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Alan Scheflin
Santa Clara University School of Law, ascheflin@scu.edu

Jon M. Van Dyke

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Alan Scheflin and Jon M. Van Dyke, *Merciful Juries: The Resilience of Jury Nullification* , 48 Wash. & Lee L. Rev. 165 (1996), Available at: http://digitalcommons.law.scu.edu/facpubs/681

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MERCIFUL JURIES: THE RESILIENCE OF JURY NULLIFICATION

ALAN W. SCHEFLIN*
JON M. VAN DYKE**

The power of a jury to soften the harsh commands of the law and return a verdict that corresponds to the community's sense of moral justice has long been recognized.[1] Widely disputed, however, is whether jurors should be told they have this authority. Proponents have seen a right to a jury nullification instruction as an inalienable part of the heritage of democracy,[2] whereas opponents have argued that it is tantamount to anar-

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* Professor of Law, Santa Clara University. B.A. 1963, University of Virginia; J.D. 1966, George Washington University; LL.M. 1967, Harvard University; M.A. in Counseling Psychology 1987, Santa Clara University.

** Professor of Law, William S. Richardson School of Law, University of Hawaii. B.A. 1964, Yale; J.D. 1967, Harvard University. The authors would like to thank Gerald W. Berkley, William S. Richardson School of Law, University of Hawaii, class of 1991, for assistance with research on this article.

1. *See, e.g.*, Lessard v. State, 719 P.2d 227, 231 (Wyo. 1986) (citing numerous other cases).

The topic of "jury nullification" has been discussed in detail by the authors in their previous writings: J. VAN DYKE, JURY SELECTION PROCEDURES: OUR UNCERTAIN COMMITMENT TO REPRESENTATIVE PANELS 225-51 (1977); Scheflin & Van Dyke, JURY NULLIFICATION: THE CONTOURS OF A CONTROVERSY, 43:4 LAW & CONTEMP. PROB. 51 (1980); Scheflin, *Jury Nullification: The Right to Say No*, 45 So. CAL. L. REV. 168 (1972); Van Dyke, *The Jury as a Political Institution*, 16 CATH. LAW. 224 (1970); Van Dyke, 3 THE CENTER MAG. 17 (No. 2, March-April 1970).

2. Among those advocating giving jurors an honest instruction about their powers, in addition to the authors in the articles cited *supra* in note 1 are: Timko, *Jury Nullification Thru the Initiative Process*, in JURY NULLIFICATION VOL. I (1987); Becker, *Jury Nullification: Can A Jury Be Trusted?*, 16 TRIAL 41 (Oct. 1980); Freeman, *Why Not A Jury Nullification Statute Here Too?*, 131 NEW L.J. 304 (March 19, 1981); Kaufman, *The Right of Self-Representation and the Power of Jury Nullification*, 28 CASE W. RES. L. REV. 269 (1978); Kunstler, *Jury Nullification in Conscience Cases*, 10 VA. J. INT'L L. 71 (1969); McCall, *Sentencing By Death Qualified Juries and the Right to Jury Nullification*, 22 HARV. J. ON LEGIS. 289 (1985); Osterman, *Should Jurors Be Told They Can Refuse To Enforce The Law?: Law Must Respect Consciences*, 72 A.B.A. J. 36 (March 1986); Sax, *Conscience and Anarchy: The Prosecution of War Resisters*, 57 YALE REV. 481 (1968); Schultz, *Will 'Jury Nullification' Save Ollie North?*, 11 LEGAL TIMES 18 (March 6, 1989); Note, *Jury Nullification and Jury-Control Procedures*, 65 N.Y.U. L. REV. 825 (1990); Note, *Laws That Are Made to Be Broken: Adjusting for Anticipated Noncompliance*, 75 MICH. L. REV. 687 (1977); Note, *The Jury's Role Under the Indiana Constitution*, 52 INDIANA L.J. 793 (1977); Note, *Toward Principles of Jury Equity*, 83 YALE L.J. 1023 (1974); Note, *Jury Nullification: The Forgotten Right*, 7 NEW ENG. L. REV. 105 (1971).

Articles discussing jury nullification or the "dispensing power" of juries which provide support for nullification but do not reach an explicit conclusion on whether an instruction should be given include: Barkan, *Jury Nullification in Political Trials*, 31 SOC. PROB. 28 (Oct. 1983); Howe, *Juries As Judges of Criminal Law*, 52 HARV. L. REV. 582 (1939); Jacobsohn, *A Right to Disagree: Judge, Juries, and the Administration of Criminal Justice in Maryland*,

chy.[3] Although in the past judges did instruct jurors about their role,[4] and judges in Maryland and Indiana still do,[5] most courts now refuse to explain honestly to jurors that they have the ultimate power to decide whether it is appropriate to apply the law to the facts presented to them.[6]

This judicial lack of candor has been periodically challenged; during the past few years a persistent grass roots movement has developed to promote the notion that our juries should be fully informed of their powers. Information about jury nullification has been spreading to an increasingly larger group of citizens and potential jurors. This movement serves to illustrate the resilience of the "jury nullification" concept and its link to fundamental notions of democracy.

This article discusses this new populist movement, analyzes some recent court decisions, reports some of the significant developments related to jury nullification during the past decade, and concludes that our judicial system would be better served if judges instructed jurors of their true powers.[7]

WHAT'S IN A NAME?

Persuaders have long been aware of the significance of what something is called. For example, when President Ronald Reagan wanted financial and other support for the "Contras" who were fighting the Sandanista government in Nicaragua, he found it advisable to rename them "freedom fight-

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1976 WASH. U.L.Q. 571; Kamins, *Jury Nullification—A Rarity in Criminal-Law Practice*, 194 N.Y.L.J. 1 (Aug. 20, 1985); Levine, *The Legislative Role of Juries*, 1984 A.B.F. RES. J. 605; Myers, *Rule Departures and Making Law: Juries and Their Verdicts*, 13 LAW & SOC. REV. 781 (1979); Pacelle, *Sanctuary Jurors' Dilemma: Law or Justice?*, 8 AM. LAW. 95 (Sept. 1986).

