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## COMMENT

# POPULISM, FREE SPEECH, AND THE RULE OF LAW: THE "FULLY INFORMED" JURY MOVEMENT AND ITS IMPLICATIONS\*

ERICK J. HAYNIE

### INTRODUCTION

Anti-government groups are on the rise.<sup>1</sup> While some use violence to further their ends, many consist of "paper warriors" who fight the power of government through quasi-legal mechanisms.<sup>2</sup> Some of the paper warriors' better known tactics include filing liens, lawsuits, and bogus letters of credit against IRS agents, judges, county clerks, and other public officials.<sup>3</sup>

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\* Professors Gary L. Malecha and Jim Moore of the University of Portland, and Charles C. Haynie, provided helpful comments on prior drafts and methodology.

<sup>1</sup> See, e.g., JOEL DYER, *HARVEST OF RAGE: WHY OKLAHOMA CITY IS ONLY THE BEGINNING* (1997) (describing the rise, growth, and likely longevity of the radical anti-government movement); MORRIS DEES, *GATHERING STORM: AMERICA'S MILITIA THREAT* (1996) (same); KENNETH S. STERN, *A FORCE UPON THE PLAIN* (1996) (same). See also R. J. Larizza, *Paranoia, Patriotism, and the Citizen Militia Movement: Constitutional Right or Criminal Conduct*, 47 *MERCER L. REV.* 581 (1996); *Militia Groups Growing*, Gannett News Service, Mar. 28, 1997, available in 1997 WL 8825052 (reporting a 6% increase in militia and American patriot groups in 1996 and listing active groups by state).

<sup>2</sup> See Jim Nesbitt, *Paper Warriors: Some Rightists Think the Pen is Mightier than the Sword*, *LAS VEGAS REV. J.*, Sept. 17, 1995, at 1K (describing the "paper warrior" approach to rightist populist reform). The "paper" approach to fighting government overreaching has been motivated in part by the strict laws criminalizing citizen militia training enacted by many states in recent years. See, e.g., *MONT. CODE ANN.* § 45-8-109 (1995) (criminalizing citizen military association or training for the purpose of engaging in destruction or "civil disorder" and imposing a punishment of up to ten years in prison and a fine of \$50,000); *IDAHO CODE* § 18-8103(3) (1995) (similar prohibition). See also 18 U.S.C. § 231 (Supp. 1995) (similar federal statute). See generally Larizza, *supra* note 1, at 594.

<sup>3</sup> Nesbitt, *supra* note 2, at 1K. See also Larizza, *supra* note 1, at 593 n.46.

However, one of the greatest and least noticed challenges paper warriors pose to the constitutional order—and to the criminal justice system in particular—comes from the jury nullification activists of the Fully Informed Jury Association (FIJA).

Since its inception in 1989, FIJA<sup>4</sup> has waged an aggressive and unscrupulous advocacy campaign to inform sitting and prospective jurors about their power to engage in “jury nullification”—the raw and undisclosed power of juries to render verdicts contrary to both law and fact.<sup>5</sup> The theory behind the FIJA movement is that, by making every potential juror in America “fully informed” of his ability to “veto” the law, political power will be “returned to the people” by making juries the chief determinant of public policy.<sup>6</sup>

FIJA advocacy takes a wide variety of forms, the most potent of which is FIJA’s practice of picketing courthouses to advertise and pass out “nullification instruction pamphlets” and other information to jurors explaining their absolute power to nullify.<sup>7</sup>

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<sup>4</sup> Though generally known for its connections with rightist groups, FIJA supporters cover a wide political spectrum. Supporters and activists include marijuana legalization advocates, militia members, radical pro- and anti-abortion demonstrators, bikers opposed to mandatory helmet laws, and anti-logging environmentalists, among others. See Ted Cilwick, *Power to the Juries*, A.B.A. J., July 1991, at 18; Katherine Bishop, *Diverse Group Wants Juries to Follow Natural Law*, N.Y. TIMES, Sept. 27, 1991, at B6. Noting the diversity of subgroups within FIJA, one observer described its gatherings as follows: “[a]s the room filled up, pot smokers mingled with church ladies and tree lovers swapped stories with gun buffs.” Stephen J. Adler, *Courtroom Putsch?*, WALL ST. J., Jan. 4, 1991, at A1. The ultimate commonality among all FIJA members is an interest in defying the law.

<sup>5</sup> While a jury’s ability to nullify the law is widely recognized, see, e.g., *Horning v. District of Columbia*, 254 U.S. 135, 138 (1920); *United States v. Trujillo*, 714 F.2d 102, 105 (11th Cir. 1983); *Lessard v. Wyoming*, 719 P.2d 227, 231 (Wyo. 1986), modern American courts almost universally forbid juries to be explicitly informed of this power. See, e.g., *Sparf & Hansen v. United States*, 156 U.S. 51 (1895) (leading case); *United States v. Krzyske*, 836 F.2d 1013, 1021 (6th Cir. 1988); *South Dakota v. Vigna*, 260 N.W.2d 506 (S.D. 1977).

<sup>6</sup> See Alan W. Schefflin, *Jury Nullification: The Right to Say No*, 45 S. CAL. L. REV. 168, 186-87 (1972). As FIJA co-founder Don Doig stated, “Our proposal would return power to the people. So those who want power returned to the people like it, and those who don’t don’t.” Adler, *supra* note 4, at A1.

<sup>7</sup> In addition to picketing courthouses and passing out leaflets, FIJA also pushes for a constitutional amendment to overrule the landmark decision of *Sparf & Hansen v. United States*, 156 U.S. 51 (1895), which held that federal courts may refuse to instruct juries on their nullification powers. See also *infra* Part II (discussing *Sparf*). FIJA also

Over the past seven years, FIJA advocates have attempted to inform juries about their nullification powers in hundreds of criminal cases nationwide.<sup>8</sup> Despite the fact that FIJA advocates are often dismissed as "wackos"<sup>9</sup> and ignored by courthouse officials, these solicitations are influencing jurors and the jury decision-making process.<sup>10</sup> Because little has been done to

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pushes for state and local laws that would allow for nullification instructions in state courts.

Beyond institutional reforms and courthouse picketing, FIJA also employs various non-institutional means to inform juries of their nullification "rights." FIJA maintains billboards, a quarterly national newsletter, and a toll-free jury hot-line that anyone may call to learn about jury nullification powers (*1-800-Tel-Jury*). FIJA also maintains a marketing department that sells FIJA audio tapes, jury pamphlets, T-shirts, bumper stickers, coffee mugs, and the like. See *FIJA Activists' Supply Shop*, THE FIJACTIVIST, Winter-Spring 1996, at 18. FIJA advocates have also been known to paste stickers on payphones that advertise its mission and "1-800" number. See, e.g., Sticker on Payphone, Chicago, Ill. (Elevated Train, Washington Station (Red Line-Blue Line Transfer)) (observed Nov. 25, 1997).

FIJA has also attempted to place FIJA newsletters in newsracks outside courthouses, although this has been met with resistance. See *Fully Informed Jury Ass'n v. County of San Diego*, No. 95-55121 (9th Cir. Feb. 23 1996) (unpublished opinion), available in 1996 WL 80208 (finding a compelling state interest in disallowing FIJA newsletters to be placed in newsracks within 50 feet of the San Diego County Courthouse), cert. denied, 117 S. Ct. 63 (1996).

FIJA National, and some state FIJA organizations, also maintain Internet webpages that explain its mission and how it can be accomplished. See, e.g., Fully Informed Jury Ass'n, *Distributing FIJA Literature in Front of Courthouses* (visited Oct. 7, 1996) <[http://nowscape.com/fija/fija\\_us.htm](http://nowscape.com/fija/fija_us.htm)>; Utah Fully Informed Jury Ass'n (visited Feb. 21, 1997) <[http://nowscape.com/fija/fija\\_ut.htm](http://nowscape.com/fija/fija_ut.htm)>. FIJA National claims "5000 hits every month" on its website. Telephone Interview with Jim Harnsberger, FIJA California Coordinator (Jan. 10, 1997). On the role of the Internet in radicalizing the democratic process, see Clinton Francis & Marcus Shepard, *Is There Life Behind the Screen?: Computing, Identity, and Social Change* (1996) (unpublished essay, on file with author). For a critical analysis of the Internet as a propaganda tool for protest groups, see Kelly R. Damphousse & Brent L. Smith, *The Internet: A Terrorist Medium for the 21st Century*, in THE FUTURE OF TERRORISM: VIOLENCE IN THE NEW MILLENNIUM 208, 213-24 (Harvey W. Kushner ed., 1998).

<sup>8</sup> See discussion *infra* Part I.B.

<sup>9</sup> Commenting on jury nullification activists, former Missouri Senator Thomas F. Eagleton remarked that the nullification movement "seeks to institutionalize jury rebellion. Jurors would follow only those laws they liked and ignore the ones they didn't like . . . [The movement] is an attempt by the wacko fringe to further its anti-government agenda." Fred W. Lindecke, *Point of Law: Juries Entitled to Ignore It*, ST. LOUIS POST-DISPATCH, Oct. 25, 1995, at 5B.

<sup>10</sup> *Turney v. Alaska*, 936 P.2d 533 (Alaska 1997), is illustrative of the potential impact of FIJA demonstrations on jury verdicts. This case is discussed *infra* Part I.

counteract this growing movement, its potential impact is enormous.

This Comment discusses the serious challenge FIJA poses to the impartial administration of criminal justice. Part I examines the nature and scope of FIJA advocacy and its ability to influence the jury decision-making process. This section looks in particular to *Turney v. Alaska*,<sup>11</sup> which involved the prosecution of a FIJA advocate who successfully persuaded jurors in a case he “lobbied” to “change their vote” to an acquittal. Part II considers the dangers FIJA poses to due process and the rule of law. In particular, this section examines the virtually universal state and federal common law rules that bar nullification instructions or any jury exposure to nullification arguments by counsel. By examining the reasons courts refuse to allow nullification *instructions*, the extent to which FIJA advocacy (which accomplishes the same result) is at odds with established judicial policy is revealed. Finally, Part III discusses the uncertain prospects for a remedy. This section reveals that, while history, tradition, and the Sixth Amendment right to a fair trial place some limits on FIJA “lobbying,” these limits may not be enough to stop FIJA from achieving its ultimate goal—fully informing every juror in America of its right and power to render verdicts in the teeth of both law and fact.

## I. THE PROBLEM: FIJA IN ACTION

### A. TURNEY v. ALASKA

This section explores *Turney v. Alaska*,<sup>12</sup> a case involving a FIJA advocate’s challenge to a grand jury indictment for jury tampering arising from his protest activities at a state courthouse in Fairbanks, Alaska. This case merits attention for two reasons. First, the facts of *Turney* offer rare (though anecdotal) insight into both the effects of FIJA advocacy on the jury decision-making process, as well as the consequences of a jury be-

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<sup>11</sup> *Id.*

<sup>12</sup> *Id.*

coming aware of its own nullification powers.<sup>13</sup> This case also merits inquiry because, despite the hundreds of FIJA protests that occur every year,<sup>14</sup> *Turney* is the only published appellate opinion directly adjudicating the legality of FIJA activism under a state jury tampering statute.

Frank W. Turney regularly demonstrated in support of FIJA both inside and outside the Fairbanks courthouse between 1990 and 1994.<sup>15</sup> Over the course of these four years, Turney used signs, bullhorns and a variety of other techniques to communicate with sitting and prospective jurors about their nullification "rights."<sup>16</sup> In the course of these protests, Turney would

stand outside the wall of the jury assembly area and yell with his bullhorn. At other times, Turney would bleat like sheep at the prospective jurors and he would beat on the doors of the room, disrupting not only the jury assembly proceedings but also other court proceedings in adjoining areas of the building.<sup>17</sup>

The protests that finally led to Turney's arrest occurred in connection with the trial of one Merle Hall, a convicted felon who was being tried for knowing possession of a concealed weapon.<sup>18</sup> In July of 1994, jury selection was underway for Hall's trial.<sup>19</sup> Turney closely monitored Hall's case, sitting in on much of the jury selection process and the trial.<sup>20</sup> Turney's interest in the case arose from both his friendship with Hall as well as his opposition to the statute under which Hall was to be prosecuted.<sup>21</sup> Before trial, Hall's attorney had predicted that the jury

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<sup>13</sup> As Part II reveals, courts have long forbade affirmative instruction on the nullification prerogative. *See infra* Part II.

<sup>14</sup> *See* discussion *infra* Part I.B.

<sup>15</sup> *Turney v. Alaska*, 922 P.2d 283, 285 (Alaska Ct. App. 1996), *aff'd*, 936 P.2d 533 (Alaska 1997).

