

Nullifying the Jury: “The Judicial Oligarchy” Declares War on Jury Nullification

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I. INTRODUCTION

Its existence is denied.¹ Its advocates are imprisoned.² While the pages of history once shined on jury nullification,³ that book was long ago closed,⁴ and today, the judiciary seems poised to burn it. Jury nullification occurs when a jury or juror finds a criminal defendant not guilty despite their belief that there is no reasonable doubt that a violation of a criminal statute has occurred.⁵ The American jury draws its power of nullification from its right to render a general verdict in criminal trials, the inability of criminal courts to direct a verdict no matter how strong the evidence, and the Fifth Amendment’s Double Jeopardy Clause, which prohibits the appeal of an acquittal.⁶

Public attention and academic argument concerning jury nullification reached a fevered pitch in the 1990’s. During that period, several high profile trials ended in controversial verdicts that were widely speculated to be acts of jury nullification.⁷ Spurred by the controversy

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1. *People v. Blessett*, No. 241432, 2003 Mich. App. LEXIS 2854, at *2 (Mich. Ct. App. Nov. 13, 2003) (upholding a judge’s comment “to a prospective juror that there [is] no such thing as jury nullification”).

2. *Turney v. Pugh*, 400 F.3d 1197, 1198-99, 1205 (9th Cir. 2005) (upholding the conviction and imprisonment of a jury nullification advocate for jury tampering); *Braun v. Baldwin*, 346 F.3d 761, 762, 766 (7th Cir. 2003) (upholding the arrest of a jury nullification advocate charged with disorderly conduct).

3. *United States v. Dougherty*, 473 F.2d 1113, 1130 (D.C. Cir. 1972).

4. *Sparf v. United States*, 156 U.S. 51, 74 (1895) (holding that the jury did not have the right to disregard judicial instructions as to the law). *Sparf* has been consistently interpreted to allow judges to refuse to instruct jurors about their nullification power. See *infra* text accompanying note 98.

5. Darryl K. Brown, *Jury Nullification Within the Rule of Law*, 81 MINN. L. REV. 1149, 1150 (1997).

6. Clay S. Conrad, *Jury Nullification as a Defense Strategy*, 2 TEX. F. ON C.L. & C.R. 1, 1-2 (1995).

7. These alleged nullification verdicts included many of the most famous trials of the 1990’s, including: the prosecution of Washington D.C.’s former mayor, Marion Barry; the trial of Lorena Bobbitt; the prosecution of the police officers accused of beating Rodney King; the prosecution of

surrounding jury nullification, the judiciary began a continuing and unprecedented course of action to try and dissuade jurors from using their nullification power. These measures include deception of the jury, prosecution of jury nullification advocates, and interference with the deliberative process that threatens to not only decrease the use of jury nullification powers, but also to curtail the independence that makes our jury system valuable.

In Part II, this note outlines the history of jury nullification, its genesis, the importance of the power to the constitutional framers, and the treatment of the power by the American judiciary. Part II ends by discussing the volatile decade of the 1990's, and the raging debate surrounding jury nullification during that period. Part III describes the most important arguments made by academics concerning the ongoing controversy over jury nullification. Part IV catalogs the recent unprecedented judicial reaction aimed at preventing the occurrence and acknowledgement of jury nullification. Part V discusses the harmful effects this recent judicial reaction has had on our democracy and on our system of justice. Finally, Part VI suggests that the jury's nullification power is important and that America would be better off if juries were regularly informed of this power.

II. HISTORY OF THE JURY

A. *The Beginnings of Jury Nullification*

The power of juries to ignore the law can be traced back to courts established before the Magna Carta.⁸ These early courts were described as "courts of conscience," when juries acted as both judge and jury, deciding cases not according to the laws of the king, but according to their own sense of justice.⁹ Although jury nullification may have always been in the range of the jury's function, as the judiciary became established in England, it began to impose harsh controls over juries that made the nullification power less practicable.¹⁰ If these judges disagreed with a jury's verdict, they could force the jury to reconsider its verdict, fine the jurors, or even charge the jurors before the Star Chamber for violating their oaths.¹¹

two men charged with beating Reginald Denny in the resulting riots; the trial of the surviving Branch Davidian members; the trial of the Menendez brothers for the murder of their parents; and perhaps most famously, the O.J. Simpson trial. See Judge Lawrence W. Crispo et al., *Jury Nullification: Law Versus Anarchy*, 31 LOY. L.A. L. REV. 1, 33-36 (1997).

8. Conrad, *supra* note 6, at 4.

9. *Id.*

10. See Major Bradley J. Huestis, *Jury Nullification: Calling for Candor from the Bench and Bar*, 173 MIL. L. REV. 68, 72 (2002).

11. *Id.* The Star Chamber was an English court that had broad jurisdiction under the king's discretion; it was infamous for its arbitrary, oppressive, and secretive procedures, especially its lack of a jury, inquisitorial investigation, and compulsory self-incrimination. BLACK'S LAW DICTIONARY

Lieutenant Colonel John Lilburne made the first known attempt to argue for jury nullification in 1649, during his trial for treason for distributing pamphlets that were critical of the English government.¹² After being denied counsel, Lilburne argued to the jury that it could judge the law as well as the facts.¹³ Consequently, the jury acquitted Lilburne.¹⁴ On trial again in 1653, this time facing the death penalty, Lilburne asked the jury to acquit if it found that the death penalty was “unconscionably severe” in proportion to the acts proved against him.¹⁵ The jury obliged, finding Lilburne “not guilty of any crime worthy of death.”¹⁶

Bushell’s Case,¹⁷ decided in 1670, is the most famous and important early English case regarding jury nullification. *Bushell’s Case* arose from the prosecution of Quakers William Penn and William Mead for preaching to an unlawful assembly and for breach of the peace.¹⁸ At the end of the trial, the judge instructed the jury to return a guilty verdict; however, four jurors, led by Edward Bushell, refused to do so.¹⁹ Refusing to discharge the jury, the judge sent them back for further deliberations.²⁰ This time the jury returned with a unanimous verdict finding Penn guilty of speaking to an assembly but not guilty of disturbing the peace, and acquitting Mead on all charges.²¹ The judge admonished the jury, threatening not to release them until they returned with an acceptable verdict: “you shall be locked up, without meat, drink, fire, and tobacco . . . we will have a verdict, by the help of God, or you shall starve for it.”²² Throughout two days and nights without food, water, or heat, the jury repeatedly refused to return a guilty verdict, and the judge ended the trial.²³ As punishment for the jury’s disobedience, the judge

1442 (8th ed. 2004). Despite the sometimes harsh consequences, juries would still sometimes refuse to apply the law; perhaps the earliest recorded nullification verdict occurred in 1544, when Sir Nicholas Throckmorton, accused of high treason for participating in Wyatt’s Rebellion, was acquitted by an English jury despite extensive evidence of guilt. David N. Dorfman & Chris K. Iijima, *Fictions, Fault, and Forgiveness: Jury Nullification in a New Context*, 28 U. MICH. J.L. REFORM 861, 867 (1995).

12. See The Trial of Lieutenant-Colonel John Lilburne, 4 Cobbett’s Complete Collection of State Trials 1270, 1320-29, 1466 (Old Bailey 1649).

13. See *id.* at 1293-94, 1329-30, 1466; THOMAS ANDREW GREEN, VERDICT ACCORDING TO CONSCIENCE: PERSPECTIVES ON THE ENGLISH CRIMINAL TRIAL JURY 1200-1800, at 173 (1985).

14. GREEN, *supra* note 13, at 153.

15. *Id.* at 159-60, 192.

16. *Id.* at 197.

17. (1670) 124 Eng. Rep. 1006.

18. Aaron T. Oliver, *Jury Nullification: Should the Type of Case Matter?*, 6 KAN. J.L. & PUB. POL’Y 49, 50 (1997).

19. See Trial of Penn and Mead, 6 Cobbett’s Complete Collection of State Trials 951, 960-61 (London, T.C. Hansard 1810). The term Recorder was the title given the magistrate who presided over the trial. See BLACK’S LAW DICTIONARY 1301 (8th ed. 2004).

20. Trial of Penn and Mead, 6 Cobbett’s Complete Collection of State Trials at 962.

21. *Id.* at 962-63.

22. *Id.* at 963.

23. *Id.* at 964-67.

ordered the jurors imprisoned until they paid a fine to the court.²⁴ Some of the jurors, including Bushell, refused to pay the fine and spent months in jail.²⁵ The jurors eventually sought their release by filing a habeas corpus petition.²⁶ The case reached the Court of Common Pleas, where Chief Justice Sir John Vaughan declared that the jury determines the law in all matters decided by a general verdict, and forbade judges from punishing jurors for returning a verdict that a judge disagreed with.²⁷

While *Bushell's Case* did not represent the first exercise of jury nullification, the decision was monumental because it provided the jury the protection necessary to make its nullification power more practicable. Political opponents of the Crown seized on this new protection for juries and greatly increased efforts to advocate jury nullification.²⁸ These efforts led to the publishing of *The English-Man's Right* and other pamphlets advocating the jury's right to refuse to apply the law as instructed.²⁹

Both before and after *Bushell's Case*, the English Crown broadened its use of the courts to persecute its critics.³⁰ Faced with increasing refusals by juries to enforce these unpopular restrictions on speech, English judges created the doctrine of seditious libel.³¹ Under this doctrine, the jury was only given the question of whether the defendant published the material in question.³² The judge would then decide whether the publication was of a seditious nature and published with seditious intent as a matter of law.³³ The doctrine of seditious libel was imported into colonial American law and eventually collided with popular ideas about jury independence in the colonial period's most famous jury nullification case.³⁴

B. *The Jury in the Colonies and the Constitution*

The colonial jury played a vital and celebrated role in American resistance to British tyranny leading up to the revolution.³⁵ American counsel regularly argued the validity of laws directly to juries, which of-

24. *Id.* at 967-68.

25. See Oliver, *supra* note 18, at 50.

26. Bushell's Case, (1670) 124 Eng. Rep. 1006, 1006.

27. See *id.* at 1012-13.

28. See Simon Stern, Note, *Between Local Knowledge and National Politics: Debating Rationales for Jury Nullification After Bushell's Case*, 111 YALE L.J. 1815, 1829 (2002).

29. *Id.* at 1829-32. American colonists reprinted many of these pamphlets after the trial of John Peter Zenger. *Id.* at 1852. These jury-rights pamphlets made an important contribution to American conceptions about the jury. See *id.*

30. Dorfman & Iijima, *supra* note 11, at 870.

31. Crispo, *supra* note 7, at 6; Dorfman & Iijima, *supra* note 11, at 871.

32. Dorfman & Iijima, *supra* note 11, at 871.

33. *Id.*

34. *Id.* at 871-72.

35. Huestis, *supra* note 10, at 74.

ten refused to enforce British laws they felt were unjust.³⁶ American juries especially refused to apply British laws in maritime cases—particularly prosecutions for smuggling.³⁷ These acts of jury nullification were so common that British prosecutors temporarily gave up prosecuting smugglers because they felt any attempt to get an American jury to convict was futile.³⁸ To deal with this problem, British authorities eventually removed the defendant's right to a colonial jury in all maritime cases.³⁹ This move caused a great amount of bitterness between Britain and the colonies, fermenting into one of the many grievances that would lead to revolution.⁴⁰

American juries were also hesitant to convict defendants in cases of seditious libel.⁴¹ The trial of John Peter Zenger is the most famous of these cases.⁴² The British charged Zenger with seditious libel for publishing statements that were critical of British rule over the colonies.⁴³ Under then current law, the judge, not the jury, determined the seditious nature of the publication, and truth was not a defense as it is in modern libel law.⁴⁴ The jury's sole role was to determine whether the defendant had indeed published the statement in question.⁴⁵ Faced with this situation, Zenger's attorney decided to urge the jury to nullify the law.⁴⁶ Hamilton argued that the jury should acquit Zenger because the published statements were true.⁴⁷ Hamilton urged the jury "to make use of their own consciences and understandings in judging of the lives,

36. *Id.*; Albert W. Alschuler & Andrew G. Deiss, *A Brief History of the Criminal Jury in the United States*, 61 U. CHI. L. REV. 867, 874 (1994).

37. One colonial governor of Massachusetts protested, "A Custom house officer has no chance with a jury." Akhil Reed Amar, *Fourth Amendment First Principles*, 107 HARV. L. REV. 757, 777 (1994) (quoting Notes on Erving v. Cradock, in JOSIAH QUINCY, JR., REPORTS OF CASES ARGUED AND ADJUDGED IN THE SUPERIOR COURT OF JUDICATURE OF THE PROVINCE OF MASSACHUSETTS BAY BETWEEN 1761 AND 1772, at 553, 557 (1865)). Another colonial governor complained that "trial by jury here is only trying one illicit trader by his fellows, or at least by his well-wishers." STEPHEN BOTEIN, *EARLY AMERICAN LAW AND SOCIETY* 57 (Knopf, 1983) (quoting Governor William Shirley).

38. See JEFFREY ABRAMSON, WE, THE JURY: THE JURY SYSTEM AND THE IDEAL OF DEMOCRACY 24 (1994).

39. Lieutenant Commander Robert E. Korroch & Major Michael J. Davidson, *Jury Nullification: A Call for Justice or an Invitation to Anarchy?*, 139 MIL. L. REV. 131, 134 (1993).

40. *Id.*

41. Alschuler & Deiss, *supra* note 36, at 874. During the seventeenth and eighteenth centuries, hundreds of defendants were convicted of seditious libel in England, while there were only a half-dozen such prosecutions in the American colonies. *Id.*

42. Paul Butler, *Racially Based Jury Nullification: Black Power in the Criminal Justice System*, 105 YALE L.J. 677, 702 (1995).

43. See The Trial of Mr. John Peter Zenger, 17 T.B. Howell, A Complete Collection of State Trials 675, 683 (1735).

44. Dorfman & Iijima, *supra* note 11, at 872. In fact, a well-established maxim of the day was "the greater the truth, the greater the libel." JOHN E. NOWAK & RONALD A. ROTUNDA, CONSTITUTIONAL LAW 987 (5th ed. 1995) (quoting ZECHARIAH CHAFEE, JR., FREE SPEECH IN THE UNITED STATES 500 (4th ed. 1948)).

45. Dorfman & Iijima, *supra* note 11, at 872.

46. See The Trial of Mr. John Peter Zenger, 17 T.B. Howell, A Complete Collection of State Trials at 693-94.

47. *Id.*

liberties or estates of their fellow subjects,"⁴⁸ declaring in summation that jurors "have the right, beyond all dispute, to determine both the law and the fact; and where they do not doubt of the law, they ought to do so."⁴⁹ After deliberations, the jury acquitted Zenger.⁵⁰

American publishers, including Zenger, printed transcripts of the trial that spread throughout the colonies.⁵¹ Although the case did not have the force of precedent, Zenger's trial became a paragon of American ideas regarding jury rights and freedom of speech, and effectively ended colonial prosecutions for seditious libel.⁵² The trial helped introduce the jury's nullification power to the American public, popularizing the idea in the public discourse leading up to the American Revolution.⁵³

Given the celebrated role of the jury in Zenger's trial and the importance of nullification in colonial resistance to British oppression, it seems intuitive that the Constitutional framers envisioned that the jury would continue this role when they guaranteed the right to a jury trial in the Sixth Amendment. Leading jurists had generally agreed that juries could judge both the law and the facts even before the American Revolution.⁵⁴ At the time of the Constitution's framing, juries were entrusted to make decisions according to justice, even if the decision went against the explicit instructions of the court.⁵⁵ An examination of writings by the founding fathers does nothing to rebut this assumption. Alexander Hamilton, Thomas Jefferson, Benjamin Franklin, John Adams, John Jay, and numerous others, regardless of party, all proclaimed the independence of the jury, believing that the jury's role included both judging the law and the facts of a case.⁵⁶ Dictionaries current with the framing of the Constitution also define the jury as "decid[ing] both the law and

48. JAMES ALEXANDER, A BRIEF NARRATIVE OF THE CASE AND TRIAL OF JOHN PETER ZENGER PRINTER OF THE NEW YORK WEEKLY JOURNAL 93 (Stanley Nider Katz ed., 1963).

49. The Trial of Mr. John Peter Zenger, 17 T.B. Howell, A Complete Collection of State Trials at 706.

50. *Id.* at 723.

51. Dorfman & Iijima, *supra* note 11, at 873.

52. *Id.*; David A. Pepper, *Nullifying History: Modern-Day Misuse of the Right to Decide the Law*, 50 CASE W. RES. L. REV. 599, 614 (2000).

53. Pepper, *supra* note 52, at 614.

54. Honorable Robert D. Rucker, *The Right to Ignore the Law: Constitutional Entitlement Versus Judicial Interpretation*, 33 VAL. U.L. REV. 449, 453 (1999).

55. Butler, *supra* note 42, at 702-03.

56. Conrad, *supra* note 6, at 5. John Adams argued, "It is not only [the juror's] right, but his duty . . . to find the verdict according to his own best understanding, judgment, and conscience, though in direct opposition to the direction of the court." *Id.* at 5 n.27 (alteration in original) (quoting 2 John Adams' Works, 255). Benjamin Franklin's Pennsylvania Gazette commented that if jury nullification is not the law, "it is better than law, it ought to be law, and will always be law wherever justice prevails." VINCENT BURANELLI, THE TRIAL OF PETER ZENGER 63 (Vincent Buranelli ed., 1957). Thomas Jefferson remarked, "Were I called upon to decide whether the people had best be omitted in the Legislative or Judiciary department, I would say it is better to leave them out of the Legislative. The execution of the laws is more important than the making [of] them." Letter from Thomas Jefferson to the Abbe Arnoux (July 19, 1789), in 15 THE PAPERS OF THOMAS JEFFERSON 283 (Julian P. Boyd ed., 1958).

the facts in criminal prosecutions.”⁵⁷ This wealth of evidence proves that the framers intended the Sixth Amendment to guarantee the jury the right to refuse to apply criminal laws when they would lead to an unjust result.

