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FICTIONS, FAULT, AND FORGIVENESS: JURY NULLIFICATION IN A NEW CONTEXT

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Recently, critics of the Anglo-American jury system have complained that juries in criminal trials have been ignoring the law, in favor of defendants who claim that they lack criminal responsibility because they are afflicted by the various victimization syndromes now popularized in the mass media. In this Article, Professors Dorfman and Iijima counter this characterization of the "runaway" jury and argue that juries are not ignoring the law, but rather, are exercising a primary power of the jury, to nullify the application of the law when such application to a particular defendant is unjust. The Authors trace the development of the jury nullification power from its beginnings in the late seventeenth century to the present. The Authors then counter the standard arguments against jury nullification. Finally, the Authors propose an explicit jury nullification instruction and accommodating adjustments to other trial procedures that would solve the deficiencies of the current manner in which juries exercise their nullification power.

INTRODUCTION

Coincident with this country's political swing to the right, the popular call to redefine the American character has assumed

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an increasingly retributive tone.[1] For those who seek to recharacterize the national psyche and return to the virtues of "traditional American values"—rugged individualism, self-sufficiency, and national machismo—much evidence for our dwindling moral character is found in the American jury. Recent newspaper articles,[2] Op-Ed pieces,[3] television news magazines,[4] and pundits of every stripe have been decrying the modern jury, the "runaway jury," the jury that has been "giving away the store," the jury that has been buying "no responsibility" defenses from clever attorneys.[5]

There is indeed something going on. Certain communities and contemporary juries are taking a firmer stand against what they perceive to be the excesses of the criminal justice system than did their counterparts of thirty or forty years ago. However, much of what is going on is hardly new—it has been known historically as jury nullification, the exercise of jury power to disregard the judge's instructions on the law. What does seem new is the way juries are nullifying the law. Rather than directly rejecting unpopular penal law, they take exception to other well-established parts of the judge's instructions, such as the standard of proof beyond a reasonable doubt, punishment as solely within the province of the judge, interested witness and witness credibility, jury sympathy, bias, and prejudice. Even this kind of jury independence is neither unprecedented nor a contemporary phenomenon; it is simply

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1. *See, e.g.*, CHARLES J. SYKES, A NATION OF VICTIMS: THE DECAY OF THE AMERICAN CHARACTER 241 (1992) (positing that American society has "emphasized rights over responsibilities, refused to hold individuals accountable for their own behavior, and made a national industry out of the manufacture and elaboration of grievance"). Hidden beneath Sykes' call for a return to old-fashioned "character" lies the equally old-fashioned and disquieting assumption that the condition of the poor and disenfranchised "stems less from 'the absence of opportunity than from the inability or reluctance to take advantage of opportunity.' " *Id.* at 237 (quoting Lawrence M. Mead, *The New Politics of the New Poverty*, 103 PUB. INTEREST 3, 3 (1991)).

2. *See, e.g.*, Margot Slade, *At the Bar*, N.Y. TIMES, May 20, 1994, at B20 (discussing examples of defenses created by attorneys to portray their clients as victims).

3. *See, e.g.*, *Trial by Jury*, CHRISTIAN SCI. MONITOR, May 8, 1992, at 20 (suggesting explanations for the Rodney King verdicts).

4. *See generally Eye to Eye* (CBS television broadcast, May 26, 1994) (considering the Menendez brothers and Damian Williams cases in terms of social responsibility) (transcript on file with the *University of Michigan Journal of Law Reform*).

5. *See, e.g.*, ALAN M. DERSHOWITZ, THE ABUSE EXCUSE (1994) (describing various tactics by which defendants claim a history of abuse as an excuse for violent retaliation); Sophfronia S. Gregory, *Oprah! Oprah in the Court!*, TIME, June 6, 1994, at 30 (attributing the trend of juries to consider mitigating circumstances, once deemed irrelevant, in part to the public's exposure to themes of abuse on television talk shows).

more widely experienced by the public through increased media coverage.

In the past, scholars and judges have parsed the issue of jury nullification, considering real nullification to be the jury's rejection of the penal law under which the defendant is charged. The jury's independent view of other factors, namely the standard of proof, witness credibility, and sympathy, was not seen as an issue of nullification but rather as the inscrutable and unpredictable result of lay fact-finding.[6] In other words, the jury's nullification of the judge's charge on the penal law was an endeavor into an issue of "law," doctrinally the province of the judge, while the jury's independent view of the standard of proof, of witness credibility, prejudice, and sympathy was properly within its "fact-finding" province.

This traditional distinction between the jury that disregards a penal instruction and the jury that practices more subtle dynamics is a direct result of the history of jury nullification itself. The notion that the jury might acquit defendants "in the teeth of both law and facts"[7] has been deeply rooted in Anglo-American law. Thematically, the foundational jury nullification cases have been political cases involving the prosecution of crimes of conscience against the government or the prevailing social order.[8] Because of the preponderance of cases in the literature, the jury nullification debate has been characterized by an analysis peculiar to these cases, that is, the dynamic of a legally guilty defendant being acquitted because of the jury's rejection of an unpopular law or an oppressive government or the jury's embrace of the position of conscience held by the accused.

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6. *See, e.g.*, HARRY KALVEN, JR. & HANS ZEISEL, THE AMERICAN JURY 116, 149 (1966); *see also* discussion *infra* Part II.B (detailing the findings of the Kalven and Zeisel jury nullification study).

7. Horning v. District of Columbia, 254 U.S. 135, 138 (1920).

8. *See* Alan W. Scheflin, *Jury Nullification: The Right to Say No*, 45 S. CAL. L. REV. 168, 191 n.85 (1972). Scheflin defines "political trials" as including

> (1) any trial which will have political repercussions if the defendant is convicted; (2) prosecutions of technically criminal activity when the state's motive is to suppress political opposition; (3) prosecutions where the state has fabricated a case on traditional criminal grounds but [where] the primary motive . . . is to silence a member of a political minority; and (4) trials involving political offenses such as treason . . . .

Id.

The modern jury nullification debate has centered around furnishing nullification instructions from the bench in "conscience cases."[9] Because of this particular focus, the parallel phenomenon of acquittal has been downplayed. This Article attempts to synthesize these two phenomena—the disregard of penal instructions and the disregard of judicial instructions of general applicability—under the rubric of jury nullification. Such analysis offers more than semantic and conceptual value. By changing this conceptual framework, one may re-examine the bases and merits of an explicit nullification instruction, particularly in the context of the "ordinary" criminal trial.

We make several assertions. First, jury nullification in the ordinary criminal trial is a common, and perhaps increasing, phenomenon because nullification often occurs by means other than the jury's failure to adhere faithfully to the elements of the substantive law as charged. Nullification also occurs when the jury disregards other instructions such as the consideration of punishment or the elimination of bias. In this way, nullification is often accomplished by the jury's conscious or subconscious focus on fictions, that is, on collateral issues which act as surrogates for the jury's true discomfort with the propriety of the conviction itself. As such, jury deliberation may focus on the reliability of evidence or on the credibility of witnesses when in actuality there is no real dispute about it among jury members. Jurors, trying to be faithful to the court's instructions, deliberate around false issues of law or fact because the underlying issues of justice or mercy are, by the judge's proscription, out of bounds. As a result, substantive elements of the crime, particularly *mens rea* requirements, may be distorted or misstated, or the burden of persuasion may be heightened well beyond the applicable standard, in order for the jury to

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9. *See, e.g.*, United States v. Dougherty, 473 F.2d 1113, 1136 (D.C. Cir. 1972) (deciding that although jury nullification serves as a "necessary counter to case-hardened judges and arbitrary prosecutors," the jury does not have to be informed of this option, even in civil disobedience cases) (citation omitted); United States v. Dellinger, 472 F.2d 340, 408 (7th Cir. 1972) (holding that the court trying the Chicago Seven should only instruct the jury to apply the law), *cert. denied*, 410 U.S. 970 (1973); United States v. Simpson, 460 F.2d 515, 519 (9th Cir. 1972) (refusing to permit an instruction to the jury that it may acquit regardless of evidence of guilt); United States v. Boardman, 419 F.2d 110, 116 (1st Cir. 1969) (holding that the court should instruct the jury that although it has the power to ignore the law, the jury's duty is to apply the law as interpreted by the court), *cert. denied*, 397 U.S. 991 (1970); United States v. Moylan, 417 F.2d 1002, 1006 (4th Cir. 1969) (holding that the jury should not be told that it can decide the case according to conscience), *cert. denied*, 397 U.S. 910 (1970).

reach a verdict that it can tolerate. This manner of deliberation may lead to acquittal verdicts, but not for the reasons expressly agreed upon inside the jury room or even for the reasons which the jurors themselves believe they had for the acquittal.

Second, we assert that jury nullification is best understood as a community's check on judicial, prosecutorial, and police discretion. In communities where the population does not trust government and is estranged economically, culturally, or racially from it, nullification in the ordinary criminal trial becomes an inchoate political act that challenges the legitimacy of government itself. Jury nullification is one of the few ways through which a community can challenge the "power structure" with an immediate impact.

Third, we argue that an explicit and carefully crafted nullification charge would officially recognize the nullification phenomena that already exists and which may be increasing in frequency. Such a charge would not necessarily encourage additional nullification, but would instead directly address it as it happens. Moreover, such a charge would transform the judicial process by providing a more rational basis for jury deliberation and decision making. In particular, it would allow jury deliberation to be an open process in which extrajudicial biases are aired and confronted.[10] Further, those communities whose members are increasingly estranged from the criminal justice system's decision-making process will benefit indirectly from greater participation and, in turn, from power over the kinds of cases prosecuted.[11] In sum, contrary to the argument that a nullification charge is an invitation to anarchy,[12] such a charge could help to control the anarchy that has already gripped much of the system.

This Article attempts to give some perspective on critics' concern over the effectiveness and fairness of the jury system by discussing the nullification phenomenon in a societal

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10. The concept of extrajudicial concerns is somewhat problematic given our premise that issues outside the substantive elements of a crime may be relevant to a jury's determination of guilt or innocence and therefore by definition are not extralegal. Nevertheless, we use extrajudicial as a term of convenience to indicate those matters which are outside the usual purview of the jury in a criminal case.

11. A fundamental premise of this Article, that nullification serves as a community check on governmental power, assumes that the composition of juries adequately represents minorities. To the extent that such representation is not yet a reality, judicial reform must proceed on other fronts, of which a nullification instruction is but one. These other fronts are beyond the scope of this Article.

12. *E.g.*, *Dougherty*, 473 F.2d at 1114; *Moylan*, 417 F.2d at 1009.

context. Part I examines the historical background behind jury nullification and its relationship to the conscience cases, which have in turn dictated the terms of the jurisprudential discussion. Part II explores the types of nullification that occur when juries focus on collateral issues as surrogates for their desire to nullify. In particular, we will attempt to reconcile the proliferation of state-of-mind defenses, including spousal abuse syndrome, urban survival syndrome, and the increasing acquittal rates seen in particular crimes in certain communities, with the inability of juries to bring extrajudicial concerns into deliberation. Part III discusses why the traditional arguments against jury nullification instructions do not confront contemporary social issues and why the traditional "right versus power" framework of the discussion is appropriate only in the context of crimes of conscience. Additionally, Part III examines how a nullification instruction would provide a community with a check upon the discretion of law enforcement and prosecution. Part IV is a description and critique of actual nullification instructions and of some proposed in the literature. In particular, we examine these instructions from the standpoint that they should adequately rationalize the deliberation process such that the fact-finding of the jury is not confused with nullification sentiment.

Finally, Part V presents some suggestions for a nullification instruction and a framework for how to resolve some of the practical issues that an explicit instruction would raise, particularly how to balance jury empowerment with efficient criminal procedure. We discuss the possibility of a notice requirement for a nullification defense, which would add some deterrence to the assertion of the defense and would afford the prosecution an opportunity to mount a counter-nullification case. Notice would also expand notions of legal relevance throughout the trial from *voir dire*, to the admission of evidence, and finally to deliberation. We consider the possibility of a bifurcated nullification instruction and deliberation: the jury would first reach a verdict on the "factual" guilt or innocence of the defendant and then, second, consider the possibility of acquittal on the grounds that conviction would not serve the ends of justice.

We hope that by rethinking nullification in a social context we can empower the jury and rationalize the process, rather than continue to gripe about a process with inadequate information about it. In the final analysis, any true redefinition of

the American character must bring our collective sense of justice and mercy out of the shadows. Opening up the jury deliberation process may yet cast more light.

I. HISTORICAL BACKGROUND OF JURY NULLIFICATION

A. Early English Common Law History and Bushell's Case

The nullification phenomenon has political roots that can be traced back as early as 1544, when an English jury declined to convict, on charges of high treason, the then-notorious Sir Nicholas Throckmorton, who had openly participated in Wyatt's Rebellion.[13] The jury acquitted Throckmorton in spite of the overwhelming evidence of his guilt because of his ascendant political popularity.[14]

Throckmorton was subsequently brought before the Court of the Star Chamber,[15] which heard cases of particular importance to the Crown.[16] The binding over or summoning of "runaway juries" for trial and punishment in the Star Chamber was a common practice in England well into the seventeenth century.[17] Juries, almost exclusively in political cases, were menaced and ultimately convicted "by attaint" or prosecuted for giving false verdicts under oath.[18]

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13. *See* THEODORE F.T. PLUCKNETT, A CONCISE HISTORY OF THE COMMON LAW 133–34 (5th ed. 1956).

14. Robert E. Korroch & Michael J. Davidson, *Jury Nullification: A Call for Justice or an Invitation to Anarchy?*, 139 MIL. L. REV. 131, 133 n.16 (1993).

15. *See* JOHN BELLAMY, THE TUDOR LAW OF TREASON 172–73 (1979).

16. Other cases that the Star Chamber heard involved cases of forgery, perjury, libel, and conspiracy. *See* JOHN GUINTHER, THE JURY IN AMERICA 23 (1988). In addition to reversing the jury's verdict, Throckmorton's Case, 73 Eng. Rep. 215 (K.B. 1554), the Star Chamber imprisoned the jurors themselves and fined them for their impermissible verdict. *See* BELLAMY, *supra* note 15, at 172–73.

17. *See* THOMAS A. GREEN, VERDICT ACCORDING TO CONSCIENCE 141–42 (discussing juries bound over to the Star Chamber).

18. *Id.* False verdicts under oath were characterized as perjury. The prosecution of disobedient juries was purportedly for juror corruption—bribery, conflict of interest, and contempt. The only showing required to bind a jury over for the Star Chamber, however, was that the jury's verdict was "contrary to the evidence," at which point the burden of proof shifted to the jurors to establish that their decision was not a product of improper motive. *See id.*

The Court of the Star Chamber was abolished by Parliament in 1641.[19] The courts' power to harass and punish juries, however, was retained by the common law bench through the remedy of attaint and the power to hold juries in summary contempt, which resulted in fines and imprisonment.[20] The power to chill jury independence in cases where the Crown had an interest remained relatively intact until the Court of Common Pleas decision in *Bushell's Case*.[21]

Bushell's Case arose from the arrest and prosecution of Quaker leader William Penn and his associate William Mead on grounds of violation of the Conventicle Act of 1670.[22] The Conventicle Act was a harsh provision against religious freedom, specifically the public expression of religious beliefs in any manner other than in accordance with the practice of the Church of England.[23] The law was aimed particularly at Catholics, who were thought to be devising a "Popish Plot" linked to French imperial designs.[24]

At trial, Penn and Mead stood before Sir Samuel Starling, Judge and Lord-Mayor of London, a group of aldermen, and a jury of twelve.[25] In effect, Penn and Mead admitted to the assembly that they had preached to a large crowd but denied breaking any valid law.[26] Judge Starling had both defendants

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19. GUINTHER, *supra* note 16, at 23.

20. *See generally* GREEN, *supra* note 17, at 209–12 (describing the fining of jurors in the Quaker cases of the 1660s).

21. 1 Vaughan 135, 124 Eng. Rep. 1006 (C.P. 1670).

22. Conventicle Act, 1670, 22 Car. II, ch. 1 (Eng.), *reprinted in* PAUL L. HUGHES & ROBERT F. FRIES, CROWN AND PARLIAMENT IN TUDOR-STUART ENGLAND 271–72 (1959); GUINTHER, *supra* note 16, at 24. On August 14, 1670, while Penn was preaching to a crowd on a London street corner, with Mead in close attendance, they were arrested for seditiously causing "a tumult" in violation of the Conventicle Act. *See* Scheflin, *supra* note 8, at 170.

23. Conventicle Act, 1670, 22 Car. II, ch. 1.

24. Though not the stated target of the law, Quakers became the main focus of prosecution under the Conventicle Act because of their public expression of their religion and the suspicion of some that the Quakers were secret Papists. *See* GUINTHER, *supra* note 16, at 24. Some thought that Quaker pacificism was designed to bring down England's military guard against invasion from the continent. *Id.*

25. *See* VALERIE P. HANS & NEIL VIDMAR, JUDGING THE JURY 21 (1986). A record of the proceedings of this trial is reported in *The Trial of William Penn and William Mead*, 2 A COMPLETE COLLECTION OF STATE-TRIALS, AND PROCEEDINGS UPON HIGH-TREASON, AND OTHER CRIMES AND MISDEMEANOURS 606 (2d ed. 1730) [hereinafter STATE TRIALS].

26. 2 STATE TRIALS, *supra* note 25, at 608. In presenting their cases to the jury pro se, as trials for sedition did not permit representation by counsel, both defendants spoke eloquently of the right to free worship. *See id.* Penn argued that "tumult" required an intent to breach the peace and declared the defendants' motives completely peaceful. *See id.* at 610.

locked in the bail-dock during the balance of the trial for having the temerity to challenge the purposes and enforcement of the Conventicle Act in public. The Recorder then recited the undisputed facts underlying the indictment to the jury while Penn was said to have been heard shouting through the bars of the bail-dock: "I appeal to the Jury, who are my Judges, and this great Assembly, whether the proceedings of the Court are not most Arbitrary and void of all Law, in offering to give the Jury their charge in the absence of the Prisoners."[27]

Despite threats and entreaties by the judge, the jury refused to make a finding of unlawful assembly.[28] Starling then tried to force a verdict satisfactory to the Crown by jailing the jury and denying them food or water.[29] Two days passed, and the jury returned its final verdict, not guilty for both of the accused.[30]

Judge Starling was bound by law to enter an acquittal for Penn and Mead on the indicted charge; however, he fined the defendants and the jurors for contempt and jailed them when they refused to pay.[31] The defendants and eight of the jurors soon paid their fines and were released.[32] However, four of the jurors refused to pay their fines and remained incarcerated in Newgate Prison while arguing an appeal to the Court of Common Pleas.[33] A year later, the appeal judgment was rendered and the convictions were reversed.[34] The Chief Justice of the Court, Sir John Vaughan, pronounced that no jury could be punished for its verdict, whether by attaint or by fine.[35] Thus, jury nullification was established in the common law.