<sup>16</sup> *Id.*

<sup>17</sup> *Id.*

<sup>18</sup> *Turney*, 936 P.2d at 536.

<sup>19</sup> Brief of Respondent at 2, *Turney v. Alaska*, 936 P.2d 533 (Alaska 1997) (No. S-6932).

<sup>20</sup> *Id.* at 3.

<sup>21</sup> *Turney*, 936 P.2d at 536. FIJA advocates often target cases involving so-called "victimless crimes" (or, in FIJA vernacular, "crimes against the government"). *See* Larry Dodge, *Four Criteria for Deciding When and Where to Leaflet*, *THE FIJACTIVIST*, Winter-Spring 1996, at 5. FIJA leaders also encourage "leafleting" trials when the defendant so requests. *Id.*

would quickly return a guilty verdict by virtue of his client's facial violation of the Alaska statute.<sup>22</sup> The attorney took the case to trial solely to preserve an issue for appeal.<sup>23</sup>

During the course of the jury selection process and trial, Frank Turney on several occasions communicated with both prospective and impaneled jurors.<sup>24</sup> Allan Coty, for example, was among the prospective jurors ultimately selected for trial.<sup>25</sup> When Coty arrived for jury duty at the Fairbanks courthouse on the 14th of July, he saw Turney holding up a sign that said *1-800-Tel-Jury*.<sup>26</sup> Later that day, as the prospective jurors walked to the courtroom for jury selection, Turney approached Coty and several other prospective jurors.<sup>27</sup> Turney told them to call *1-800-Tel-Jury* if they had any "questions" about jury nullification.<sup>28</sup> After completion of jury selection, Turney again approached the jurors and told them to telephone the number.<sup>29</sup>

During the course of the Hall trial, Turney continued to make contact with the jurors.<sup>30</sup> At one point, for example, jurors Lena Flood and Richard Ellis left the jury room for a cigarette break.<sup>31</sup> While the two jurors were standing in the hallway, Turney approached and asked them to telephone *1-800-Tel-Jury*.<sup>32</sup> Flood tried to ignore Turney, but she heard his message nonetheless.<sup>33</sup> Ellis took note of Turney's advertisement and later called the number.<sup>34</sup>

<sup>22</sup> Brief of Respondent at 2-3, *Turney* (No. S-6932).

<sup>23</sup> *Id.*

<sup>24</sup> *Id.* Whether improper communications with a *prospective* juror constitute jury tampering depends on how the state defines "juror." See, e.g., ALASKA STAT. § 11.56.900(3) (Michie 1996) (defining a "juror" as a person who "is a member of an impaneled jury" or "has been drawn or summoned to attend as a *prospective juror*") (emphasis added).

<sup>25</sup> Brief of Respondent at 3, *Turney* (No. S-6932).

<sup>26</sup> *Id.*

<sup>27</sup> *Id.*

<sup>28</sup> *Id.* at 3-4.

<sup>29</sup> *Id.*

<sup>30</sup> Apparently, Turney even went fishing with one of the jurors. See *Turney v. Alaska*, 936 P.2d 533, 537 (Alaska 1997).

<sup>31</sup> Brief of Respondent at 4, *Turney* (No. S-6932).

<sup>32</sup> *Id.*

<sup>33</sup> *Id.*

<sup>34</sup> *Id.*

At the time of these events, a caller to *1-800-Tel-Jury* would have heard the following voice-mail message prepared by FIJA:

Thank you for calling the Fully Informed Jury Association. FIJA is a nonprofit educational association that wants all Americans to know their rights as jurors to judge the law itself as well as the facts regardless of the instructions from the judge because jurors cannot be punished for their verdict. [Jurors] are the final check and balance on our government, with more power than the President, Congress, or the Supreme Court. To talk to a live person, call 406-793-5550 or we will mail you more free information on jury veto power, if you tell us how you heard of us. Then name and spell your name, address, and zip code. Here's the tone. [Tone].<sup>35</sup>

As the trial progressed, juror Ellis told another juror, Jeanine Paluck, that he had called the "1-800" number advertised by Turney.<sup>36</sup> Ellis also told Paluck that calling the number "would open [her] eyes."<sup>37</sup> Paluck later called the number and was told by FIJA that "jurors are powerful and can keep the government in check."<sup>38</sup> When asked whether the recording was in conflict with the trial judge's instructions, Paluck testified that:

Well, basically when the judge instructs us, they tell us that . . . you can't vote your feelings, you have to vote according to the letter of the law. And the—and the tell jury deal, from what I gathered from the recording that I got that I have more rights than what was read to me by the judge.<sup>39</sup>

Jury deliberations in the Hall trial began at about 1:00 p.m. on Monday, July 18.<sup>40</sup> The jury deliberated well into the afternoon but was unable to reach a verdict.<sup>41</sup> Ten jurors were voting for conviction, two for acquittal.<sup>42</sup>

When deliberations recommenced the following morning, Ellis told his fellow jurors that he had phoned the "1-800" num-

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<sup>35</sup> *Id.* See also *Turney*, 936 P.2d at 536 n.1. According to one FIJA leader, about 500 people call this number per month. Telephone Interview with Jim Harnsberger, FIJA California Coordinator (Jan. 30, 1997).

<sup>36</sup> *Turney*, 936 P.2d at 537; Brief of Respondent at 5, *Turney* (No. S-6932).

<sup>37</sup> Brief of Respondent at 5, *Turney* (No. S-6932) (alteration in original).

<sup>38</sup> *Id.*

<sup>39</sup> *Turney*, 936 P.2d at 537 n.4.

<sup>40</sup> Brief of Respondent at 5, *Turney* (No. S-6932).

<sup>41</sup> *Id.*

<sup>42</sup> *Id.*



ber Turney advertised.<sup>43</sup> Ellis said that by calling this number he learned that “we weren’t told our full rights” in the jury instructions.<sup>44</sup> Ellis also said that FIJA taught him that the jury did *not* have to “follow the law” in the decision-making process.<sup>45</sup> “I know my rights,” he told the jury.<sup>46</sup> “I called 1-800-Tel-Jury. And I’m changing my vote to . . . not guilty.”<sup>47</sup>

The jurors continued to deliberate until about 1:00 p.m. that afternoon.<sup>48</sup> Again, it rendered no verdict. At Turney’s trial, the foreman of the Hall jury testified that at least two of the dissenting jurors had changed their vote to “not guilty” after speaking with Turney or calling FIJA.<sup>49</sup> The foreman also testified that the jurors who switched stated they were “vot[ing] their consciences.”<sup>50</sup> The jury eventually announced that it was deadlocked, and the trial judge declared a mistrial.<sup>51</sup>

#### B. THE SCOPE OF FIJA ADVOCACY NATIONWIDE

The FIJA advocacy efforts of Frank W. Turney, who was ultimately indicted for jury tampering and criminal trespass under the facts above,<sup>52</sup> are not extraordinary in nature or scope. Nor is there any reason to suggest they are extraordinary in result. With outposts in over forty states,<sup>53</sup> FIJA advocates picket literally hundreds of criminal cases every year and distribute hundreds of thousands of pamphlets to jurors and other courthouse passersby.<sup>54</sup> According to Jim Harnsberger, FIJA coordinator for

<sup>43</sup> *Id.*

<sup>44</sup> *Id.*

<sup>45</sup> *Id.*

<sup>46</sup> *Id.*

<sup>47</sup> *Id.*

<sup>48</sup> *Id.* at 6.

<sup>49</sup> *Turney v. Alaska*, 936 P.2d 533, 537 (Alaska 1997).

<sup>50</sup> *Id.*

<sup>51</sup> Brief of Respondent at 6, *Turney* (No. S-6932).

<sup>52</sup> *See Turney*, 936 P.2d at 545 (affirming denial of motion to dismiss indictments).

<sup>53</sup> Nesbitt, *supra* note 2, at 1K.

<sup>54</sup> *Id.* To avoid conflict between state activists and courthouse authorities, the national FIJA association offers “leafletting guidelines” for activists who picket courthouses. A FIJA brochure (which is available on-line) explains the strategies of courthouse “leafletting”:

the State of California, over a million brochures are distributed at various courthouses by FIJA activists every year.<sup>55</sup> Oklahoma coordinator Lorianne Horner says she has distributed "thousands, just thousands" of leaflets at courthouses throughout Oklahoma.<sup>56</sup> Similarly, activists in New Jersey claim to have distributed materials at courthouses "every week for three years,"<sup>57</sup> and the leader of the Texas organization says her members picket "hundreds of cases every year throughout Texas."<sup>58</sup>

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The best time to be [at the courthouse] is when the whole jury pool is first assembled (often on Monday morning; be there bright and early). At this time they are not official jurors, and the authorities will be less likely to hassle you. . . .

FIJA activists should make it clear that they are only passing out information of general interest to all jurors, and not trying to influence any particular case. FIJA literature, which informs jurors of their rights and powers in general terms and which seeks reform of the judicial process, is protected speech under the first amendment. . . . Literature distribution is most effective if you dress neatly and conservatively, smile, and are polite. A FIJA button on your lapel would also be appropriate. . . .

You're more likely to encounter trouble if you insist on distributing brochures inside the courthouse, but it has been done successfully. In any case, if the powers that be react at all, expect them to warn you first and ask you to leave.

Fully Informed Jury Ass'n, *Distributing FIJA Literature in Front of Courthouses* (visited Feb. 16, 1997) <[http://nowscape.com/fija/fija\\_us.htm](http://nowscape.com/fija/fija_us.htm)>.

<sup>55</sup> Harnsberger explains that "some areas are more active than others," but estimates that "at minimum, each state organization is handing out 2,500 copies of our brochure at local courthouses every month." Telephone Interview with Jim Harnsberger, FIJA California Coordinator (Jan. 30, 1997). With "active chapters in 42 states," says Harnsberger, "that makes for upwards of 1.2 million copies" distributed per year at courthouses throughout the country. *Id.* Harnsberger himself claims to have distributed "about 5,000" nullification pamphlets every month for two years at the courthouse of the San Diego Superior Court, stopping only after he was held in contempt for failure to obey court directives barring such activities. *Id.* See also *Fully Informed Jury Ass'n v. County of San Diego*, No. 95-55121 (9th Cir. Feb. 23 1996), available in 1996 WL 80208 (upholding constitutionality of court orders barring FIJA activities and newsracks within 50 feet of the San Diego Superior Courthouse), *cert. denied*, 117 S. Ct. 63 (1996). *County of San Diego* is discussed *infra* Part III.A.1.

<sup>56</sup> Telephone Interview with Lorianne Horner, FIJA Oklahoma Coordinator (Jan. 30, 1997).

<sup>57</sup> Telephone Interview with Emerson Ellett, FIJA New Jersey Coordinator (Jan. 30, 1997).

<sup>58</sup> Telephone Interview with Honey Dodge, FIJA Texas Coordinator (Jan. 30, 1997). Texas advocates were also involved in the 1994 trial of the Branch Davidians, who were charged with murder in the deaths of federal agents in Waco, Texas. See JEFFREY ABRAMSON, *WE THE JURY* 256 (1995). According to Abramson, these "advocates of jury nullification mailed leaflets to the (supposedly anonymous) jurors, urging them to nullify federal gun laws by acquitting the defendants." *Id.*

Other state coordinators make similar claims.<sup>59</sup> FIJA National also claims to have 3,000 dues-paying members nationwide.<sup>60</sup>

Of course, the *actual* number of cases and jurors FIJA has picketed and informed over the years is difficult to calculate. The multitude of newspaper articles reporting on FIJA activities, however, lends some credence to the numbers suggested by the FIJA activists themselves. A search of the WESTLAW periodicals database, for example, reveals over 200 newspaper articles and wire stories discussing FIJA protests and the movement in general.<sup>61</sup> These articles reveal an array of FIJA activities.<sup>62</sup> The ar-

<sup>59</sup> According to FIJA publications, for example, activists in Idaho recently distributed 100,000 FIJA fliers in the Boise area. *State News*, THE FIJACTIVIST, Winter-Spring 1996, at 4. The Idaho activists are also reported to have designed a special flier to be distributed to the neighbors of judges, whose addresses were discovered by searching county real estate records. *Id.* The goal of the "judge's neighbors" program was "to put social pressure on [judges] to tell the truth in the courtroom." *Id.* In Arkansas, FIJA supporters claim to have "leafleted the courthouse" during the trial of former Governor Jim Guy Tucker and to have mailed information to Tucker's jury pool. *Id.* In Louisiana, FIJA activists teamed up with a New Orleans cable network to run FIJA PSAs (Public Service Announcements) that explain a jury's right to engage in jury nullification. *Id.* In Alabama, FIJA brochures are apparently planted in courthouse bathrooms and inside magazines in the jury waiting room. See *State News*, THE FIJACTIVIST, Summer 1996, at 2.