C. *The Century of the Jury (1789-1895)*

If there was any doubt about the jury’s right to judge the law after the adoption of the Sixth Amendment, this doubt was quickly laid to rest in the Supreme Court decision of *Georgia v. Brailsford*,⁵⁸ where Chief Justice John Jay instructed that juries have the right “to determine the law as well as the fact in controversy.”⁵⁹ While the Supreme Court did not have the occasion to elaborate further on this right, the decisions of lower courts consistently upheld the criminal jury’s right to judge the law.⁶⁰ During the first half century following the Bill of Rights’ ratification, the right of juries to judge the law as well as the facts in criminal cases generally remained unquestioned.⁶¹

The earliest precedent usually cited as signaling the forthcoming denial of the jury’s right to judge the law is the 1835 case of *United States v. Battiste*.⁶² This highly politicized case involved the prosecution of a sailor who allegedly attempted to seize and sell a black man into slavery.⁶³ Justice Joseph Story, presiding over the case, believed that the implicated criminal statute did not cover sailors who had not enslaved a “negro” directly nor held title in the slaves.⁶⁴ To prevent what he felt could be an unwarranted conviction by a hostile Massachusetts jury, Justice Story delivered the following instruction:

[I]t [is] the most sacred constitutional right of every party accused of a crime, that the jury should respond as to the facts, and the court as to the law. It is the duty of the court to instruct the jury as to the law; and it is the duty of the jury to follow the law, as it is laid down by the court.⁶⁵

Modern commentators have cited this language as a condemnation of jury nullification, but a simple analysis of the case shows that Justice Story’s instructions were aimed at a different concern.⁶⁶ In *Battiste*, Justice Story was concerned not about a jury’s willingness to refuse application of a criminal law, but that the jury might impose criminal sanctions

57. Conrad, *supra* note 6, at 6 (quoting NOAH WEBSTER, *DICTIONARY OF THE ENGLISH LANGUAGE* (1st ed. 1828)).

58. 3 U.S. 1 (1794).

59. *Id.* at 4.

60. Pepper, *supra* note 52, at 621.

61. Conrad, *supra* note 6, at 7.

62. 24 F. Cas. 1042 (C.C.D. Mass. 1835).

63. Dorfman & Iijima, *supra* note 11, at 873-74.

64. *Battiste*, 24 F. Cas. at 1045.

65. *Id.* at 1043.

66. See, e.g., Crispo et al., *supra* note 7, at 9 (arguing that *Battiste* reduced the jury’s ability to determine the law).

on a defendant outside the parameters of existing law.⁶⁷ While the Sixth Amendment implicitly protects the right of the jury to judge the law, Justice Story correctly reasoned that to allow the jury to impose criminal sanctions outside of the law violated a criminal defendant's right to due process.⁶⁸ Consequently, the scope of *Battiste* has no relevance to the jury's constitutionally ordained power to refuse application of a criminal law.

Whatever the judicial support for the jury's nullification power, juries during the nineteenth century were not bashful about exercising their right to judge the law when they determined it to be appropriate. Northern juries regularly displayed their contempt for slavery by acquitting defendants charged with violating the Fugitive Slave Acts.⁶⁹ Juries in both England and America were also using their nullification power to oppose harsh applications of capital punishment.⁷⁰ English juries used nullification to force Parliament to end application of the death penalty in minor offenses.⁷¹ Meanwhile, in America, jury nullification was a pivotal motivation when state legislatures began to limit the death penalty to the offenses of murder and treason in the beginning of the century, and again when Congress replaced the mandatory federal death sentence with discretionary jury sentencing at the end of the nineteenth century.⁷²

Although juries continued to exercise their right to judge the law, as the nineteenth century reached its latter decades, the judiciary became increasingly hostile to the practice.⁷³ There are several different theories that attempt to explain this change. Some commentators cite changes in the American psyche, transitioning a young republic with revolutionary zeal and distrust for governmental authority into a mature democracy more concerned with efficiency and consistency.⁷⁴ Another possible motivation was the increasing tendency to view law as a professional undertaking.⁷⁵ Under this reasoning, only trained and experienced judges should be allowed to determine questions of law.

67. See *Battiste*, 24 F. Cas. at 1043.

68. See *Jackson v. Virginia*, 443 U.S. 307, 317-18 (1979) (noting that proof beyond a reasonable doubt is required for a conviction to satisfy due process).

69. John Clark, *The Social Psychology of Jury Nullification*, 24 LAW & PSYCHOL. REV. 39, 43-44 (2000).

70. *Id.* at 44; Huestis, *supra* note 10, at 75.

71. See Clark, *supra* note 69, at 44.

72. Huestis, *supra* note 10, at 75.

73. See Pepper, *supra* note 52, at 619.

74. See, e.g., Butler, *supra* note 42, at 703; Conrad, *supra* note 6, at 11; Dorfman & Iijima, *supra* note 11, at 873.

75. Huestis, *supra* note 10, at 75-76. Instrumental in this shift of thought was Christopher Columbus Langdell, who, after becoming Dean of Harvard's Law School in 1870, advocated for rigorous professional training for lawyers and judges. LAWRENCE M. FRIEDMAN, A HISTORY OF AMERICAN LAW 612-618 (2d ed. 1985). Langdell believed that legal adjudication was a demanding process that required formal training and ability beyond that possessed by the ordinary lay juror. See *id.*

Another factor that may have contributed to the limitation of the jury's responsibilities was the increasing diversity of the jury pool.⁷⁶ In 1879, the Supreme Court ruled that blacks could not be excluded from jury service on the basis of race.⁷⁷ The freeholder requirement was also increasingly discarded to provide the necessary supply of jurors, and the mostly poor, recent immigrants who had swarmed into America during the end of the nineteenth century were quickly becoming citizens eligible for jury service.⁷⁸ While economic and gender discrimination still shaped the jury pool, the jury began to resemble the cross-section of the community so valued today.⁷⁹ The limitation of the jury's role may have been at least partially motivated by a distrust of the increasingly diverse jury pool and the possibility that it might defy America's ruling, wealthy, white elite.⁸⁰

During the 1890's, prosecutors increasingly charged union organizers with criminal conspiracy in an attempt to combat labor unrest.⁸¹ Some commentators have suggested that American juries' growing reluctance to convict in these labor cases motivated the Supreme Court to take a stand against jury nullification,⁸² and certify for review the otherwise unremarkable case of *Sparf v. United States*.⁸³ In *Sparf*, two sailors charged with murder for allegedly throwing another sailor overboard asked the trial judge to instruct the jury that they could render a verdict on either murder or manslaughter.⁸⁴ The judge refused the instruction, and during deliberations, the jurors specifically asked the judge whether they could return a verdict on manslaughter.⁸⁵ The judge admitted that the jury had the physical power to render a verdict under manslaughter, but he admonished the jury that a manslaughter verdict was not appropriate, stating that "a jury is expected to be governed by law, and the law it should receive from the court."⁸⁶

On appeal, the Supreme Court considered whether the trial court erred by refusing to instruct the jury that it could render a verdict on the lesser included offense of manslaughter and whether the trial court erred in instructing the jury that it had a duty to accept the law as given by the court.⁸⁷ The majority, written by the elder Justice John Harlan,

76. Conrad, *supra* note 6, at 11-12.

77. *Strauder v. West Virginia*, 100 U.S. 303, 309 (1879).

78. Conrad, *supra* note 6, at 11.

79. *Id.*

80. *See id.* at 12.

81. *See id.* at 13-14.

82. *Id.* at 14.

83. 156 U.S. 51 (1895).

84. *Id.* at 59. The sailors based their argument on a statute allowing for a conviction on any lesser included offense of the offense charged. *Id.* at 62-63.

85. *Id.* at 59, 62 n.1.

86. *Id.*

87. *Id.* at 59.

ruled that the trial court did not err.⁸⁸ Harlan not only denied that jurors had a right to judge the law, but he also denied that jurors ever had such a right.⁸⁹ Harlan warned that if juries were allowed to ignore the law, “our government will cease to be a government of laws, and become a government of men.”⁹⁰ Harlan admitted that the jury had “the physical power to disregard the law,” but he denied that it had the right to do so.⁹¹ To the contrary, Harlan ruled “that the jury should respond as to the facts, and the court as to the law.”⁹²

In dissent, Justice Horace Gray thoroughly explored the extensive history of the jury and reached the opposite conclusion that juries had the right to judge the law.⁹³ Justice Gray criticized the majority for its illogical conclusion that the jury had the power to judge the law but had no right to exercise its power.⁹⁴ Despite Justice Gray’s criticism, it is for this point of law that the *Sparf* decision is most often cited. This tension between right and power shaped jury nullification jurisprudence for most of the next century.

D. *The Century of the Judge (1896-1990)*

The actual holding in *Sparf* was a narrow one.⁹⁵ Harlan’s opinion did not preclude judges from rendering nullification instructions or allowing nullification arguments in proper circumstances, it did not require judges to mislead jurors about their power to judge the law, and it did not sanction a judicial denial of the jury’s nullification power, either by instruction or interference. *Sparf* only held that it was not reversible error to instruct the jury that it would be wrong to disregard the court’s instruction as to the law.⁹⁶ In fact, the trial judge in *Sparf* informed the jury that it had the “physical power” to render a verdict contrary to his instructions.⁹⁷ Despite the narrow holding of *Sparf*, federal courts relied on the case for the proposition that criminal defendants have no right to a nullification instruction.⁹⁸ By the dawn of the twentieth century, an increasing number of states had reached the same conclusion as *Sparf* in striking down the suddenly “archaic, outmoded and atrocious” custom of informing juries that they could judge the law as well as the facts.⁹⁹

88. *Id.* at 101.

89. *See id.* at 101-02.

90. *Id.* at 103.

91. *Id.* at 74.

92. *Id.*

93. *See id.* at 114 (Gray, J., dissenting).

94. *Id.* at 148.

95. Conrad, *supra* note 6, at 13.

96. *Sparf*, 156 U.S. at 106.

97. *Id.* at 62 n.1.

98. *See* Korroch & Davidson, *supra* note 39, at 136.

99. Conrad, *supra* note 6, at 15 (quoting Prescott, *Juries as Judges of the Law: Should the Practice Be Continued?*, 60 MD. ST. B.A. REP. 246, 257 (1955)). Although states still acknowledged the

Although *Sparf* generally ended the old practice of instructing the jury of its power to judge the law, the American jury refused to relinquish its nullification power. During alcohol prohibition, juries commonly refused to enforce laws outlawing alcohol.¹⁰⁰ For example, in New York between 1929 and 1930, sixty percent of alcohol related prosecutions ended in acquittal.¹⁰¹ The refusal of juries to convict in alcohol cases helped to hasten prohibition's repeal.¹⁰²

During the 1960's and 1970's, America again found itself in the midst of controversies that inspired acts of jury nullification.¹⁰³ Even absent nullification instructions or argument, juries in the South too often refused to convict whites accused of violence against blacks and civil rights workers.¹⁰⁴ However, the judiciary and public gave more attention to efforts made at promoting nullification in a number of cases involving Vietnam War protests. These cases, sometimes called "the Vietnam War resister cases," usually had similar facts.¹⁰⁵ The government would prosecute anti-war activists who had violated the law in acts of civil disobedience.¹⁰⁶ The defense would request a nullification instruction, and the court would refuse to give one.¹⁰⁷ Sometimes the court would also instruct the jury that the defendant's motives in breaking the law were irrelevant to the jury's role of determining guilt.¹⁰⁸ These instructions were often given in response to creative defense tactics that sought to encourage the jury to use their conscience to acquit the defendant.¹⁰⁹

The most famous war resister decision was *United States v. Dougherty*.¹¹⁰ *Dougherty* was the first case since *Sparf* to discuss jury nullification at length, and it was the first case to seriously examine whether jurors should be instructed about their power to nullify.¹¹¹ *Dougherty* involved the prosecution of the "D.C. Nine," nine Catholic clergy members who ransacked a Dow Chemical office to protest Dow's

criminal jury's power to judge the law, by 1900, at least twelve states had denied the jury the right to judge the law. See *Pierson v. State*, 12 Ala. 149 (1847); *Pleasant v. State*, 13 Ark. 360 (1852); *People v. Anderson*, 44 Cal. 65 (1872); *State v. Buckley*, 40 Conn. 246 (1873); *State v. Jeandell*, 5 Del. 475 (1 Harr.) (1854); *Ridenhour v. State*, 75 Ga. 382 (1895); *State v. Miller*, 4 N.W. 900 (Iowa 1880); *Montee v. Commonwealth*, 26 Ky. 132 (1880); *State v. Tisdale*, 6 So. 579 (La. 1889); *Hamilton v. People*, 29 Mich. 173 (1874); *Williams v. State*, 32 Miss. 389 (1856); *Parrish v. State*, 14 Neb. 60 (1883); *Duffy v. People*, 26 N.Y. 588 (1863).

100. PAULA DIPERNA, *JURIES ON TRIAL: FACES OF AMERICAN JUSTICE* 191 (1984).

101. HARRY KALVEN, JR. & HANS ZEISEL, *THE AMERICAN JURY* 292 n.10 (1966). Nationally, twenty-six percent of Prohibition Act prosecutions ended in acquittal. *Id.*

102. Clark, *supra* note 69, at 44.

103. *Id.* at 44-45.

104. Crispo et al., *supra* note 7, at 12.

105. Dorfman & Iijima, *supra* note 11, at 876.

106. *Id.*

107. *Id.*

108. *Id.*

109. *Id.* at 876-77.

110. 473 F.2d 1113 (D.C. Cir. 1972).

111. Oliver, *supra* note 18, at 53.

manufacture of napalm being used in the Vietnam War.¹¹² At trial, the defendants requested that the jury be given a nullification instruction, but the trial judge refused.¹¹³ After a lengthy review of the jury nullification doctrine, the Court of Appeals upheld the trial court's refusal to give a nullification instruction.¹¹⁴ Noting the jury's unreviewable power to nullify, Judge Harold Leventhal stated that "[t]he pages of history shine on instances of the jury's exercise of its prerogative to disregard uncontradicted evidence and instructions of the judge."¹¹⁵ Despite this praise, Leventhal argued that instructing juries of their nullification power would dangerously "encourage individuals to make their own determinations as to which laws they will obey and which they will permit themselves as a matter of conscious to disobey."¹¹⁶

Instead, Leventhal argued that it is valuable to limit jury nullification to those cases where the jury felt so strongly that it made the choice to disregard the judge's instructions by its own initiative, or *sua sponte*.¹¹⁷ Comparing jury nullification to a potent but dangerous medicine, Leventhal argued that "[w]hat makes for health as an occasional medicine would be disastrous as a daily diet."¹¹⁸ In dissent, Chief Judge David Bazelon advocated instructing juries that they had the right to nullify laws.¹¹⁹ Bazelon argued that it was wrong to assume that juries would rampantly abuse their nullification power, noting that "[t]rust in the jury is, after all, one of the cornerstones of our entire criminal jurisprudence, and if that trust is without foundation we must re-examine a great deal more than just the nullification doctrine."¹²⁰

While lower courts have consistently held that neither the defendant nor the jury has a right to jury instructions on the jury's nullification power, another question is whether courts can prevent defense counsel from making arguments for jury nullification. The Supreme Court has not addressed this issue, and while trial courts rarely allow nullification arguments,¹²¹ federal appellate courts have allowed trial judges to limit defense arguments aimed at nullification.¹²²

112. *Id.*

113. *Dougherty*, 473 F.2d at 1117.

114. *Id.* The case was reversed and remanded, however, because the trial court had denied the defendants' request to proceed pro se. *Id.* at 1130.

115. *Id.* at 1130.

116. *Id.* at 1133-34.

117. *Id.* at 1136-37.

118. *Id.* at 1136.

119. *Id.* at 1139 (Bazelon, C.J., dissenting).

120. *Id.* at 1142.

121. *See, e.g.*, *United States v. Krzyske*, 836 F.2d 1013, 1021 (6th Cir. 1988) (noting defense counsel was allowed to mention jury nullification in closing argument); *State v. Weitzman*, 427 A.2d 3, 7 (N.H. 1981) (quoting trial judge's instruction: "[Y]ou are entitled to act upon your own conscientious feeling about what is a fair result in this case." (alteration in original)).

122. *See, e.g.*, *United States v. Trujillo*, 714 F.2d 102, 106 (11th Cir. 1983) ("[D]efense counsel may not argue jury nullification during closing argument.").