3. Recent works arguing that such an instruction should not be given to the jurors include: M. KADISH & S. KADISH, DISCRETION TO DISOBEY: A STUDY OF LAWFUL DEPARTURES FROM LEGAL RULES (1973); Allen, *Editorial: Nihilism at Santa Barbara*, 57 A.B.A. J. 999 (Oct. 1971); Christie, *Lawful Departures from Legal Rules: 'Jury Nullification' and Legitimated Disobedience*, 62 CAL. L. REV. 1289 (1974); Goldsmith, *Jury Nullification and the Rule of Law*, 17 THE COLO. LAW. 2151 (1988); Kadish & Kadish, *On Justified Rule Departures by Officials*, 59 CAL. L. REV. 905 (1971); Marshall, *Should Jurors Be Told They Can Refuse To Enforce The Law?: Jurors Must Respect The Law*, 72 A.B.A. J. 36 (March 1986); McBride, *The Jury is Not a Political Institution*, 11 JUDGE'S J. 37 (April 1972); Scott, *Jury Nullification: An Historical Perspective on a Modern Debate*, 91 W. VA. L. REV. 389 (1989); Simson, *Jury Nullification in the American System: A Skeptical View*, 54 TEX. L. REV. 488 (1976); Tavris, *The Law of An Unwritten Law: A Common Sense View of Jury Nullification*, 11 WEST. ST. L. REV. 97 (Fall 1983); Note, *Jury Nullification in Historical Perspective: Massachusetts as a Case Study*, 12 SUFFOLK U.L. REV. 968 (1978); Comment, *Jury Nullification and the Pro Se Defense: The Impact of* Dougherty v. United States, 21 U. KAN. L. REV. 47 (1972).

4. *See* Scheflin & Van Dyke, *supra* note 1, at 56-63.

5. *Id.* at 79-85.

6. *Id.* at 59-68.

7. We will not revisit the major arguments rejecting or supporting nullification. These may be found in our prior work, *see supra* note 1, and in the work of others, *see supra* notes 2 and 3. Nor will we discuss two evolving questions: the application of jury nullification in civil trials, and the expansion of jury powers to influence the admission of evidence. Our focus in this article is on the emerging politics of the nullification debate as it shifts from the courthouse to the statehouse and ballot box.

ers," which had a patriotic and positive tone, rather than "Contras," a term with negative connotations. Similarly, people who believe abortion is immoral have stopped calling themselves "anti-abortionists," opting instead for the more positive "pro-lifers."

Jury nullification debate similarly has been hampered by semantics. The term "jury nullification" is widely used by commentators and will also be used here by the authors, but it is not a term that accurately describes what is being advocated. The jury power at issue here is not a power to "nullify" statutes or precedents in order to create or substitute a new version of the law.[8] Instead, it is a power to "complete" or "perfect" the law by permitting the jury to exercise that one last touch of mercy where it may not be appropriate and just to apply the literal law to the actual facts.

According to Professor George Fletcher, the term "jury nullification"

> is unfortunate and misleading, because it suggests that when the jury votes its conscience, it is always engaged in an act of disrespect toward the law. The acquittal, supposedly, nullifies the law. In place of the law, it is said, the jury interposes its own moral judgment or political preferences.[9]

Fletcher rejects the view that jury nullification is an affront to the rule of law, and he provides a healthier and more accurate image:

> [T]he function of the jury as the ultimate authority on the law [is] not to "nullify" the instructions of the judge, but to complete the law, when necessary, by recognizing principles of justification that go beyond the written law. It would be better if we abandoned the phrase "jury nullification" and spoke instead of the jury's function in these cases of completing and perfecting the positive law recognized by the courts and the legislature.[10]

If "jury nullification" originally had been called "jury mercy," some of the emotional opposition might not have developed. Fletcher is correct to observe that this opposition has been based on a sense that when juries "nullify" they are acting *extra*-legally, outside the bounds of law. Under this view, the act of "nullification" appears to stand in opposition to the law.

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8. Some opponents of jury nullification have argued that juries will have the power to "ignore" or "disregard the law," or to return a verdict that may "fly in the face of both the evidence and the law." Indeed, the more radical proponents like jury nullification for just this reason. But this rhetoric does nullification a disservice. Lawless "Rambo" juries have no place in the legal system; the supremacy of the rule of law is essential in a constitutional democracy. Juries should not act as quasilegislators deciding which laws to eliminate or revise.

9. G. FLETCHER, A CRIME OF SELF-DEFENSE: BERNHARD GOETZ AND THE LAW ON TRIAL 155 (1988). The quote continues: "There are some who defend this residual power in juries as the highest expression of democracy and community control over the machinery of the state, and others who decry the same power as an invitation to anarchy." *Id.*

10. *Id.*

Fletcher's perspective is more cordial. Jury nullification is not *extra*-legal; quite the opposite. Nullification is an integral part of the law itself, serving the unique and vital function of smoothing the friction between law and justice, and between the people and their laws. Nullification then becomes a tolerable, and occasionally beneficial, side-effect of the power to return general verdicts of acquittal not subject to judicial review. Take, for illustrative purposes, the case of Leroy Reed.

INSIDE THE JURY ROOM: WISCONSIN V. LEROY REED[11]

Leroy Reed, a sincere but dull-witted convict on parole, was arrested by his parole officer for illegal possession of a weapon. Reed enjoyed the television detective program *The Equalizer* and thought he might like to become a private investigator himself. Off went letters to mail-order detective companies for brochures, books, and courses. Some of the information he received stated he would need a gun. Reed obediently bought one, not fully realizing that he was violating a condition of his parole. No one in the courtroom doubted that Reed was only vaguely aware of what was going on and that he had not caused harm, was not likely to cause harm, and certainly did not have any intent to cause harm or violate rules. Punishing him would be like rebuking a five-year old for not knowing algebra. Under the technical wording of the law, however, Reed was guilty. His defense lawyer pleaded for a jury nullification instruction, but the trial judge called it "an invitation to anarchy."

Once in the jury room, it was clear that the jurors were unanimous about two things: that Reed was guilty under the law, but morally was innocent. The just thing to do would be to acquit him. But the jurors had been told they had to follow the letter of the law. What should they do? During the spirited two-hour debate, some jurors argued that their oath required them to convict even though it meant doing an injustice. Others argued that they must follow what their consciences told them was the right thing to do in this case.

Both sides, however, seemed upset that the law had left them in this predicament. In the end, the conscience arguments converted the last remaining holdout. When he reluctantly retreated from his belief that the jury had no moral leeway, a verdict was reached.