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27. *Id.* at 609.

28. *See* Scheflin, *supra* note 8, at 170–71. After a short deliberation, the jury returned eight to four for conviction. Threats were made both from the bench and from seated aldermen towards the four holdouts and the jury was sent back to find a unanimous and "acceptable" verdict. Soon thereafter, the jury returned with a unanimous decision—not guilty for Mead, and guilty for Penn, but only for "speaking at Gracechurch Street." *Id.* at 170.

29. *Id.*

30. 2 STATE TRIALS, *supra* note 25, at 612.

31. *See* Scheflin, *supra* note 8, at 171.

32. *See* GUINTHER, *supra* note 16, at 27.

33. GREEN, *supra* note 17, at 236.

34. *See* 1 Vaughan 135, 124 Eng. Rep. 1006 (C.P. 1670).

35. *Id.*

In *Bushell's Case*, Vaughan rejected any notion of objective truth by which to grade a jury's verdict.[36] He likened the individual's assessment of testimony to the varying personal interpretations of religious texts.[37] Such variance in the understanding of the same evidence by judge and jury did not necessarily implicate insincerity or corruption on the part of the jury but, on the contrary, was the expected order of things.[38]

Not surprisingly, Chief Justice Vaughan chose not to discuss the underlying politics or theology of the jury. Specifically, he chose not to consider the role of the jury as a check on judicial tyranny or as a check on the enforcement by the Crown of unjust laws.[39] In fact, Vaughan's opinion is not reasoned in a way specific to crimes of conscience. The very political nature of the prosecution of Penn and other Quakers, however, made jury independence a highly charged political issue. Thus, it is of no surprise that the precedent of *Bushell's Case*, though meaning little in the ordinary criminal matter, became very important to the prosecution of political crimes—in particular, treason, unlicensed publications, and seditious libel.[40]

During this same period, the Crown, under the Stuart Monarchy, sought to broaden the use of the courts to purge and punish those whom it viewed as subversive. The Stuart period was a period of inquisition in England, spear-headed by Titus Oates's concoction of the "Popish Plot" to assassinate Charles II and install a Catholic monarch.[41]

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36. *Id.* at 148, 124 Eng. Rep. at 1012–13. Most familiarly, Vaughan pronounced that:

> A man cannot see by anothers eye, nor hear by anothers ear, no more can a man conclude or inferr the thing to be resolv'd by anothers understanding or reasoning; and though the verdict be right the jury give, yet they being not assur'd it is so from their own understanding, are forsworn, at least in foro conscientiae.

Id.

37. *Id.* at 141, 124 Eng. Rep. at 1009.

38. GREEN, *supra* note 17, at 239–49.

39. Similarly, Vaughan did not cite to any theological doctrine of conscience or to the right of the jury to apply the law mercifully. It is inconceivable, however, that Vaughan did not realize that his opinion, limited to the issue of jury verdict nonreviewability, would affect the ongoing debate and the law itself.

40. *See* GREEN, *supra* note 17, at 249.

41. *Id.* at 250–51. *See generally* JOHN POLLOCK, THE POPISH PLOT (1903) (providing a complete history of the alleged Popish Plot). Examples of jury-packing, prosecutorial and judicial misconduct, excessive sentencing and punishment, and other manipulations have been documented. *E.g.*, GREEN, *supra* note 17, at 251. Neverthe-

In order to curb jury non-compliance protected from sanctions under *Bushell's Case*, the Stuart judges established the doctrine of seditious libel. In a seditious libel case, the jury was only instructed to find whether or not the defendant published the words in question. The seditious nature and intent of those words became a matter of law for the judge to decide.[42]

B. American Colonial History and Zenger's Case

The Stuart doctrine of seditious libel was exported to the American colonies along with the English tradition of jury trials. William Penn himself wrote the *Frame of Government* for the colonists of Pennsylvania, extending to its inhabitants civil liberties yet unrealized in England, such as freedom of religion and limitations on capital punishment.[43] However, Penn retained and liberally enforced Stuart seditious libel laws that penalized criticism of the government.[44]

The most prominent defendant to be charged with seditious libel in Pennsylvania was William Bradford, a printer known for his mocking portrayals of the colonial governor and of Penn in particular.[45] Bradford was arrested twice and prosecuted once for printing allegedly seditious material.[46] Ultimately discouraged by the censorial Pennsylvania authorities, Bradford moved his printing press to New York, where he became the publisher of the *Gazette* and hired a young apprentice named John Peter Zenger.[47]

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less, a number of courageous juries bucked the tide of anti-Jesuit emotion and acquitted defendants even during this period of political and religious oppression. *See id.*

42. Similar doctrines parsing the fact-finding role of the judge and jury were also developed for homicide and unlawful assembly cases. *See id.* at 254. These doctrines were developed in response to juries, which, now immune from sanctions, arrived at unacceptable verdicts in political cases. *See* Thomas A. Green, *The Jury, Seditious Libel, and the Criminal Law in* R.H. HELMHOLZ & THOMAS A. GREEN, JURIES, LIBEL, & JUSTICE: THE ROLE OF ENGLISH JURIES IN 17TH AND 18TH CENTURY TRIALS FOR LIBEL AND SLANDER 37 (1984).

43. GUINTHER, *supra* note 16, at 27.

44. *Id.*

45. *Id.* at 27–28.

46. *Id.* at 28.

47. *See id.* at 27–28. *See generally* JAMES ALEXANDER, A BRIEF NARRATIVE OF THE CASE AND TRIAL OF JOHN PETER ZENGER (Stanley N. Katz ed., 1963) (giving an account of *Zenger's Case*, based on Alexander Hamilton's notes).

Zenger worked as an employee for Bradford and later became partners with him for fifteen years.[48] In 1726, Zenger left and started his own printing business.[49] He first specialized in religious tracts but in 1733 began publishing the *New York Weekly Journal*.[50] The *Journal* was a political paper whose main target was William Cosby, the Royal Governor of New York.[51] On November 2, 1734, Governor Cosby had four issues of the *Journal* publicly burned.[52] On November 17th, Zenger was arrested and charged with seditious libel for the anti-Cosby material in his weekly.[53]

Zenger was prosecuted for seditious libel.[54] At trial, Zenger's attorney could neither argue that the opinions published in the *Journal* were not malicious nor prove that they were factually based. Truth was not a defense for seditious libel, as it is under modern libel law, and the malicious and seditious quality of a statement was determined by the bench, not the jury.[55] The jury's sole job was to find whether or not a statement was made or published.[56] Thus precluded by the law of seditious libel, Zenger's attorney could only urge the jury to nullify the law:

> It is the Cause of Liberty; and I make no Doubt but your upright Conduct, this Day, will not only entitle you to the Love and Esteem of your Fellow-Citizens; but every Man who prefers Freedom to a Life of Slavery will bless you and honour You, as Men who have baffled the Attempt of Tyranny.[57]

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48. ALEXANDER, *supra* note 47, at 8.
49. *Id.*
50. *Id.*
51. *See id.* Cosby was purportedly an acquisitive, power hungry man who exacted large sums from the New York council and sued the former governor, Rip Van Dam, for half of his salary. For this and other alleged official misconduct, including electoral manipulations, Cosby became a generally despised figure and the target of political cartoons, advertising, and editorials in Zenger's journal. *See* Philip B. Scott, *Jury Nullification: An Historical Perspective on a Modern Debate*, 91 W. VA. L. REV. 389, 410–15; *see also* GUINTHER, *supra* note 16, at 27–30 (describing Cosby's arrival and reputation in New York).
52. ALEXANDER, *supra* note 47, at 18.
53. *Id.*
54. *Id.* at 12.
55. *Id.*
56. GUINTHER, *supra* note 16, at 29.
57. LIVINGSTON RUTHERFORD, JOHN PETER ZENGER 123 (1941).

After summations, the jury retired to deliberate. They returned shortly thereafter with a not-guilty verdict, and Zenger was acquitted.[58]

Zenger and his fellow publishers printed transcripts of the trial, and word of the verdict spread throughout the colonies and back to England.[59] Though not a landmark precedent in the way that *Bushell's Case* was, the *Zenger's Case* verdict effectively ended the prosecution of seditious libel cases in the colonies.[60]

C. Nineteenth and Twentieth Century Developments

The nineteenth-century American common law continued the jury nullification trend in crimes of conscience cases. However, the jurisprudence of jury nullification began to shift. The common law tradition and American constitutional history through the early nineteenth century held that the jury was the arbiter of the facts and of the law, a formulation consistent with jury nullification.[61] This recognition of the plenary power of the jury was not inconsistent with the revolutionary spirit of a young nation that had defied its sovereign in declaring independence, and with that, its own sense of justice.[62]

It was in a case involving the highly charged political issue of slavery that the winds began to change. *United States v. Battiste*[63] concerned the prosecution of a sailor who allegedly

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58. Scott, *supra* note 51, at 415.

59. *See* ALEXANDER, *supra* note 47, at 36–37.

60. *See id.* at 34–35. Arguably, *Zenger's Case* also stands for a full appreciation of trial by jury and a deep distaste for excessive bail and fines.

61. *See* William E. Nelson, *The Eighteenth-Century Background of John Marshall's Constitutional Jurisprudence*, 76 MICH. L. REV. 893, 915–16 (1978).

62. Professor Nelson notes that the transfer of the law-finding function from the jury to the judge reflected a shift from a conception of law as a mechanism that preserves local power, builds local consensus, and mirrors shared values, to a mechanism that enforces personal choices, resolves individual disputes, and protects private control over economic resources. WILLIAM NELSON, AMERICANIZATION OF THE COMMON LAW: THE IMPACT OF LEGAL CHANGE ON MASSACHUSETTS SOCIETY, 1760–1830, at 173–74 (1975). These considerations and the development of certain jury controls in the civil context may be less applicable in the criminal context, which suggests that the policies inherent in the earlier law-finding function of the jury may still be more relevant in the criminal context. *See id.* at 27 n.37 (noting that the transformation from jury law-finding to fact-finding in Massachusetts did not occur as rapidly in criminal cases as it did in civil cases).

63. 24 F. Cas. 1042 (C.C.D. Mass. 1835) (No. 14,545).

had seized a black man in Massachusetts with the intent to sell him into servitude. Justice Story, concerned that a Northern abolitionist jury would summarily convict the defendant, instructed:

> [I]t [is] 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. It is the duty of the court to instruct the jury as to the law; and it is the duty of the jury to follow the law, as it is laid down by the court.[64]

Justice Story found that the statute under which the defendant was charged was not intended to cover sailors who had neither enslaved a "negro or mullatto" directly nor had title or interest in the slaves.[65] The jury acquitted the defendant.[66] To that extent, Justice Story's counter-nullification instruction prevented a conviction.[67]

Not coincidentally, the *Battiste* decision arrived on the cusp of a particularly volatile time in the history of the American jury. Under the Fugitive Slave Act of 1850,[68] "aiders and abettors" of alleged fugitive slaves could be held liable both criminally and civilly.[69] Massachusetts and Pennsylvania jurors in particular were celebrated for nullifying judicial instructions and finding for defendants in "aiding and abetting" cases.[70] A number of trial judges at the time refused defense requests to charge juries that they had the independent right to find the law in fugitive slave cases.[71] Nevertheless, northern jurors often found ways to acquit defendants, following their consciences and disregarding the judge's instructions.

The precedential significance of *Battiste* remained somewhat unclear until *Sparf and Hansen v. United States*,[72] sixty years later. In *Sparf and Hansen*, members of the crew of the Ameri-

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64. *Id.* at 1043. Justice Story presided over this case as the Circuit Justice.
65. *Id.* at 1045.
66. *Id.*
67. *Cf.* Scheflin, *supra* note 8, at 177–78 (noting that Justice Story, while conceding the jury's power to nullify, successfully persuaded the jurors that they did not have the moral right to do so).
68. Act of Sept. 18, 1850, ch. 60, 9 Stat. 462 (repealed 1864).
69. *See* ROBERT COVER, JUSTICE ACCUSED: ANTISLAVERY AND THE JUDICIAL PROCESS 190–91 (1975).
70. *Id.* at 191.
71. *Id.*
72. 156 U.S. 51 (1894).

can vessel, *Hesper*, were charged with and convicted for murder. One of the issues on appeal was the trial court's refusal to instruct the jury that, as an alternative to murder, the jury could convict the defendant of manslaughter. The trial court had instead instructed the jury that, although it had the power to return a verdict of manslaughter, any verdict other than murder, if a felonious homocide had been committed, would be improper.[73]

The Supreme Court affirmed the conviction, finding that the trial judge's instruction was correct and holding that, although the jury had the power to ignore the judge's charge on the law, it had no right to do so.[74] According to Justice Harlan, a jury that disobeys a judge's instruction on the law acts contrary to the law, but the judge cannot set aside an acquittal or direct a conviction.[75]

This formulation of a jury's power to disobey a judge's instruction—the power to nullify versus its right to do so—has dominated much of the case law and scholarship since Justice Harlan's opinion.[76] *Sparf and Hansen* presented a relatively narrow issue to the Court: whether a judge may refuse to instruct a jury on a particular matter of law if the judge deems that law to be inapplicable to the facts presented at trial.[77] According to Justice Harlan, it is not error not to instruct a jury on inapplicable law.[78] A narrower reading of *Sparf and Hansen* might suggest the following issue: whether a judge *may* instruct a jury that its failure to follow the instructions would be inconsistent with the law, though beyond the court's power to control. The Court answered that question in the affirmative, without breaking from prior common law and constitutional understandings of the jury's proper function and power.[79] Given either reading, *Sparf and Hansen* has

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73. *See id.* at 60–61. The trial judge charged: "[A]s I have said in this case, if a felonious homicide has been committed at all, of which I repeat you are the judges, there is nothing to reduce it below the grade of murder." *Id.* at 60 (emphasis omitted).

74. *Id.* at 101–03.

75. *Id.* at 106.

76. *See infra* Part III.

77. *See* 156 U.S. at 63, 103.

78. *See id.* at 106 ("We are of the opinion that the court below did not err in saying to the jury that they could not consistently with the law . . . find the defendants guilty of manslaughter or of any offense less than the one charged . . . .").

79. *See id.*

come to mean that jury nullification instructions are impermissible in a federal court.[80]

Thus, the common law history of jury nullification, from the birth of the Star Chamber and through the nineteenth century, is a composite of "conscience cases," in which juries have declared their independence from tyrannical laws enforced against political, social, and religious dissidents.[81] The use of jury nullification as a political tool continues into recent times.

D. The Vietnam War Resister Cases

Many, if not all, of the issues in *Bushell's Case*, *Zenger's Case*, and the Fugitive Slave cases were again articulated in the Vietnam War resister cases. The war resister cases share a common fact pattern. In each case, the government prosecuted one or more anti-war activists who had broken laws during protests, usually through acts of civil disobedience. These acts ranged from the destruction of government property,[82] to violation of the Selective Service Act,[83] conspiracy to aid in draft evasion,[84] malicious destruction, and unlawful entry.[85]

In a number of cases, the defense requested a nullification instruction that would have permitted a juror's own sense of justice to enter into the deliberation and override the judge's instructions on the law.[86] In each case, the court refused to give a nullification instruction, and in some cases the court

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80. *See, e.g.*, United States v. Simpson, 460 F.2d 515, 519 (9th Cir. 1972); United States v. Moylan, 417 F.2d 1002, 1007 (4th Cir. 1969).

81. Of course, *Sparf and Hansen* is not a political case, and *Battiste* is political only in the sense that Justice Story's charge responded to the threat of a politically motivated nullification conviction against the defendant. *See* Scheflin, *supra* note 8, at 178. Much of the reasoning in *Battiste* in opposition to jury nullification responds to this purported fear of nullification convictions. *See* United States v. Battiste, 24 F. Cas. 1042, 1043 (C.C.D. Mass. 1835) (No. 14,545). The court argued at length that a jury that is the arbiter of the law endangers the defendant's due process rights and threatens the prosecution. *Id.*

82. *E.g.*, *Simpson*, 460 F.2d 515; *Moylan*, 417 F.2d 1002.

83. *E.g.*, United States v. Boardman, 419 F.2d 110 (1st Cir. 1969).

84. *E.g.*, United States v. Spock, 416 F.2d 165 (1st Cir. 1969).

85. *E.g.*, United States v. Dougherty, 473 F.2d 1113 (D.C. Cir. 1972).

86. For a discussion of nullification instructions in Vietnam era cases, see William M. Kunstler, *Jury Nullification in Conscience Cases*, 10 VA. J. INT'L L. 71 (1969); Joseph L. Sax, *Conscience and Anarchy: The Prosecution of War Resisters*, 57 YALE REV. 484 (1968).

instructed the jury that the reasons behind the defendant's acts of civil disobedience were irrelevant to the issue of criminal liability.[87] This counter-nullification instruction also served to negate arguments by the defense that acts of civil disobedience could be justified by necessity, defense of others, emergency, moral compulsion, or choice of the lesser evil.[88]

In at least one war resister case, the trial court attempted to exert more extensive jury control and was reversed on appeal. In *United States v. Spock*,[89] the trial court had instructed the jury to deliver special verdicts in order to ensure that the jury could not nullify. The Court of Appeals for the First Circuit reversed the defendants' convictions for conspiracy to aid draft evaders, holding that the special verdicts were prejudicial and improper because they sought to control the jury's right to unfettered deliberation.[90] In discussing the right of a jury to deliberate, the court recognized the power of a jury to acquit notwithstanding a factual finding of liability.[91] One can liken the court's disavowal of special verdicts, particularly in a political case like *Spock*, to earlier resistance against the Stuart formulation of seditious libel, which also sought, by parsing issues of fact and law, to control the jury's power to deliberate and nullify the judge's charge.

In contrast to *Spock*, most of the other war resister cases follow a more familiar pattern, relying on *Sparf and Hansen* for the rule that a jury nullification instruction is impermissible in federal court because the jury has no "right" to disregard the judge's instruction.[92]

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87. *See, e.g.*, *Dougherty*, 473 F.2d at 1137–38 n.54.
88. *See id.*
89. 416 F.2d 165 (1st Cir. 1969).
90. *Id.* at 181.
91. *Id.* at 182.
92. *See, e.g.*, United States v. Simpson, 460 F.2d 515, 519 (9th Cir. 1972); United States v. Moylan, 417 F.2d 1002, 1007 (4th Cir. 1969). The only case that truly stands out among the war resister cases is United States v. Dougherty, largely for the comprehensive dissent of Judge Bazelon. 473 F.2d 1113, 1138–48 (D.C. Cir. 1972) (Bazelon, J., concurring in part, dissenting in part) (maintaining that nullification "permits the jury to bring to bear on the criminal process a sense of fairness and particularized justice").