E. Georgia, Indiana, Maryland, and the Kansas Experiment

Although federal courts and most state courts did not allow jury instruction on the jury's power to judge the law during the twentieth century, there were exceptions. Three states, Georgia, Indiana, and Maryland, mandated through their state constitutions that juries are not only judges of the facts, but also judges of the law in criminal cases.¹²³ Despite the seeming clarity of these provisions, courts in these jurisdictions have eviscerated any literal translation of these constitutional provisions. For example, Section 23 of the Maryland Declaration of Rights reads: "In the trial of all criminal cases, the Jury shall be the Judges of the Law, as well as of fact, except that the Court may pass upon the sufficiency of the evidence to sustain a conviction."¹²⁴ This language clearly states that the jury is the judge of the law in all criminal cases, and the exception clause would seem to indicate that the jury is the judge of the law in all instances, except that judges can set aside convictions for lack of evidence. Maryland's courts, however, have consistently ruled since the 1960's "that Article 23 'does not mean precisely what it seems to say.'"¹²⁵ Instead, Maryland's courts have restricted the jury's law judging power to only those cases where the judiciary feels that there is a sound basis for dispute about the law governing the crime.¹²⁶ Otherwise, the judge's instructions on the law are binding on jury and counsel alike, and the judge is not required to instruct the jury that it can judge the law as well as the facts.¹²⁷

Georgia's judiciary dispensed with a literal meaning of its constitutional provision much earlier. As early as 1898, Georgia's Supreme Court ruled that a trial court could refuse to instruct the jury that it could judge the law as well as the facts.¹²⁸ This ruling was despite the fact that Georgia added its constitutional provision bestowing on the jury this power as a response to an earlier judicial decision that had likewise denied that the jury was the judge of the law.¹²⁹

In Indiana, the jury is reserved the right to "determine the law."¹³⁰ Despite this language, the Indiana Supreme Court has ruled that a judge's instructions as to the law are not merely advisory and that a jury

123. GA. CONST. art. I, § 1, para. 11(a) (1998); IND. CONST. art. I, § 19 (1999); MD. CODE ANN., CONST. § 23 (LexisNexis 2003).

124. MD. CODE ANN., CONST. § 23 (LexisNexis 2003).

125. *Barnhard v. State*, 587 A.2d 561, 567 (Md. Ct. Spec. App. 1991) (quoting *Stevenson v. State*, 423 A.2d 558 (Md. 1980)).

126. *Id.* at 568.

127. *Id.* at 567-68.

128. *Berry v. State*, 31 S.E. 592, 593 (Ga. 1898).

129. *Harris v. State*, 9 S.E.2d 183, 186 (Ga. 1940). Georgia's constitution provides in pertinent part: "In criminal cases, the defendant shall have a public and speedy trial by an impartial jury; and the jury shall be the judges of the law and the facts." GA. CONST. art. I, § 1, para. 11(a) (1998).

130. IND. CONST. art. I, § 19 (1999).

has no right to disregard or ignore the law as it exists.¹³¹ Many other states have constitutional provisions that allow juries to judge the law in cases of libel; some of these provisions include language that implies that juries also have the right to judge the law in other types of cases.¹³² Despite this language, none of these states recognize the right of juries to judge the law in cases outside of libel.¹³³

In 1971, Kansas began a short and unique experiment by giving trial judges the discretion to give a nullification instruction to juries.¹³⁴ The pattern instruction, which could not be used over the defendant's objection, read in pertinent part:

[J]udges are presumed to be the best judges of the law. Accordingly, you must accept my instructions as being correct statements of the generally accepted legal principles that apply in a case of the type you have heard These principles are intended to help you in reaching a fair result in this case Even so, it is difficult to draft legal statements that are so exact that they are right for all conceivable circumstances. Accordingly, you are entitled to act upon your conscientious feeling about what is a fair result in this case and acquit the defendant if you believe that justice requires such a result. Exercise your judgment without passion or prejudice, but with honesty and understanding. Give respectful regard to my statements of the law for what help they may be in arriving at a conscientious determination of justice in this case. That is your highest duty as a public body and as officers of this court.¹³⁵

The instruction's life was short lived, as it was struck down in the 1973 case of *State v. McClanahan*.¹³⁶ Although the instruction counseled the jury that it could only employ its conscience to acquit outside of the law, the Kansas Supreme Court expressed concern that a jury might use the instruction as a license to convict in heinous crimes even if the conviction was not supported by the evidence.¹³⁷ The Court further ruled that although the jury had the power to acquit against the law, it is the jury's proper function and duty to apply the law as given by the court.¹³⁸

F. The 1990's: A Decade of Debate

1. Marion Barry

During the 1990's, racial tensions, controversial verdicts, and harsh

131. Rucker, *supra* note 54, at 470. Judge Rucker argues that Indiana's present construction of Article 1, Section 19 of the Indiana Constitution renders the provision a nullity and is contrary to any sound constitutional construction. *See id.*

132. Teresa L. Conaway et al., *Jury Nullification: A Selective, Annotated Bibliography*, 39 VAL. U. L. REV. 393, 443 (2004).

133. *See, e.g.,* Simonsen v. State, 542 A.2d 1215 (Del. 1988); Ramos v. State, 934 S.W.2d 358, 367 (Tex. Crim. App. 1996).

134. Korroch & Davidson, *supra* note 39, at 139.

135. *Id.* at 139 n. 56 (quoting Pattern Instructions for Kansas 51.03, at 36 (1971)).

136. 510 P.2d 153 (Kan. 1973).

137. *Id.* at 157.

138. *Id.* at 158.

criminal laws swirled together, forming a storm of media and academic attention focused on jury nullification. The storm began in January 1990, when the FBI conducted a drug sting on the enormously popular black mayor of Washington, D.C., Marion Barry.¹³⁹ Prosecutors charged Mayor Barry with conspiracy to possess cocaine, possession of cocaine, and perjury for lying to a grand jury.¹⁴⁰ Before his trial, Mayor Barry proclaimed the prosecution racist and declared his hope that he would be acquitted in an act of jury nullification.¹⁴¹ The trial drew an enormous amount of media attention and the attendance of several notable personalities, including Louis Farrakhan.¹⁴² Although Barry was convicted on one count of perjury, the public widely viewed his acquittal on the cocaine charges as an act of jury nullification by a mostly black jury.¹⁴³

2. Dr. Death

In 1991, a controversy erupted when Dr. Jack Kevorkian allowed Janet Adkins to kill herself using his “suicide machine.”¹⁴⁴ In the mid-nineties, the highly publicized debate over assisted suicide spilled over into the jury room when Kevorkian was repeatedly acquitted of violating laws against assisted suicide.¹⁴⁵ In one of the trials, jurors acquitted Kevorkian by finding that his release of carbon monoxide into a person’s lungs was intended to ease pain and suffering instead of causing death.¹⁴⁶ Widely seen as jury nullification, these acquittals brought added attention to the jury nullification debate.

3. Rodney King

Public outrage over alleged acts of jury nullification reached a boiling point in 1992. By this time, the media was using the term jury nullification to describe any verdict with which the media or public disagreed.¹⁴⁷ When four white members of the Los Angeles Police Department were recorded beating Rodney King, the media frequently played the video, and the public became convinced of the officers’

139. Butler, *supra* note 42, at 681-82. The sting began when Rasheeda Moore, an old friend of Mayor Barry, invited the mayor to visit her at her hotel. *Id.* at 682. Unbeknownst to Barry, Rasheeda Moore was working as an informant for the FBI. *Id.* Upon Mayor Barry’s visit, Ms. Moore offered him some crack cocaine and eventually convinced him to smoke it with her. *Id.* The FBI and police stormed the room and arrested Mayor Barry. *Id.*

140. *See* United States v. Barry, 938 F.2d 1327, 1329 (D.C. Cir. 1991).

141. Butler, *supra* note 42, at 682-83.

142. *Id.* at 682.

143. *See id.* at 684.

144. Oliver, *supra* note 18, at 57.

145. *Id.*

146. *Id.*

147. Nancy S. Marder, *The Myth of the Nullifying Jury*, 93 NW. U. L. REV. 877, 878 (1999).

guilt.¹⁴⁸ After a jury acquitted the officers, parts of Los Angeles exploded into riots.¹⁴⁹ During the riots, another video captured the vicious beating of a white truck driver named Reginald Denny.¹⁵⁰ When two individuals were charged with the beating, the jury acquitted them on the most serious charges.¹⁵¹ The public generally considered the pair's conviction on lesser charges as too lenient, and the media chalked the verdict up as one more instance of jury nullification.¹⁵²

4. Nullification by Insanity

Jury nullification continued to receive public attention in 1994 as three trials tested the limits of self-defense. Eric and Lyle Menendez were charged with killing their parents and were tried by two separate juries in 1993.¹⁵³ The brothers claimed their actions were the result of years of sexual and psychological abuse.¹⁵⁴ Although the brothers were eventually convicted, their first trials both ended in hung juries at the beginning of 1994.¹⁵⁵ That same year, Lorena Bobbitt was found not guilty by reason of insanity in the trial stemming from her 1993 dismemberment of her husband John.¹⁵⁶ Lorena claimed she was the victim of abuse and that she carried out the attack in a state of temporary insanity.¹⁵⁷ While the media debated whether the so-called "abuse excuse" was becoming increasingly utilized, some commentators viewed the verdicts as possible acts of jury nullification.¹⁵⁸

5. O.J. Simpson and Professor Butler

In 1995, the most famous and recent alleged act of jury nullification occurred when a predominantly black jury returned a not guilty verdict in the O.J. Simpson trial.¹⁵⁹ During the closing arguments of Simpson's defense, his attorney, Johnnie Cochran, seemed to implore the jury to flex their nullification power, arguing:

You . . . police the Police. You police them by your verdict. You are the ones to send the message. Nobody else is going to do it in this society.

148. Anne Bowen Poulin, *The Jury: The Criminal Justice System's Different Voice*, 62 U. CIN. L. REV. 1377, 1378 (1994).

149. *Id.*

150. *Id.*

151. *Id.*

152. *Id.* at 1378-79.

153. CNN, *Menendez Brothers Escape Death Sentence: Jury Recommends Life in Prison*, <http://www.cnn.com/US/9604/17/menendez.2/> (last visited Jan. 19, 2007).

154. *Id.*

155. *Id.*

156. Court TV Library, *Virginia v. Lorena Bobbitt*, <http://www.courtvtv.com/archive/casefiles/verdicts/bobbitt.html> (last visited January 19, 2007).

157. *Id.*

158. Dorfman & Iijima, *supra* note 11, at 878-79.

159. See Elissa Krauss & Martha Schulman, *The Myth of Black Juror Nullification: Racism Dressed Up in Jurisprudential Clothing*, 7 CORNELL J.L. & PUB. POL'Y 57, 59-60 (1997).

They don't have the courage. Nobody has the courage. They have a bunch of people running around with no courage to do what is right, except individual citizens. You . . . are the ones in war; you are the ones on the front line.¹⁶⁰

We will never know whether the jury acquitted Simpson to send a message to police or because the prosecution did not prove its case beyond a reasonable doubt; nonetheless, the verdict was ridiculed across the nation.¹⁶¹ The media wondered aloud whether the jury system was in crisis.¹⁶² Many of these critics targeted black jurors, arguing that they were corrupting the justice system by bringing a biased distrust of police and prosecutors into the jury box or that they were too sympathetic to the plight of black defendants.¹⁶³ Also in 1995, Professor Paul Butler released a provocative article arguing that black jurors should engage in race-based jury nullification—this only added to the controversy.¹⁶⁴

6. Three-Strikes and the Bronx Jury

Even before Butler's article, juries across the nation were using their own sense of justice to nullify prosecutions under punitive criminal laws, such as California's three strikes law and New York's Rockefeller drug laws.¹⁶⁵ California's three-strikes law requires that any person convicted of a felony who has two prior serious convictions be sentenced to between twenty-five years and life in prison.¹⁶⁶ Because drug crimes are included in the definition of a serious conviction, eighty-five percent of people sentenced under the law are convicted of non-violent offenses.¹⁶⁷ Blind application of the law has led to some grotesque results, including life imprisonment for a man whose third strike was stealing a slice of pizza.¹⁶⁸ Although juries are not informed of whether a case is a three-strikes case, they have often acquitted defendants when they believed the case involved a third strike.¹⁶⁹ In San Francisco and Los Angeles, juries' refusals to convict in three-strikes cases became so common that both cities' prosecutors offices had to change their policies about the types of cases they would prosecute under the three-strikes

160. 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, 1125 (1996).

161. Krauss & Schulman, *supra* note 159, at 59-60.

162. *Id.* at 59.

163. *Id.* at 60.

164. See Butler, *supra* note 42.

165. Nancy S. Marder, *Juries, Drug Laws & Sentencing*, 6 J. GENDER RACE & JUST. 337, 341 (2002). Federal law and approximately twenty states employ a version of the three-strikes law. *Id.* at 341-42. California, however, prosecutes three-strikes cases more aggressively, and its law is considered the most punitive. *Id.* at 341-42.

166. CAL. PENAL CODE § 667 (West 1999).

167. Marder, *supra* note 165, at 342.

168. *Id.* at 343. For a ranking of the top 150 unjust three-strike stories, visit FACTS: Top 150 Unjust 3-Strike Stories, <http://www.facts1.com/ThreeStrikes/Stories/> (last visited Jan. 19, 2007).

169. Marder, *supra* note 165, at 345.

law.¹⁷⁰

In New York, another jury phenomenon gained the attention of academics. The term “Bronx jury” is used to describe the supposedly higher rate of acquittals among minority juries in the Bronx.¹⁷¹ While there has been some dispute about the actual extent of the difference, the numbers show a higher acquittal rate in the Bronx than the rest of New York City or the nation as a whole.¹⁷² A large number of these acquittals are in prosecutions under New York’s famously harsh Rockefeller drug laws.¹⁷³ It is unclear if any of these acquittals are instances of jury nullification. Commentators often speculate, however, that these juries’ reluctance to convict in drug cases stems from their perceptions about the devastating effects their community has experienced as a result of the high rate of incarceration among black males.¹⁷⁴

7. The Fully Informed Jury Association

While the media fueled public distrust of the jury during the 1990’s, a large group of citizens began calling for a return to the policy of informing juries about their nullification power. Founded in 1989, the Fully Informed Jury Association (FIJA) educates jurors about their power to judge the law, and seeks passage of state or federal constitutional amendments aimed at requiring jury instructions that inform jurors that they have the right to judge the law.¹⁷⁵ The FIJA believes that jurors have a duty to render a just verdict and should consider the facts of the case, mitigating circumstances, and merits of the law to do so.¹⁷⁶ Jurors, the FIJA argues, are uniquely situated to play this role because they have no personal stake in the decision.¹⁷⁷ The centerpiece of the FIJA program is the Fully Informed Jury Amendment, the short version of which reads:

Whenever government is one of the parties in a trial by jury, the court shall inform the jurors that each of them has an inherent right to vote on the verdict, in the direction of mercy, according to his own conscience and sense of justice. Exercise of this right may include jury consideration of the defendant’s motives and circumstances, degree of harm done, and evaluation of the law itself. Failure to so inform the jury is grounds for mistrial and another trial by jury.¹⁷⁸

170. *Id.* at 348-49.

171. *Id.* at 357.

172. *Id.* at 358-59.

173. *Id.* at 358. New York’s Rockefeller drug laws, enacted in 1973, mandate long prison sentences for drug convictions, even for minor first time offenses. See N.Y. PENAL LAW § 220.00-220.65 (McKinney 2000).

174. Marder, *supra* note 165, at 361.

175. Fully Informed Jury Association, *The FIJA Mission*, <http://www.fija.org/index.php?page=staticpage&id=1> (last visited on January 19, 2007).

176. *Id.*

177. *Id.*

178. Robert C. Black, *FIJA: Monkeywrenching the Justice System?*, 66 UMKC L. REV. 11, 18

The FIJA has succeeded in proposing its Fully Informed Jury Amendment, or some other form of jury nullification legislation, before the people or the legislature in a number of states, although no such legislation has yet been adopted.¹⁷⁹ Although the FIJA is sometimes dismissed as a marginal fringe, the movement has garnered a large amount of support from people across the political spectrum.¹⁸⁰

III. THE JURY NULLIFICATION DEBATE

Jury nullification has generated far more academic debate than judicial consideration. The United States Supreme Court has not addressed the issue since 1895, and federal decisions on jury nullification saw little to no change until after the public and academic debate began to rage in the 1990's. Because of the importance of the academic debate regarding jury nullification, a discussion of the subject cannot be complete without cataloging some of the important academic arguments made both for and against jury nullification.

Although both arguments for, and instances of, jury nullification occurred before 1680, the first well known public debate over the subject did not occur until the aftermath of *Bushell's Case*.¹⁸¹ The decision in *Bushell's Case* came down on the cusp of a raging political battle in England between the Whigs and the Tories.¹⁸² The English Crown sought to crack down on political criticism by charging Whig publishers with seditious libel.¹⁸³ To counter these efforts, the Whigs used the recent decision in *Bushell's Case* to shape and legitimize their emerging argument for jury nullification in pamphlets like *The English-Mans Right*.¹⁸⁴ These pamphlets went beyond the contours of *Bushell's Case* and used problematic hypotheticals to argue for outright jury nullification.¹⁸⁵ These hypotheticals would use seemingly innocent acts that might technically violate the law and ask whether anyone would return a verdict of guilty in a resulting prosecution.¹⁸⁶ These pamphlets would

(1997).

179. See Julie Johnson, *The Jury Nullification Debate*, 5 U.S.A.F. ACAD. J. LEGAL STUD. 139, 142-43 (1994); Fully Informed Jury Association, *History of FIJA*, <http://www.fija.org/index.php?page=staticpage&id=3> (last visited on January 19, 2007). FIJA legislation has been introduced in Arizona, Alaska, Arkansas, California, Colorado, Connecticut, Georgia, Iowa, Louisiana, Massachusetts, Montana, Nevada, New Hampshire, New York, Oklahoma, Oregon, South Carolina, Tennessee, Texas, Utah, and South Dakota. *Id.*

180. Black, *supra* note 178, at 22. The FIJA has been instrumental in instigating much of the non-academic discussion of jury nullification by generating over two thousand articles in a wide array of mainstream publications that discuss the jury's right to be informed of their nullification power. Fully Informed Jury Association, *History of FIJA*, <http://www.fija.org/index.php?page=staticpage&id=3> (last visited on Jan. 19, 2007).