<sup>60</sup> Gail D. Cox, *Feeling the Pressure*, NAT'L L.J., May 29, 1995, at A1.

<sup>61</sup> Search of WESTLAW, ALLNEWSPLUS database (Apr. 29, 1997) (extended search under query "Fully Informed Jury Association").

<sup>62</sup> See, e.g., Julie Fields, *Hedlund: Let Juries Ignore Laws; State Senate Foe Attacks Position*, THE PATRIOT LEDGER, Oct. 18, 1996, at 1 (discussing the FIJA movement in Massachusetts, its website, its distribution of pamphlets to prospective jurors, and its attempts at state legislative reform); Stewart Bell, *Reform MP Can't Understand Fuss*, VANCOUVER SUN, Aug. 21, 1996, at B1 (reporting that FIJA co-founder Larry Dodge "admitted his group had become active in the defense of militia members and that a member had distributed white supremacist literature"); Billy Martin, *Juries Can But Shouldn't Ignore Law*, SYRACUSE POST-STANDARD, July 29, 1996, at A6 (noting FIJA's "increase[d] presence outside of courthouses around the country"); Donald C. Dilworth, *Jury Nullification: When Jurors Leave the Law Behind*, TRIAL, May 1, 1996, available in 1996 WL 13323198 (noting FIJA's nationwide efforts to lobby legislatures, picket courthouses, and distribute newsletters); *Holland Claim of Support May Be "Premature,"* EVANSVILLE COURIER, Jan. 12, 1996, at 5A (noting FIJA efforts to "change the Montana Constitution to permit juries to decide the law themselves rather than be required to follow instructions from judges"); Frank Santiago, *A Red-Hot Subject for Judges, Lawyers*, DES MOINES REG., Dec. 17, 1995, at 1 (reporting that a FIJA-sponsored bill to allow juries to decide questions of state law "reached the floor of the Iowa House" in 1994); Katherine Bishop, *Diverse Group Wants Juries to Follow Natural Law*, N.Y. TIMES, Sept. 27, 1991, at B6 (discussing the birth of FIJA and its attempts at legislative reform in New York).

ticles also affirm FIJA's presence at recent criminal trials in California,<sup>63</sup> Colorado,<sup>64</sup> Florida,<sup>65</sup> Kansas,<sup>66</sup> Nevada,<sup>67</sup> New York,<sup>68</sup> Oklahoma,<sup>69</sup> Pennsylvania,<sup>70</sup> and other states as well.

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<sup>63</sup> The *San Diego Union-Tribune* repeats Jim Harnsberger's claim, see *supra* note 55, that he demonstrated at the San Diego Superior Court. See *Top Court Rejects Free-Speech Case*, SAN DIEGO UNION & TRIB., Oct. 8, 1996, at B3. The paper also reports that Harnsberger was held in contempt for violating the court orders, discussed *infra* notes 129-30, barring FIJA activism around the perimeter of the courthouse.

<sup>64</sup> In a recent felony drug possession case in Colorado, a juror sympathetic to the "themes sounded by the Fully Informed Jury Assn. [sic]" refused to convict the defendant in the case after the juror looked up the crime's punishment on the Internet. Barry Siegel, *Holdout Juror Accused of Criminal Contempt*, L.A. TIMES, Feb. 4, 1997, at A5. The juror, 19-year-old Laura Kriho of Nederland, Colorado, was charged with contempt. *Id.* Kriho's fellow jurors testified in her contempt hearing that she had told them in deliberations that "I'm against the drug laws and won't vote for guilt. . . . Jurors have the right to nullify laws they don't like." *Id.* Apparently, Kriho was also untruthful during voir dire. See Harvey A. Silverglate, *The Perils of Being a Juror with a Conscience*, NAT'L L.J., Dec. 23, 1996, at A17.

<sup>65</sup> FIJA was involved in the 1996 trial of a man charged with arson for burning down a reputed crack house in Palm Beach, Florida. In response to FIJA's "threat[s] to contact prospective jurors," the state's attorney involved in the case requested that the names and addresses of all prospective jurors be kept secret to prevent the jury pool from being "tainted." The judge refused to take preliminary action. Mike Folks, *Judge Won't Shield Jurors in Arson Case*, FLA. SUN SENTINEL, Mar. 29, 1996, at 7B.

<sup>66</sup> FIJA was involved in the 1994 trial of a radical anti-abortion activist charged with shooting a Wichita abortion provider. Joe Lambe, *Bill Would Let Juries Decide Law in Cases*, KAN. CITY STAR, Apr. 8, 1996, at A1. The anti-abortionist and his followers "ran a newspaper ad telling potential jurors of their power to nullify the law. They also distributed leaflets from the Fully Informed Jury Association outside the courthouse." *Id.*

<sup>67</sup> One FIJA activist was arrested after witnesses spotted him handing out literature to prospective jurors at the Clark County Courthouse in Las Vegas. Carri Geer, *LV Man Jailed for Pamphlets*, LAS VEGAS REV. J., June 7, 1996, at 2B. According to the court administrator, the 53-year-old FIJA activist "was seen passing out pamphlets from the Fully Informed Jury Association that encourage jurors to vote on verdicts according to their own conscience, regardless of the law." *Id.* See also William P. Cheshire, *Nevada Florist Charged with "Felonious" Handbill Distribution*, ARIZ. REPUBLIC, Aug. 17, 1995, at B4 (reporting the jury tampering charge of a 51-year-old mother who "papered the windshields of cars parked near the federal courthouse with literature from [FIJA]" when her son was on trial for illegal drug activities).

<sup>68</sup> FIJA was involved in the 1995 trial of a New York man charged with second-degree criminal sale of a controlled substance and two counts of third-degree criminal sale of a controlled substance. David L. Shaw, *Drug Trial Begins With a Pamphlet, Distributed by a Man Outside the Courthouse*, POST-STANDARD, Sept. 6, 1995, at C1. The activist reportedly "handed out pamphlets from the Fully Informed Jury Association . . . as potential jurors and others entered the courthouse . . ." *Id.*

<sup>69</sup> FIJA activists in Oklahoma told the LAS VEGAS REVIEW-JOURNAL that they had planned to distribute 50,000 leaflets at the federal courthouse in Lawton, Oklahoma

This section has attempted to reveal the nature and scope of FIJA protest activities. The next section attempts to show the legal, normative, and historical problems posed by FIJA advocacy on and about America's courthouse lawns. For over 100 years, federal and state courts have striven to prevent juror consciousness of the nullification prerogative.

## II. THE JURISPRUDENCE ON NULLIFICATION IN STATE AND FEDERAL COURTS

This section discusses the doctrine of jury nullification and identifies the various reasons why American courts refuse to give nullification instructions. By identifying the problems courts associate with nullification instructions, the dangers inherent in FIJA advocacy are revealed. This is because nullification instructions and FIJA advocacy are two roads to the same evil—open *instruction* to juries on their power to ignore the law.

### A. THE NULLIFICATION POWER

It has long been recognized that juries have the power to render verdicts inconsistent with the criminal law.<sup>71</sup> Since jury acquittals are never subject to appellate review,<sup>72</sup> a "not guilty" verdict will always be final regardless of the jury's reasoning or its interpretation of the facts.<sup>73</sup> Consequently, juries in criminal

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during the trial of the two men accused of bombing Oklahoma City's federal building. See Thomas G. Watts, *Growing Movement Seeks Broader Jury Discretion*, LAS VEGAS REV. J., Nov. 19, 1995, at 1K. That trial was subsequently moved to Denver, Colorado.

<sup>70</sup> In Pennsylvania, a 26-year-old man was acquitted on obstruction of justice charges stemming "from his distribution of leaflets for the Fully Informed Jury Association at the Perry County Courthouse in 1994." *Appeal Reverses T-shirt Conviction*, HARRISBURG PATRIOT & EVENING NEWS, May 2, 1996, at B2.

<sup>71</sup> See, e.g., *Horning v. District of Columbia*, 254 U.S. 135, 138 (1920) (a jury sitting at criminal law "has the power to bring in a verdict in the teeth of both law and facts"); *United States v. Trujillo*, 714 F.2d 102, 105 (11th Cir. 1983) (juries have the power to nullify the law); *Lessard v. Wyoming*, 719 P.2d 227, 231 (Wyo. 1986) (same).

<sup>72</sup> The Fifth Amendment to the Constitution provides that "No person shall . . . be subject for the same offense to be twice put in jeopardy of life or limb . . ." U.S. CONST. amend. V. See also *United States v. Scott*, 437 U.S. 82, 91 (1978) (jury acquittals may not be reviewed).

<sup>73</sup> A jury's right to render a general verdict (which does not specify how it applied the law to the facts of its case) further insulates its reasoning from appellate review. See *Ballard v. Uribe*, 715 P.2d 624, 647 (Cal. 1986) (Bird, C.J., concurring in part and

trials are said to enjoy a *de facto* "nullification" power—i.e., a power to acquit (or convict) a defendant regardless of the law or the weight of evidence.<sup>74</sup>

The great distinction in American jury nullification doctrine, however, is that while juries enjoy an unrestrained *power* to nullify the law, courts almost universally forbid this power to be *explained* to juries.<sup>75</sup> The prevailing view among jurisdictions is that affirmative instruction on the ability to nullify would lead to lawlessness in the jury decision-making process.<sup>76</sup> As the California Supreme Court has written:

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dissenting in part); Robert E. Korroch & Michael J. Davidson, *Jury Nullification: a Call for Justice or an Invitation to Anarchy?*, 139 *MIL. L. REV.* 131, 139 n.6 (1993).

<sup>74</sup> *Dunn v. United States*, 284 U.S. 390 (1932) (holding that in criminal cases, juries have the naked power to return a not-guilty verdict even where acquittal is inconsistent with the law given by the court); *Cargill v. Georgia*, 340 S.E.2d 891, 914 (Ga. 1986) (same); *State v. Lane*, 629 S.W.2d 343, 346 (Mo. 1982) (en banc) (the nullification power exists because "once the verdict is entered it cannot be impeached").

<sup>75</sup> See, e.g., *Sparf & Hansen v. United States*, 156 U.S. 51, 63 (1895) (leading case) (holding that the federal trial court below properly refused criminal defendant's request to instruct the jury that it may judge the law as well as the facts); *United States v. Krzyske*, 836 F.2d 1013, 1021 (6th Cir. 1988) (trial judge properly refused to give nullification instruction even when such an instruction was requested by the jury); *United States v. Drefke*, 707 F.2d 978, 982 (8th Cir. 1983) (the jury should not be instructed on its ability to ignore the court's statement of the law); *United States v. Washington*, 705 F.2d 489, 494 (D.C. Cir. 1983) (nullification instruction properly denied by trial court); *United States v. Dellinger*, 472 F.2d 340, 408 (7th Cir. 1972) (nullification instructions may be refused by the trial court); *United States v. Moylan*, 417 F.2d 1002, 1006-07 (4th Cir. 1969) (although juries have the power to acquit, they should not be told of this power). See also *Ballard*, 715 P.2d at 647 ("[a] criminal defendant is not entitled . . . to an instruction informing the jury that it has this power [of nullification]"); *South Dakota v. Vigna*, 260 N.W.2d 506, 508 (S.D. 1977) (trial judge properly refused to give jury nullification instruction); *Wisconsin v. Olexa*, 402 N.W.2d 733, 738 (Wis. Ct. App. 1987) (trial judge did not err in refusing to give jury a nullification instruction, since "[i]f the jury ignores the instruction as to the applicable legal rules, the jury becomes in effect the legislature and its decision depends entirely on uncontrolled, arbitrary discretion, not legal principle"). No federal or military court has ruled in favor of a nullification instruction in over a century. Korroch & Davidson, *supra* note 73, at 133 n.15. But see *United States v. Hodges*, 26 F. Cas. 332, 332 (C.C.D. Md. 1815) (No. 15,374) (observing that "[t]he jury are here judges of law and fact, and are responsible only to God, to the prisoner, and to their own consciences").

