

11-1-1997

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Recommended Citation

Lawrence W. Crispo, Jill M. Slansky & Geanene M. Yriarte, *Jury Nullification: Law Versus Anarchy*, 31 Loy. L.A. L. Rev. 1 (1997).
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JURY NULLIFICATION: LAW VERSUS ANARCHY

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We would like to extend our sincere thanks to Judge Lawrence W. Crispo for his contribution and assistance with this Article. Judge Crispo contributed Part VII.B.1.

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** University of Maryland, College Park, B.A. 1989; Loyola Law School, Los Angeles, J.D. 1997. I wish to express my gratitude to Judge Lawrence W. Crispo for his support and encouragement of my legal study. I also wish to thank Jeremy Osher and Lisa Phelan, whose patience and belief in this Article made it possible, Geanene Yriarte and Christopher Chaudoir for their hard work and dedication, and the editors and staff of the *Loyola of Los Angeles Law Review*. Most especially, I wish to thank my husband, Tim Galbraith, for his unfailing support of my goals, and my parents, Barry and Suzanne Slansky, and my brothers, Stephen and Adam, for a lifetime of unconditional love and for always being by my side.

*** California State Polytechnic University, Pomona, B.A. 1991; Loyola Law School, Los Angeles, J.D. December 1996. I dedicate this Article to my husband, Kevin, who has given me more than I can ever thank him for. I thank Judge Lawrence W. Crispo, Judge Thomas C. Falls, and Don W. Vincent for their continued guidance throughout my legal career. I also thank Jill Slansky and the *Loyola of Los Angeles Law Review* members for their time and effort. Finally, I thank my family and friends who have given me their never-ending love and encouragement.

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I. INTRODUCTION

This Article encapsulates the history, issues, and current state of the law regarding the doctrine of jury nullification. Part II discusses the arguments that proponents of jury nullification set forth and highlights the weaknesses of these arguments. Part III offers an overview of the English and colonial American history of nullification through the late nineteenth century, when American courts terminated the right of juries to nullify the law. Part IV reviews twentieth-century case law on jury nullification in both federal and California courts. Part V presents an overview of recent cases in which nullification may have played a role. Part VI presents the arguments in support of nullification. Part VII reviews the “voir dire” process, including its history and scope. It instructs lawyers and judges on how to conduct voir dire to minimize the risk of nullification and presents a discussion of what judges and lawyers can do when confronted with a jury that nullifies the law. Part VIII discusses recent legislative efforts in California that endorse nullification and how they have fared. ◊

II. PRINCIPLES OF ANARCHY VERSUS THE RULE OF LAW

Jury nullification occurs when a jury ignores the law as given by the court and chooses instead to play by its own rules. Proponents of jury nullification claim that it tempers law with justice and brings the common sense of the average citizen and the “community conscience”¹ to bear on individual cases, supplying needed flexibility and equity to the law. In so doing, the nullifying jury serves as a mini-legislature, repealing laws it deems unjust or preventing what it sees as the harsh, inequitable application of law in certain cases.²

Despite the merits of these arguments, nullification results in inconsistent application of laws, allows bad law to remain on the books, and permits juries to disregard the law without accountability.³ This disregard gives juries unreviewable, unchecked power and results in arbitrary judicial results.⁴ When legislatures make law that violates the so-called conscience of the community, their acts are reviewable by voters, who can cast votes against their legislators at election time. Between elections, constituents can write to their legislators and express their opposition. By giving a jury nullification instruction, judges ask jurors to act as “mini-legislators,” placing too burdensome a duty upon those individuals who are compelled to serve on jury duty.⁵

If it is true that “[t]he public conscience must be satisfied that fairness dominates the administration of justice,”⁶ then it follows that laws must be given consistent application. If jury nullification were a common practice, laws would change from day to day, leading to anarchy,⁷ rather than a society where all must live by the same stan-

1. See *Witherspoon v. Illinois*, 391 U.S. 510, 519 n.15 (1968) (explaining that respect for nullification flows from the jury’s role as the “conscience of the community” in the criminal justice system); *United States v. Dougherty*, 473 F.2d 1113, 1142 (D.C. Cir. 1972) (Bazelon, C.J., concurring in part and dissenting in part) (denying petitioner’s request for a jury nullification instruction on the grounds that the jury has no right to be instructed on its prerogative to disregard the instructions of the court, even in matters of law).

2. See *Dougherty*, 473 F.2d at 1142 & n.8.

3. See *id.* at 1133-34.

4. See *id.*; see also Franklin Delano Strier, *On Nullification: Don’t Let Some Juries Write Their Own Rules*, L.A. DAILY J., Oct. 17, 1995, at 6 [hereinafter Strier, *Own Rules*] (noting that encouraging individuals to decide based on their own conscience invites chaos and anarchy).

5. See *Dougherty*, 473 F.2d at 1136.

6. *Adams v. United States ex rel. McCann*, 317 U.S. 269, 279 (2d Cir. 1942).

7. See *Dougherty*, 473 F.2d at 1133-34.

To encourage individuals to make their own determinations as to which

dards. Juries are not impaneled to solve social problems.⁸ The jury's duty is to apply the facts to the law as stated by the court and reach a verdict consistent with this law.⁹

III. HISTORY

The concept of jury nullification dates back to sixteenth-century England.¹⁰ In 1649 Lieutenant Colonel John Lilburne was prosecuted for publishing pamphlets critical of the British government, in violation of treason laws.¹¹ Lilburne was denied assistance of counsel¹² and requested an opportunity to speak to the jury himself.¹³ He expressed to the court his belief that "[t]he jury [members] . . . are not only

laws they will obey and which they will permit themselves as a matter of conscience to disobey is to invite chaos. No legal system could long survive if it gave every individual the option of disregarding with impunity any law which by his personal standard judged morally untenable.

Id. (quoting Judge Sobeloff in *United States v. Moylan*, 417 F.2d 1002, 1009 (4th Cir. 1969)).

8. See James P. Pinkerton, *Nullification: Wrong in 1832 and in 1995*, L.A. TIMES, Oct. 12, 1995, at B9 (quoting Susan Estrich, a professor at USC Law Center, following the O.J. Simpson verdict).

9. The Supreme Court has stated:

We must hold firmly to the doctrine that in the courts of the United States it is the duty of juries in criminal cases to take the law from the court and apply that law to the facts as they find them to be from the evidence. Upon the court rests the responsibility of declaring the law; upon the jury, the responsibility of applying the law so declared to the facts as they, upon their conscience, believe them to be. Under any other system, the courts, although established in order to declare the law, would for every practical purpose be eliminated from our system of government as instrumentalities devised for the protection equally of society and of individuals in their essential rights. When that occurs our government will cease to be a government of laws, and become a government of men. Liberty regulated by law is the underlying principle of our institutions.

Sparf & Hansen v. United States, 156 U.S. 51, 102-03 (1895).

10. See Lt. Commander Robert E. Korroch & Major Michael J. Davidson, *Jury Nullification: A Call for Justice or an Invitation to Anarchy?*, 139 MIL. L. REV. 131, 133-34 (1993).

11. See THOMAS A. GREEN, VERDICT ACCORDING TO CONSCIENCE PERSPECTIVES ON THE ENGLISH CRIMINAL TRIAL JURY 1200-1800, at 153-56 (1985); *The Trial of Lieutenant Colonel John Lilburne* (1 Car. 1 1649), reprinted in 4 HOWELL, A COMPLETE COLLECTION OF STATE TRIALS 1270, 1291-94 (London, T.C. Hansard 1816) [hereinafter *Lilburne*]; Philip B. Scott, *Jury Nullification: An Historical Perspective on a Modern Debate*, 91 W. VA. L. REV. 389, 397-99 (1989); M. Kristine Creagan, Note, *Jury Nullification: Assessing Recent Legislative Developments*, 43 CASE W. RES. L. REV. 1101, 1103-05 (1993).

12. See GREEN, *supra* note 11, at 135-36 (stating that the accused was not allowed assistance of counsel until 1696 for treason, and in all other capital cases until the 18th century).

13. See *id.* at 173.

judges of fact, but of law also: [the court is only the pronouncer of the jury's] . . . verdict."¹⁴ Lieutenant Colonel Lilburne was prosecuted a second time in 1653.¹⁵ His punishment, if convicted, was death.¹⁶ Defending himself again, Lilburne argued that the jury should acquit him if it believed that the "proscribed punishment was unconscionably severe in light of the acts proved to have been committed by [him]."¹⁷ The jury returned a verdict of "not guilty of any crime worthy of death."¹⁸

In 1671 *Bushell's Case* established that jurors could not be punished for returning verdicts the court considered incorrect.¹⁹ William Penn and William Mead were prosecuted for preaching before an unlawful assembly and disturbing the peace.²⁰ Despite admitting at trial that they had assembled a large crowd on the streets of London, Penn argued that the facts as alleged failed to show that any law was broken.²¹ Penn maintained that the indictment, therefore, was illegal²² and that the jurors should use their consciences to decide whether he and Mead were guilty.²³ The judge instructed the jury, implying that they must return a guilty verdict.²⁴ After a half hour of deliberation, only eight of the twelve jurors wanted to convict.²⁵ The court threatened the four dissenting jurors after they refused to convict Penn and Mead.²⁶ The jury then returned a verdict finding Penn guilty of preaching to an assembly²⁷ but refused to say whether the assembly was unlawful.²⁸ Sent back again, it returned with a verdict of not guilty for Mead and a guilty verdict for preaching to an assembly

14. *Id.*

15. *See id.* at 195-97.

16. *See id.* at 193.

17. *Id.* at 159-60.

18. *Id.*

19. *See id.* at 246-49.

20. *See Trial of Penn and Mead, reprinted in 6 T.B. HOWELL, A COMPLETE COLLECTION OF STATE TRIALS 951, 951-55 (London, T.C. Hansard 1816) [hereinafter Penn & Mead's Case]; Paul Butler, Racially Based Jury Nullification: Black Power in the Criminal Justice System, 105 YALE L.J. 677, 701 (1995); Alan W. Scheflin, Jury Nullification: The Right to Say No, 45 S. CAL. L. REV. 168, 202-03 (1972).*

21. *See Penn & Mead's Case, supra* note 20, at 958-59.

22. *See id.*; GREEN, *supra* note 11, at 223.

23. *See Penn & Mead's Case, supra* note 20, at 959-60.

24. *See id.* at 960-61.

25. *See id.* at 961.

26. *See id.*

27. *See id.* at 962.

28. *See id.*

for Penn.²⁹ By refusing to find the assembly unlawful, the jury essentially acquitted both men.³⁰

Following the reading of their verdict, the jurors were instructed: Gentlemen, you shall not be dismissed till we have a verdict that the court will accept; and you shall be locked up, without meat, drink, fire, and tobacco; you shall not think thus to abuse the court; we will have a verdict, by the help of God, or you shall starve for it.³¹

The jury was ordered back to reconsider the verdict.³² The foreman of the jury, Bushell, objected to the order on the ground that the jury had reached a verdict and that any other decision by them would be given only to save their lives.³³ The jurors were imprisoned until they paid fines set by the court.³⁴

Bushell filed a writ of habeas corpus seeking his release.³⁵ The Court of Common Pleas held that courts could not punish jurors in criminal cases for voting to acquit, even when the trial judge believed that the verdict was inconsistent with the evidence.³⁶ With one exception, all the judges in England concurred with this opinion of Chief Justice Sir John Vaughan.³⁷ Commentators have stated that this decision created the right of juries to nullify.³⁸ However, this is incorrect; the Chief Justice did not hold that juries had a right to nullify. Rather, "he implied that no such right exists, but that the de facto power to nullify without fear of punishment is justified only because nullification is not provable."³⁹

Instances of jury nullification began to increase during the eighteenth century and were common in the early nineteenth century in seditious libel prosecutions.⁴⁰ William Davis Shipley was prosecuted for seditious libel in 1783.⁴¹ The jury was instructed that its only de-

29. *See id.* at 962-63.

30. *See id.*

31. *Id.* at 963.

32. *See id.* at 964.

33. *See id.* at 966.

34. *See id.* at 967-68.

35. *See Bushell's Case*, 124 Eng. Rep. 999, 1000 (1670).

36. *See id.* at 1012.

37. *See id.* at 1013-14.

38. *See Korroch & Davidson*, *supra* note 10, at 134.

39. Chaya Weinberg-Brodt, *Jury Nullification and Jury-Control Procedures*, 65 N.Y.U. L. REV. 825, 830 (1990).

40. *See Korroch & Davidson*, *supra* note 10, at 134.

41. *See Proceedings against the Dean of St. Asaph*, 23 Geo. 3 (1784), reprinted in 21 T.B. HOWELL, A COMPLETE COLLECTION OF STATE TRIALS 847 (London,

cision was whether there was in fact a publication, an issue upon which there was no dispute.⁴² They were told not to consider any offered justification.⁴³ In closing argument, Shipley's attorney told the jurors that they should not obey the court's rulings and argued:

They therefore call upon you to pronounce that guilt, which they forbid you to examine into. Thus without inquiry into the only circumstance which can constitute guilt, and without meaning to find the defendant guilty, you may be seduced into a judgment which your consciences may revolt at, and your speech to the world deny—I shall not agree that you are therefore bound to find the defendant guilty unless you think so likewise.⁴⁴

The most famous early American case involving jury nullification was the trial of John Peter Zenger.⁴⁵ Zenger was a New York printer who published a newspaper severely critical of the state's governor.⁴⁶ As a result, he was charged with seditious libel.⁴⁷ In pre-Revolutionary days, seditious libel was defined as criticism directed against the government or public officials.⁴⁸ It was considered a threat against public order and a criminal offense.⁴⁹ Zenger's criminal trial began on August 4, 1735,⁵⁰ with Andrew Hamilton as his defense attorney.⁵¹ In a prosecution for seditious libel, the truth of the statement was not a recognized defense.⁵² The Attorney General needed only to prove that Zenger had printed or published the statement.⁵³ The judge "would then instruct the jury that the words were scandalous, libelous, a threat to the public order and that they

T.C. Hansard 1816) [hereinafter *St. Asaph's Case*].

42. *See id.* at 851.

43. *See id.*

44. *Id.*

45. *See Trial of John Peter Zenger*, 9 Geo. 2 (1735), reprinted in 17 T.B. HOWELL, COBBETT'S COMPLETE COLLECTION OF STATE TRIALS 675 (London, T.C. Hansard 1816) [hereinafter *Zenger*]; William R. Glendon, *The Trial of John Peter Zenger*, 68 N.Y. ST. B.J., Dec. 1996, at 48.

46. *See Zenger*, *supra* note 45, at 675-82.

47. *See id.*

48. *See Glendon*, *supra* note 45, at 48.

49. *See id.*

50. *See id.* at 50.

51. *See id.*

52. *See id.*; Todd Barnet, *New York Considers Jury Nullification: Informing the Jury of Its Common Law Right to Decide Both Facts and Law*, N.Y. ST. B.J. 40, 41 (1993).

53. *See Zenger*, *supra* note 45, at 694; Glendon, *supra* note 45, at 48.

could therefore find the defendant guilty.”⁵⁴ “Hamilton’s strategy was to concede the factual question of whether publication had occurred, and argue the legal question of whether truth should be a defense [to the charge of seditious libel.]”⁵⁵ He “conceded that Zenger had printed and published the offending papers but demanded that the prosecution prove them to be false.”⁵⁶ In response, the Attorney General argued that the statement was no less a libel simply because it was true.⁵⁷ The Court refused to allow Hamilton to prove the truth of the facts published in the papers, prohibiting him from calling any witnesses on the subject.⁵⁸ The only way Hamilton could gain Zenger an acquittal was to rely on the jurors’ own notions of truth of the allegations in the paper because the law was completely against him.⁵⁹ He urged jurors to uphold freedom and asked them “to see with their own eyes, to hear with their own ears, and to make use of their own consciences and understandings in judging of the lives, liberties or estates of their fellow subjects.”⁶⁰ The jury returned a verdict of not guilty.⁶¹ It is asserted that though a nullified verdict, the outcome of Zenger’s case strengthened freedom of the press.⁶²

In the early history of the American colonies, and for a time after the Revolution, criminal juries enjoyed the right to decide questions of both law and fact.⁶³ In *Georgia v. Brailsford*,⁶⁴ a 1794 civil case, Supreme Court Chief Justice John Jay instructed the jury on the law, which he explained it should take from the court.⁶⁵ He further expressed that the jury had the right to decide the proper law as well as the facts. Chief Justice Jay stated, “you [the jury] have nevertheless a right to take upon yourselves to judge of both, and to determine

54. Glendon, *supra* note 45, at 48.

55. John T. Reed, Comment, *Penn, Zenger and O.J.: Jury Nullification—Justice or the “Wacko Fringe’s” Attempt to Further Its Anti-Government Agenda?*, 34 DUQ. L. REV. 1125, 1132 (1996); see Zenger, *supra* note 45, at 693.

56. Glendon, *supra* note 45, at 50; see also Zenger, *supra* note 45, at 698-99.

57. See Zenger, *supra* note 45, at 703.

58. See *id.*

59. See *id.*

60. JAMES ALEXANDER, A BRIEF NARRATIVE OF THE CASE AND TRIAL OF JOHN PETER ZENGER 93 (Stanley Nider Katz ed., 2d ed. 1972).

61. See *id.* at 101.

62. See Stanley Nider Katz, *Introduction* to JAMES ALEXANDER, A BRIEF NARRATIVE OF THE CASE AND TRIAL OF JOHN PETER ZENGER 1, 1 (Stanley Nider Katz ed., 2d ed. 1972).

