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Jury Nullification: Law Versus Anarchy

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

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I. INTRODUCTION

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

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

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

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

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1. See Witherspoon v. Illinois, 391 U.S. 510, 519 n.15 (1968) (explaining that respect for nullification flows from the jury's role as the "conscience of the community" in the criminal justice system); United States v. Dougherty, 473 F.2d 1113, 1142 (D.C. Cir. 1972) (Bazelon, C.J., concurring in part and dissenting in part) (denying petitioner's request for a jury nullification instruction on the grounds that the jury has no right to be instructed on its prerogative to disregard the instructions of the court, even in matters of law).
2. See Dougherty, 473 F.2d at 1142 & n.8.
3. See id. at 1133-34.
5. See Dougherty, 473 F.2d at 1136.
7. See Dougherty, 473 F.2d at 1133-34.

To encourage individuals to make their own determinations as to which
standards. Juries are not impaneled to solve social problems. The jury's duty is to apply the facts to the law as stated by the court and reach a verdict consistent with this law.

III. HISTORY

The concept of jury nullification dates back to sixteenth-century England. In 1649 Lieutenant Colonel John Lilburne was prosecuted for publishing pamphlets critical of the British government, in violation of treason laws. Lilburne was denied assistance of counsel and requested an opportunity to speak to the jury himself. He expressed to the court his belief that "[t]he jury [members] . . . are not only laws they will obey and which they will permit themselves as a matter of conscience to disobey is to invite chaos. No legal system could long survive if it gave every individual the option of disregarding with impunity any law which by his personal standard judged morally untenable."

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


9. The Supreme Court has stated:

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


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

13. See id. at 173.
judges of fact, but of law also: [the court is only the pronouncer of the jury's] . . . verdict." Lieutenant Colonel Lilburne was prosecuted a second time in 1653. His punishment, if convicted, was death. Defending himself again, Lilburne argued that the jury should acquit him if it believed that the "proscribed punishment was unconscionably severe in light of the acts proved to have been committed by [him]." The jury returned a verdict of "not guilty of any crime worthy of death."

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

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14. Id.
15. See id. at 195-97.
16. See id. at 193.
17. Id. at 159-60.
18. Id.
19. See id. at 246-49.
21. See Penn & Mead's Case, supra note 20, at 958-59.
22. See id.; GREEN, supra note 11, at 223.
23. See Penn & Mead's Case, supra note 20, at 959-60.
24. See id. at 960-61.
25. See id. at 961.
26. See id.
27. See id. at 962.
28. See id.
for Penn. By refusing to find the assembly unlawful, the jury essentially acquitted both men.

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

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

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

Instances of jury nullification began to increase during the eighteenth century and were common in the early nineteenth century in seditious libel prosecutions. William Davis Shipley was prosecuted for seditious libel in 1783. The jury was instructed that its only de-

29. See id. at 962-63.
30. See id.
31. Id. at 963.
32. See id. at 964.
33. See id. at 966.
34. See id. at 967-68.
36. See id. at 1012.
37. See id. at 1013-14.
38. See Korroch & Davidson, supra note 10, at 134.
40. See Korroch & Davidson, supra note 10, at 134.
41. See Proceedings against the Dean of St. Asaph, 23 Geo. 3 (1784), reprinted in 21 T.B. Howell, A COMPLETE COLLECTION OF STATE TRIALS 847 (London,
cision was whether there was in fact a publication, an issue upon which there was no dispute. They were told not to consider any offered justification.

In closing argument, Shipley’s attorney told the jurors that they should not obey the court’s rulings and argued:

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

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

T.C. Hansard 1816 [hereinafter St. Asaph’s Case].
42. See id. at 851.
43. See id.
44. Id.
46. See Zenger, supra note 45, at 675-82.
47. See id.
48. See Glendon, supra note 45, at 48.
49. See id.
50. See id. at 50.
51. See id.
53. See Zenger, supra note 45, at 694; Glendon, supra note 45, at 48.
could therefore find the defendant guilty."\textsuperscript{54} "Hamilton's strategy was to concede the factual question of whether publication had occurred, and argue the legal question of whether truth should be a defense [to the charge of seditious libel]."\textsuperscript{55} He "conceded that Zenger had printed and published the offending papers but demanded that the prosecution prove them to be false."\textsuperscript{56} In response, the Attorney General argued that the statement was no less a libel simply because it was true.\textsuperscript{57} The Court refused to allow Hamilton to prove the truth of the facts published in the papers, prohibiting him from calling any witnesses on the subject.\textsuperscript{58} The only way Hamilton could gain Zenger an acquittal was to rely on the jurors' own notions of truth of the allegations in the paper because the law was completely against him.\textsuperscript{59} He urged jurors to uphold freedom and asked them "to see with their own eyes, to hear with their own ears, and to make use of their own consciences and understandings in judging of the lives, liberties or estates of their fellow subjects."\textsuperscript{60} The jury returned a verdict of not guilty.\textsuperscript{61} It is asserted that though a nullified verdict, the outcome of Zenger's case strengthened freedom of the press.\textsuperscript{62}

In the early history of the American colonies, and for a time after the Revolution, criminal juries enjoyed the right to decide questions of both law and fact.\textsuperscript{53} In \textit{Georgia v. Brailsford},\textsuperscript{64} a 1794 civil case, Supreme Court Chief Justice John Jay instructed the jury on the law, which he explained it should take from the court.\textsuperscript{65} He further expressed that the jury had the right to decide the proper law as well as the facts. Chief Justice Jay stated, "you [the jury] have neverthelefs a right to take upon yourselves to judge of both, and to determine

\begin{footnotes}
\footnote{54. Glendon, supra note 45, at 48.}
\footnote{55. John T. Reed, Comment, \textit{Penn, Zenger and O.J.: Jury Nullification—Justice or the "Wacko Fringe's" Attempt to Further Its Anti-Government Agenda?}, 34 DUQ. L. REV. 1125, 1132 (1996); see Zenger, supra note 45, at 693.}
\footnote{56. Glendon, supra note 45, at 50; see also Zenger, supra note 45, at 698-99.}
\footnote{57. See Zenger, supra note 45, at 703.}
\footnote{58. See id.}
\footnote{59. See id.}
\footnote{60. \textit{JAMES ALEXANDER, A BRIEF NARRATIVE OF THE CASE AND TRIAL OF JOHN PETER ZENGER} 93 (Stanley Nider Katz ed., 2d ed. 1972).}
\footnote{61. See id. at 101.}
\footnote{63. See Schefflin, supra note 20, at 174.}
\footnote{64. 3 U.S. (3 Dall.) 1 (1794).}
\footnote{65. See id. at 4; Schefflin, supra note 20, at 175-76; Reed, supra note 55, at 1133.}
\end{footnotes}
the law as well as the fact in controversy.”