Leroy Reed was acquitted. Some jurors went home having less respect for the legal system than when they had first reported for jury duty. Imagine how much worse they would have felt upon learning that an honest jury nullification instruction could have solved their dilemma and made them proud and respectful of the legal process. Other jurors, however, when

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11. The story of Leroy Reed is told in a remarkable television documentary where, for the first time, television cameras were allowed to film an actual jury deliberating to verdict. *Inside the Jury Room* (1986) was a segment of the PBS show *Frontline*. The film was written and produced by Alan M. Levin and Stephen J. Herzberg.

finally told about jury nullification, did not condemn the failure to receive the instruction.[12]

The doctrine of jury nullification strikes a resonant chord in the community. Professors Hans and Vidmar report on the results of a 1979 Canadian survey "where people were asked whether jurors should be instructed that they are entitled to follow their own conscience instead of strictly applying the law if it will produce a just result."[13] The survey showed that

> over three-quarters of the respondents said yes. Furthermore, people who had actually served on a jury were even more supportive; 93% of them endorsed the idea of giving these instructions. (On the other hand, Canadian judges were overwhelmingly opposed: Fewer than five percent agreed that jurors should receive such instructions.)[14]

Despite its popular appeal, judges in the United States, like their Canadian counterparts, are not kind to arguments for nullification.

Judicial Decisions

The decisions concerning jury nullification during the past decade have been relatively predictable, with most courts acting defensively and negatively when litigants have requested a jury nullification instruction.[15] The nullification doctrine is raised by defendants with some regularity in cases of tax protests,[16] abortion protests,[17] antinuclear protests,[18] and euthanasia,[19] but it usually meets an icy judicial reception.

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12. Law Professor Stephen J. Herzberg, co-producer of *Inside The Jury Room*, met with the jurors immediately after the trial. He explained jury nullification to them and said that they did have the right to return an acquittal. It was a highly emotional session. Many of the jurors were crying. Herzberg, *Inside the Jury Room*, presented at the Bill of Jury Rights Conference, St. Louis, Missouri (No. 10, 1990). The authors wish to thank Franklin M. Nugent for an audiotape of Professor Herzberg's talk. The authors also wish to thank Professor Herzberg for supplying us with additional information about the case and with a videotape of his postverdict discussions with the jurors and the judge.

A case in which the failure to give a nullification instruction may have produced a conviction is reported in Pacelle, *supra* note 2, at 95. According to Pacelle, many of the jurors are still suffering from their experience.

13. V. Hans & N. Vidmar, Judging the Jury 158 (1986), (citing Doob, *Public's View of Criminal Jury Trial*, and Doob, *Canadian Trial Judges' View of the Criminal Jury Trial*, in Law Reform Commission of Canada Studies on the Jury (1979)).

14. V. Hans & N. Vidmar, *supra* note 13, at 158.

15. *See, e.g.*, Medley v. Commonwealth, 704 S.W.2d 190 (Ky. 1985); People v. St. Cyr, 341 N.W.2d 533 (Mich. App. 1983); State v. Perkins, 353 N.W.2d 557 (Minn. 1984); State v. Maloney, 490 A.2d 772 (N.H. 1985); State v. Champa, 494 A.2d 102 (R.I. 1985).

16. *See generally* United States v. Krzyske, 836 F.2d 1013 (6th Cir. 1988); United States v. Wiley, 503 F.2d 106 (8th Cir. 1974).

In United States v. Ogle, 613 F.2d 233, 236 (10th Cir. 1980), Ogle, a tax protester, was convicted of trying to influence potential jurors by supplying them with a "Handbook for Jurors." The Handbook contained an inaccurate description of jury nullification ("it is

One particularly illuminating example is *State v. Ragland*,[20] decided by the New Jersey Supreme Court in 1986. The defendant, a prior convicted felon, was charged with four separate crimes all stemming from the same incident—(1) conspiracy to commit armed robbery, (2) unlawful possession of a weapon, (3) unlawful possession of a weapon without a permit, and (4) possession of a weapon by a convicted felon. The trial court severed the last charge "to avoid the inevitable prejudice in the trial of the other charges that would be caused by introducing defendant's prior felony conviction, an essential element in the severed charge."[21]

After the jurors found the defendant guilty of the first three charges, the trial judge gave the jury the following instruction and asked them to give their verdict on the fourth charge:

> If you find that the defendant, Gregory Ragland, was previously convicted for the crime of robbery and that he was in possession of a sawed-off shotgun, *as you have indicated* . . . then you *must* find him guilty as charged by this Court.[22]

The defendant appealed on the ground that this instruction took from the jurors their right to reach an independent verdict and, indeed, constituted a "directed verdict" from the judge.

All seven justices on the New Jersey court agreed that the above instruction was improper because the instruction included the "as you have indicated" phrase. The court reasoned that the use of this phrase denied the jury the power to evaluate the evidence anew to determine whether the prosecutor had proved beyond a reasonable doubt that the defendant had violated the fourth charge.

The justices divided sharply, however, on whether the use of the word "must" in this charge was proper, with four concluding that it was and three arguing that it was not. The three judges in the minority argued that the use of language such as "must" should be discontinued "because of its potential to be interpreted in a manner that compromises jury independence and blurs the accepted dichotomy between judge and jury."[23]

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unnecessary for jurors to follow the law of the land where they conceive of the law being contrary to their concepts of morals").

17. *See, e.g.*, United States v. Anderson, 716 F.2d 446 (7th Cir. 1983).

18. *See, e.g.*, State v. Champa, 494 A.2d 102 (R.I. 1985).

19. *See* S. KASSIN & L. WRIGHTSMAN, THE AMERICAN JURY ON TRIAL: PSYCHOLOGICAL PERSPECTIVES 157-58 (1988). Kassin and Wrightsman describe two euthanasia cases. In the first, the jury acquitted. In the second, the jury convicted because, as one juror explained, "We had no choice. The law does not allow for sympathy." *Id.* at 158.

In their book JUDGING THE JURY, *supra* note 13, Professors Hans and Vidmar observe that euthanasia cases demonstrate the unique value served by jury nullification. In these cases, "the legal authorities feel compelled to bring charges, but they rely on the jury's sense of fairness to acquit the defendant." *Id.* at 158.

20. 105 N.J. 189, 519 A.2d 1361 (1986).

21. State v. Ragland, 105 N.J. 189, 192, 519 A.2d 1361, 1362 (1986).

22. *Id.* (emphasis added).

23. *Id.* at 220, 519 A.2d at 1377 (Handler, J., concurring in part and dissenting in part).