181. Stern, *supra* note 28, at 1817-18.

182. *Id.* at 1827.

183. *Id.* at 1829.

184. *Id.*

185. *Id.* at 1832.

186. *Id.*

resurface in pre-revolutionary America a century later and help to inject conscience into early American conceptions about the jury.¹⁸⁷

In colonial America, jury nullification served as a vital tool allowing the colonists to resist what they viewed as oppressive British laws.¹⁸⁸ Based on this experience and the general distrust of governmental power among the Constitutional framers, there was little, if any, debate about the importance of the jury as a protection of American freedoms. During the debates surrounding the ratification of the Constitution, Alexander Hamilton noted:

The friends and adversaries of the plan of the convention, if they agree on nothing else, concur at least in the value they set upon the trial by jury; or if there is any difference between them it consists of this: the former regard it as a valuable safeguard to liberty; the latter represent it as the very palladium of free government.¹⁸⁹

A review of the writings of the founding fathers finds little debate that the jury's importance as a protection of liberty resulted from the jury's ability to judge the law.¹⁹⁰

It was not until the controversy over slavery arose that any significant level of debate about the jury's right of nullification emerged.¹⁹¹ Faced with increased nullification in fugitive slave cases, some judges began to question the wisdom of jury nullification. Although most of this criticism was aimed more at limiting the jury's power to judge the law within constitutionally workable bounds,¹⁹² these efforts helped to inspire one of the most complete and spirited defenses of jury nullification in the writings of Lysander Spooner.

In *An Essay on the Trial by Jury*, Spooner outlined a thoughtful, well-reasoned defense of the jury's nullification power.¹⁹³ Spooner emphasized that the use of the term trial *per pais*, which can be translated to trial by country, described the right to a jury guaranteed by the Magna Carta.¹⁹⁴ Spooner argued that this language made a distinction between trial by jury, i.e., trial by the people, and a trial by the government.¹⁹⁵ According to Spooner, for the jury to have any significance, it must have the right to refuse to apply the law, otherwise the jury could be made a tool of the government and would serve no purpose in protecting the individual from government oppression.¹⁹⁶ Another impor-

187. See *supra* note 29.

188. See *supra* notes 35-53 and accompanying text.

189. THE FEDERALIST NO. 83 (Alexander Hamilton).

190. See *supra* note 56 and accompanying text.

191. See *supra* text accompanying notes 62-65.

192. See *supra* notes 67-68 and accompanying text.

193. LYSANDER SPOONER, AN ESSAY ON THE TRIAL BY JURY (1852), available at <http://www.lysanderspooner.org/TrialByJury.htm>.

194. *Id.* at 6.

195. *Id.*

196. *Id.* at 5.

tant argument Spooner advanced is that the jury serves the important function of protecting minorities against majoritarian oppression.¹⁹⁷

After Spooner's essay, little was written about jury nullification, even after 1895, when the Supreme Court stripped the jury of its right to nullify in *Sparf*.¹⁹⁸ In 1910, Roscoe Pound argued that jury nullification allowed adjustment of the letter of the law to the demands of its administration in actual cases.¹⁹⁹ Pound argued that this flexibility allows juries to seek justice in extraordinary cases while apparently leaving the law unaltered.²⁰⁰ It was not until 1939 that Mark DeWolfe Howe, in *Juries as Judges of Criminal Law*, criticized the judicial reversal in *Sparf*.²⁰¹ Scholarly writing about juries continued, but until the late 1960's, it was generally restrained to descriptions about the practical functioning of juries and arguments concerning state constitutional provisions.²⁰²

A flurry of academic debate emerged in response to the Vietnam War resister cases when defendants often sought jury nullification.²⁰³ Some of the most interesting of these articles dealt with the relationship between acts of civil disobedience and jury nullification.²⁰⁴ Harris Mirkin's *Judicial Review, Jury Review & the Right of Revolution Against Despotism*, took a slightly different approach by comparing jury nullification with judicial review and arguing that nullification was a necessary populist counterpart to judicial review, which he asserted was an aristocratic institution.²⁰⁵ Mirkin theorized that both institutions

197. *Id.* at 206-07. Spooner's use of the term minority here is not limited to racial, ethnic, or religious groupings, but instead refers to any numerically inferior grouping or position of opinion. See *id.* For Spooner, the most important attribute of the jury was its tendency to limit laws to the extent of societal consensus. *Id.* at 206.

198. *Sparf v. United States*, 156 U.S. 51 (1895).

199. Roscoe Pound, *Law in Books and Law in Action*, 44 AM. L. REV. 12, 18 (1910).

200. *Id.*

201. Mark DeWolfe Howe, *Juries as Judges of Criminal Law*, 52 HARV. L. REV. 582, 615-16 (1939).

202. See, e.g., Dale W. Broeder, *The Functions of the Jury: Facts or Fictions?*, 21 U. CHI. L. REV. 386 (1954) (examining the duties of the jury); Samuel K. Dennis, *Maryland's Antique Constitutional Thorn*, 92 U. PA. L. REV. 34 (1943) (discussing the application and history of Maryland's constitutional provision giving juries the right to judge the law).

203. See, e.g., Frank A. Kaufman, *The Right of Self-Representation and the Power of Jury Nullification*, 28 CASE W. RES. L. REV. 269 (1978) (discussing the relationship between the pro se defendant and jury nullification); William M. Kuntsler, *Jury Nullification in Conscience Cases*, 10 VA. J. INT'L L. 71 (1969) (arguing that juries should be informed that they are the consciences of the community and are free to acquit in cases where it would be unjust to do otherwise); Alan W. Schefflin, *Jury Nullification: The Right to Say No*, 45 S. CAL. L. REV. 168 (1972) (arguing that jury nullification is an important element of discretion in the administration of law and is critical to stability in a democracy); Gary J. Simson, *Jury Nullification in the American System: A Skeptical View*, 54 TEX. L. REV. 488 (1976) (arguing that there is no justification for a right to jury nullification, but concluding that any attempts to limit a jury's power to nullify would have unacceptable side effects); Jon M. Van Dyke, *The Jury as a Political Institution*, 16 CATH. LAW. 224 (1970) (arguing that juries should be instructed that they have the power to acquit if applying the law would be unjust).

204. Robert T. Hall, *Legal Toleration of Civil Disobedience*, 81 ETHICS 128 (1971) (examining four different means for societal accommodation of civil disobedience and concluding that jury nullification was the most effective of the alternatives); Joseph L. Sax, *Conscience and Anarchy: The Prosecution of War Resisters*, 57 YALE REV. 481 (1968) (arguing that nullification was necessary to allow the legal system to properly address those situations where violation of the law is justifiable).

205. Harris G. Mirkin, *Judicial Review, Jury Review, & the Right of Revolution Against Despot-*

provided necessary alternatives to revolution by preventing the application of unjust laws that might otherwise create a right to revolt.²⁰⁶

The debate over jury nullification decreased during the 1980's, and although some writing continued on the subject, little was added to the debate.²⁰⁷ At the dawn of the 1990's, however, highly publicized and controversial jury verdicts thrust the issue back into the center of academic attention.²⁰⁸ Some of these articles were direct reactions to the controversial verdicts or the issues that permeated them,²⁰⁹ while others addressed the traditional debate over whether jurors should be informed of their nullification power.²¹⁰ Other authors suggested new jury control procedures or prosecution strategies to prevent acts of jury nullification, and some of these suggestions were eventually employed in the judicial reaction against nullification beginning in the late 1990's.²¹¹

Few law journal articles have generated as much attention as Paul Butler's essay, *Racially Based Jury Nullification: Black Power in the Criminal Justice System*.²¹² Butler's essay combined the public debate over jury nullification with the soaring racial tensions of the 1990's to

ism, 6 POLITY 36, 55 (1973).

206. *Id.* at 69-70.

207. See, e.g., Phillip B. Scott, *Jury Nullification: An Historical Perspective on a Modern Debate*, 91 W. VA. L. REV. 389 (1989); Eleanor Tavris, *The Law of an Unwritten Law: A Common Sense View of Jury Nullification*, 11 W. ST. U. L. REV. 97 (1983).

208. See *supra* Part II.F.

209. See, e.g., Dorfman & Iijima, *supra* note 11, at 878 (discussing jury nullification in an array of contexts, including "abuse excuse" cases like that of the Menendez brothers and Lorena Bobbit); W. William Hodes, *Lord Brougham, the Dream Team, and Jury Nullification of the Third Kind*, 67 U. COLO. L. REV. 1075 (1996) (arguing that the O.J. Simpson verdict was jury nullification where the jury voted to acquit to send a message); Rita Simon, *Jury Nullification, or Prejudice and Ignorance in the Marion Barry Trial*, 20 J. CRIM. JUST. 261 (1992) (questioning whether the Marion Barry verdict was an act of partial jury nullification or an example of prejudice and ignorance overshadowing the facts and the law).

210. See, e.g., James Joseph Duane, *Jury Nullification: The Top Secret Constitutional Right*, LITIG., Summer 1996, at 6, 6-14, 59-60 (arguing that if we continue to hide the nullification power from jurors, juries will continue to make bad choices about when to utilize it, and judges will lose their credibility); David Farnham, *Jury Nullification: History Proves It's Not a New Idea*, CRIM. JUST., Winter 1997, at 4, 4-14 (arguing that failure to instruct juries on their nullification power keeps the responsible jury from fulfilling its duty while doing nothing to prevent individual jurors from making decisions based on prejudice); Honorable Jack B. Weinstein, *Considering Jury "Nullification": When May and Should a Jury Reject the Law to Do Justice*, 30 AM. CRIM. L. REV. 239 (1993) (opposing government attempts to prevent jury nullification by employing strict controls, but also opposing instructing juries of their nullification power). Instead, Judge Weinstein argued that judges should use discretion to admit morally significant evidence in appropriate circumstances that might lead a jury to nullify. *Id.*

211. See, e.g., Crispo et al., *supra* note 7, at 3, 52-57 (arguing that jury nullification threatens to undermine the justice system, and suggesting procedures to protect against nullification); Nancy J. King, *Silencing Nullification Advocacy Inside the Jury Room and Outside the Courtroom*, 65 U. CHI. L. REV. 433, 500 (1998) (concluding that excluding potential nullifiers from juries and restricting nullification speech around the courthouse are constitutional means for combating jury nullification); Justice Rebecca Love Kourlis, *Not Jury Nullification: Not a Call for Ethical Reform; But Rather a Case for Judicial Control*, 67 U. COLO. L. REV. 1109 (1996) (arguing that jury nullification is anarchic, ethical standards prevent defense counsel from arguing for nullification, and that it is the responsibility of the judge to prevent such argument); Steven M. Warshawsky, Note, *Opposing Jury Nullification: Law, Policy, and Prosecutorial Strategy*, 85 GEO. L.J. 191, 223-34 (1996) (suggesting prosecution strategies for discouraging jury nullification).

212. Butler, *supra* note 42.

create an explosion of interest that has seen little equal in the academic world.²¹³ Butler advocated the use of race based jury nullification as a means for the African-American community to address the racism in the criminal justice system, which was reflected in the alarming rate of incarceration among African-American men.²¹⁴ Butler argued that the African-American community would be better off if more non-violent black offenders remained in their communities and advocated blacks using jury nullification accordingly.²¹⁵

Professor Butler's article set off a flurry of scholarship on the interplay between race and jury nullification. In *The Dangers of Race-Based Jury Nullification: A Response to Professor Butler*, Andrew Leipold argued that instituting Butler's plan would help legitimize racism and leave African-Americans in a worse position.²¹⁶ Much of the other scholarship surrounding race and jury nullification discussed whether alleged instances of jury nullification were really jury nullification at all.²¹⁷ These articles make the important point that jury nullification is a difficult phenomenon to identify and argue that when trials end in unpopular verdicts, the public, media, and occasionally the judiciary, make the rash conclusion that jury nullification has taken place.²¹⁸

In 1999, Sherman Clark's *The Courage of Our Convictions* provided an interesting theory about the role the jury serves in allowing society to take responsibility for problematic judgments.²¹⁹ Clark argued that the jury is an important means by which our society takes responsibility for the condemnation of its citizens, and therefore, the court should make the jury aware that it is serving as the conscience of the community.²²⁰ In 2000, Norman Finkel's *Commonsense Justice, Culpability, and Punishment* provided an analysis of the capability of lay ju-

213. Professor Butler's argument for race based jury nullification was even featured in a segment on "60 Minutes." Paul D. Butler, *Race-Based Jury Nullification: Case-in-Chief*, 30 J. MARSHALL L. REV. 911, 913 (1997).

214. Butler, *supra* note 42, at 679.

215. *Id.*

216. Andrew D. Leipold, *The Dangers of Race-Based Jury Nullification: A Response to Professor Butler*, 44 UCLA L. REV. 109, 111 (1996).

217. See, e.g., Clay S. Conrad, *Scapegoating the Jury*, 7 CORNELL J.L. & PUB. POL'Y 7, 47-48 (1997) (arguing that allegations of racist jury nullification were exaggerated, and that the actions of police, prosecutors, and judges often had a greater influence on alleged nullification verdicts); Long X. Do, Comment, *Jury Nullification and Race-Conscious Reasonable Doubt: Overlapping Reifications of Commonsense Justice and the Potential Voir Dire Mistake*, 47 UCLA L. REV. 1843 (2000) (arguing that race conscious reasonable doubt is too easily mistaken for race-based jury nullification and can lead to racist jury dismissals that undermine the role of the jury); Krauss & Schulman, *supra* note 159, at 57-58 (arguing that allegations of black juror nullification are an exaggerated and racist assault on the jury system); Nancy S. Marder, *The Interplay of Race and False Claims of Jury Nullification*, 32 U. MICH. J.L. REFORM 285, 285-86 (1999) (arguing that the media makes false claims of jury nullification when verdicts are actually based on reasonable doubt).

218. Conrad, *supra* note 217, at 47-48; Krauss & Schulman, *supra* note 159, at 57-58; Marder, *supra* note 217, at 285-86.

219. Sherman J. Clark, *The Courage of Our Convictions*, 97 MICH. L. REV. 2381 (1999).

220. *Id.* at 2381-82.

rors to make difficult judgments.²²¹ Finkel's article examined a detailed study of juror judgments, which he termed "Commonsense Justice," and concluded that lay jurors often offer a more complex, varied, and appropriate response than the law can.²²²

IV. THE JUDICIAL REACTION

As a result of the controversy surrounding the jury in the 1990's, the jury has been an institution increasingly under siege.²²³ The media has portrayed the jury as out of control and untrustworthy.²²⁴ Legislatures across the country have considered eliminating the unanimity requirement in criminal cases, requiring only ten or eleven jurors to vote for a conviction.²²⁵ A survey of federal judges found that more than a quarter of them believed that "juries should decide fewer types of cases."²²⁶ Most importantly, judicial decisions have further limited the types of issues juries are allowed to decide,²²⁷ and restricted information that the jury is given about its role.²²⁸

Jury control procedures are not a novel concept. Courts have been using *voir dire* to keep possible nullifiers off of juries since the days of the Fugitive Slave Act.²²⁹ The judiciary has generally refused to instruct juries about their nullification power since the dawn of the twentieth century, and courts since that time have instructed jurors that it is their duty to apply the law as given by the court.²³⁰ Nonetheless, beginning in the 1990's, courts have escalated the war on jury nullification to a scale never before seen.

A. *Overruling Bushell?*

In the most shocking reported attacks on jury nullification, jurors have been arrested for advocating for, or participating in, jury nullification.²³¹ In *People v. Kriho*,²³² the trial court held a juror in contempt after he advocated jury nullification to another juror. Division One of the

221. Norman J. Finkel, *Commonsense Justice, Culpability, and Punishment*, 28 HOFSTRA L. REV. 669 (2000).

222. *Id.* at 705.

223. Marder, *supra* note 165, at 337.

224. *See id.*

225. *Id.* at 338 n.10.

226. *Id.* at 339 n.14.

227. For example, California now often tries the issue of previous convictions in three-strikes cases separately to prevent possible jury nullification. *See, e.g., People v. Cuevas*, 107 Cal. Rptr. 2d 529, 532 (2001).

228. Marder, *supra* note 165, at 338-39.

229. SPOONER, *supra* note 193, at 8 n.1.

230. *See supra* text accompanying note 100.

231. *People v. Kriho*, 996 P.2d 158, 163-64 (Colo. Ct. App. 1999); John Tiffany, *Juror Nullifies Judge: Teacher Charged with Respecting Constitution*, AM. FREE PRESS, Mar. 27, 2006, available at http://www.americanfreepress.net/html/juror_nullifies_judge.html.

232. 996 P.2d 158 (Colo. Ct. App. 1999).