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

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

The trend to diminish a jury’s power to nullify continued in *Commonwealth v. Porter*. Ten years after *Battiste*, the Massachu-
setts Supreme Court held that a jury could not determine questions of law. 78 Although the court's holding did not follow Massachusetts precedent, it was not completely inconsistent. While the judge gave the law to the jury, the defense attorney was still allowed to argue the law to the jury, ostensibly to allow jurors to better grasp it. 79

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

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

78. See id. at 286; Scheflin, supra note 20, at 178.
79. See Porter, 51 Mass. (10 Met.) at 285-87; Scheflin, supra note 20, at 178.
80. 26 F. Cas. 1323 (C.C.D. Mass. 1851) (No. 15,815).
81. See id. at 1323-31.
82. See id. at 1331.
83. See id. at 1336.
84. See id. at 1332; Reed, supra note 55, at 1135.
85. U.S. CONST. art. VI, § 2. (This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding).
86. See Scheflin, supra note 20, at 179.
87. See Morris, 26 F. Cas. at 1332-33.
88. See Scott, supra note 11, at 419.
89. 156 U.S. 51 (1895).
sailor on board an American ship, the *Hesper.* The murder statute under which the defendants were charged provided for the lesser included offense of manslaughter. At trial, the defendants asked the court to instruct the jury on the lesser included offense. The trial judge refused the request and told the jury that there was no evidence to support such a finding. During deliberations the jury asked the court whether the crime committed must have been murder or whether it could be manslaughter. The court responded that although in an average case, the verdict may be murder or manslaughter, in this case manslaughter was not appropriate: “[I]f a felonious homicide has been committed, the facts of the case do not reduce it below murder.” Further,

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

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

Since 1895 the United States Supreme Court has followed this
precedent that the right to decide the law belongs to the court, not to the jury.99

IV. MODERN JUDICIAL DEVELOPMENTS

A: Federal Case Law

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

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

100. See Weinberg-Brodt, supra note 39, at 833 n.45.
103. See Weinberg-Brodt, supra note 39, at 836.
104. See PAULA DIPERNA, JURIES ON TRIAL 82 (1984).
105. See id.
106. See id.
108. See id. at 168.
109. See id. at 180.
110. See id. at 180-82.
cases, they are almost nonexistent in the criminal context. In a civil case, the judge may order the jury to find against a defendant, regardless of the strength of the evidence. The same cannot be done in criminal cases. The court asserted that in order for a defendant to be tried by a jury of his peers, that jury must be free from judicial pressure and control in rendering its verdict. The First Circuit expressed concern with

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

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

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

111. See id. at 180. Judge Aldrich did point out that there is a narrow area of special criminal cases where questions have been used; however, he implied that the case at bar was not such a case. See id. at 182.
112. See id. at 180.
113. See id. at 181.
114. Id. at 182.
115. See id.
116. See id.
117. See id. at 183.
118. 417 F.2d 1002 (4th Cir. 1969).
119. See id. at 1003.
acts and were convicted.\textsuperscript{121} The defendants appealed their convictions on two grounds, one being that the trial court erred in refusing to instruct the jury on its right to nullify the law.\textsuperscript{122} They contended that the trial judge should have informed the jury or allowed defense counsel to argue that it had the power to acquit the defendants even if they were clearly guilty of the crimes charged.\textsuperscript{123} The appellants maintained that “since the jury has ‘the power to bring in a verdict in the teeth of both law and facts,’ then the jury should be told that it has this power.”\textsuperscript{124} This argument was based on their contention that the jury’s power to acquit where the law may compel otherwise is central to democracy. A jury must be so informed to fairly ponder the actions of the defendants, because society speaks through the jury in judging fellow citizens and can mitigate a law which society deems is too harsh.\textsuperscript{125} In response to the appellants’ assertions, the Fourth Circuit noted:

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

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

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

129. 460 F.2d 515 (9th Cir. 1972).
130. See id. at 516.
132. See id. at 518-19. The requested instruction read:

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

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

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

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

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

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

Id. at 518 n.9.
133. Id. at 519.
134. See id. at 520.
135. See id.
136. Id. at 519 (quoting Sparf & Hanson v. United States, 156 U.S. 51, 102 (1895)).
dated as correct the rule of Sparf, as reiterated in Moylan.\textsuperscript{137}

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

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

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

\begin{thebibliography}{99}
\bibitem{} See Moylan, 417 F.2d at 1007 n.13.
\bibitem{} See id. at 1116.
\bibitem{} See Creagan, supra note 11, at 1112.
\bibitem{} See Dougherty, 473 F.2d at 1117.
\bibitem{} See id.
\bibitem{} See Creagan, supra note 11, at 1112.
\bibitem{} See Dougherty, 473 F.2d at 1117.
\bibitem{} See id. (They were convicted for a violation of title 22, section 403 of the District of Columbia Code.).
\bibitem{} See id.
\bibitem{} See id. at 1130.
\bibitem{} Id. at 1133.
\bibitem{} Id. at 1133-34 (quoting Judge Simon E. Sobeloff in United States v. Moy-
Moreover, Judge Leventhal asserted that informing jurors of their power of nullification would compel them to assume the duties of a legislator or a judge.\textsuperscript{150} This task was too burdensome for a citizen involuntarily assigned to jury duty.\textsuperscript{151} Holding that the existence of a juror's ability to nullify does not establish a rule that jurors must be so informed by the judge, the court stated: "What makes for health as an occasional medicine would be disastrous as a daily diet."\textsuperscript{152} The court reasoned that an explicit instruction conveys approval, and when a jury feels so strongly about a case, it must use its own initiative to act against the court's instructions, thereby limiting the doctrine to only select cases.\textsuperscript{153} "Since it is the essence of the judicial function to declare the applicable law, it follows that the mere declaration of the law cannot be held outside the judicial function."\textsuperscript{154} As such, although Dougherty, like Sparf and Moylan, recognizes the jury's power to nullify, it also refrains from giving jurors an express right to do so.

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

The defendant in \textit{United States v. Grismore}\textsuperscript{157} requested that the jury be instructed both that it could decide issues of law and fact,\textsuperscript{158} as well as ignore the court's instruction regarding the law. The trial court rejected these requests.\textsuperscript{159} Defendant appealed his conviction on the grounds that he was denied a fair trial as a result of the trial judge's failure to instruct on nullification.\textsuperscript{160} The Tenth Circuit dis-
posed of the issue with two sentences: "It is well-established that the court instructs the jury as to the rules of law and that the jury applies the facts as they find them to those rules."\(^{161}\) "A criminal defendant is not, of course, entitled to have the jury instructed that they can disregard the law."\(^{162}\)

Political, social, and therefore legal issues changed with the times. For example, in 1973 the United States Supreme Court took its first significant step towards legalizing abortion.\(^{163}\) With that decision, a whole new political debate began. Hector Zevallos was a doctor from Illinois who rendered medical services, including abortions, to women.\(^{164}\) Don Anderson and two accomplices forced Zevallos and his wife from their home at gunpoint and kept them in a remote area for eight days.\(^{165}\) Mr. Anderson informed Zevallos that Anderson and his companions were members of the Army of God, an anti-abortion group, and had abducted the couple because of the doctor’s connection with abortion clinics.\(^{166}\) The kidnappers forced Zevallos to tape a message to President Ronald Reagan calling for anti-abortion legislation.\(^{167}\) Anderson was charged with two counts of conspiracy and attempt to obstruct, delay, and affect interstate commerce through extortionate means.\(^{168}\) At trial, Anderson requested a special jury instruction informing jurors of their power to nullify. The court denied Anderson’s request\(^{169}\) and convicted him on both counts.\(^{170}\) On appeal to the Seventh Circuit, Anderson asserted that the trial court erred in refusing his proposed instruction.\(^{171}\) Anderson

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

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


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

\(^{165}\) See id.