The majority opinion of Chief Justice Wilentz acknowledged that precedents are divided on this issue,[24] but argued in strongly emotional language that "must" is an appropriate word to use because New Jersey juries do not have a "'right' to announce a verdict of acquittal despite its determination of guilt."[25] Chief Justice Wilentz argued that no evidence exists that jury nullification serves society well,[26] that an instruction to jurors about their power "would confuse any conscientious citizen"[27] and produce "total arbitrariness"[28] and "cynicism,"[29] and that a system that included a jury nullification instruction would be "almost ludicrous."[30]

Although *Ragland* remains the judicial norm, a decision that strikes a dramatically different tone is *Stevenson v. State*,[31] in which the Maryland Court of Appeals reaffirmed the constitutionality of Article 23 of the Maryland Declaration of Rights, which states that:

> In the trial of all criminal cases, the Jury shall be the Judges of Law, as well as of fact, except that the Court may pass upon the sufficiency of the evidence to sustain a conviction.[32]

The majority's decision in this case also helps explain how this provision is to be interpreted and applied.

Dorothy Lou Stevenson was convicted by a jury of murdering her husband by pouring gasoline on him while he slept and then igniting the gas with a match. At the beginning of the trial, the trial judge explained to the jurors the unique constitutional role that juries play in Maryland and, pursuant to Article 23, informed them that:

> Under the Constitution of Maryland, [you are] the judge of the law as well as of the facts. Therefore, anything which I may say about the law, including any instructions which I may give you, is

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The dissenting judges did not, however, advocate giving a jury nullification instruction. *Id.* at 221, 519 A.2d at 1378.

24. *Id.* at 198-99, 519 A.2d at 1365-66. One decision subsequent to *Ragland* that strikes a very different tone and criticizes a trial judge for confining a jury too narrowly is Cheek v. United States, 59 U.S.L.W. 4049 (1991). The jury indicated that it felt constrained by "the narrow and hard expression" of the law as given by the judge, *id.* at 4051 n.6, and the United States Supreme Court agreed that the instruction was too strict, reversing and remanding for a new trial.

25. *Id.* at 204, 519 A.2d at 1369.

26. *Id.* at 206, 519 A.2d at 1370.

27. *Id.* at 208, 519 A.2d at 1371.

28. *Id.* at 210, 519 A.2d at 1372.

29. *Id.* at 209, 519 A.2d at 1371.

30. *Id.* at 210, 519 A.2d at 1372.

31. 289 Md. 167, 423 A.2d 558 (1980). The majority opinion was written by Judge Digges for himself and three other judges. Judges Eldridge and Davidson dissented, arguing that Article 23 of the Maryland Declaration of Rights violates the 14th Amendment of the United States Constitution. *Id.* at 194, 423 A.2d at 572. Judge Cole also dissented with regard to the specific manner in which the instructions were given in this case, reserving the question of the status of Article 23 under the United States Constitution. *Id.* at 204, 423 A.2d at 577.

32. MD. CONST. DECLARATION OF RIGHTS art. 23.

merely advisory and you are not in any way bound by it.[33]

After the evidence was presented, the judge did not again make such a statement, but instead gave instructions on the issues of law and "couched all of his remarks in mandatory language."[34] Mrs. Stevenson argued that the preliminary instruction violated her right to due process under the Fourteenth Amendment of the United States Constitution and specifically infringed upon her privilege against self-incrimination, the presumption of innocence, and the requirement of proof beyond a reasonable doubt.[35]

The majority opinion rejected these arguments and reaffirmed the propriety of issuing the preliminary instruction under Article 23. It also clarified exactly what the jury's power includes and thus responds to the fears expressed by Chief Justice Wilentz in New Jersey. The Maryland jury's role under Article 23 "is confined 'to *resolv[ing] conflicting interpretations of the law [of the crime]* and to decid[ing] whether th[at] law should be applied in dubious factual situations,' *and nothing more.*"[36]

The Maryland jury's responsibility thus is to determine whether it is equitable and just to apply the law defining a crime to the facts presented to it. The jury has no role in determining whether evidence should be admitted, whether witnesses are competent to testify, whether the court has jurisdiction, or whether the statutes are constitutional.[37] In summary, the Maryland Court of Appeals stated:

> Implicit in the decisions of this Court limiting the jury's judicial role to the "law of the crime" is a recognition that all other legal issues are for the judge alone to decide.
>
> Because of this division of the law-judging function between judge and jury, it is incumbent upon a trial judge to carefully delineate for the jury the following dichotomy: (i) that the jury, under Article 23, is the final arbiter of disputes as to the substantive "law of the crime," as well as the "legal effect of the evidence," and that any comments by the judge concerning these matters are advisory only; and (ii) that, by virtue of this same constitutional provision, all other aspects of law (e.g., the burden of proof, the requirement of unanimity, the validity of a statute) are beyond the jury's pale, and that the judge's comments on these matters are binding upon that body. In other words, the jury should not be informed that all of the court's instructions are merely advisory; rather only that portion of the charge addressed to the former areas of "law" may be regarded as nonbinding by it, and it is only these aspects of the "law" which counsel may dispute in their respective

33. Stevenson v. State, 289 Md. 167, 171, 423 A.2d 558, 560 (1980).

34. *Id.* at 171, 423 A.2d at 561.

35. *Id.* at 188, 423 A.2d at 569.

36. *Id.* at 179, 423 A.2d at 564 (emphasis in original) (quoting from Dillon v. State, 277 Md. 571, 581, 357 A.2d 360, 367 (1976) (emphasis in original)).

37. *Id.* at 178, 423 A.2d at 564.

> arguments to the jury. On the other hand, the jury should be informed that the judge's charge with regard to any other legal matter is binding and may not be disregarded by it.[38]

In 1981, the Maryland Court of Appeals addressed this matter once again and said that the jury's role in evaluating the law of the crime was limited to those instances where the law is unclear or in dispute: "[I]n those circumstances where there is no dispute nor a sound basis for a dispute as to the law of the crime, the court's instructions are binding on the jury and counsel as well."[39]

A subsequent case that illustrates the leeway still given to a jury in Maryland is *Mack v. State*.[40] The defendant in *Mack* was charged with assault and battery and use of a handgun in the commission of a crime of violence. The trial court instructed the jurors that they had to find the defendant guilty of a crime of violence (assault and battery) in order to find him guilty of the second crime, which required a violent crime as a prerequisite. The trial judge also informed the jury that this instruction was binding.[41] Nonetheless, the jury found the defendant not guilty on the first charge and guilty on the second. When the defendant challenged this decision as inconsistent with the "binding" instructions, the trial judge ruled "that the jury's verdict was 'in all probability, a compromise verdict' that could stand."[42] The Court of Appeals accepted this illogical result as within the jury's power and affirmed the verdict.