Colorado Court of Appeals remanded the contempt conviction for a new trial because the trial court impermissibly included evidence about jury deliberations and considered the juror's membership in a political group as a basis for contempt.²³³ Even though the case was remanded, the court failed to declare that a juror should not be punished for his opinion about a case.²³⁴

In a more recent case, a juror was charged with perjury after reportedly declaring during jury deliberations "that she could not vote to convict because she answered to a higher power than the judge."²³⁵ The former nun and school teacher, Carol Asher, was one of four jurors to vote against conviction.²³⁶ In interviews, Asher also expressed doubts about whether the prosecutor had provided sufficient evidence of guilt.²³⁷ Idaho law requires jurors to sign an oath declaring that they will decide the case according to the law as it is determined by the judge.²³⁸ After a fellow juror informed the prosecutor that Asher had claimed to answer "to a higher power than the judge," the prosecutor charged Asher with perjury.²³⁹ Although the charges were eventually dismissed, Asher was forced to spend nearly \$16,000 in legal fees and face the prospect of up to 14 years in prison.²⁴⁰ While the prosecution of jurors for their deliberations or verdict remains a rarity, even its rare occurrence implicates the dangerous success the judiciary has enjoyed in deceiving jurors and apparently even some attorneys about criminal jurors' ability to acquit against the law.²⁴¹ For the first time in almost three and a half centuries, the principle first announced in *Bushell's Case*—that jurors cannot be punished for their verdict—is beginning to face attack.

B. Judicial Deception

The truth about jury nullification has long been hidden from most juries, but only recently has this judicial denial turned into outright deception.²⁴² In 1997, the Seventh Division of California's Second Appel-

233. *Id.* at 170, 172-74.

234. *See id.*

235. Tiffany, *supra* note 231.

236. Iloilo Marguerite Jones, *Kamiah, Idaho*, IDAHO OBSERVER, Feb. 2006, available at <http://www.proliberty.com/observer/20060202.htm>.

237. Tiffany, *supra* note 231. Specifically, Asher did not feel the prosecutor had proven that the defendant knew about the small amount of illegal drugs found in a work truck he was driving. *Id.* Asher also felt the police search that uncovered the drugs might have violated the Fourth Amendment. *Id.*

238. *Id.*

239. *Id.*

240. *Id.*; Iloilo Marguerite Jones, Fully Informed Jury Association, *You Can't Have It Both Ways*, <http://www.fija.org/index.php?page=displaytxt&id=162&refer=news> (last visited Jan. 26, 2007).

241. *See infra* Part IV.B.

242. *Compare* United States v. Dougherty, 473 F.2d 1113, 1137 (D.C. Cir. 1972) (refusing to compel trial judges to provide a jury nullification instruction), with *People v. Blessett*, No. 241432, 2003 Mich. App. LEXIS 2854, at *2 (Mich. Ct. App. Nov. 13, 2003) (upholding a judge's comment to

late District upheld a judge's threatening of jurors with removal when the jury seemed poised to bring in a verdict contrary to the law.²⁴³ The case was a felony-murder prosecution involving a robbery.²⁴⁴ Concerned that the defendant had not committed the physical murder, the jury asked the court if it could return a verdict finding the defendant guilty of second degree murder and robbery.²⁴⁵ The court instructed the jury that if there was a murder committed during the robbery, the verdict must be for first degree murder according to the felony murder rule.²⁴⁶ The court then went on to lecture the jurors, threatening them with removal if they failed to follow the law.²⁴⁷ The appellate court upheld the trial court's impromptu instruction as "direct, accurate, and easily understood."²⁴⁸ The dissent, however, criticized the instruction for suggesting that the jurors would be subject to sanctions if they did not follow the court's instructions as to the law.²⁴⁹ Continuing the trend of threatening jurors, California upheld similar threats made even before the jury was impaneled in 2002.²⁵⁰ When judges threaten jurors with removal for showing intent to disregard the law, they are not making idle threats.²⁵¹ Still, these instructions can be deceptive in their implication that jurors could be subject to sanctions because of their verdict.²⁵²

In 2002, Division Four of the First Appellate District of California went a step further by upholding a judge's admonishment to a jury that it had a legal obligation to apply the law.²⁵³ While juries have long been told that it is their duty to apply the law,²⁵⁴ replacing duty with legal obligation carries the improper connotation that jurors would be subject to punishment if they refused to apply the law. These concerns are not mere speculation. Besides jurors, some attorneys have also been wrongly convinced that jurors can somehow "get[] into trouble" for their verdicts.²⁵⁵ Of course, when jurors are already aware that they can exercise their nullification power with impunity, judicial deception

a prospective juror that there is "no such thing" as jury nullification).

243. *People v. Sanchez*, 69 Cal. Rptr. 2d 16, 21 (Cal. Ct. App. 1997).

244. *Id.* at 20.

245. *Id.*

246. *Id.*

247. *Id.* at 21.

248. *Id.* at 22 n.2.

249. *Id.* at 26 (Johnson, J., dissenting).

250. *People v. Noriega*, 120 Cal. Rptr. 2d 776, 778 (Cal. Ct. App. 2002).

251. *See infra* Part IV.C.

252. *See Sanchez*, 69 Cal. Rptr. 2d at 28 (Johnson, J., dissenting). Ironically, however, this deception may be turning prophetic, as prosecutors and judges are becoming increasingly bold in bringing criminal charges against jurors. *See, e.g., People v. Kriho*, 996 P.2d 158 (1999); Tiffany, *supra* note 231.

253. *People v. Bibbs*, No. A095952, 2002 Cal. App. LEXIS 11342, at *5 (Cal. Ct. App. Dec. 11, 2002).

254. *Sparf v. United States*, 156 U.S. 51, 59-61, 101-02 (1895).

255. *United States v. Rosenthal*, 454 F.3d 943, 947 (9th Cir. 2006).

might not work. In these cases, the judge's weapon is usually dismissal.

C. Juror Dismissal

The United States Court of Appeals for the Tenth Circuit recently approved striking a potential juror because of his correct assertion that a criminal jury always has the power to acquit.²⁵⁶ The court allowed the dismissal although there was no evidence that the potential juror was likely to attempt jury nullification, and the juror professed his inclination to follow the judge's instructions.²⁵⁷ While this dismissal was probably premature and unnecessary, it is hardly surprising. Judges and prosecutors alike have long used voir dire as a tool to keep possible nullifiers off of juries.²⁵⁸ After the jury controversies of the 1990's, however, American courts have allowed trial judges to use increasingly invasive methods to investigate and exclude possible nullifiers from juries at all stages of the trial.

The most well known and discussed of these juror investigation cases is *United States v. Thomas*.²⁵⁹ In *Thomas*, the judge removed the jury's only black juror in the midst of deliberations.²⁶⁰ After several weeks of trial, a number of the white jurors expressed their concern about the black juror to the court reporter, complaining that he was showing signs of agreement during the course of the defense argument.²⁶¹ In response and at the urging of the prosecution, the court conducted on-the-record interviews of all the jurors to determine if the black juror was distracting the jury.²⁶² Even though only one juror expressed concern that the black juror would disrupt deliberations, the court sought to remove the black juror on its own motion.²⁶³ Only after the defense vigorously objected did the judge allow the juror to remain.²⁶⁴

During the course of deliberations, several jurors again expressed their concerns about this lone black juror who had repeatedly voted not guilty.²⁶⁵ Some jurors accused him of having a "predisposed disposition," while another said that the other jurors were "picking on" him.²⁶⁶

256. *United States v. James*, No. 98-1479, 2000 U.S. App. LEXIS 1738, at *6 (10th Cir. Feb. 7, 2000).

257. *Id.* at *5.

258. *See supra* text accompanying note 229.

259. 116 F.3d 606 (2d Cir. 1997).

260. *Id.* at 614. Even before the trial began, the prosecution attempted to exercise a peremptory challenge to strike the juror because he failed to make eye contact with the prosecutor during voir dire. *Id.* at 609. The trial court denied the challenge, ruling that failure to make eye contact is insufficient to warrant removal. *Id.*

261. *Id.* at 610.

262. *Id.*

263. *Id.* at 610-11.

264. *Id.* at 611.

265. *Id.*

266. *Id.*

The court again interviewed the jury, and some of the white jurors accused the black juror of favoring acquittal because of improper considerations, including that the defendants were his “people;” other jurors, however, indicated that the black juror was only concerned with the evidence.²⁶⁷ When interviewed, the black juror indicated that he was not persuaded by the evidence.²⁶⁸ Despite this conflicting testimony, the court removed the juror, stating that it believed his motives to be immoral and his doubts not based on the evidence.²⁶⁹ After the removal, the court notified the jury and instructed it to not draw conclusions from the removal of one of the only jurors in favor of acquittal.²⁷⁰ Soon after the dismissal, the remaining eleven jurors found eight of the nine defendants guilty of one or more charges.²⁷¹

One of the issues on appeal was whether there was “just cause” to dismiss the juror under Rule 23(b) of the Federal Rules of Criminal Procedure.²⁷² Just cause under 23(b) has traditionally been limited to instances where the juror was physically unable to perform his duty, or he admitted that he could not be partial.²⁷³ The United States Court of Appeals for the Second Circuit expanded just cause in a new direction by ruling “that a juror’s purposeful refusal to apply the law” constitutes just cause for removal.²⁷⁴ After discussing jury nullification, the court ruled that trial courts have a duty to prevent jury nullification when possible.²⁷⁵ The court noted the importance of jury secrecy and admitted that there is no way of investigating possible jury nullification “without unduly breaching the secrecy of deliberations.”²⁷⁶ Nonetheless, by giving trial courts a duty to strike jurors if there is no “possibility that [the request for discharge] stems from the juror’s view of the sufficiency of the governments evidence,” the Second Circuit ensured that these intrusive investigations would continue.²⁷⁷ The court, however, found that the trial court did not satisfy this evidentiary burden and remanded for a new trial.²⁷⁸ Subsequent to *Thomas*, several other circuits and states have addressed the removal of jurors after the beginning of deliberation

267. *Id.*

268. *Id.*

269. *Id.* at 612.

270. *Id.*

271. *Id.*

272. *Id.* Rule 23(b)(2)(B) now allows a jury of fewer than twelve to return a verdict “if the court finds it necessary to excuse a juror for good cause after the trial begins.” FED. R. CRIM. P. 23(b)(B). Congress replaced “just cause,” with “good cause,” by amendment in 2002, but according to the notes of the advisory committee, this change was not intended to change the meaning of the rule. FED. R. CRIM. P. 23, Notes of Advisory Committee on 2002 amendments.

273. *Thomas*, 116 F.3d at 613.

274. *Id.* at 617.

275. *Id.* at 616.

276. *Id.* at 621.

277. *Id.* at 622.

278. *Id.* at 624-25.

to prevent jury nullification.²⁷⁹ All have approved of the idea while requiring evidentiary standards that vary only slightly from *Thomas's* to justify the removal.²⁸⁰

D. Killing the Messenger

Lying to jurors about their powers and dismissing those jurors that actually do know the truth would still fail to eradicate jury nullification if criminal defendants, their attorneys, or other parties were allowed to inform potential jurors about their power to refuse to apply criminal laws. Not surprisingly, judges have increased their efforts to prevent criminal defendants, their attorneys, and other parties from informing jurors about their nullification power. With regard to trial arguments for jury nullification, courts have long allowed trial judges to restrict such argument.²⁸¹ Recently, however, attorneys attempting to solicit jury nullification are being accused of ethical violations, with one judge even declaring that arguing for jury nullification is illegal.²⁸²

Limiting jury nullification argument is especially problematic when a defendant proceeds pro se. For example, in *United States v. Penick*,²⁸³ a defendant sought to argue in his own defense after his counsel refused to argue for jury nullification, or, as Penick put it, would not put the “judicial oligarchy” on trial.²⁸⁴ After being allowed to proceed, Penick attempted to argue for jury nullification, but was rebuffed by the court and eventually convicted by a jury.²⁸⁵ On appeal, through counsel, Penick argued that he should be granted a new trial because his waiver of counsel was not knowing and intelligent.²⁸⁶ The Tenth Circuit counseled that trial courts should conduct a thorough interview of the defendant to determine that the defendant understands “the nature of the charges, the range of allowable punishments and possible defenses, and

279. See, e.g., *United States v. Abbell*, 271 F.3d 1286 (11th Cir. 2001); *United States v. Symington*, 195 F.3d 1080 (9th Cir. 1999); *State v. Elmore*, 123 P.3d 72 (Wash. 2005); *People v. Cleveland*, 21 P.3d 1225 (Cal. 2001).

280. Compare *Thomas*, 116 F.3d at 621-22 (ruling that for a removal to be valid after deliberations have begun, the record cannot disclose “any possibility that [the request to discharge] stems from the juror’s view of the sufficiency of the government’s evidence”), with *Abbell*, 271 F.3d at 1302 (requiring that “no ‘substantial possibility’ exists that she is basing her decision on the sufficiency of the evidence”); *Symington*, 195 F.3d at 1087 (ruling that if there is “any reasonable possibility that the impetus for a juror’s dismissal stems from the juror’s views on the merits of the case, the court must not dismiss the juror”); *Elmore*, 123 P.3d at 73 (also adopting the “any reasonable possibility standard”); *Cleveland*, 21 P.3d at 1237 (requiring that the jurors refusal to deliberate must appear in the record as a “demonstrable reality”).

281. See, e.g., *United States v. Trujillo*, 714 F.2d 102, 106 (11th Cir. 1983); *United States v. Dougherty*, 473 F.2d 1113, 1130-37 (D.C. Cir. 1972); *United States v. Moylan*, 417 F.2d 1002, 1007 (4th Cir. 1969).

282. *State v. Waters*, No. 48611-0-I, 2002 Wash. App. LEXIS 1722, at *3 (Wash. Ct. App. July 22, 2002).

283. 26 F. App’x 831 (10th Cir. 2001).

284. *Id.* at 835.

285. *Id.* at 834.

286. *Id.*

is fully informed of the risks of proceeding pro se.”²⁸⁷ Despite its own advice, the Tenth Circuit ruled that no such undertaking was required so long as there is sufficient evidence that the waiver is knowing and intelligent.²⁸⁸ Although the defendant clearly had the mistaken belief that he would be allowed to solicit jury nullification as a possible defense, the Tenth Circuit ruled that his waiver was knowing and intelligent.²⁸⁹

Another area of concern is the increased restrictions placed on free speech in and around courthouses in the name of stamping out jury nullification. Jury nullification advocates are now arrested, and even imprisoned, for jury tampering,²⁹⁰ disorderly conduct,²⁹¹ or contempt of court²⁹² resulting from attempts to spread the message to possible jurors that they have the power to acquit contrary to the law. Many times, courts have stretched the language of the applicable statute to uphold the prosecution or arrest of jury nullification advocates.²⁹³ Courts considering the issue have consistently rejected the idea that jury nullification advocacy around a courthouse is protected under the First Amendment as political speech.²⁹⁴ Instead, courts have favored the “compelling governmental interest” of keeping jurors ignorant of their constitutionally protected power to acquit in any circumstance.²⁹⁵

E. Collateral Damage

Recent attempts to purge jury nullification have had undesirable effects on other aspects of our criminal justice system. Attempts by prosecutors to remove possible nullifiers are often aimed at minority jurors.²⁹⁶ Indeed, minority jury verdicts are more often attacked as products of jury nullification.²⁹⁷ In such cases, a juror’s alleged intent to nullify the law is too often used as a surrogate for impermissible racial

287. *Id.*

288. *Id.* at 834-35.

289. *Id.* at 835. Indeed, the entire reason why the defendant decided to proceed pro se was so he could argue for jury nullification when his attorney refused to do so. *Id.*

290. *See, e.g.,* Turney v. Pugh, 400 F.3d 1197 (9th Cir. 2005).

291. *See, e.g.,* Braun v. Baldwin, 346 F.3d 761 (7th Cir. 2003).

292. *See, e.g.,* People v. Kriho, 996 P.2d 158 (Colo. Ct. App. 1999).

293. *See, e.g.,* Turney, 400 F.3d at 1205 (upholding the conviction of a jury nullification advocate for jury tampering even though the statute only prohibited attempts to affect the outcome of a specific case, and the jury nullification advocate was only attempting to educate potential jurors about the general power of jury nullification); Braun, 346 F.3d at 766 (upholding the summary judgment against an unlawful arrest claim brought by a jury nullification advocate, even though there was significant evidence that the arrest was unlawful).

294. *See, e.g.,* Turney, 400 F.3d at 1199. Courts have often dismissed the proposition that jury nullification advocacy is protected political speech by perpetuating the myth that jury nullification advocacy is aimed at affecting the outcome of a particular case. *Id.* at 1201.

295. United States v. Grace, 461 U.S. 171, 177 (1983) (noting that “an absolute prohibition on a particular type of expression will be upheld only if narrowly drawn to accomplish a compelling governmental interest”).

296. *See, e.g.,* Williams v. Rhoades, 354 F.3d 1101, 1106 (9th Cir. 2004) (upholding the prosecutor’s removal of the last black juror because of her “demeanor”).

297. *See* Krauss & Schulman, *supra* note 159, at 59-60.

considerations when attempting to strike jurors who may be sympathetic to a defendant.²⁹⁸ These cases threaten to undermine the protection provided by *Batson v. Kentucky*,²⁹⁹ against striking jurors on the basis of race. Prosecutors can too easily cite the juror's demeanor,³⁰⁰ lack of eye contact,³⁰¹ or other non-verbal behavior to support their premise that the juror, who just happens to be of the same ethnicity as the defendant,³⁰² is intent on disregarding the law.