II. PRESENT-DAY NULLIFICATION ISSUES

Given the political history behind jury nullification, it is ironic that the current debate on verdicts takes place not in the rarified air of crimes of conscience but in the superheated atmosphere of notorious crimes of passion. The media coverage surrounding these verdicts has obscured the relationship between political and apolitical cases. In each type of case, juries have grappled with issues of justice and mercy despite strong evidence of guilt. Recent commentators have failed to acknowledge that the reactions of present day juries are directly analogous to jury reactions recorded at least as far back as the 1950s.[93]

Indeed, in the wake of hung juries in the trials of the Menendez brothers and the jury acquittal of Lorena Bobbitt, there has been much discussion in the media about whether the use of criminal defenses, such as "victimization" or "abuse excuse," has increased.[94] Indeed, such defenses have been asserted in both celebrated cases as well as in the relatively obscure.[95] What has been forgotten in the spate of publicity

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93. *Cf.* KALVEN & ZEISEL, *supra* note 6, at 223–26 (discussing juries' willingness to acquit in cases involving reprisals against violent aggressors).

94. *See generally* DERSHOWITZ, *supra* note 5 (arguing that the "abuse excuse" is being used with greater frequency and success and noting that it is the subject of daily discussion on radio and television talk shows). Indeed, justification defenses in highly charged cases, offered to the jury and accepted apparently at face value, have been criticized by Professor Dershowitz as "lawless invitation[s] to vigilantism." *Id.* at 27. Professor Dershowitz also calls the apparent proliferation of these defenses a "national abdication of personal responsibility." *Id.* at 41.

95. Some examples of these defenses include:

1. Mob frenzy defense: the defense of Damian Williams, accused of beating truck driver, Reginald Denny, during the 1992 Los Angeles riots. Williams was acquitted of felony charges in his state trial;
2. Black rage defense: the proposed, but later abandoned, defense theory of Colin Ferguson, accused of shooting six people to death on a Long Island Railroad commuter train;
3. Abused child defense: the defense used by the Menendez brothers, accused of shooting their parents to death. The brothers were tried before two separate juries that were both unable to reach a verdict resulting in mistrials for the brothers;
4. Battered spouse defense: the defense put forward by Lorena Bobbitt, accused of severing her husband's penis. The jury returned a verdict of not-guilty by reason of temporary insanity;
5. Urban survival syndrome: the defense of Damion Osby, accused of shooting two unarmed African American men in a parking lot;

about these cases and in the outcry that their verdicts have produced is that the results of these trials are neither particularly new nor novel. Obscured by the media frenzy is the extent to which jury nullification may be at work.

Before the apparent proliferation of these types of cases, critics had expressed discomfort with justification defenses.[96] The rise of the insanity defense, for example, has been characterized for years as "almost wholly dominat[ing]" the area of criminal responsibility.[97] As Professor Alan Scheflin notes, a jury is asked to determine criminal responsibility by focusing on, among other factors, the defendant's criminal intent.[98] In the insanity defense context, Scheflin argues, the jury is asked to make a decision involving moral, legal, and medical judgments in deciding whether the defendant had the requisite psychiatric condition to exculpate the defendant of criminal responsibility.[99] Thus, the jury must act as the "referee in a battle of experts despite the lack of expertise on their part to make a responsible and intelligent choice."[100] According to Scheflin, the rise of various insanity defenses has obscured the role and function of the jury because a guilty verdict should

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6. Steroid rage defense: the defense of Troy Mentzler, accused of tossing rocks at cars on an interstate highway;
7. Fetal trimethadione syndrome: the defense of Eric Smith, accused of beating a 4-year-old to death, attributing the action to his mother's epilepsy medication taken during pregnancy; and
8. Adopted-child syndrome: the defense of accused serial killer, Joel Rifkin, who allegedly murdered 17 women.

See DERSHOWITZ, *supra* note 5, at 321–41 (providing a "glossary of abuse excuses," including the mob frenzy defense); Walter Goodman, *Examining the Abuse Defense in Trials*, N.Y. TIMES, May 26, 1994, at C20 (reviewing *Don't Blame Me*, a television special surveying different victimization defenses, and pointing to the influence of talk shows for "spreading the notion that everyone is a victim"); Gregory, *supra* note 5, at 30–31 (discussing the black rage, urban survival, and battered spouse defenses); John T. McQuiston, *A Novel Insanity Defense for Joel Rifkin*, N.Y. TIMES, July 26, 1994, at B1 (describing the adopted-child defense); Margot Slade, *supra* note 2, at B20 (noting the trend of defendants to portray themselves as victims by creating such defenses as steroid rage, fetal trimethadione syndrome, and others).

96. *See, e.g.*, Scheflin, *supra* note 8, at 193–94 (discussing the role of the jury in criminal responsibility defenses, such as insanity, and in mitigation factors, such as poverty).

97. *Id.*

98. *See id.*

99. *Id.* at 194; *cf.* Debra West, *Accused's Words at Core of Insanity Defense*, N.Y. TIMES, Nov. 27, 1994, at 58 (illustrating the various considerations in a New York case involving an insanity defense).

100. Scheflin, *supra* note 8, at 194.

represent the community's decision that the defendant's conduct warrants moral condemnation.[101]

The jury's range of choices in determining criminal responsibility need not be seen as so limited. While some or all of these defenses may be quite legitimate—indeed more than a few have been successful—the debate concerning their propriety would be informed greatly by some indication of whether the juries consider these defenses on their own terms or merely as surrogates for impermissible concerns that a nullification instruction would otherwise permit.[102] Moreover, the broader conclusions drawn by some social commentators relating to the apparent proliferation of "abuse excuse" defenses have assumed a distinctly political tone and are often linked to a conservative agenda.[103] Unless the jury deliberation process is rationalized, however, there can be no real basis upon which to make an informed analysis of the actual reasons behind the outcome of trials involving "abuse excuse" defenses or any other defenses where there is room for nullification.

A. "Inside the Jury Room"

In the television documentary, *Inside the Jury Room*, a jury seized upon a fact-finding fiction to justify a result that nullified the court's instructions on the law.[104] *Inside the Jury Room* followed the trial of Leroy Reed, a mentally impaired defendant, who was tried for violating a Minnesota law which forbade former felons from carrying guns.[105] Reed had bought the gun because he wanted to become a private investigator

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101. *See id.*

102. The concern may in fact be overstated because cases in which an insanity defense goes to a jury are extremely rare. For example, in New York State, it has been estimated that only 3 in every 1000 cases propose an insanity defense, and of that number, only 7% are heard by a jury; the rest are concluded through plea bargain or other resolution. *See* West, *supra* note 99, at 58. Moreover, notwithstanding suspicions about the ability of juries to understand insanity defenses, all diminished capacity defenses claim that the defendant lacked the requisite *mens rea* and thus should not be found guilty of the crime charged. Thus, a jury's finding of insanity is, in actuality, a determination that the defendant's conduct does not warrant the community's moral condemnation.

103. *See supra* notes 1–5 and accompanying text.

104. *Frontline #410: Inside the Jury Room* (PBS television broadcast, Apr. 8, 1986) (transcript on file with the *University of Michigan Journal of Law Reform*).

105. *Id.* (transcript at 2).

and believed from watching his favorite television program that all one needed to do to become a private investigator was to carry a pistol.[106] In fact, the defendant was so naïve that he handed the sales slip for the gun to a detective when asked for identification. The receipt was taken to the sheriff's office whereupon Reed was instructed to get the gun.[107] When he dutifully presented himself with his new gun, he was arrested.[108]

The elements of the crime were straightforward. All the prosecution had to establish was that Reed was a former felon and that he owned a gun. The court denied the defense's request to have a nullification instruction given to the jury.[109] The judge, however, did permit defense counsel to present a "nullification summation" through which counsel exhorted the jury to employ mercy and common sense to acquit the defendant.

Rather than simply acquit Reed because the circumstances indicated prosecutorial overreaching and misjudgment, the jurors finally reached the tenuous factual conclusion that Reed did not have any knowledge that he was carrying a weapon because he had a diminished intellectual capacity.[110] The jury reached this conclusion despite the defendant's own testimony that he bought the gun and wanted to carry it because a gun was an accoutrement of a famous televison character, the "Equalizer."[111] Indeed, the jury's anguish lay not in their concern that they consciously were violating their oath as jurors; on the contrary, much of their difficulty was created by their reliance upon tortured fictions which they needed to erect in order to support their final conclusion on the facts.

This is a kind of "nullification by misdirection," where surrogate issues within the jury's fact-finding province are deliberated, and where fictions are created to reach a result consistent with the jury's sense of justice. This kind of jury behavior clouds the deliberation process, obscures the meaning of the verdict, and consequently undermines respect for the jury system as a whole.[112]

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106. *Id.*
107. *Id.* (transcript at 4).
108. *Id.* (transcript at 5).
109. *Id.* (transcript at 11).
110. *Id.* (transcript at 15).
111. *Id.* (transcript at 2).
112. As Jeffrey Abramson notes:

> [J]urors are discouraged from openly deliberating about the justice of enforcing the law and are no doubt forced frequently into smuggling their views on the justice of law into 'approved debate' about the evidence or facts. . . . Would not the quality of the debate . . . be better if jurors were told that such debate was

B. The American Jury

The phenomenon of seizing on collateral issues in order to arrive at a merciful verdict is neither rare, nor isolated, nor new. What happened during the deliberations at the trial of Leroy Reed is typical of deliberating juries. A study by Harry Kalven and Hans Zeisel, *The American Jury*, examined several thousand jury verdicts.[113] This study remains an authoritative source in revealing the operation of the jury system, even though it relied on data now almost forty years old.[114]

The Kalven & Zeisel study used judges both as subjects and as reporters. By mailed questionnaire, judges were asked, regarding the cases tried before them: (1) how the jury decided the case, (2) how they would have decided the case had it been a bench trial, and (3) to provide some descriptions and evaluations of the case, the counsel, and the parties.[115] Because the study tracks instances solely where the presiding judge and the jury disagreed on the outcome of a particular trial and is based exclusively on reports by the judge,[116] it is impossible to make any definitive pronouncements about jury nullification. Nevertheless, the study offers powerful insights into the deliberation process of juries, because presiding judges have firsthand exposure to the same evidence and arguments.[117]

The Kalven & Zeisel study reinforces the notion that nullification occurs in many more cases than just cases where there may be jury dissatisfaction with a particular law or where the outcome would conflict with a jury's sense of conscience or religious conviction.[118] Nullification is often simply a check on

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part of their function, that we cherish trial by jury precisely because we expect ordinary citizens to repudiate laws, or instances of law enforcement, that are repugnant to their consciences?

JEFFREY ABRAMSON, WE, THE JURY 67 (1994).

113. *See* KALVEN & ZEISEL, *supra* note 6, at 33 & n.1 (including 3576 criminal trials occurring mainly during 1954–1955 and 1958).

114. *See id.* Professors Kalven and Zeisel estimated that, in 1955, 60,000 criminal trials were tried to a verdict in the United States. *Id.* at 12.

115. *Id.* at 45 n.1, 56–57 (finding that juries and judges disagreed on the outcome in 24.6% of the sample cases).

116. *Id.* at 45 n.1.

117. *See id.* at 94–96 (explaining why judges are a reliable source in locating the areas of disagreement between judge and jury).

118. *See generally id.* at 104–17 (determining that jurors commonly nullify when they feel that the probable sentence will be too severe for the crime committed).

prosecutorial discretion. Many juries nullify simply by bringing extralegal concerns into their deliberations or by engaging in fictions about the elements of the crime or the credibility of the evidence.[119]

Kalven and Zeisel termed the extralegal exercise as "the liberation hypothesis."[120] Although careful not to label this "liberation" as a "jury nullification," Kalven and Zeisel studied cases in which the jury disagreed with the judge's outcome based not only upon evidentiary difficulties but also upon the jury's differing sentiments and values.[121] According to Kalven and Zeisel, the underlying jury sentiment gives direction to the resolution of the evidentiary doubt, and the evidentiary doubt provides a condition for a response to the sentiment.[122] Thus, the jury's sentiment works to liberate it from the confines of the evidence.[123] As Kalven and Zeisel observe:

> We know, from other parts of our jury study, that the jury does not often consciously and explicitly yield to sentiment in the teeth of the law. Rather it yields to sentiment in the apparent process of resolving doubts as to evidence. The

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119. *Id.* at 166–67 (offering two explanations for judge-jury disagreement: (1) the credibility hypothesis, disagreement over an item of proof, and (2) the reasonable doubt standard, where a "jury will tolerate less doubt in convicting than will the judge").

120. *Id.* at 486 (defining the liberation hypothesis as "the yielding to sentiment in the guise of evaluating factual doubt").

121. *Id.* at 164–66.

122. *Id.*

123. For example, in the first trial of the four police officers accused of beating Rodney King, the jury refused to convict Officer Laurence Powell for using deadly force against King. Despite the testimony of four eyewitnesses that Powell landed the initial blows to King's head, the jury discarded the testimony, in part, because it was not corroborated by 15 blurry seconds of videotape. *See* D.M. Osborne, *Reaching for Doubt*, AM. LAW., Sept. 1992, at 65. For the majority of the Simi Valley jurors who had a "reverence for police officers as guardians of the social order," the explicit and shocking videotape actually undermined the prosecution's case. *Id.*

In the trials of Damian Williams and Henry Watson, who were accused of beating truckdriver Reginald Denny during the Los Angeles riots after the Rodney King verdicts, the jury also saw explicit videotape evidence and heard testimony that Williams had threatened to "hurt and kill people." Edward J. Boyer, *No Threats Made, Denny Juror Contends; Trial: Contradicting Televised Claims by an Alternate Panelist, Juror 251 Acknowledges That Tempers Flared. But She Says That No One's "Personal Safety" Was Jeopardized*, L.A. TIMES, Oct. 28, 1993, at B3. One juror explained, however, that she had a reasonable doubt that either defendant had a specific intent to kill Denny because the witness placed the statement at a time before the Rodney King verdicts came out. *Id.*

> jury, therefore, is able to conduct its revolt from the law within the etiquette of resolving issues of fact.[124]

Whether one describes the jury's revolt from the law as a form of "etiquette" or as a surrogate for nullification, the result is the same—the jury has decided to acquit notwithstanding the evidence.

The tendency of the jury in the 1950s to use surrogates for nullification has analogues in the well-publicized verdicts of the past decade. For example, when a defendant asserts a self-defense argument, juries tend to expand the doctrine, showing what Kalven and Zeisel describe as "an impatience with the nicety of the law's boundaries."[125] Kalven and Zeisel discern this trend particularly in self-defense cases in which there has been a history of prior abuse or unfaithfulness on the part of the victim.[126] The juries apparently expand the notions of self-defense either to acquit the defendant or to find guilt on lesser charges.[127] Thus, at least in the area of self-defense, the appearance of surrogate nullification strategies is not a new phenomenon.[128] Whatever moves juries in the 1990s was equally persuasive to juries forty years ago.

C. The Bobbitt Jury

The tendency of the jury to expand notions of self-defense could have been at work during the jury deliberations leading to the finding of temporary insanity in the highly publicized Lorena Bobbitt case. The Bobbitt case involved a woman who claimed that she was systematically beaten and abused by her husband, leading her to cut off her husband's penis while he slept.[129] Her defense at trial was that at the time of the act

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124. KALVEN & ZEISEL, *supra* note 6, at 165.

125. *Id.* at 240–41.

126. *See id.* at 231–36.

127. *Id.*

128. *See* ABRAMSON, *supra* note 112, at 94–95 (recounting an instance from fourteenth-century England where the trial jury in a heat-of-passion case found different facts than did the inquest jury and acquitted the defendant on grounds of self-defense).

129. *See* David Margolick, *Lorena Bobbitt Acquitted in Mutilation of Her Husband*, N.Y. TIMES, Jan. 22, 1994, § 1, at 1 (reporting on the trial and verdict).

she was temporarily insane and lacked any rational understanding of the circumstances.[130]

By the end of the deliberations, the jury unanimously believed her defense.[131] However, they initially had split on whether to acquit or to convict.[132] Yet, they quickly moved to a point where nine jurors favored acquittal and three held out for a conviction.[133] What is most interesting is that a key piece of evidence discussed by holdout jurors to favor acquittal was a statement made by a police officer during his interview with Lorena Bobbitt on the night of the act.[134] Despite Bobbitt's detailed narrative of her actions prior and subsequent to the dismemberment, when the officer asked her whether she "*didn't* know what was happening," she responded affirmatively.[135] This interview persuaded the holdout jurors to conclude that Bobbitt did not have the *mens rea* required to convict her.[136]

Whether the Bobbitt jury acquitted based solely on a faithful interpretation of the elements of the substantive charge or based on an expansion of the notion of self-defense is unclear. Given the public's interest in this case, however, it would have been helpful to have had a nullification instruction in order to understand the true motivations of the jurors, unfettered by the constraints of their present oath.

D. The Police and the Community

In instances where the police used an unusual or excessive amount of force in arresting a suspect who resisted with violence, Kalven and Zeisel found that juries tended to show "a special indulgence" toward the defendant.[137] Moreover, in an

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130. *Id.*

131. Videotape Interviews with anonymous Bobbitt Jurors, *Courtroom Television Network* (1994) (videotapes on file with the *University of Michigan Journal of Law Reform*).

132. *Id.* at tape 2.

133. *Id.*

134. *Id.* at tapes 1–2.

135. *Id.*

136. *Id.* at tape 1.

137. KALVEN & ZEISEL, *supra* note 6, at 236–40. Kalven and Zeisel also discuss situations in which the jury acquits "in protest against a police or prosecution practice that it considers improper." *Id.* at 318–23.

assault case where the defendant was brutally treated by the arresting officers, the presiding judge reported:

> [I]nhuman treatment of the defendant throughout the arrest and after the arrest made the jury feel . . . that he had received unusual punishment and the verdict was prompted to discipline the officers which, in the Court's opinion, the jury was entitled to do. While the Court could have dismissed the treatment angle and based its decision on the assault, it is very understandable how the jury reached its verdict. As a matter of fact, the rough treatment of prisoners by arresting authorities is so well known that it is difficult to get convictions where police or prosecuting detectives are involved.[138]

This 1950s phenomenon has repeated itself more recently, albeit on a community-wide basis and regardless of whether there has been any evidence of police misconduct. In fact, jury trends indicate that African American and Latino communities express general estrangement from the police and adopt, in effect, a presumption against police witnesses through their verdicts.[139] In cases involving police testimony in Bronx County, New York, juries with a high proportion of minority jurors were more willing to acquit minority defendants even when there existed clear evidence of guilt.[140]

A similar phenomenon has occurred in Brooklyn, New York, where poor people and people of color make up a sizable percentage of the population.[141] In that borough, jury verdicts in gun possession cases from 1990 through 1993 were a statistical anomaly. According to figures obtained from the Office of the Kings County District Attorney, acquittal rates in gun possession cases ran as high or higher than acquittal rates of prohibition violators at the height of the Prohibition Era.[142]

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138. *Id.* at 320.

