisiana

State v. Porter, 639 So. 2d 1137 (La. 1994):

The Supreme Court of Louisiana held that jury nullification is a "recognized practice," which allows a jury to disregard both evidence and the law as instructed by the court. The court found that the concept of jury nullification may be compared to the "law of responsive verdicts" in Louisiana. The court reasoned that even when the evidence clearly supports a conviction of a charged offense, a jury must be allowed to convict the defendant of the lesser offense.

Maine

State v. Poulin, 277 A.2d 493 (Me. 1971):

The Supreme Judicial Court of Maine refused to declare that juries are judges of law as well as fact. The court noted that it "has long been the settled practice [in Maine] that the function of the jury is to find the facts and to apply the law as given by the Court."

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Maryland

Stevenson v. State, 423 A.2d 558 (Md. 1980):

The Court of Appeals of Maryland held that the Maryland Constitution makes the jury the judge of the law as well as the facts. An amendment made in 1950 requires judges in criminal trials to instruct the jury as to the law. Under the constitution, the jury is the final arbiter of the "law of the crime." The law of the crime refers only to the court's interpretation of a criminal statute and the legal effect of evidence. Instructions by the judge on these issues are advisory only. However, in all other areas of the law, the jury is bound by the judge's instructions.

Montgomery v. State, 437 A.2d 654 (Md. 1981):

The court found that counsel is permitted to argue contrary to the court's instructions regarding the law of the crime when there is a sound basis for a dispute as to the law. However, counsel may not attempt to persuade the jury to enact new law or repeal or ignore existing law. The court held that where there is no dispute or a sound basis for a dispute as to the law of the crime, the court's instructions are binding on both the jury and the attorneys.

In re Petition for Writ of Prohibition, 539 A.2d 664 (Md. 1988):

The court determined that the rule that the jury is the judge of the law as well as the facts has been eroded through judicial interpretation of the Maryland Constitution. The court noted that the jury's right to judge the law has been "virtually eliminated."

Massachusetts

Commonwealth v. Leno, 616 N.E.2d 453 (Mass. 1993):

The Supreme Judicial Court of Massachusetts found that no jury instruction on jury nullification is required. It held that although jurors' verdicts sometimes do not comply with the instructions of the court, jurors have no right to nullify the law, and judges have no duty to inform the jury of its power to nullify.

Michigan

People v. Bailey, 549 N.W.2d 325, *amended by* 551 N.W.2d 163 (Mich. 1996), *remanded to* 554 N.W.2d 391 (Mich. 1996):

The court explained that the power to acquit exists because the state may not appeal a jury's acquittal. The court reasoned that there is a

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distinction between the jury's power to enter a verdict against the evidence to dispense mercy, and the right to do so. The court held that the defense is not entitled to an instruction on a lesser included offense when there is no evidence to support such an instruction.

People v. Demers, 489 N.W.2d 173 (Mich. Ct. App. 1992):
The court found that jury nullification is the power of the jury to dispense justice by returning a verdict that is not supported by the evidence. The court held that although the jury has the *power* to disregard the court's instructions, it does not have the *right* to do so. Therefore, a defendant is not entitled to present evidence at trial that related solely to jury nullification.

Minnesota

State v. Perkins, 353 N.W.2d 557 (Minn. 1984):
The Supreme Court of Minnesota held that the jury has the power to grant lenity in a criminal case and enter a not guilty verdict in spite of both the facts and the law. However, this power is not a right; rather, it is derived from the right of a jury trial, the prohibition against inquiring into the jury's deliberations, and the lack of appellate review of not guilty verdicts. The court found that the Minnesota Constitution does not mandate an instruction on jury nullification in a criminal case.

Mississippi

Davis v. State, 520 So. 2d 493 (Miss. 1988):
The Supreme Court of Mississippi held that the jury's power to order an acquittal in a criminal case even when the evidence supports the defendant's conviction is "an important part of the constitutional scheme" of the criminal law system. However, there is virtually uniform consent among the courts that a defendant is not entitled to a nullification instruction.

Missouri

State v. Hunter, 586 S.W.2d 345 (Mo. 1979):
The Supreme Court of Missouri held that while jury nullification may occasionally occur, it is not encouraged by either the Missouri or federal courts. The court noted that Missouri has no pattern jury instruction on nullification, and no Missouri case has sanctioned such an instruction. Jury nullification usually occurs in cases involving issues of

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conscience and morality, including the fugitive slave cases and cases involving protest of the war in Vietnam.

Montana

State v. Pease, 740 P.2d 659 (Mont. 1987):
The Supreme Court of Montana found that the trial court properly refused to instruct the jury that it could ignore the law and find the defendant not guilty even if he had violated the statute at issue. The court concluded that the trial court's refusal to allow the defendant's jury nullification arguments did not deny him a right to a fair trial.