Courts have also upheld convictions when judges have engaged in improper instruction of, or communication with, jurors to discourage jury nullification.³⁰³ California briefly instituted a pattern jury instruction that informed jurors they had a duty to notify the court if any juror expressed intent "to disregard the law" or decide the case on some other "improper basis."³⁰⁴ The instruction was used in countless criminal prosecutions improperly inviting jurors to police deliberations, undoubtedly chilling the openness and freedom of jury deliberations, and giving majority jurors a tool with which they could threaten dissenting jurors into submission.³⁰⁵ Although the California Supreme Court eventually disapproved this instruction because it correctly believed the instruction would adversely affect jury dynamics, the court ruled that giving the instruction did not constitute reversible error and refused to consider any of the convictions that could have been affected by the erroneous instruction.³⁰⁶

In *Crease v. McKune*,³⁰⁷ the Tenth Circuit ruled that a judge's ex parte instruction to a juror that she could not allow sympathy to affect her deliberations was harmless error. Although ex parte communications are presumptively prejudicial, the court ruled that the government met the heavy burden of proving that the communication was harmless to the defendant.³⁰⁸ The court reached this conclusion even though there was disagreement about what was said and how many jurors the judge actually communicated with.³⁰⁹ After the ex parte conversation, the jury, which had been struggling with the verdict, returned a guilty verdict that same day.³¹⁰

Courts have also increasingly limited the discretion of trial judges

298. See *Williams*, 354 F.3d at 1104.

299. 476 U.S. 79 (1986).

300. See *Williams*, 354 F.3d at 1106.

301. *United States v. Thomas*, 116 F.3d 606, 609 (2d Cir. 1997).

302. See, e.g., *Williams*, 354 F.3d at 1105; *Thomas*, 116 F.3d at 609.

303. See, e.g., *Crease v. McKune*, 189 F.3d 1188 (10th Cir. 1999); *People v. Engelman*, 121 Cal. Rptr. 2d 862 (Cal. 2002).

304. *Engelman*, 121 Cal Rptr. 2d at 866 (quoting CALJIC No. 17.41.1).

305. See *id.* at 870-71.

306. *Id.* at 872.

307. 189 F.3d 1188 (10th Cir. 1999).

308. *Id.* at 1193-94.

309. *Id.* at 1190.

310. *Id.* at 1190-91.

in an attempt to thwart jury nullification.³¹¹ Before the 1990's, almost all jury nullification cases considered the issue of whether a trial judge was required to instruct a jury about its nullification power.³¹² While most of these cases determined that it was within a judge's discretion to refuse such an instruction,³¹³ it was also generally assumed that judges had the discretion to give instructions or admit evidence that might induce a jury to nullify.³¹⁴ In fact, in the seminal jury nullification case of *Sparf v. Hansen*, the trial judge actually informed the jury of their power to render a verdict contrary to the law.³¹⁵

Recently, however, courts not only have denied judges the discretion to instruct a jury on its nullification power, but also have denied them of the discretion to admit evidence that might motivate a jury to exercise their nullification power *sua sponte*.³¹⁶ This result creates an imbalance between prosecution and defense because judges are allowed to admit government evidence that is only relevant to convince a jury that a conviction would be "morally reasonable," thereby persuading the jury not to nullify.³¹⁷ These decisions are also counter to the traditional judicial attitude that jury nullification should not be encouraged but is often valuable when exercised by juries upon their own initiative.³¹⁸

V. THE JUDICIAL REACTION AGAINST JURY NULLIFICATION HAS VIOLATED THE CONSTITUTION

A series of controversial verdicts during the 1990's began a pattern of unprecedented attack against America's jury system by the public and media.³¹⁹ Many judges succumbed to the public perception that there was a rising tide of jury nullification. So alarmed, the American judiciary has declared war on jury nullification.³²⁰ Like any war, this judicial reaction has had its casualties. Two constitutional principles are threatened: the criminal defendant's right to a trial by jury and the jury nullification advocate's freedom of speech.

311. See, e.g., *United States v. Pabon-Cruz*, 391 F.3d 86, 91 (2d Cir. 2004).

312. See, e.g., *United States v. Drefke*, 707 F.2d 978, 982 (8th Cir. 1983); *United States v. Washington*, 705 F.2d 489, 494 (D.C. Cir. 1983); *United States v. Wiley*, 503 F.2d 106, 107 (8th Cir. 1974).

313. See, e.g., *Drefke*, 707 F.2d at 982; *Washington*, 705 F.2d at 494; *Wiley*, 503 F.2d at 107.

314. See, e.g., *United States v. Burkhart*, 501 F.2d 993, 997 n.3 (6th Cir. 1974) (stating that the law "allow[s] a defense attorney some leeway" in arguing for jury nullification); *State v. Mayo*, 480 A.2d 85, 87 (N.H. 1984) (ruling that it is within the discretion of the trial court to decide whether to give a jury nullification instruction when it has been requested by a party); *Fox v. State*, 779 P.2d 562, 573 (Okla. Crim. App. 1989) (stating that trial judges may in their discretion give a jury nullification instruction).

315. *Sparf v. United States*, 156 U.S. 51, 61-62 n.1 (1895).

316. *Pabon-Cruz*, 391 F.3d at 91.

317. *Old Chief v. United States*, 519 U.S. 172, 188 (1997).

318. *United States v. Dougherty*, 473 F.2d 1113, 1136-37 (D.C. Cir. 1972).

319. See *supra* text accompanying notes 223-228.

320. See *supra* Part IV.

A. The Judicial Reaction Treats the Jury in a Manner Inconsistent With Its Constitutional Role As Outlined by the Supreme Court

The Supreme Court has spoken sparingly about the jury's unreviewable nullification power. *Sparf*, the only Supreme Court case to directly consider the issue, stands for the narrow proposition that it is not reversible error to instruct the jury that it should accept the law as given by the court while admitting that the jury has the power to disregard the law.³²¹ Although the Supreme Court has not dealt directly with the jury's nullification power since 1895, the Court has thoroughly discussed the importance of the jury's roles beyond its mere fact-finding function.³²² The judicial reaction against jury nullification has severely jeopardized these constitutionally mandated roles established by the Supreme Court.

Perhaps the jury's most important role is "to prevent oppression by the [g]overnment."³²³ The jury protects against government oppression by safeguarding criminal defendants against "the arbitrary exercise of power by prosecutor or judge."³²⁴ Traditionally, courts had protected this role by allowing juries to engage in sua sponte acts of jury nullification.³²⁵ The judicial reaction, however, has changed the attitude of courts towards jury nullification. Instead of treating nullification as a powerful, but rarely appropriate, medicine against government oppression, courts now treat it like an ever-threatening pestilence to be eradicated at all costs. To attack this disease, courts have: (1) begun removing any juror who is aware of their nullification power;³²⁶ (2) interfered with jury deliberations by investigating jurors who may intend to nullify;³²⁷ (3) removed jurors who seem poised to nullify, even after the start of deliberations;³²⁸ (4) interfered with the discretion of trial judges to render jury instructions or admit evidence which might allow a jury to consider jury nullification;³²⁹ and (5) arrested and jailed jury nullification advocates.³³⁰ These increased jury control procedures make it less likely that juries will summon the courage to act against the instruction and intimidation of the court and exercise their power of nullification

321. *Supra* text accompanying notes 95-97.

322. *See, e.g.*, *Batson v. Kentucky*, 476 U.S. 79, 87 n.8 (1986); *Taylor v. Louisiana*, 419 U.S. 522, 528 (1975); *Furman v. Georgia*, 408 U.S. 238, 388 (1972); *Witherspoon v. Illinois*, 391 U.S. 510, 519 (1968); *Duncan v. Louisiana*, 391 U.S. 145, 155-56 (1968).

323. *Duncan*, 391 U.S. at 155.

324. *Batson*, 476 U.S. at 86.

325. *See, e.g.*, *United States v. Dougherty*, 473 F.2d 1113, 1136-37 (D.C. Cir. 1972) (arguing that jury nullification can be valuable when limited to those instances where the jury disregards the law upon its own initiative).

326. *See supra* notes 256-258 and accompanying text.

327. *See supra* text accompanying notes 259-266.

328. *See supra* text accompanying note 269.

329. *See United States v. Pabon-Cruz*, 391 F.3d 86, 91 (2d Cir. 2004).

330. *See supra* Part IV.D.

when it is needed to protect a criminal defendant against “oppression by the [g]overnment.”³³¹

The Supreme Court has stated that the jury, as part of its role in safeguarding against government oppression, is supposed to act as “the conscience of the community.”³³² By acting as “the conscience of the community,” the jury is “entrusted to determine in individual cases that the ultimate punishment is warranted.”³³³ Removing jurors because they understand their unconditional power to acquit certainly impedes this function. Indeed, the Supreme Court has ruled that jurors cannot be automatically removed due to their conscientious scruples against a given law because it prevents the jury from serving its role as “the conscience of the community.”³³⁴ In disregard of these constraints, courts now regularly strike jurors not only for disagreeing with the applicable law, but also for recognizing that they have the power to acquit against that law.³³⁵

To facilitate the jury’s role as “the conscience of the community,” the Sixth Amendment requires that criminal juries be selected from a “cross-section of the community.”³³⁶ The cross-section requirement is necessary to protect the jury’s function as a check on government oppression.³³⁷ Using “discriminatory selection procedures make[s] ‘juries ready weapons’” for government oppression.³³⁸ When trial judges discriminatorily strike jurors who are educated about their ability to acquit against the law,³³⁹ judges directly inhibit the jury’s constitutionally ordained role to safeguard against “the arbitrary exercise of power by prosecutor or judge” and “prevent oppression by the [g]overnment.”³⁴⁰

B. The Judicial Reaction Threatens to Undermine Jury Processes to an Extent Which Violates the Sixth Amendment Right to a Jury

While increased jury control procedures have threatened to undermine the constitutional roles of the jury, the judicial reaction against jury nullification has also interfered with the secrecy of jury deliberations, threatening jury independence and endangering criminal defendants’ constitutional right to a trial by jury. By the use of dangerous,

331. *Duncan v. Louisiana*, 391 U.S. 145, 155 (1968).

332. *Furman v. Georgia*, 408 U.S. 238, 388 (1972).

333. *Id.*

334. *Witherspoon v. Illinois*, 391 U.S. 510, 519 (1968).

335. *See supra* text accompanying notes 256-257.

336. *Taylor v. Louisiana*, 419 U.S. 522, 528 (1975). According to the Supreme Court, the Sixth Amendment does not require that the actual jury selected must be representative of society. *Id.* at 538.

337. *Batson v. Kentucky*, 476 U.S. 79, 87 n.8 (1986).

338. *Id.* (quoting *Akins v. Texas*, 325 U.S. 398, 408 (1945) (Murphy, J., dissenting)).

339. *United States v. James*, No. 98-1479, 2000 U.S. App. LEXIS 1738, at *5 (10th Cir. Feb. 7, 2000).

340. *Batson*, 476 U.S. at 86; *Duncan v. Louisiana*, 391 U.S. 145, 155 (1968).

new jury control mechanisms, courts have increasingly threatened not just the jury's role as a safeguard against government oppression, but also the jury's ability to reach a freely reasoned and accurate verdict as to the facts.

Starting in 1997, a series of cases came before various circuit and state courts that considered the issue of whether and how trial judges can remove suspected nullifiers from juries after deliberations have already begun.³⁴¹ Each court ruled that the trial judge had a duty to try and prevent jury nullification, and that as part of that duty, they could strike jurors who intended to disregard the law, even after jury deliberations had begun.³⁴² Each court, however, recognized that this process created the danger of striking a juror who was basing their resistance not on intent to disregard the law, but instead on their view of the evidence.³⁴³ In an effort to prevent this occurrence, each court required judges to find, by a high standard of proof, that the decision to strike the juror was not based on the juror's perception of the evidence.³⁴⁴ Although there were several different articulations of this standard of proof, each court required trial judges to at least prove that there was "no 'substantial possibility'" that the decision to strike the juror stemmed from that juror's view of the evidence.³⁴⁵

While these courts recognized the need to prevent striking jurors whose real disagreement was with the evidence, they only paid fleeting attention to the dangers inherent in an investigation into juror thought processes. "The secrecy of deliberations is the cornerstone of the modern Anglo-American jury system," and investigating possible jury nullification undoubtedly and unduly penetrates that secrecy.³⁴⁶ By intrusively questioning jurors about one of their number holding out for acquittal, the court makes a clear statement about its perception of the trial's proper outcome. This statement is made regardless of whether the holdout juror is found to have intent to disregard the law. Imagine the enormous pressure on a holdout juror unconvinced of a defendant's

341. *E.g.*, *United States v. Abbell*, 271 F.3d 1286 (11th Cir. 2001); *United States v. Symington*, 195 F.3d 1080 (9th Cir. 1999); *United States v. Thomas*, 116 F.3d 606 (2d Cir. 1997); *People v. Cleveland*, 21 P.3d 1225 (Cal. 2001); *State v. Elmore*, 123 P.3d 72 (Wash. 2005).

342. *See Abbell*, 271 F.3d at 1302; *Symington*, 195 F.3d at 1087; *Thomas*, 116 F.3d at 621-22; *Cleveland*, 21 P.3d at 1237; *Elmore*, 123 P.3d at 73.

343. *See supra* note 342.

344. *See Abbell*, 271 F.3d at 1302 (requiring that "no 'substantial possibility' exists that she is basing her decision on the sufficiency of the evidence"); *Symington*, 195 F.3d at 1087 (ruling that if there is "any reasonable possibility that the impetus for a juror's dismissal stems from the juror's views on the merits of the case, the court must not dismiss the juror"); *Thomas*, 116 F.3d at 621-22 (ruling that for a removal to be valid after deliberations have begun, the record cannot "disclose[] any possibility that the request to discharge stems from the juror's view of the sufficiency of the government's evidence"); *Cleveland*, 21 P.3d at 1237 (requiring that the jurors refusal to deliberate must appear in the record as a "demonstrable reality"); *Elmore*, 123 P.3d at 73 (also adopting the "any reasonable possibility" standard).

345. *Abbell*, 271 F.3d at 1302.

346. *Thomas*, 116 F.3d at 618.

guilt. This lone juror, already standing against the tide of the majority who are prepared to convict, must now go before the judge to be interrogated about her reasoning and/or threatened with removal.³⁴⁷ Few jurors can continue to stand against such pressure, no matter how convinced they are of a defendant's innocence.

Investigation into jury deliberations is not the only recent intrusion into the function of the jury. For a period in California, jurors were routinely instructed to inform the court if they felt one of their number was intent on deciding the case on an "improper basis."³⁴⁸ Although this instruction was eventually disapproved, there is no way of knowing how many times it was used to break the will of dissenting jurors.³⁴⁹ Entire juries have also been threatened with removal when trial judges thought they were poised to render what the judge considered to be an improper verdict.³⁵⁰ At least one dissenting judge has recognized that these types of threats give the jury the impression that they could be punished for their verdict.³⁵¹ This impression is not entirely unreasonable,³⁵² and jurors are not the only people so mistaken. In one case, a judge mistakenly told jurors that they were under a legal obligation to apply the law,³⁵³ and in another, a conviction was overturned after the court learned that an attorney told their juror friend that they could get into trouble if they did not follow the judge's instructions.³⁵⁴

In perhaps the most shocking reported attacks on jury nullification, prosecutors have pursued charges against jurors who advocated for nullification or declared that they answer to a higher authority than the judge.³⁵⁵ Although prosecutions of jurors are still rare, the road back to the days before *Bushell*, when judges could wring their desired verdict from the jury like water from a rag, seems increasingly short.³⁵⁶ Punishing jurors who advocate the invocation of conscience in exercising their duties surely must not have been envisioned when the framers guaranteed criminal defendants the right to an impartial jury in the Sixth

347. See generally *supra* text accompanying notes 262-270.

348. *People v. Engelman*, 49 P.3d 209, 211 (2002) (quoting CALJIC No. 17.41.1).

349. See *id.*

350. *People v. Noriega*, 120 Cal. Rptr. 2d 776, 778 (Cal. Ct. App. 2002); *People v. Sanchez*, 69 Cal. Rptr. 2d 16, 20-21 (Cal. Ct. App. 1997).

351. *Sanchez*, 69 Cal. Rptr. 2d at 29 (Johnson, J., dissenting) (arguing that the instruction was "contrary to established law that jurors cannot be punished if they choose to exercise their power of nullification").

352. See *supra* Part IV.A.

353. *People v. Bibbs*, No. A095952, 2002 Cal. App. LEXIS 11342, at *5 (Cal. Ct. App. Dec. 11, 2002).

354. *United States v. Rosenthal*, 454 F.3d 943, 947 (9th Cir. 2006).

355. *People v. Kriho*, 996 P.2d 158, 163-64 (Colo. Ct. App. 1999); Tiffany, *supra* note 231.

356. Compare *Bushell's Case*, (1670) 124 Eng. Rep. 1006 (ruling that jurors cannot be punished for voting for an acquittal, even when their verdict seems unreasonable under the law), with *Kriho*, 996 P.2d at 170 (overturning the contempt of court conviction of a juror who advocated jury nullification to his fellow jurors on other grounds dealing with the admission of evidence).