63. See Schefflin, *supra* note 20, at 174.

64. 3 U.S. (3 Dall.) 1 (1794).

65. See *id.* at 4; Schefflin, *supra* note 20, at 175-76; Reed, *supra* note 55, at 1133.

the law as well as the fact in controversy.”⁶⁶

The ability of the jury to determine valid law was diminished by the courts. The watershed case of *Marbury v. Madison*⁶⁷ established the rule that “[i]t is emphatically the province and duty of the judicial department to say what the law is.”⁶⁸ In 1835 the United States District Court for the District of Massachusetts decided *United States v. Battiste*,⁶⁹ its first opinion reducing a jury’s power to determine the law.⁷⁰ *Battiste* was a member of the crew of the *America*, a ship that transported African slaves between ports on the African coast.⁷¹ He was charged with violating a law that prohibited any U.S. ship from transporting individuals with the intent to make them slaves, an offense punishable by death.⁷² *Battiste*’s attorney urged the jury to determine the law on its own.⁷³ Justice Joseph Story rejected this argument. The court reasoned that while juries may have the ability to nullify laws, they do not have the moral right to take such actions.⁷⁴ Arguably this holding implies that the court was concerned that if a jury could decide the law, the law would become uncertain.

The *Battiste* case was decided at a time in post-Revolutionary American history when the colonists were in control of their own government. Judges were no longer a part of the English monarchy but rather, a part of the newly independent nation. Apparently, the court was concerned with the country’s need for stability in the law.⁷⁵ Justice Story stated, “[e]very person accused as a criminal has a right to be tried according to the law of the land . . . and not by the law as a jury may understand it, or choose, from wantonness, or ignorance, or accidental mistake, to interpret it.”⁷⁶ One could read Justice Story’s reasoning in *Battiste* to support the modern role of the jury as the trier of fact.

The trend to diminish a jury’s power to nullify continued in *Commonwealth v. Porter*.⁷⁷ Ten years after *Battiste*, the Massachu-

66. *Brailsford*, 3 U.S. (3 Dall.) at 4.

67. 5 U.S. (1 Cranch) 137 (1803).

68. *Id.* at 177.

69. 24 F. Cas. 1042 (C.C.D. Mass. 1835) (No. 14,545).

70. *See id.* at 1043.

71. *See id.* at 1042.

72. *See id.* at 1044.

73. *See id.* at 1043.

74. *See id.*

75. *See United States v. Dougherty*, 473 F.2d 1113, 1132 (D.C. Cir. 1972).

76. *Battiste*, 24 F. Cas. at 1043.

77. 51 Mass. (10 Met.) 263 (1845).

setts Supreme Court held that a jury could not determine questions of law.⁷⁸ Although the court's holding did not follow Massachusetts precedent, it was not completely inconsistent. While the judge gave the law to the jury, the defense attorney was still allowed to argue the law to the jury, ostensibly to allow jurors to better grasp it.⁷⁹

The Supreme Court severely limited the ability of juries to determine the law in *United States v. Morris*.⁸⁰ Three defendants were prosecuted in 1851 for aiding and abetting a runaway slave's escape to Canada in violation of the Fugitive Slave Acts.⁸¹ During closing arguments, a defense attorney told the jury that it was the finder of the law and if it believed that the law was unconstitutional, it could so hold.⁸² The court interrupted and rejected the lawyer's argument. Justice Benjamin Robbins Curtis, writing for the court, held that juries do not have the right to decide questions of law.⁸³ He further held that all actions of the government should apply equally to all citizens.⁸⁴ Justice Curtis reasoned that if juries had the right to overrule precedent and hold statutes unconstitutional, there would be no "supreme Law of the Land."⁸⁵ If given this power, there would be no protection from the arbitrary and harsh use of it by the jury.⁸⁶ The court also mentioned the fact that Article VI of the Constitution binds judges but not juries.⁸⁷

Finally, in 1896 the United States Supreme Court effectively ended the right of jury nullification in federal court.⁸⁸ The seminal case of *Sparf & Hansen v. United States*⁸⁹ represents the final nail in the coffin for the right of the jury to decide the law. It was *Sparf* that defined the role of the modern jury in federal cases. The litigation involved the prosecution of two sailors for the murder of another

78. See *id.* at 286; Schefflin, *supra* note 20, at 178.

79. See *Porter*, 51 Mass. (10 Met.) at 285-87; Schefflin, *supra* note 20, at 178.

80. 26 F. Cas. 1323 (C.C.D. Mass. 1851) (No. 15,815).

81. See *id.* at 1323-31.

82. See *id.* at 1331.

83. See *id.* at 1336.

84. See *id.* at 1332; Reed, *supra* note 55, at 1135.

85. U.S. CONST. art. VI, § 2. (This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding).

86. See Schefflin, *supra* note 20, at 179.

87. See *Morris*, 26 F. Cas. at 1332-33.

88. See Scott, *supra* note 11, at 419.

89. 156 U.S. 51 (1895).

sailor on board an American ship, the *Hesper*.⁹⁰ The murder statute under which the defendants were charged provided for the lesser included offense of manslaughter.⁹¹ At trial, the defendants asked the court to instruct the jury on the lesser included offense.⁹² The trial judge refused the request and told the jury that there was no evidence to support such a finding.⁹³ During deliberations the jury asked the court whether the crime committed must have been murder or whether it could be manslaughter.⁹⁴ The court responded that although in an average case, the verdict may be murder or manslaughter, in this case manslaughter was not appropriate: “[I]f a felonious homicide has been committed, the facts of the case do not reduce it below murder.”⁹⁵ Further,

[i]n a proper case, a verdict for manslaughter may be rendered, . . . and even in this case you have the physical power to do so; but as one of the tribunals of the country, a jury is expected to be governed by law, and the law it should receive from the court.⁹⁶

The jury returned a guilty verdict on the murder charge from which the defendants appealed.

The question presented on appeal was whether “the court transcended its authority when saying . . . a jury is expected to be governed by law, and the law it should receive from the court.”⁹⁷ In the lead opinion, Justice John Marshall Harlan held that a jury has the physical power to disregard the law, as laid down to them by the court. But I deny that . . . they have the moral right to decide the law according to their own notions or pleasure. On the contrary, I hold it the most sacred constitutional right of every party accused of a crime that the jury should respond as to the facts, and the court as to the law This is the right of every citizen, and it is his only protection.⁹⁸

Since 1895 the United States Supreme Court has followed this

90. *See id.* at 52.

91. *See id.* at 59.

92. *See id.*

93. *See id.* at 59-60.

94. *See id.* at 61 n.1.

95. *Id.* at 62 n.1.

96. *Id.*

97. *Id.* at 63 (emphasis omitted).

98. *Id.* at 74.

precedent that the right to decide the law belongs to the court, not to the jury.⁹⁹

IV. MODERN JUDICIAL DEVELOPMENTS

A. Federal Case Law

Although juries continued to nullify the law after Justice Harlan's opinion in *Sparf*, federal courts did not address the issue between 1895 and 1960.¹⁰⁰ During the 1920s juries repeatedly nullified in cases involving violations of prohibition statutes.¹⁰¹ Nullification was prevalent in the South during the 1960s in cases of violence against African Americans and civil rights workers.¹⁰² Yet, it was not until the politically charged era of the Vietnam War that the jury nullification issue reappeared at the legal forefront.¹⁰³

In 1967 the "Boston Five" were prosecuted for acts arising from their protests of the war in Vietnam.¹⁰⁴ They were charged with conspiracy to help young men avoid the draft.¹⁰⁵ Included in this group were famous pediatrician Benjamin Spock, Marcus Raskin, codirector of the Institute for Policy Studies, and the Reverend William Sloan Coffin, chaplain of Yale University.¹⁰⁶ At trial, the district court instructed the jury to return a general verdict of guilty or not guilty, as well as "yes" or "no" answers to ten "special" questions.¹⁰⁷ Four of the five defendants were convicted.¹⁰⁸ On appeal, appellants contended that the submission of special questions was prejudicial error.¹⁰⁹ The First Circuit Court of Appeals reviewed the differences of the jury's role in criminal and civil cases.¹¹⁰ Chief Judge Bailey Aldrich noted that while special questions are commonplace in civil

99. See, e.g., *United States v. Gaudin*, 515 U.S. 506 (1995); *Berra v. United States*, 351 U.S. 131, 134 (1956); *Hepner v. United States*, 213 U.S. 103, 104 (1909).

100. See Weinberg-Brodt, *supra* note 39, at 833 n.45.

101. See HARRY KALVEN, JR. & HANS ZEISEL, *THE AMERICAN JURY* 292 n.10 (Phoenix ed. 1971).

102. See Kristen K. Sauer, *Informed Conviction: Instructing the Jury About Mandatory Sentencing Consequences*, 95 COLUM. L. REV. 1232, 1258-59 (1995).

103. See Weinberg-Brodt, *supra* note 39, at 836.

104. See PAULA DiPERNA, *JURIES ON TRIAL* 82 (1984).

105. See *id.*

106. See *id.*

107. See *United States v. Spock*, 416 F.2d 165, 180 (1st Cir. 1969).

108. See *id.* at 168.

109. See *id.* at 180.

110. See *id.* at 180-82.

cases, they are almost nonexistent in the criminal context.¹¹¹ In a civil case, the judge may order the jury to find against a defendant, regardless of the strength of the evidence. The same cannot be done in criminal cases.¹¹² The court asserted that in order for a defendant to be tried by a jury of his peers, that jury must be free from judicial pressure and control in rendering its verdict.¹¹³ The First Circuit expressed concern with

the subtle, and perhaps open, direct effect that answering special questions may have upon the jury's ultimate conclusion. There is no easier way to reach, and perhaps force, a verdict of guilty than to approach it step by step. A juror, wishing to acquit, may be formally catechized. By a progression of questions each of which seems to require an answer unfavorable to the defendant, a reluctant juror may be led to vote for a conviction which, in the large, he would have resisted.¹¹⁴

Because the jury is the "conscience of the community," it must be free to look at more than what the court expects it to focus on.¹¹⁵ Further, constitutional due process and jury trial rights demand a jury free from direct or indirect pressure of the court.¹¹⁶ As such, the court held that the special questions constituted prejudicial error.¹¹⁷

*United States v. Moylan*¹¹⁸ was one of the first Vietnam era cases to look at the right of juries to nullify. In *Moylan* nine defendants were prosecuted for burning draft cards in protest of the Vietnam War.¹¹⁹ They were charged with mutilation of government records, destruction of government property, and interference with the administration of the Selective Service System.¹²⁰ All nine admitted the

111. *See id.* at 180. Judge Aldrich did point out that there is a narrow area of special criminal cases where questions have been used; however, he implied that the case at bar was not such a case. *See id.* at 182.

112. *See id.* at 180.

113. *See id.* at 181.

114. *Id.* at 182.

115. *See id.*

116. *See id.*

117. *See id.* at 183.

118. 417 F.2d 1002 (4th Cir. 1969).

119. *See id.* at 1003.

120. *See id.* The violations were of 18 U.S.C. § 1361 (West 1994) (destruction of government property), 18 U.S.C. § 2071(a) (West 1994) (mutilation of government property), and 50 U.S.C. app. § 462(a) (West 1994) (interference with selective service system administration). *See id.* at 1003 n.1.

acts and were convicted.¹²¹ The defendants appealed their convictions on two grounds, one being that the trial court erred in refusing to instruct the jury on its right to nullify the law.¹²² They contended that the trial judge should have informed the jury or allowed defense counsel to argue that it had the power to acquit the defendants even if they were clearly guilty of the crimes charged.¹²³ The appellants maintained that "since the jury has 'the power to bring in a verdict in the teeth of both law and facts,' then the jury should be told that it has this power."¹²⁴ This argument was based on their contention that the jury's power to acquit where the law may compel otherwise is central to democracy. A jury must be so informed to fairly ponder the actions of the defendants, because society speaks through the jury in judging fellow citizens and can mitigate a law which society deems is too harsh.¹²⁵ In response to the appellants' assertions, the Fourth Circuit noted:

We recognize . . . the undisputed power of the jury to acquit, even if its verdict is contrary to the law as given by the judge and contrary to the evidence. This is a power that must exist as long as we adhere to the general verdict in criminal cases, for the courts cannot search the minds of the jurors to find the basis upon which they judge. If the jury feels that the law under which the defendant is accused is unjust, or that exigent circumstances justified the actions of the accused, or for any reason which appeals to their logic or passion, the jury has the power to acquit, and the courts must abide by that decision.¹²⁶

Despite the previous discussion, the appeals court held that the jury should not be encouraged to nullify.¹²⁷ The court stated: "[B]y clearly stating to the jury that they may disregard the law, telling them that they may decide according to their prejudices or consciences . . . we would indeed be negating the rule of law in favor of the rule of lawlessness."¹²⁸

The Ninth Circuit was faced with a similar issue in *United States*

121. *See id.* at 1003.

122. *See id.* at 1004.

123. *See id.* at 1005.

124. *Id.* (footnote omitted) (quoting *Horning v. District of Columbia*, 254 U.S. 135, 138 (1920)).

125. *See id.*

126. *Id.* at 1006.

127. *See id.*

128. *Id.*

v. Simpson.¹²⁹ Like the defendants in *Moylan*, Simpson had burned Selective Service draft cards in protest of the Vietnam conflict.¹³⁰ Simpson was prosecuted and convicted.¹³¹ On appeal, Simpson claimed, among other things, that the district court erred in refusing to instruct the jury of its power to acquit a defendant regardless of the strength of evidence of guilt.¹³² The court approached the issue presented by asking whether justice would be better served by instructing jurors. The instruction would empower the jurors to disregard the law and decide questions of law based on their own judgments and consciences, thereby opening the way for more "conscience verdicts."¹³³ The court agreed that the jury has an independent role in the judicial system and that juries reach conscience verdicts without being instructed.¹³⁴ The court determined, however, that satisfactory safeguards existed for this power so that no further instruction was necessary.¹³⁵ The Ninth Circuit stated that "in the courts of the United States it is the duty of juries in criminal cases to take the law from the court, and apply that law to the facts as they find them to be from the evidence."¹³⁶ In so holding, the court vali-

129. 460 F.2d 515 (9th Cir. 1972).

130. *See id.* at 516.

131. *See id.* at 516-17. The court convicted Simpson of the following statutory violations: 18 U.S.C. § 1361 (West 1994) (destroying government property), 18 U.S.C. § 2071(a) (West 1994) (mutilating and destroying government records), 50 U.S.C. app. § 462(a) (West 1990) (interfering with the administration of the Selective Service System). *See id.* at 516-17 nn.1-3.

132. *See id.* at 518-19. The requested instruction read:

The jury has the power to decide, according to its own judgment and conscience, all questions of law and fact involved in the issue of guilty or not guilty.

Juries may apply matter [sic] of fact and law together, and form their consideration of, and a right judgment upon, both.

The jury has the power to find the defendant not guilty even if the evidence of guilt is overwhelming or conclusive.

Jurors may not be punished for voting for acquittal, even if the evidence of guilt is overwhelming or conclusive.

Juries have the power to disregard the law in fact in reaching its verdict.

Juries, as representative cross-sections of their communities may, in conscience cases, nullify the law and the fact if they approve of the conceded acts of defendants.

Id. at 518 n.9.

133. *Id.* at 519.

134. *See id.* at 520.

135. *See id.*

136. *Id.* at 519 (quoting *Sparf & Hanson v. United States*, 156 U.S. 51, 102 (1895)).

dated as correct the rule of *Sparf*, as reiterated in *Moylan*.¹³⁷

Less than two months after Judge Walter Raleigh Ely, Jr.'s opinion in *Simpson*, the District of Columbia Circuit Court published its famed *Dougherty* opinion.¹³⁸ Defendants were seven members of the "D.C. Nine,"¹³⁹ as well as members of the Catholic clergy.¹⁴⁰ Each was charged with one count of second degree burglary and two counts of destroying private property.¹⁴¹ The prosecution arose from the break-in, vandalism, and destruction of property of the Washington, D.C. offices of Dow Chemical Company.¹⁴² Defendants protested Dow's manufacture of napalm used in American military efforts in Vietnam.¹⁴³ None of the defendants disputed that they had entered the office.¹⁴⁴ Each defendant was convicted of two counts of malicious destruction of property.¹⁴⁵

On appeal, the defendants asserted that the trial judge erred in refusing to instruct the jury of its power to nullify the law.¹⁴⁶ Appellants maintained that jurors have a recognized right to disregard the court's instructions and should be informed of their power.¹⁴⁷ In his majority opinion, Judge Harold Leventhal noted that the right of jury nullification, although put forth "in the name of liberty and democracy," is the "ultimate logic of anarchy."¹⁴⁸ His expressed disavowal of jury nullification went further:

To encourage individuals to make their own determinations as to which laws they will obey and which they will permit themselves as a matter of conscience to disobey is to invite chaos. No legal system could long survive if it gave every individual the option of disregarding with impunity any law which by his personal standard was judged morally untenable. Toleration of such conduct would not be democratic . . . but [would be] inevitably anarchic.¹⁴⁹

137. See *Moylan*, 417 F.2d at 1007 n.13.

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

139. See *id.* at 1116.

140. See Creagan, *supra* note 11, at 1112.

141. See *Dougherty*, 473 F.2d at 1117.

142. See *id.*

143. See Creagan, *supra* note 11, at 1112.

144. See *Dougherty*, 473 F.2d at 1117.

145. See *id.* (They were convicted for a violation of title 22, section 403 of the District of Columbia Code.).

146. See *id.*

147. See *id.* at 1130.

148. *Id.* at 1133.