\(^{166}\) See id.

\(^{167}\) See id.

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

\(^{169}\) See id. at 449.

\(^{170}\) See id. at 447.

\(^{171}\) The requested instruction read:

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

Juries may apply matter [sic] of fact and law together, and form their
maintained that the instruction was necessary to inform jurors of their role as the community conscience in a case involving political debate. Judge Harlington Wood, writing for the majority, emphasized the *Dougherty* opinion, which stated in part that

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

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

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

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

*Id.* at 449.

172. *See id.*
173. *Id.* at 449-50 (quoting United States v. *Dougherty*, 473 F.2d 1113, 1137 (D.C. Cir. 1972)).
174. *See id.* at 450.
175. *See id.*
176. *See id.*
177. 714 F.2d 102 (11th Cir. 1983).
178. *See id.* at 105.
179. *See id.* at 104.
180. *See id.* at 105.
guilty verdict because he cooperated with the government. The court held that closing arguments must relate to the law as the jury will be later instructed by the judge. Further, although the jury has the ability to return whatever verdict it deems appropriate, "neither the court nor counsel should encourage jurors to violate their oath." As such, the Eleventh Circuit held that defense counsel may not argue jury nullification to the jury during closing argument.

The growth of anti-government groups has brought with it those who assert exemption from federal tax statutes. One such case came before the Ninth Circuit in 1991. Roy and Dixie Lee Powell were convicted of willful failure to file tax returns for the years 1982, 1983, and 1984. On appeal, the Powells asserted that the district court had erred in refusing their requested jury nullification instruction. The text of the proposed instruction included the following:

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

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

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

181. See id.
182. See id. at 106.
183. Id.
184. See id.
185. United States v. Powell, 955 F.2d 1206 (9th Cir. 1991).
186. See id. at 1208.
187. See id. at 1210.
188. Id. at 1213.
189. See id.
190. 15 F.3d 1161 (1st Cir. 1993).
191. See id. at 1190.
fendants prodded the jury to investigate the doctrine. During deliberations, the jury asked the judge to "clarify the law on jury nullification." The trial court explained to the jury that federal judges give the law which applies to the case and are prohibited from instructing on jury nullification. In clarifying for the jury, the judge stated that if the government proved the defendant guilty beyond a reasonable doubt the jury should convict and if the government failed to do so, the jury must acquit. It was this supplemental instruction to which the defendants objected. The First Circuit followed previous federal cases holding that a judge may not instruct a jury on nullification. It noted that while juries may sometimes "flex their muscles," and ignore law and evidence, neither the court nor counsel should encourage such action. Judge Bruce M. Selya also held that trial judges can prohibit counsel from advocating nullification to juries and may disapprove jury nullification in instructing jurors on their role in the decision-making process.

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

192. See id. at 1189.
193. Id.
194. See id.
195. See id. at 1189-90.
196. See id. at 1190.
197. Id.
198. See id.
199. See id.
200. See Sauer, supra note 102, at 1234.
202. See id. at 418.
203. See id. at 412.
204. See id. at 412 nn.2-3 (noting that the minimum term on the attempted distribution charge was ten years, plus an additional ten if convicted of the conspiracy and five more on the firearm count).
prevent government oppression. The judge based this determination on precedent establishing the role of the jury as the "conscience of the community." As such, the court reasoned that a jury has the right to all relevant information to insure its proper function as protector against government oppression. Judge Wiseman held that awareness of sentencing allows the jury to approve or disapprove of penalties, fulfilling its "oversight" purpose. He further stressed that while no outright nullification instruction would be given, the jury could use the information on sentencing to nullify. In so holding, the court affirmed that although it did not necessarily approve of nullification with or without a court instruction, it accepted that there are cases where redress is part of the jury's function. Datcher, according to the court, was one of those cases.

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

205. See id. at 414.
206. Id. (quoting Witherspoon v. Illinois, 391 U.S. 510, 519 & n.15 (1968)).
207. See id. at 415.
208. Id. at 416.
209. See id. at 417-18.
210. See id. at 418.
211. See id. at 417.
212. 512 U.S. 573.
213. See id. at 575.
214. See id. at 579.
215. See id. at 586-87.
216. See id. at 579 n.4. Justice Thomas did note, however, that in capital cases juries may be given sentencing roles. See id.
cific limited circumstances, the case before it was not such a circum-
stance.\textsuperscript{217} In holding that a federal district court is not required to in-
struct the jury regarding consequences of an NGI verdict,\textsuperscript{218} the
opinion explained that “providing jurors sentencing information in-
vites them to ponder matters that are not within their province, dis-
tracts them from their fact-finding responsibilities, and creates a
strong possibility of confusion.”\textsuperscript{219}

The Sixth Circuit expressly relied on \textit{Shannon} and rejected \textit{Datcher} in \textit{United States v. Chesney}.\textsuperscript{220} In \textit{Chesney}, the defendant ap-
pealed his conviction for possession of a firearm.\textsuperscript{221} On appeal, de-
fense counsel relied on \textit{Datcher}, maintaining that the district court
erred in refusing to instruct the jury on punishment.\textsuperscript{222} Following
\textit{Shannon}, the Sixth Circuit held that well-settled precedent estab-
lished that the jury had no sentencing function in the defendant’s
case, and therefore affirmed the conviction.\textsuperscript{223}

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

\section*{B. California Case Law}

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

\begin{footnotesize}
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\item \textsuperscript{217} \textit{See id.} at 587-88. The opinion stated that such an instruction may be nec-
essary where a witness or prosecutor remarks in front of the jury that the defen-
dant would “go free” if found NGI. In a case of this type, the Court recognized
the need for a curative instruction. \textit{See id.}
\item \textsuperscript{218} \textit{See id.} at 575.
\item \textsuperscript{219} \textit{Id.} at 579.
\item \textsuperscript{220} 86 F.3d 564, 574 (6th Cir. 1996).
\item \textsuperscript{221} \textit{See id.} at 567.
\item \textsuperscript{222} \textit{See id.} at 574.
\item \textsuperscript{223} \textit{See id.}
\item \textsuperscript{224} \textit{See} \textit{Sparf & Hansen v. United States, 156 U.S. 51 (1895).}
\item \textsuperscript{225} \textit{See discussion infra Part IV.B.}
\item \textsuperscript{226} 97 Cal. 224, 32 P. 11 (1893).
\end{itemize}
\end{footnotesize}
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defendant’s guilt or innocence and apply those facts to the law given to them by the court.227 Distinguishing the court’s role in the decision-making process, Justice Thomas B. McFarland explained that the materiality of the evidence is a question of law which must be decided by the court and not a factual determination for the jury. In this opinion, the court also recognized the jury’s “naked power to decide all the questions arising on the general issue of not guilty.”228 Over a half-century later, the same court acknowledged that often “extralegal factors” are responsible for verdicts which are contrary to the evidence in a case.229 The court noted that triers of fact exercise this power to reduce harsh legal punishment or to show mercy.230 It commented further on the awesome character of a jury’s state constitutional power and noted that jury convictions can be set aside only for a miscarriage of justice.231