An Empirical Study

The general judicial hostility to nullification ignores the popular sentiment for the doctrine and does not seem to be influenced by the data suggesting that a nullification instruction would not spawn "runaway" juries.

It is extremely difficult to develop definitive studies that illustrate how a jury nullification instruction affects a jury's deliberation, but Professor Irwin A. Horowitz of the University of Toledo Department of Psychology attempted such a study recently.[43] Professor Horowitz sought to study

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38. *Id.* at 179-80, 423 A.2d at 565.

39. Montgomery v. State, 292 Md. 84, 89, 437 A.2d 654, 657 (1981). In Allnutt v. State, the Maryland Court of Special Appeals noted that:

> Instances of dispute of the law of the crime are an endangered species rapidly approaching extinction. Once an appellate court has ruled on the "law of the crime," the matter then becomes settled law, and thereafter the jury is no longer the judge of the law with respect to that particular matter. Consequently, disputes of the law of the crime will decrease in number with each successive appellate ruling.

59 Md. App. 694, 703, 478 A.2d 321, 325 (1984).

40. 300 Md. 583, 479 A.2d 1344 (1984).

41. Mack v. State, 300 Md. 583, 600, 479 A.2d 1344, 1352 (1984).

42. *Id.*

43. *See* Horowitz, *The Effect of Jury Nullification Instruction on Verdicts & Jury Functioning in Criminal Trials*, 9 L. & Hum. Behav. 25 (1985); Horowitz, *Jury Nullification: The Impact of Judicial Instructions, Arguments, and Challenges on Jury Decision Making*, 12 Law & Hum. Behav. 439 (1988).

"whether the jury functioned differently if it was given nullification instructions; whether the impact of such instructions depended on the precise form in which they were given; and whether their impact also depended on the type of case in which they were given."[44]

Horowitz assembled forty-five six-person juries, drawing names from the official jury pool used in Toledo, Ohio.[45] He then chose three different factual situations and asked fifteen of the juries to evaluate each of three situations presented with professionally-acted audio tapes and slides. The cases involved (1) the murder of a grocer during a robbery attempt, (2) the killing of a pedestrian by a drunk college student driving in a foggy night, and (3) the "mercy" killing of a terminally ill and suffering cancer patient by a sympathetic nurse who had the consent of the patient and her family.

The fifteen juries were in turn broken into groups of five and each group was given one of three jury instructions: (a) a standard instruction taken from the Ohio Pattern Juror Instructions, which does not make any reference to nullification; (b) the Maryland Instruction, which contains nullification language;[46] and (c) what Professor Horowitz characterizes as a "radical" nullification instruction, taken from one of the present authors' earlier articles.[47] The result was that all fifteen of the juries convicted the alleged murderer of the grocer despite the three different instructions they received, but variations occurred in their evaluations of the other two fact situations. Two of the five juries that received the "standard" and "Maryland" instructions acquitted the drunk college student but *none* of those receiving the "radical" instruction reached a verdict of acquittal. And in

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44. V. HANS & N. VIDMAR, *supra* note 13, at 159 (describing studies of Professor Irwin Horowitz). The quote ends "The answer he got was yes to all three questions." *Id.*

45. All 170 participants had previously served as jurors in Ohio courts. Horowitz (1985), *supra* note 43, at 30.

46. The instruction used by Professor Horowitz was as follows:

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

Horowitz (1985), *supra* note 43, at 29 (quoting Scheflin & Van Dyke, *supra* note 1, at 83, quoting Wyley v. Warden, 372 F.2d 742, 743 n.1 (4th Cir. 1967)).

47. The instruction is taken from Van Dyke (1970), *supra* note 1.

> Jurors were told the following:
>
> 1. "Although they are a public body bound to give respectful attention to the laws, they have the final authority to decide whether or not to apply a given law to the acts of the defendant on trial before them";
>
> 2. That 'they represent (the community) and that it is appropriate to bring into their deliberations the feelings of the community and their own feelings based on conscience';
>
> 3. And, jurors were told that despite their respect for the law, "nothing would bar them from acquitting the defendant if they feel that the law, as applied to the fact situation before them, would produce an inequitable or unjust result."

Horowitz (1985), *supra* note 43, at 30-31.

the "mercy" killing case, one of the five "standard" juries acquitted the nurse, two of the "Maryland" juries acquitted, and *four* of the "radical" juries acquitted.[48]

Although the sample Horowitz used is small and more work clearly is required, this study does show that juries told that they have power are more likely to exercise it and to reach results that—at least in these cases—appear to be more just and equitable.[49]

From the Judicial to the Political Arena

The controversy over the propriety of a jury nullification instruction lay dormant for most of this century until resurrected in the 1960s as part of the defense strategy in anti-Vietnam War demonstration trials.[50] As mentioned above, it did not meet with a warm judicial reception, and most judges still refuse to instruct juries honestly about their nullification power. Such refusal in the 1960s did not significantly undermine the legitimacy of the judiciary because few people knew about nullification. This is no longer true in the 1990s. The jury nullification movement is more active now than at any previous period. Journalists have noted that juries have appeared to invoke their nullification power in many prominent recent cases.[51] More

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48. Horowitz, *supra* note 43, at 32.

49. Kassin & Wrightsman identify two potential problems arising from the Horowitz study. First, "jury nullification is like a door that can swing both ways. Just as it can license jurors to acquit the guilty, it is argued, it can enable them to convict those who are innocent." S. Kassin & L. Wrightsman, *supra* note 19, at 161. Carefully worded jury instructions should all but eliminate this possibility. Even if such a conviction occurred, it could be reversed. Jury convictions, unlike jury acquittals, are not final.

The second concern is that when the jury nullification instruction is made explicit, jurors will become "diverted from the external to the internal, from the evidence onto their sentiments." *Id.* at 161. It seems more likely to us that jurors will deal more openly and honestly with their sentiments, but would not be "diverted" from their initial task of finding the true facts.