149. *Id.* at 1133-34 (quoting Judge Simon E. Sobeloff in *United States v. Moy-*

Moreover, Judge Leventhal asserted that informing jurors of their power of nullification would compel them to assume the duties of a legislator or a judge.¹⁵⁰ This task was too burdensome for a citizen involuntarily assigned to jury duty.¹⁵¹ Holding that the existence of a juror's ability to nullify does not establish a rule that jurors must be so informed by the judge, the court stated: "What makes for health as an occasional medicine would be disastrous as a daily diet."¹⁵² The court reasoned that an explicit instruction conveys approval, and when a jury feels so strongly about a case, it must use its own initiative to act against the court's instructions, thereby limiting the doctrine to only select cases.¹⁵³ "Since it is the essence of the judicial function to declare the applicable law, it follows that the mere declaration of the law cannot be held outside the judicial function."¹⁵⁴ As such, although *Dougherty*, like *Sparf* and *Moylan*, recognizes the jury's power to nullify, it also refrains from giving jurors an express right to do so.

The Eighth Circuit also rejected a proposed nullification instruction in *United States v. Wiley*.¹⁵⁵ In holding that the defendant was not entitled to such an instruction, the court noted that since 1969, every federal court confronted with the issue of jury nullification had rejected it.¹⁵⁶

The defendant in *United States v. Grismore*¹⁵⁷ requested that the jury be instructed both that it could decide issues of law and fact,¹⁵⁸ as well as ignore the court's instruction regarding the law. The trial court rejected these requests.¹⁵⁹ Defendant appealed his conviction on the grounds that he was denied a fair trial as a result of the trial judge's failure to instruct on nullification.¹⁶⁰ The Tenth Circuit dis-

lan, 417 F.2d 1002, 1009 (4th Cir. 1969)).

150. *See id.* at 1136.

151. *See id.*

152. *Id.*

153. *See id.* at 1136-37.

154. *Id.* at 1138.

155. 503 F.2d 106 (8th Cir. 1974). The proposed instruction included the following: "[T]he members of the jury have an inherent right to disregard the instructions of the court and the evidence presented and return a verdict of acquittal if you find that the defendant was not blameworthy in the sense that he has not shocked the community conscience" *Id.* at 106-07.

156. *Id.* at 107.

157. 546 F.2d 844 (10th Cir. 1976).

158. *See id.* at 849.

159. *See id.*

160. *See id.*

posed of the issue with two sentences: "It is well-established that the court instructs the jury as to the rules of law and that the jury applies the facts as they find them to those rules."¹⁶¹ "A criminal defendant is not, of course, entitled to have the jury instructed that they can disregard the law."¹⁶²

Political, social, and therefore legal issues changed with the times. For example, in 1973 the United States Supreme Court took its first significant step towards legalizing abortion.¹⁶³ With that decision, a whole new political debate began. Hector Zevallos was a doctor from Illinois who rendered medical services, including abortions, to women.¹⁶⁴ Don Anderson and two accomplices forced Zevallos and his wife from their home at gunpoint and kept them in a remote area for eight days.¹⁶⁵ Mr. Anderson informed Zevallos that Anderson and his companions were members of the Army of God, an anti-abortion group, and had abducted the couple because of the doctor's connection with abortion clinics.¹⁶⁶ The kidnappers forced Zevallos to tape a message to President Ronald Reagan calling for anti-abortion legislation.¹⁶⁷ Anderson was charged with two counts of conspiracy and attempt to obstruct, delay, and affect interstate commerce through extortionate means.¹⁶⁸ At trial, Anderson requested a special jury instruction informing jurors of their power to nullify. The court denied Anderson's request¹⁶⁹ and convicted him on both counts.¹⁷⁰ On appeal to the Seventh Circuit, Anderson asserted that the trial court erred in refusing his proposed instruction.¹⁷¹ Anderson

161. *Id.* (citing *Delli Paoli v. United States*, 352 U.S. 232 (1957); *Sparf v. United States*, 156 U.S. 51 (1895)).

162. *Id.* (citing *United States v. Gorham*, 523 F.2d 1088 (D.C. Cir. 1975); *Wiley*, 503 F.2d 106; *United States v. Dellinger*, 472 F.2d 340 (1972); *United States v. Dougherty*, 473 F.2d 1113 (D.C. Cir. 1972)).

163. *See Roe v. Wade*, 410 U.S. 113 (1973).

164. *See United States v. Anderson*, 716 F.2d 446, 447 (7th Cir. 1983).

165. *See id.*

166. *See id.*

167. *See id.*

168. *See id.* at 448. One of the clinics where Zevallos was employed purchased products from supply companies out of state. Those items were then shipped to the clinic in Illinois, thereby subjecting the transaction to regulation of interstate commerce. *See id.*

169. *See id.* at 449.

170. *See id.* at 447.

171. The requested instruction read:

The jury has the power to decide, according to its own judgment and conscience, all questions of law and fact involved in the issue of guilty or not guilty.

Juries may apply matter [sic] of fact and law together, and form their

maintained that the instruction was necessary to inform jurors of their role as the community conscience in a case involving political debate.¹⁷² Judge Harlington Wood, writing for the majority, emphasized the *Dougherty* opinion, which stated in part that

while the "community conscience" verdict is to be accepted as a natural and at times desirable aberration under our system, it is not to be positively sanctioned by instructions, such as defendant's, which would encourage a jury to acquit "under any circumstances" regardless of the applicable law or proven facts.¹⁷³

In refusing to reverse, the Seventh Circuit held that while nullification may be worthwhile as a self-initiated exception to the norm, it becomes something quite different and threatens the integrity of the judicial system if formalized and added to the court's instructions.¹⁷⁴ In other words, unreviewable, not-guilty verdicts in cases where the evidence clearly indicates guilt ensures satisfactory safeguards to the jury's role as conscience of the community.¹⁷⁵ The *Anderson* court, following the *Dougherty* and *Simpson* opinions, held that explicit instructions sanctioning jury nullification posed too great a threat to the rule of law.¹⁷⁶

Although it is apparent that federal courts were refusing to instruct criminal juries on nullification, *United States v. Trujillo*¹⁷⁷ presented the issue of whether defense counsel may encourage nullification in closing arguments.¹⁷⁸ Trujillo was convicted of three counts relating to possession of and intent to distribute cocaine.¹⁷⁹ On appeal he alleged that the trial court erred by refusing to allow his attorney to argue jury nullification during closing argument.¹⁸⁰ Specifically, defense counsel wanted to argue that Trujillo was entitled to a not-

consideration of, and right judgment upon, both.

Jurors may not be punished for voting for acquittal under any circumstances.

Id. at 449.

172. *See id.*

173. *Id.* at 449-50 (quoting *United States v. Dougherty*, 473 F.2d 1113, 1137 (D.C. Cir. 1972)).

174. *See id.* at 450.

175. *See id.*

176. *See id.*

177. 714 F.2d 102 (11th Cir. 1983).

178. *See id.* at 105.

179. *See id.* at 104.

180. *See id.* at 105.

guilty verdict because he cooperated with the government.¹⁸¹ The court held that closing arguments must relate to the law as the jury will be later instructed by the judge.¹⁸² Further, although the jury has the ability to return whatever verdict it deems appropriate, "neither the court nor counsel should encourage jurors to violate their oath."¹⁸³ As such, the Eleventh Circuit held that defense counsel may not argue jury nullification to the jury during closing argument.¹⁸⁴

The growth of anti-government groups has brought with it those who assert exemption from federal tax statutes. One such case came before the Ninth Circuit in 1991.¹⁸⁵ Roy and Dixie Lee Powell were convicted of willful failure to file tax returns for the years 1982, 1983, and 1984.¹⁸⁶ On appeal, the Powells asserted that the district court had erred in refusing their requested jury nullification instruction.¹⁸⁷ The text of the proposed instruction included the following:

If you feel strongly about the values involved in this case, so strongly that your conscience is aroused, then you may, as the conscience for the community, disregard the strict requirements of the law. You should disregard the law only if the requirements of the law cannot justly be applied in this case. By disregarding the law, you may use your common sense judgment and find a verdict according to your conscience.¹⁸⁸

Relying on *Simpson* as precedent, the Ninth Circuit held that defendants were not entitled to the proposed instruction on nullification.¹⁸⁹

In *United States v. Sepulveda*,¹⁹⁰ twelve defendants appealed their convictions for various crimes arising out of a drug-trafficking operation. One of the many issues on appeal was whether a supplemental trial court instruction to the jury was erroneous because it repudiated jury nullification.¹⁹¹ During closing arguments, the defendants endorsed the practice of jury nullification. Counsel for one of the de-

181. *See id.*

182. *See id.* at 106.

183. *Id.*

184. *See id.*

185. *United States v. Powell*, 955 F.2d 1206 (9th Cir. 1991).

186. *See id.* at 1208.

187. *See id.* at 1210.

188. *Id.* at 1213.

189. *See id.*

190. 15 F.3d 1161 (1st Cir. 1993).

191. *See id.* at 1190.

fendants prodded the jury to investigate the doctrine.¹⁹² During deliberations, the jury asked the judge to “[c]larify the law on jury nullification.”¹⁹³ The trial court explained to the jury that federal judges give the law which applies to the case and are prohibited from instructing on jury nullification.¹⁹⁴ In clarifying for the jury, the judge stated that if the government proved the defendant guilty beyond a reasonable doubt the jury should convict and if the government failed to do so, the jury must acquit.¹⁹⁵ It was this supplemental instruction to which the defendants objected. The First Circuit followed previous federal cases holding that a judge may not instruct a jury on nullification.¹⁹⁶ It noted that while juries may sometimes “flex their muscles,”¹⁹⁷ and ignore law and evidence, neither the court nor counsel should encourage such action.¹⁹⁸ Judge Bruce M. Selya also held that trial judges can prohibit counsel from advocating nullification to juries and may disapprove jury nullification in instructing jurors on their role in the decision-making process.¹⁹⁹

The current trend of mandatory sentencing schemes opened the door to defendants seeking to inform juries of punishments.²⁰⁰ While excluding a specific nullification instruction, the district court in *United States v. Datcher*²⁰¹ granted a defendant’s motion to inform the jury of the harsh punishment he faced if convicted.²⁰² In *Datcher*, the defendant was charged with attempted distribution of a controlled substance, conspiracy to distribute, and use or carrying of a firearm in connection with the distribution.²⁰³ He faced a minimum prison term of twenty-five years if convicted on all three counts.²⁰⁴ In his memorandum granting the motion to inform the jury, Judge Thomas A. Wiseman Jr. looked at the function of the jury trial as necessary to

192. *See id.* at 1189.

193. *Id.*

194. *See id.*

195. *See id.* at 1189-90.

196. *See id.* at 1190.

197. *Id.*

198. *See id.*

199. *See id.*

200. *See Sauer, supra* note 102, at 1234.

201. 830 F. Supp. 411 (M.D. Tenn. 1993).

202. *See id.* at 418.

203. *See id.* at 412.

204. *See id.* at 412 nn.2-3 (noting that the minimum term on the attempted distribution charge was ten years, plus an additional ten if convicted of the conspiracy and five more on the firearm count).

prevent government oppression.²⁰⁵ The judge based this determination on precedent establishing the role of the jury as the "conscience of the community."²⁰⁶ As such, the court reasoned that a jury has the right to all relevant information to insure its proper function as protector against government oppression.²⁰⁷ Judge Wiseman held that awareness of sentencing allows the jury to approve or disapprove of penalties, fulfilling its "oversight" purpose.²⁰⁸ He further stressed that while no outright nullification instruction would be given,²⁰⁹ the jury could use the information on sentencing to nullify.²¹⁰ In so holding, the court affirmed that although it did not necessarily approve of nullification with or without a court instruction, it accepted that there are cases where redress is part of the jury's function.²¹¹ *Datcher*, according to the court, was one of those cases.

When faced with a similar question regarding a jury instruction on penalty, the United States Supreme Court held in opposition to the *Datcher* opinion. The issue facing the Court in *Shannon v. United States*²¹² was whether a federal district court must instruct the jury about the result of a verdict of not guilty by reason of insanity (NGI).²¹³ In his majority opinion, Justice Clarence Thomas reviewed the role of the jury and reiterated the well-established rule that while the jury is the trier of fact, it is the judge's duty to impose a sentence.²¹⁴ The opinion noted that jurors are not informed regarding minimum and maximum sentencing, probation, parole, and sentencing ranges for lesser included offenses.²¹⁵ Justice Thomas further noted that one of the reasons federal courts generally disapproved of instructing the jury about the consequences of their verdict is that an instruction on penalty would violate the principle that a jury is to reach its verdict on the evidence, regardless of its possible consequences.²¹⁶ While the Court acknowledged that there was a potential for an instruction similar to that proposed by the defendant in spe-

205. *See id.* at 414.

206. *Id.* (quoting *Witherspoon v. Illinois*, 391 U.S. 510, 519 & n.15 (1968)).

207. *See id.* at 415.

208. *Id.* at 416.

209. *See id.* at 417-18.

210. *See id.* at 418.

211. *See id.* at 417.

212. 512 U.S. 573.

213. *See id.* at 575.

214. *See id.* at 579.

215. *See id.* at 586-87.

216. *See id.* at 579 n.4. Justice Thomas did note, however, that in capital cases juries may be given sentencing roles. *See id.*

cific limited circumstances, the case before it was not such a circumstance.²¹⁷ In holding that a federal district court is not required to instruct the jury regarding consequences of an NGI verdict,²¹⁸ the opinion explained that “providing jurors sentencing information invites them to ponder matters that are not within their province, distracts them from their fact-finding responsibilities, and creates a strong possibility of confusion.”²¹⁹

The Sixth Circuit expressly relied on *Shannon* and rejected *Datcher* in *United States v. Chesney*.²²⁰ In *Chesney*, the defendant appealed his conviction for possession of a firearm.²²¹ On appeal, defense counsel relied on *Datcher*, maintaining that the district court erred in refusing to instruct the jury on punishment.²²² Following *Shannon*, the Sixth Circuit held that well-settled precedent established that the jury had no sentencing function in the defendant’s case, and therefore affirmed the conviction.²²³

To date, every federal circuit court of appeal considering the question has denied the right to a specific instruction on jury nullification and the right of defense counsel to directly argue for it. Although one federal district court has allowed it, the United States Supreme Court has prohibited attorneys from arguing for nullification.²²⁴ Although jury nullification instructions or arguments are prohibited in federal court, state courts are not bound by federal precedent in this area. California practice, however, is consistent with federal jury nullification perspective.²²⁵

B. California Case Law

The role of the jury in California was expressly set out in 1893 by *People v. Lem You*.²²⁶ The Supreme Court of California held that the jury in a criminal trial has a right to determine the facts regarding a

217. See *id.* at 587-88. The opinion stated that such an instruction may be necessary where a witness or prosecutor remarks in front of the jury that the defendant would “go free” if found NGI. In a case of this type, the Court recognized the need for a curative instruction. See *id.*

218. See *id.* at 575.

219. *Id.* at 579.

220. 86 F.3d 564, 574 (6th Cir. 1996).

221. See *id.* at 567.

222. See *id.* at 574.

223. See *id.*

224. See *Sparf & Hansen v. United States*, 156 U.S. 51 (1895).

225. See discussion *infra* Part IV.B.

226. 97 Cal. 224, 32 P. 11 (1893).

defendant's guilt or innocence and apply those facts to the law given to them by the court.²²⁷ Distinguishing the court's role in the decision-making process, Justice Thomas B. McFarland explained that the materiality of the evidence is a question of law which must be decided by the court and not a factual determination for the jury. In this opinion, the court also recognized the jury's "naked power to decide all the questions arising on the general issue of not guilty."²²⁸ Over a half-century later, the same court acknowledged that often "extralegal factors" are responsible for verdicts which are contrary to the evidence in a case.²²⁹ The court noted that triers of fact exercise this power to reduce harsh legal punishment or to show mercy.²³⁰ It commented further on the awesome character of a jury's state constitutional power and noted that jury convictions can be set aside only for a miscarriage of justice.²³¹

The California decision cited most often by nullification advocates is Justice Otto Kaus's concurring opinion in *People v. Dillon*.²³² The defendant in *Dillon* was a seventeen-year-old minor charged with first degree murder and attempted robbery.²³³ The defendant was convicted of both counts.²³⁴ The first degree murder conviction was based upon the California felony-murder rule.²³⁵ At trial a clinical psychologist was called as an expert witness. The psychologist testified that after conducting a number of tests and examinations, he

227. See *id.* at 228, 32 P. at 12.

228. *Id.* (emphasis omitted).

229. *People v. Powell*, 34 Cal. 2d 196, 205, 208 P.2d 974, 980 (1949).

230. See *id.* at 207, 208 P.2d at 981.

231. See *id.* at 206, 208 P.2d at 980. Today's California Constitution lays out the rule:

No judgment shall be set aside, or new trial granted, in any cause, on the ground of misdirection of the jury, or of the improper admission or rejection of evidence, or for any error as to any matter of pleading, or for any error as to any matter of procedure, unless, after an examination of the entire cause, including the evidence, the court shall be of the opinion that the error complained of has resulted in a miscarriage of justice.

CAL. CONST. art. VI, § 13.

232. 34 Cal. 3d 441, 668 P.2d 697, 194 Cal. Rptr. 390 (1983).

