

Volume 43 | Issue 3

1993

Jury Nullification: Assessing Recent Legislative Developments

M. Kristine Creagan

Follow this and additional works at: <http://scholarlycommons.law.case.edu/caselrev>



Part of the [Law Commons](#)

Recommended Citation

M. Kristine Creagan, *Jury Nullification: Assessing Recent Legislative Developments*, 43 Cas. W. Res. L. Rev. 1101 (1993)
Available at: <http://scholarlycommons.law.case.edu/caselrev/vol43/iss3/17>

This Note is brought to you for free and open access by the Student Journals at Case Western Reserve University School of Law Scholarly Commons. It has been accepted for inclusion in Case Western Reserve Law Review by an authorized administrator of Case Western Reserve University School of Law Scholarly Commons.

JURY NULLIFICATION: ASSESSING RECENT
LEGISLATIVE DEVELOPMENTS

Jury nullification is a doctrine based on the concept that "jurors have the inherent right to set aside the instructions of the judge and to reach a verdict of acquittal based upon their own consciences, and the defendant has the right to have the jury so instructed."¹ Though jury nullification may seem like a shocking proposal today, it is by no means a new idea.² In fact, jury nullification was first espoused nearly three and one half centuries ago.³ The development of jury nullification, however, has been erratic, gaining more and then less attention in various political climates. The most recent application of jury nullification in the United States occurred during the politically troubled Vietnam era.⁴ The most dramatic developments of jury nullification have occurred, however, only since 1991. In 1991, seven states proposed legislation or constitutional amendments requiring judges, when issuing their instructions to juries, to inform jurors that they are the judges

1. Alan W. Schefflin, *Jury Nullification: The Right to Say No*, 45 CAL. L. REV. 168, 168 (1972).

2. See *infra* notes 9-92 and accompanying text (discussing the history of jury nullification).

3. The concept of jury nullification arose in 1649 in the treason trial of John Lilburne. See *infra* notes 9-23 and accompanying text (discussing the Lilburne trial).

4. See Irwin A. Horowitz, *The Effect of Jury Nullification Instruction on Verdicts and Jury Functioning in Criminal Trials*, 9 LAW & HUM. BEHAV. 25, 27 (1985, No. 1) ("The [jury nullification] controversy flared anew during the turbulent 1960s and earlier 1970s when the U.S. government began to prosecute antiwar activists on, generally, criminal conspiracy charges."); Irwin A. Horowitz and Thomas E. Willging, *Changing Views of Jury Power: The Nullification Debate, 1787 - 1988*, 15 LAW & HUM. BEHAV. 165, 171 (1991, No. 2) (noting that the nullification controversy remained dormant until the Vietnam War period); Alan Schefflin & Jon Van Dyke, *Jury Nullification: The Contours of a Controversy*, 43 LAW & CONTEMP. PROB. 51, 63 (1980, No. 4) ("For the first half of this century the controversy over jury nullification remained largely dormant. It began anew in the 1960s in criminal cases involving political controversies.").

of both law and fact and have the right to ignore the law and vote their conscience.⁵

This note will discuss the concept of jury nullification in light of the legislative and constitutional proposals of the last few years, rather than debate the doctrine of jury nullification.⁶ This note will first discuss the history of jury nullification, describing its ascent and demise and how it has once again emerged as a popular, though controversial, concept. This note will then discuss the various legislative proposals and constitutional amendments, focusing on differences in both language and scope. This note will further analyze the doctrine in terms of the benefits and drawbacks resulting from each of the various proposals, including why all of the proposals have failed to be enacted. Finally, this note will propose language for legislation or a constitutional amendment which will encompass the benefits of the various proposals, but avoid the pitfalls which have thus far resulted in their failure.