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

227. See id. at 228, 32 P. at 12.
228. Id. (emphasis omitted).
230. See id. at 207, 208 P.2d at 981.
231. See id. at 206, 208 P.2d at 980. Today’s California Constitution lays out the rule:

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

CAL. CONST. art. VI, § 13.
232. 34 Cal. 3d 441, 668 P.2d 697, 194 Cal. Rptr. 390 (1983).
233. See id. at 450-51, 668 P.2d at 700, 194 Cal. Rptr. at 393.
234. See id. at 450, 668 P.2d at 700, 194 Cal. Rptr. at 393.
235. Felony-murder is described in California Jury Instruction number 8.21, which was included as part of the jury instructions at trial. It states in pertinent part: “The unlawful killing of a human being, whether intentional, unintentional or accidental, which occurs [during the commission or attempted commission of the crime] . . . is murder of the first degree when the perpetrator had the specific intent to commit that crime.” CALIFORNIA JURY INSTRUCTIONS, CRIMINAL No. 8.21 (6th ed. 1996) [hereinafter CALIC].
determined that the defendant was intellectually, socially, and emotionally immature, and that the defendant lived in a "world of make-believe." During deliberations, the jury sent two notes to the judge. The first asked about the doctor's testimony regarding the fact that the defendant was being tried as an adult. It further clarified that "[f]rom his testimony, it appears that Norman's [i.e., defendant's] mentality and emotional maturity is that of a minor." The trial judge responded by telling the jury not to theorize as to why the defendant was being tried as an adult. Later, a second note asked the judge whether a second degree murder or manslaughter verdict could be rendered if it was determined that death occurred in the course of the attempted robbery. The court answered that if the jury found that the killing occurred during a robbery, then it would be first degree murder. After announcing the guilty verdict for first degree murder and before discharging the jury, the judge expressed sympathy toward the jurors, explaining that he understood their reluctance to apply the felony-murder rule to the facts presented in this case. Two days later the jury foreman wrote a letter to the judge regarding the jury's unwillingness to return a verdict according to the felony-murder rule. The letter stated in pertinent part:

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

. . . .

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

236. Dillon, 34 Cal. 3d at 483, 668 P.2d at 723, 194 Cal. Rptr. at 416.
237. Id., 668 P.2d at 723, 194 Cal. Rptr. at 416-17.
238. See id., 668 P.2d at 723, 194 Cal. Rptr. at 417.
239. See id. at 484, 668 P.2d at 724, 194 Cal. Rptr. at 417.
240. See id.
241. The judge's comments included the following:

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

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

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

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

In a concurring opinion, Justice Pro Tem Robert Kingsley de-
fined jury nullification as a concept allowing jurors to "ignore the plain letter of the law" and execute whatever justice they deem socially appropriate. He relied on Dean Pound's interpretation of nullification as a "soft spot" allowing "the law to yield in a special case rather than cast doubt on the justice of the applicable law in general."

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

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

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253. *Id.* at 493, 668 P.2d at 730, 194 Cal. Rptr. at 423 (Kingsley, J., concurring).
254. *Id.*
256. *See id.* at 568, 715 P.2d at 625, 224 Cal. Rptr. at 666.
257. *See id.* at 574, 715 P.2d at 629, 224 Cal. Rptr. at 670.
258. *See id.* at 590-91, 715 P.2d at 641, 224 Cal. Rptr. at 681 (Bird, C.J., concurring in part and dissenting in part).
259. *See id.* at 575, 715 P.2d at 630, 224 Cal. Rptr. at 670 (Mosk, J., concurring).
260. *See id.*
261. *Id.*
262. *See id.* at 576-77, 715 P.2d at 631, 224 Cal. Rptr. at 672 (Mosk, J., concurring).

I am confident it is not uncommon for a juror or jurors to express ill-
belief that “[i]t would be a grave disservice to the integrity of the jury system and to the finality of judgments if we were to encourage probing into the subjective reasons behind the unanimous verdict . . . .” Justice Mosk also feared an end to jury secrecy; in recognizing that nullification may occur, he maintained that what happens in the jury room should stay there and not be subject to appellate review.

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

“[L]et me not be understood as saying there are no bad laws, or that grievances may not arise for the redress of considered disagreement with the law recited by the judge. Indeed, Justice Kaus, in his separate opinion in People v. Dillon, argued for recognition of what he described as the “power of a jury to nullify what it considers an unjust law.”

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Id. (citations omitted).

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

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

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

266. See id.

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

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

269. See id. at 600, 715 P.2d at 648, 224 Cal. Rptr. at 688 (Bird, C.J., concurring in part and dissenting in part).
which no legal provisions have been made. I mean to say no such thing. But I do mean to say that although bad laws, if they exist, should be repealed as soon as possible, still, while they continue in force, for the sake of example, they should be religiously observed.\footnote{270}

The California Court of Appeal confronted Justice Kaus's Dillon opinion head on in 1986.\footnote{271} The facts were similar to those in Dillon: Johnny Partner was convicted of "first degree murder, robbery, and of the special circumstances that the murder was committed during the commission of robbery," thereby invoking the felony-murder rule.\footnote{272} During deliberations, the jury asked the trial judge whether they could find guilt on robbery and second degree murder.\footnote{273} The judge explained to the jurors that they could reach such a verdict if the killing did not result from the robbery.\footnote{274} On appeal, the defendant relied on Justice Kaus's concurrence in Dillon and asserted that the court should have assumed that the jury's question was an attempt to avoid imposing the felony-murder rule therefore entitling them to receive a nullification instruction.\footnote{275} The Court of Appeal pointed out that the cited opinion was expressly rejected by the lead opinion of the same case.\footnote{276} The court explained that, faced with the same issue, other courts had routinely held that while a jury may exercise such a power, the power should not be "legitimized" with a jury instruction.\footnote{277} In expressing its opinion that the jury should not be instructed that it may disregard the law, the Court of Appeal quoted Dougherty: "An explicit instruction to a jury conveys an implied approval that runs the risk of degrading the legal structure requisite for true freedom, for an ordered liberty that protects against anarchy as well as tyranny."\footnote{278} As in previous California cases, the