233. See *id.* at 450-51, 668 P.2d at 700, 194 Cal. Rptr. at 393.

234. See *id.* at 450, 688 P.2d at 700, 194 Cal. Rptr. at 393.

235. Felony-murder is described in California Jury Instruction number 8.21, which was included as part of the jury instructions at trial. It states in pertinent part: "The unlawful killing of a human being, whether intentional, unintentional or accidental, which occurs [during the commission or attempted commission of the crime] . . . is murder of the first degree when the perpetrator had the specific intent to commit that crime." CALIFORNIA JURY INSTRUCTIONS, CRIMINAL No. 8.21 (6th ed. 1996) [hereinafter CALJIC].

determined that the defendant was intellectually, socially, and emotionally immature, and that the defendant lived in a "world of make-believe."²³⁶ During deliberations, the jury sent two notes to the judge. The first asked about the doctor's testimony regarding the fact that the defendant was being tried as an adult. It further clarified that "[f]rom his testimony, it appears that Norman's [i.e., defendant's] mentality and emotional maturity is that of a minor."²³⁷ The trial judge responded by telling the jury not to theorize as to why the defendant was being tried as an adult.²³⁸ Later, a second note asked the judge whether a second degree murder or manslaughter verdict could be rendered if it was determined that death occurred in the course of the attempted robbery.²³⁹ The court answered that if the jury found that the killing occurred during a robbery, then it would be first degree murder.²⁴⁰ After announcing the guilty verdict for first degree murder and before discharging the jury, the judge expressed sympathy toward the jurors, explaining that he understood their reluctance to apply the felony-murder rule to the facts presented in this case.²⁴¹ Two days later the jury foreman wrote a letter to the judge regarding the jury's unwillingness to return a verdict according to the felony-murder rule. The letter stated in pertinent part:

It was extremely difficult for most of the members, including myself, not to allow *compassion* and *sympathy* to influence our verdict as Norman Dillon by *moral* standards is a minor

. . . .

The felony-murder law is *extremely* harsh but with the evidence and keeping 'the law, the law', we the jury had little choice but to bring in a verdict of guilty of 1st degree

236. *Dillon*, 34 Cal. 3d at 483, 668 P.2d at 723, 194 Cal. Rptr. at 416.

237. *Id.*, 668 P.2d at 723, 194 Cal. Rptr. at 416-17.

238. *See id.*, 668 P.2d at 723, 194 Cal. Rptr. at 417.

239. *See id.* at 484, 668 P.2d at 724, 194 Cal. Rptr. at 417.

240. *See id.*

241. The judge's comments included the following:

I don't want to say a lot about the verdict at this point, but I can tell you that, based upon the evidence, your decision is certainly supported by the evidence. *This felony murder rule is a very harsh rule and it operated very harshly in this case.* I felt that the evidence did not support a first degree murder conviction under any theory other than felony first degree murder, and the law is the law.

Id.

murder.²⁴²

Based upon these facts, Justice Kaus, in a concurring opinion, asserted that the trial court's instructions "caused an unwilling jury to return a verdict of first degree murder."²⁴³ He reasoned that the instruction should have informed the jury of its right to return a verdict more lenient than the facts dictated and should have mentioned that jurors could not be punished for doing this.²⁴⁴ He maintained that these elements were the "essence of the jury's power to 'nullify.'"²⁴⁵

Despite the previous assertions, Justice Kaus's concurrence did not support an outright nullification instruction. "To instruct on nullification at the outset of deliberations affirmatively invites the jury to consider disregarding the law. I . . . do not advocate it."²⁴⁶ According to Justice Kaus, the jury in *Dillon* essentially asked, "May we nullify?"²⁴⁷ At this point he supports informing the jury of nullification.²⁴⁸ While Justice Kaus supports the view that the court need not push the jury in the direction of nullification, he also noted that the court is not permitted to pressure the jury "into stifling a spontaneous urge to nullify."²⁴⁹

In the plurality opinion, Justice Stanley Mosk responded to the nullification scheme set forth in Justice Kaus's concurrence. He stated that Justice Kaus's opinion "impliedly reopen[ed] the classic debate as to whether society has created courts of law or courts of justice."²⁵⁰ Incredulous, Justice Mosk stated that despite the results of such debate, "it cannot seriously be urged that, when asked by the jurors, a trial judge must advise them: 'I have instructed you on the law applicable to this case. Follow it or ignore it, as you choose.'"²⁵¹ Justice Mosk's opinion holds that, although nullification may provide sensible fairness in extraordinary cases, "the more likely result is anarchy."²⁵²

In a concurring opinion, Justice Pro Tem Robert Kingsley de-

242. *Id.* at 484-85, 668 P.2d at 724, 194 Cal. Rptr. at 417 (emphasis added).

243. *Id.* at 490, 668 P.2d at 728, 194 Cal. Rptr. at 421.

244. *See id.* at 490-91 & n.2, 668 P.2d at 728 & n.2, 194 Cal. Rptr. at 421 & n.2 (Kaus, J., concurring).

245. *Id.* at 490, 668 P.2d at 728, 194 Cal. Rptr. at 421 (Kaus, J., concurring).

246. *Id.* at 491, 668 P.2d at 729, 194 Cal. Rptr. at 422 (Kaus, J., concurring).

247. *Id.* at 492, 668 P.2d at 729, 194 Cal. Rptr. at 422 (Kaus, J., concurring).

248. *See id.* at 491-92, 668 P.2d at 729, 194 Cal. Rptr. at 422 (Kaus, J., concurring).

249. *Id.* at 493, 668 P.2d at 730, 194 Cal. Rptr. at 423 (Kaus, J., concurring).

250. *Id.* at 488 n.39, 668 P.2d at 726 n.39, 194 Cal. Rptr. at 419 n.39.

251. *Id.*, 668 P.2d at 726 n.39, 194 Cal. Rptr. at 419-20 n.39.

252. *Id.*

finer jury nullification as a concept allowing jurors to "ignore the plain letter of the law" and execute whatever justice they deem socially appropriate.²⁵³ He relied on Dean Pound's interpretation of nullification as a "soft spot" allowing "the law to yield in a special case rather than cast doubt on the justice of the applicable law in general."²⁵⁴

Although the issue of jury nullification was not directly addressed by the California Supreme Court in *Ballard v. Uribe*, Chief Justice Bird and Justice Mosk recognized the problems associated with jury nullification and expressed their differing views in separate opinions.²⁵⁵ The underlying litigation concerned a personal injury in which the jury returned a verdict for the plaintiff.²⁵⁶ Both parties appealed, and the plaintiff moved for a new trial based upon alleged juror misconduct.²⁵⁷ On appeal, plaintiff provided declarations of four jury members asserting that two other jurors had stated they would not award money for pain and suffering regardless of the law's requirements.²⁵⁸

In his concurring opinion, Justice Mosk maintained that the plaintiff's appeal should be dismissed as a matter of principle.²⁵⁹ According to Mosk, finality of judgment is threatened when appeals of this type are given credit.²⁶⁰ He asserted that "[j]ustice is not served by tiresome replays of jury deliberations."²⁶¹ While acknowledging the existence of nullification in some cases,²⁶² he also expressed his

253. *Id.* at 493, 668 P.2d at 730, 194 Cal. Rptr. at 423 (Kingsley, J., concurring).

254. *Id.*

255. *See Ballard v. Uribe*, 41 Cal. 3d 564, 715 P.2d 624, 224 Cal. Rptr. 664 (1986). In his plurality opinion, Justice Joseph Grodin did not address the question of jury nullification. *See id.* at 568-75, 715 P.2d at 625-30, 224 Cal. Rptr. at 666-70. Justice Malcolm Lucas did not address the question in his concurrence. *See id.* at 578, 715 P.2d at 632, 224 Cal. Rptr. at 672 (Lucas, J., concurring). However, both Justice Stanley Mosk and Chief Justice Rose Bird addressed the issue and concluded with differing views. *See id.* at 575-600, 715 P.2d at 630-48, 224 Cal. Rptr. at 670-88 (Mosk, J., concurring, Bird, C.J., concurring in part and dissenting in part).

256. *See id.* at 568, 715 P.2d at 625, 224 Cal. Rptr. at 666.

257. *See id.* at 574, 715 P.2d at 629, 224 Cal. Rptr. at 670.

258. *See id.* at 590-91, 715 P.2d at 641, 224 Cal. Rptr. at 681 (Bird, C.J., concurring in part and dissenting in part).

259. *See id.* at 575, 715 P.2d at 630, 224 Cal. Rptr. at 670 (Mosk, J., concurring).

260. *See id.*

261. *Id.*

262. *See id.* at 576-77, 715 P.2d at 631, 224 Cal. Rptr. at 672 (Mosk, J., concurring).

I am confident it is not uncommon for a juror or jurors to express ill-

belief that “[i]t would be a grave disservice to the integrity of the jury system and to the finality of judgments if we were to encourage probing into the subjective reasons behind the unanimous verdict”²⁶³

Justice Mosk also feared an end to jury secrecy; in recognizing that nullification may occur, he maintained that what happens in the jury room should stay there and not be subject to appellate review.²⁶⁴

On the other hand, while recognizing that nullification occurs in criminal cases—though unsanctioned and without instruction from the court—Chief Justice Bird contended that jury nullification has no place in a civil context.²⁶⁵ In her opinion—part concurring, part dissenting—the Chief Justice distinguished nullification in criminal cases from nullification in civil cases.²⁶⁶ She noted that while the jury has no right to do so, it asserts the “naked power to return a verdict of ‘not guilty’ even where acquittal is inconsistent with the law given by the court.”²⁶⁷ This power of juries, she maintains, is fitting in the criminal arena due to the very nature of criminal proceedings, with the existence of general verdicts and double jeopardy. Because criminal juries only return general verdicts and because double jeopardy bars appellate courts from reversing a jury’s findings, courts in criminal actions have little power to stop jurors from nullifying.²⁶⁸ Chief Justice Rose Bird stated that in civil cases, however, jury nullification is inconsistent with special verdicts because it contradicts the trial court’s ability to order such verdicts. Additionally, it precludes courts from ordering a new trial as a result of juror misconduct, despite long-standing precedent.²⁶⁹ To support her position, the Chief Justice quoted Abraham Lincoln:

“[L]et me not be understood as saying there are no bad laws, or that grievances may not arise for the redress of

considered disagreement with the law recited by the judge. Indeed, Justice Kaus, in his separate opinion in *People v. Dillon*, argued for recognition of what he described as the “power of a jury to nullify what it considers an unjust law.”

Id. (citations omitted).

263. *Id.* at 577, 715 P.2d at 632, 224 Cal. Rptr. at 672 (Mosk, J., concurring).

264. *See id.* at 577-78, 715 P.2d at 632, 224 Cal. Rptr. at 672 (Mosk, J., concurring).

265. *See id.* at 599-600, 715 P.2d at 647, 224 Cal. Rptr. at 687-88 (Bird, C.J., concurring in part and dissenting in part).

266. *See id.*

267. *Id.*, 224 Cal. Rptr. at 687 (Bird, C.J., concurring in part and dissenting in part) (citing *Dunn v. United States*, 284 U.S. 390, 393-94 (1932)).

268. *See id.* at 599-600, 715 P.2d at 647-48, 224 Cal. Rptr. at 687-88 (Bird, C.J., concurring in part and dissenting in part).

269. *See id.* at 600, 715 P.2d at 648, 224 Cal. Rptr. at 688 (Bird, C.J., concurring in part and dissenting in part).

which no legal provisions have been made. I mean to say no such thing. But I do mean to say that although bad laws, if they exist, should be repealed as soon as possible, still, while they continue in force, for the sake of example, they should be religiously observed."²⁷⁰

The California Court of Appeal confronted Justice Kaus's *Dillon* opinion head on in 1986.²⁷¹ The facts were similar to those in *Dillon*: Johnny Partner was convicted of "first degree murder, robbery, and of the special circumstances that the murder was committed during the commission of robbery," thereby invoking the felony-murder rule.²⁷² During deliberations, the jury asked the trial judge whether they could find guilt on robbery and second degree murder.²⁷³ The judge explained to the jurors that they could reach such a verdict if the killing did not result from the robbery.²⁷⁴ On appeal, the defendant relied on Justice Kaus's concurrence in *Dillon* and asserted that the court should have assumed that the jury's question was an attempt to avoid imposing the felony-murder rule therefore entitling them to receive a nullification instruction.²⁷⁵ The Court of Appeal pointed out that the cited opinion was expressly rejected by the lead opinion of the same case.²⁷⁶ The court explained that, faced with the same issue, other courts had routinely held that while a jury may exercise such a power, the power should not be "legitimized" with a jury instruction.²⁷⁷ In expressing its opinion that the jury should not be instructed that it may disregard the law, the Court of Appeal quoted *Dougherty*: "An explicit instruction to a jury 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."²⁷⁸ As in previous California cases, the

270. *Id.* (Bird, C.J., concurring in part and dissenting in part) (quoting Abraham Lincoln, Address at the Young Men's Lyceum, Springfield, Ill. (Jan. 27, 1837), in 1 THE COMPLETE WORKS OF ABRAHAM LINCOLN 44 (John G. Nicolay & John Hay eds., 1905)).

271. *See* *People v. Partner*, 180 Cal. App. 3d 178, 185-86, 225 Cal. Rptr. 502, 506 (1986).

272. *Id.* at 181, 225 Cal. Rptr. at 503.

273. *See id.* at 185, 225 Cal. Rptr. at 506.

274. *See id.*

275. *See id.*

276. *See id.* at 185-86, 225 Cal. Rptr. at 506.

277. *Id.* at 186, 225 Cal. Rptr. at 506.

278. *Id.* (quoting *United States v. Dougherty*, 473 F.2d 1113, 1137 (D.C. Cir. 1972)).

power of the jury to nullify was recognized, though the *right* to do so was not.²⁷⁹

A little more than three weeks after its decision in *Partner*, the California Court of Appeal considered another first degree felony-murder conviction.²⁸⁰ At trial, the defendant's request for jury instructions on lesser included offenses was denied.²⁸¹ On appeal, the defendant argued that Justice Kaus's *Dillon* concurrence regarding jury nullification required that the jury in a felony-murder case "be permitted to determine the degree of the defendant's guilt."²⁸² The defendant further argued that the other justices in *Dillon* impliedly adopted Justice Kaus's nullification opinion.²⁸³ Rejecting the nullification contention once again, the court affirmed the defendant's conviction.²⁸⁴

A new spin on the nullification question is whether the trial court's refusal to give an instruction on jury nullification violates the defendant's Sixth Amendment right to a jury trial. This was the issue on appeal in *People v. Fernandez*.²⁸⁵ In this case, defendant Fernandez was charged with felony false imprisonment by violence and battery with serious bodily injury.²⁸⁶ In the middle of deliberations, the jury sent a note to the trial judge asking whether it could return a guilty verdict to the lesser crime of "assault" instead of "[b]attery with serious bodily injury."²⁸⁷ The basis for the confusion was that although the jurors apparently agreed upon the battery charge, they did not feel the victim's injuries were "serious."²⁸⁸ The court answered the jury's question simply: "[N]o."²⁸⁹ On appeal, defendant alleged that by informing the jury that it could not convict on the lesser offense, the court compelled a guilty verdict on the battery charge²⁹⁰ and thereby violated his Sixth Amendment rights.²⁹¹ At the outset of its opinion, the court stressed that no modern court has held

279. See *id.* (citing *People v. Powell*, 34 Cal. 2d 196, 205 n.2, 208 P.2d 974, 980 n.2 (1949)).

280. See *People v. Williams*, 180 Cal. App. 3d 922, 225 Cal. Rptr. 842 (1986).

281. See *id.* at 924, 225 Cal. Rptr. at 842.

282. *Id.* at 925, 225 Cal. Rptr. at 843.

283. See *id.*

284. See *id.* at 927, 225 Cal. Rptr. at 844.

285. 26 Cal. App. 4th 710, 31 Cal. Rptr. 2d 677 (1994).

286. See *id.* at 712, 31 Cal. Rptr. 2d at 678.

287. *Id.* at 713, 31 Cal. Rptr. 2d at 678-79.

288. *Id.*

289. *Id.*, 31 Cal. Rptr. 2d at 679.

290. See *id.* at 713-14, 31 Cal. Rptr. 2d at 679.

291. See *id.*

that a judge must instruct jurors that they may disregard the law.²⁹² The appellate court recognized that “[a] jury has the ‘undisputed power’ to acquit,” even where its verdict conflicts with the evidence and law as given by the court.²⁹³

Moreover, the majority opinion noted that modern nullification, unlike its historical counterpart in which the jury decided both fact and law, is based upon “the juror’s conscience rather than a different view of the law.”²⁹⁴ Agreeing with precedent that a juror’s duty includes the obligation to follow the law, the court stressed that not requiring this duty “is akin to telling all drivers to drive as fast as they think appropriate without posting a limit as a point of departure. It risks, if not chaos, at least caprice.”²⁹⁵ The court affirmed the modern jury’s duty by reasoning that jurors have redress through their elected representatives for laws they believe are too strict or unfair.²⁹⁶ Based on this reasoning, the appellate court held that the trial judge did not err in refusing to tell the jury it could return a verdict of guilty on the lesser offense when it had unanimously concluded that the defendant was not guilty of the greater.²⁹⁷ “Such a response would have been tantamount to telling the jurors to let their emotions govern their decision and to disregard the law.”²⁹⁸

Punishment prescribed by California’s “three strikes” law was at issue in a 1996 case, *People v. Baca*.²⁹⁹ Defendant Baca was convicted in a three strikes case.³⁰⁰ On appeal, Baca argued that the trial judge should have allowed the jury to consider the harshness of the potential punishment in his case as a basis for acquittal.³⁰¹ The appellate court noted that the judge did inform the jurors, at the beginning of the case, that it was a third-strike prosecution.³⁰² Furthermore, in closing argument, defense counsel stressed that the case was “about

292. *See id.* at 714, 31 Cal. Rptr. 2d at 679.