Regardless of one's personal opinion of the concept of jury nullification, reality dictates that juries, in appropriate cases, are likely to nullify the law whether they are given permission to or not.⁷ It seems practical, then, in light of the widespread support that jury nullification has recently obtained and the reality of how juries behave, to draft legislation which will enable juries to fully perform their functions while, simultaneously, keeping enough restraints on them to avoid "anarchy"⁸

5. This instruction would ordinarily be applicable only in criminal trials and in civil trials where the government is a party. There are, however, many exceptions and variations to the instruction as proposed in individual states. See *infra* notes 93-125 and accompanying text.

6. Although the purpose of this note is not to debate the doctrine of jury nullification, the author wishes to make clear that the concept of jury nullification which she endorses in this note, by way of a proposal for future jury nullification legislation, is only the power of jurors to determine whether a particular law should be applied under the circumstances of the case before them. This is how the concept of jury nullification has emerged in recent years: as a mechanism by which jurors can do justice in a particular situation by refusing to apply a certain law to the particular facts of the case before them. See Gary J. Simson, *Jury Nullification in the American System: A Skeptical View*, 54 TEX. L. REV. 488, 507 (1976) (drawing a distinction between the modern justice-oriented concept of jury nullification and the historical notion of the jury's right to decide the law). The author is not, however, endorsing the historical view of jury nullification: that jurors, as the conscience of the community, have the right to decide what the law is or should be. *Id.*

7. Schefflin & Van Dyke, *supra* note 4, at 55 ("Even without such an instruction, in a small but significant number of cases, juries return verdicts of 'not guilty' despite strong evidence to the contrary because they feel the application of the law to the defendant would lead to an unjust result.").

8. Benton L. Becker, *Jury Nullification: Can a Jury Be Trusted?*, TRIAL Oct. 1980 at

I. THE TRADITION OF JURY NULLIFICATION

A. The English Tradition

In 1649, the notion that jurors ought to be regarded as the judges of both law and fact was introduced by Lt. Col. John Lilburne in his celebrated trial for treason.⁹ Lilburne was prosecuted for the publication of several pamphlets highly critical of the English government under a series of newly enacted statutes making even the expression of anti-government opinion treasonous.¹⁰ At trial, Lilburne argued that the jurors were the judges of law as well as of fact. This novel argument did not arise from his contesting the validity of the laws under which he was being prosecuted, but arose from the Court's refusal to allow Lilburne the assistance of counsel.¹¹ His request for counsel having been denied, Lilburne asked the court if he might

speak in [his] own behalf unto the jury, [his] countrymen, upon whose consciences, integrity and honesty, [his] life, and the lives and liberties of the honest men of this nation, now lie; who are in law judges of law as well as fact, and you [the court] only the pronouncer of their sentence¹²

Historians have searched for the origin of and basis for Lilburne's claim but have failed to uncover any material published prior to Lilburne's 1649 trial referring to the jury's right to judge the law¹³ In fact, until Lilburne's focus on the law-finding role of

41 ("Opponents maintain that jury nullification defenses amount to an invitation to anarchy."). See also Schefflin, *supra* note 1, at 184 (stating that critics of nullification have argued that jury discretion leads to a lawless society).

9. Philip B. Scott, *Jury Nullification: An Historical Perspective on a Modern Debate*, 91 W. VA. L. REV. 389, 397 (1989). Lt. Col. John Lilburne was the leader of the "Levellers", a prominent radical political segment arising during the English Civil War of the 1640s. THOMAS A. GREEN, VERDICT ACCORDING TO CONSCIENCE 153-56 (1985). The Levellers promoted the idea of universal male suffrage and a localized court system which would take power away from "the centralized bench at Westminster and the elitist legal profession." *Id.*

10. Scott, *supra* note 9, at 398.

11. *Id.* at 398-99. See also Green, *supra* note 9, at 173 ("Had the court acceded to Lilburne's extraordinary claim to counsel, he might never have made his claim to a jury right, although he could have hoped to provoke a debate on the law between his own counsel and the government's attorney, a debate which the jury might then have resolved by its verdict, with or without the approval of the bench.").