\footnotesize{\begin{itemize}
  \item \footnote{270} Id. (Bird, C.J., concurring in part and dissenting in part) (quoting Abraham Lincoln, Address at the Young Men's Lyceum, Springfield, Ill. (Jan. 27, 1837), in 1 THE COMPLETE WORKS OF ABRAHAM LINCOLN 44 (John G. Nicolay & John Hay eds., 1905)).
  \item \footnote{271} See People v. Partner, 180 Cal. App. 3d 178, 185-86, 225 Cal. Rptr. 502, 506 (1986).
  \item \footnote{272} Id. at 181, 225 Cal. Rptr. at 503.
  \item \footnote{273} See id. at 185, 225 Cal. Rptr. at 506.
  \item \footnote{274} See id.
  \item \footnote{275} See id.
  \item \footnote{276} See id. at 185-86, 225 Cal. Rptr. at 506.
  \item \footnote{277} Id. at 186, 225 Cal. Rptr. at 506.
  \item \footnote{278} Id. (quoting United States v. Dougherty, 473 F.2d 1113, 1137 (D.C. Cir. 1972)).
\end{itemize}}
power of the jury to nullify was recognized, though the right to do so was not.279

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

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

279. See id. (citing People v. Powell, 34 Cal. 2d 196, 205 n.2, 208 P.2d 974, 980 n.2 (1949)).
281. See id. at 924, 225 Cal. Rptr. at 842.
282. Id. at 925, 225 Cal. Rptr. at 843.
283. See id.
284. See id. at 927, 225 Cal. Rptr. at 844.
286. See id. at 712, 31 Cal. Rptr. 2d at 678.
287. Id. at 713, 31 Cal. Rptr. 2d at 678-79.
288. Id.
289. Id., 31 Cal. Rptr. 2d at 679.
290. See id. at 713-14, 31 Cal. Rptr. 2d at 679.
291. See id.
that a judge must instruct jurors that they may disregard the law.\footnote{292} The appellate court recognized that "[a] jury has the 'undisputed power' to acquit," even where its verdict conflicts with the evidence and law as given by the court.\footnote{293}

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

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

\footnotesize{\begin{tabular}{l}
292. See \textit{id.} at 714, 31 Cal. Rptr. 2d at 679. \\
293. \textit{id.} (citing United States v. Moylan, 417 F.2d 1002, 1006 (4th Cir. 1969)). \\
296. See \textit{id.} \\
297. See \textit{id.} at 715-16, 31 Cal. Rptr. 2d at 680; CAL. PENAL CODE § 667 (West 1997). \\
298. \textit{Fernandez}, 26 Cal. App. 4th at 716, 31 Cal. Rptr. 2d at 680. \\
300. See \textit{id.} at 1705, 56 Cal. Rptr. 2d at 446. \\
301. See \textit{id.} at 1705-06, 56 Cal. Rptr. 2d at 447. \\
302. See \textit{id.} at 1706, 56 Cal. Rptr. 2d at 447. \\
\end{tabular}
as serious as it gets in a courtroom . . . . [A]ny case that involves those kinds of consequences deserves or warrants pretty careful conscientious consideration and deliberation.” In its opinion, the appeals court recognized the jury's “undisputed power” to acquit but also noted that the jury should not be informed of that power, “much less invited to use it.”

The court held that since no California court had adopted jury nullification, it would not either.

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

V. RECENT NEWSMAKING CASES

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

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

303. Id.
304. Id. at 1707, 56 Cal. Rptr. 2d at 448.
305. See id. at 1708, 56 Cal. Rptr. 2d at 448.
307. See Weinberg-Brodt, supra note 39, at 849.
asserting that junk food was one of the influences that deprived him of the capacity to act with malice. The jury accepted what has since been euphemistically referred to as “the Twinkie defense.” Dan White was convicted of two counts of voluntary manslaughter and sentenced to the maximum term of seven years and eight months in state prison.

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

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

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311. Id.
313. See id.
315. See id.
316. See id.
317. See id.
318. Id.
319. Butler, supra note 20, at 682.
321. See id.
dence conclusively proved that Barry was guilty of at least eleven of
the thirteen counts charged. The judge complained that the jury
ignored overwhelming evidence of guilt and engaged in “anarchy.”

In 1991 a Manhattan jury acquitted El-Sayyid Nosair of killing
Meir Kahane, founder of the Jewish Defense League. The trial
judge declared that the jury’s verdict was “against the overwelm-
ing weight of the evidence and devoid of common sense and logic.”

One year later, a jury acquitted Lemrick Nelson, Jr. of the stab-
bbing death of Yankel Rosenbaum during a violent encounter be-
tween blacks and Hasidic Jews in Crown Heights, Brooklyn. Before
his death, Rosenbaum had identified Nelson as his attacker. Nelson
was arrested with a bloody knife in his pocket and confessed
to killing Rosenbaum, although he later recanted. Nelson accom-
panied jurors to a dinner celebrating his acquittal. Despite admi-
itting to cutting off her husband’s penis, Lorena Bobbitt was found not guilty by reason of insanity for the malicious
wounding of John Bobbitt. Despite significant evidence to the con-
trary, John Bobbitt was also acquitted in his criminal trial on charges
of marital sexual assault of Lorena.

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

327. See id. Nelson was convicted of violating Rosenbaum’s federal civil rights on February 10, 1997, in federal court. See id.
328. See id.
329. See id.
331. See Sean Piccoli, Now It’s Bobbitt’s Chance to Tell the Media His Story, WASH. TIMES, Nov. 11, 1993, at C3.
to keep law abiding citizens safe from the “criminal element.” He went on to explain to jurors that a “certain amount of force is inevitable in maintaining law and order.”

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

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

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

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334. Id.
337. See id.
339. See id.
341. See Perry, *supra* note 333, at A5.
342. See id.
345. See id.
murdered their parents. Was it nullification based on sympathy, or was there a failure of proof in the minds of the jurors? That debate will continue. Commentators have asserted that the reason Dr. Jack Kevorkian was acquitted in his assisted suicide prosecutions in 1996 was that the jurors decided to follow their instincts instead of the law.

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

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

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

VI. NULLIFICATION ADVOCATES

A. A "Fully Informed Jury Act"

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

346. See id.
347. See Eugene Kane, Jury Nullification Fails at Being Colorblind, MILWAUKEE J. SENTINEL, Apr. 9, 1996, at 1.
350. Id. at *10.
352. CHARLES DUDLEY WARNER, MY SUMMER IN A GARDEN (1870), reprinted in BARTLETT'S FAMILIAR QUOTATIONS 603 (Emily Morison Beck ed., 1980).
JURY NULLIFICATION

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

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

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

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

354. See Fully Informed Jury Association, True or False? When You Sit on a Jury, You Have the Right to Vote Your Conscience [hereinafter FIJA Pamphlet].
355. See id.
357. FIJA Pamphlet, supra note 354.
358. Id.
359. Id.
360. See Perry, supra note 333, at A5.
361. See Wolf, supra note 356, at B1.
362. See FIJA Pamphlet, supra note 354.
363. See id.
The order prohibits FIJA members from distributing their literature within 150 feet of San Diego County courthouses. The judges claim that FIJA interferes with the jury system and the administration of justice by passing out information urging jurors to violate their oaths. FIJA filed for injunctive relief in federal district court alleging that the order was unconstitutional. When the district court held that the order did not violate the group's First Amendment rights, FIJA appealed. The Ninth Circuit affirmed, holding that even if the order constituted a "content-based restriction on political speech in a public forum... the regulation [was] necessary to serve the state's compelling interest in protecting the integrity of the jury system and [was] narrowly drawn to achieve that end."