293. *Id.* (citing *United States v. Moylan*, 417 F.2d 1002, 1006 (4th Cir. 1969)).

294. *Id.* (citing George C. Christie, *Lawful Departures from Legal Rules: “Jury Nullification” and Legitimated Disobedience*, 62 CAL. L. REV. 1289, 1299 (1974)).

295. *Fernandez*, 26 Cal. App. 4th at 715, 31 Cal. Rptr. 2d at 680.

296. *See id.*

297. *See id.* at 715-16, 31 Cal. Rptr. 2d at 680; CAL. PENAL CODE § 667 (West 1997).

298. *Fernandez*, 26 Cal. App. 4th at 716, 31 Cal. Rptr. 2d at 680.

299. 48 Cal. App. 4th 1703, 56 Cal. Rptr. 2d 445 (1996).

300. *See id.* at 1705, 56 Cal. Rptr. 2d at 446.

301. *See id.* at 1705-06, 56 Cal. Rptr. 2d at 447.

302. *See id.* at 1706, 56 Cal. Rptr. 2d at 447.

as serious as it gets in a courtroom [A]ny case that involves *those kinds of consequences* deserves or warrants pretty careful conscientious consideration and deliberation."³⁰³ In its opinion, the appeals court recognized the jury's "undisputed power" to acquit but also noted that the jury should not be informed of that power, "much less invited to use it."³⁰⁴ The court held that since no California court had adopted jury nullification, it would not either.³⁰⁵

In summary, California case law does recognize the jury's ability, or "naked power," to nullify. Nevertheless, no formal instruction from the court or argument by counsel inviting jury nullification is permitted. Despite this restriction, jury nullification takes place suprisingly often.

V. RECENT NEWSMAKING CASES

Although jury nullification has existed in the United States since the pre-Revolutionary War era, jurors have used it frequently in recent history. Commentators proffer explanations for what seems to be a wave of nullification over the past two decades. It may be that in today's less formal setting, jurors feel less intimidated by the authority of the court than in the past. Or, given recent enactments of three-strikes laws and mandatory sentencing schemes, jurors may believe that laws are unjust or that penalties are excessive.³⁰⁶ Some believe that the courtroom provides a forum to address social problems.³⁰⁷ Racial tensions that exist in society do not disappear when citizens take an oath and become jurors on a case. Possibly the American public has softened, accepting excuses and justifications that the law does not. Whatever the reasons, jurors are taking the law into their own hands more frequently.

In 1979 a jury tried Dan White for the murders of San Francisco Mayor George Moscone and Supervisor Harvey Milk.³⁰⁸ White faced two counts of first degree murder and a possible death penalty sentence if convicted.³⁰⁹ White presented a diminished capacity defense,

303. *Id.*

304. *Id.* at 1707, 56 Cal. Rptr. 2d at 448.

305. *See id.* at 1708, 56 Cal. Rptr. 2d at 448.

306. *See* Gail Diane Cox, *Jurors Rise Up Over Principle and Their Perks*, NAT'L L.J., May 29, 1995, at A1.

307. *See* Weinberg-Brodth, *supra* note 39, at 849.

308. *See* Francis J. Moriarty, *White Is Convicted of Voluntary Manslaughter*, WASH. POST, May 22, 1979, at A1.

309. *See* Francis J. Moriarty, *Defense Says White "Unable to Cope,"* WASH. POST, May 2, 1979, at A16.

asserting that junk food was one of the influences that deprived him of the capacity to act with malice.³¹⁰ The jury accepted what has since been euphemistically referred to as "the Twinkie defense."³¹¹ Dan White was convicted of two counts of voluntary manslaughter³¹² and sentenced to the maximum term of seven years and eight months in state prison.³¹³

Twenty members of the Lucchese crime family of La Cosa Nostra were prosecuted on federal racketeering charges.³¹⁴ The trial lasted two years, including five months of jury selection and a year and a half of testimony.³¹⁵ There were eighty-nine witnesses, eight hundred and fifty exhibits, and a transcript of over forty-one thousand pages.³¹⁶ Nevertheless, after less than two days of deliberations, the jury acquitted all twenty defendants on each of the seventy-seven counts.³¹⁷ It was reported that confusion existed regarding the judge's instructions. Judge Harold Ackerman, trial judge on the case, expressed that "[t]oo much was charged against too many, which took too long and resulted in jury nullification."³¹⁸

In 1990 District of Columbia Mayor Marion Barry was "charged with one count of conspiracy to possess cocaine, ten counts of possession of cocaine, and three counts of perjury for allegedly lying to the grand jury that had investigated him."³¹⁹ Barry, caught on videotape smoking crack cocaine, was acquitted on one felony charge; the jury hung on all other felony counts.³²⁰ However, Barry was also convicted of one misdemeanor count of possession.³²¹ United States District Court Judge Thomas Penfield Jackson, who presided over the trial, later told an audience of Harvard law students that the evi-

310. See Maura Dolan, *Why Jurors Err: They're Just Human*, L.A. TIMES, Sept. 25, 1994, at A1.

311. *Id.*

312. See Francis J. Moriarty, *Maximum Term Imposed in San Francisco Killings*, WASH. POST, July 4, 1979, at A3.

313. *See id.*

314. See Otto G. Obermaier, *The Lawyer's Bookshelf*, N.Y. L.J. June 23, 1995, at 2 (book review).

315. *See id.*

316. *See id.*

317. *See id.*

318. *Id.*

319. Butler, *supra* note 20, at 682.

320. See Jeanne Dewey & Brian Blomquist, *5 Years Later, A Very Different Barry, Personal, Public Changes Since Conviction*, WASH. TIMES, Aug. 10, 1995, at C4.

321. *See id.*

dence conclusively proved that Barry was guilty of at least eleven of the thirteen counts charged.³²² The judge complained that the jury ignored overwhelming evidence of guilt and engaged in "anarchy."³²³

In 1991 a Manhattan jury acquitted El-Sayyid Nosair of killing Meir Kahane, founder of the Jewish Defense League.³²⁴ The trial judge declared that the jury's verdict was "against the overwhelming weight of the evidence and devoid of common sense and logic."³²⁵

One year later, a jury acquitted Lemrick Nelson, Jr. of the stabbing death of Yankel Rosenbaum during a violent encounter between blacks and Hasidic Jews in Crown Heights, Brooklyn.³²⁶ Before his death, Rosenbaum had identified Nelson as his attacker.³²⁷ Nelson was arrested with a bloody knife in his pocket and confessed to killing Rosenbaum, although he later recanted.³²⁸ Nelson accompanied jurors to a dinner celebrating his acquittal.³²⁹

Despite admitting to cutting off her husband's penis, Lorena Bobbitt was found not guilty by reason of insanity for the malicious wounding of John Bobbitt.³³⁰ Despite significant evidence to the contrary, John Bobbitt was also acquitted in his criminal trial on charges of marital sexual assault of Lorena.³³¹

A jury in Ventura County, California, failed to convict four Los Angeles police officers for the beating of Rodney King, all of which was caught on videotape.³³² An attorney for the defense argued to the jury that only a "thin blue line" of police officers will risk their lives

322. See Cox, *supra* note 306, at A1.

323. Frank J. Murray, *Race, Distrust of Cops Color Black-Jury Verdicts*, WASH. TIMES, Oct. 4, 1995, at A1 (quoting Judge Jackson's speech at Harvard University).

324. U.S. v. Nosair, 854 F. Supp. 251 (S.D.N.Y. 1994).

325. David Johnston, *Reno Sees Growing Evidence and Makes Call*, N.Y. TIMES, Aug. 26, 1993, at B4.

326. See Jan Hoffman, *Learning from a Loss: Federal Prosecutors Win a Guilty Verdict by Avoiding Mistakes Made in First Trial*, N.Y. TIMES, Feb. 11, 1997, at A1.

327. See *id.* Nelson was convicted of violating Rosenbaum's federal civil rights on February 10, 1997, in federal court. See *id.*

328. See *id.*

329. See *id.*

330. See Dennis Duggan, *For Lorena, Verdict's as Good as It Will Get*, NEWSDAY, Jan. 22, 1994, at A4.

331. See Sean Piccoli, *Now It's Bobbitt's Chance to Tell the Media His Story*, WASH. TIMES, Nov. 11, 1993, at C3.

332. See Marvin Zalman & Maurisa Gates, *Rethinking Venue in Light of the "Rodney King" Case: An Interest Analysis*, 41 CLEV. ST. L. REV. 215, 215-16 (1993).

to keep law abiding citizens safe from the "criminal element."³³³ He went on to explain to jurors that a "certain amount of force is inevitable in maintaining law and order."³³⁴

The King verdicts resulted in the worst race riot in American history and the brutal beating of Reginald Denny.³³⁵ Regardless of the fact that Denny's beating—like King's before—was videotaped, a Los Angeles jury acquitted Damian Williams and Henry Watson of the most serious charges against them: willful, deliberate, premeditated attempted murder.³³⁶ Williams was convicted on one felony count of simple mayhem and for misdemeanor assault charges.³³⁷ Watson was found guilty on a misdemeanor assault charge.³³⁸ Had they been convicted of the attempted murder charges, both would have faced life in prison.³³⁹

Members of the Branch Davidian cult were prosecuted for murder in connection with the FBI raid on their Waco, Texas compound.³⁴⁰ Before the trial in February 1994, jury nullification proponents distributed fifty thousand pamphlets outside the courthouse.³⁴¹ The pamphlets informed potential jurors that they could acquit without fear of punishment.³⁴² All eleven defendants were acquitted.³⁴³

The Menendez brothers riddled their parents with eleven bullets and went on a million-dollar spending spree.³⁴⁴ The first two juries in the case were unable to reach a verdict.³⁴⁵ These juries, hearing the brothers' essentially uncorroborated claims of sexual abuse and death threats if they made the abuse public, could not decide whether they

333. Tony Perry, *Snubbing the Law to Vote on Conscience*, L.A. TIMES, Oct. 5, 1995, at A5.

334. *Id.*

335. See Amy Wallace & John Hurst, "Let's Get on with Life," *Denny Says After Jury Verdicts*, L.A. TIMES, Oct. 19, 1993, at A1.

336. See Edward J. Boyer & John L. Mitchell, *Attempted Murder Acquittal, Deadlock Wind Up Denny Trial*, L.A. TIMES, Oct. 21, 1993, at A1.

337. *See id.*

338. See Wallace & Hurst, *supra* note 335, at A1.

339. *See id.*

340. See Reynolds Holding, *Group Tries to Sway Jurors*, S.F. CHRON., Dec. 11, 1995, at B1.

341. *See Perry, supra* note 333, at A5.

342. *See id.*

343. *See Holding, supra* note 340, at B1.

344. See Ann W. O'Neil, *Menendezes Are Found Guilty of Killing Parents*, L.A. TIMES, Mar. 21, 1996, at A1.

345. *See id.*

murdered their parents.³⁴⁶ Was it nullification based on sympathy, or was there a failure of proof in the minds of the jurors? That debate will continue. Commentators have asserted that the reason Dr. Jack Kevorkian was acquitted in his assisted suicide prosecutions in 1996 was that the jurors decided to follow their instincts instead of the law.³⁴⁷

California judges are seeing a backlash to three strikes cases where, despite sufficient evidence establishing guilt, jurors refuse to convict because of mandatory twenty-five year to life prison terms.³⁴⁸

When Johnnie Cochran urged jurors during his closing argument in the O.J. Simpson trial³⁴⁹ to "send a message"³⁵⁰ to the Los Angeles Police Department, they complied. The jurors deliberated for just over three hours, following nine months of testimony before returning verdicts of not guilty.³⁵¹ The debate continues as to whether Simpson's acquittal resulted from jury nullification or the jurors' view that the prosecution failed to meet its burden of proof.

This is only a sample of the cases that have attracted media attention. There are less widely known cases where nullification has occurred. Although most courts do not instruct on nullification, advocates are becoming more assertive in their efforts to inform the general public of the concept of jury nullification, and advocate that jurors nullify when they feel it is appropriate.

VI. NULLIFICATION ADVOCATES

A. A "Fully Informed Jury Act"

Among the groups attracted to the jury nullification theory, many make "strange bedfellows."³⁵² Members of the National Rifle Association, gun control advocates, abortion rights supporters, pro-life groups, those who support legalizing marijuana, and militia

346. *See id.*

347. *See* Eugene Kane, *Jury Nullification Fails at Being Colorblind*, MILWAUKEE J. SENTINEL, Apr. 9, 1996, at 1.

348. *See* Cox, *supra* note 306, at A1.

349. *People v. Simpson*, No. BA097211 1995 WL 697928 (Cal. Super. Ct. 1995).

350. *Id.* at *10.

351. Sheryl Stolberg, *Will We Ever Get Along?*, L.A. TIMES, Oct. 10, 1995, at 83 (The Simpson Legacy, Special Report).

352. CHARLES DUDLEY WARNER, *MY SUMMER IN A GARDEN* (1870), reprinted in BARTLETT'S FAMILIAR QUOTATIONS 603 (Emily Morison Beck ed., 1980).

groups support a "Fully Informed Jury Act."³⁵³ The proposal, if enacted, would require judges to instruct jurors that they can determine both facts and law.³⁵⁴ The proposed legislation is backed by the Fully Informed Jury Association (FIJA), an organization which supports the idea that jurors have a right to vote their conscience.³⁵⁵ The group contends that jurors can choose to acquit defendants in spite of evidence of guilt beyond a reasonable doubt, if they conclude that it is the right thing to do.³⁵⁶

FIJA alleges three results that will occur if the act becomes law. First, unjustly accused defendants will be satisfied that the "*system actually delivers justice.*"³⁵⁷ Second, "[l]egislators will have access to *regular feedback from ordinary people*" so they can better represent their constituents.³⁵⁸ Third, "[w]hen the laws of the land respect the will of the people, as revealed by their jury verdicts, the people, in turn, will show *more respect for the law.*"³⁵⁹

FIJA was founded in Helmsville, Montana, in 1989. The group's founders say that their purpose for forming the group was to control an out-of-control government.³⁶⁰ The group, which advocates telling jurors that they have the power to judge the law and the facts of any case, claims to have three thousand members nationwide, with one thousand in California and three hundred in San Diego County.³⁶¹ The organization's literature states that if jurors were only supposed to determine the facts, a computer would suffice in their place.³⁶² FIJA argues that nullification is best applied in victimless crimes such as gambling, prostitution, and drug possession.³⁶³

The five presiding judges of the San Diego Municipal Courts signed a general court order against the local FIJA Coordinator and

353. See Korroch & Davidson, *supra* note 10, at 139-40 (citing Stephen J. Adler, *Courtroom Putsch? Jurors Should Reject Laws They Don't Like, Activist Group Argues*, WALL ST. J., Jan. 4, 1991, at A1).

354. See Fully Informed Jury Association, *True or False? When You Sit on a Jury, You Have the Right to Vote Your Conscience* [hereinafter FIJA Pamphlet].

355. See *id.*

356. See Leslie Wolf, *Can Jury Void Law? Proponent Faces Jail*, SAN DIEGO UNION-TRIB., Dec. 6, 1993, at B1.

357. FIJA Pamphlet, *supra* note 354.

358. *Id.*

359. *Id.*

360. See Perry, *supra* note 333, at A5.

361. See Wolf, *supra* note 356, at B1.

362. See FIJA Pamphlet, *supra* note 354.

363. See *id.*

FIJA.³⁶⁴ The order prohibits FIJA members from distributing their literature within 150 feet of San Diego County courthouses.³⁶⁵ The judges claim that FIJA interferes with the jury system and the administration of justice by passing out information urging jurors to violate their oaths.³⁶⁶ FIJA filed for injunctive relief in federal district court alleging that the order was unconstitutional. When the district court held that the order did not violate the group's First Amendment rights, FIJA appealed.³⁶⁷ The Ninth Circuit affirmed, holding that even if the order constituted a "content-based restriction on political speech in a public forum, . . . the regulation [was] necessary to serve the state's compelling interest in protecting the integrity of the jury system and [was] narrowly drawn to achieve that end."³⁶⁸

San Diego Municipal Judge, Harley J. Earwicker, said, "I've taken an oath to uphold the law, to uphold the Constitution and all the laws written by the Legislature, whether or not I agree with them."³⁶⁹ Judges warn jurors that they have sworn to uphold the law and that nullification is a violation of this oath.³⁷⁰

FIJA's assertions of the act's benefits are unreasonable. To believe that the unjustly accused are better served by nullification is naïve and misguided. The American justice system is designed to protect the innocent. Jurors bring their own life experiences and biases with them to the jury panel.³⁷¹ Instructing jurors to ignore the law and "vote their conscience" allows them to use bias in the decision-making process, leading to potentially guilty verdicts in cases of innocent defendants. While the current system may allow some of the same, the requirement that jurors take the law from the judge eliminates the total discretion of the jury and safeguards the wrongly

364. See *Fully Informed Jury Ass'n v. County of San Diego*, 78 F.3d 593, 593 (9th Cir. 1996), *cert. denied*, 117 S. Ct. 63 (1996).

365. The general order prohibited:

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

Id.