12. GREEN, *supra* note 9, at 173.

13. Scott, *supra* note 9, at 397.

the criminal trial jury, the attention of the Levellers and other reformers had been primarily focused on the formal attributes of the jury, rather than its history and purpose.¹⁴ It appears, however, that Lilburne's concept of the "jury as judges of law" was not a spur of the moment last ditch effort at a defense, but was implicit in his work from 1646 onward.¹⁵

In addition to the source of the "jury as judges of law" theory being unclear, Lilburne's meaning regarding his view of jurors as judges of both law and fact was also remarkably unclear.¹⁶ In 1653, the full scope of Lilburne's "jury as judges of law" theory became clear when Lilburne was once again put on trial for his life.¹⁷ In this second trial, Lilburne based his entire defense on the notion that the act which banished him and prescribed his death was unlawful.¹⁸ Historians describe Lilburne's defense in the following manner:

Lilburne argued that the jury had the right and duty to judge a statute or an indictment in the light of English fundamental law and to acquit the defendant if, despite a judicial charge to the contrary, the jury found that the statute was void. Moreover, Lilburne now asserted that the jury ought to acquit the defendant if it believed that the prescribed punishment was unconscionably severe in light of the acts proved to have been committed by the defendant. The jury test the "legality" of the indictment and decide the fairness of the prescribed punishment.¹⁹

The jury took heed of Lilburne's claims and on August 20, 1653, found him "not guilty of any crime worthy of death."²⁰

While Lilburne was the person responsible for igniting the debate, the Quakers soon picked up on the "jury as judges of law"

14. GREEN, *supra* note 9, at 161-62.

15. *See id.* at 162 (Lilburne's early work claimed that the jury's role was to judge cases; control over law as well as fact is an implicit assumption in this role).

16. *Id.* at 159. Following Lilburne's utterance of this concept, another Leveller writer, John Jones, attempted to give meaning to this phrase. He argued that full control over issues of law should rest with the people, the jury. Scott, *supra* note 9, at 399 (citing JOHN JONES, JUDGES JUDGED OUT OF THEIR OWN MOUTHS (London, May 6, 1650); JOHN JONES, JURORS, JUDGES OF LAW AND FACT (London, Aug. 2, 1650)).

17. *See* Scott, *supra* note 9, at 401-02 (discussing Lilburne's second trial and the arguments presented).

18. *Id.* at 401.

19. GREEN, *supra* note 9, at 159-60.

20. Scott, *supra* note 9, at 402.

concept and carried the debate forward into the 1660's.²¹ The Quakers, persecuted by the Stuart monarchy for their religious beliefs, argued to the juries before whom they were tried that the Acts under which they were being prosecuted were being improperly interpreted by the English courts.²² By 1670 the issue of jury control of the law was ripe for resolution.²³

On August 14, 1670, William Penn and William Mead were arrested for seditious preaching before an unlawful assembly.²⁴ Penn argued at trial that the facts as alleged failed to prove that any law was broken and, therefore, the indictment was illegal.²⁵ The judge replied that the indictment was not based on a statute but on the common law.²⁶

After deliberations, only eight of the twelve jurors were ready to convict.²⁷ The jury was then threatened with imprisonment and starvation if they continued to refuse to convict Penn and Mead.²⁸ The jury returned what was essentially a special verdict, refusing to speak to the heart of the indictment, finding Penn guilty of speaking but not to an unlawful assembly and finding Mead not guilty.²⁹ After the judge sent the jury out once again, a simple not guilty verdict was returned for both defendants.³⁰ The jurors were then fined 40 marks and imprisoned until it was paid.³¹

Edward Bushel was one of the four Penn and Mead jurors who stood by his conscience and refused to convict the defendants.³²

21. *Id.*

22. *Id.* at 403 (stating that the Quakers did not challenge the validity of the Conventicles Act itself, but only the interpretation that presumed seditious intent).