Amendment.³⁵⁷ No jury can be impartial when they are threatened, investigated, encouraged to “snitch” on one another, and even prosecuted in an effort to prevent them from bringing their conscience to the courtroom.³⁵⁸

C. The Judicial Reaction Against Jury Nullification Has Impermissibly Infringed Upon Free Speech Rights of Nullification Advocates

Besides jurors, the other major target in the judicial reaction has been out-of-court jury nullification advocates. These advocates have repeatedly been arrested under jury tampering or disorderly conduct statutes because they proclaimed their belief that jurors have the right to acquit in criminal cases when justice requires it, even if the defendant is technically guilty.³⁵⁹ In most contexts, “[t]he Supreme Court has developed robust protections for speech concerning judicial proceedings.”³⁶⁰ Speech regarding the justice system is evaluated under the clear and present danger test, and therefore, “may be restricted only if it ‘is directed to inciting or producing’ a threat to the administration of justice that is both ‘imminent’ and ‘likely’ to materialize.”³⁶¹

Despite these protections, private communication or contact with a juror concerning the matter before the jury is not protected under the First Amendment.³⁶² During the judicial reaction, courts have used this limitation on the freedom of speech to uphold the convictions of jury nullification advocates,³⁶³ but they misapply the limitation unless the advocates are lobbying for jury nullification in a particular case. Jury nullification advocates, however, are usually only seeking to inform juries of their nullification power in general.³⁶⁴ If nullification advocates urge jurors to acquit in a particular case, then their speech is not protected because it concerns the matter presently before the jury.³⁶⁵ Conversely, when nullification advocates only educate jurors about their general powers, they are not communicating with jurors about the matter presently before them. Certainly, educating potential jurors about their undisputable and constitutionally designed power to acquit against the law cannot create an imminent “threat to the administration of justice,” especially when jurors are implored to exercise that power only

357. See U.S. CONST. amend. VI. America’s constitutional framers strongly advocated the criminal jury’s right to refuse to apply the law when justice required it. See *supra* note 56 and accompanying text.

358. See *supra* Part IV.

359. See, e.g., *Turney v. Pugh*, 400 F.3d 1197 (9th Cir. 2005); *Braun v. Baldwin*, 346 F.3d 761 (7th Cir. 2003).

360. *Turney*, 400 F.3d at 1201.

361. *Id.* at 1202 (quoting *Brandenburg v. Ohio*, 395 U.S. 444, 447 (1969)).

362. See *Remmer v. United States*, 347 U.S. 227, 229 (1954).

363. See, e.g., *Turney*, 400 F.3d at 1202-03.

364. See, e.g., *id.* at 1198; *Braun*, 346 F.3d at 762.

365. See *Remmer*, 347 U.S. at 229.

when law and justice do not coincide.³⁶⁶

Without any real justification for allowing restrictions on general jury nullification advocacy, courts are left grasping at imaginary straws in attempts to justify the restriction of what would otherwise be highly protected political speech. Courts often use the protection of the due process rights of criminal defendants as one such justification for restriction of out-of-court jury nullification advocacy.³⁶⁷ While many restrictions on speech in a courthouse can be upheld as protective of the fair trial rights of defendants, nullification information cannot be said to prejudice the defendant because if jurors adopted the practices implored in nullification advocacy material, the defendant could only stand to be helped, not harmed. In an attempt to aid their argument, courts sometimes perpetuate the myth that jury nullification can be used to convict.³⁶⁸ However, if this ever occurred, the fault would lie with the judge instead of the jury because the due process clause requires courts to set aside convictions against the law or evidence.³⁶⁹ In fact, federal courts admit their hypocrisy by holding that the exposure of jurors to jury nullification information does not prejudice the due process rights of criminal defendants.³⁷⁰ Because general jury nullification advocacy does not prejudice the trial rights of the defendant, there is no remaining government interest capable of outweighing the importance of the advocate's free speech rights.

VI. CRIMINAL COURTS SHOULD INFORM JURORS OF THEIR NULLIFICATION POWER

Even if courts unanimously strike down the deception, threats, investigations, punishments, and restrictions on speech aimed at preventing jury nullification, the tension surrounding nullification will not go away. For over a century now, courts have struggled to overcome the shortcomings of a justice system that is designed to allow the exercise of a constitutionally protected power, yet still refuses to inform the system's participants that such a power exists.³⁷¹ Because the nullification power is protected by several constitutional principles, the only solution is to inform the jury of its unconditional power to acquit.

366. *Id.*

367. *E.g., Turney*, 400 F.3d at 1202.

368. *See, e.g., People v. Noriega*, 120 Cal. Rptr. 2d 776, 780 (Cal. Ct. App. 2002).

369. *See Jackson v. Virginia*, 443 U.S. 307, 317 (1979).

370. *See United States v. Lawrence*, 405 F.3d 888, 904 (10th Cir. 2005).

371. *See Sparf v. United States*, 156 U.S. 51, 148 (1895) (Gray, J., dissenting).

A. *Jury Nullification Was Contemplated As Part of Our Constitutional System*

The criminal jury's right to refuse to apply the law is not specifically enshrined in the Constitution, but historical and structural evidence suggests that the constitutional framers intended jury nullification to be part of the jury's design. Even under current constitutional interpretation, the de facto power of the criminal jury to acquit technically guilty defendants is protected by its right to render a general verdict in criminal trials,³⁷² the inability of criminal courts to direct a verdict, no matter how strong the evidence,³⁷³ and the Fifth Amendment's Double Jeopardy Clause, which prohibits the appeal of an acquittal.³⁷⁴ As long as these protections remain, the criminal jury will have the unconditional power to acquit any criminal defendant, no matter how overwhelming the evidence against him. Ever since the Supreme Court decision in *Sparf*, however, courts have ruled that juries have no right to exercise their nullification power even though they cannot be prevented from doing so.³⁷⁵ While this distinction may be entirely semantic,³⁷⁶ in practice, courts have used it to justify hiding the nullification power from juries,³⁷⁷ and more recently, have taken affirmative measures to prevent juries from nullifying.³⁷⁸

It seems odd that the constitutional framers would so carefully protect the power of jury nullification if they did not intend this power to be a valid exercise of a jury's duties. If criminal juries are truly to be confined to deciding questions of fact, why protect the ability of juries to render a general verdict in a case where the facts have been stipulated to?³⁷⁹ In truth, of course, the constitutional framers did not intend such a strange result. A review of their writings concerning the functions of the jury make clear that they intended the jury to be an institution charged with judging the law as well as the facts in a criminal case.³⁸⁰ Legal commentators from the period of constitutional framing generally listed the right to judge the law among the powers of the criminal jury.³⁸¹ Dictionary definitions current with the constitution's framing

372. See, e.g., *United States v. Spock*, 416 F.2d 165, 180-83 (1st Cir. 1969) (reversing convictions secured with the use of special interrogatories that unduly restricted jury abilities to render a general verdict free from judicial control).

373. *United Brotherhood of Carpenters v. United States*, 330 U.S. 395 (1947) (holding that a judge cannot direct a guilty verdict in a criminal case even if no reasonable jury would acquit).

374. See U.S. CONST. amend. V.

375. *Sparf*, 156 U.S. at 101-02.

376. "The distinction between power and right, whatever may be its value in ethics, in law is very shadowy and unsubstantial. He who has the legal power to do anything has the legal right." *Kane v. Commonwealth*, 89 Pa. 522, 525 (1879).

377. See *supra* text accompanying note 98.

378. See *supra* Part IV.

379. See *Horning v. District of Columbia*, 254 U.S. 135, 136-38 (1920).

380. Conrad, *supra* note 6, at 5.

381. Rucker, *supra* note 54, at 453.

also define criminal juries as having the right to judge the law.³⁸² Because the conception of the criminal jury at the time of constitutional framing included the jury's ability to judge the law, the original understanding of the right to a jury protected under the Sixth Amendment included the right to have the jury judge the law in criminal cases.³⁸³

Recently, at least one writer has tried to distinguish the right to judge the law from acts of jury nullification.³⁸⁴ In his article, David Pepper argues that the historical right to judge the law did not include the right to disregard the law.³⁸⁵ Pepper argues that instead, the right to judge the law included the right to make independent legal interpretations of existing law but not the right to refuse to apply the law altogether.³⁸⁶ Pepper apparently draws this distinction out of his reading of many of the historical cases often cited as examples of jury nullification. For example, Pepper asserts that Hamilton's arguments to the jury in the *Zenger* trial support his distinction.³⁸⁷ Pepper points out that the main thrust of Hamilton's argument to the jury was that Zenger should not be found guilty of libel because his statements were true.³⁸⁸ Pepper characterizes Hamilton's arguments as a request to the jury to apply the existing law in good faith by finding an additional element to libel—the truth or falsity of the statement—which the trial judge had somehow misinterpreted as not existing.³⁸⁹

By Pepper's own admission, however, the truth of the statement had no bearing on libel under then current libel law.³⁹⁰ Instead, Hamilton was asking the jury to find Zenger not guilty based on a new vision of what the law should be—that truthful statements should not be libelous.³⁹¹ Clearly, Hamilton was arguing that it would be unjust to convict Zenger of libel because his statements were truthful.³⁹² Contrary to Pepper's thesis, this argument is no different than a modern nullification argument that a law should not be applied in a given context because the law or application thereof would not further justice.

The historical record simply does not support Pepper's conclusions. The colonial jury was a celebrated institution not because of its ability to make well reasoned legal judgments about existing law, but because it

382. Conrad, *supra* note 6, at 6 (citing NOAH WEBSTER, *DICTIONARY OF THE ENGLISH LANGUAGE* (1st ed. 1828)).

383. *See* U.S. CONST. amend. VI.

384. *See* Pepper, *supra* note 52.

385. *Id.* at 616-17.

386. *See id.*

387. *Id.* at 614-17.

388. *Id.* at 616.

389. *Id.* at 616-17.

390. *Id.* at 614.

391. *See supra* notes 44-49 and accompanying text.

392. *Id.*

routinely refused to enforce unpopular laws.³⁹³ The fact that these juries may have been motivated to act because of their beliefs concerning inherent rights and liberties does not render their refusal to apply existing law any less of a rejection of that law. The writings of the constitutional framers repeatedly exhorted jurors in criminal cases to determine or judge the law according to their own conscience.³⁹⁴ Clearly, the call for criminal juries to judge the law was more than just a call for interpretation of existing law; it was an invitation for jurors to refuse to apply laws that did not comport with their understanding of justice. Historical analysis, therefore, shows that the constitutional framers understood the right to a jury in criminal cases to include the right of that jury to refuse to apply the law.³⁹⁵

B. The Arguments Against Informing a Jury of Their Power to Nullify Do Not Withstand Scrutiny

1. Jury Nullification Will Not Lead to Anarchy

The classic judicial argument against informing the jury of its constitutionally protected nullification power is that informing the jury of this power to acquit against the law will lead to anarchy.³⁹⁶ The severity of language employed in this argument reflects the shallowness of its content. The government clearly survived when, for most of America's first century, juries were routinely told that they had the right to judge the law.³⁹⁷ In fact, anarchy was never a concern until the racial, ethnic, and socio-economic backgrounds of the jury began to diverge significantly from those of judges.³⁹⁸ Even among judges, the use of the term anarchy is admittedly not the reasoned prediction of a social scientist, but instead an exaggeration used to dramatically portray the fear that instructing the jury about its nullification power will turn the jury into a runaway institution.³⁹⁹ The true fear then is not of anarchy, but that juries aware of their nullification power will be more likely to abuse their power in the interests of bias and prejudice.⁴⁰⁰

2. Jury Nullification Will Not Be Abused

A common attack on jury nullification is that it can be used to con-

393. See Huestis, *supra* note 10, at 74.

394. See *United States v. Dougherty*, 473 F.2d 1113, 1132 (D.C. Cir. 1972). See also *supra* note 56.

395. See *supra* Part II.B.

396. See, e.g., *United States v. Powell*, 955 F.2d 1206, 1213 (9th Cir. 1991); *Dougherty*, 473 F.2d at 1133; *United States v. Moylan*, 417 F.2d 1002, 1009 (4th Cir. 1969).

397. See *supra* Part II.C.

398. See *supra* text accompanying notes 76-80.

399. See *Dougherty*, 473 F.2d at 1134.

400. *Id.* at 1141 (Bazelon, C.J., dissenting).

vict against the law just as easy as it is can be used to acquit against the law.⁴⁰¹ This argument is no more realistic than the argument that informing juries of their nullification power will lead to anarchy. First, the argument denies our system's assumption that disinterested, unbiased jurors will try to do the right thing. This assumption is not without empirical support. Jury studies indicate that jurors take their role seriously, approach it conscientiously, and are capable of making complex moral judgments.⁴⁰²

Second, jury nullification does not include the power to convict outside of the law or against the evidence. Any good jury nullification instruction counsels the jury that it can only exercise its power in the direction of mercy.⁴⁰³ If guilt is not proved beyond a reasonable doubt, the jury must acquit. It is true that a jury cannot be punished for a wrongful conviction any easier than for a wrongful acquittal, but there are other protections against this occurrence. Judges have the right, power, and responsibility to overturn any criminal conviction not supported by the law or the evidence, and if the trial judge fails in this responsibility, the conviction can be appealed.⁴⁰⁴

A more genuine argument against informing juries of their nullification power is that jurors will use it to acquit not just to ensure justice, but also to express biases.⁴⁰⁵ The historical example most often used for this proposition is the acquittal of white criminals who targeted blacks in the pre-civil-rights-era south.⁴⁰⁶ Because these acquittals continued long after nullification instruction became an historical relic, this example helps defeat the very proposition for which it is meant to stand.⁴⁰⁷ It is certainly arguable that juries informed, educated, and cautioned about their awesome and important nullification power are less likely to reach a verdict based on bias.⁴⁰⁸ Regardless, if such a jury does acquit according to bias, the problem is not found in their unreviewable power to acquit, but in the jury selection process's failure to provide an unbiased jury.⁴⁰⁹

Another concern some courts have expressed is that juries informed of their nullification power will use it recklessly. On the con-

401. See, e.g., *People v. Noriega*, 120 Cal. Rptr. 2d 776, 781 (Cal. Ct. App. 2002).

402. Finkel, *supra* note 221, at 705.

403. See Korroch & Davidson, *supra* note 96, at 139 n.56 (quoting Pattern Instructions for Kansas 51.03, at 36 (1971)); Black, *supra* note 178, at 18.

404. See *Jackson v. Virginia*, 443 U.S. 307, 317-18 (1979).

405. See, e.g., *United States v. Moylan*, 417 F.2d 1002, 1009 (4th Cir. 1969).

406. See, e.g., *United States v. Dougherty*, 473 F.2d 1113, 1143 (D.C. Cir. 1972) (Bazelon, C.J., dissenting).

407. The nullification verdicts argued to be a result of racial bias occurred after the jury lost its right to be informed about its jury nullification power. Compare *id.* at 1143, with *Sparf v. United States*, 156 U.S. 51, 61 (1895). Apparently, these juries needed no judicial instruction or urging from defense counsel to focus their biases and acquit based on racial prejudice.

408. See *Dougherty*, 473 F.2d at 1141 (Bazelon, C.J., dissenting).

409. *Id.* at 1143.

trary, informing jurors about their nullification power may engender a greater feeling of respect and responsibility for their role as an important part of the criminal justice system.⁴¹⁰ No unbiased juror has any incentive to acquit the technically guilty without good cause; on the contrary, jurors have strong incentives to make sure that any dangerous defendants are found guilty according to the law.⁴¹¹ Even if a few blameworthy defendants are set free, the cost is not too steep if it ensures that the law is not made a tool of injustice.⁴¹²

C. Acknowledging Jury Nullification Is Beneficial to American Democracy

1. Jury Nullification Allows General Laws to Comply with Individual Justice

Roscoe Pound called jury nullification “the great corrective of law in its actual administration.”⁴¹³ Clearly, nullification allows the jury to ensure that generally enacted laws do not create injustice in their individual applications.⁴¹⁴ Neither legislators nor voters can anticipate every instance where a defendant’s actions will be unlawful yet not blameworthy.⁴¹⁵ A jury informed of its nullification power, however, can employ the “community’s sense of values” to determine this “subtle and elusive boundary” as it exists in an individual case.⁴¹⁶

According to Judge Learned Hand, the jury’s nullification power provides “a slack into the enforcement of [the] law.”⁴¹⁷ This slack allows the jury to temper the law’s rigor “by the mollifying influence of current ethical conventions.”⁴¹⁸ Because the jury serves as “the conscience of the community,” it is uniquely suited for patrolling the gap between law and justice to ensure that the latter is not unduly sacrificed for the former.⁴¹⁹ When the jury is uninformed about this power, however, the jurors who conscientiously follow the judge’s instructions are

410. Dorfman & Iijima, *supra* note 11, at 926.

411. See *Dougherty*, 473 F.2d at 1143 (Bazelon, C.J., dissenting). Presumably jurors would be reluctant to release a dangerous defendant back into their community because it would increase the likelihood that they or someone they care about will be victimized by crime.

412. *Contra Dougherty*, 473 F.2d at 1135 (arguing that although jurors who are not instructed about their nullification power may wrongly feel compelled to convict against their conscience, this danger is not as great as the danger inherent in instructing the jury that it may escape the constraint of the judge’s instruction). The attitude reflected by the majority in *Dougherty* and many other anti-nullification cases runs contrary to America’s expressed avowal to protect the freedom of the innocent even if the cost is escape of many more guilty. See, e.g., *Furman v. Georgia*, 408 U.S. 238, 368 (1972) (Marshall, J., concurring).

413. Pound, *supra* note 199, at 18.

414. See *Dougherty*, 473 F.2d at 1142 (Bazelon, C.J., dissenting).

415. See *id.*

416. *Id.*

417. *United States ex rel. McCann v. Adams*, 126 F.2d 774, 776 (2d Cir. 1942).

418. *Id.*

419. *Witherspoon v. Illinois*, 391 U.S. 510, 519 (1968).

left out of the number available to inject their community values into the determination of guilt.⁴²⁰ Consequently, only those jurors that are willing to break their oaths and ignore judicial instruction are allowed to inject their conscience into the jury's decision.⁴²¹ The decisions of juries would better reflect the values of society if all jurors were instructed of their power to acquit against the law when justice requires.