366. See *Wolf*, *supra* note 356, at B1.

367. See *Fully Informed Jury Ass'n*, 78 F.3d at 593.

368. *Id.*

369. *Wolf*, *supra* note 356, at B1.

370. See *Perry*, *supra* note 333, at A5.

371. See *id.*

accused. Nullification removes this safeguard.

The belief that nullification allows legislators to better represent the people is false. If the act FIJA proposes is enacted, laws would change daily depending on the twelve people in the jury box for a particular day. Currently, legislators have access to information from a broad base of constituents via letters, telegrams, phone calls, protests, and the media. Nullification merely provides legislators the feedback of twelve people on a given day. This is not democracy; it is anarchy.

A founder of FIJA contends that jury nullification should apply only in cases of victimless crime.³⁷² However, his goal is impossible to accomplish. Once jurors are given unbridled discretion, it becomes impractical to draw the line between "justified" and "unjustified" nullification. Jury nullification permits jurors to ignore the law, allowing no guarantee of which guilty defendants will go unpunished.

The California FIJA coordinator believes that "rights come directly from God, they don't come from the Constitution . . . God created man and man created government, and it's clear that God's law is the supreme law."³⁷³ The Coordinator further believes that laws come from God and the church.³⁷⁴ Even if this were true, not all jurors believe in the same god or church. Legitimizing jury nullification by permitting an instruction on it does not provide a necessarily consistent application of the law in a religiously pluralistic society.

B. Nullification Based Upon Race

Paul Butler, associate professor of law at George Washington University Law School, advocates that African-American jurors nullify the law and acquit black defendants who are clearly guilty of nonviolent crimes.³⁷⁵ According to Professor Butler, jury nullification may be the only way blacks can escape "[t]he tyranny of the majority."³⁷⁶ Butler's contention is that the "black community is better off when some nonviolent lawbreakers remain in the community rather than go to prison."³⁷⁷ He offers nullification as a way for black people

372. See Wolf, *supra* note 356, at B1.

373. *Id.*

374. See *id.*

375. See Butler, *supra* note 20, at 715.

376. *Id.* at 709-10 n.179 (quoting JOHN STUART MILL, ON LIBERTY 7 (Currin V. Shields ed., Liberal Arts Press 1956)).

377. *Id.* at 679.

to combat racism. While Butler does acknowledge that nullification was used in the South to the disadvantage of black defendants, he counters that nullification in approved cases is permissible.³⁷⁸ He argues that Southern jurors "erred in their calculus of justice,"³⁷⁹ however, he sets forth no proposal as to how defendants will be protected from such errors in the future. Butler further asserts that it is a "moral responsibility of black jurors to emancipate some guilty black outlaws."³⁸⁰ While Butler is not proposing a jury instruction on nullification, his goal is to inform African-American jurors of their power to nullify. Professor Butler's argument raises questions about crime and punishment that reach well beyond the scope of jury nullification.

C. Nullification as a Constitutional Right

Alan Schefflin, associate professor of law at Georgetown University Law Center,³⁸¹ believes that jury nullification is essential to restoring public faith in the courts and making laws accountable to the people they serve.³⁸² Like Butler, however, Schefflin does not advocate a jury instruction regarding nullification.³⁸³ Schefflin acknowledges the day-to-day legal changes that would occur if juries were permitted to determine laws.³⁸⁴ Nevertheless, he bases his support of nullification on a defendant's Sixth Amendment right to a jury trial.³⁸⁵

Schefflin states that the Sixth Amendment includes "a right of the defendant to be given the chance to be acquitted, even though such acquittal conflicts with both the facts and the judge's instructions on the law."³⁸⁶ He asserts that the jury should be told about the full acquittal rights of the defendant.³⁸⁷ Hence, although there is no "right" to a jury nullification instruction, in most cases, informing the jury of such an acquittal right would be equivalent to an outright nullification instruction.

In addition to the alleged Sixth Amendment basis, the right to a

378. *See id.* at 705.

379. *Id.*

380. *Id.* at 679.

381. *See* Schefflin, *supra* note 20, at 168.

382. *See id.* at 224-25.

383. *See* Wolf, *supra* note 356, at B1.

384. *See id.*

385. *See* Alan Schefflin & John Van Dyke, *Jury Nullification: The Contours of Controversy*, 43 LAW & CONTEMP. PROBS. 51, 55 (1980).

386. Schefflin, *supra* note 20, at 219.

387. *See id.*

nullification instruction has also been presented on equal protection grounds.³⁸⁸ Proponents argue that defendants will benefit or suffer randomly, depending on whether or not the jury is aware of its power to nullify.³⁸⁹

The many arguments in support of jury nullification, both constitutional and non-constitutional, run the risk of creating a system where anything goes. As President John F. Kennedy once said, “[O]ur Nation is founded on the principle that observance of the law is the eternal safeguard of liberty and defiance of the law is the surest road to tyranny.”³⁹⁰

VII. THE JUDICIARY

A. *Voir Dire*

The French term “voir dire” means “[t]o speak the truth.”³⁹¹ “Voir dire is the face-to-face courtroom examination of prospective jurors for the purpose of ascertaining their ability and competency to decide a particular controversy.”³⁹² Voir dire aids in fulfilling defendants’ Sixth Amendment constitutional guarantee of trial by an impartial jury of their peers.³⁹³ This right of impartiality, however, does

388. See George C. Christie, *Lawful Departures from Legal Rules: “Jury Nullification” and Legitimated Disobedience*, 62 CAL. L. REV. 1289, 1303 (1974).

389. See *id.*

390. President John F. Kennedy, Radio and Television Report to the Nation on the Situation at the University of Mississippi (Sept. 30, 1962) in 1962 PUB. PAPERS 726-27.

391. BLACK’S LAW DICTIONARY 1575 (6th ed. 1990).

392. Debra K. Buteyn, Note, *People v. Williams: Expansion of the Permissible Scope of Voir Dire in the California Courts*, 15 LOY. L.A. L. REV. 381, 381 (1982); see also Beth S. Ayres, Note, *Preempting the Peremptory: An Examination of J.E.B. v. Alabama ex rel. T.B.*, 3 GEO. MASON INDEP. L. REV. 233, 234 (1994) (defining “voir dire” as “the stage of the jury selection process at which the judge, the attorneys, or both, question prospective jurors in an attempt to uncover potential biases”).

Jury selection first begins with a pool of qualified citizens called to serve on jury duty for a specified time period. See Roger C. Harper, Note, *Rethinking Limitations on the Peremptory Challenge*, 85 COLUM. L. REV. 1357, 1358 (1985). From the jury pool, the court randomly chooses individuals for a specified trial to be venirepersons. The court then poses questions to the venirepersons during voir dire and removes certain individuals with either challenges for cause or peremptory challenges. “The process of seating a venire, conducting voir dire, and exercising challenges continues until a sufficient number of jurors has been selected.” *Id.* at 1359.

393. See U.S. CONST. amend. VI; *Kelly v. Trans Globe Travel Bureau, Inc.*, 60

not include the right to jury nullification.³⁹⁴ Although the impartial jury possesses the power to nullify, it does not have the "right" to ignore the law.³⁹⁵ During voir dire, if a juror expresses an unwillingness to follow the law, the court can remove the juror from the panel.³⁹⁶ Thus, the court may use voir dire as a pre-trial tool to avoid jury nullification for the benefit of both parties to the case.

1. Challenges for cause and peremptory challenges

In California, voir dire generally begins with the trial judge asking the venirepersons questions regarding occupation, marital status, prior jury experience, and law enforcement experience, among other preliminary questions.³⁹⁷ Next, in civil cases, both parties normally conduct their own voir dire on the pool of potential jurors.³⁹⁸ However, in California criminal matters, the court conducts voir dire and may, at its discretion, allow counsel to conduct additional voir dire. It is after this questioning of potential jurors that both parties and the judge have the opportunity to raise challenges—for example, objections to the potential juror's qualifications for selection.³⁹⁹ Challenges for cause and peremptory challenges preserve the constitutional right to an impartial jury.⁴⁰⁰

Cal. App. 3d 195, 203, 131 Cal. Rptr. 488, 493 (1976).

394. See *Lee v. State*, 743 P.2d 296, 300 (Wyo. 1987) (Thomas, J., dissenting). *But see* Korroch & Davidson, *supra* note 10, at 133 (arguing that the court should allow argument and instructions on jury nullification); Andrew D. Leipold, *Rethinking Jury Nullification*, 82 VA. L. REV. 253, 255-56 (1996) (contending there has been a movement to require judges to instruct juries on their power to nullify).

395. See *United States v. Trujillo*, 714 F.2d 102, 106 (11th Cir. 1983); *United States v. Washington*, 705 F.2d 489, 494 (D.C. Cir. 1983).

396. See *Poyner v. Commonwealth*, 329 S.E.2d 815, 825 (Va. 1985).

397. See Emily M. De Falla, Note, *Voir Dire for California's Civil Trials: Applying the Williams Standard*, 39 HASTINGS L.J. 517, 521 & n.17 (1988).

398. See *id.* at 521.

399. See *id.*

400. See *Swain v. Alabama*, 380 U.S. 202, 219-20 (1965); Buteyn, *supra* note 392, at 383 & n.15; see also CALIFORNIA CONTINUING EDUCATION OF THE BAR, EFFECTIVE JURY VOIR DIRE 6 (1987) [hereinafter CEB] (stating that voir dire questioning is used to determine whether challenges for cause or peremptory challenges are appropriate).

Voir dire differs in civil and criminal cases in the number of peremptory challenges allowed. In civil cases, the court allows each party between six and eight peremptory challenges. See CAL. CIV. PROC. CODE § 231(c) (West Supp. 1997); CAL. SUPER. CT. R. 228 (1996) (discussing judicial rules on voir dire examination in civil trials). In criminal cases seeking the death sentence, the court allows each party twenty peremptory challenges. See CAL. CIV. PROC. CODE § 231(a). In all other criminal trials the court allows each party ten peremptory challenges unless the crime is punishable by imprisonment of 90 days or less, in

Challenges for cause allow the removal of "jurors who are unable to fulfill the Sixth Amendment's mandate of impartiality because of either actual prejudice or prejudice implied from the juror's relationship to the case or the parties."⁴⁰¹ There is no limit on how many jurors the judge may dismiss based upon an attorney's challenge for cause.⁴⁰² Challenges for cause—that is, for actual or implied bias—must be disclosed on the record and found by the court to be sufficient in law.⁴⁰³ The court will sustain a challenge for cause based upon actual bias when the juror's state of mind or attitude towards the parties inhibits the juror from being impartial.⁴⁰⁴ On the other hand, statutory grounds govern challenges for cause based upon implied biases.⁴⁰⁵ The court will automatically presume implied bias if any juror falls within specified statutory categories, which include being related to the defendant, being adversely involved in a civil action with the defendant, or having served on the grand jury that brought about the defendant's indictment.⁴⁰⁶

which case, the court allows each party six peremptory challenges. See CAL. CIV. PROC. CODE § 231(a)-(b).

401. Buteyn, *supra* note 392, at 383.

402. See Shirley S. Abrahamson, *Justice and Juror*, 20 GA. L. REV. 257, 283 (1986).

403. See Edward V. Byrne, *The Demise of the Peremptory Challenge: Evisceration of an Ancient Privilege*, 42 KAN. L. REV. 15, 17 (1994).

404. See Buteyn, *supra* note 392, at 383-84.

405. See *id.* at 384.

406. See CAL. PENAL CODE § 1074 (West 1997). The only grounds to bring a challenge based upon implied bias are as follows:

1. Consanguinity or affinity within the fourth degree to the person alleged to be injured by the offense charged, or on whose complaint the prosecution was instituted, or to the defendant.
2. Standing in the relation of guardian and ward, conservator and conservatee, attorney and client, master and servant, or landlord and tenant, or being a member of the family of the defendant, or of the person alleged to be injured by the offense charged, or on whose complaint the prosecution was instituted, or in his employment on wages.
3. Being a party adverse to the defendant in a civil action, or having complained against or been accused by him in a criminal prosecution.
4. Having served on the grand jury which found the indictment, or on a coroner's jury which inquired into the death of a person whose death is the subject of the indictment or information.
5. Having served on a trial jury which has tried another person for the offense charged.
6. Having been one of a jury formerly sworn to try the same charge, and whose verdict was set aside, or which was discharged without a verdict, after the case was submitted to it.
7. Having served as a juror in a civil action brought against the defendant for the act charged as an offense.
8. If the offense charged be punishable with death, the entertaining of

Peremptory challenges to excuse a potential juror do not require a showing of cause.⁴⁰⁷ The challenge is "without explanation and without judicial scrutiny."⁴⁰⁸ "Time and scope restraints on voir dire questioning require a vehicle to remove those jurors who seem to be biased but whose answers do not evince a reason rising to the level necessary to sustain a challenge for cause."⁴⁰⁹ Even when an attorney cannot prove that a prospective juror is biased, the peremptory challenge allows for the removal of that juror in question.⁴¹⁰

However, there is a constitutional limitation on the use of peremptory challenges. Peremptory challenges cannot be used if they are based solely upon a "group bias."⁴¹¹ Group bias occurs "when a party presumes that certain jurors are biased merely because they are members of an identifiable group distinguished on racial, religious, ethnic, or similar grounds."⁴¹² The use of peremptory challenges rooted in a group bias upsets the natural demographics of the venire, thereby violating the defendant's constitutional right to be tried by a jury selected from a representative cross-section of the community.⁴¹³

The peremptory challenge is a very meaningful tool to the trial lawyer. To effectively use the peremptory challenge, "it must be prefaced by a voir dire examination that is sufficiently broad in scope to permit the attorney to discover a juror's bias."⁴¹⁴ Consequently, the historical scope of voir dire has grown to "include questions designed to elicit information helpful to the intelligent exercise of peremptory challenges."⁴¹⁵

such conscientious opinions as would preclude his finding the defendant guilty; in which case he must neither be permitted nor compelled to serve as a juror.

Id.

407. See Harper, *supra* note 392, at 1359.

408. See *id.* (quoting Swain v. United States, 380 U.S. 202, 212 (1965)).

409. Harper, *supra* note 392, at 1360. But see CEB, *supra* note 400, at 25 (stating that many attorneys exercise peremptory challenges based upon a "hunch").

410. See Harper, *supra* note 392, at 1360.

411. See People v. Wheeler, 22 Cal. 3d 258, 276-77, 583 P.2d 748, 761-62, 148 Cal. Rptr. 890, 903 (1978). Both the prosecution and the defense can bring a "Wheeler Motion" before the court to challenge the alleged unconstitutional use of the peremptory challenge. See *id.*

412. *Id.* at 276, 583 P.2d at 761, 148 Cal. Rptr. at 902.

413. De Falla, *supra* note 397, at 523

414. See *id.*

415. *Id.*

2. A historical look at voir dire

In 1855 the court in *People v. Backus*⁴¹⁶ established the right of counsel to examine the venire prior to a challenge. However, in the 1912 decision of *People v. Edwards*,⁴¹⁷ the court held that counsel did not have a right to voir dire the venire "solely for the purpose of a peremptory challenge or for the allowance of questions which do not tend to prove some fact material to a challenge for cause."⁴¹⁸ The court noted that there was an increasing tendency for counsel to abuse voir dire by questioning the venire for extended periods of time in the hopes of eliciting a basis for a peremptory challenge.⁴¹⁹ The court concluded that proper examination of the venire could be accomplished by mimicking the federal practice of having the attorney submit questions to the court, which in turn, would question the venire.⁴²⁰

"Despite the *Edwards* decision, the problem of lengthy and inordinate *voir dire* continued, and in 1927 the Commission for the Reform of Criminal Procedure in California recommended the enactment of a statute to govern the procedure."⁴²¹ The Commission proposed the following statute: "It shall be the duty of the trial court to examine the prospective jurors and to select a fair and impartial jury. He *may*, in his discretion, permit reasonable examination of prospective jurors by counsel for the people and for the defendant."⁴²² The legislature, however, did not enact that specific version; instead it enacted Penal Code section 1078.⁴²³ Penal Code section 1078 stated: "It shall be the duty of the trial court to examine the prospective jurors to select a fair and impartial jury. He shall permit reasonable examination of prospective jurors by counsel for the people and for the defendant."⁴²⁴ Later, in 1974, the legislature amended Penal Code section 1078 to provide that the judge "shall permit reasonable examination of prospective jurors by counsel for the people and for the

416. 5 Cal. 275 (1855).

417. 163 Cal. 752, 127 P. 58 (1912).

418. *Id.* at 754-55, 127 P. at 59.

419. *See id.* at 753, 127 P. at 58.

420. *See People v. Crowe*, 8 Cal. 3d 815, 824, 506 P.2d 193, 199, 106 Cal. Rptr. 369, 375 (1973).

421. *Id.* at 822, 506 P.2d at 197, 106 Cal. Rptr. at 373.

422. *Id.* (quoting REPORT OF THE COMM'N FOR THE REFORM OF CRIMINAL PROCEDURE IN CALIFORNIA at 19 (1927)).