139. *See, e.g.*, John Kifner, *Bronx Juries: A Defense Dream, A Prosecution Nightmare*, N.Y. TIMES, Dec. 5, 1988, at B1.

140. *Id.*

141. Although whites are still the largest group in Brooklyn, they are not a majority. In 1990, they numbered 1,078,549, constituting only 47% of the borough's total population. *See* Bob Liff, *Diversity Key to City's Most Populous Borough*, NEWSDAY, Mar. 3, 1991, at 2. This figure includes 155,000 Latinos who identified themselves as white. Blacks comprised the second largest group, with a population of 872,305, or 38% of the population. *Id.*

142. *Compare* Memorandum from the Office of the Kings County District Attorney to Professor Dorfman (July 7, 1994) (reporting gun possession acquittal rates) (on file with the *University of Michigan Journal of Law Reform*) *with* KALVEN & ZEISEL, *supra*

Brooklyn juries were acquitting in gun possession cases at an average rate of 56%, in contrast to an overall acquittal rate of approximately 35% and in sharp contrast to a rate of 28.7% in narcotics cases during the same period.[143]

These results are inconsistent with data indicating support for gun control legislation by Kings County residents and among people of color in general.[144] Thus, it seems unlikely that Brooklyn juries were nullifying the law because of some conscious revolt against gun legislation in the way that Prohibition juries revolted against the Prohibition. Neither is gun legislation unpopular law reminiscent of the "conscience cases."[145] Rather, the compelling conclusion is that Brooklyn juries were not nullifying in simple gun possession cases to protest the gun laws but to check prosecutorial discretion.

In addition, because police testimony in simple gun possession cases is often less professional than in drug sale or possession cases, juries may be discounting police testimony, as evidenced by the high rate of acquittal verdicts. In drug cases—often "buy and bust" operations—police testimony is given by undercover officers, experienced and trained in

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note 6, at 292 n.10 (noting that federal juries acquitted liquor violators at the average rate of 60% in New York City).

143. *See* Memorandum from the Office of the Kings County District Attorney to Professor Dorfman, *supra* note 142, at 2. *But cf.* Memorandum from the Office of the Kings County District Attorney to Professor Dorfman 1 (Nov. 20, 1995) [hereinafter Kings County Update] (reporting acquittal rates according to data released by the State Division of Criminal Justice Services) (on file with the *University of Michigan Journal of Law Reform*).

More recent figures indicate that, in 1994, gun possession cases resulted in only 35% acquittals at trial. Kings County Update, *supra*, at 1. More startling, in 1995, gun possession cases have resulted in only 10% acquittals, which actually exceeded the prosecutorial success rate for felony trial cases overall. This sharp decline in the 1994 and 1995 figures seems to be a result of a change in policy and practice of the Kings County District Attorney's Office in response to the 1993 acquittal rate figures. The Kings County District Attorney's Office may now be offering many more misdemeanor plea bargains as well as lesser included-offense plea bargains with shorter sentences to gun possession defendants, because the Office knows that Brooklyn juries will very likely acquit a defendant in a "garden variety" gun possession case. The result of this practice of weeding-out the cases that may be in the least bit problematic at trial is a much higher trial conviction rate. *See infra* notes 254–55 and accompanying text. This change in acquittal rates, however, does not necessarily indicate a change in the dynamics of the Brooklyn jury.

144. "[M]ajorities of women, blacks and Democrats [nationwide thought] stricter gun control laws [would] reduce violent crime." Jack Nelson, *Most Support President on New Gun Laws*, L.A. TIMES MIRROR, Dec. 10, 1993, at 24.

145. *See supra* Part I; *see also* Katherine Q. Seelye, *In Gun Vote, An Odd Hero for Liberals*, N.Y. TIMES, May 7, 1994, at 10 (nearly 80% of Americans favor some form of gun control).

testifying before juries.[146] In gun possession cases, on the other hand, the jury hears testimony from front-line patrol or beat officers. The community's response, as reflected by the jury's response to police officer testimony in general, becomes more of a critical factor. The extent to which this response amounts to nullification of the standard charge—instructing that a police officer's testimony is no less credible than a civilian's—remains an open question. It is quite possible, however, that jurors consider these police officers to be presumptively non-credible and thereby nullify the judge's charge.

In addition, the jury sometimes considers the harm resulting from the criminal behavior to be trivial. For example, a jury may refuse to convict defendants of forcible robbery when the stolen amounts were de minimis.[147] In these situations, nullification most clearly operates as a community check on prosecutorial discretion; "the jury has a somewhat narrower view than the prosecutor or the legislator of what constitutes an offense serious enough to rise to the dignity of the criminal law."[148] This kind of sentiment operates in the gun possession cases as well, so long as there is no evidence that the gun was used wrongfully.

Kalven and Zeisel stress that it is not the seriousness of the crime that triggers what they term, the de minimis jury response, since these types of disagreements cut across crime categories. Thus, jury reaction to de minimis crimes is not necessarily a criticism of the wisdom of any particular law; rather, it is a comment upon a particular law's application in a given situation against a particular individual.[149]

The message that Brooklyn juries are sending through their gun possession verdicts remains unclear. Is the message an expression of dissatisfaction with gun laws, perceptions of unequal enforcement of the laws, the nature of the police

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146. *E.g.*, People v. Wharton, 549 N.E.2d 462 (N.Y. 1989); People v. Kelsey, 606 N.Y. S.2d 621 (N.Y. App. Div. 1994).

147. KALVEN & ZEISEL, *supra* note 6, at 258–85 (applying the term "de minimis" to refer to circumstances where there is trivial harm, no harm, cured harm, reluctance to prosecute, small social harm, marginal illegality, or a "plague on both houses" situation).

148. *Id.* at 259.

149. *See id.* at 345–46. For example, a jury refused to convict a bowling alley owner for violating child labor laws, where the activity of the defendant could be interpreted as merely trying to keep youth employed and out of trouble. The jury was not hostile to child labor laws in general. Rather, the verdict may have been the jury's attempt to do equity where the policy behind the law was not implicated. *Id.*

presence in minority communities, or are they merely a recognition that firearms are a fact of life in the urban landscape? Because these issues presumably remain undiscussed in the jury room—the judge's instructions proscribe such discussions—we may only take the verdicts at face value or surmise an answer without an empirical or even anecdotal basis.

E. Other Examples of Jury Revolt

Kalven and Zeisel report circumstances in which the conduct of the victims may lead juries to apply tort concepts, such as contributory negligence or assumption of risk, even though these concepts are inapplicable in a criminal context.[150] For example, one jury acquitted a defendant of homicide charges where the victims had been playing "chicken" with the defendant's automobile. The judge concluded that "[b]ecause the jury did not follow the charge of the court, they saw some evidence of contributory negligence on part of person assaulted. [However,] [c]ontributory negligence is no defense in the laws of this state to criminal actions."[151]

Kalven and Zeisel reason that, in certain instances, such as where there has been restitution by the defendant, the jury's willingness to acquit may take into account circumstances relevant to sentencing and apply them as relevant to the determination of guilt.[152] Kalven and Zeisel conclude that this application indicates jury confusion over the purposes of tort and criminal law, where the former resolves private disputes and the latter represents societal sanctions and values.[153] This tendency, however, may not be indicative of any confusion at all. Because juries are both factfinders as well as surrogates for the prosecution's client, the State, they are in the best position to evaluate the harm inflicted.

The Kalven and Zeisel Study did not reveal any contemporary law against which the jury could be said to be revolting, as juries had against the Prohibition laws.[154] The study did find, however, that juries were hostile to sumptuary laws,

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150. *Id.* at 242–57.
151. *Id.* at 243.
152. *Id.* at 269.
153. *Id.*
154. *Id.* at 286.

which regulate activities such as gambling, gaming, the purchase and consumption of liquor, and drunken driving.[155] Most significantly, the study concluded that the recurring theme with regard to jury antipathy toward these types of cases was not that the juries considered the laws themselves to be unjust, but rather "that the prosecution of the particular defendant [seemed] to be selective and to violate the ideal of evenhanded administration of justice."[156]

In sum, one of the more striking elements of the Kalven & Zeisel Study was evidence of jury deviance from the strict application of the law as charged in cases other than the "conscience cases." Moreover, the American jury's tendency to expand notions of justice beyond the constraints of the applicable law has existed much longer than some observers would have us believe. Perhaps it is because Kalven and Zeisel believe that "nullification" is properly limited only to certain categories of unpopular crimes that they do not recognize that jury nullification occurs in each of these other instances as well.[157] Nonetheless, their research reveals numerous areas in which there is strong reluctance, if not outright refusal, by juries to apply the law strictly as instructed, and a willingness to reach verdicts of not guilty despite the dictates of evidence and law.[158]

The question remains, why should these instances of jury self-deception continue when a nullification instruction would allow jury deliberation to focus on what actually influences its decision—the jurors' own concept of justice? Thus, whether a jury ultimately accepts a victimization defense, or attempts to circumvent the constraints of the applicable law, a properly devised nullification instruction would allow the jury to examine honestly and directly whether any of its sentiments are "extra-legal" and would allow them consciously to apply or reject these sentiments while determining the verdict.

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155. *See id.* at 296.

156. *Id.* at 296–97.

157. *See id.* Kalven and Zeisel do assert, however, that acquittals for violations of unpopular laws, such as sumptuary laws, are "closest to classic instances of jury revolt and nullification." *Id.* at 433. Additionally, they refer to capital crimes in early nineteenth-century England as a "great source of jury nullification." *Id.* at 311–12.

158. Kalven and Zeisel also review instances of jury discomfort where there are issues of punishment, preferential treatment of one defendant over another, improper police methods, and inadvertent conduct. *See id.* at 236–40, 301–12, 314–17, 324–28.

III. THE POSITION AGAINST NULLIFICATION INSTRUCTIONS

Since *Sparf and Hansen*, the debate surrounding the nullification instruction has centered predominantly around the issue of a jury's right to nullify as opposed to its inchoate power to do so.[159] The dominant judicial view, derived from *Sparf and Hansen*, is that the jury, through its delivery of a general verdict, has the power to disregard the judge's charge but is not entitled to do so.[160] Consequently, the jury has no right to be informed through judicial instruction of its ability to disregard the judge. If a jury nullifies, it must do so purely on its own volition.

On the other hand, those who argue for the right of the jury to receive a nullification instruction view that right as derivative of either the "jury's right to be instructed as to its proper function, or from the defendant's right to trial by jury."[161] In the first instance, the right to a nullification instruction is grounded in notions of democratic decision making.[162] Where the jury acts as a representative of the community, the jury must decide whether, by "contemporary standards of moral blameworthiness, the defendant should be punished for his

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159. *See, e.g.*, Sparf and Hansen v. United States, 156 U.S. 51, 157 (1894) (Gray, J., dissenting) (stating that juries have the power to nullify and must have the right to exercise it because there is no remedy against the exercise of the power); *see also* Scheflin, *supra* note 8, at 197 (arguing that the inquiry is whether the defendant has the right to an instruction on nullification and whether the jury has the right to be informed of its nullification power). *But see* Gary J. Simson, *Jury Nullification in the American System: A Skeptical View*, 54 TEX. L. REV. 488, 524 (1976) (arguing that the indefensibility of a right to nullify does not require limits on the jury's power to do so); Eleanor Tavris, *The Law of an Unwritten Law: A Common Sense View of Jury Nullification*, 11 W. ST. U. L. REV. 97, 105 (1983) (noting that courts' nullification rationales usually concentrate on the issue of the power versus the right of jury nullification).

160. *See, e.g.*, United States v. Dougherty, 473 F.2d 1113 (D.C. Cir. 1972); United States v. Simpson, 460 F.2d 515 (9th Cir. 1972); United States v. Moylan, 417 F.2d 1002 (4th Cir. 1969).

161. *See* Scheflin, *supra* note 8, at 222.

162. It is worth noting, however, that the issue of whether a judge may or should instruct the jury on its power to nullify was not expressly decided by the Court in *Sparf and Hansen*. In fact, by not finding error in the trial court's instruction, 156 U.S. at 106–07, the Court approved *sub rosa* a charge that informed the jury of its power to nullify while also informing the jury that it would be wrongful to do so, *see id.* at 60 (stating that, although "it may be in the *power* of the jury" to find the defendants guilty of the lesser included crime of manslaughter, if a felonious homocide had been committed, there was no evidence that would reduce the crime to below that of murder).

actions."[163] Thus, the jury's right to a nullification instruction derives from the necessity to inform it of its role in the judicial process.[164]

The second rights argument is a defendant-centered approach, which argues that a criminal defendant's Sixth Amendment right to a jury trial includes the possibility of a jury acquittal. That is, since the jury has the power to acquit against the law and facts, "the defendant cannot be deprived of his right to an opportunity for the jury to exercise this power."[165] Indeed, this argument is related to the first notion that the jury's function is greater than mere discernment of the facts in a particular case. It recognizes that the jury plays a unique role in the judicial process independent from that of other government actors.

Some commentators have evaluated nullification in terms of other rights standpoints, including equal protection[166] and other defendant-centered considerations.[167] In essence, these approaches have de-emphasized the instruction itself in favor of allowing the jury the evidentiary and procedural freedom to consider nullification, whether or not they receive permission by way of an explicit instruction.

The defendant-centered approach attempts to eliminate the logical dilemma inherent in the power-versus-right dichotomy, that is, the "internal contradiction of protecting the power while negating the right."[168] Instead, one commentator proposes that nullification be considered in the context of the Sixth Amendment guarantee of a jury trial "not eviscerated by trial procedures that cause the jury's verdict to mimic what the judge's verdict would have been."[169] Under this view, the jury's ability to nullify derives from the defendant's Sixth Amendment right. As opposed to Scheflin's framework, however, this approach argues that the defendant's rights are independent

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163. Scheflin, *supra* note 8, at 197.

164. *Id.* at 198.

165. *Id.* at 219.

166. *See* George C. Christie, *Lawful Departures from Legal Rules: "Jury Nullification" and Legitimated Disobedience*, 62 CAL. L. REV. 1289, 1304 (1974) (arguing that not all juries are equally aware of the power to nullify and therefore must be expressly instructed about their authority).

167. *See* Chaya Weinberg-Brodt, Note, *Jury Nullification and Jury Control Procedures*, 65 N.Y.U. L. REV. 825, 829 (1990).

168. *Id.* at 866.

169. *Id.* at 841.

of the jury's power to nullify.[170] The jury's ability to nullify is "accepted as a necessary side effect . . . to a fully independent jury," a jury which is given "unrestricted power of independence," free from controls such as directed verdicts, vacated acquittals, juror pre-qualification, and certain prosecutorial motions *in limine*.[171]

Judge Weinstein proposes a judge-centered approach, in which the locus of power shifts dramatically toward the judge.[172] Weinstein advocates a system in which nullification is permitted, but not fostered, by having judges occasionally take a broad view of relevance or admit evidence bearing on moral values which might lead to nullification.[173] This approach turns the others on their heads because it transforms jury decision-making independence into a process essentially controlled by the presiding judge. Under this judge-centered approach, jury nullification would depend primarily on whether the judge, rather than the jury, thinks it appropriate in the first instance. There is a logical contradiction in this position. If the jury has no inherent right to nullify independently, then there can be no collateral right vested in a judge to allow the jury to nullify. Indeed, a judge's "permission" to nullify is a legal oxymoron.

As superficially compelling as the power-versus-right debate may be, the debate assumes that nullification is a conscious act by the jury. The power-versus-right dichotomy fails to address the far more frequent phenomenon, in which the jury nullifies without understanding that it is doing so, through fictions and surrogates.[174] Because the dichotomy only considers conscious revolt, the analysis of a nullification instruction's possible effect is artificially constrained as well.

The defendant-centered approach makes the power-versus-right debate irrelevant, but it still does not address the educational and remedial effect that explicit nullification would have on the rest of society. Nullification not only provides the criminal defendant with the right to an unfettered jury but also lends greater legitimacy to the administration of justice by enfranchising those jurors who are relatively distanced from

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170. *Id.* at 866.

171. *Id.* at 866–67.

172. Jack B. Weinstein, *Considering Jury "Nullification": When May and Should a Jury Reject the Law to Do Justice*, 30 AM. CRIM. L. REV. 239 (1993).

173. *Id.* at 249–51.

174. *See supra* Part II.A.

power. Nullification, viewed this way, becomes an affirmation of the jury as a truly democratic institution. Thus, the significance of nullification is not that it embodies some constitutional abstraction, such as the right of a suspect to be informed of the right against self-incrimination, but rather that it provides an inextricable link to the community's awareness of its power and its deliberate exercise of that power.

In contrast, the dominant position in both federal and state courts is that a jury should not be informed of its nullification power.[175] The literature articulates numerous related but discrete arguments against informing the jury of this power.[176]

First, critics argue that informing the jury of its nullification power is an attack upon the rule of law because it asserts the right of individuals, rather than that of society as a whole, to determine what lawful conduct should be.[177] Moreover, explicit knowledge of this power would loosen any restraints upon the jury and lead to anarchy in the courts.[178] Underlying this position is the concern that a jury's deliberate nullification would pose an unwarranted and undemocratic intrusion into the legislative arena. By refusing to enforce those laws perceived to be unjust, a jury would usurp the power of the democratically elected legislature to determine what conduct is unlawful.[179]

A second argument against informing a jury of its power to disregard the law is that it may give free rein to the jury's extralegal biases. Thus, a nullification instruction could lead to acquittals or convictions based on these biases.[180]

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175. *See, e.g.*, United States v. Moylan, 417 F.2d 1002, 1007 (4th Cir. 1969) ("Since the *Sparf* case, the lower federal courts—even in the occasional cases in which they may have ventured to question its wisdom—have adhered to the doctrine it affirmed [that the jury must take the law from the court]. Furthermore, among the states, only two still allow the jury to be told that they can disregard the law as given them by the court.") (footnotes omitted).

176. *See, e.g.*, Alan W. Scheflin & Jon M. Van Dyke, *Jury Nullification: Contours of a Controversy*, 43 LAW & CONTEMP. PROBS. 51, 85–111 (1980) (summarizing five such arguments: (1) it would be anarchy to give the instruction; (2) the instruction is unnecessary; (3) the instruction is unwise; (4) the nullification power is necessary but better left unsaid; and (5) the instruction would impair the responsibility of the juror).

177. *See* United States v. Simpson, 460 F.2d 515, 519 (9th Cir. 1972).

178. *See* United States v. Dougherty, 473 F.2d 1113, 1137 (D.C. Cir. 1972) (noting potential "grave dangers" to the current system, which protects against anarchy as well as tyranny).

179. Simson, *supra* note 159, at 512–13.

180. *See id.* at 513–14; *see also* Irwin A. Horowitz & Thomas E. Willging, *Changing Views of Jury Power*, 15 LAW & HUM. BEHAV. 165, 172–73 (1991) (reporting empirical evidence that suggests that when given a nullification charge, juries will occasionally

Finally, some argue that informing the jury of its power to nullify eliminates the cost placed upon a jury wishing to do so, which removes the built-in constraint that limits the nullification power only to extraordinary circumstances.[181] We review these traditional objections to the nullification instruction, with particular attention to how they fail to address issues in the context of ordinary criminal trials.