Nebraska

State v. Green, 458 N.W.2d 472 (Neb. 1990), *overruled on other grounds by*, *State v. Tingle*, 477 N.W.2d 544 (Neb. 1991):
The Nebraska Supreme Court found that a trial judge has the duty to instruct the jury on the law, and the jury must apply that law even if it decides that the law is incorrect. The court reasoned that although a jury may acquit a defendant even when the verdict is contrary to both the law and the evidence, the defendant is not entitled to a jury instruction about the power of jury nullification. Therefore, the court held that the defendant did not have the right to instruct the jury that it has a right to nullify the law if it did not wish to be governed by the law.

Nevada

Graham v. State, 992 P.2d 255 (Nev. 2000):
The Nevada Supreme Court stated that "lenity" is not a separate basis for giving instructions on second degree murder. The court held that the defendant's position that he was entitled to the instruction absent any evidence supporting it was an attempt to legitimize lenity as a separate basis for a jury instruction. Such a position is one of jury nullification and was correctly refused by the trial court.

New Hampshire

State v. Bonacorsi, 648 A.2d 469 (N.H. 1994):
The Supreme Court of New Hampshire held that the jury has the power to acquit a defendant even where the acquittal is contrary to the law and evidence. However, nullification is not a right of the defendant,

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nor is it recognized as a defense. Therefore, it is within the court's discretion whether to permit a jury nullification instruction.

New Jersey

State v. Ragland, 519 A.2d 1361 (N.J. 1986):

The Supreme Court of New Jersey held that the jury's power to acquit despite its belief in the defendant's guilt is simply a power that is undesirable. The court stated that the defendant has no right to an instruction that advises the jury of its power to nullify and to act upon its "conscientious feeling about what is a fair result" even when the prosecution has proven its case. The court concluded that nullification is not the only solution for unjust laws.

New Mexico

State v. Clark, 990 P.2d 793 (N.M. 1999):

The Supreme Court of New Mexico held that the trial court properly rejected testimony regarding the death penalty from religious leaders and lawyers since the evidence was not relevant and it might have promoted jury nullification.

New York

People v. Douglas, 680 N.Y.S.2d 145 (1998):

The court recognized that the doctrine of jury nullification arose during a period when American jurisprudence was not fully developed. The court held that the trial judge properly instructed the jury that the question of whether the stop was lawful was a question of law for the court and was not for the jury to decide.

North Carolina

State v. Lang, 264 S.E.2d 821 (N.C. Ct. App. 1980), *rev'd on other grounds*, 272 S.E.2d 123 (N.C. 1980):

The court found "interesting, but without merit" the argument given by the defense that because a court may not advise a jury concerning its power of nullification, an instruction admonishing the jury that it had a duty to convict if they found that the State proved all the elements of the charges beyond a reasonable doubt was equally improper. The court held that although a court may not order a jury to return a verdict of guilty, the instruction was consistent with the duty of the jury in a

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criminal case to take and apply the law as given by the court to the evidence.

North Dakota

State v. Tolley, 136 N.W. 784 (N.D. 1912):

The Supreme Court of North Dakota discussed the state constitutional provision providing that "in all indictments or informations for libel the jury shall have the right to determine the law and the facts under the direction of the court as in other cases." The court found that this language was intended to vest in the jury the right to render general verdicts in such cases, not to make jurors the judges of law.

Ohio

No reported decisions found.

State v. Jackson, No. 00AP-183, 2001 WL 138089 (Ohio Ct. App., February 20, 2001):

The court found that it was not error for the trial court to refuse to instruct the jury on nullification. Although a jury may ignore the law and the evidence in rendering its verdict, a trial court does not have a duty to advise the jury on its nullification power. The court determined that such an instruction would imply approval of the doctrine of jury nullification.

State v. Haywood, No. 78276, 2001 WL 664121 (Ohio Ct. App., June 7, 2001):

The court held that the trial court properly permitted the prosecution to argue against jury nullification, anticipating that the defense would argue in favor of it, as it was the only argument for acquittal available.

Oregon

Fauvre v. Roberts, 791 P.2d 128 (Or. 1990):

The Supreme Court of Oregon held that jury nullification is "an acquittal in the face of evidence which would support a conviction, based upon the jurors' assessment that the law under which the defendant is charged is unjust, the defendant is not blameworthy, or both." The court found that under the present state of the law, a jury has

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the power, but not the right, to acquit a defendant when his or her guilt is proven beyond a reasonable doubt.

Pennsylvania

Commonwealth v. Feaser, 723 A.2d 197 (Pa. Super. Ct. 1999):
The court found that the bar of double jeopardy prevented retrial of defendant on greater inclusive offenses after he had been found guilty of a lesser included offense. The court recognized that of the three interests served by the double jeopardy principle, the most significant is the right of nullification, that is, the jury's right to acquit against the weight of evidence.

Rhode Island

State v. Champa, 494 A.2d 102 (R.I. 1985):
The Supreme Court of Rhode Island held that a jury has the power to reach a verdict in violation of the law, but such a verdict violates the jurors' legal responsibility. Therefore, a jury instruction on nullification would be improper, as it would lend the court's approval to conduct that is lawless. The court held that while a jury may not be sanctioned for ignoring the requirements of the law, it has no right to do so.