23. *Id.*

24. Schefflin, *supra* note 1, at 170. The unlawful assembly resulted after Penn and Mead were locked out of their usual meeting place and forced instead to speak before a large crowd gathered on the street. Scott, *supra* note 9, at 394.

25. See Scott, *supra* note 9, at 394 ("[T]he thrust of Penn and Mead's defense was that the facts as alleged failed to prove that any law was broken.").

26. *Id.* The judge, after removing Penn and Mead from his courtroom, informed the jury that the indictment was for "preaching and drawing a tumultuous company." Penn & Mead's Case (22 Charles II 1670), reprinted in 6 I. HOWELL, COBBETT'S COMPLETE COLLECTION OF STATE TRIALS 960 (Vol. VI 1810).

27. Scott, *supra* note 9, at 395.

28. Schefflin, *supra* note 1, at 170; Scott, *supra* note 9, at 395.

29. Schefflin, *supra* note 1, at 170-71.

30. Scott, *supra* note 9, at 395.

31. *Id.*

32. *Id.* See also Schefflin, *supra* note 1, at 171-72 (stating that after the court had ordered the jury to reconsider their verdict several times, Bushel, the foreman, objected to any further deliberations arguing that the jurors had given their verdict and were all agreed to it).

Charges were then waged against Bushel that his verdict was "*contra plenum et manifestam evidentiam*" and "*contra directionam cariae in materia legis*"³³ The opinion in *Bushel's Case*, written by Chief Justice Vaughn, is the basis of jury nullification proponents' claim of a common law right to nullify the law³⁴ The main premise of Vaughn's decision results from his disposition of the first charge against Bushel, that his verdict was against the full and manifest weight of the evidence. On this charge Vaughn "held that a juror can be fined only if it is shown that the juror returned a verdict contrary to *his own* view of the evidence, an act of perjury"³⁵ In reaching this conclusion, Vaughn reasoned that often two men, and even two judges, presented the same set of facts will draw different conclusions, whether due to differing backgrounds which gives one a different perspective on a case or for any number of other reasons.³⁶ This rationale set the stage for Vaughn's disposition of the second charge that the return of an acquittal was against the direction of the court in matter of law³⁷ Judge Vaughn argued that:

Without a fact agreed, it is impossible for a judge, or any other, to know the law relating to that fact or directly concerning it, as to know an accident that hath no subject. Hence it follows, that the judge in logic can never direct what the law is in any matter controverted, without first knowing the fact; and then it follows, that without his previous knowledge of the fact, the jury cannot in logic go against his direction in law for he could not direct yet the jury find not (as in a special verdict) the fact of every case by itself, leaving the law to the court, but find for the plaintiff or defendant upon the issue to be tried, wherein they resolve both law and fact complicatedly, and not the fact by itself; so as though they answer not singly to the

33. *Bushel's Case*, 124 Eng. Rep. 1006 (1670), reprinted in 6 I. HOWELL, COBBETT'S COMPLETE COLLECTION OF STATE TRIALS 999 (Vol. VI 1810).

34. See Schefflin, *supra* note 1, at 172 (using language in *Bushel's Case* to support his argument for the historic right of juries to nullify the law); Scott, *supra* note 9, at 396-97 (stating that jury nullification proponents herald this case as supporting their cause); Simson, *supra* note 6, at 493 ("For those anxious to prove the jury's historical right to reach an independent determination of the law, then, *Bushel's Case* is nothing less than a paean to that purported right.").

35. Scott, *supra* note 9, at 396.

36. *Id.* at 395-96.