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

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

364. See Fully Informed Jury Ass'n v. County of San Diego, 78 F.3d 593, 593 (9th Cir. 1996), cert. denied, 117 S. Ct. 63 (1996).
365. The general order prohibited:
   [t]he distribution or attempted distribution of any written materials tending to influence, interfere or impede the lawful discharge of the duties of a trial juror, and communication or attempt so to communicate with any person summoned, drawn, or serving as a trial juror in these courts for purposes of so influencing, interfering, or impeding the lawful discharge of the duties of a trial juror in or within 50 yards of any public entrance to the facilities within which Courts conduct jury trials within this County.
   Id.
366. See Wolf, supra note 356, at B1.
367. See Fully Informed Jury Ass'n, 78 F.3d at 593.
368. Id.
370. See Perry, supra note 333, at A5.
371. See id.
accused. Nullification removes this safeguard.

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

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

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

### B. Nullification Based Upon Race

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

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\[^{372}\] See Wolf, supra note 356, at B1.

\[^{373}\] Id.

\[^{374}\] See id.

\[^{375}\] See Butler, supra note 20, at 715.

\[^{376}\] Id. at 709-10 n.179 (quoting JOHN STUART MILL, ON LIBERTY 7 (Currin V. Shields ed., Liberal Arts Press 1956)).

\[^{377}\] Id. at 679.
to combat racism. While Butler does acknowledge that nullification was used in the South to the disadvantage of black defendants, he counters that nullification in approved cases is permissible.\(^\text{378}\) He argues that Southern jurors "erred in their calculus of justice;"\(^\text{379}\) however, he sets forth no proposal as to how defendants will be protected from such errors in the future. Butler further asserts that it is a "moral responsibility of black jurors to emancipate some guilty black outlaws."\(^\text{380}\) While Butler is not proposing a jury instruction on nullification, his goal is to inform African-American jurors of their power to nullify. Professor Butler’s argument raises questions about crime and punishment that reach well beyond the scope of jury nullification.

### C. Nullification as a Constitutional Right

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

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

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

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378. See id. at 705.
379. Id.
380. Id. at 679.
381. See Scheflin, supra note 20, at 168.
382. See id. at 224-25.
383. See Wolf, supra note 356, at B1.
384. See id.
386. Scheflin, supra note 20, at 219.
387. See id.
nullification instruction has also been presented on equal protection grounds. Proponents argue that defendants will benefit or suffer randomly, depending on whether or not the jury is aware of its power to nullify.

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

VII. THE JUDICIARY

A. Voir Dire

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


389. See id.


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

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

393. See U.S. CONST. amend. VI; Kelly v. Trans Globe Travel-Bureau, Inc., 60
not include the right to jury nullification. Although the impartial jury possesses the power to nullify, it does not have the "right" to ignore the law. During voir dire, if a juror expresses an unwillingness to follow the law, the court can remove the juror from the panel. Thus, the court may use voir dire as a pre-trial tool to avoid jury nullification for the benefit of both parties to the case.

1. Challenges for cause and peremptory challenges

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

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


398. See id. at 521.

399. See id.

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

Voir dire differs in civil and criminal cases in the number of peremptory challenges allowed. In civil cases, the court allows each party between six and eight peremptory challenges. See CAL. CIV. PROC. CODE § 231(c) (West Supp. 1997); CAL. SUPER. Ct. R. 228 (1996) (discussing judicial rules on voir dire examination in civil trials). In criminal cases seeking the death sentence, the court allows each party twenty peremptory challenges. See CAL. CIV. PROC. CODE § 231(a). In all other criminal trials the court allows each party ten peremptory challenges unless the crime is punishable by imprisonment of 90 days or less, in
Challenges for cause allow the removal of "jurors who are unable to fulfill the Sixth Amendment's mandate of impartiality because of either actual prejudice or prejudice implied from the juror's relationship to the case or the parties.\textsuperscript{401} There is no limit on how many jurors the judge may dismiss based upon an attorney's challenge for cause.\textsuperscript{402} Challenges for cause—that is, for actual or implied bias—must be disclosed on the record and found by the court to be sufficient in law.\textsuperscript{403} The court will sustain a challenge for cause based upon actual bias when the juror's state of mind or attitude towards the parties inhibits the juror from being impartial.\textsuperscript{404} On the other hand, statutory grounds govern challenges for cause based upon implied biases.\textsuperscript{405} The court will automatically presume implied bias if any juror falls within specified statutory categories, which include being related to the defendant, being adversely involved in a civil action with the defendant, or having served on the grand jury that brought about the defendant's indictment.\textsuperscript{406}

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

405. \textit{See} id. at 384.
406. \textit{See} CAL. PENAL CODE § 1074 (West 1997). The only grounds to bring a challenge based upon implied bias are as follows:

1. Consanguinity or affinity within the fourth degree to the person alleged to be injured by the offense charged, or on whose complaint the prosecution was instituted, or to the defendant.
2. Standing in the relation of guardian and ward, conservator and conservatee, attorney and client, master and servant, or landlord and tenant, or being a member of the family of the defendant, or of the person alleged to be injured by the offense charged, or on whose complaint the prosecution was instituted, or in his employment on wages.
3. Being a party adverse to the defendant in a civil action, or having complained against or been accused by him in a criminal prosecution.
4. Having served on the grand jury which found the indictment, or on a coroner's jury which inquired into the death of a person whose death is the subject of the indictment or information.
5. Having served on a trial jury which has tried another person for the offense charged.
6. Having been one of a jury formerly sworn to try the same charge, and whose verdict was set aside, or which was discharged without a verdict, after the case was submitted to it.
7. Having served as a juror in a civil action brought against the defendant for the act charged as an offense.
8. If the offense charged be punishable with death, the entertaining of
Peremptory challenges to excuse a potential juror do not require a showing of cause. The challenge is "without explanation and without judicial scrutiny." "Time and scope restraints on voir dire questioning require a vehicle to remove those jurors who seem to be biased but whose answers do not evince a reason rising to the level necessary to sustain a challenge for cause." Even when an attorney cannot prove that a prospective juror is biased, the peremptory challenge allows for the removal of that juror in question.

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

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

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

Id.