A. Anarchy and Undemocratic Usurpation Arguments

Perhaps the most common reason articulated in opposition to an explicit nullification charge is the belief that the jury's knowledge of its prerogative would degrade the rule of law. This approach misconstrues the significance of an explicit nullification instruction: knowledge of the power to nullify is not the power to make or decide whether the law has actually been broken, which is a separate and reconcilable function of a jury. Rather, the jury's knowledge of its nullification power allows it to decide whether the application of the law to the particular circumstances of the case before it is just. The jury need not violate its oath to take the law as given by the court. After deciding that the law has been broken, the jury's function should be to determine whether the lawbreaker ought to be punished for the behavior as instructed by the court.

Moreover, the decision whether to enforce particular laws does not usurp legislative power. Indeed, this decision is not legislative at all. Rather, it is a species of traditional executive and judicial discretion.[182] Professor Scheflin argues that jury nullification is an assessment of whether unlawful conduct should be punished and that it therefore checks prosecutorial indiscretion.[183] According to Scheflin, prosecutorial discretion filters out many marginal cases, and jury nullification weeds out the rest.[184] Yet Scheflin and others, such as Professor Jon

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be more severe with "unsympathetic" defendants than the law mandates).

181. *E.g.*, MORTIMER R. KADISH & SANFORD H. KADISH, DISCRETION TO DISOBEY 35, 59–66 (1973); *see also* Weinstein, *supra* note 172, at 250–51 (opining that the absence of the instruction ensures that nullification will occur only in "relatively infrequent extreme cases").

182. Scheflin, *supra* note 8, at 181.

183. *Id.*

184. *Id.*

Van Dyke, confine their analysis to political trials. According to their analysis, in ordinary criminal trials, prosecutorial discretion reflects community attitudes; in political trials, where the government is the purported victim, the jury must exercise the discretion normally residing in the prosecutor.[185]

Scheflin and Van Dyke do not consider the potential effect on verdicts of our multiracial, multicultural, and economically stratified society, in which many groups either are or perceive themselves to be excluded from positions which traditionally have exercised discretion—the police, the prosecution, and the judiciary. In particular, Scheflin and Van Dyke's conclusion does not address the fact that the racial make-up of those administering justice and that of defendants and jury greatly diverge. For example, the Report of the New York State Judicial Commission on Minorities concluded that "inequality, disparate treatment and injustice remain hallmarks of [New York State's] justice system" and that "courts . . . have lost the confidence of the poor."[186] Scheflin and Van Dyke's premise that official discretion in ordinary criminal trials reflects community sentiment is therefore dubious. If community sentiment differs from prosecutorial practice, then it is proper for the community, through the jury, to provide a check on prosecutorial judgment in ordinary criminal matters as well. A jury's decision to allow a lawbreaker to go free does not compromise the integrity of the rule of law any more than the decision of an individual police officer or prosecutor not to arrest or prosecute a lawbreaker prior to trial.[187]

Professor Simson argues that informing a jury of its nullification power would be an undemocratic usurpation of

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185. *See id.* at 191 ("[I]n ordinary criminal trials, prosecutorial discretion tempers harsh . . . laws and forbears from instigating criminal violations not founded upon community support. . . . [whereas in political trials] prosecutorial discretion no longer acts as a buffer between the community and the law . . ."); *cf.* Jon M. Van Dyke, *The Jury As a Political Institution*, 16 CATH. LAW. 224, 238 (1970) (arguing that juries in ordinary criminal trials will not be tempted to exercise nullification powers because the jurors are victims of crimes of violence rather than crimes of conscience).

186. 1 REPORT OF THE NEW YORK STATE JUDICIAL COMMISSION ON MINORITIES 1 (1991) [hereinafter N.Y. REPORT].

187. *See* KENNETH C. DAVIS, POLICE DISCRETION 1 (1975) [hereinafter POLICE DISCRETION] (noting that the individual patrol officer decides daily "what law to enforce, how much to enforce it, against whom, and on what occasions"); *see also* KENNETH C. DAVIS, DISCRETIONARY JUSTICE: A PRELIMINARY INQUIRY 188 (1969) [hereinafter DISCRETIONARY JUSTICE] (noting that the discretionary power in the criminal justice system that trumps all others is the power to decide whether to prosecute).

legislative power.[188] According to Professor Simson, nullification "frustrate[s] the people's sense of justice" since the legislature, not the jury, reflects the majoritarian view.[189] Nullification essentially attacks democratic principles by compromising, among other things, the dispensation of equal justice, the need for legislative reform, and the executive's ability to implement policies on a wide scale.[190]

The Ninth Circuit expressed similar views in *United States v. Simpson*.[191] In *Simpson*, the defendant had set fire to Selective Service files to protest the United States' involvement in Southeast Asia.[192] As in many of the war resister cases, the defendant appealed on the ground that the trial court had refused to inform the jury of its power to acquit regardless of the evidence of the defendant's guilt.[193] The Ninth Circuit affirmed the conviction, reasoning that such an instruction would strike "to the heart of our society" because what was being proposed was "not merely that jurors should be given the power to determine what is the law, but that they should be instructed that they may acquit a defendant even though they believe that he did something the law forbids."[194] The *Simpson* court suggested that if a nullification instruction were given, "we would have a kind of anarchy; that is, a system in which the ultimate test of socially permissible conduct is, to a significant degree, the random reaction of a group of twelve people selected at random."[195]

Both Professor Simson and the *Simpson* court conflate the notions of a general proscription and its enforcement. Nullification is not any single jury's attempt to veto the majority's notions of impermissible conduct as expressed through the legislature. It is simply one jury's decision that under the particular circumstances before it, conduct that may otherwise be generally impermissible should not be subject to sanction. Professors Scheflin and Van Dyke refer to this authority as the "dispensing power" of the jury, the "power of conscience which permits the jury to suspend the application of a particular law

188. *See* Simson, *supra* note 159, at 512–16.
189. *Id.* at 512.
190. *See id.* at 513–16.
191. 460 F.2d 515 (9th Cir. 1972).
192. *Id.* at 516.
193. *Id.* at 517.
194. *Id.* at 519 (citation omitted).
195. *Id.* at 520 n.12.

in a particular instance to a particular defendant in the interest of conscience and justice."[196]

This is precisely the discretionary power already given to unelected police officers and prosecutors.[197] Professors Scheflin and Van Dyke argue that the police have the discretion not to arrest; that the prosecutors have the discretion whether or not to bring criminal charges; and that the trial judges have the discretion whether or not to allow cases to proceed to trial.[198] Thus, in many instances these actors may act to "temper the rigor of the law" despite a technical violation of that law.[199] In fact, by appropriating only one-half to two-thirds of the funds and personnel necessary to achieve full enforcement, legislatures have acquiesced to the discretionary enforcement of statutes by the government.[200]

The full contour of the nullification debate can best be seen in *United States v. Dougherty*.[201] In *Dougherty*, the defendants appealed convictions for destroying Dow Chemical Company property. At trial, the defendants contended that they destroyed the property to protest the Vietnam War and Dow's support of United States military efforts.[202] On appeal, they argued that the trial judge improperly refused to instruct the jury of its right to acquit the defendants without regard to the law and further refused to allow the defendants to argue this issue to the jury.[203]

In affirming the trial court, Judge Leventhal stated that "the simultaneous achievement of modest jury equity and avoidance of intolerable caprice depends upon formal instructions that do not expressly delineate a jury charter to carve out its own rules

196. Scheflin & Van Dyke, *supra* note 176, at 87 (arguing that this dispensing power is not the power to make, redefine, supplant, or overrule the law).

197. *See* DISCRETIONARY JUSTICE, *supra* note 187, at 190 ("The prosecutor has more control over life, liberty, and reputation than any other person in America.") (quoting Justice Robert H. Jackson, *Federal Trial Rules Simulate State Reform*, 24 J. AM. JUD. SOC. 18, 18–19 (1940)); Weinstein, *supra* note 172, at 246–47 ("By far the greatest nullification takes place as a result of decisions not to prosecute or reduce charges. . . . [P]rosecutors have enormous discretion because of the great number of crimes found in our over-expansive criminal laws.").

198. Scheflin & Van Dyke, *supra* note 176, at 87.

199. *Id.*

200. POLICE DISCRETION, *supra* note 187, at 80–81; *see also* Scheflin & Van Dyke, *supra* note 176, at 112 (arguing that the generality of the laws written by legislatures necessitates the exercise of prosecutorial discretion).

201. 473 F.2d 1113 (D.C. Cir. 1972).

202. *See id.* at 1120.

203. *Id.* at 1117.

of law."[204] According to Judge Leventhal, to notify the juror of the nullification power, "is to inform him, in effect, that it is he who fashions the rule that condemns."[205] Thus, an explicit nullification instruction "conveys an implied approval that runs the risk of degrading the legal structure requisite for true freedom, for an ordered liberty that protects against anarchy as well as tyranny."[206]

In his dissenting opinion, Chief Judge Bazelon sought to correct the majority's characterization of jury nullification by emphasizing that it is the legislature's function

> to define and proscribe certain behavior that is generally considered blameworthy. . . . [However,] [t]he drafters of legal rules cannot anticipate and take account of every case where a defendant's conduct is "unlawful" but not blameworthy, any more than they can draw a bold line to mark the boundary between an accident and negligence. It is the jury—as spokesman for the community's sense of values—that must explore that subtle and elusive boundary.[207]

Judge Bazelon's dissent suggests the importance of the nullification instruction to ensure community input in enforcing the law. This species of jury discretion may have positive societal as well as legal value. Many communities perceive that the legal system dispenses justice inequitably, and this perception is grounded in a disgraceful reality. For example, the Report of the New York State Judicial Commission on Minorities found that "a general public perception of bias" in the New York state courts exists because "[v]estiges of long-standing discrimination" against people of color "pervade their . . . perceptions of their ability to achieve justice."[208] Furthermore, as of 1991, out of a total of 1129 New York state judges, only 93 are members of minority groups.[209] Moreover, the Commission found that, in 1989, whites comprised eighty-two percent of New York court's nonjudicial employees[210] and that minorities

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204. *Id.* at 1134.
205. *Id.* at 1136.
206. *Id.* at 1137.
207. *Id.* at 1140 & n.5, 1142 (Bazelon, C.J., dissenting).
208. 1 N.Y. REPORT, *supra* note 186, at 27.
209. *Id.* at 94. Seventy-one African Americans, 19 Latinos, and 3 Asian Americans comprised the 8.2% of judges who were minorities. *Id.*
210. *Id.* at 116.

were underrepresented as attorneys, court officers, junior court analysts, court reporters, and court clerks.[211] Statistics like these have led Franklin H. Williams, Chairperson of the Commission on Minorities, to conclude that "there is more here than just the perception of a biased court system. There is in New York State in the 1990's the reality of a biased court system."[212]

According to the *New York Law Journal*, in 1994, of 1167 trial and appellate judges in New York, only 125 were minorities.[213] This figure indicates that even with an apparent effort over the last three years to increase minority representation on the bench, the gap between whites and minorities remains substantial. Indeed, while the majority of the population of Brooklyn and Queens are people of color, the same is true of less than twenty percent of the judges in each borough.[214]

Thus, the community's lack of knowledge that it has the authority to check inequitable law enforcement and prosecutorial discretion through nullification is more than an academic problem.[215] This ignorance may reinforce the community's sense of powerlessness and erode its respect for the law and the criminal justice system.[216] The law will ultimately be strengthened, not weakened, by acknowledging the check on police and prosecutorial discretion given to the jury as a representative body, because society thus gains community oversight of the conduct of governmental officials.

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211. *Id.* at 105.

212. *Id.* at vii.

213. *Today's News*, N.Y. L.J., Aug. 3, 1994, at 1 (discussing a report by the Association of Hispanic Judges and the Judicial Friends which places this figure at 11%).

214. *Id.*; *see also* David Johnston, *Bias Found in Choosing of Justices*, N.Y. TIMES, Dec. 6, 1994, at B1, B4 (reporting that as of July 1994, 90% of the appointed judges on the bench in Manhattan, Brooklyn, and the Bronx were white and that 73% of the elected judges sitting on the New York Supreme Court in these boroughs were white).

215. *Cf.* Scheflin, *supra* note 8, at 190 ("[P]articipation on the jury gives the people a feeling of greater involvement in their government which further legitimizes that government.").

216. Scheflin & Van Dyke, *supra* note 176, at 103 (noting that a nullification instruction "would give the jurors a sense of responsibility, respect, and influence over the law that regulates their lives"). Scheflin and Van Dyke assert, however, that in the ordinary criminal case nullification is unlikely because "people [like themselves] are victims of these crimes." *Id.* While we agree that juries are less likely to nullify when violent crimes have been committed against other members of the community, we nevertheless believe that, as the racial makeup of criminal defendants has become overwhelmingly different from that of the majority of the police, prosecution, and judiciary, the minority community's trust in the justice system has waned but that it may be reinforced with increased input from the community.

A recent *New York Times/WCBS News* poll found that, out of all city residents polled, minority group residents most strongly expressed skepticism about the New York City Police Department.[217] The poll found that a majority of African American and Latino respondents, as well as a "sizable minority" of white respondents, believed that the New York City police were generally tougher on people of color.[218] This criticism is not without a rational basis. For example, in New York City, a city in which over fifty-three percent of the population is either African American or Latino, members of both groups account for only twenty-five percent of the police force.[219] Moreover, ninety-three percent of the sergeants are white, and, as of April 1994, not a single African American had attained the rank of captain.[220] There are similar disparities in other cities where the non-Caucasian population is in the majority, including Chicago,[221] Los Angeles,[222] and Houston.[223] Detroit is the only major city in which a majority of police officers are people of color, although the discrepancy remains substantial between their representation on the police force and their share of the population.[224]

As a popular check on executive and judicial discretion, the nullification instruction would inject more democracy into the justice system, rather than usurp its influence, and would serve as a direct reminder from the bench that one of the purposes of the jury is to reflect community values. A nullification instruction would reemphasize to the jury, and to the actors in the entire criminal justice system, why we do not employ professional fact finders in criminal cases and why we have a constitutional right to a trial by jury. Perhaps most importantly, a carefully crafted nullification instruction would allow the community to exercise its role as overseer consciously and deliberately, rather than through fictions and surrogates. It would create the incentive to deliberate openly about the merits of the evidence and would remove the inclination to

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217. Clifford Krauss, *Poll Finds a Lack of Faith in Police*, N.Y. TIMES, June 19, 1994, at A1, B30.

218. *Id.* at B30.

219. Peter T. Kilborn, *New York Police Force Lagging in Recruitment of Black Officers*, N.Y. TIMES, July 17, 1994, at 1, 26.

220. *Id.* at 1.

221. Approximately 56% of the population and 32% of the police force. *Id.* at 26.

222. Approximately 54% of the population and 37% of the police force. *Id.*

223. Approximately 56% of the population and 27% of the police force. *Id.*

224. Approximately 78% of the population and 59% of the police force. *Id.*

disguise nullification sentiment as fact finding. As a result, the instruction would enable jurors to focus on the evidence without hindering their ability to question frankly and freely the propriety of the prosecution.

B. Bias-determined Outcomes

Another frequently expressed objection to a nullification instruction is that it would give freer rein to juror biases, thereby producing convictions or acquittals based upon improper prejudice.[225] This position ignores procedural protections against convictions not supported by the evidence, such as the defendant's right to appeal and the trial court's power to vacate convictions.

The position is also illogical. To illustrate, in *Dougherty*, Judge Bazelon responded to the argument that "the spontaneous and unsolicited act of nullification" will more likely reflect bias than lack of instruction as follows:

> It seems substantially more plausible to me to assume that the very opposite is true. The juror motivated by prejudice seems to me more likely to make spontaneous use of the power to nullify, and more likely to disregard the judge's exposition of the normally controlling legal standards. The conscientious juror, who could make a careful effort to consider the blameworthiness of the defendant's action in light of prevailing community values, is the one most likely to obey the judge's admonition that the jury enforce strict principles of law.[226]

Thus, a carefully crafted nullification instruction, one that informs the jury of its discretion to find guilt beyond a reasonable doubt and yet to acquit on the basis that justice is better served by not convicting the offender, would actually offer protection against bias.[227]

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225. *Cf.* Simson, *supra* note 159, at 514 ("[B]y activating local biases, jury nullification may at times in effect immunize criminal acts visited upon members of society's 'discrete and insular minorities.'").

226. United States v. Dougherty, 473 F.2d 1113, 1141 (D.C. Cir. 1972) (Bazelon, C.J., dissenting).

227. According to Judge Bazelon:

> [I]t is hard . . . to see how a nullification instruction could enhance the likelihood of [an unjust conviction]. . . . The instruction would speak in terms of

Finally, while some abuses inevitably do occur in the jury room, to the extent that jurors represent a fair cross-section of the community, the likelihood that a particular bias will improperly influence the jury to convict or acquit will decrease.[228] Scheflin notes that the spectre that white juries would convict black defendants and acquit white defendants solely out of racial prejudice lessens as the presence of disenfranchised groups in the administration of justice increases.[229] Thus, the solution to bias in the jury system is not avoidance of a nullification instruction but education of and greater participation by the entire community.[230]

A properly crafted nullification instruction would create a better environment in which to expose and confront social biases during deliberation. At present, the availability of surrogates for the jury's own concepts of justice provides cover

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> acquittal, not conviction, and it would provide no comfort to a juror determined to convict a defendant in defiance of the law or the facts of the case. Indeed, unless the jurors *ignored* the nullification instruction they could not convict on the grounds of prejudice alone. Does the judge's recitation of the instruction increase the likelihood that the jury will ignore the limitation that lies at its heart? I hardly think so.
>
> As for the problem of unjust acquittal, . . . [w]here defendants seem dangerous, juries are unlikely to exercise their nullification power, whether or not an explicit instruction is offered. Of course, that check will not prevent the acquittal of a defendant who may be blameworthy and dangerous except in the jaundiced eyes of a jury motivated by a perverse and sectarian sense of values. But whether a nullification instruction would make such acquittals more common is problematical, if not entirely inconceivable. In any case, the real problem in this situation is not the nullification doctrine, but the values and prejudice that prompt the acquittal. And the solution is not to condemn the nullification power, but to spotlight the prejudice and parochial values that underlie the verdict in the hope that the public outcry will force re-examination of those values, and deter their implementation in subsequent cases.

Id. at 1143 (Bazelon, C.J., dissenting) (footnote omitted).