50. Credit goes to Professor Sax for rekindling the flame of jury nullification. *See* Sax, *supra* note 2.

51. Among the recent highly publicized trials where jury nullification appears to have played a role are those of Mayor Marion Barry of Washington, D.C., for durg use, Oliver L. North for his role in the Iran-Contra Affair, and Bernhard Goetz for his assault in a New York City subway.

After Mayor Barry's jury returned a conviction for a relatively minor charge and acquittals on the other counts, the trial judge Thomas Penfield Jackson spoke at Harvard Law School and expressed his dismay that the jurors had failed to return more convictions even though the evidence was "overwhelming" on at least a dozen counts. Bruce Fein then wrote a column chastising Judge Jackson for his "acid carping at jurors for nullifying the law." Fein, *Judge, Jury . . . and the Sixth*, Wash. Times, Nov. 8, 1990, at G3. Judge Jackson had said:

> The jury is not a minidemocracy or a minilegislature. They are not to go back and do right as they see fit. That's anarchy. They are supposed to follow the law.

Commentator Fein responded by saying:

> Jury nullification in a particular case is no more a legislative repeal of a criminal law, or anarchy, than are the commonplace decisions of prosecutors to resist prosecutions where the crime is deemed inconsequential or mitigated by special

significantly, frustration with the judicial system, and in particular the perception that judges are dishonest with juries, has caused proponents of jury nullification to seek satisfaction from two more hospitable forums—voters and legislators.

Voters and Legislators

Debate about jury nullification raises fundamental, and unanswered, questions about sovereignty in a constitutional democracy. It was therefore natural that nullification proponents would seek out the two major forums for lawmaking, the popular vote and legislation.

In the summer of 1989, Larry Dodge, a Montana businessman, joined with his friend Don Doig to found the Fully Informed Jury Association (FIJA). This "national nonprofit nonpartisan group [is] dedicated to jurors being fully informed of their rights."[52] Within eighteen months, the organization had jury rights lobbyists in thirty-five states.[53]

FIJA sponsored the first Bill of Jury Rights Conference in November 1990. The purpose of the gathering was to plan strategy to lobby legislators to enact "fully informed jury" statutes, and to urge voters to pass initiatives, referenda, or constitutional amendments to protect the heritage of the jury's right of nullification.[54] The Conference concluded with a ceremony at the federal courthouse to kickoff a national Jury Rights Campaign.

Because public sentiment supports jury nullification,[55] FIJA's appeal spans the political and social spectrum:

> Conservatives and constitutionalists, liberals and progressives, libertarians, populists, greens, gun owners, peace groups, taxpayer rights groups, home schoolers, alternative medicine practitioners, drug decriminalization groups, criminal trial lawyers, seat belt and helmet law activists, environmentalists, women's groups, anti-nu-

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circumstances.

Id.; *see also* Thompson, *Sifting the Pool; Juror Questionnaires Explore Drug Addiction, Prejudice*, Wash. Post, June 5, 1990, at A1.

The jury in Oliver North's trial similarly returned a verdict that indicated sympathy with the accused, convicting him on only three of the twelve charges against him. Georgetown University Law Professor Paul F. Rothstein analyzed the trial by saying: "It's jury nullification . . . . The instructions on aiding and abetting left [the jurors] little choice, but I think they sort of vaguely felt in their minds that his superiors ordered it and he was in a bind . . . ." Strasser, *Jury in North's Trial Settled on the Concrete; Abstractions Rejected*, Nat'l L.J., May 15, 1989, at 9; *see also* Schultz, *supra* note 2.

Regarding the Goetz case and jury nullification, *see* G. FLETCHER, *supra* note 9; Pinsley, *Goetz Appeal Explores Jury Nullification Issue*, Manhattan Lawyer, Nov. 1, 1988, at 11; April 5, 1987, sec. 4, at 6, col. 1.

52. FULLY INFORMED JURY ASSOCIATION, MEDIA HANDOUT 2 (Oct. 30, 1990).

53. Adler, *Courtroom Putsch?*, Wall St. J., Jan. 4, 1991, at A1, col. 1.

54. FIJA has many other jury reform proposals besides the nullification issue. Discussion of them is beyond the scope of this paper.

55. *See* sources cited *supra* note 13.

> clear groups, ethnic minorities, . . . and judges (yes, some judges are sympathetic).[56]

As of January 1991, FIJA had successfully persuaded legislators to introduce bills in the state legislatures of Alaska, Arizona, Georgia, Louisiana, Massachusetts, New York, Oklahoma, Tennessee, and Wyoming.[57]

These bills differ widely in language. One of the more interesting options is the Massachusetts bill, introduced by Senator Robert L. Hedlund,[58] which seeks to soften the confrontation between the legislature and the judiciary. Senator Hedlund has strong feelings about its importance: "I see this bill as supporting one of the two pillars of freedom—the right to a fully informed jury. The other pillar is the right to vote."[59] If passed, the bill will amend the handbook all potential trial jurors receive and would add a new segment to the video presentation they watch. Senator Hedlund's bill states:

> In informing the jurors of the nature and extent of their duties and responsibilities . . . the handbook shall inform the jurors that in all cases they have the historical, constitutional, and natural right to judge not only the liability, guilt, or innocence of the defendant(s) under the law as charged, but to exercise their conscience in doing so and that, if they determine according to their conscience that the law as charged by the judge is unjust or wrongly applied to the defendant(s), it is their obligation, right, and duty to judge according to their conscience.

By its wording, the bill would apply both to civil and criminal jury trials. Application of jury nullification in civil cases is less pressing an issue because the judge always maintains the authority to alter or reject the verdict. Thus, a jury that votes its conscience can be judicially reversed. Discussions of jury nullification in the context of civil cases thus tend to be rare.[60]

Senator Hedlund's bill contains one great virtue and one great vice. Its virtue is that it attempts to avoid a direct confrontation with judges and therefore does not order them to instruct juries about their nullification

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56. THE FIJACTIVIST 1 (Special Outreach Issue, 1990).

57. Some of these bills, such as the ones in Arizona and Wyoming, have been defeated. Others remain to be debated.

58. The authors would like to thank David J. Shagoury, aide to Senator Hedlund, for helpful discussions about jury nullification.

59. Telephone interview with Massachusetts Senator Robert L. Hedlund (January 28, 1991). The authors would like to thank Senator Hedlund for providing us with additional information about his bill.