408. See id. (quoting Swain v. United States, 380 U.S. 202, 212 (1965)).
409. Harper, supra note 392, at 1360. But see CEB, supra note 400, at 25 (stating that many attorneys exercise peremptory challenges based upon a "hunch").
411. See People v. Wheeler, 22 Cal. 3d 258, 276-77, 583 P.2d 748, 761-62, 148 Cal. Rptr. 890, 903 (1978). Both the prosecution and the defense can bring a "Wheeler Motion" before the court to challenge the alleged unconstitutional use of the peremptory challenge. See id.
412. Id. at 276, 583 P.2d at 761, 148 Cal. Rptr. at 902.
413. De Falla, supra note 397, at 523
414. See id.
415. Id.
2. A historical look at voir dire

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

“Despite the *Edwards* decision, the problem of lengthy and inordinate voir dire continued, and in 1927 the Commission for the Reform of Criminal Procedure in California recommended the enactment of a statute to govern the procedure.”[^421] The Commission proposed the following statute: “It shall be the duty of the trial court to examine the prospective jurors and to select a fair and impartial jury. He *may*, in his discretion, permit reasonable examination of prospective jurors by counsel for the people and for the defendant.”[^422] The legislature, however, did not enact that specific version; instead it enacted Penal Code section 1078.[^423] Penal Code section 1078 stated: “It shall be the duty of the trial court to examine the prospective jurors to select a fair and impartial jury. He shall permit reasonable examination of prospective jurors by counsel for the people and for the defendant.”[^424] Later, in 1974, the legislature amended Penal Code section 1078 to provide that the judge “shall permit reasonable examination of prospective jurors by counsel for the people and for the

[^416]: 5 Cal. 275 (1855).
[^417]: 163 Cal. 752, 127 P. 58 (1912).
[^418]: Id. at 754-55, 127 P. at 59.
[^419]: See id. at 753, 127 P. at 58.
[^421]: Id. at 822, 506 P.2d at 197, 106 Cal. Rptr. at 373.
[^422]: Id. (quoting REPORT OF THE COMM’N FOR THE REFORM OF CRIMINAL PROCEDURE IN CALIFORNIA at 19 (1927)).
[^423]: See id.
[^424]: Id. (emphasis omitted) (quoting CAL. PENAL CODE § 1078) (repealed 1997).
defendant, such examination to be conducted orally and directly by
counsel."425

In 1981 the California Supreme Court in People v. Williams426
abandoned the rule expressed in Edwards.427 The court criticized the
Edwards rule as being arbitrary, difficult to apply, and insensitive to
the defendant’s constitutional right to a fair and impartial jury.428
Williams defined the scope of voir dire by stating that counsel “should
be allowed to ask questions reasonably designed to assist in the intel-
ligent exercise of peremptory challenges whether or not such ques-
tions are also likely to uncover grounds sufficient to sustain a chal-
lenge for cause.”429 The court in Williams further stated that endless
and unfocused questioning of jurors should not be tolerated by the
court.430 Yet, “expedition should not be pursued at the cost of the
quality of justice.”431 The court left intact the “considerable discre-
tion of the trial court to contain voir dire within reasonable limits.”432

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

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

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

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

427. See id. at 398, 628 P.2d at 871, 174 Cal. Rptr. at 319.
428. See id. at 398-99, 628 P.2d at 871, 174 Cal. Rptr. at 319.
429. Id. at 407, 628 P.2d at 877, 174 Cal. Rptr. at 325; see also Franklin Delano
Strier, Jurors’ Eyes] (discussing the rule expressed in Edwards).
430. See Williams, 29 Cal. 3d at 408, 628 P.2d at 877, 174 Cal. Rptr. at 325.
431. Id. (quoting United States v. Blount, 479 F.2d 650, 652 (6th Cir. 1973)).
432. Id.
in which voir dire is conducted shall not cause any conviction to be reversed unless the exercise of that discretion has resulted in a miscarriage of justice, as specified in Section 13 of Article VI of the California Constitution.434

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

3. Scope of voir dire

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

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

434. Id.
435. See Buteyn, supra note 392, at 381 (citing Crawford v. Bounds, 395 F.2d 297, 312 (4th Cir. 1968)).
436. Id.
437. See People v. Visciotti, 2 Cal. 4th 1, 47-48, 825 P.2d 388, 412, 5 Cal. Rptr. 2d 495, 519 (1992). But see Strier, Jurors’ Eyes, supra note 429, at 80 (asserting that voir dire is used to condition jurors rather than to select them).
440. See id. at 897, 891 P.2d at 100, 39 Cal. Rptr. 2d at 554.
441. See id. at 907, 891 P.2d at 107, 39 Cal. Rptr. 2d at 561.
tions and that the jurors limit their answers to "yes" or "no."\textsuperscript{442}

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

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

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

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

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

\textsuperscript{442} See id.
\textsuperscript{443} See id. at 908, 891 P.2d at 107, 39 Cal. Rptr. 2d at 561.
\textsuperscript{444} Id.
\textsuperscript{445} 52 Cal. 3d 909, 802 P.2d 950, 277 Cal. Rptr. 166 (1991).
\textsuperscript{446} See id. at 940, 802 P.2d at 967, 277 Cal. Rptr. at 183.
\textsuperscript{447} See id. at 939, 802 P.2d at 966, 277 Cal. Rptr. at 182.
\textsuperscript{448} See id. at 918, 802 P.2d at 953, 277 Cal. Rptr. at 169.
\textsuperscript{449} See id. at 919, 802 P.2d at 953, 277 Cal. Rptr. at 169.
\textsuperscript{450} See id.
\textsuperscript{451} See id.
\textsuperscript{452} See id. at 926, 802 P.2d at 958, 277 Cal. Rptr. at 174.
\textsuperscript{453} See id. at 940 n.9, 802 P.2d at 967 n.9, 277 Cal. Rptr. at 183 n.9.
The California Supreme Court found that the defense counsel's question would give the jurors a highlight of the facts of the case and would compel the jurors to make a decision to vote in a particular way before the trial's completion. The court further stated that "[i]t is not a proper object of voir dire to obtain a juror's advisory opinion based upon a preview of the evidence." The court held that the trial court had properly exercised its discretion in limiting voir dire.

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

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

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454. Id.
455. See id. at 940, 802 P.2d at 967, 277 Cal. Rptr. at 183.
456. See id.
457. See id.
458. 2 Cal. 4th 1, 825 P.2d 388, 5 Cal. Rptr. 2d 495 (1992).
459. See id. at 47-48, 825 P.2d at 412, 5 Cal. Rptr. 2d at 519.
460. See id. at 27-28, 825 P.2d at 398, 5 Cal. Rptr. 2d at 505.
461. See id. at 28-29, 825 P.2d at 399, 5 Cal. Rptr. 2d at 506.
462. See id.
463. See id. at 29, 825 P.2d at 399, 5 Cal. Rptr. 2d at 506.
464. See id.
465. See id.
466. See id.
467. See id. at 36, 825 P.2d at 404, 5 Cal. Rptr. 2d at 511. The defendant's complaint of indoctrinating the jury is known as improper "Hovey voir dire." See id. at 47, 825 P.2d at 412, 5 Cal. Rptr. 2d at 519. Hovey voir dire seeks to determine if, because of his views on capital punishment, any prospective juror would "vote against the death penalty without regard to the evidence produced at trial." People v. Clark, 50 Cal. 3d 583, 597, 788 P.2d 127, 136, 268 Cal. Rptr. 399, 408 (1990) (quoting People v. Adcox, 47 Cal. 3d 207, 250, 763 P.2d 906, 929, 253 Cal.
juror the following question to determine whether, under such facts, the juror would be able to vote for the death penalty:

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

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

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

\(^{468}\) Visciotti, 2 Cal. 4th at 46, 825 P.2d at 411, 5 Cal. Rptr. 2d at 518.