228. The issue of whether juries fairly represent a cross-section of most communities is an important issue but is beyond the scope of this Article. For discussion on the underrepresentation of minority jurors, see 1 N.Y. REPORT, *supra* note 186, at 53–59 (reporting that African-American and other minority communities are either not welcome or actually excluded from New York state jury pools); Deborah A. Ramirez, *Excluded Voices: The Disenfranchisement of Ethnic Groups from Jury Service*, 1993 WIS. L. REV. 761 (concluding that Hernandez v. New York, 500 U.S. 352 (1991), which upheld the exclusion of bilingual Latinos on the basis that these jurors would not adhere solely to the official English translation of Spanish testimony, could potentially exclude all bilingual Latino jurors in cases where Spanish testimony could be brought before the court); Joseph P. Fried, *Bias Charged in Selection of U.S. Juries*, N.Y. Times, June 2, 1994, at B1, B2 (discussing the controversy surrounding the Eastern District of New York's practice of using predominately white, Long Island juror pools for cases tried in Brooklyn, while using only Long Island-based jurors for cases tried on Long Island).

229. Scheflin, *supra* note 8, at 212.

230. *Id.*

for juror biases. A nullification instruction would offer less incentive to conceal prejudices or to exercise prejudice by raising false collateral issues.

C. Nullification Power Only in Extraordinary Circumstances

A third objection to informing a jury of its nullification power posits that "nullification which arises out of ignorance is in some sense more worthy than nullification which arises out of knowledge."[231] That is, the jury has a "recourse role," the authority to reevaluate and go beyond procedural constraints when these constraints are perceived to conflict with goals.[232] The difference between a recourse role and unfettered discretion, however, is that the former imposes a cost upon the body wishing to redefine its constraints. By not informing the jury of its nullification power, the cost limits the exercise of the power to extraordinary circumstances, which reflects the proper application of the nullification power.[233]

The difficulty with this position, asserted by Professors Mortimer and Sanford Kadish, is that it assumes that the proper limits on the exercise of the nullification power are dictated by the jury's ignorance. Meanwhile, there is reason to believe that a conscious decision on the part of a jury to

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231. *Dougherty*, 473 F.2d at 1141 (Bazelon, C.J., dissenting); *see also* KADISH & KADISH, *supra* note 181, at 59–66.

232. Scheflin & Van Dyke, *supra* note 176, at 99 (defining "recourse role" as "the authority to reexamine the constraints . . . . when those constraints appear to conflict with the goals they were set up to further"); *see also* KADISH & KADISH, *supra* note 181, at 65 (positing that "an explicit statement that the jury may invoke their own values . . . would . . . invite jury nullification on a greater scale").

233. *Id.* at 64–65; *cf. Dougherty*, 473 F.2d at 1136–37. In *Dougherty*, the court suggested that

> it is pragmatically useful to structure instructions in such wise [sic] that the jury must feel strongly about the values involved in the case, so strongly that it must itself identify the case as establishing a call of high conscience. . . . [This] confines the happening of the lawless jury to the occasional instance that does not violate, and viewed as an exception may even enhance, the over-all normative effect of the rule of law.

Id. at 1136–37 (footnote omitted). *See also* KALVEN & ZEISEL, *supra* note 6, at 498 ("Perhaps one reason why the jury exercises its very real power so sparingly is because it is officially told it has none.").

exercise its nullification power, guided by appropriate instructions, would not impose a cost and may even confer a benefit.[234] Moreover, this position evidences a basic mistrust of the way jurors approach their task, of their collective common sense and moral judgment, and consequently, of the jury system itself.[235] Indeed, by creating an atmosphere where juries deliberate fully and carefully about whether any issue other than a defendant's legal guilt should be considered, jurors might be less inclined to succumb to bias because such bias would be met by prosecutorial counterargument and the critical response of the other members of the jury.

The empirical evidence supports our hypothesis. In experimental studies conducted by Professor Irwin Horowitz, mock juries were given explicit nullification instructions and standard nonnullification instructions.[236] Professor Horowitz found that prosecutorial challenges made to nullification arguments counterbalanced and sufficiently curbed juror bias.[237] Thus, a nullification instruction that imposes procedural constraints on the power to nullify and allows substantive challenges to its

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234. *See Dougherty*, 473 F.2d at 1141–43 (Bazelon, C.J., dissenting) (placing trust in the jury not to abuse their power upon receipt of a nullification instruction).

235. *Cf. id.* at 1142.

236. Irwin A. Horowitz, *The Effect of Jury Nullification Instruction on Verdicts and Jury Functioning in Criminal Trials*, 9 LAW & HUM. BEHAV. 25, 30–32 (1985). The Horowitz juries deliberated three different scenarios: felony murder, vehicular homicide involving drunk driving, and euthanasia. Different juries were given different instructions: a standard nonnullification instruction, a Maryland instruction containing a nullification charge, or a "Radical Nullification Instruction," in which jurors were told that they had the power to decide whether to apply a given law, that it was appropriate to bring their conscience and that of the community into the deliberations, and that nothing would bar an acquittal if the jury felt that a conviction would produce inequitable or unjust results. *Id.* Horowitz found that the acquittal rates for juries given the standard nonnullification instruction or the Maryland instruction did not differ substantially. *Id.* at 32–34. In fact, there is no evidence that Maryland has greater or fewer instances of nullification than any other state. *Id.* However, Horowitz later concluded that when juries were given the Radical Nullification Instruction they were more likely to acquit a sympathetic defendant, judge a dangerous defendant more harshly, and spend less time on the evidence and more on defendant characteristics. *See* Horowitz, *infra* note 237, at 451–52. This result does not mean receipt of a nullification instruction liberates the jury from the constraints of instructions per se. Indeed, given the wording of the Radical Nullification Instruction, an argument could be made that the mock juries were diligently following the instructions given. For a discussion of the various instructions used in the Horowitz studies, see *infra* notes 273–75 and accompanying text.

237. Irwin A. Horowitz, *Jury Nullification: The Impact of Judicial Instructions, Arguments and Challenges on Jury Decision Making*, 12 LAW & HUM. BEHAV. 439, 451 (1988) ("The impact of challenges to nullification arguments depressed juries' tendencies to act upon their sentiments.").

application would levy the kind of cost that the Kadishes believe is required for the proper exercise of nullification. An instruction which informs the jury of its nullification power, but at the same time conveys the expectation that the jury must follow the law to reach its verdict, would likely minimize the number of nullifications.[238]

A nullification instruction that commands the jury to consider the evidence and decide the guilt of the defendant *before* considering issues of justice would both inform the jury of the parameters of deliberation and impose constraints upon the their discretion to nullify. One commentator has suggested that a nullification instruction is "like telling children not to put beans in their noses. Most of them would not have thought of it had it not been suggested."[239] But, just as many parents will attest that there need be no prompting for children to push small objects into their nostrils and ears, so too do recent events and anecdotal and empirical evidence suggest that juries do think about and act upon their nullification impulses more than has been traditionally acknowledged.[240] We do not leave the dispensation of justice to children. Moreover, we leave it to juries composed of concerned and intelligent adults who are sensitive to the need for justice.

IV. ATTEMPTS TO INTRODUCE NULLIFICATION INSTRUCTIONS

There have been various attempts to introduce a nullification instruction to the modern jury process, both in actual cases and under simulated conditions.[241] Two states, Maryland and Indiana, currently permit nullification instructions.[242] These states have been viewed as laboratories, allowing scholars to study

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238. *See* Stephen R. Mysliwiec, Note, *Toward Principles of Jury Equity*, 83 YALE L.J. 1023, 1051–52 (1974); *see also Dougherty*, 473 F.2d at 1141 (Bazelon, C.J., dissenting) (arguing that the conscientious juror who will carefully consider the blameworthiness of the defendant is the one most likely to obey the judge's admonition to enforce the law).

239. Weinstein, *supra* note 172, at 250.

240. *See, e.g.*, United States v. Dougherty, 473 F.2d 1113, 1143 (D.C. Cir. 1972) (Bazelon, C.J., dissenting) ("Surely nothing is gained by the pretense that the jurors lack the power to nullify, since that pretense deprives them of the opportunity to hear the very instruction that might compel them to confront their responsibility.").

241. *See infra* Part IV.A–B.

242. *See infra* notes 247–48 and accompanying text.

the actual effect of nullification instructions on the outcome of real cases.[243] However, given a number of factors, most importantly the wording of the nullification instruction, such studies are not particularly instructive in understanding the actual effects of an instruction on a deliberating jury. Notwithstanding the nullification language in the charges, we are not convinced that Maryland and Indiana juries have been provided with the clear opportunity to nullify which comes from a real understanding of the power to nullify.[244]

A number of other states had bills pending in their legislatures which would permit nullification instructions.[245] Some of the language proposed in these bills differs markedly from that currently employed in Maryland and Indiana. Until these bills are enacted,[246] however, there will be no empirical evidence by which to determine the effects of these instructions either.

It is helpful at this point to restate that the fundamental purposes of a nullification instruction are to inform a jury of its power to acquit a defendant notwithstanding a clear factual finding of guilt and to inform the jury of its power to import

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243. *See* Scheflin & Van Dyke, *supra* note 176, at 80–85 (analyzing jury nullification in the Maryland and Indiana courts); *cf.* Gary J. Jacobsohn, *The Right to Disagree: Judges, Juries, and the Administration of Criminal Justice in Maryland*, 1976 WASH. U. L.Q. 571, 577–79 (noting counsel's role in providing interpretations of law to Maryland juries); M. Kristine Creagan, Note, *Jury Nullification: Assessing Recent Legislative Developments*, 43 CASE W. RES. L. REV. 1101, 1130–36 (1993) (discussing the practical effects of nullification instructions on trial outcomes in Maryland and Indiana).

244. *See* Horowitz, *supra* note 236, at 29 ("Proponents of the nullification doctrine feel that the Maryland instruction is too vaguely worded to have a substantial impact.").

245. *See, e.g.*, H.B. 5248, Gen. Assembly, Reg. Sess. (Conn. 1995) ("[I]f a juror finds the law to be unjust or wrongly applied to the defendant such juror may exercise the traditional right of jurors to vote according to conscience regardless of the facts of the case . . . ."); S. 4157, 218th Gen. Assembly, 1st Reg. Sess. (N.Y. 1995) ("Upon request of a defendant, the court must also state that the jury has the final authority to decide whether or not to apply the law to the facts before it, that it is appropriate to bring into its deliberations the feelings of the community and its own feelings based on conscience, and that nothing would bar the jury from acquitting the defendant if it feels that the law, as applied to the facts, would produce an inequitable or unjust result."); H.B. 296, 54th Legis. Sess. (Mont. 1995) (defining the right to a jury trial as including the right to inform the jury of its power to judge both law and facts as well as to vote according to conscience); *cf.* H.B. 2514, 74th Reg. Sess. (Tex. 1995) (creating a right in the defendant to inform the jury of its nullification power, explicitly forbidding the court or the State to infringe on that right, and providing that the failure to allow the defendant to exercise this right is grounds for mistrial).

246. As of the time of this Article's publication, none of the bills cited, *supra* note 245, have been enacted. The Connecticut bill was rejected in committee. The Montana bill had passed the house committee but failed to pass on the floor. The New York and Texas bills are still awaiting action.

its own concept of justice into its deliberation. A nullification instruction must serve the purposes both of jury empowerment and of a rational, deliberative process. The proposed instructions from the literature and the courts fall short of the second purpose; while they inform the jury of its power to nullify, they do not provide the jury with any guidance to nullify in a rational way.

A. The Maryland Charge and Empirical Studies

The Constitution of Maryland states that, "[i]n the trial of all criminal cases, the Jury shall be the Judges of Law, as well as of fact, except that the Court may pass upon the sufficiency of the evidence to sustain a conviction."[247] In Maryland, the typical jury instruction regarding the jury's proper role reads as follows:

> Members of the Jury, this is a criminal case and under the Constitution and the laws of the State of Maryland in a criminal case the jury are the judges of the law as well as of the facts in the case. So that whatever I tell you about the law while it is intended to be helpful to you in reaching a just and proper verdict in the case, it is not binding upon you as members of the jury and you may accept or reject it. And you may apply the law as you apprehend it to be in the case.[248]

The empirical studies of jury nullification in the Maryland courts have been inconclusive as to the effect of such an instruction.[249] There has been no showing that such an instruc-

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247. MD. CONST., Declaration of Rights art. 23 (amended 1992). Similarly, the Indiana state constitution provides: "In all criminal cases . . . the jury shall have the right to determine the law and the facts." IND. CONST. art. I, § 19. As previously noted, a number of other states have recently considered legislation which would similarly grant the jury the power and the right to pass upon the law as well as the facts. *See* legislative bills cited *supra* note 245 and accompanying text.

248. *See* Wyley v. Warden, Maryland Penitentiary, 372 F.2d 742, 743 n.1 (4th Cir.), *cert. denied*, 389 U.S. 863 (1967).

249. *See* Jacobsohn, *supra* note 243, at 582–600 (finding that 47.7% of polled judges believe that the nullification instruction has no observable impact on Maryland verdicts). Jacobsohn's methodology relied exclusively on judges as reporters; it did not factor in other constraints on the trial process such as jury control mechanisms and evidentiary rulings. *See id.* at 583. Without factoring in other means by which the

tion has resulted in substantial disruption in the administration of justice.[250] Specifically, studies have shown that judicial disagreement with jury verdicts is only marginally greater in Maryland than it is nationwide.[251]

Unfortunately, and perhaps inevitably, the greatest difficulty in evaluating the empirical effects of such an instruction involves the sample of trials selected. This is not merely an issue of methodology, which is itself highly problematic,[252] but one of the overall effects that a legitimized jury nullification will have on a state's criminal justice system, jury control practices, and legal culture.[253] For example, if certain cases

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court controlled the trial process, we cannot know whether the failure of a given jury to nullify was due to (1) a direct rejection of nullification on the merits, (2) a failure of the jury to appreciate the nullification power contained in the Maryland instructions, or (3) a trial that by judicial rulings, evidentiary and otherwise, was cleansed of all facts and arguments that might incline a jury to nullify.

250. *Id.* at 589.

251. *Id.* at 585; *see also* Samuel K. Dennis, *Maryland's Antique Constitutional Thorn*, 92 U. PA. L. REV. 34, 39 (1943) (explaining that Maryland criminal trials proceed with "fair success and justice" due to the excellence of Maryland jurors and the narrow scope of their duties).

252. Although the statistical results of these studies use relatively neutral characterizations, such as "juror agreement" or "juror disagreement" with the judge, these studies are based upon the assumption that the judge is a reliable reporter. *See, e.g.*, KALVEN & ZEISEL, *supra* note 6, at 50–54. However, a subsequent study by Baldwin and McConville has questioned that assumption. John Baldwin & Michael McConville, *Trial by Jury: Some Empirical Evidence on Contested Criminal Cases in England*, 13 LAW & SOC. REV. 861 (1979). In this study, all trial participants, including judges, defense lawyers, the prosecution, and police witnesses, evaluated the trials in which they had participated. The results in each case varied widely from reporter to reporter. *See id.* at 865–71. Sociologist Martha Myers, relying largely on interviews with actual jurors, has shed additional light on the reasons for jurors' "rule departures." *See generally* Martha A. Myers, *Rule Departures and Making Law: Juries and Their Verdicts*, 13 LAW & SOC. REV. 781 (1979) (finding that rule departures reflect not only a concern about the defendant's behavior but also about the choices of the victim and the seriousness of the prosecution's charge).

The most tendentious part of most experimental jury studies is the use of the mini-trial. By subjecting the mock jury to a proceeding no more than a few hours in length, as opposed to a trial which can last anywhere from a few days to many months, and because of the inevitable influence that editing choices and camera work have on the viewer, certain highlighted "events" tend to loom larger in the jurors' minds. Stretched memories, boredom, the sheer volume of information, and the tendency of a real jury to view the courtroom experience through a wider lens go untested in simulated studies. Because of the miniaturization of the trial experience, certain tested events tend to exert a greater effect on the overall outcome than might otherwise be the case.

Additionally, simulated jury findings may not necessarily be generalized to complex situations in which numerous variables affect jurors and the verdicts actually affect a defendant's life. *See* V. Lee Hamilton, *Obedience and Responsibility: A Jury Simulation*, 36 J. PERSONALITY & SOC. PSYCH. 126, 128–30 (1978); Myers, *supra*, at 794–95.

253. *See generally* KENT GREENAWALT, CONFLICTS OF LAW AND MORALITY, 349–73 (1987) (discussing how judges, prosecutors, and police may ameliorate the potentially unjust

involving classes of crimes, such as sumptuary crimes, de minimis violations, and petty offenses, are viewed by the police as more likely to result in nullification acquittals, then the police might exercise more discretion in effectuating or booking arrests in these cases.[254] A similar calculation by a prosecutor may result in a dismissal of the charges or a "low-ball" plea bargain to resolve the case at an early stage rather than to risk a nullification acquittal. Similarly, judges may not wish to clog their trial calendars with cases more likely to result in acquittals; they in turn, will pressure prosecutors either to dismiss the charges or to accept pleas to lesser offenses. Subject to statutory and state constitutional constraints, judges may dismiss cases "in furtherance of justice" over the prosecutor's objection.[255] The factors that the court considers in evaluating

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application of law); JEROME HALL, THEFT, LAW & SOCIETY 80–92 (2d ed. 1952) (discussing the development of common law offenses into statutory offenses); William W. Fisher III, *Ideology, Religion and Constitutional Protection of Private Property*, 39 EMORY L.J. 65, 121–31 (1990) (celebrating nullification of the fugitive slave laws by judges through sentencing, directed verdicts, and evidentiary findings); Scheflin, *supra* note 8, at 181 (discussing amelioration through reduction of charges, declining to prosecute, and dismissing cases); Weinstein, *supra*, note 172, at 246 (noting police discretion in declining to arrest assailants in domestic abuse cases). However, none of these sources has explored the possible effect that a nullification instruction would have on the exercise of discretion by the other participants, namely jurors, in the criminal justice system.

254. *See, e.g.*, N.Y. CRIM. PROC. LAW § 140.20(4) (McKinney 1992) (requiring the release of a suspect from custody based on a lack of reasonable cause to detain at any time prior to bringing the suspect before the court).

255. *See, e.g.*, N.Y. CRIM. PROC. LAW § 210.40(1) (McKinney 1993) (permitting as a matter of judicial discretion the dismissal of an indictment "in the furtherance of justice" because of the existence of a "compelling factor, consideration or circumstance"); *see also* People v. Clayton, 342 N.Y.S.2d 106 (N.Y. App. Div. 1973) (creating a "Clayton Dismissal" which allows dismissal of charges in response to a defendant's motion pursuant to § 210.40(1)). The *Clayton* court listed a number of issues which should be considered when determining the "interests of justice" in a particular case. *Id.* at 110. After *Clayton*, § 210.40(1) was amended to list explicitly factors which a court should consider in reviewing a motion brought under § 210.40(1). These factors are:

(a) the seriousness and circumstances of the offense;
(b) the extent of harm caused by the offense;
(c) the evidence of guilt, whether admissible or inadmissible at trial;
(d) the history, character and condition of the defendant;
(e) any exceptionally serious misconduct of law enforcement personnel in the investigation, arrest and prosecution of the defendant;
(f) the purpose and effect of imposing upon the defendant a sentence authorized for the offense;
(g) the impact of a dismissal upon the confidence of the public in the criminal justice system;
(h) the impact of a dismissal on the safety or welfare of the community;

when to dismiss in the furtherance of justice fit the prosecutorial and judge-driven amelioration and nullification models quite closely. In each of these circumstances, however, cases that would otherwise go to trial and be subject to a nullification charge never go before the jury. Thus, whatever lessons we might learn from the verdicts of the nullification cases that ultimately go to trial and are acquitted are difficult to surmise.