37. GREEN, *supra* note 9, at 241.

question what is law, yet they determine the law in all matters, where issue is joined³⁸

Jury nullification advocates contend that this language supports the interpretation of this case holding that the jurors had the right to set aside the judge's rendition of the law for one more consistent, in their opinion, with the principles of fundamental law³⁹ Jury nullification advocates, however, are not the only ones who hoped to profit from this opinion. Vaughn's words may also, and indeed have been, interpreted as lending support to the idea that judges control the law while jurors control the facts.⁴⁰

An even more powerful blow to the proponents' position, however, is delivered by the following statement by Vaughn in the same decision: "That Decantum in our books, 'ad quaestionem facti nonrespondent iudices, ad quaestionam legis nonrespondent juratores', literally taken is true: for if it be demanded, what is the fact? the Judge cannot answer it; if it be asked, what is the law in the case, the jury cannot answer it."⁴¹ Thus, Vaughn's opinion does not clearly and explicitly lend support to the jury's right to judge the law. In reality, Vaughn managed to sidestep the whole debate by concentrating on the jury's role as factfinder and how fining jurors under such charges as those levied against Bushel encroached on the jurors' ability to perform this function.⁴²

38. *Bushel's Case* at 1010, 1015-17.

39. See Simson, *supra* note 6, at 492 (stating that nullification proponents contend that the court's reason for granting Bushel's and his fellow jurors' writs of habeas corpus was that "the jurors had been punished for doing what was traditionally their right: setting aside the judge's rendition of the law for one more consistent, in the jury's estimation, with the principles of 'fundamental law' informing the development of the common law.").

40. Scott, *supra* note 9, at 406 (arguing that Vaughn's opinion supports the absolute power of juries to find the facts but does not address any legitimate law-finding role for the jury); Simson, *supra* note 6, at 493 ("The case is far more amenable, however, to a wholly different construction: that the abuse of judicial authority which the Court of Common Pleas took measures to correct was not the trial judge's denial of any right on the jury's part to decide questions of law but rather his encroachment on the jury's undisputed right to decide questions of fact."). Opponents of jury nullification argue that Vaughn did not intend that the right to apply the law, which he recognized as an inherent function of criminal juries, include the right to nullify the law. Scott, *supra* note 9, at 406. Instead, the crux of Vaughn's opinion is that the law of any given case is dependent on its facts. *Id.* Since everyone draws different inferences from the same facts, and it is the jury's role to determine just what the facts are, it is impossible for a judge to rule that a given verdict is in contravention of the facts, or, consequently, of the law since that law is dependent on the facts. *Id.*

41. *Bushel's Case* at 1013.

42. Scott, *supra* note 9, at 406-07.

Following Vaughn's decision in *Bushel's Case*, English courts conceded that a jury's determination of fact and the application of the law to such fact was final and unreviewable in criminal cases.⁴³ This division of power worked well in the run of the mill felony cases where even the judges were likely to feel the punishments prescribed for such crimes were too harsh.⁴⁴ Problems arose, however, when the crime charged was of a more political nature, particularly that of seditious libel.⁴⁵

B. The American Tradition

The English law of seditious libel gave rise to the central case in the American tradition of jury nullification: the trial of John Peter Zenger.⁴⁶ The trial of John Peter Zenger began on August

43. *Id.* at 408. See also Schefflin & Van Dyke, *supra* note 4, at 57 (stating that "The broader right of the jury to pass on questions of law as well as issues of fact was quickly accepted in England.").

44. Scott, *supra* note 9, at 408.

45. *Id.* Seditious libel is defined as a "communication written with the intent to incite the people to change the government otherwise than by lawful means, or to advocate the overthrow of the government by force or violence." BLACK'S LAW DICTIONARY 1357 (6th ed. 1990).

In seditious libel cases, the courts developed a common law which infringed tremendously on the role of the jury as it had been defined in *Bushel's Case*. *Id.* at 409 (stating that the reservations to the court as questions of law whether the words were in fact libelous and whether the defendant had the necessary criminal intent made significant inroads on the traditional role of the jury as defined in *Bushel's Case*); Jon M. Van Dyke, *The Jury as a Political Institution*, 16 CATH. LAW. 224, 229-30 (Summer 1970) (discussing seditious libel law in 18th century England).