South Dakota

State v. Vigna, 260 N.W.2d 506 (S.D. 1977):
The Supreme Court of South Dakota held that where the trial judge instructed the jury "that they were the sole judges of all questions of fact and the credibility of the witnesses" in accordance with statute, failure also to instruct on the jury's nullification power was not an error.

Tennessee

State v. Taylor, 771 S.W.2d 387 (Tenn. 1989):
The Supreme Court of Tennessee affirmed the giving of instructions which stated that a jury "should" find the defendant guilty if the evidence proved beyond a reasonable doubt that he committed the offense and that if it found from the evidence that the defendant was guilty it "will" report that fact in its verdict. The court held that a trial court should not inform a jury in a criminal case that it can ignore the law in reaching its verdict.

Conaway et al.: Jury Nullification: A Selective, Annotated Bibliography

Texas

Ramos v. State, 934 S.W.2d 358 (Tex. Crim. App. 1996):

The court held that a criminal defendant does not have the right to a jury that will nullify the court's instructions as to the law. While a jury has the power to ignore the instructions of the court, it is not expected to do so. The court recognized that the Supreme Court has held that a trial judge may constitutionally exclude "nullifiers" from the jury.

Vermont

State v. Findlay, 765 A.2d 483 (Vt. 2000):

The Supreme Court of Vermont held that it was not error to refuse to instruct the jury that it had an "inherent right" to nullify. The court further held that while jurors cannot be held accountable for their verdicts, they do not have a legal right to override the law and to "declare it for themselves."

Virginia

Walls v. Commonwealth, 563 S.E.2d 384 (Va. Ct. App. 2002):

The court held that while jury nullification occurs, a party is not entitled to encourage it. The court reasoned that because a reduction in the minimum sentence would not be permitted during the penalty phase, the sole reason for allowing this argument would be to encourage an acquittal by the jury despite the evidence. The court held that because there was no legitimate reason for the jury to be advised about the mandatory minimum sentence during the guilt phase, the trial court did not err in excluding an argument on the nullification issue.

Washington

State v. Meggyesy, 958 P.2d 319 (Wash. Ct. App. 1998):

The court held that a defendant is not entitled to an instruction regarding jury nullification. The court found that there is no distinction between the requested instruction, which stated that a jury "may" acquit, and an instruction on "jury nullification." The court concluded that a jury's power to acquit despite the evidence does not require the court to instruct the jury as to that power.

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Valparaiso University Law Review, Vol. 39, No. 2 [2004], Art. 5

West Virginia

State v. Morgan Stanley & Co., 459 S.E.2d 906 (W. Va. 1995):

The Supreme Court of Appeals of West Virginia held that depriving the defendant of the benefit of a jury in a civil fraud case was inappropriate. The court recognized that while jury nullification is "out of favor," the jury, historically, had a right to determine both the law and the facts. The court stated that although such an instruction would be improper today, the federal courts still retain an "abiding respect" for the jury's power to nullify an oppressive law. The court concluded that in a case where the judgment constituted a fine or shifting of losses among those who were equally guilty, "inquiry into the facts will clarify the application of the law."

Wisconsin

State v. Bjerkaas, 472 N.W.2d 615 (Wis. Ct. App. 1991):

The court held that the trial court did not err when it refused to allow defense counsel to argue "jury nullification" in the closing argument. The court stated that there is a considerable difference between a jury's power to nullify and a right to do so. The court found that the nullification power arises out of the inability of the state to appeal from an acquittal, no matter how "lawless." However, the court concluded that the mere existence of the jury's power does not mean it has a right to ignore the law, nor does a defendant have a right to a nullification instruction.

Wyoming

Henderson v. State, 976 P.2d 203 (Wyo. 1999):

The Wyoming Supreme Court held that the jury's power of nullification is not a criminal defendant's right. The court further held that the State's interest in the jury's application of the correct law to the facts can only be protected by a correct instruction to the jury regarding the law to be applied. The court concluded that there could be significant harm to an accused if a jury is not instructed that it must follow the law.

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B. State Constitutional Provisions

1. General Provisions

Ga. Const. art. I, §1, para. 11(a):
Ind. Const. art. VII, § 6.
Md. Const. Decl. of Rights § 23.

2. Provisions Applying Only to Libel

The following provisions state that in cases of libel, juries shall decide law and fact. Some of the provisions include language, such as "as in other cases," which suggests that juries also decide law and fact in other types of cases.

Colo. Const. art II, §10.
Del. Const. art I, § 5 ("as in other cases").
Ky. Const. § 9.
Me. Const. art I, § 4.
Mich. Const. art I, § 7.
Mo. Const. art I, § 8.
Mont. Const. art. II, § 7.
N.J. Const. art. I, § 6.
N.Y. Const. art. I, § 8.
N. Dak. Const. art I, § 4 ("as in other cases").
Penn. Const. art I, § 7 ("as in other cases").
So.Dak. Const. art VI, § 5.
Tex. Const. art. I, § 8 ("as in other cases").
Utah Const. art. I, § 16.
Wisc. Const. art. I, § 3.
Wyo. Const. art I, § 20.

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