<sup>76</sup> See *infra* notes 84-93 and accompanying text. The Constitutions of Maryland and Indiana, by contrast, provide criminal juries with the right to determine both law and fact. See *IND. CONST.* art. 1, § 19; *MD. CONST. DECL. OF RIGHTS* art. 23. These provisions, however, have been narrowly construed. See, e.g., *Critchlow v. State*, 346 N.E.2d 591, 596 (Ind. 1976) (while the jury is the judge of both law and fact, "this does not

[I]t cannot seriously be urged that, when asked by the jurors, a trial judge must advise them: "I have instructed you on the law applicable to this case. Follow it or ignore it, as you choose." Such advice may achieve pragmatic justice in isolated instances, but we suggest the more likely result is anarchy.<sup>77</sup>

Thus, whatever may have been the practice of common law England or the courts of the early American Republic,<sup>78</sup> modern American juries are not instructed to determine or weigh the utility or validity of the law.<sup>79</sup> Although the great majority of American courts recognize the *power* of a jury to nullify,<sup>80</sup> neither the defendant's attorney,<sup>81</sup> nor the court,<sup>82</sup> is typically al-

mean that a jury is free to disregard existing law of the state and legislate on its own in each case"); *Malone v. State*, 660 N.E.2d 619, 632 (Ind. Ct. App. 1996) (a jury's right under the Indiana Constitution "to determine the law as well as the fact is neither absolute nor exclusive"); *Hebron v. State*, 627 A.2d 1029, 1036 (Md. 1993) ("the jury's role with respect to law is limited to resolving conflicting interpretations of the law of the crime and determining whether that law should be applied in dubious factual situations").

<sup>77</sup> *People v. Dillon*, 668 P.2d 697, 726 n.39 (Cal. 1983). See also *Ballard*, 715 P.2d at 647 (Bird, C.J., concurring in part and dissenting in part).

<sup>78</sup> In the late Eighteenth and early Nineteenth centuries, American juries were sometimes told of their ability to judge both law and fact. Korroch & Davidson, *supra* note 73, at 135. As John Adams (hardly a populist) wrote in 1771, "[i]t is not only [the juror's] right, but his duty . . . to find the verdict according to his own best understanding, judgment, and conscience, though in direct opposition to the direction of the court." 2 THE WORKS OF JOHN ADAMS 254-55 (1850). Chief Justice Jay held a similar view, writing in 1794 that "[i]t is the province of the jury . . . to determine both the law as well as the fact in [a civil] controversy." *Georgia v. Brailsford*, 3 U.S. 1, 4 (1794). Indeed, there is much evidence of the general acceptance of jury nullification in the period immediately after the adoption of the Constitution. See ABRAMSON, *supra* note 58, at 17-95. In modern times, however, jury nullification is viewed critically. This is due in part to the sour ends toward which jury nullification was used in the late Nineteenth and Twentieth centuries. In the 1960s, for example, jury nullification enabled some Southern juries to shield local racial preferences. *Id.* at 62. See also discussion *infra* Part II.B (discussing of the drawbacks of jury nullification).

Arguably, the collapse of American moral and cultural unity has been the downfall of jury nullification in America. Multiculturalism, moral pluralism, and natural law institutions do not well mix.

<sup>79</sup> *Olexa*, 402 N.W.2d at 738. Not even the courts (absent constitutional considerations) are given such a power. *Id.*

<sup>80</sup> See, e.g., authorities cited *supra* note 71.

<sup>81</sup> See, e.g., *United States v. Trujillo*, 714 F.2d 102, 106 (11th Cir. 1983); *United States v. Dougherty*, 473 F.2d 1113, 1138 (D.C. Cir. 1972); *United States v. Childress*, 746 F. Supp. 1122, 1140 (D.D.C. 1990); *United States v. Renfro*, 634 F. Supp. 1536, 1548-50 (W.D. Pa. 1986); *State v. Pease*, 740 P.2d 659, 663 (Mont. 1987). But see *United States v. Krzyske*, 836 F.2d 1013, 1021 (6th Cir. 1988) (discussing defense at-

lowed to *inform* the jury of that power. Judges are to instruct juries on the applicable law; juries are to apply that law to the facts of the case.<sup>83</sup>

## B. THE DRAWBACKS OF NULLIFICATION INSTRUCTIONS AND FIJA ADVOCACY

Courts and commentators offer five primary reasons why juries are not explicitly instructed on their nullification powers.

### 1. *Rule of Law v. Rule of Men*

At the core of American constitutional jurisprudence is the notion that ours is a government of laws, not of men.<sup>84</sup> Under the rule of law, citizen behavior is regulated not according to the passions and prejudices of human beings, but according to objective, published laws formally sanctioned by elected representatives through a pre-ordained process. As a federal judge sitting at criminal law aptly observed in 1941:

Our American system represents the collective wisdom, the collective industry, the collective common sense of people who for centuries had been seeking freedom, freedom from the tyranny of government actuated or controlled by the personal whims and prejudices of kings and

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torney's nullification argument); *People v. Simpson*, No. BA097211 (Cal. Super. Ct. 1995), Reporter's Tr. of Proceedings, Sept. 28, 1995, Vol. 232, at 47793-8036, 9:01 a.m., available in LEXIS, Cal. library, OJTRAN file (showing celebrity defendant's attorney arguing (in essence) for jury nullification by remarking that jurors should "set the standards" of "right and wrong" with reference to "common sense" and not law); John T. Reed, *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, 1125 (1996) (discussing, *inter alia*, the nullification efforts of O.J. Simpson's criminal defense attorneys).

<sup>82</sup> See *supra* note 5 and accompanying text.

<sup>83</sup> *Id.* As Justice Story noted in 1835, "I hold it the most sacred constitutional right of every party accused of a crime that the jury should respond as to the facts, and the court as to the law." *United States v. Battiste*, 24 F. Cas. 1042 (C.C.D. Mass. 1835) (No. 14,545).

<sup>84</sup> STEPHEN B. PRESSER, *RECAPTURING THE CONSTITUTION* 33 (1994). See also *Marbury v. Madison*, 5 U.S. 137, 163 (1803) ("[t]he government of the United States has been emphatically termed a government of laws, and not of men"); *United States v. Ogle*, 613 F.2d 233, 241 (10th Cir. 1979) (a pre-FIJA jury nullification advocacy case) ("our system is one of laws and not of men").



dictators. The result is a government founded on principles of reason and justice, a government of laws and not of men.<sup>85</sup>

Because nullification instructions give juries affirmative permission to ignore applicable legislative definitions of culpable conduct, such instructions undermine the rule of law.<sup>86</sup> This reality was explained long ago in the Supreme Court's landmark decision of *Sparf & Hansen v. United States*,<sup>87</sup> which addressed the issue of jury nullification in the federal court system. Holding that it is the right and duty of the trial judge to instruct the jury to follow the law, the Court wrote that:

Public and private safety alike would be in peril if the principle be established that juries in criminal cases may, of right, [be told to] disregard the law as expounded to them by the court, and become a law unto themselves. Under such a system, the principal function of the judge would be to preside and keep order while jurymen, untrained in the law, would determine questions affecting life, liberty, or property according to such legal principles as, in their judgement, were applicable to the particular case being tried. . . . We must hold firmly to the doctrine that in the courts of the United States it is the duty of juries in criminal cases to take the law from the court, and apply that law to the facts as they find them to be from the evidence.<sup>88</sup>

The Ninth Circuit has criticized nullification arguments by counsel as violative of the rule of law in even stronger terms:

If we . . . allow lawyers to appeal for jury nullification at will and indefinitely, and if we grant defendants a Sixth Amendment right to explain themselves in legally irrelevant terms—then we move to a “system” in which the loudest voice carries the day, in which the phrase “order in the court” literally has no meaning, and in which the [rule of] law has about as much force as the Cheshire Cat's grin.<sup>89</sup>

Stated another way, the principal danger in giving juries an affirmative option to ignore the criminal law is that the jury is thereby transformed from a *fact-finding* into a *law-making* body.<sup>90</sup> In so doing, nullification instructions convert juries into junior

<sup>85</sup> *United States v. Dewey*, 37 F. Supp. 449, 449-50 (1941). See also PRESSER, *supra* note 84, at 34.

<sup>86</sup> *Sparf & Hansen v. United States*, 156 U.S. 51 (1895).

<sup>87</sup> *Id.*

<sup>88</sup> *Id.* at 101-02.

<sup>89</sup> *Zal v. Steppe*, 968 F.2d 924, 931 (9th Cir. 1992).

<sup>90</sup> The distinction between questions of law and fact is deeply ingrained in American jurisprudence, statute, and tradition. See Gary Lawson, *Proving the Law*, 86 Nw. U. L. REV. 859, 862-66 (1992).

varsity legislatures whose decisions undermine the impartial determination of justice based on published law.<sup>91</sup> Thus, explicit nullification instructions would convey "an implied approval that runs the risk of degrading the legal structure [below the level of integrity] requisite for true freedom, for an ordered liberty that protects against anarchy as well as tyranny."<sup>92</sup> By refusing to allow the nullification power to be explained to juries, courts better ensure that jurors use the nullification power sparingly, departing from the rule of law only where their own conscience naturally compels a veto of a judge's instructions.<sup>93</sup>

## 2. Due Process

A second and related reason courts refuse nullification instructions is that they would frustrate due process.<sup>94</sup> As the venerable Latin maxim *nullum crimen sine lege, nulla poena sine lege* provides, there shall be "no crime without law, nor punishment without law."<sup>95</sup> This maxim rings true today in the constitutional due process requirement that criminal liability and punishment be based only "upon a prior legislative enactment of a prohibition expressed with adequate precision and clarity."<sup>96</sup> As the Supreme Court has stated, "[l]iving under a rule of law entails various suppositions, one of which is that [all persons] are entitled to be informed as to what the State commands or forbids."<sup>97</sup>

<sup>91</sup> *United States v. Krzyske*, 836 F.2d 1013, 1021 (6th Cir. 1988); *Wisconsin v. Olexa*, 402 N.W.2d 733 (Wis. Ct. App. 1987). Indeed, nullification instructions not only corrupt the rule of law, but also pervert separation of powers. By giving the jury a legislative mandate, the sovereign law-making power of Congress and the state legislatures is usurped. *See, e.g.*, U.S. CONST. art. I, § 7 (ordaining the sole process through which federal law is to be created); *INS v. Chadha*, 462 U.S. 919 (1983) (recognizing that legal proposals must attain bicameral and presidential approval to become federal "law"); *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579 (1952) (only Congress may make federal law); *Marbury v. Madison*, 5 U.S. 137, 177 (1803) (noting that it is "emphatically" the duty of the judicial branch to "say what the law is," not what it *should be*) (emphasis added).

<sup>92</sup> *United States v. Dougherty*, 473 F.2d 1113, 1137 (D.C. Cir. 1972).

<sup>93</sup> *Korroch & Davidson*, *supra* note 73, at 145.

<sup>94</sup> *United States v. Washington*, 705 F.2d 489, 494 (D.C. Cir. 1983) (observing that nullification verdicts are "lawless" and "a denial of due process").

<sup>95</sup> PAUL H. ROBINSON, *FUNDAMENTALS OF CRIMINAL LAW* 117 (1995).

<sup>96</sup> *Id.*

<sup>97</sup> *Papachristou v. City of Jacksonville*, 405 U.S. 156, 162 (1972) (alteration in original) (quoting *Lanzetta v. New Jersey*, 306 U.S. 451, 453 (1939)). *See also* Con-

By affirmatively authorizing juries to assign moral blame inconsistent with the law, nullification instructions confuse juries and increase the odds that a defendant will be convicted of conduct he is not on notice to avoid.<sup>98</sup>

Nullification instructions also frustrate due process by thwarting a defendant's "fundamental right" to a fair, impartial trial by jury.<sup>99</sup> The Sixth Amendment<sup>100</sup> guarantees every criminal defendant a trial based exclusively on the evidence of record,<sup>101</sup> in accordance with the law,<sup>102</sup> and free from outside influences.<sup>103</sup> By making the jury the "finder of law" as well as fact, however, nullification instructions encroach upon the promise of due process. For what better way to ensure a verdict outside the law than to instruct jurors that they may ignore it.<sup>104</sup>

### 3. Democracy

Closely related to their damaging effect on due process and the rule of law, nullification instructions also run contrary to democratic principles. As the D.C. Circuit observes, "[a]ny ar-

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nally v. General Constr. Co., 269 U.S. 385, 391 (1926) (holding that "a statute which either forbids or requires the doing of an act in terms so vague that men of common intelligence must necessarily guess at its meaning . . . violates the first essential of due process of law").

<sup>98</sup> Gary J. Simson, *Jury Nullification in the American System: A Skeptical View*, TEX. L. REV. 488, 518-20 (1976).