423. *See id.*

424. *Id.* (emphasis omitted) (quoting CAL. PENAL CODE § 1078) (repealed 1997).

defendant, such examination to be conducted orally and directly by counsel."⁴²⁵

In 1981 the California Supreme Court in *People v. Williams*⁴²⁶ abandoned the rule expressed in *Edwards*.⁴²⁷ The court criticized the *Edwards* rule as being arbitrary, difficult to apply, and insensitive to the defendant's constitutional right to a fair and impartial jury.⁴²⁸ *Williams* defined the scope of voir dire by stating that counsel "should be allowed to ask questions reasonably designed to assist in the intelligent exercise of peremptory challenges whether or not such questions are also likely to uncover grounds sufficient to sustain a challenge for cause."⁴²⁹ The court in *Williams* further stated that endless and unfocused questioning of jurors should not be tolerated by the court.⁴³⁰ Yet, "expedition should not be pursued at the cost of the quality of justice."⁴³¹ The court left intact the "considerable discretion of the trial court to contain voir dire within reasonable limits."⁴³²

In 1990 the law governing voir dire changed yet again. The passage of section 7 of Proposition 115 placed restrictions on voir dire. The California Code of Civil Procedure, section 223, as amended by Proposition 115, provides that the court shall conduct voir dire, but counsel may conduct voir dire on the venire upon a showing of good cause.⁴³³ The Code of Civil Procedure, section 223, states:

In a criminal case, the court shall conduct the examination of prospective jurors. However, the court may permit the parties, upon a showing of good cause, to supplement the examination by such further inquiry as it deems proper, or shall itself submit to the prospective jurors upon such a showing, such additional questions by the parties as it deems proper

Examination of prospective jurors shall be conducted only in aid of the exercise of challenges for cause.

The trial court's exercise of its discretion in the manner

425. CAL. PENAL CODE § 1078 (West 1996) (repealed 1997).

426. 29 Cal. 3d 392, 628 P.2d 869, 174 Cal. Rptr. 317 (1981).

427. *See id.* at 398, 628 P.2d at 871, 174 Cal. Rptr. at 319.

428. *See id.* at 398-99, 628 P.2d at 871, 174 Cal. Rptr. at 319.

429. *Id.* at 407, 628 P.2d at 877, 174 Cal. Rptr. at 325; *see also* Franklin Delano Strier, *Through the Jurors' Eyes*, A.B.A. J., Oct. 1988, at 78, 80 [hereinafter Strier, *Jurors' Eyes*] (discussing the rule expressed in *Edwards*).

430. *See Williams*, 29 Cal. 3d at 408, 628 P.2d at 877, 174 Cal. Rptr. at 325.

431. *Id.* (quoting *United States v. Blount*, 479 F.2d 650, 652 (6th Cir. 1973)).

432. *Id.*

433. *See* CAL. CIV. PROC. CODE § 223 (West Supp. 1997).

in which voir dire is conducted shall not cause any conviction to be reversed unless the exercise of that discretion has resulted in a miscarriage of justice, as specified in Section 13 of Article VI of the California Constitution.⁴³⁴

The Code of Civil Procedure, section 223, as amended, is the current California law regarding voir dire by counsel.

3. Scope of voir dire

Voir dire explores the "subtle nuances" of the venireperson's conscience to ascertain any predispositions regarding the case at hand.⁴³⁵ This process "functions as a method . . . to ensure that the jury is composed of qualified individuals who are competent to determine the factual issues presented without bias, prejudice, or partiality."⁴³⁶ However, counsel may not use voir dire to preview the case for jurors, to persuade the jurors to take a particular stance on the issues, or to prejudice the jury for or against a party.⁴³⁷ The limitation of scope of inquiry during voir dire, intended to avoid abuses and meet the goal of impartiality, lies with the discretion of the court.⁴³⁸

In *People v. Champion*,⁴³⁹ the California Supreme Court determined the permissible scope of voir dire. The jury found Stephen Allen Champion guilty of one count of burglary and two counts of murder.⁴⁴⁰ Defense counsel had previously made a motion to limit the scope of the questions during voir dire.⁴⁴¹ Defense counsel had requested that prospective jurors be asked a maximum of four ques-

434. *Id.*

435. See Buteyn, *supra* note 392, at 381 (citing *Crawford v. Bounds*, 395 F.2d 297, 312 (4th Cir. 1968)).

436. *Id.*

437. See *People v. Visciotti*, 2 Cal. 4th 1, 47-48, 825 P.2d 388, 412, 5 Cal. Rptr. 2d 495, 519 (1992). But see *Strier, Jurors' Eyes*, *supra* note 429, at 80 (asserting that voir dire is used to condition jurors rather than to select them).

438. See *People v. Lucas*, 12 Cal. 4th 415, 479, 907 P.2d 373, 414, 48 Cal. Rptr. 2d 525, 566 (1995); *People v. Champion*, 9 Cal. 4th 879, 908, 891 P.2d 93, 107, 39 Cal. Rptr. 2d 547, 561 (1995); *Visciotti*, 2 Cal. 4th at 48, 825 P.2d at 412, 5 Cal. Rptr. 2d at 519; *People v. Pinholster*, 1 Cal. 4th 865, 915, 824 P.2d 571, 589, 4 Cal. Rptr. 2d 765, 783 (1992); *People v. Edwards*, 54 Cal. 3d 787, 829, 819 P.2d 436, 463, 1 Cal. Rptr. 2d 696, 723; *People v. Mason*, 52 Cal. 3d 909, 939, 802 P.2d 950, 966, 277 Cal. Rptr. 166, 182 (1991); *People v. Johnson*, 47 Cal. 3d 1194, 1224, 767 P.2d 1047, 1059, 255 Cal. Rptr. 569, 581 (1989).

439. 9 Cal. 4th 879, 891 P.2d 93, 39 Cal. Rptr. 2d 547 (1995).

440. See *id.* at 897, 891 P.2d at 100, 39 Cal. Rptr. 2d at 554.

441. See *id.* at 907, 891 P.2d at 107, 39 Cal. Rptr. 2d at 561.

tions and that the jurors limit their answers to "yes" or "no."⁴⁴²

The supreme court held that the permissible scope of voir dire rests in the discretion of the trial court.⁴⁴³ Accordingly, "[t]he trial court was under no duty to limit the prospective jurors to 'yes or no' answers, or to limit voir dire in the manner suggested by defendant Champion."⁴⁴⁴

In *People v. Mason*,⁴⁴⁵ defense counsel for David Edwin Mason proposed a voir dire question that the trial court would not allow before potential jurors.⁴⁴⁶ The defendant argued that the trial court had impermissibly limited the scope of voir dire.⁴⁴⁷

A jury convicted Mason of five counts of first degree murder.⁴⁴⁸ Within a ten-month period, the defendant had entered the homes of four elderly people, burglarized the victims, and then strangled them to death.⁴⁴⁹ The age of his victims ranged from seventy-two to eighty-three years old.⁴⁵⁰ The fifth murder was of a fellow inmate named Boyd Johnson.⁴⁵¹ Mason strangled Johnson and then hung him from a shower rod with a towel to make it appear as though Johnson had committed suicide.⁴⁵²

Defense counsel wanted to pose a question to the venire that would ask the individuals to assume that they, as jurors, had found Mason guilty of five counts of first degree murder.⁴⁵³ Defense counsel wanted to inquire, based upon the evidence in the following question, whether the venire would vote for death:

[F]our of the murder victims were elderly; one was 69, [two] in their 70's and one who was 83 years old; that each of the elderly victims . . . was beaten and then strangled to death; that each of the [four] elderly victims was robbed of a small amount of money or goods; that in the [fifth] case, the killing of Boyd Johnson, that Boyd Johnson was an inmate in the jail along with Mr. Mason and that Mr. Johnson was beaten and then strangled and then hung with a noose from

442. *See id.*

443. *See id.* at 908, 891 P.2d at 107, 39 Cal. Rptr. 2d at 561.

444. *Id.*

445. 52 Cal. 3d 909, 802 P.2d 950, 277 Cal. Rptr. 166 (1991).

446. *See id.* at 940, 802 P.2d at 967, 277 Cal. Rptr. at 183.

447. *See id.* at 939, 802 P.2d at 966, 277 Cal. Rptr. at 182.

448. *See id.* at 918, 802 P.2d at 953, 277 Cal. Rptr. at 169.

449. *See id.* at 919, 802 P.2d at 953, 277 Cal. Rptr. at 169.

450. *See id.*

451. *See id.*

452. *See id.* at 926, 802 P.2d at 958, 277 Cal. Rptr. at 174.

453. *See id.* at 940 n.9, 802 P.2d at 967 n.9, 277 Cal. Rptr. at 183 n.9.

a shower curtain rod.⁴⁵⁴

The California Supreme Court found that the defense counsel's question would give the jurors a highlight of the facts of the case and would compel the jurors to make a decision to vote in a particular way before the trial's completion.⁴⁵⁵ The court further stated that "[i]t is not a proper object of voir dire to obtain a juror's advisory opinion based upon a preview of the evidence."⁴⁵⁶ The court held that the trial court had properly exercised its discretion in limiting voir dire.⁴⁵⁷

Like *Mason*, *People v. Visciotti*⁴⁵⁸ is a case in which voir dire possibly exceeded its permissible scope. Yet, in this case, defense counsel failed to object to the prosecution's questioning.⁴⁵⁹ In *Visciotti*, John Louis Visciotti was tried and convicted by a jury of first degree murder, attempted murder, and robbery.⁴⁶⁰ Visciotti and Brian Hefner needed extra money, so they devised a plan to rob two of their coworkers.⁴⁶¹ Visciotti and Hefner led the two coworkers to a remote area and robbed them.⁴⁶² After the robbery, Visciotti shot the first coworker.⁴⁶³ The bullet grazed the heart and entered the lung of the first coworker, causing him to die of blood loss.⁴⁶⁴ Visciotti then shot the second coworker in the torso, shoulder, and eye, leaving him for dead.⁴⁶⁵ Fortunately, the second coworker survived the attack.⁴⁶⁶

The defendant claimed that during voir dire, the prosecution biased the jury by using case specific hypothetical questions to condition or forewarn the venire.⁴⁶⁷ The prosecution asked one prospective

454. *Id.*

455. *See id.* at 940, 802 P.2d at 967, 277 Cal. Rptr. at 183.

456. *See id.*

457. *See id.*

458. 2 Cal. 4th 1, 825 P.2d 388, 5 Cal. Rptr. 2d 495 (1992).

459. *See id.* at 47-48, 825 P.2d at 412, 5 Cal. Rptr. 2d at 519.

460. *See id.* at 27-28, 825 P.2d at 398, 5 Cal. Rptr. 2d at 505.

461. *See id.* at 28-29, 825 P.2d at 399, 5 Cal. Rptr. 2d at 506.

462. *See id.*

463. *See id.* at 29, 825 P.2d at 399, 5 Cal. Rptr. 2d at 506.

464. *See id.*

465. *See id.*

466. *See id.*

467. *See id.* at 36, 825 P.2d at 404, 5 Cal. Rptr. 2d at 511. The defendant's complaint of indoctrinating the jury is known as improper "*Hovey* voir dire." *See id.* at 47, 825 P.2d at 412, 5 Cal. Rptr. 2d at 519. *Hovey* voir dire seeks to determine if, because of his views on capital punishment, any prospective juror would "vote *against* the death penalty without regard to the evidence produced at trial." *People v. Clark*, 50 Cal. 3d 583, 597, 789 P.2d 127, 136, 268 Cal. Rptr. 399, 408 (1990) (quoting *People v. Adcox*, 47 Cal. 3d 207, 250, 763 P.2d 906, 929, 253 Cal.

juror the following question to determine whether, under such facts, the juror would be able to vote for the death penalty:

If we get to the penalty phase, if we get that far, then you've already found the man guilty of first degree murder. It's a horrible crime. And you found he committed this murder while he was engaged in a robbery, based on facts that would be something like a man decides to commit a robbery, arms himself with a handgun to make sure he's successful, robs his victim. During the course of the robbery it occurs to him that if the victim is not alive, there won't be anybody going to the police and complain So, realizing that, the robber points his gun at the victim, pulls the trigger, shoots him once through the heart and kills him.⁴⁶⁸

The California Supreme Court stated that the questioning regarding the death penalty phase of the trial should be framed to determine whether the prospective juror would refuse to vote for the death penalty regardless of the evidence presented at trial.⁴⁶⁹ "It was not necessary, therefore, to permit extensive questioning of the prospective jurors during . . . voir dire regarding their willingness to impose the death penalty based on the anticipated facts of, or a hypothetical set of facts based on, the case to be tried."⁴⁷⁰

The court noted that it would not presume, even if the questioning was beyond the permissible scope of voir dire, that defense counsel should have objected to such a line of questioning.⁴⁷¹ The court held that "[a]bsent a timely objection . . . any claim of abuse of discretion is deemed to have been waived."⁴⁷²

Rptr. 55, 78 (1988); *Wainwright v. Witt*, 469 U.S. 412, 416 (1985); *see also* *Strier, Juror's Eyes supra* note 429, at 80 (stating that a judge's survey indicated that up to eighty percent of voir dire questioning used by attorneys is to try to indoctrinate the jurors).

468. *Visciotti*, 2 Cal. 4th at 46, 825 P.2d at 411, 5 Cal. Rptr. 2d at 518.

469. *See id.* at 47, 825 P.2d at 412, 5 Cal. Rptr. 2d at 519, 1 Cal. 4th 865, 915, 824 P.2d 571, 590, 4 Cal. Rptr. 2d 765, 784 (1992).

470. *Id.*; *see also Pinholster*, 1 Cal. 4th 865, 915, 824 P.2d 571, 590, 4 Cal. Rptr. 765, 784 (1992) (stating that the trial court has discretion to limit the scope of voir dire when the questions are couched with facts similar to the case at hand in order to prevent indoctrinating the jury).

471. *See Visciotti*, 2 Cal. 4th at 47 n.17, 825 P.2d at 412 n.17, 5 Cal. Rptr. 2d at 519 n.17.

472. *Id.* at 48, 825 P.2d at 412, 5 Cal. Rptr. 2d at 519; *see also Rousseau v. West Coast House Movers*, 256 Cal. App. 2d 878, 881, 64 Cal. Rptr. 655, 658 (1967) (stating that failure to make a timely objection to the court's voir dire examination precludes a future attack on such grounds); *cf. Clark*, 3 Cal. 4th at 155, 833 P.2d at 625, 10 Cal. Rptr. 2d at 618 (contending that where the defense has not fully exercised the allotted peremptory challenges and fails to assert dissatisfac-

The responsibility to conduct voir dire lies first with the court. If counsel is given the opportunity to conduct voir dire, counsel must make a careful inquiry of the potential jurors to try to safeguard against jury nullification.

4. The need to guard against nullification

The main goal of voir dire is to protect a defendant's constitutional right to a trial by an impartial and fair jury.⁴⁷³ "The requirement of impartiality demands that *voir dire* examination serve as a filter capable of screening out prospective jurors who are unable to lay aside any opinion as to [fault or as to] guilt or innocence and render a verdict based on the evidence presented in court."⁴⁷⁴ In serving the demands of impartiality, voir dire can also help prevent impaneling a jury likely to nullify.

Many of the cases depicting the scope of voir dire are death penalty cases.⁴⁷⁵ They offer a helpful insight into the proper scope of questioning on jury nullification. The court determines jury nullification based upon the intricate facts of each case. Under *Williams* and *Mason* it is clear that attorneys may not question the venire on particular facts that might preview the case at hand to determine if a potential juror might lean towards nullification.⁴⁷⁶ Yet, an attorney may pose the simple question: Would you follow the law even if you did not agree with it? This type of questioning aids in creating the basis for a peremptory challenge as suggested under *Williams*. Thus, voir dire can be a vital instrument to probe whether or not a potential juror may tend to refuse to follow the law and thus can help prevent

tion with the selected jury, then any error in including unwanted prospective jurors is harmless).

473. See *United States v. Liddy*, 509 F.2d 428, 434 (D.C. Cir. 1974).

474. *Id.*

475. See *People v. Lucas*, 12 Cal. 4th 415, 476, 907 P.2d 373, 412, 48 Cal. Rptr. 2d 495, 564 (1995); *People v. Sanders*, 11 Cal. 4th 475, 475, 905 P.2d 420, 420, 46 Cal. Rptr. 2d 751, 751 (1995); *People v. Champion*, 9 Cal. 4th 879, 891 P.2d 93, 39 Cal. Rptr. 2d at 547 (1995); *People v. Kirkpatrick*, 7 Cal. 4th 988, 988, 874 P.2d 248, 248, 30 Cal. Rptr. 2d 818, 818 (1994); *Visciotti*, 2 Cal. 4th at 1, 825 P.2d at 388, 5 Cal. Rptr. 2d at 495; *Pinholster*, 1 Cal. 4th at 865, 824 P.2d at 571, 4 Cal. Rptr. 2d at 765; *People v. Mason*, 52 Cal. 3d 909, 802 P.2d 950, 277 Cal. Rptr. 166 (1991); see also Stephen Gillers, *Proving the Prejudice of Death-Qualified Juries After Adams v. Texas*, 47 U. PITT. L. REV. 219, 225-26 (1985) (discussing the prevention of jury nullification by voir dire in death penalty cases).

476. See *People v. Williams*, 29 Cal. 3d 392, 408, 628 P.2d 869, 877, 174 Cal. Rptr. 317, 325 (1981); *Mason*, 52 Cal. 3d at 940, 802 P.2d at 967, 277 Cal. Rptr. at 183.

jury nullification.

The court must uproot potential jurors' tendencies to ignore the law prior to trial. At the conclusion of trial, the court cannot require the jury to give a justification of its verdict.⁴⁷⁷ "Juries thus can introduce into the law a flexibility and responsiveness to special circumstances that may [seem to] be important to its public acceptance."⁴⁷⁸ Jury nullification is a "covert and illegitimate power, dangerous to the proper functioning of law."⁴⁷⁹ Voir dire must guard against nullification so that passion, mercy, bias, or prejudice does not determine the outcome of trials.