Just as significantly, in cases where judges find no issue of justice or judicial economy that would warrant dismissal or a reduction of the charges, jury control mechanisms and evidentiary rulings during trial often will minimize the effect of a nullification charge.[256] Judicial discretion thus may work to keep away from the jury the sorts of facts and arguments that might otherwise incline jurors to nullify. Under such circumstances, the nullification instruction may be of no real benefit to the defendant or to the deliberation process. In such cases, we cannot know what effect the nullification instruction could have had.

Lastly, petty offenses, de minimis violations, and sumptuary crimes are often misdemeanors which carry a maximum sentence of less than six months.[257] Charged with such a misdemeanor, a criminal defendant has no right guaranteed by the Federal Constitution to a jury trial,[258] and many states do not provide statutory or constitutional guarantees of a jury

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(i) where the court deems it appropriate, the attitude of the complainant or victim with respect to the motion;

(j) any other relevant fact indicating that a judgment of conviction would serve no useful purpose.

Id. § 210.40(1)(a)–(j).

256. *See, e.g.*, FED. R. EVID. 403 (designating the judge as the sole arbiter of "relevant evidence," defined as evidence "having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence"). In determining admissibility, relevant evidence "may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence." *Id.* Surely, the judge's power to limit the admission of evidence under Rule 403 can serve to exclude facts that, while relevant to a nullification argument, might "confuse the issues" or "mislead the jury."

257. *See, e.g.*, N.Y. PENAL LAW § 10.00(4) (McKinney 1987) (defining the term "misdemeanor").

258. Dyke v. Taylor Implement Co., 391 U.S. 216 (1968), *noted in* Baldwin v. New York, 399 U.S. 66, 69 (1970) (holding that offenses punishable by a maximum of six months incarceration are "petty" and thus do not fall within the ambit of the Sixth Amendment's guarantee of a jury trial for serious offenses).

trial for such crimes.[259] Thus, many types of crimes which would warrant nullification[260] are tried before the bench and not before juries.

These practices do not discount in any way the indirect effects that a standard nullification instruction might have on the exercise of law enforcement and prosecutorial and judicial discretion even in cases that will never go to trial. The feedback that a nullification instruction would provide would be a real virtue, a kind of prior restraint on prosecutorial and law enforcement overzealousness and abuse.[261] However, this indirect application would make interpretation of trial statistics alone extremely problematic.

The precise wording of the nullification instruction itself may determine whether the jury chooses to exercise its power.[262] For example, nothing in the Maryland instruction allows the judge to marshal facts from the case to remind the jury of what evidence might be relevant to nullification.[263] Neither does the Maryland instruction link the jury's power to the law charged in the case.[264] No mention is made as to what kinds of considerations should help the jury come to a just and proper verdict; for example, the jury is not invited to import into its deliberations the conscience of the community or its own sense of what is just and fair.[265] In the absence of any particular invitation or direction, all that comes from the bench that would purportedly assist the jury in reaching its verdict is the judge's instructions on the law. Arguably, it is fair to say that only a very independent and intelligent jury would have the wherewithal to extract any practical meaning from the standard Maryland nullification instruction without additional clarification.

Indeed, if not from the bench, any additional clarification could otherwise come only from the evidence itself or from the

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259. *See, e.g.*, N.Y. CONST. art. 6, § 18; People v. Epps, 243 N.Y.S.2d 833, 834–35 (N.Y. Special & Trial Term 1963).

260. *See supra* notes 253–56 and accompanying text.

261. *See* Roscoe Pound, *Law in Books and Law in Action*, 44 AM. L. REV. 12, 18–19 (1910) (claiming that [j]ury lawlessness is the "great corrective" in the administration of law); Scheflin, *supra* note 8, at 181–82 (advocating that jury discretion may be a useful check on prosecutorial indiscretion because "[n]o system of law can withstand the full application of its principles untempered by considerations of justice, fairness and mercy").

262. *See* Horowitz, *supra* note 236, at 29.

263. *See supra* note 248 and accompanying text.

264. *Id.*

265. *Id.*

arguments of the attorneys. However, the judge has broad discretion to preclude evidence and arguments which the judge deems irrelevant or otherwise inadmissible.[266] Consequently, a nullification instruction like the Maryland charge merely redefines the problem of whether to inform the jury of its power to nullify; it does not solve the problem. The Maryland instruction merely hints to the jury that it has the power to ignore the judge's instructions. Without further direction, without relevant evidence on the issue of justice, and without the attorney's arguments about that justice, the jury remains uninformed about when to use its power. Under such circumstances, it is no surprise that the incidence of nullification hardly varies from cases in which no such instruction is given.

Without a more coherent and informative instruction, not only will the jury remain in the dark about its power, but they more likely will become confused rather than educated.[267] Confusion may arise particularly when instructions of general applicability conflict with the nullification instruction. In sum, a standard jury instruction patterned after the Maryland model is neither an invitation to "anarchy"[268] nor to "equity,"[269] but rather a source of potential confusion.[270]

B. The Horowitz Studies and the Effect of Nullification Instructions

The effects of nullification instructions and their wording was the subject of mock jury studies conducted in the 1980s, the most well-known of which was conducted by Professor Irwin Horowitz.[271] In his first study, Professor Horowitz divided forty-five, six-person juries into nine experimental groups. Each group listened to an audiotape of a mock trial and then

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266. *See supra* note 256.

267. For a discussion on jury confusion with instructions from the bench, see JEROME FRANK, COURTS ON TRIAL 110–14 (1949). The fact that Maryland jury verdicts are apparently unaffected by the instruction may be a function of its vagueness or its ambiguous language.

268. *See* United States v. Dougherty, 473 F.2d 1113, 1133–34 (D.C. Cir. 1972).

269. KALVEN & ZEISEL, *supra* note 6, at 9 ("[O]ne man's equity is another man's anarchy.").

270. *See id.* at 229–31 (discussing cases in which juries departed from the formal rule of law).

271. *See* Horowitz, *supra* note 236; Horowitz, *supra* note 237.

received instructions on the law. Horowitz provided three different trials and three different types of instructions, such that no two of the nine groups saw the same trial nor heard the same instruction.[272]

The three trials concerned euthanasia, felony murder, and vehicular homicide.[273] The three instructions were: (1) a standard pattern instruction informing jurors that they were the arbiters of the facts only and that they must apply the law as given; (2) the Maryland nullification instruction; and (3) the "Radical Nullification Instruction," based on a proposal by Professor Jon Van Dyke.[274] The Radical Nullification Instruction advised jurors of the following:

1. Although they are a public body bound to give respectful attention to the laws, they have the final authority to decide whether or not to apply a given law to the acts of the defendant on trial before them;

2. That they represent (the community) and that it is appropriate to bring into their deliberations the feelings of the community and their own feelings based on conscience;

3. And, jurors were told that despite their respect for the law, nothing would bar them from acquitting the defendant if they feel that the law, as applied to the fact situation before them, would produce an inequitable or unjust result.[275]

Juries that were instructed by the standard pattern jury instruction or the Maryland nullification instruction had comparable verdict patterns, with only a slight variation in results for the euthanasia case.[276] Juries given the Radical Nullification Instruction, however, came out with a significantly higher number of acquittals on the euthanasia case and a higher number of convictions on the drunk driving case.[277]

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272. *See* Horowitz, *supra* note 236, at 30–32.

273. *Id.* at 31.

274. *Id.* at 30–31 (noting that the standard pattern instruction was taken from the 1974 Ohio Jury Instructions).

275. *Id.* (internal quotations omitted) (citing Van Dyke, *supra* note 185, at 241).

276. *Id.* at 32.

277. *Id.* at 32, 35.

Observation of the deliberations revealed that those juries which were instructed either by the pattern charge or by the Maryland nullification instruction did not seem to have any markedly different appreciation of their power to nullify.[278] However, the juries that were given the Radical Nullification Instruction spent more time discussing the meaning of those instructions, less time discussing the evidence, and more time discussing the personal characteristics of the defendant, the jurors' own personal experiences relevant to the case, and general issues of justice.[279] Apparently, juries that heard an explicit instruction inviting them to exercise their power to nullify deliberate differently than juries that are not so instructed. Such deliberations may also result in different verdicts in some cases and do not necessarily benefit the defendant.[280]

Unfortunately, it is impossible to infer much from these results because of the peculiarities of the wording in the Radical Nullification Instruction. First, the instruction invites jurors to bring in their "feelings," a wording which could convey to some jurors that they were thus liberated not only from the law and the evidence but also from reasonableness itself. The instruction also fails to distinguish "feelings" derived from conscience and those derived from the fact-finding that the jury is charged to do. That is, the Radical Nullification Instruction does not ensure that the fact-finding role of the jury remains unchanged. Without any other accommodation in either the instructions or the procedure, it would not be surprising for juries to fail to pay attention to the evidence and to import personal concerns into their fact-finding. The emphasis placed on "feelings" in the Radical Nullification Instruction, without some clearer delineation of the proper role for feelings in the deliberation process, is problematic and potentially confusing.

Second, while the Radical Nullification Instruction informs jurors that nothing will bar them from acquitting the defendant to avoid injustice, the instruction does not explicitly instruct jurors that nullification may only benefit the defendant, because the standard and burden of proof on the prosecution does not change.[281] Thus, the Radical Nullification Instruction

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278. *Id.* at 34.

279. *Id.* at 33–36.

280. *See id.* at 35.

281. *See* Scheflin, *supra* note 8, at 214–15; *see also In re* Winship, 397 U.S. 358, 372 (1970) (Harlan, J., concurring) ("In a criminal case, on the other hand, we do not

leaves open the opportunity for, and arguably invites, a nullification conviction. Thus, this first Horowitz study might seem to confirm the fears of the Court in *Sparf and Hansen*, that a jury given the widest possible latitude in finding the law may just as likely make the law harsher as well as make it more lenient.[282] Consequently, the first Horowitz study, by not appreciating the unfortunate wording of the Radical Nullification Instruction and not introducing any other jury control mechanisms, evidentiary counterweights, or nullification arguments from the attorneys, did not put jury nullification to a true test.

Horowitz's second study introduced a number of additional factors into the discussion, thereby curing some but not all of the defects from the earlier study. The three trials played before the mock juries in the second study were the same drunk-driving, vehicular homicide case and the euthanasia case from the first study, as well as a new weapons possession case.[283] In the second study, some mock juries heard the standard instruction without nullification language, some heard the Radical Nullification Instruction, and others heard only nullification arguments by the defense lawyers.[284] Some juries heard prosecutorial reminders in both the opening and closing statements to follow the law regardless of personal sentiments, and those same prosecutors objected to every mention of nullification by the defense.[285] The judge, in such instances, never overruled or sustained the State's objection, but instead instructed the jurors that they might consider these objections in their deliberations.[286]

The results were more complex than those from the first Horowitz study. First, the results demonstrated that nullification information affected deliberations regardless of whether the information came from the bench by way of an instruction or from the defense lawyer by way of an argument.[287] Second,

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view the social disutility of convicting an innocent man as equivalent to the disutility of acquitting someone who is guilty. . . . In this context, I view the requirement of proof beyond a reasonable doubt in a criminal case as bottomed on a fundamental value determination of our society that it is far worse to convict an innocent man than to let a guilty man go free.").

282. *See* Sparf and Hansen v. United States, 156 U.S. 51, 101 (1894).

283. Horowitz, *supra* note 237, at 443.

284. *Id.* at 444.

285. *Id.* at 444–45.

286. *Id.* at 445.

287. *Id.* at 446.

a defense attorney's nullification argument in the drunk-driving, vehicular homicide case resulted in more confident *guilty* verdicts by the jury than if nullification was introduced from the bench.[288] Third, objections by the prosecutor to the nullification argument seemed to temper the juries' guilty verdicts in the vehicular homicide case.[289] As in the first study, juries who received nullification information, whether from the judge or from the attorneys, spent less time deliberating the evidence and more time deliberating characteristics of the defendant, personal experiences, and general issues of justice.[290] Again, the test of a nullification instruction or argument on deliberation was weakened in the second study by the use of the Radical Nullification Instruction.

Another problem with the Horowitz studies is that they did not deal with the effect that a nullification instruction or argument could have on the general instructions given to the jury. To inject a nullification instruction into the judge's charge without making adjustments to the other charges at odds with it in order to clearly separate the issue of nullification from fact-finding serves only to confuse the jury and weaken the efficacy of all of the instructions.

For example, the standard instruction that identifies the judge as the arbiter of the law and the jury as the arbiter of the facts[291] is facially at odds with a nullification instruction, unless in the instruction there is some accommodation or procedural delineation of the jury's fact-finding role as separate from the jury's ultimate determination of guilt or innocence. Similarly, the standard instructions precluding a verdict based on bias, prejudice, sympathy, whim, speculation, or a desire to avoid a disagreeable duty,[292] require some adjustment, either in the language or the procedure, so that jurors do not confuse a finding of reasonable doubt based on conscience with a finding of reasonable doubt based on racial animus, guesswork, or an elevation of the standard of proof to a metaphysical certainty.[293]

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288. *Id.* at 450–51.

289. *Id.* at 446; *see also* Creagan, *supra* note 243, at 1140–44 (reviewing the Van Dyke studies).

290. Horowitz, *supra* note 237, at 451–52.

291. *See, e.g.*, 1 CRIMINAL JURY INSTRUCTIONS NEW YORK No. 2.44, at 61 (1983) [hereinafter CJI(NY)] ("Indictment Not Evidence"); 1 CJI(NY) No. 2.55, at 69 ("Jury Exclusive Judges of Facts"); 1 CJI(NY) No. 3.25, at 112 ("Function of Court and Jury"); 1 CJI(NY) No. 5.10, at 222 ("Function of Jury").

292. *See, e.g.*, 1 CJI(NY) No. 2.53, at 67 ("Potential Racial Bias").

293. *See, e.g.*, 1 CJI(NY) No. 6.20, at 248–50 ("Reasonable Doubt").

The standard charge perhaps most dissonant with a nullification instruction is one that tells the jury not to consider the subject of punishment.[294] Almost all nullification acquittals can be reduced to one common judgment—that the defendant, although technically guilty, should not be punished. The reasoning underlying this phenomenon may differ, but in any case, an instruction precluding jury consideration of punishment is inconsistent with a nullification instruction. Again, an accommodation must be made, either by changing the language or by clearly delineating the jury's fact-finding role from its verdict obligation. Otherwise, the instruction does not empower the members of the jury as much as it confuses them.

To avoid ambiguity, certain charges of general applicability should be linked explicitly to the nullification instruction. Those charges include (1) the reasonable doubt instruction, which establishes the standard of proof required for a conviction,[295] and (2) the burden of proof instruction, which places the burden of demonstrating guilt exclusively on the prosecution.[296] A nullification instruction affects both charges in that a reasonable doubt could arise out of concepts of justice or matters of conscience not explicitly charged by the judge. Further, the power to nullify does not alter the prosecution's burden or the high standard of proof required for conviction, thus precluding a jury from convicting via nullification.

V. THE PROPOSED CHARGE

In this Part we will propose a model nullification instruction. We will also propose other reforms in the trial and deliberation process which will more closely serve the dual purposes of jury empowerment and rationality in returning verdicts. These reforms include changes to pre-trial notice requirements, evidentiary rules, the judge's charge, and most significantly, a bifurcated jury deliberation process in nullification cases.

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294. *See, e.g.*, 1 CJI(NY) No. 3.09, at 96–97 ("Jury Not to Consider Punishment"); 1 CJI(NY) No. 6.30, at 255 ("Jury Not to Consider Punishment").

295. *See, e.g.*, 1 CJI(NY) No. 6.20, at 248–50.

296. *See, e.g.*, 1 CJI(NY) No. 6.05, at 244 ("Burden of Proof").

A. Bifurcated Deliberation

An adequate jury nullification instruction must both empower the jury and provide for a rational deliberating process. It must liberate but not confuse. It must work alongside other charges of general applicability, not at cross-purposes with these charges. With these goals in mind, we propose a bifurcated jury deliberation whenever a nullification instruction is given in a criminal case.[297]

After the attorneys' summations, the court should give the case to the jury with the requested final instructions, adjusted to accommodate the nullification charge and to eliminate ambiguities. At this first stage, the court should make it clear to the jury that this is but the first of two stages of deliberation and fact-finding.

Once the jury has reached either a provisional verdict or an impasse,[298] based solely on the applicability of the law to the facts, only then should the jury be charged by the court to consider whether or not justice demands an acquittal irrespective of its findings of fact. The purpose of this bifurcation is to avoid the adverse consequences of a nullification instruction given along with other instructions by isolating the jury's two roles, fact-finding and verdict delivering.

Thus, the first stage of the bifurcated deliberation should be similar to the usual jury deliberation in which the jury applies the law received from the judge to the facts. The difference will be that the jury will arrive at a provisional verdict, or a finding of fact similar to a special verdict in a civil trial.[299] Unlike a special verdict, however, which is impermissible in a criminal

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297. *See, e.g.*, David U. Strawn & G. Thomas Munsterman, *Helping Juries Handle Complex Cases*, *in* IN THE JURY BOX 180, 180–82 (Lawrence S. Wrightsman et al. eds., 1987) (suggesting bifurcation to permit juries to handle complex cases more efficiently). Whereas a nullification case is not necessarily a complex case by way of complicated facts or legal theory, it is a case that invites confusion through the conflation of the jury's fact-finding obligation with the jury's power to render a general, unreviewable verdict. We believe that bifurcation provides the jury with a better opportunity to isolate the issue of justice in a particular case from findings of facts relating to the elements of the underlying crime.

298. *See, e.g.*, N.Y. CRIM. PROC. LAW § 310.60 (McKinney 1993) (allowing the court to discharge a jury after the court determines that agreement is unlikely and each party consents to such a discharge, or if the court declares a mistrial under § 280.10).