<sup>99</sup> See *Estelle v. Williams*, 425 U.S. 501, 503 (1976). See also *Irvin v. Dowd*, 366 U.S. 717, 721 (1961) (stating that, among the safeguards for the preservation of "individual liberty and of the dignity and worth of every man, . . . the most priceless . . . is that of trial by jury"); *Norris v. Risley*, 918 F.2d 828, 830 (9th Cir. 1990) (the right to a fair trial is a fundamental right); *State v. Bush*, 714 P.2d 818, 823 (Ariz. 1986) (en banc) (the right to a trial by jury is of "constitutional magnitude and importance").

<sup>100</sup> The Sixth Amendment provides:

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence.

U.S. CONST. amend VI.

<sup>101</sup> *Deutch v. United States*, 367 U.S. 456, 471 (1961).

<sup>102</sup> *People v. Kiihoa*, 349 P.2d 673, 676 (Cal. 1960) (en banc) (holding that it is the right of the accused to have a fair trial "conducted substantially according to law").

<sup>103</sup> *Sheppard v. Maxwell*, 384 U.S. 333 (1966); *Rideau v. Louisiana*, 373 U.S. 723 (1963); *United States v. Malmay*, 671 F.2d 869 (5th Cir. 1982).

<sup>104</sup> *Sparf & Hansen v. United States*, 156 U.S. 51, 101-02 (1895).

guably salutary functions served by inexplicable jury acquittals would be lost if that prerogative were frequently exercised . . . [for] calling attention to that power could encourage the substitution of individual standards for openly developed community rules."<sup>105</sup> Indeed, the ultimate effect of nullification instructions is simply to give twelve "randomly selected individuals with no constituency but themselves" an open invitation to frustrate the policies of Congress or the state legislatures, whose laws in all probability will "reflect the majority's view."<sup>106</sup> The undemocratic force of nullification instructions is particularly strong given that it takes not twelve but one nullifying juror to prevent conviction of a man guilty of the crime charged beyond a reasonable doubt.<sup>107</sup>

Nullification instructions are also inherently undemocratic because they frustrate the right of the people to insure that those who violate their laws do not go without punishment.<sup>108</sup> Furthermore, jurors who are forced into the unaccustomed role of making macro-social choices would undoubtedly tend to "overlook the broader implications of their decisions."<sup>109</sup>

#### 4. *The Inappropriateness of Juror Legislators*

An additional rationale for denying nullification instructions is that juries are not competent to make the law.<sup>110</sup> First, it

<sup>105</sup> *United States v. Washington*, 705 F.2d 489, 494 (D.C. Cir. 1983).

<sup>106</sup> Simson, *supra* note 98, at 512. See also ROBERT H. BORK, *THE TEMPTING OF AMERICA: THE POLITICAL SEDUCTION OF THE LAW* 2 (1990) (observing that "[t]hose who would politicize the law offer the public, and the judiciary, the temptation of results without regard to democratic legitimacy"); J. FRANK, *COURTS ON TRIAL* 129-30 (1949) (noting in general that "each jury is a twelve-man ephemeral legislature, not elected by the voters, but empowered to destroy what the elected legislators have enacted").

<sup>107</sup> Simson, *supra* note 98, at 513. Federal criminal jury verdicts must be unanimous to support a conviction. FED. R. CRIM. P. 31(a). Every state but Louisiana and Oregon requires unanimous verdicts for felony convictions. See ABRAMSON, *supra* note 58, at 181.

<sup>108</sup> See, e.g., *Burks v. United States*, 437 U.S. 1, 15 (1978) (noting the public's "valid concern for insuring that the guilty are punished"); *Arizona v. Washington*, 434 U.S. 497, 509 (1978) (noting society's right to "convict those who have violated its laws"). See also *Blyew v. United States*, 80 U.S. 581, 598 (1871) (Bradley, J., dissenting) (noting the "inestimable right" of "invoking the penalties of the law upon those who criminally or feloniously attack our persons or our property").

<sup>109</sup> Simson, *supra* note 98, at 513 n.113.

<sup>110</sup> *Id.* at 513.

is highly questionable whether jurors should be instructed to “make” the law when a legislative body has already done the job for them. Congress and the state legislatures have superior expertise, resources and perspective to make macro-social decisions.<sup>111</sup> Congress and the state legislatures also have greater access to relevant information, and much more time to reach a well-reasoned decision than does “a group of twelve citizens of no particular distinction snatched away from their primary vocations” to spend a couple of days in court.<sup>112</sup> Secondly and more importantly, it is utterly unfair to thrust upon jurors a duty of criminal law-making. As the D.C. Circuit explains, “[t]o tell [a juror] expressly of [his] nullification prerogative . . . is to inform him, in effect, that it is he who fashions the rule that condemns. That is an overwhelming responsibility, an extreme burden for the jurors’ psyche.”<sup>113</sup>

#### 5. *Inconsistent Application of Laws*

The final reason courts deny nullification instructions is that allowing jury nullification would lead to inconsistent application of laws.<sup>114</sup> If nullification instructions were allowed, local, state and federal penal laws would never be uniformly applied. Rather, their application would depend entirely on the idiosyncrasies of particular juries.<sup>115</sup> For this reason, nullification instructions pose the greatest threat to the fair and consistent application of federal criminal laws—laws with which local biases may be in greater conflict.<sup>116</sup> As the Supreme Court noted in *Sparf*:

If a petit jury can rightfully exercise this power [of nullification] over one statute of Congress, they must have an equal right and power over any other statute, and indeed over all the statutes; for no line can be drawn, no restriction imposed, on the exercise of such power; it must rest in discretion only. If this power be once admitted, petit jurors will be superior to the national legislature. . . . *The doing of certain acts will be held*

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<sup>111</sup> *Id.*

<sup>112</sup> *Id.*

<sup>113</sup> *United States v. Dougherty*, 473 F.2d 1113, 1136 (D.C. Cir. 1972).

<sup>114</sup> *Reed*, *supra* note 81, at 1141. *See also* *Simson*, *supra* note 98, at 513-14.

<sup>115</sup> *Reed*, *supra* note 81, at 1141.

<sup>116</sup> *Simson*, *supra* note 98, at 514.

*criminal, and punished in one state, and similar acts may be held innocent, and even approved and applauded, in another.*<sup>117</sup>

Indeed, nullification instructions are ultimately an invitation to greater parochialism in the jury decision-making process.<sup>118</sup> By legitimizing local biases, nullification instructions run the risk of immunizing "criminal acts visited upon members of society's 'discrete and insular minorities . . .'"<sup>119</sup> In the 1960s, for example, jury nullification was used by some Southern juries to shield local racial preferences and block enforcement of federal civil rights legislation.<sup>120</sup>

### 6. Nullification Policies of the States: Conclusion

This discussion has identified the major reasons courts, while recognizing the power of juries to nullify the law, nonetheless refuse to allow juries to be explicitly informed of this power. To some, this arrangement is hypocritical.<sup>121</sup> To others, it is outrageous.<sup>122</sup> Nevertheless, it strikes a necessary balance in a system based on the rule of law and which also refuses to police the minds of jurors to ensure the legal propriety of their decisions.<sup>123</sup>

<sup>117</sup> *Sparf & Hansen v. United States*, 156 U.S. 51, 71 (1895) (emphasis added).

<sup>118</sup> *Simson*, *supra* note 98, at 514.

<sup>119</sup> *Id.* at 514 (quoting *United States v. Carolene Prods. Co.*, 304 U.S. 144, 153 n.4 (1938)).

<sup>120</sup> *See* ABRAMSON, *supra* note 58, at 62. *See also* Martin H. Redish, *Seventh Amendment Right to Jury Trial: a Study in the Irrationality of Rational Decision Making*, 70 NW. U. L. REV. 486, 508 (1975).

<sup>121</sup> ABRAMSON, *supra* note 58, at 64. *See also* Keenan v. State, 379 So. 2d 147, 148 (Fla. Dist. Ct. App. 1980) ("[i]f a jury possesses . . . [the power to nullify] as a 'right,' it is illogical that it is not so instructed"); Todd Barnet, *New York Considers Jury Nullification*, 65 N.Y. ST. B.J. 40, 40 (1993) (arguing that since the right of nullification existed at common law before ratification of the Constitution, jury nullification has been "implicitly constitutionalized" and therefore requires juries to be made aware of that right).

<sup>122</sup> Some commentators strongly advocate a return to the Eighteenth Century norm where juries were sometimes instructed to judge the law. *See, e.g.*, ABRAMSON, *supra* note 58, at 57-95 (advocating a return for moral and natural law reasons); Paul Butler, *Racially Based Jury Nullification: Black Power in the Criminal Justice System*, 105 YALE L.J. 677 (1995) (advocating a return for racial reasons); Clay S. Conrad, *Jury Nullification as a Defense Strategy*, 2 TEX. F. CIV. LIBERTIES CIV. RTS. 1 (1995) (advocating a return for criminal defense attorney reasons).

<sup>123</sup> *See* *Tanner v. United States*, 483 U.S. 107, 120-21 (1987); *United States v. Moylan*, 417 F.2d 1002, 1005 (4th Cir. 1969).

## C. THE DILEMMA

The rise of the Fully Informed Jury Association has shaken the modern jurisprudence on jury nullification. The current jurisprudence—wary as it is of asking juries to judge the law—operates on the assumption that the only way jurors will discover their nullification powers is by being informed of these powers by an officer of the court. Silencing attorneys and refusing nullification instructions, however, is no longer an adequate solution to the nullification problem. With the rise of FIJA, judges are no longer the sole gate keepers of that secret and powerful message.<sup>124</sup> Consequently, as the FIJA movement continues to grow it will become necessary for the jurisdictions to develop new approaches to the nullification problem that are more mindful of juror awareness of jury nullification.

## III. SOLUTIONS: A LIMITED PALETTE

This final section explores some possible ways to reduce the problems posed by the FIJA movement. Because of the constitutional status of jury trials and the broad protections of the First Amendment, none of these “solutions” fully resolve the ultimate “problem”—the fact that FIJA has a right to talk with almost anyone it wants to about jury nullification. Nonetheless, this section offers five possible ways the legal system can dilute the problems FIJA creates: (1) better control of FIJA demonstrations near courthouses; (2) better screening of jurors during voir dire; (3) more explicit jury instructions on the duty of jurors to follow the law; (4) promulgation of error-correcting devices to remedy the effects of jury nullification; and (5) application of the juror impeachment doctrine to tainted criminal convictions. Each suggestion, and its weaknesses, is addressed in turn.

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<sup>124</sup> Dilworth, *supra* note 62, at \*8-9 (noting that “[a] growing number of jurors are coming to trial with at least some awareness of their power to nullify” as a result of FIJA efforts). See also *supra* text accompanying notes 52-70. As an empirical matter, however, most Americans are not (yet) aware of a jury’s nullification prerogative. See David C. Brody, Sparf & Hansen Revisited: Why the Court Should Instruct the Jury of Its Nullification Powers, 33 AM. CRIM. L. REV. 89, 109 n.146 (1995) (citing David C. Brody et al., Jury Nullification: A Study of the *Doughtery* All-Knowing Assumption (Nov. 1995) (paper presented to the American Soc’y of Criminology Annual Meeting)).

## A. POSSIBLE SOLUTIONS

## 1. Containment of FIJA Activities

The most obvious remedy to the FIJA problem is to reign in the movement itself. Local governments should take greater efforts to stop FIJA protectors from confronting jurors in unacceptable ways. As illustrated by *Turney v. Alaska*,<sup>125</sup> FIJA activities may violate jury tampering statutes.<sup>126</sup> It is imperative that local prosecutors bring charges against FIJA activists under these statutes.

Courts should also use their inherent powers to issue orders or other regulations barring the presence on courthouse premises of any person who seeks to influence, interfere or impede the juror decision-making process.<sup>127</sup> The Superior Court of San Diego, for example, has issued orders for the specific purpose of barring FIJA activities on courthouse premises.<sup>128</sup> In 1994, it ordered all newsracks removed from its sidewalks after FIJA made its newsletter available in receptacles outside the front steps of

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<sup>125</sup> 936 P.2d 533 (Alaska 1997). *Turney* is discussed *supra* Part I.