B. What Judges and Lawyers Can Do to Avoid Nullification

Proper voir dire can aid in the prevention of nullification. Although no instruction on jury nullification is given, a lack of instruction will not necessarily prevent jurors from nullifying. Jurors must be educated about their duty to apply the facts, as they determine them to be, to the law given to them by the judge. Affirmative steps must be taken by the court and counsel to avoid empaneling a jury prone to nullify.

1. A suggested technique for the court to follow

The court can help prevent jury nullification by conducting a thorough examination of potential jurors during the voir dire process. In conducting voir dire, the court should focus on the jurors' ability to follow the law, to be a fair judge of all witnesses, to set aside personal beliefs and biases, to overcome personal opinions towards the defendant, and to disregard the penalty when making a decision.

In a case which lends itself to jury nullification concerns, a chambers conference between the judge and all counsel should take place prior to jury selection. If the judge does not invite such a meeting, counsel should request it. During the conference, the judge should instruct counsel regarding voir dire and the scope of questioning.

Essential to the voir dire process is the oath administered to

477. See Toni M. Massaro, *Peremptories or Peers?—Rethinking Sixth Amendment Doctrine, Images, and Procedures*, 64 N.C. L. REV. 501, 512 (1986); see also Leipold, *supra* note 394, at 255 n.5 (asserting that the difficulty in determining why a jury reached a particular verdict makes it hard to provide specific case examples of nullification).

478. Massaro, *supra* note 477, at 512.

479. Zalman & Gates, *supra* note 332, at 221.

jurors. The court clerk gives the following oath to the prospective jury panel:

You do, and each of you, understand and agree that you will accurately and truthfully answer, under penalty of perjury, all questions propounded to you concerning your qualifications and competency to serve as a trial juror in the matter pending before this court; and that failure to do so may subject you to criminal prosecution.⁴⁸⁰

Reminding jurors of this oath may help them search deeper when answering voir dire questions.

The distribution of literature advocating nullification encouraged Los Angeles criminal judges to remind jurors of their responsibility to tell the truth during voir dire questioning. To focus jurors on their obligation, judges should advise jurors that their verdicts should be based only on the evidence presented in court and on the law as stated by the court.

One successful technique the court can use to avoid jury nullification is to pose a two-sided coin scenario during voir dire. For example, jurors are asked in both criminal and civil cases whether they have any family or friends in law enforcement. Assume one juror has a close relative who is a police officer with whom the juror keeps in close contact and for whom the juror has high regard. At this point it is vital for the court to inquire whether this juror can put aside personal feelings for the relative while evaluating the credibility and veracity of witness testimony. The concern is that the juror will give more weight to a police officer's testimony merely because that person is a police officer. The court must ask the juror whether the juror will evaluate the credibility of all witnesses by the same standards.

The same is true on the flip side of the coin. For example, assume that potential jurors indicate that they have had primarily negative experiences with law enforcement. Jurors may express cynicism or a lack of trust for law enforcement. Here again, it is vital that the court inquire as to whether this juror can set aside those personal feelings and judge each witness fairly and consistently and by the same standards.

The court needs to convey that there may be many different

480. Memorandum from James A. Bascue, Supervising Judge of the Central Criminal Division, Los Angeles Superior Court, to All Judges Assigned to Central Criminal Division, Los Angeles Superior Court (Jan. 23, 1996) (on file with *Loyola of Los Angeles Law Review*) [hereinafter Bascue].

witnesses testifying before the jury. Whether the witness be a police officer, school teacher, trash collector, lawyer, car dealer, priest, or rabbi, the jurors need to consider each witness as equally credible when the witness steps on the stand to begin to testify. Once the witness testifies and the juror has had the ability to evaluate the witness' demeanor and statements, then the juror may properly evaluate the credibility of the witness.

The next step is for the court to stress the juror's obligation to inform the court if a fellow juror violates the oath. The court should ask the potential jurors: Is there anyone here who would not have the courage to tell me that a fellow juror refuses to follow the law or has violated his or her oath? Do each and every one of you have the courage to do this?

Informing the jury of a true occurrence here proves to be invaluable. For example, in 1995 a courageous juror, after being instructed by the court as suggested above, sent a note to the court at the very beginning of jury deliberations. In part the note stated, in effect, that: One juror stated prior to deliberation that he would not find the defendant guilty on the felony charge. He stated that in his own opinion that all police were corrupt and he would not take seriously what any of them said.⁴⁸¹ The juror advised the court that the "offending juror" was not willing to discuss the testimony of any police officers because of his predisposition. The court conducted a hearing and thereafter discharged the offending juror.

The ability of jurors to follow the law can also be examined by questioning on the decriminalization of drugs. This approach works well in any type of case, regardless of whether drugs are involved. To illustrate the point, assume that a criminal drug case is before the court. Assume further that there is a potential juror who believes in the legalization of all drugs. The court has a responsibility in such a situation to ask the juror: "Would you be able to follow the law whether or not you believe in the law?"

During such an examination of the venire, if a juror states that due to personal beliefs he or she will be unable to follow the law, the juror will be excused. If the jurors state that they can follow the law despite these beliefs, the jurors may remain on the panel. The jurors' willingness to follow the law indicates a psychological commitment to both the court and to the other jurors.

This technique impresses upon the venire the obligation to

481. From a personal experience in Judge Crispo's court room.

follow the law. Moreover, this method of examination imposes the psychological persuasion on the individual jurors to follow the law or face the probability of being challenged by other jurors for attempting to disregard the law in jury deliberations.

Another crucial area for the court to inquire into emphasizes the juror's responsibility to set aside personal feelings toward the party. The potential jurors must be informed that they cannot make a decision based upon their like or dislike of the party.

Further, the venire must be informed that it is not to consider punishment in reaching a verdict. Three-strike criminal cases have posed serious nullification problems.⁴⁸² Jurors often feel that the punishment is too severe and choose not to follow the law.⁴⁸³ The jurors need to understand that they are the judges of the facts and evidence in the case, not the judges of the proper sentence for the crimes.

Again, demonstrating the success of highlighting the jury's proper role and scope, the 1995 note stated in effect that his fellow juror stated that he would not put the defendant, Mr. [X], "a nice guy" in prison for ten to fifteen years.⁴⁸⁴ The juror who sent the letter understood and took seriously the court's questions on insuring that a decision in the case was not based either upon personal feelings about the defendant or upon punishment.

The final question in this technique the court should pose to the jury is: Mr. or Ms. Smith, please search your mind, your heart, and your soul—is there any reason whatsoever why you could not apply the law, as given to you by the court, to the facts as you find them, as judges of those facts, and be fair to each of the parties? This inquiry reiterates the significance of the jury's obligation to follow the law and morally persuades each juror to render a verdict according to the law.

After a panel is chosen, jurors are asked to take another oath. This oath states: "You do and each of you understand and agree that you will well and truly try the cause now pending before this court, and a true verdict render according only to the evidence presented to you and to the instructions of the court."⁴⁸⁵

Prior to leaving the courtroom to deliberate, the jurors are

482. See Cox, *supra* note 306, at A1.

483. See *id.*

484. From a personal experience in Judge Crispo's court room.

485. Bascue, *supra* note 480.

mindful of this oath. In this last reminder, the court has fulfilled its attempt to guard against jury nullification through the voir dire process.

2. Using jury instructions as a preventive tool

Required instructions in California inform jurors that you "must base the decisions you make on the facts and the law. First, you must determine the facts from the evidence received in the trial and not from any other source. A 'fact' is something proved by the evidence or by stipulation."⁴⁸⁶

The jury is instructed further regarding functions of the jury and the court. Jurors are instructed that they are the triers of fact and must apply the law as given them by the court, regardless of whether or not they agree with the law. The instruction also stresses that jurors "must not be influenced by pity for or prejudice against a defendant You must not be influenced by mere sentiment, conjecture, sympathy, passion, prejudice, public opinion or public feeling."⁴⁸⁷ This is the closest "non-nullification" instruction California courts include. An outright anti-nullification instruction would be self-defeating. "Such an 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."⁴⁸⁸

Other instructions in California include reminding jurors how to conduct themselves during the course of trial. Jurors "must not discuss this case with any other person except a fellow juror, and then only after the case is submitted to [them]."⁴⁸⁹ Another instruction educates the jury on how to approach reaching a verdict and touches the core of nullification:

The attitude and conduct of jurors at all times are very important. It is rarely helpful for a juror at the beginning of deliberations to express an emphatic opinion on the case or to announce a determination to stand for a certain verdict. When one does that at the outset, a sense of pride may be aroused, and one may hesitate to change a position even if shown it is wrong. Remember that you are not partisans or

486. CALJIC, *supra* note 235, No. 0.50.

487. CALJIC, *supra* note 235, No. 1.00.

488. Judge Jack B. Weinstein, *Considering Jury Nullification: When May and Should a Jury Reject the Law to Do Justice*, 30 AM. CRIM. L. REV. 239, 250 (1993), reprinted in JACK B. WEINSTEIN, 4 VOIR DIRE 5, 9 (1995).

489. CALJIC, *supra* note 235, No. 1.03.

advocates in this matter. You are impartial judges of the facts.⁴⁹⁰

These instructions clarify the importance of the jurors' task. Similar to opening statements, early instructions can focus jurors on their task, and on how to evaluate the evidence as it is presented. Thus, offering jury instructions on the law at the beginning of trial can be an effective means of guarding against nullification.

The current practice of instructing the jury at the end of closing arguments has been analogized to "telling jurors to watch a baseball game and to determine who won without telling them the rules until the game is over."⁴⁹¹ Partial instructions to jurors at the beginning of trial can be highly effective. Although those instructions will be re-stated at the conclusion of the case, a valuable opportunity will be lost by waiting until immediately before deliberations to present them.

3. Recommendation for specified criminal cases

In criminal cases prosecutors should refrain from overcharging, especially in cases of fraud or tax evasion. The evidence is very confusing to jurors, and numerous charges make the situation worse. It is easy for jurors to ignore instructions and evidence they do not understand, regardless of its weight.

Criminal cases requiring long-term sequestration may also lead to jury nullification. The simple solution is to not sequester juries for long periods of time.⁴⁹² Commenting on the O.J. Simpson case, jury consultant Jo-Ellan Dimitriou said, "[y]ou can't sequester people for this long without something happening."⁴⁹³ Keeping people away from their homes, family, and friends causes resentment which, over time, easily turns to anger. An angry jury may not always care about the instructions of the court and may decide not to follow the law.

VIII. CALIFORNIA LEGISLATIVE EFFORTS

Currently, Maryland and Indiana are the only states that provide a nullification instruction. In both states, the instruction is approved

490. CALJIC, *supra* note 235, No. 17.41.

491. Albert W. Alschuler, *Our Faltering Jury*, 122 PUB. INTEREST, Winter 1996, at 28, 36-37 (1996) (quoting Judge William Schwarzer of the California Northern District Court).

492. *See* Cox, *supra* note 306, at A1.

493. *Id.*

for use in criminal trials only.⁴⁹⁴ In Indiana, nullification is a right from the Indiana Constitution, which provides: "In all criminal cases whatever, the jury shall have the right to determine the law and the facts."⁴⁹⁵ The Maryland Constitution also provides a similar right and 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."⁴⁹⁶ The instruction given in Maryland is generally vague and usually states:

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.⁴⁹⁷

The right of jurors to nullify is not a right embodied in either the United States or the California Constitutions. There is no statute or case law within either system that provides for such a right. Nevertheless, the issue of jury nullification has faced many state legislatures, including California's.

In February 1996 California State Senator Don Rogers introduced a bill proposing an added provision to the Code of Civil Procedure. The new section would have added the right of jurors to be instructed on nullification.⁴⁹⁸ The bill stated that the right to trial by jury includes the right to tell jurors that they have the power to judge the law and facts and vote their consciences.⁴⁹⁹ The bill provided in pertinent part:

- (a) An accused or aggrieved party's right to trial by jury, in all instances where the government or any of its agencies is an opposing party, includes the right to inform the jurors of their power to judge the law as well as the evidence, and to vote on the verdict according to conscience.
- (b) This right shall not be infringed by any statute, juror

494. See Creagan, *supra* note 11, at 1133.

495. IND. CONST. art. I, § 19.

496. MD. CONST. art. XXIII.

497. Wyley v. Warden, Md. Penitentiary, 372 F.2d 742, 743 n.1 (4th Cir. 1967).

498. See S.B. 2140, 1995-1996 Legis. Sess. 99-100 (Cal. 1996).

499. See *id.*

oath, court order, or procedure or practice of the court, including the use of any method of jury selection which could preclude or limit the empanelment of jurors willing to exercise this power.

(c) This right shall not be infringed by preventing any party to the trial . . . from presenting arguments to the jury which may pertain to issues of law and conscience, including (1) the merit, intent, constitutionality, or applicability of the law in the instant case; (2) the motives, moral perspective, or circumstances of the accused or aggrieved party; (3) the degree . . . of guilt or actual harm done; or (4) the sanctions which may be applied to the losing party.

(d) Failure to allow the accused or aggrieved party . . . to so inform the jury shall be grounds for mistrial and another trial by jury.⁵⁰⁰

The Senate bill failed to pass committee approval⁵⁰¹ and was later dropped in favor of a similar Assembly bill.⁵⁰²

California State Assemblyman Steve Baldwin also introduced a bill to amend the Code of Civil Procedure to include a provision on jury nullification.⁵⁰³ It provided that if defense counsel submits an instruction, judges in misdemeanor criminal cases could instruct a jury that it may disregard any jury instructions and render a verdict for the defendant according to conscience.⁵⁰⁴ The bill originally included approval of an instruction in felony cases but was later amended to apply only to misdemeanors.⁵⁰⁵ The Fully Informed Jury Association was the only organization to register support for AB 3079.⁵⁰⁶ Fortunately, the Assembly bill failed passage by a majority vote of the Public Safety Committee on April 9, 1996.⁵⁰⁷

California Attorney General Dan Lungren has stated in an advisory opinion that California jurors do not have the right to refuse to apply the law where they believe the law should not be applied in a

500. *Id.*

501. *See id.*

502. *See* Mike Lewis, *Will the State Codify Jury Nullification?*, L.A. DAILY J., Apr. 3, 1996, at 1.

503. *See id.*

504. *See* A.B. 3079, 1995-1996 Reg. Sess. 1 (Cal. 1996).

505. *See* Lewis, *supra* note 502, at 1.

506. *See id.*

507. *See* Legislative Counsel's Digest, Complete Bill History, Apr. 19, 1996, at 1.

particular case.⁵⁰⁸ The basic principle that ours is a government of laws, not of individual people, is irreconcilable with the theory of jury nullification.⁵⁰⁹ Lungren's reasoning rests on the premise that our legislative process allows general citizens to participate in the creation of laws. As such, nullification has no place in our system.⁵¹⁰ Lungren acknowledged that nullification may have had a place in history when law was not necessarily democratically created.⁵¹¹ This is no longer the case. "The law cannot be properly developed through appellate review if it is uncertain whether the law applied at trial was that given by the judge or that conjured up by individual members of the jury."⁵¹² Lungren's opinion properly maintains that remedies such as reprieve, pardon, or commutation exist for cases which produce unduly harsh results.⁵¹³ There is no recognized right for California jurors to disregard the law.⁵¹⁴

Outside California, legislation or constitutional amendments on jury nullification have been presented in Washington, Arizona, New York, Massachusetts, Louisiana, Tennessee, Texas,⁵¹⁵ and Oregon.⁵¹⁶ None have become law.⁵¹⁷

IX. CONCLUSION

While it is true that each juror brings personal life experience and attitude to the deliberation room, it is also true that effective safeguards can ensure an impartial jury. Jury nullification does and will continue to occur, but courts should never encourage it. If jurors are given instructions clearly explaining their role, reminded by the court of their function, and asked to follow the law and not their hearts, nullification will occur only in limited instances. If laws are unfair or penalties too harsh, legal remedies exist to correct such situations; nullification is not the answer. The development of legal principles is rooted in the will of the people. If we need change in the laws that dictate a result contrary to current societal beliefs and

508. See 77 Op. Att'y Gen. Cal. 118, 119 (1994).

509. See *id.* at 125.

510. See *id.*

511. See *id.*

512. *Id.* at 126.

513. See *id.*

514. See *id.*

515. See Creagan, *supra* note 11, at 1115-29.

516. See Lewis, *supra* note 502, at 1.

517. See Creagan, *supra* note 11, at 1115-29; Lewis, *supra* note 502, at 1.

needs, it is up to the legislature and not juries to modify the law.⁵¹⁸ Jurors have the “naked power” to nullify, but that power is not a right and should be used in only the rarest of circumstances. If individuals were allowed to decide that certain laws apply to some and not to others, true anarchy would reign. As Theodore Roosevelt stated,

No man is above the Law, and no man is below it; nor do we ask any man’s permission when we require him to obey it. Obedience to the law is demanded as a right, not asked as a favor. If we allow the optional appreciation of laws, we will have created a system in which some people are above the law and some people are below the law.⁵¹⁹

We must ensure that the law is upheld and followed with a certain measure of consistency. To do otherwise would encourage anarchy.

518. See Leipold, *supra* note 394, at 299. *But cf.* Massaro, *supra* note 477, at 545 (one can argue that nullification sends a message to the legislatures and courts that they need to change the law because it is no longer in line with community standards).

519. Theodore Roosevelt, Third Annual Message (Dec. 7, 1903), *reprinted in* JOHN BARTLETT, *FAMILIAR QUOTATIONS* 847 (Emily Morrison Beck ed., 1968).