299. *See, e.g.*, FED. R. CIV. P. 49(a); N.Y. CIV. PRAC. L. & R. 4111(c) (McKinney 1993).

trial,[300] the jury will not detail any explicit finding to the judge other than "we have reached a verdict" or "we have an impasse." If the jury reports that it has reached a verdict, the court should instruct the following:

> If your vote is unanimously not guilty at this stage, then your deliberations are essentially over. You should return to the jury room to take a final vote to confirm your not guilty verdict. If, on the other hand, your vote is unanimously guilty on the facts as governed by the law as I have instructed you at this stage, you must return to the jury room for a second deliberation to determine whether, as a matter of conscience, these circumstances present the extraordinary situation where a verdict of guilty will result in an injustice of such magnitude that the defendant should be acquitted notwithstanding your provisional finding of guilt.
>
> You are the jury, and by that, you are the final authority to decide whether or not to apply a given law to the alleged acts of the defendant on trial in this case. As jurors, you are representatives of the community, and as such, it is appropriate for you to bring into your deliberations the community's concept of justice and your own deeply felt ideas about justice based on conscience. To that end, if you think that applying the law in the particular circumstances before you and convicting the defendant of some or all of the crimes charged would produce an inequitable or unjust result, then you may acquit the defendant, notwithstanding any findings of fact you may have already made as to the guilt or innocence of the defendant. Such a vote of not guilty is unreviewable by this or any other court.

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300. Unlike the civil rules, the Federal Rules of Criminal Procedure do not provide for a special verdict or special interrogatories. *But see* FED. R. CRIM. P. 23(c) (mentioning special provisions permitting such findings during bench trials).

In addition, special verdicts have been held to be error in a number of federal criminal cases. *See, e.g.*, United States v. Spock, 416 F.2d 165, 180–81 (1st Cir. 1969); Gray v. United States, 174 F.2d 919, 923 (8th Cir.), *cert. denied*, 338 U.S. 848 (1949). The courts have held special verdicts impermissible in criminal cases largely because such an imposition from the bench infringes on the jury's right to deliberate free from legal fetters. *See Spock*, 416 F.2d at 180–83. Interrogatories interfere with the jury's power to arrive at a general verdict without having to support the verdict with reasons or a report of the jury's deliberations. *Id.* Most importantly, interrogatories and special verdicts abridge the jury's power to follow or choose not to follow the judge's charge. *See id.* at 181.

> Again, at this second stage of deliberation, your verdict of not guilty must be unanimous. If only five or less of you vote not guilty during this second stage, then you should ultimately return a guilty verdict based upon your findings during your first stage of deliberations. However, if six or more of you vote not guilty at this second stage of deliberations, then report to me that you are at an impasse. You may now return to your deliberations.[301]

The same procedure should apply when the jury has reached an impasse after the first stage of deliberation.[302] The same instruction should be given for a hung jury at the second stage as for a jury which has unanimously found factual guilt, less the language reflecting that the jury is deadlocked on the facts. If the jury reached an impasse after the first stage and remains at an impasse after the second stage, then a mistrial is in order if the parties do not consent to a discharge of the jury.

However, if the jury has made a unanimous finding of guilt at the first stage, then a verdict of not guilty notwithstanding

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301. Much of the wording of our suggested instruction incorporates language from other proposed pattern instructions. *Cf.* legislative bills cited *supra* note 245 (discussing proposals in various states to instruct the jury of its authority to consider equity and conscience in reaching its verdict).

302. If the jury reports that it has reached an impasse at the first stage, i.e., that it is unable to agree on a finding of factual guilt or non-guilt, the judge should then instruct the following:

> You have indicated to me that you cannot reach a unanimous decision as to the guilt or innocence of the defendant on the facts as governed by the law as I have instructed you. Accordingly, I direct that you return to the jury room for a second deliberation to determine whether as a matter of conscience, these circumstances present the extraordinary situation where a verdict of not guilty will result in a better administration of justice despite the fact that some of you believe that the defendant is guilty beyond a reasonable doubt of the crime charged.
>
> You are the jury, and by that, you are the final authority to decide whether or not to apply a given law to the alleged acts of the defendant on trial in this case. As jurors, you are representatives of the community, and as such, it is appropriate for you to bring into your deliberations the community's concept of justice and your own deeply felt ideas about justice based on conscience. To that end, if you think that applying the law in the particular circumstances before you and convicting the defendant of some or all of the crimes charged would produce an inequitable or unjust result, then you may vote to acquit the defendant, notwithstanding any findings of fact you may have already made as to the guilt or innocence of the defendant. Such a vote of not guilty is unreviewable by this or any other court.
>
> Again, at this second stage of deliberation, your verdict of not guilty must be unanimous. If it is not unanimous, then you must report to me that you are at an impasse again. You may now return to your deliberations.

factual guilt at the second stage must also be unanimous, and a minority vote of not guilty at the second stage should be insufficient to hang the jury. In other words, if a unanimous jury makes a factual finding of guilt at the first stage, a guilty verdict will stand unless, notwithstanding factual guilt, at least six jurors in a twelve-person jury vote not guilty at the second stage.[303] If six or more jurors vote to nullify but the jury falls short of unanimous agreement, then an impasse and a mistrial should be declared. A unanimous vote of not-guilty notwithstanding factual guilt is the only vote sufficient to permit a verdict of not-guilty once the second stage has been reached. To avoid the criticisms of a special verdict in criminal trials,[304] none of these deliberations should be reported to the judge. No doubt, such a procedure at the second stage places additional burdens on the jury foreperson in charge of the deliberation process, but this procedure is no more difficult or cumbersome than any number of instructions and procedures that juries now are expected to follow.[305]

The purpose behind requiring a non-minority vote of acquittal at the second stage in order to hang a jury that had unanimously found factual guilt is to emphasize the importance of the first stage deliberations and the resultant findings. A decision to nullify a previous finding of guilt according to law should not be viewed casually. Whereas the first stage requires unanimity as a jury control protection against an improper verdict based on improper fact-finding,[306] the second stage requires a balancing of interests not under explicit consideration during the first stage. At the second stage, the jury has been expressly instructed that it is empowered to acquit in spite of the law as charged by the judge and irrespective of the law as it pertains to the facts found during the first stage of deliberations. With evidence of guilt established at the first stage, it is proper to require something more than a single vote

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303. The formula for declaring impasse or referring back to the original finding of factual guilt is based on a 12-person jury model. Not all states try crimes with a 12-person jury. Thus, with a 6-person jury, the number of votes required to constitute an impasse at the second stage should be half that required to hang a 12-person jury, or 3-not-guilty votes.

304. *See supra* note 300.

305. *See, e.g.*, Strawn & Munsterman, *supra* note 297, at 180–83 (suggesting an instruction to the jury to deliberate issues in a complex case sequentially).

306. *See* David A. Vollrath & James H. Davis, *Jury Size and Decision Rule*, *in* THE JURY: ITS ROLE IN AMERICAN SOCIETY 73–106 (Rita J. Simon ed., 1980) (discussing unanimity and non-unanimity requirements in jury trials).

for nullification by a single juror to create an impasse at the second stage.[307] The purposes of a jury nullification instruction must be to empower the jury and to provide rational process. Once a jury has made a unanimous finding of fact according to law, rational process requires that the power of a jury to disaffirm that finding must be itself the product of some measure of consensus, not merely the caprice of one person or a small number of people.

B. The Notice Requirement and Evidentiary Parameters

Bifurcation of the deliberation process is the primary means by which rational process would be achieved in our proposed system. However, it is not and cannot be the only means. For example, the prosecutor's objections and arguments against nullification strongly influence the jury.[308] This is as it should be. Rational process and full deliberation require not only that the nullification power be made explicit but also that the contrary position be explored fully as well. The only way to make sure that the jury's verdict is the product of deeply felt ideas about justice is to put those ideas to the test of controversy. In this regard, a defendant's request for a nullification charge necessarily opens the door to a nullification case itself.[309]

Thus, as a matter of procedure, the prosecution must be given adequate opportunity to try its counternullification case. A sufficient opportunity requires pre-trial notice, much like a notice of an alibi[310] or a non-responsibility defense.[311] Notice would not only inform the prosecution of the defense's intention to request a nullification charge but also provide a brief

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307. *See* Johnson v. Louisiana, 406 U.S. 356, 377 (1972) (Powell, J., concurring) (discussing juror "irrationality" and decision rules).

308. *See supra* note 289 and accompanying text.

309. The concept of "opening the door" to what ordinarily would be inadmissible evidence is a familiar concept to criminal trial lawyers. For instance, Rule 405 of the Federal Rules of Evidence permits the admission of testimony relating to character traits and reputation evidence. The scope of cross-examination, however, expands commensurately into inquiry of specific instances of conduct that might shed a contrary light on character. In other words, when the defense puts its good character at issue, the defense opens the door to bad character evidence.

310. *See* N.Y. CRIM. PROC. LAW § 250.20 (McKinney 1993).

311. *See* N.Y. CRIM. PROC. LAW § 250.10 (McKinney 1993).

description of the content of the defense itself.[312] For example, if such a procedural requirement had been in place during the Leroy Reed gun possession case,[313] the defense attorney would have given notice of the defendant's diminished intelligence and illiteracy, his lack of blameworthiness in purchasing the gun, and his ignorance both the law and of the requirements of his parole to the prosecution before trial in order to afford the prosecution the opportunity to investigate and prepare its case.

The notice requirement should not be construed as burden-shifting to the disadvantage of the defendant. If the defendant wishes to try a nullification defense without putting the prosecution on notice, it could do so in the form of argument. The only problem the defense will encounter is that the court will not provide a nullification instruction, and the judge may rule more strictly on legal relevancy, thus precluding some of the defendant's evidence. On the other hand, adherence to the notice requirement will not lock the defendant into a nullification defense. If the defendant chooses at the last minute to assert a more standard defense and does not open the door to nullification issues before the jury, then the scope of the prosecution's case remains the same as it would be otherwise. The scope of the prosecution's case expands only when the defense opens the door to counternullification by putting forth facts and arguments clearly aimed at creating a defense beyond the bounds of positive law. This result requires some care on the part of the defense, because mere mention of the nullification argument, even during *voir dire* questioning, may serve to open the door.

Finally, bifurcation will not place additional burdens upon the defense. Defense attorneys are accustomed to cautious toeing of the evidentiary line in order to avoid raising certain issues. For example, they must raise character and propensity issues cautiously because of the risk that they will open the door to the admission of prior bad acts or negative personal traits.[314] Defense counsel take similar care to avoid questioning police conduct when it might open the door to otherwise

312. *See* N.Y. CRIM. PROC. LAW § 250.20 (requiring the defendant to provide a list of the places where the defendant claims to have been at the time of the crime and a list of witnesses to corroborate the alibi).

313. *See supra* Part II.A.

314. *See* FED. R. EVID. 404(a)(1).

inadmissible and prejudicial evidence that would rehabilitate the police witness or explain the officer's conduct.

CONCLUSION

A nullification instruction and a bifurcated deliberation that separate fact-finding from the issues of conscience which might prevail notwithstanding factual guilt, along with the pre-trial procedural and evidentiary adjustments discussed, will serve the dual requirements needed for informed nullification. Such an instruction must communicate in a relatively simple and straightforward manner the power that the jury has to acquit in spite of a clear violation of criminal law. The instruction and the related procedures must also create a process by which that power will be exercised thoughtfully—through a process that encourages true deliberation rather than confusion, caprice, or bad faith.

Implementation of such procedures will not necessarily make trial procedure more efficient. It probably will not diminish the length of most trials and may even lengthen others. It will do very little for clogged court calendars and overcrowded jails. But it will enhance integrity in the jury's work. Instead of nullifying the judge's instructions by focusing on surrogate issues, such as lack of *mens rea*, or raising the standard of proof, the jury will be given the opportunity to consider directly the issue of justice. Direct consideration will in turn produce verdicts that better satisfy the jury and society, not because the results will be any different than they would be otherwise, but because they will be verdicts deriving from informed discussion. The jury will understand its power and have a procedural structure that will encourage it to use that power rationally, carefully, and deliberately.

The recent examples of jury nullification add little to the history of jury verdicts nor signal fundamental changes in the character of the American jury. What has changed, through media focus, is the degree to which the public experiences the nullification phenomenon. More importantly, the political conclusions that interpretations of recent verdicts have spawned are based upon information that is neither complete nor informed.

A carefully crafted nullification instruction and deliberation procedure will help accomplish a number of salutary purposes, including increasing the availability of information on how juries deliberate. It will also rationalize jury decision making by allowing the jury to discuss issues of justice and mercy without forcing them to deliberate these issues covertly through the use of surrogates disguised as fact-finding. To that end, this Article advocates a bifurcated deliberation procedure that clearly separates the fact-finding task from the justice-dispensing function of the jury, both for the jury's sake and for the sake of a society that desires rational process in its courts.

Moreover, a pattern nullification instruction and deliberation procedure will further empower communities, particularly those which are poor and disenfranchised, to exercise direct and immediate oversight over government action. In that way, it will strengthen the respect for the jury process and the criminal justice system in communities that are currently estranged from their government by giving societal recognition to the right of ordinary citizens to exercise discretion on law enforcement.

Finally, although defendants will be free to pursue a nullification defense without an instruction, this Article proposes that, in order to receive a nullification instruction, defendants must give notice to the prosecution to prepare a counter nullification case, to address issues of relevancy during the trial, and to impose a cost upon the defendant electing to pursue such an extraordinary defense and jury instruction.

In the final analysis, we need juries to deliberate honestly and openly, not just because society learns from their decisions, but also because juries in essence are the last deliberative body of grassroots decision making. As Professor Abramson writes, "only the jury still regularly calls upon ordinary citizens to engage each other in a face-to-face process of debate."[315]

We vote alone and in secret. Our elected officials do not always engage in principled discussion about issues, sometimes preferring to talk in sound-bites and to jostle each other for large contributions to their war chests. The judiciary is removed from our direct influence by design. Ordinary citizens, particularly those who are poor and without political power, are increasingly alienated from the process of government and feel increasingly forgotten by it. In the absence of the early

315. ABRAMSON, *supra* note 112, at 8.

colonial town meetings where citizens were able to participate directly in government, the jury remains the only institution through which ordinary citizens know that their voices and votes still count. Indeed, "the jury is the last, best refuge of this connection among democracy, deliberation, and the achievement of wisdom by ordinary persons."[316] Consequently, rationalizing the jury deliberation process helps to restore our sense that, in some arena of governance, purposeful self-delusion need no longer be the norm.

POSTSCRIPT

At the time that this Article was completed, the trial of O.J. Simpson[317] was still in progress. We did not discuss the case because any speculation as to whether jury nullification might have been at play would clearly have been premature. Now that the jury has returned a unanimous verdict of acquittal, some perceive the Simpson verdict as illustrative of jury nullification.[318] Although it is impossible to make confident conclusions from post-trial juror statements, we believe that the wide extent of the speculation about it is illustrative of the confusion now surrounding the meaning of jury verdicts and the issue of jury nullification. Whereas there was extensive speculation of nullification in the *Simpson* case, despite the ample evidence to indicate that the jury did not nullify, nullification was relatively undiscussed in cases involving "abuse excuse" defenses, where nullification could have been, in fact, at work.[319]

While we offer no comprehensive analysis of the *Simpson* verdict we note several striking aspects about it. There is much basis to believe that juror doubts were not grounded in Simpson's celebrity status or race so much as in mistrust of the

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316. *Id.* at 11.

317. People v. Simpson, No. B3BA097211 (Cal. Super. Ct. Oct. 3, 1995).

318. *See, e.g.*, Laura Mansnerus, *Under Fire, Jury System Faces Overhaul*, N.Y. TIMES, Nov. 4, 1995, at L9 (quoting Greg Totten, the executive director of the California District Attorneys Association as stating "Simpson does illustrate vividly the problem of jury nullification").

319. *See supra* Part II.

prosecution's evidence,[320] the credibility of the prosecution's witnesses,[321] and the prosecution's theory of the case.[322] Indeed, particularly telling was one juror's post-verdict, gnawing suspicion of Simpson's guilt. In that regard, she stated, "[I]f we made a mistake, I would rather it be a mistake on the side of a person's innocence than the other way."[323] When she had expressed her doubt to several other jurors, she reported that they cried and remarked that " '[m]aybe the laws need to be changed to remove the reasonable doubt.' "[324] These anecdotes indicate a jury taking seriously the presumption of innocence, the standard of proof, and the policy that undergirds both due process protections—that we as a society would rather occasionally acquit the guilty to ensure that we have a system that does not convict the innocent.

In addition, the Simpson jury seemed to have been listening to the judge's instructions of general applicability rather than disregarding them. One of the instructions charged:

> [A] witness who is willfully false in one material part of his or her testimony is to be distrusted in others. You may reject the whole testimony of a witness who has willfully testified falsely as to a material point unless from all the

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320. Brenda Moran, the first juror to make a public statement, indicated doubts about whether the bloody glove fit on Simpson, *Larry King Live, Transcript #1556* (CNN television Broadcast, Oct. 4, 1995) (transcript at 8, on file with the *University of Michigan Journal of Law Reform*), and possible crime lab blood preservative on evidence supposedly found at the crime scene, *Larry King Live, Transcript 1558* (CNN television broadcast, Oct. 6, 1995) (transcript at 6, on file with the *University of Michigan Journal of Law Reform*). Anice Aschenbach, a white juror who initially voted for guilt in the first jury poll, also thought the DNA evidence was "shaky." *Prime Time Live, Transcript #422* (ABC television broadcast, Oct. 4, 1994) (transcript at 1, on file with the *University of Michigan Journal of Law Reform*).

321. Aschenbach stated that it was "possible that the [bloody glove] was planted" by Detective Fuhrman at Simpson's estate. She expressed that she largely discounted Fuhrman's testimony because of the detective's virulent racism and previous perjury, as well as doubted the credibility of the lead detective in the Simpson investigation. *Prime Time Live, Transcript #422*, *supra* note 320 (transcript at 1).

322. Alternate juror Walter Watson Calhoun stated his doubts about the time line presented by the prosecution. He stated that to him "the key moment was the time element of—that they allotted Mr. Simpson to change his clothes, get rid of a weapon, clean himself up, and all those things a murderer would have to do, it was impossible for him to do it in five minutes." *Larry King Live, Transcript #1556*, *supra* note 320 (transcript at 9).

323. *Prime Time Live, Transcript #422*, *supra* note 320 (transcript at 2).

324. *Id.*

> evidence you believe the probability of truth favors his or her testimony in other particulars . . . .[325]

Such a strong instruction as to witness credibility, combined with the strong emphasis by both sides on the police witness' credibility, or lack of it, was apparently devastating to the prosecution. While the underlying tensions between the Los Angeles African American community and the Los Angeles Police Department may have been at work with regard to how the police testimony was received by the Simpson jury, the judge's instruction, in effect, invited them to disregard all the testimony of the police witnesses. Thus, no importation of general and extralegal antipolice sentiment was necessary for the jury to discount the police testimony. Indeed, the evidence suggests that the Simpson jury listened to Judge Ito very carefully.

325. *O.J. Unofficial Transcript 10:19 a.m.–11:33 a.m. (Pacific)*, Sept. 22, 1995, *available in* Westlaw, OJ-Update Database.