60. *See* Zenith Radio Corp. v. Matsushita Electric Indus. Co., Ltd., 478 F. Supp. 889 (E.D. Pa. 1979); V. HANS & N. VIDMAR, *supra* note 13, at 160-63; Scheflin & Van Dyke, *supra* note 1, at 69-71.

power. The jurors will receive accurate information from their handbook, and judges will not be compelled to give it to them.[61]

The one great vice in the bill is that it makes a statement of jury power that is far too broad. Under its terms, for example, a jury could *convict* on the basis of conscience if the jurors feel the law is too soft or lenient. The bill needs to be amended to remove that impression. Language must be added to convey to the jury that it may exercise its conscience or "mercy" power only for leniency. No defendant may be judged by a standard harsher than the law on the books. *Ex post facto* convictions are unacceptable.

Another illustration of the breadth of the bill's language is to be found in the sentence that permits jurors to exercise conscience if the law as charged by the judge "is unjust or wrongly applied" to the defendant(s). It would be better to say that jurors, in the exercise of their consciences, "may acquit the defendant if the application of the law, as given by the judge, would result in an unjust conviction."

Having jurors speculate on the "justness" of a law is to distract them from their central task of applying the facts to the law in that particular case. If a law is unjust, its application in any case is unjust, and voters, legislators, or judges should remove it from the books. Juries do not have this power. Their power is limited to refusing to apply the law in the single case presented to them, and then only when following the technical mandate of the law would offend the community's sense of justice.

Senator Hedlund's bill undoubtedly will undergo language changes as it moves through the legislative process. In rewritten form, it may serve as a model for laws that truly make our nation a "government of the people, by the people and for the people."[62]

Legislation has not been the only path to jury nullification law reform. FIJA has been busy circulating petitions for ballot initiatives in many states, including Arkansas, California, Colorado, Florida, Idaho, Montana, Utah, and Washington. In some of these states, amendments to the state constitutions are sought. By the end of 1991, FIJA hopes to have electoral campaigns in all fifty states.

One of the most elaborate jury nullification provisions appeared as an initiative to amend the Oregon Constitution:[63]

> It is the natural right of every citizen of the state of Oregon, when serving on a criminal-trial jury, to judge both the law and the facts

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61. With this silver lining, however, comes a dark cloud. If judges do not give nullification instructions, or, worse yet, give a strong statement that jurors must follow the judge's instructions, jurors may rightly become confused about their role. Some judicial cooperation inevitably will be necessary.

62. A. Lincoln, Address at Gettysburg (Nov. 19, 1863).

63. Oregon's Constitution presently recognizes a right of jury power. Article I section 16 provides "In all criminal cases whatever, the jury shall have the right to determine the law, and the facts under the direction of the court as to the law, and the right of new trial, as in civil cases." ORE. CONST. art. I, § 16.

> pertaining to the case before the jury, in order to determine whether justice will be served by applying the law to the defendant. It is mandatory that all jurors be informed of this right. Before the jury hears a case, and again before jury deliberation begins, the court shall inform the jurors of their rights in these words: "As jurors, your first responsibility is to decide whether the prosecution has proven beyond reasonable doubt every element of the criminal charge. If you decide that the prosecution has proven beyond reasonable doubt every element of the criminal charge but that you cannot in good conscience support a guilty verdict, you are not required to do so. To reach a verdict which you believe is just, each of you has the right to consider to what extent the defendant's actions have actually caused harm or otherwise violated your sense of right and wrong. If you believe justice requires it, you may also judge both the merits of the law under which the defendant has been charged and the wisdom of applying that law to the defendant. Accordingly, for each charge against the defendant, even if review of the evidence strictly in terms of the law would indicate a guilty verdict, you have the right to find the defendant not guilty. The court cautions that with the exercise of this right comes the full moral responsibility for the verdict you bring in." As part of their oath, the jurors shall affirm that they understand the information concerning their rights which this section requires the court to give them, and that no party to the trial may be prevented from encouraging jurors to exercise this right. For the jurors to be so informed is declared to be part of the defendant's fundamental right to trial by jury, and failure to conduct any criminal trial in accordance with this section shall not constitute harmless error, and shall be grounds for a mistrial. No potential juror may be disqualified from serving on a jury because he or she expresses willingness to judge the law or its application, or to vote according to his or her conscience.

As the Oregon Supreme Court succinctly stated, this initiative, if adopted, "would enshrine in the Oregon Constitution the concept of 'jury nullification.'"[64] The Court expressed hostility toward the initiative,[65] but did not strike it down.

JURIDICAL DISHONESTY

Essential to the success of the grass roots jury nullification movement is publicity. People need to be informed about the right to fully informed

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64. Fauvre v. Roberts, 309 Ore. 691, 694, 791 P.2d 128, 130 (1990).

65. The Court ruled against proponents of the initiative who were challenging the wording of the description of the provision in the Attorney General's certification of the ballot title. *Id.* at 696, 791 P.2d at 132.

juries. Jury nullification makes news in most major criminal trials where a clash of values attracts public attention. Articles about jury nullification now appear in newspapers and magazines with great frequency. When the Public Broadcast System (PBS) aired *Inside the Jury Room*, an estimated twenty-five million viewers saw the program.[66] Jury nullification is getting more press coverage than ever before. Millions of people are learning what the judges refuse to tell them.

Contacting Potential Jurors

Press coverage has the advantage of reaching many people, but it does so at a time in their lives when the jury nullification issue is not very pressing. For potential jurors, however, information about jury nullification may have a more direct impact on the juror's deliberations.

On January 25, 1990, the *San Diego Reader* published a three-quarter page advertisement[67] with the following headline:

ATTENTION JURORS & FUTURE JURORS
You Can Legally Acquit Anti-Abortion
"Trespassers" Even If They 're "Guilty"

The advertisement began by saying "[s]uppose you're on the jury in the trial of pro-life 'rescuers' who blocked the entrances to an abortion facility. The judge will probably tell you it makes no difference whether you agree with their actions. . . . He's Not Telling the Truth." The text went on to praise a Philadelphia jury that had used its "common-law right to 'nullify'" a trespass law.

The timing of the appearance of the advertisement was well planned. Trials were beginning for Operation Rescue defendants accused of trespass and other offenses at the site of a medical clinic. That the advertisement was designed to influence jury verdicts cannot be in doubt. Indeed, the publisher of *The Reader* was one of the defendants and his lawyer told the press that he was aware the advertisement would be run.[68]

Three weeks before the San Diego advertisement appeared, leaflets were distributed outside the courthouse in El Cajon, California. The demonstrators stopped when warned by the marshal that they could be arrested for felony jury-tampering. To combat the information being handed out, judges gave jurors special instructions to disregard the leaflets.