The King's Bench announced that it would have sole jurisdiction over such political cases and reserved unto itself as questions of law whether the words were in fact libelous and whether the defendant had the necessary criminal intent. *Id.* In addition, the truth was not considered a defense to charges of seditious libel. *Id.* As a result, the only questions of fact left to the jury were the fact of publication and whether the publication referred to the particular people or government body as charged. *Id.* The controversy was put to rest in England in 1792 when an Act of Parliament returned these questions of fact to the jury so that the role of the jury in seditious libel cases would be the same as it was in every other criminal trial. Scott, *supra* note 9, at 416.

46. Zenger was a printer living in the colony of New York. Scott, *supra* note 9, at 410-11. In 1733, Zenger was solicited by James Alexander to print the *New York Weekly Journal*, a paper founded expressly to oppose the governor of New York, William Cosby, by various means from serious criticism to satire and to rally support for the new opposition party. *Id.* James Alexander was a prominent New York attorney representing popular New York politicians Lewis Morris and Rip Van Dam, each of whom had an axe to grind with the Governor Cosby. *Id.* at 410. See also Stanley N. Katz, *Introduction to JAMES ALEXANDER, A BRIEF NARRATIVE OF THE CASE AND TRIAL OF JOHN PETER ZENGER* 3-5 (Stanley N. Katz ed. 1963) (discussing the conflicts between Cosby and Lewis Van Dam). In January of 1734, after being in publication for only two months, Governor Cosby determined that he was going to shut the paper down. Scott, *supra* note

4, 1735.⁴⁷ Zenger's attorney, Hamilton, argued the law to the jury. The premise of Hamilton's argument was that truth should be a viable defense to a charge of seditious libel.⁴⁸ Hamilton contended that:

[Juries] have the right beyond all dispute to determine both the law and the facts, and where they do not doubt of the law, they ought to do so. This of leaving it to the judgment of the Court *whether the words are libelous or not* in effect renders juries useless (to say no worse) in many cases.⁴⁹

The essence of Hamilton's defense, then, was that, in order for the jury to fulfill their traditional role, they must nullify the law.⁵⁰ In a very short period of time the jury returned a verdict of not guilty for John Peter Zenger.⁵¹

The impact of *Zenger* on the American colonies was dramatic. Every jurisdiction which confronted the issue of the jury's right to decide the law as well as the facts reached the same conclusion: American juries had the right to decide the law.⁵² Although it is difficult to say precisely why this tradition of jurors as finders of law as well as fact emerged, three reasons can reasonably be asserted.

First, in colonial America the jury was a shield between the people and an undemocratic, tyrannical government.⁵³ The jury

9, at 411-12. For an entire year Cosby was unable to get a grand jury to return an indictment against Zenger for seditious libel. *Id.* During this period, however, Cosby had, despite the lack of an indictment, burned issues of the *Weekly Journal*, which Alexander continued to print himself, and ordered Zenger jailed. *Id.* In January of 1735, an information finally had to be resorted to in order to bring Zenger to trial. *Id.* at 412. After disbarring Zenger's attorneys, Alexander and Smith, the presiding judge, Chief Justice DeLancey, who had himself been appointed by Cosby, appointed another New York attorney loyal to the Governor, John Chambers, to represent Zenger. *Id.* Katz, *supra*, at 19-21. Morris and Van Dam, however, doubting Chambers' impartiality, retained Alexander Hamilton to represent Zenger. Scott, *supra* note 9, at 413; Katz, *supra*, at 21. The fact that Hamilton would be defending Zenger was not divulged to the Attorney General or the Chief Justice. *Id.*

47. Scott, *supra* note 9, at 413.

48. Katz, *supra* note 42, at 23.

49. Scott, *supra* note 9, at 414.

50. *Id.*

51. *Id.* at 415.

52. Mark D. Howe, *Juries as Judges of Criminal Law*, 52 HARV. L. REV. 582 (1939); Note, *The Changing Role of the Jury in the Nineteenth Century*, 74 YALE L. J. 170 (1964).