<sup>126</sup> In most states, any unauthorized attempt to influence the outcome of a jury verdict in a particular case by communicating with a juror constitutes jury tampering. See, e.g., ARIZ. REV. STAT. § 13-2807 (West 1989) ("[a] person commits jury tampering if, with intent to influence a juror's vote, opinion, decision, or other action in a case, such person directly or indirectly, communicates with a juror other than as part of the normal proceedings of the case"); DEL. CODE ANN. tit. 11, § 1266 (1995) ("[a] person is guilty of tampering with a juror when, with intent to influence the outcome of an official proceeding, [he] communicates with a juror in the proceeding, except as permitted by the rules of evidence governing the proceeding"); ME. REV. STAT. ANN. tit. 17-A, § 454(1-A) (West 1996) ("[a] person is guilty of tampering with a juror, if that person contacts, by any means, a person who is a juror or any other person the actor believes is in a position to influence a juror and the actor does so with the intention of influencing the juror in the performance of the juror's duty"); N.Y. PENAL LAW § 215.25 (McKinney 1996) ("[a] person is guilty of tampering with a juror . . . when, with intent to influence the outcome of an action or proceeding, he communicates with a juror in such action or proceeding, except as authorized by law"); TENN. CODE ANN. § 39-16-508 (1996) ("[a] person commits an offense who . . . influences or attempts to influence a juror not to vote or to vote in a particular manner").

<sup>127</sup> On the inherent powers of courts, see Martha Stolley, Note, *Sword or Shield: Due Process and the Fugitive Disentitlement Doctrine*, 87 J. CRIM. L. & CRIMINOLOGY 751, 752-53 (1997).

<sup>128</sup> See *infra* notes 129-30.



the courthouse.<sup>129</sup> That court has also issued a general order barring the distribution of any materials intended to influence the jury decision-making process on or about courthouse premises.<sup>130</sup>

The obvious limitation of the "containment" approach, however, is that the First Amendment limits the extent to which FIJA activities may be contained. As a general matter, speech concerning the policies of all three branches of government is protected by the First Amendment.<sup>131</sup> In the famous words of the Supreme Court, "the First Amendment reflects 'a profound national commitment' to the principle that 'debate on public issues should be uninhibited, robust and wide-open.'"<sup>132</sup> Public discussion on the criminal law is also valued and clearly protected by the First Amendment.<sup>133</sup>

<sup>129</sup> General Order 2-14-94 ordered all "vendors and distributors of newspapers distributed from newsracks currently placed on the sidewalk bordering the front entrance of the San Diego County Courthouse [to] remove said newsracks to another location within two weeks." See *Fully Informed Jury Ass'n v. County of San Diego*, No. 95-55121 (9th Cir. Feb. 23 1996), available in 1996 WL 80208 (unpublished opinion upholding constitutionality of the order under the public forum doctrine), *cert. denied*, 117 S. Ct. 63 (1996).

<sup>130</sup> General Order 10-20-93 prohibits

[t]he distribution or attempted distribution of any written materials tending to influence, interfere or impede the lawful discharge of the duties of a trial juror, and [any] communication [attempting] to so communicate with any person summoned, drawn, or serving as a trial juror in these courts for purposes of so influencing, interfering, or impeding the lawful discharge of the duties of a trial juror in or within 50 yards of any public entrance of the facilities within which Courts conduct jury trials within this County.

See *id.* (finding order constitutional).

<sup>131</sup> The First Amendment provides that "Congress shall make no law . . . abridging the freedom of speech . . ." U.S. CONST. amend. I.

<sup>132</sup> *Boos v. Barry*, 485 U.S. 312, 318 (1988) (quoting *New York Times v. Sullivan*, 376 U.S. 254, 270 (1964)). See also *Williams v. Rhodes*, 393 U.S. 23, 32 (1968) ("[c]ompetition in ideas and government policies is at the core of our electoral process and of the First Amendment Freedoms").

<sup>133</sup> *Nebraska Press Ass'n v. Stewart*, 427 U.S. 539, 587 (1976) (Brennan, J., concurring):

Commentary . . . on the criminal justice system is at the core of First Amendment values, for the operation and integrity of that system is of crucial import to citizens concerned with the administration of government . . . [F]ree and robust . . . criticism and debate can contribute to public understanding of the rule of law and to comprehension of the functioning of the entire criminal justice system, as well as improve the quality of that system by subjecting it to the cleansing effects of exposure and public accountability.

Furthermore, peaceful picketing and leafleting for political purposes are considered expressive activities involving "speech" and are thus generally protected by the First Amendment.<sup>184</sup> Indeed, picketing and leafleting in places historically associated with free exercise of expressive activities—such as streets, sidewalks, parks, and other public fora—are given special protection.<sup>185</sup> Under the so-called "public forum doctrine," the government may only enforce reasonable time, place, and manner restrictions on speech occurring in "public fora"—and only so long as the restrictions are "content neutral, . . . narrowly tailored to serve a significant government interest, and . . . open [to] ample alternative channels of communication."<sup>186</sup> Absolute bars to specific types of public fora expressions are constitutional only if the restricting regulation is "narrowly drawn to accomplish a compelling governmental interest."<sup>187</sup>

Despite the great protections afforded to political and public fora speech, however, there remain strong and well defined limits that may—and indeed must—be imposed on FIJA activities. For "[t]he right of free speech, strong though it be, is not absolute . . . ."<sup>188</sup> Rather, "the First Amendment . . . must yield to the 'most fundamental of all freedoms—the right to a fair trial for the accused.'"<sup>189</sup>

Indeed, free speech has long been contained in the context of criminal trials.<sup>140</sup> In order to protect a defendant's Sixth

*Id.*

<sup>184</sup> *United States v. Grace*, 461 U.S. 171, 177 (1983); *Carey v. Brown*, 447 U.S. 455, 460 (1980).

<sup>185</sup> *Grace*, 461 U.S. at 177.

<sup>186</sup> *Perry Educ. Ass'n v. Perry Local Educator's Ass'n*, 460 U.S. 37, 45 (1983). See also *Grace*, 461 U.S. at 177; *Fully Informed Jury Ass'n v. County of San Diego*, No. 95-55121 (9th Cir. Feb. 23 1996) (unpublished opinion), available in 1996 WL 80208, cert. denied, 117 S. Ct. 63 (1996).

<sup>187</sup> *Grace*, 461 U.S. at 177. In reviewing the San Diego court orders described above, for example, the Ninth Circuit found a "compelling interest in protecting the integrity of the jury system" and thus upheld the regulations. *County of San Diego*, No. 95-55121 (9th Cir. Feb. 23 1996), available in 1996 WL 80208.

<sup>188</sup> *Wood v. Georgia*, 370 U.S. 375, 396 (1962) (Harlan, J., dissenting).

<sup>189</sup> *News-Journal Corp. v. Foxman*, 939 F.2d 1499, 1512 (11th Cir. 1991) (quoting *Estes v. Texas*, 381 U.S. 532, 540 (1965) (Harlan, J., concurring)).

<sup>140</sup> The First and Sixth Amendments embody the two distinct models of truthfinding. The theory behind the First Amendment is that citizens and government stand

Amendment right to a fair and impartial jury, for example, tight controls are placed on the arguments each party may make to the jury. Misleading, inflammatory, and hearsay evidence are all excluded to prevent jurors from being "led astray" or having an inappropriate emotional response.<sup>141</sup> Rules of practice also shield jurors from broad policy arguments by prohibiting defense attorneys from injecting "issues broader than the guilt or innocence of the accused under the controlling law" at trial.<sup>142</sup>

The controls that the rules of court place on speech are not limited to the parties at trial. The very purpose of jury and witness tampering statutes, for example, is to deny the Frank Tur-

the best chance of discovering truth when the government refrains from regulating the free exchange of ideas. *New York Times v. Sullivan*, 376 U.S. 254 (1964). *See also* Brief of Respondents at 31, *Turney v. Alaska*, 936 P.2d 533 (Alaska 1997) (No. 2-6932). Under this model of truthfinding, the damaging effects of false and misleading speech are not remedied by shielding the listener. The appropriate remedy is "more speech, not enforced silence." 44 *Liquormart, Inc. v. Rhode Island*, 116 S. Ct. 1495, 1505 (1996) (quoting *Whitney v. California*, 274 U.S. 257, 277 (1927) (Brandeis, J., concurring)). Truth is to be discovered not by paternal guidance but "through its competition with falsehood for acceptance" in the marketplace of ideas. *State v. O'Neil Investigations, Inc.*, 609 P.2d 520, 532 (Alaska 1980).

A wholly different and constitutionally required model of truthfinding is embodied in the criminal justice system and the regulations that govern jury trials. Brief of Respondents at 31, *Turney* (No. S-6932). In the courtroom forum, truth is found not through robust and wide-open discussion but through strict controls on the speech to which jurors are exposed. *See, e.g.*, *Paterson v. Colorado*, 205 U.S. 454, 462 (1907); *Sheeran v. State*, 526 A.2d 886, 895 (Del. 1987). Rather than remedy misleading speech with "more speech," federal and state rules of evidence and criminal procedure shield jurors from the "communicative impact" of potentially prejudicial "speech" that is otherwise valued in public discourse. *See, e.g.*, LAWRENCE TRIBE, *AMERICAN CONSTITUTIONAL LAW* 790 (2d ed. 1988). "[A] trial is not a 'free trade in ideas,' nor is the best test of truth in a courtroom 'the power of the thought to get itself accepted in the competition of the market.'" *Bridges v. California*, 314 U.S. 252, 283 (1941) (Frankfurter, J., dissenting). Rather, a trial "is circumscribed in the range of its inquiry and in its methods by the Constitution, by laws, and by age-old traditions." *Id.* *See also* Brief of Respondent at 31, *Turney* (No. S-6932).

<sup>141</sup> *See, e.g.*, FED. R. EVID. 402 (barring irrelevant evidence), 403 (barring prejudicial, confusing, misleading, and needless evidence), 404 (barring evidence of "a person's character" under certain circumstances), 407 (barring admission of subsequent remedial measures by the defendant), 802 (barring hearsay evidence). *See also* Brief of Respondent at 33, *Turney* (No. S-6932).

<sup>142</sup> ABA STANDARDS FOR CRIMINAL JUSTICE, THE PROSECUTION FUNCTION 3-5.8(d) (2d ed. 1986). *See also* *State v. Sanchez*, 923 P.2d 934, 950 (Haw. Ct. App. 1996); Brief of Respondent at 33, *Turney* (No. S-6932).

neys of the world any role in the jury decision-making process.<sup>143</sup> Under no circumstances may any third party—including well meaning citizens—exert legitimate influence over a criminal trial.<sup>144</sup> Indeed, trial spectators can be removed at the whim of the trial judge, and can be held in contempt for misbehavior.<sup>145</sup> Similarly, lawyers advocating on behalf of their clients have no independent First Amendment rights in the courtroom.<sup>146</sup> An attorney, for example, may not, by speech or conduct, resist a ruling of the trial court “beyond the point necessary to preserve a claim for appeal.”<sup>147</sup>

In short, the free speech interests of non-parties to criminal trials are “minuscule” in comparison to the Sixth Amendment interests of defendants and society in general.<sup>148</sup> The judicial branch and its jurors simply are not subject to solicitation.<sup>149</sup>

<sup>143</sup> See *Sheppard v. Maxwell*, 384 U.S. 333, 351 (1966) (due process requires that “the jury’s verdict be based on evidence received in open court, not from outside sources”); *Paterson*, 205 U.S. at 462 (jury conclusions are to be “induced only by evidence and argument in open court and not by any outside influence”); *Sheeran*, 526 A.2d at 895 (no outside influences). See also Brief of Respondent at 32, *Turney* (No. S-6932).

<sup>144</sup> Brief of Respondent at 32, *Turney* (No. S-6932). The exception to this rule arises when the third party is an *amicus curiae*. An *amicus curiae* may be given leave to file a third party brief or even submit an argument under certain circumstances, such as where important questions of public policy are at issue. See, e.g., *Giammalvo v. Sunshine Mining Co.*, 644 A.2d 407, 408-09 (Del. 1994) (discussing the historical role of *amicus curiae*). In any event, however, it is clear that non-parties are never allowed to casually “contribute” to a criminal trial.

<sup>145</sup> See *Hope v. State*, 732 P.2d 905, 908 (Okla. Crim. App. 1987) (“the privilege to remove a spectator from the courtroom is clearly within the sound discretion of the trial judge”). See also *International Union v. Bagwell*, 512 U.S. 821, 831 (1994) (noting that courts have the inherent power “to impose silence, respect, and decorum . . . and submission to their lawful mandates . . .” (quoting *Anderson v. Dunn*, 19 U.S. 204, 227 (1821))).

<sup>146</sup> See *Zal v. Steppe*, 968 F.2d 924, 931 (9th Cir. 1992) (Trott, J., concurring) (“a lawyer properly functioning as such on behalf of a client has no independent First Amendment rights in the courtroom”).

<sup>147</sup> *Gentile v. State Bar of Nevada*, 501 U.S. 1030, 1071 (1991). See also *Sacher v. United States*, 343 U.S. 1, 8 (1952).