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66. Herzberg, *supra* note 12.

67. At the bottom right of the advertisement there is a small box, labelled "ATTENTION LAWYERS," which contains a reference to our article in 43:4 LAW & CONTEMP. PROB. 52 (1980). Neither of us was contacted before this reference was used. Statements in the advertisement are in direct contradiction to our position. We categorically and emphatically do not endorse jurors lying to judges nor do we endorse telling jurors to disbelieve everything they hear from judges.

68. *See* Jackson, *DA's Office Decries 'Jury Nullification' Ad*, San Diego Union, Jan. 26, 1990, at B1.

California was not the first location where such leaflets appeared. Operation Rescue adherents in Jackson, Mississippi distributed leaflets urging jurors to "nullify every rule or 'law' that is not in accordance with the principles of Natural, God-given, Common, or Constitutional Law."[69]

Many of these leaflets present a distorted and incorrect discussion of nullification. Potential jurors who read them may taint the deliberations of actual juries with misinformation. Only an accurate jury nullification instruction from the judge can eliminate this problem.

In fact, many of the pamphlets and leaflets go further than presenting misinformation. They suggest or hint that potential jurors should deceive judges.

Should Jurors Be Honest With Judges?

Sir Walter Scott wrote the much quoted phrase, "Oh! what a tangled web we weave [w]hen first we practise to deceive!"[70] Proponents of jury nullification have written about the lack of candor involved when the judge fails to tell the jury about nullification. This dishonesty now has spawned a more virulent deception in the reverse direction: jurors lying to judges.

In 1988, the authors received a four-page pamphlet entitled "The Informed Juror." Written by Paul deParrie and sponsored by an Oregon group called Advocates for Life, the pamphlet gives a very brief description of nullification before calling on conservatives, "especially Christians," to refrain from showing during voir dire that they have strong feelings about abortion. The pamphlet's author advises:

> During jury selection it may be wise to refrain from elaborating on answers to questions asked by attorneys. Any appearance of being educated, involved or opinionated may be sufficient cause to be rejected, thus being removed from the opportunity to be a watchman for abuses by the executive and judicial departments of government. This does not mean that you would be untruthful in answering questions. Simply keep your answers brief if you would like to improve your chances of serving on a jury.

Not all anti-abortion activists have been content with silence or brevity. For some, outright deception appears justified. One such illustration surfaced in San Diego where a published advertisement stopped just short of advocating lying.[71] Noting that "before you even *get on* the jury, they may ask you whether you know about your right to 'nullify,'" the advertisement then offered a suggested response:

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69. The authors thank Jerry Mitchell, reporter for the Jackson, Mississippi *Clarion-Ledger*, for sending us the leaflet. This particular leaflet was sponsored by the Christian Action Group of Jackson, Mississippi.

70. SIR WALTER SCOTT, *Marmion*, Canto VI, Stanza 17, in COMPLETE POETICAL WORKS 145 (1900).

71. *See supra* text at note 65.

> *Don't believe a word they say. . . .*
> *Here's How to Do It*
>
> It's easy. The most important rule is, *don't let the judge and prosecutor know that you know about this right.*
>
> It is unjust and illegal for them to deny you this right. So, if you have to, it's perfectly all right for you to make a "mental reservation."
>
> Give them the same answer you would have given if you were hiding fugitive slaves in 1850 and the 'slave catchers' asked if you had runaways in your attic. Or if you were hiding Jews from the Nazis in Germany.

This recommendation for "pious dishonesty" was then followed by two other suggestions:

> The second rule is, *educate the other jurors* about jury nullification and, if possible, persuade them to vote "not guilty."
>
> The third rule is *stick to your guns.* Don't let other jurors make you change your position.

Millions of potential jurors may be exposed to similar advertisements, leaflets, or pamphlets. That means that countless juries may contain members who have concealed their awareness of nullification, who hold seriously incorrect views about it, and who intend to "educate" the other jurors to rebuff laws they do not like.

When jury nullification was a judicial secret, it was easier to refuse to give jury nullification instructions.[72] Such refusal today, however, may seriously compromise the justice of our jury verdicts.

Should Judges Be Honest With Jurors?

What should the judge do about the fact that jurors may know something about nullification, accurate or not? Suppose, for example, we have a panel of potential jurors in a criminal case that has attracted media attention. Some of these jurors have seen literature about a right to nullify laws. What they read contained many errors. The defense lawyer or prosecutor may request to ask questions about nullification on voir dire. Should the lawyers be allowed to voir dire about nullification? If not, these jurors will contaminate the jury deliberations. If so, information about nullification will be made public. The judge may decide to give an antinullification

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72. Larry Dodge has reported a case from New York in which one of the jurors began to explain jury nullification to the others, but they sent a note to the judge about him. The judge permitted him to continue to deliberate after telling him to "keep his politics out of the case and apply the law as given." The juror agreed, went back to the deliberations, and hung the jury. He was later threatened with perjury and contempt charges, but they were never brought. Dodge, *A Complete History of the Power Rights and Duties of the Jury System*, a talk delivered at the State of the Nation Conference, sponsored by the Texas Liberty Association (July 7, 1990).

instruction, but this, of course, will reinforce what the literature said would happen and would not correct any errors about the doctrine.

Judicial failure to give honest and correct instructions on nullification may thus directly contribute to contamination of jury deliberations. It is a sad irony that while judges continue to refuse to give accurate jury nullification instructions, they in fact are creating the anarchy they seek to avoid.

CONCLUSION

The renewed grass roots interest in a "fully informed jury" reinforces our earlier views that judges should give jurors an accurate and honest instruction about the jury's role and power. The instruction should state that the judge must properly make rulings on procedural matters and will be guiding the trial so that all constitutional protections are provided to the litigants. The instruction should also say that the jury does not have the power to create new statutes or evaluate the constitutionality of the statutes before them. The jury should be encouraged to pay respectful attention to the acts of the legislature which, after all, reflect the democratic wishes of the community's majority. But the jurors should also be told that their function is to represent the community in this trial and that their ultimate responsibility is to determine the facts that occurred and to evaluate whether applying the law to these facts will produce, in the eyes of the community, a just and equitable verdict.

This type of honest instruction would reinforce our nation's commitment to a government where the people are sovereign, and it would serve to bring the people and their laws together in closer harmony.