53. Scott, *supra* note 9, at 417; Note, *supra* note 52, at 171.

provided the only significant means of democratic expression available to the people at this time.⁵⁴ Second, the political philosophy in the last days of colonial rule and the first as an independent nation demanded popular control over every facet of government.⁵⁵

The colonists had a basic distrust of legal experts and a profound belief in the ability of the common man. Natural rights and the natural law were the maxims of the day, and one of the basic tenets of Lockean theory is that the natural law, principles of right and wrong, is equally accessible to every man. Consequently, each juror was just as qualified as each judge to determine the true law⁵⁶

The primary reason, however, for the acceptance of the "jury as judges of law" concept was pragmatism.⁵⁷ During this period in American history, the judge truly knew no more than the jurors, the judiciary being largely comprised of laymen.⁵⁸

These reasons for accepting and even promoting the jury's right to decide questions of law, however, waned as the nation grew and the republican form of government was activated.⁵⁹ The will of the people was now expressed through popular elections and legislation.⁶⁰ Thus, nullifying the law would be a frustration of the popular will.⁶¹ Additionally, judges were more likely to receive formal training.⁶² The transformation of the role of the jury, which occurred as the United States matured, was summarized in the case of *United States v. Dougherty*:⁶³

As the distrust of judges appointed and removable by the king receded, there came increasing acceptance that under a republic the protection of citizens lay not in recognizing

54. Scott, *supra* note 9, at 416.

55. *Id.* at 417.

56. Note, *supra* note 52, at 172.

57. Scott, *supra* note 9, at 417.

58. *Id.* (arguing that it was only natural for the jury to assert itself on legal issues when the judges, who were largely laymen, knew no more than the jurors did); Simson, *supra* note 6, at 503 (arguing that since the colonial judges were typically laymen and, therefore, had no greater claim to know the law than the jurors, the colonial judges readily ceded to the jury the authority to decide the law).

59. Scott, *supra* note 9, at 417-18.

60. *Id.*

61. *Id.* at 418.

62. *Id.*

63. 473 F.2d 1113 (D.C. Cir. 1972)

the right of each jury to make its own law, but in following democratic processes for changing the law⁶⁴

The widespread acceptance of jury nullification in America, then, was gradually replaced with the realization that such a right was no longer necessary or desirable in a democratic society⁶⁵. Thus, judges began to assert that the jury was to decide questions of fact while the judge would decide questions of law. In 1895, in the case of *Sparf and Hansen v. United States*,⁶⁶ the Supreme Court determined once and for all that, in the federal system at least, there would be no right to jury nullification.

[Juries] have 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.⁶⁷

Following the Supreme Court's announcement in *Sparf and Hansen* that there would be no right to jury nullification in the federal court system, the controversy appeared to fizzle out. The debate was rekindled, however, in the midst of the political controversies of the 1960s.⁶⁸ "As the Department of Justice moved dramatically against antiwar activists, defense lawyers sought a legal means to allow the jurors, as the conscience of the community, to consider the morality of the defendant's actions."⁶⁹

64. *Id.* at 1132.

65. "Public and private safety alike would be in peril, if the principle be established that juries in criminal cases may, of right, disregard the law as expounded to them by the court and become a law unto themselves. [T]he result would be that the enforcement of law against criminals and the protection of citizens against unjust and groundless prosecutions, would depend entirely upon juries uncontrolled by any settled, fixed, legal principles." *Sparf and Hansen v. United States*, 156 U.S. 51, 101-02 (1895).

66. *Id.*

67. *Id.* at 74.