2. The Jury Is Uniquely Equipped to Exercise Discretionary Non-Enforcement

Some opponents of jury nullification argue that it is unnecessary because prosecutors and judges have the discretion to avoid unjust applications of the law.⁴²² Apparently, nullification opponents' fear is not that the rule of law will be subverted, but that jurors will precipitate the subversion. Perhaps it was never the rule of law which courts have been so anxious to preserve, but the rule of lawyers.⁴²³ While judicial and prosecutorial discretion is an important tool, the nature of the jury actually makes it a better candidate for exercising discretionary non-enforcement.⁴²⁴

For all the concern over whether jurors will use their nullification power to further bias or prejudice, there is little acknowledgement of the historical fact that judges and prosecutors have too often used their discretionary power to promote their own biases, prejudices, or personal interests.⁴²⁵ Indeed, one of the jury's delineated roles is to act as a counter-balance to the overzealous judge or prosecutor.⁴²⁶ Judge Hand argued that the jury was uniquely suited for this role because, unlike judges and prosecutors, jurors "are in no wise accountable, directly or indirectly, for what they do, and . . . at once separate and melt anonymously in the community from which they came."⁴²⁷ The jury does not need to appear tough on crime to ensure its re-election; the jury is not concerned with a retention election, or seeking a higher office. Only the

420. *Dougherty*, 473 F.2d at 1141 (Bazelon, C.J., dissenting).

421. *See id.* at 1133, 1141.

422. *See, e.g.*, Richard St. John, Note, *License to Nullify: The Democratic and Constitutional Deficiencies of Authorized Jury Lawmaking*, 106 YALE L.J. 2563, 2586-87 (1997).

423. *See generally* *United States v. Thomas*, 116 F.3d 606, 614 (2d Cir. 1997) (rejecting "the idea that, in a society committed to the rule of law, jury nullification is desirable"); *United States v. Anderson*, 716 F.2d 446, 450 (7th Cir. 1983) (arguing "that explicit instructions sanctioning [jury nullification] . . . pose too great a threat to the rule of law"). By attempting to prevent the occurrence of jury nullification, courts aim for a justice system where only prosecutors and judges have the power to avoid unjust application of criminal sanctions. Recently, one criminal defendant termed this result "the judicial oligarchy." *United States v. Penick*, 26 F. App'x 831, 835 (10th Cir. 2001). The phrase "rule of lawyers" has been used in other contexts. *See, e.g.*, WALTER K. OLSON, *THE RULE OF LAWYERS: HOW THE NEW LITIGATION ELITE THREATENS AMERICA'S RULE OF LAW* (2003).

424. *United States ex rel. McCann v. Adams*, 126 F.2d 774, 776 (2d Cir. 1942).

425. *See Duncan v. Louisiana*, 391 U.S. 145, 155-56 (1968).

426. *Id.* at 156.

427. *McCann*, 126 F.2d at 776.

jury can evaluate the justice of a single case free from all of the institutional pressures that beset the courtroom professional.⁴²⁸

3. Jury Nullification Promotes a Stable Democracy

Jury nullification protects the stability of democracy by preventing arbitrary or unjust application of the law, protecting minorities against majority oppression, and providing an outlet for popular disagreement with existing law. As previously discussed, jury nullification provides “a slack into the enforcement of [the] law,” which ensures that the law’s rigidity does not result in unintended injustice.⁴²⁹ This is not just a protection of those who are technically guilty but not morally blameworthy; jury nullification also protects the legitimacy of the government by ensuring that its mechanisms do not become tools of oppression.⁴³⁰ Jury nullification can have a stabilizing effect on government by preventing the application of unjust laws that might otherwise give rise to revolt.⁴³¹ To take this argument one step further, jury nullification also protects against the public unrest that results when well intentioned laws are applied unjustly.⁴³²

Another important role of jury nullification in a democracy is its protection of minority groups against majority oppression.⁴³³ Lysander Spooner argued that the coercive and oppressive nature of the criminal law should not be imposed unless supported by a substantial consensus of the population.⁴³⁴ The mere fact of majority does not grant license to oppress the minority.⁴³⁵ Absent certain protections, such as the jury, democracy can result in tyranny just as easily as any other form of government. For Spooner, the unanimity requirement of the jury was not just a mechanism for proving factual guilt, but it ensured that the life and liberty of the criminal defendant would not be jeopardized “unless it first be ascertained, *beyond a reasonable doubt*, in every individual case, that justice requires it.”⁴³⁶

In a more recent invocation of jury nullification aimed at protecting minority rights, Professor Butler argued that blacks should use jury nullification to acquit some non-violent black offenders.⁴³⁷ Whether But-

428. See *Duncan*, 391 U.S. at 156.

429. *McCann*, 126 F.2d at 776.

430. This function reflects one of the basic purposes of the jury—to prevent government oppression. *Duncan*, 391 U.S. at 155.

431. Mirkin, *supra* note 205, at 69.

432. See *supra* notes 212-226 and accompanying text.

433. See, e.g., Butler, *supra* note 42; Pound, *supra* note 199, at 18; Spooner, *supra* note 193, at 206-07.

434. Spooner, *supra* note 193, at 206.

435. *Id.* at 206-07.

436. *Id.* at 209 (emphasis in original).

437. Butler, *supra* note 42, at 679. Butler expected jurors to exercise their judgment in identifying the proper candidates for jury nullification. *Id.* at 718-22. Butler’s example of an easily justifiable

ler's proposal has affected jury behavior is up for debate, but there is evidence that in some high minority population locations, juries are acquitting at a higher rate.⁴³⁸ It is impossible to know whether these acquittals are a result of jury nullification, race-conscious reasonable doubt,⁴³⁹ or something else; however, it would certainly be reasonable for minority jurors to nullify in at least some drug cases, considering the role of racial animus inherent in the existence,⁴⁴⁰ structure,⁴⁴¹ and enforcement of drug prohibition.⁴⁴²

Opinion will differ as to whether these acquittals are considered examples of jury nullification's virtue or its dangers, but history is replete with examples where a slight political majority has harnessed the coercion of the criminal law in a way that was objectionable to a substantial minority, or perhaps even majority, of the population.⁴⁴³ In some of these instances, acts of jury nullification helped to hasten an end to a controversial law and all its accompanying civil strife.⁴⁴⁴ In others, nullification provided a way for jurors to avoid the full harshness of the law and perhaps pacify the minority viewpoint until they could work for change through the political process.⁴⁴⁵ By allowing a meaningful expression of dissent, jury nullification can serve as a socially sanctioned outlet for expressing opposition to a given law while change is either frustrated or still forthcoming through the political process.

4. Jury Nullification Promotes a Balanced Federalism

Related to jury nullification's ability to protect minorities is its ability to promote a more balanced federalism. Throughout the history of the United States, the federal government has increasingly expanded both its power and reach.⁴⁴⁶ By reading federal powers broadly and let-

nullification case involved a black defendant charged with crack possession. *Id.* at 718. Butler also argued that jury nullification could be appropriate depending on the circumstance in prosecutions for drug dealing. *Id.* at 719-20.

438. Marder, *supra* note 165, at 358-59.

439. Do, *supra* note 217, at 1868.

440. See Mark Thornton, *Prohibition: The Ultimate Tax*, in TAXING CHOICE: THE PREDATORY POLITICS OF FISCAL DISCRIMINATION 171, 184-86 (William F. Shughart II ed., 1997) (discussing the important role of racism against Asian immigrants, Mexicans, and blacks in the passage of America's first anti-narcotics and anti-marijuana laws).

441. Ira Glasser, Executive Director of the ACLU, American Drug Laws: The New Jim Crow, Speech at the 1999 Edward C. Sobota Lecture (Sept. 23, 1999), in 63 ALB. L. REV. 703, 718 (2000) (discussing the racist effects of the sentencing disparity between crack cocaine and powder cocaine).

442. *Id.* at 719 (noting that "while 13% of drug users are African-American, 35% of those arrested for drug possession are African-American, 55% of those convicted are African-American, and 74% of those imprisoned are African-American").

443. See, e.g., Charles H. Whitebread, "Us" and "Them" and the Nature of Moral Regulation, 74 S. CAL. L. REV. 361, 363-64 (2000) (noting that alcohol "[p]rohibition never reflected a majority of the public's opposition to the use of intoxicating beverages").

444. See Clark, *supra* note 69, at 44 (noting that jury nullification in alcohol prohibition prosecutions helped to hasten the end of prohibition).

445. See *id.* at 43-44 (discussing jury resistance to the Fugitive Slave Law).

446. See Dianne McGimsey, Comment, *The Commerce Clause and Federalism After Lopez and*

ting the Tenth Amendment slide into relative oblivion, the Supreme Court, armed with the Supremacy Clause, has allowed an almost unlimited expansion of federal authority. State and local governments still have areas of authority, but increasingly this is a result of allotment instead of right. Because the judiciary will not stand up for rights of local determination, the jury is the lone protection when the federal government seeks to impose the coercion of the criminal law in contravention of local community values.

In many contexts, the traditional power of state governments to determine the limits of criminal culpability has been stripped from the states in favor of federal law.⁴⁴⁷ For example, federal authorities have made a decision to prevent California from implementing its Compassionate Use Act, passed by voter initiative in 1996.⁴⁴⁸ The Compassionate Use Act sought to make an exception to the criminal laws against marijuana for seriously ill patients and their primary caregivers.⁴⁴⁹ Refusing to acknowledge the expressed will of the California people that the seriously ill should not be punished for their medicinal use of marijuana, federal authorities have pursued criminal charges against Californians attempting to implement the law.⁴⁵⁰ By examining one of these prosecutions, it becomes apparent how a jury, through its nullification power, can protect local sovereignty in determining criminal culpability.

The defendant in *United States v. Rosenthal*⁴⁵¹ was arrested at his home where he was growing marijuana in accordance with California's Compassionate Use Act. Before trial and after several unsuccessful motions by the defendant to dismiss the indictment, the judge granted the government's motion in limine to prevent the defendant from presenting evidence or argument that might elicit jury nullification.⁴⁵² To further prevent jury nullification, the court removed nineteen jurors who expressed support for medical marijuana and instructed the remaining jurors that they were bound to apply the law as instructed by the court.⁴⁵³ At least two of the remaining jurors were still considering nul-

Morrison: *The Case for Closing the Jurisdictional-Element Loophole*, 90 CAL. L. REV. 1675, 1736-37 (2002) (arguing that the expansive reading of the Commerce Clause has extended federal power far past that intended by the Constitution's framers).

447. See Joseph Lesser, *The Course of Federalism in America – An Historical Overview*, in FEDERALISM: THE SHIFTING BALANCE 9 (Janice C. Griffith ed., 1989) (noting that “[t]he reinterpreted commerce clause has provided Congress with a national police power. When used in conjunction with the supremacy clause, this police power can preempt any state regulation that deals with a subject on which Congress has acted.”).

448. See *Gonzalez v. Raich*, 545 U.S. 1, 5-7 (2005); *United States v. Rosenthal*, 454 F.3d 943, 945-46 (9th Cir. 2006).

449. *Raich*, 545 U.S. at 5-7; CAL. HEALTH & SAFETY CODE § 11362.5 (West 1996).

450. See, e.g., *Rosenthal*, 454 F.3d at 945-46. For example, in *Rosenthal*, the federal government prosecuted a California man who had been promised immunity by the city of Oakland so that he could produce marijuana according to California's Compassionate Use Act. *Id.* at 945-47.

451. 454 F.3d 943 (9th Cir. 2006).

452. *Id.* at 946.

453. See *id.* at 947.

lification, and one asked her attorney friend whether she was bound to follow the judge's instructions.⁴⁵⁴ Mistakenly, the attorney told the juror that she could "get[] into trouble" if she defied the judge.⁴⁵⁵ The Ninth Circuit eventually remanded the case for a new trial, ruling that the juror's communication with her attorney friend prejudiced the defendant by giving the juror the impression that she could be punished for her verdict.⁴⁵⁶

Besides the juror's contact with an outside party, however, both the removal of the nineteen jurors and the court's instruction to the jury that it was bound by its instructions represent common jury control procedures.⁴⁵⁷ *Rosenthal* illustrates how common jury control procedures can prevent a jury from acting as a check on unrestrained federal power. Instead of representing "the conscience of the community," the jury in *Rosenthal* was reduced to acting as a tool of the federal government in its quest to overcome the expressed will of the people of California represented in the Compassionate Use Act.⁴⁵⁸

If the jurors in *Rosenthal* had been informed of their nullification power, they could have acted to protect California's choice to exempt the seriously ill from criminal culpability for pursuing their physician prescribed treatment.⁴⁵⁹ Because of its representative capacity and unconditional power to acquit, the jury can promote a more balanced federalism by defending local values concerning criminal culpability.⁴⁶⁰ But if juries are to serve as "the conscience of the community," courts must inform them that it is permissible to bring their conscience to the courtroom.⁴⁶¹

Some commentators may argue that the local jury's subversion of state or federal laws is destructive to the rule of law.⁴⁶² But because jury nullification is a constitutionally protected power, it does not subvert the rule of law. Just the opposite, it is a part of it—no more subversive than prosecutorial discretion or judicial independence. Jury nullification is necessary to ensure that local communities are not reduced to unwilling subjects without meaningful input in the decisions that jeopardize the lives and freedoms of their members.⁴⁶³ When coercive criminal laws

454. *Id.* at 950.

455. *Id.*

456. *Id.*

457. See *supra* notes 252, 256-258 and accompanying text.

458. *Witherspoon v. Illinois*, 391 U.S. 510, 519 (1968).

459. See CAL. HEALTH & SAFETY CODE § 11362.5 (West 1996).

460. See, e.g., ABRAMSON, *supra* note 38, at 24 (discussing colonial jury resistance to unpopular smuggling laws); Marder, *supra* note 165, at 341, 348-49 (discussing San Francisco and Los Angeles jury resistance against the three strikes law, and Bronx jury resistance against the Rockefeller drug laws).

461. *Witherspoon*, 391 U.S. at 519.

462. See Pound, *supra* note 199, at 35.

463. See *id.* at 18 (noting that the law "demands conviction of persons whom local or even general opinion does not desire to punish").

are applied locally and without local support, the clouds of social unrest loom closer on the horizon.⁴⁶⁴ Jury nullification, however, can provide local communities an alternative to rebellion or riot while at the same time leaving state or national laws intact.⁴⁶⁵

5. Jury Nullification Protects the Personal Integrity of Jurors

Some opponents of jury nullification argue that informing involuntarily selected jurors of their nullification power unfairly burdens them with the feeling of moral responsibility for their condemnation.⁴⁶⁶ Critics of jury nullification argue that this burden can be destructive to a juror's psyche.⁴⁶⁷ Evidence, however, suggests the opposite. There are many instances where jurors have expressed disgust after a trial upon learning that they could have acquitted to avoid injustice.⁴⁶⁸ In other cases, jurors have suffered mental breakdowns due to their mistaken belief that they were compelled by the law to convict.⁴⁶⁹ If anything, it is unfair to coerce involuntarily selected jurors to condemn against their conscience. Further, the argument that jurors should not be burdened with the responsibility of their condemnation belies the fact that making problematic moral judgments about whom and what should be condemned in our society is one of the fundamental roles of the jury.⁴⁷⁰

VII. CONCLUSION

Critics of jury nullification do not understand what they are criticizing. Judges and prosecutors interrogate jurors searching for people who might disregard the law, and when they find any juror who simply acknowledges that the jury has the unreviewable power to acquit, they immediately strike those jurors as if they were maniacal anarchists looking to thwart justice at every turn.⁴⁷¹ Contrary to this view, the jury nullifier's most evil intent for society is only to acquit a technically guilty criminal defendant when *justice requires* them to do so.

Courts and critics have all forgotten one of the fundamental assumptions that our jury system is built on: America has juries because the constitutional framers believed that twelve ordinary citizens could do the right thing. If twelve fellow citizens—twelve people who do not

464. See Mirkin, *supra* note 205, at 67.

465. See *id.* at 68.

466. See *United States v. Dougherty*, 473 F.2d 1113, 1136-37 (D.C. Cir. 1972).

467. See *id.*

468. See Marder, *supra* note 165, at 345.

469. See, e.g., *LeFlore v. State*, 823 N.E.2d 1205, 1209 (Ind. Ct. App. 2005). In *LeFlore*, a juror asked to be excused from deliberations because she "was having a breakdown" and could "[n]ot live with the consequences" of rendering a verdict against her conscience. *Id.*

470. See *Williams v. Florida*, 399 U.S. 78, 100 (1970); Clark, *supra* note 219, at 2381-82.

471. See, e.g., *United States v. James*, No. 98-1479, 2000 U.S. App. LEXIS 1738, at *6 (10th Cir. Feb. 7, 2000).

know the defendant, twelve people who have no pre-existing prejudice or bias—are presented with all of the evidence and they condemn the defendant, then condemnation must be just. Blind application of the law, by one or by twelve, can never be so sure.

The jury uses twelve ordinary citizens because of their ability to find the truth, not just in the sense of facts, but in the sense of justice. It does not take special training to do the right thing. If America is committed to a jury system, it must believe in its jurors; if America is committed to a democracy, it must believe in its people. If I must present myself to an executioner, I would lay my neck under the axe long before I laid it under the guillotine. A guillotine, like the law, can malfunction because it is a mere mechanism. The human executioner, like the jury, must make the decision to strike. If they cannot deliver that blow in good conscience, they should not be compelled to do so.