<sup>148</sup> See, e.g., *Kilgus v. Cunningham*, 602 F. Supp. 735, 740 (D.N.H. 1985) (a speaker’s interest in communicating with witness is “minuscule” and not protected by the First Amendment); *Dawkins v. State*, 208 So. 2d 119, 122 (Fla. Dist. Ct. App. 1968) (“[e]fforts to influence a grand jury in its deliberations respecting specific matters under investigation are not shielded by the constitutional right of free speech”).

<sup>149</sup> *United States v. Grace*, 461 U.S. 171, 183 (1983); *Cox v. Louisiana*, 379 U.S. 559, 563 (1965) (upholding state statute barring pickets or parades near state courthouse

Courts are not subject to lobbying, judges do not entertain visitors in their chambers for the purpose or urging that cases be resolved one way or another, and they do not and should not respond to parades, picketing or pressure groups. Neither . . . should it appear to the public that the [courts are] subject to outside influence or that picketing or marching, singly or in groups, is an acceptable or proper way of appealing to or influencing the courts.<sup>150</sup>

It is thus clear that the free speech interests of folks like Frank Turney, who flag down jurors and explain the jury nullification power in casual terms, do not outweigh the due process and fair trial interests of criminal defendants.<sup>151</sup> At the same time, however, it is also clear that standing in front of courthouses is not the only way FIJA can achieve its goals. FIJA could just as easily (though less effectively) hand out leaflets at bars and shopping malls rather than courthouses. And it is doubtful that FIJA could be prosecuted for jury tampering merely on account of its billboards, quarterly newsletter, 1-800 number, or website.<sup>152</sup> While these materials may ultimately frustrate the nullification policies of courts,<sup>153</sup> public discussion of jury nullification does not “violate” the Sixth Amendment.<sup>154</sup> Simply put, the freedom of jurors to engage in jury nullification, and the right of individuals to talk about that freedom on the street, is

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despite First Amendment challenge by defendant); *People v. McGuire*, 751 P.2d 1011, 1013 (Colo. Ct. App. 1987) (“[t]he right to a fair trial includes the right to a trial free from . . . demonstrations which may contaminate or prejudicially affect the jury”).

<sup>150</sup> *Grace*, 461 U.S. at 183 (emphasis omitted). See also *United States v. Carter*, 717 F.2d 1216, 1220-21 (8th Cir. 1983).

<sup>151</sup> *Turney v. Alaska*, 936 P.2d 533 (Alaska 1997); *Fully Informed Jury Ass’n v. County of San Diego*, No. 95-55121 (9th Cir. Feb. 23 1996) (unpublished opinion), available in 1996 WL 80208, cert. denied, 117 S.Ct. 63 (1996); *United States v. Ogle*, 613 F.2d 233 (10th Cir. 1980). In *Ogle*, a tax protestor was convicted of jury tampering after he passed out to potential jurors a pro-nullification *Handbook for Jurors*. The handbook stated, *inter alia*, that “it is unnecessary for jurors to follow the law of the land where they conceive of the law being contrary to their concepts of morals.” *Id.* at 236.

<sup>152</sup> See *supra* note 7 and accompanying text. See also *supra* note 126 (listing various state jury tampering statutes).

<sup>153</sup> See *supra* Part II.B.

<sup>154</sup> See, e.g., *Hoffman v. Perrucci*, 117 F. Supp. 38, 40 (E.D. Pa. 1953) (holding that a defendant insurance company’s use of “out-of-court” advertisements to encourage jurors to deny excessive claims so as to avoid “increased insurance premium cost to the public” does not constitute contempt).

here to stay. Containment of FIJA speech is thus only a partial solution to the problems it creates.

## 2. Screening During Voir Dire

Voir dire is the process through which the prosecution, defense, and trial judge work together to select a fair and impartial jury panel from a list of potential jurors.<sup>155</sup> Voir dire can thus be used to eliminate jurors who have been contacted by FIJA or who are otherwise "politically" predisposed to intentionally disregard the law.<sup>156</sup> Using voir dire to eliminate FIJA members or contactees from jury panels comports perfectly with the purpose of the procedure: to preserve the fair and impartial administration of justice by fleshing out any potential grounds for preemptory challenges.<sup>157</sup> Since judges play the central role in conducting voir dire in the federal courts and in many state courts,<sup>158</sup> judges in particular should be alert to any FIJA activities taking place on or near their courthouses when screening jurors.

Voir dire, however, can only do so much. Even assuming that jurors will always be honest during questioning, "[v]oir dire cannot necessarily be relied upon to compel jurors to admit either their exposure or their prejudice . . . ."<sup>159</sup> Furthermore, even if a juror has no sympathy whatsoever for the FIJA movement, he or she can be subtly influenced by a FIJA flyer or leaf-

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<sup>155</sup> See FED. R. CIV. P. 47(a); FED. R. CRIM. P. 24(a).

<sup>156</sup> See, e.g., *Hoffman*, 117 F. Supp. at 40 (refusing to find insurance company in contempt for its advertising campaign aimed at discouraging large tort awards, reasoning in part that "[b]efore a jury is empanelled to hear the action here involved, plaintiffs will have an opportunity to question the prospective jurors concerning the possible effect such advertisements and pamphlet may have on any award of damages which they may render"). See also Amicus Brief of the American Civil Liberties Union at 13-14, *Turney v. Alaska*, 936 P.2d 533 (Alaska 1997) (No. S-6932) (arguing that voir dire procedures and a judge's ability to instruct jurors to disregard outside influences moots the dangers of FIJA activism).

<sup>157</sup> See, e.g., *Rosales-Lopez v. United States*, 451 U.S. 182, 188 (1981) (stating that "[v]oir dire plays a critical function in assuring the criminal defendant that his Sixth Amendment right to an impartial jury will be honored" and that the "lack of adequate voir dire impairs the defendant's right to exercise preemptory challenges").

<sup>158</sup> David E. Sarkin, *Voir Dire: A Two-Way Street*, 83 ILL. B.J. 313, 313 (1995).

<sup>159</sup> *Mallot v. State*, 608 P.2d 737, 746-47 (Alaska 1980). See also Brief of Respondent at 45, *Turney* (No. S-6932).

let without even realizing it.<sup>160</sup> This is because informing jurors about their nullification powers is like “telling children not to put beans in their noses”—“[m]ost of them would not have thought of it had it not been suggested.”<sup>161</sup> More succinctly stated, when a juror reads a flyer that leads him to question his presumed duty to follow the law, this “weaken[s] imperceptibly the juror’s resolve to follow the judge’s instructions.”<sup>162</sup> Voir dire, though a valuable tool,<sup>163</sup> may thus ultimately fail to hedge the effects of FIJA activism. Trial judges cannot be expected to rely upon the testimony of jurors as to their subjective assessment of the impact of extraneous influences.<sup>164</sup>

### 3. Clear Jury Instructions Explaining the Juror’s Duty to Follow the Law

Juries instructed to judge the law will deliberate differently than those that are told they have a sworn duty to uphold and apply it.<sup>165</sup> It is therefore critical that jury instructions and jury handbooks be drafted in ways that make clear the juror’s duty to follow the law as laid down by the trial judge. Clear instructions on will help resolve any uncertainties caused by FIJA publications. They would also help relieve any burdens to the juror’s psyche which, as the D.C. Circuit explains, may arise upon learning that “it is he who fashions the rule that condemns.”<sup>166</sup>

Fortunately, many jury instructions and handbooks already make clear the juror’s duty to follow the law. California judges, for example, instruct jurors of their “duty to apply the law as I

<sup>160</sup> Brief of Respondent at 45, *Turney* (No. S-6932).

<sup>161</sup> Jack B. Weinstein, *Considering Jury “Nullification”*: When May and Should a Jury Reject the Law to do Justice, 30 AM. CRIM. L. REV. 239, 250 (1993). Accord Brody, *supra* note 124, at 109 n.146 (most Americans are not aware of a jury’s nullification powers).

<sup>162</sup> Brief of Respondent at 45-46, *Turney* (No. S-6932).

<sup>163</sup> See, e.g., John S. Carroll et al., *Free Press and Fair Trial: The Role of Behavioral Research*, 10 LAW & HUM. BEHAV. 187, 192 (1986) (noting that voir dire, sequestration, continuance, attorney gag orders, and other devices are useful tools for dealing with jury bias).

<sup>164</sup> *United States v. Allen*, 736 F. Supp. 914, 918 (N.D. Ill. 1990) (“the trial judge cannot rely upon any testimony of the jurors as to their subjective assessment of the actual impact of the extraneous evidence or influence on their deliberations”). See also Brief of Respondent at 46, *Turney* (No. S-6932).

<sup>165</sup> ABRAMSON, *supra* note 58, at 60.

<sup>166</sup> *United States v. Dougherty*, 473 F.2d 1113, 1136 (D.C. Cir. 1972).

[the judge] give it to you to the facts as you determine them."<sup>167</sup> Similarly, Pennsylvania's *Handbook for Jurors* explains that "[i]t is the jury's function to determine what facts are established by competent evidence [but it] is the judge's responsibility to tell . . . the jury the proper rules of law required to resolve the case."<sup>168</sup> Federal district courts in the Ninth Circuit are perhaps the most thorough in explaining the jury's duty to follow the law:

Ladies and Gentlemen: You now are the jury in this case and I want to take a few minutes to tell you about your duties as jurors. . . . It will be your duty to decide from the evidence what the facts are. You, and you alone, are the judges of the facts. You will hear the evidence, decide what the facts are, and then apply those facts to the law which I will give to you. This is how you will reach your verdict. In doing so you must follow that law *whether you agree with it or not*.<sup>169</sup>

Jurisdictions should follow the Ninth Circuit and adopt jury instructions that make absolutely clear the jury's duty to follow the law. Such explicit instructions will better ensure that juries begin their deliberations with at least a presumption that they are not to purposefully deride the law through the fact-finding process. A clear statement of its proper role will also help the jury disbelieve FIJA propaganda— i.e., that "jurors [may] judge the law . . . as well as the facts regardless of the instructions from the judge."<sup>170</sup> Of course, even with such instructions, the jury will still possess the *power* to nullify the law.<sup>171</sup> However, clear instructions on the controlling nature of the law will better ensure that jurors depart from it only when their own consciences—and not a FIJA flyer—compel them to veto the judge's instructions.

<sup>167</sup> California Criminal Jury Instructions (CALJIC), no. 1.00, *cited in* ABRAMSON, *supra* note 58, at 63.

<sup>168</sup> HANDBOOK FOR JURORS 7-10 (Montgomery County, Pa., Court of Common Pleas, 1993), *cited in* ABRAMSON, *supra* note 58, at 63.

<sup>169</sup> MANUAL OF MODERN CRIMINAL INSTRUCTIONS FOR THE NINTH CIRCUIT, nos. 1.01, 3.01 (1992) (emphasis added), *cited in* ABRAMSON, *supra* note 58, at 63.

<sup>170</sup> *See supra* note 35 and accompanying text.

<sup>171</sup> *See supra* note 71 and accompanying text.



#### 4. Implementation of Error-Correcting Devices

One of the most radical suggestions for solving the problems posed by FIJA and jury nullification generally has come from Professor Leipold.<sup>172</sup> Leipold rejects the premise of most courts (and this Comment) that the jury's raw power to nullify is constitutionally inevitable,<sup>173</sup> and suggests the adoption of "error-correcting devices" to remedy the effects of jury nullification.<sup>174</sup> Specifically, he suggests that the doctrine of jury nullification as currently recognized be abolished and replaced with a two-part scheme.<sup>175</sup>

The first part of his scheme contemplates that legislatures create an affirmative "nullification defense" that would allow a jury to return a not-guilty verdict against clear evidence of a violation of the charged offense when certain statutory criteria are satisfied.<sup>176</sup> Jury nullification would thus become the kissing

<sup>172</sup> Andrew D. Leipold, *Rethinking Jury Nullification*, 82 VA. L. REV. 253 (1996). Professor Leipold addresses jury nullification generally—and not FIJA specifically. Nonetheless, his analysis is applicable.

<sup>173</sup> *Id.* at 257. *But cf.* *Dunn v. United States*, 284 U.S. 390 (1932) (in criminal cases, juries have the naked power to return a verdict of "not guilty" even where acquittal is inconsistent with the law given by the court); *Cargill v. Georgia*, 340 S.E.2d 891, 914-15 (Ga. 1986) (same); *State v. Lane*, 629 S.W.2d 343, 346 (Mo. 1982) (en banc) (the nullification power exists because "once the verdict is entered it cannot be impeached").