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

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

\(^{471}\) See Visciotti, 2 Cal. 4th at 47 n.17, 825 P.2d at 412 n.17, 5 Cal. Rptr. 2d at 519 n.17.

\(^{472}\) Id. at 48, 825 P.2d at 412, 5 Cal. Rptr 2d at 519; see also Rousseau v. West Coast House Movers, 256 Cal. App. 2d 878, 881, 64 Cal. Rptr. 655, 658 (1967) (stating that failure to make a timely objection to the court's voir dire examination precludes a future attack on such grounds); cf. Clark, 3 Cal. 4th at 155, 833 P.2d at 625, 10 Cal. Rptr. 2d at 618 (contending that where the defense has not fully exercised the allotted peremptory challenges and fails to assert dissatisfac-
The responsibility to conduct voir dire lies first with the court. If counsel is given the opportunity to conduct voir dire, counsel must make a careful inquiry of the potential jurors to try to safeguard against jury nullification.

4. The need to guard against nullification

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

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

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

B. What Judges and Lawyers Can Do to Avoid Nullification

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

1. A suggested technique for the court to follow

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

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

Essential to the voir dire process is the oath administered to

477. See Toni M. Massaro, Peremptories or Peers?—Rethinking Sixth Amendment Doctrine, Images, and Procedures, 64 N.C. L. Rev. 501, 512 (1986); see also Leipold, supra note 394, at 255 n.5 (asserting that the difficulty in determining why a jury reached a particular verdict makes it hard to provide specific case examples of nullification).
478. Massaro, supra note 477, at 512.
479. Zalman & Gates, supra note 332, at 221.
The court clerk gives the following oath to the prospective jury panel:

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

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

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

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

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

The court needs to convey that there may be many different

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\(^{480}\) Memorandum from James A. Bascue, Supervising Judge of the Central Criminal Division, Los Angeles Superior Court, to All Judges Assigned to Central Criminal Division, Los Angeles Superior Court (Jan. 23, 1996) (on file with Loyola of Los Angeles Law Review) [hereinafter Bascue].
witnesses testifying before the jury. Whether the witness be a police officer, school teacher, trash collector, lawyer, car dealer, priest, or rabbi, the jurors need to consider each witness as equally credible when the witness steps on the stand to begin to testify. Once the witness testifies and the juror has had the ability to evaluate the witness’ demeanor and statements, then the juror may properly evaluate the credibility of the witness.

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

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

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

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

This technique impresses upon the venire the obligation to

481. From a personal experience in Judge Crispo’s court room.
follow the law. Moreover, this method of examination imposes the psychological persuasion on the individual jurors to follow the law or face the probability of being challenged by other jurors for attempting to disregard the law in jury deliberations.

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

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

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

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

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

Prior to leaving the courtroom to deliberate, the jurors are

483. See id.
484. From a personal experience in Judge Crispo’s court room.
485. Bascue, supra note 480.
minded of this oath. In this last reminder, the court has fulfilled its attempt to guard against jury nullification through the voir dire process.

2. Using jury instructions as a preventive tool

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

The jury is instructed further regarding functions of the jury and the court. Jurors are instructed that they are the triers of fact and must apply the law as given them by the court, regardless of whether or not they agree with the law. The instruction also stresses that jurors “must not be influenced by pity for or prejudice against a defendant . . . . You must not be influenced by mere sentiment, conjecture, sympathy, passion, prejudice, public opinion or public feeling.”  

This is the closest “non-nullification” instruction California courts include. An outright anti-nullification instruction would be self-defeating. “Such an instruction is like telling children not to put beans in their noses. Most of them would not have thought of it had it not been suggested.”  

Other instructions in California include reminding jurors how to conduct themselves during the course of trial. Jurors “must not discuss this case with any other person except a fellow juror, and then only after the case is submitted to [them].”  

Another instruction educates the jury on how to approach reaching a verdict and touches the core of nullification:

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

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486. CALJIC, supra note 235, No. 0.50.
487. CALJIC, supra note 235, No. 1.00.
489. CALJIC, supra note 235, No. 1.03.
advocates in this matter. You are impartial judges of the facts.\textsuperscript{490}

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

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

3. Recommendation for specified criminal cases

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

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

VIII. CALIFORNIA LEGISLATIVE EFFORTS

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

\textsuperscript{490} CALJIC, \textit{supra} note 235, No. 17.41.
\textsuperscript{492} \textit{See} Cox, \textit{supra} note 306, at A1.
\textsuperscript{493} \textit{Id.}
for use in criminal trials only. In Indiana, nullification is a right from the Indiana Constitution, which provides: "In all criminal cases whatever, the jury shall have the right to determine the law and the facts." The Maryland Constitution also provides a similar right and 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." The instruction given in Maryland is generally vague and usually states:

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

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

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

(a) An accused or aggrieved party's right to trial by jury, in all instances where the government or any of its agencies is an opposing party, includes the right to inform the jurors of their power to judge the law as well as the evidence, and to vote on the verdict according to conscience.

(b) This right shall not be infringed by any statute, juror

494. See Creagan, supra note 11, at 1133.
495. IND. CONST. art. I, § 19.
496. MD. CONST. art. XXIII.
499. See id.
oath, court order, or procedure or practice of the court, including the use of any method of jury selection which could preclude or limit the empanelment of jurors willing to exercise this power.

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

(d) Failure to allow the accused or aggrieved party . . . to so inform the jury shall be grounds for mistrial and another trial by jury.509

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

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

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

500. Id.
501. See id.
503. See id.
505. See Lewis, supra note 502, at 1.
506. See id.
507. See Legislative Counsel’s Digest, Complete Bill History, Apr. 19, 1996, at 1.
particular case. The basic principle that ours is a government of laws, not of individual people, is irreconcilable with the theory of jury nullification. Lungren’s reasoning rests on the premise that our legislative process allows general citizens to participate in the creation of laws. As such, nullification has no place in our system. Lungren acknowledged that nullification may have had a place in history when law was not necessarily democratically created. This is no longer the case. “The law cannot be properly developed through appellate review if it is uncertain whether the law applied at trial was that given by the judge or that conjured up by individual members of the jury.” Lungren’s opinion properly maintains that remedies such as reprieve, pardon, or commutation exist for cases which produce unduly harsh results. There is no recognized right for California jurors to disregard the law.

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

IX. CONCLUSION

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

509. See id. at 125.
510. See id.
511. See id.
512. Id. at 126.
513. See id.
514. See id.
515. See Creagan, supra note 11, at 1115-29.
516. See Lewis, supra note 502, at 1.
517. See Creagan, supra note 11, at 1115-29; Lewis, supra note 502, at 1.
needs, it is up to the legislature and not juries to modify the law.\textsuperscript{518} Jurors have the “naked power” to nullify, but that power is not a right and should be used in only the rarest of circumstances. If individuals were allowed to decide that certain laws apply to some and not to others, true anarchy would reign. As Theodore Roosevelt stated,

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

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

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