<sup>174</sup> Leipold, *supra* note 172, at 317-23.

<sup>175</sup> *Id.* at 258.

<sup>176</sup> *Id.* Leipold, borrowing from § 2.12 of the Model Penal Code ("De Minimis Infractions"), suggests the following provision:

##### AFFIRMATIVE DEFENSES; NULLIFICATION

(1) It shall be an affirmative defense to a charge under this Criminal Code that the jury finds that any of the following circumstances are present:

(a) the defendant's conduct was within a license or tolerance that is customarily associated with the law defining the offense, and the license or tolerance was neither expressly negated by the person whose interest was infringed nor inconsistent with the purpose of the law defining the offense;

(b) the defendant's conduct did not cause or threaten the harm or evil sought to be prevented by the law defining the offense, or did so only to an extent too trivial to warrant the condemnation of conviction; or

(c) such other extenuating facts and circumstances surrounding the defendant's conduct that it cannot reasonably be anticipated that the legislature intended to include such conduct in forbidding the offense.

(2) When the trial court finds that the defendant has presented sufficient evidence to warrant an instruction to the jury on the defense provided in this section, the court shall, at the request of the prosecution, require the jury to return

cousin of self-defense, duress, necessity, and the other affirmative defenses that justify or excuse criminal liability for good cause under certain circumstances.<sup>177</sup>

The second and more controversial prong of the proposal would permit the use of "error-correcting" procedures in criminal cases, including government appeals of "illegal" acquittals and special verdicts (to flesh out the jury's specific findings).<sup>178</sup> Professor Leipold would require the government (as appellant) to bear the burden of showing that jury error (i.e., nullification beyond the confines of the statutory nullification defense) "substantially influenced the verdict and that, absent the error, a rational jury could have found guilt beyond a reasonable doubt."<sup>179</sup> The sole remedy for the government on appeal would be a new trial. This, says Leipold, would "preserve the defendant's right to be convicted only on the judgment of his peers."<sup>180</sup>

The chief virtue of Professor Leipold's proposal is that the nullification power would become far less arbitrary in its application. Codified, jury nullification could actually *bolster* rather than degrade the rule of law by giving the doctrine the "stamp of political legitimacy that comes from duly enacted laws."<sup>181</sup> Second and most important, appellate review of legally unjustified jury nullification (as fleshed out by the use of special verdicts) would allow courts to altogether eliminate jury lawlessness. Indeed, as Leipold writes, the "only difference" under his proposed system "would be that a defendant's 'right to a jury' would no longer include being tried by a jury with the

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a special verdict, setting forth the reason for any acquittal. At the request of counsel for defendant, the court shall also require the jury to return a special verdict setting forth its findings with respect to any conviction.

(3) The defendant shall have the burden of proving a defense under this section by a preponderance of the evidence.

*Id.* at 314.

<sup>177</sup> *Id.* at 312.

<sup>178</sup> *Id.* at 259, 317.

<sup>179</sup> *Id.* at 318.

<sup>180</sup> *Id.* at 320.

<sup>181</sup> *Id.* at 323.

power to avoid the law; it would now be the right to judgment by citizens whose verdict is free from legal error."<sup>182</sup>

The insurmountable problem with Professor's Leipold's creative proposal, however, lies in its second and necessary component. As Leipold admits, the idea of government appeals in criminal cases "flies in the face of many Supreme Court opinions"—let alone the Constitution.<sup>183</sup> The Supreme Court has long interpreted the Double Jeopardy Clause<sup>184</sup> to bar *any* appellate review of jury acquittals. As the Court stated over 100 years ago, "a verdict of acquittal, although not followed by any judgment, is a bar to a subsequent prosecution for the same offence."<sup>185</sup> For "[t]o permit a second trial after an acquittal, *however mistaken the acquittal may have been*, would present an unacceptably high risk that the Government, with its vastly superior resources, might wear down the defendant so that 'even though innocent, he may be found guilty.'"<sup>186</sup>

The bar against special verdicts in criminal trials is also of constitutional proportion. As the First Circuit has noted, "[i]t is one of the most essential features of the right of trial by jury that no jury should be compelled to find any but a general verdict in criminal cases, and the removal of this safeguard would violate its design and destroy its spirit."<sup>187</sup>

Implementation of "error-correcting devices," being impossible, is thus not a viable solution to the FIJA threat. Although Leipold maintains that the bar on such devices "could be lifted

<sup>182</sup> *Id.* at 320. Even the most anxious "defendant's rights" advocates cannot deny that criminal defendants ought prefer trials free from legal error—even if such error might otherwise "help" the defendant "get off." As Hegel pointed out, punishment honors the properly convictable criminal as a rational being by giving him what he deserves. See ROBINSON, *supra* note 95, at 33; see also Stephen J. Morse, *The Twilight of Welfare Criminology*, 39 S. CAL. L. REV. 1247, 1268 (1976) (arguing that holding actors responsible "treats all persons as autonomous and capable of that most human capacity, the power to choose").

<sup>183</sup> Leipold, *supra* note 172, at 318.

<sup>184</sup> U.S. CONST. amend. V ("[n]o person shall . . . be subject for the same offense to be twice put in jeopardy of life and limb").

<sup>185</sup> *United States v. Ball*, 163 U.S. 662, 671 (1896).

<sup>186</sup> *United States v. Scott*, 437 U.S. 82, 91 (1978) (quoting *Green v. United States*, 355 U.S. 184, 188 (1957)) (emphasis added).

<sup>187</sup> *United States v. Spock*, 416 F.2d 165, 181 (1st Cir. 1969) (quoting G. CLEMENTSON, *SPECIAL VERDICTS AND SPECIAL FINDINGS BY JURIES* 49 (1905)).

without violating the Sixth Amendment,"<sup>188</sup> this conclusion is contrary to universal authority. Note, also that adopting Leipold's first prong alone, while feasible, is normatively undesirable. The adoption of a nullification defense in the absence of the possibility of appellate review would simply codify the availability of *nullification instructions*. And as Part II revealed, this would thwart the well established judicial doctrine barring open instruction on the nullification power.<sup>189</sup>

##### 5. Adoption of the Juror Impeachment Doctrine in the Criminal Context

A final solution to the FIJA problem would be to incorporate the juror impeachment doctrine to criminal acquittals. Under this doctrine, a juror is allowed (under certain circumstances) to impeach or refute the validity of a verdict previously rendered by a jury on which the juror served.<sup>190</sup> This doctrine could thus be used in the criminal context to allow jurors to testify that an acquittal (or a conviction) was the result of improper outside influences by a FIJA advocate.

The problem with this approach (as it applies to acquittals), however, is that it runs into the same wall into which Professor Leipold ran—the Constitution. Under the Fifth Amendment, "once a verdict is entered it cannot be impeached."<sup>191</sup> It is thus doubtful that any court would ever consider overturning an ac-

<sup>188</sup> Leipold, *supra* note 172, at 311. Leipold argues that "such a ruling should not interfere with the Sixth Amendment any more than judgements as a matter of law violate the Seventh Amendment." *Id.* at 319. *But cf. Ball*, 163 U.S. at 671 (noting that the review of "[t]he verdict of acquittal . . . violat[es] the constitution"). Note also that the constitutionality of judgements as a matter of law under the Seventh Amendment is by no means clear. Compare *Slocum v. New York Life Ins. Co.*, 228 U.S. 364 (1913) (judgements n.o.v. infringe upon the province of the jury and are thus unconstitutional under the Seventh Amendment), with *Baltimore & Carolina Line, Inc. v. Redman*, 295 U.S. 654 (1935) (affirming the notion in *Slocum* that judgements n.o.v. are unconstitutional, but holding that a motion for a judgement n.o.v. may be considered a "renewed" motion for directed verdict, which *is* constitutional).

<sup>189</sup> See *supra* Part II.

<sup>190</sup> See, e.g., *People v. Hutchinson*, 455 P.2d 132 (Cal. 1969). For example, Federal Rule of Evidence 606(b) allows the validity of a verdict to be attacked under certain circumstances, such as when the jury improperly received "extraneous prejudicial information" during deliberations. FED. R. EVID. 606(b).

<sup>191</sup> *State v. Lane*, 629 S.W.2d 343, 346 (Mo. 1982) (en banc).

quittal under the juror impeachment doctrine even if the jury was subject to gross solicitations by a nullification advocate.<sup>192</sup>

#### IV. CONCLUSION

For over 100 years, federal and state courts have striven to preserve due process and the rule of law by refusing to *explicitly instruct* juries on their *de facto* nullification powers. With the rise of the Fully Informed Jury Association, however, a growing number of jurors arrive at the courthouse with some awareness of this power. The FIJA movement thus poses a serious threat to the democratic and impartial administration of criminal justice; for by slipping *de facto* nullification instructions through the back door of the jury room, FIJA greatly increases the odds that the jury will render its verdict inconsistent the criminal law.

Worse yet, little can be done to counteract the movement. Despite the various remedial actions that might be taken to dilute FIJA's potency, the Sixth Amendment clearly grants the criminal jury unreviewable and almost absolute discretion in making its decisions. Indeed, it is precisely the *absolute power* vested in the criminal jury that makes the FIJA movement so penetrating.<sup>193</sup> For a jury that is taught the legal reality that, no matter the facts of the case, an acquittal verdict is unreviewable and a guilty verdict will be given much deference on appeal, will

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<sup>192</sup> See, e.g., *United States v. Scott*, 437 U.S. 82, 91 (1978) (jury acquittals may not be reviewed). Even in the case of a misguided *conviction*, the Supreme Court has expressed hesitancy in allowing jurors to impeach their verdicts. For example, in *Tanner v. United States*, 483 U.S. 107 (1987), the Court interpreted Federal Rule of Evidence 606(b) to bar impeachment of a guilty verdict even though two jurors came forward with evidence that most of the other jurors were intoxicated throughout the trial and deliberations. The two jurors described the trial as "one big party," testifying that at least seven jurors (including the foreman) engaged in heavy drinking during lunch recesses, that three smoked marijuana "[j]ust about every day," that two had snorted "a couple lines" of cocaine on several occasions, and that one juror had sold a quarter pound of marijuana to another during the trial. *Id.* at 115-16, 136; see generally Albert W. Alschuler, *The Supreme Court and the Jury: Voir Dire, Peremptory Challenges, and the Review of Jury Verdicts*, 56 U. CHI. L. REV. 153, 218-29 (1989). According to the Court, Rule 606(b) barred impeachment because the influences were not "external" to the deliberations. *Tanner*, 483 U.S. at 125. In any event, *Tanner* represents quite a "trip" from the Abramsonian view of the jury.

<sup>193</sup> As Lord Acton observed, "Power tends to corrupt and absolute power corrupts absolutely." Letter from Lord Acton to Bishop Creighton (Apr. 5, 1887), in *ESSAYS ON FREEDOM AND POWER* 329, 335 (Gertrude Himmelfarb ed., 1972).

also understand that it has nearly absolute power to determine questions of life, liberty, and property however it pleases. At that point, law is no more. Statutes become mere "suggestions" that jurors (and their lobbyists) can rewrite to see that particular groups or political causes win.<sup>194</sup> In short, the "fully informed jury" is none other than a law unto itself, and indeed has "more power than Congress, the President, and the Supreme Court."<sup>195</sup>

And so time will march on until either FIJA withers into nothingness or the rule of law comes to have "about as much force as the Cheshire Cat's grin."<sup>196</sup> True lovers of liberty will fear the latter over the former. Anarchy is no better friend of freedom than an overreaching government.

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<sup>194</sup> See, e.g., BORK, *supra* note 106, at 2. It is no answer that "good will" and "civic pride" will overcome juror passions. That is not the nature of man. As James Madison well understood:

The latent causes of faction are . . . sown in the nature of man; and we see them everywhere brought into different degrees of activity, according to the different circumstances of civil society. A zeal for different opinions concerning religion, concerning government, and many other points, . . . [have] divided mankind into parties, inflamed them with mutual animosity, and rendered them much more disposed to vex and oppress each other than to co-operate for their common good . . . .

THE FEDERALIST NO. 10, at 77 (James Madison) (Clinton Rossiter ed., 1961). See also Steven G. Calabresi & Gary Lawson, *Foreword: Two Visions of the Nature of Man*, 16 HARV. J.L. & PUB. POL'Y 1 (1993).

<sup>195</sup> *Turney v. Alaska*, 936 P.2d 533, 536 n.1 (Alaska 1997) (quoting an outgoing message left on FIJA National's answering machine in 1996).

<sup>196</sup> *Zal v. Steppe*, 968 F.2d 924, 931 (9th Cir. 1992).