68. See *supra* note 4 and accompanying text.

69. Schefflin & Van Dyke, *supra* note 4, at 63. Some examples of the politically sensitive cases in which the jury nullification issue was raised are: *United States v. Dougherty*, 473 F.2d 1113, 1130-37 (D.C. Cir. 1972) (holding that the refusal of the district court to instruct the jury of its right to acquit defendants without regard to the law and the evidence was not improper); *United States v. Spock*, 416 F.2d 165, 180-81 (1st Cir. 1969) (holding that the issuing of special interrogatories, designed to destroy the jury's power to nullify the law, to a criminal trial jury constitutes reversible error because it infringes on

*United States v. Dougherty*⁷⁰ is one of the better known, more recent cases involving a jury nullification debate. In this case the defendants, known as the D.C. Nine, all members of the Catholic clergy, ransacked the offices of Dow Chemical to protest the manufacturing of napalm by the company.⁷¹ The defendants requested that the jury be told specifically of their power to nullify the law.⁷² The trial court refused and the Court of appeals, by a 2-1 vote, upheld the trial court's decision.⁷³ In upholding the trial court's decision, Judge Leventhal, writing for the majority, indicated that, in his opinion, jurors already knew of their power to nullify the law.⁷⁴ To institutionalize these powers in judicial instructions to the jury, he concluded, would alter the system in unpredictable ways.⁷⁵ Thus, Judge Leventhal essentially recognized the *power* of juries to nullify the law but not their *right* to do so. In dissent, Judge Bazelon criticized the opinion as impinging the jury's right to exercise its conscience in reaching a verdict: "Nullification is not a 'defense' recognized by law, but rather a mechanism that permits a jury, as community conscience, to disregard the strict requirements of law where it finds that those requirements cannot justly be applied in a particular case."⁷⁶

The decision in another Vietnam era case, *United States v. Spock*,⁷⁷ is very similar. In this case, the trial court had attempted to eliminate the possibility of the jury nullifying the law by utilizing a verdict based on special interrogatories.⁷⁸ This procedure was appealed to the First Circuit, where the decision of the trial court permitting the use of special interrogatories was overturned because it restricted the criminal jury's historic right to render a verdict free from judicial control.⁷⁹ By restricting the holding to this narrow ground, the court avoided a controversial ruling that such special interrogatories were invalid because they prevented the

the jury's power to deliberate free from judicial pressure on its verdict).

70. 473 F.2d 1113 (D.C. 1972).

71. *Id.* at 1121.

72. *Id.* (stating that the district court denied defendant's request for a nullification instruction).

73. *Id.* at 1130-37 (discussing the issue of jury nullification).

74. *Id.* at 1135 ("The jury knows well enough that its prerogative is not limited to the choices articulated in the formal instructions of the court.").

75. *Id.* at 1135.

76. *Id.* at 1140.

77. 416 F.2d 165 (1st Cir. 1969).

78. *Id.* at 180.

79. *Id.* at 181-83.

possibility of jury nullification.⁸⁰

This is the pattern established by "conscience cases" in recent decades. Without holding that juries have the *right* to nullify the law, which the Supreme Court decided against almost 100 years ago,⁸¹ the recent appellate courts have recognized and may even be said to have preserved the *power* of the jury to nullify the law in appropriate cases.⁸² Whether juries have the right to nullify the law has not been considered by the Supreme Court since 1895, when this concept was rejected.⁸³ Although many people believe it is time to reconsider this decision, there is no indication from the Court that this will occur anytime soon.

Proponents and opponents of jury nullification view the reemergence of the nullification debate very differently. Opponents of jury nullification contend that "[t]oday, nullification is urged not so that a jury can refuse to apply an oppressive law, but so that it can adopt the defendant's view of policy or morality."⁸⁴ Thus, jury nullification opponents contend that the movement for jury nullification in colonial times was essentially an effort by a continually oppressed society to enact a democratic form of government. In contrast, today's jury nullification movement is an effort by grass roots organizations, unsuccessful in having their policies promoted and endorsed by Congress or their state legislatures, to sneak their political agendas in the back door by making the jury the new determinant of public policy.⁸⁵ "Jury nullification's real purpose in

80. See Becker, *supra* note 8, at 44 (arguing that the court's narrow holding weakens the authority for a jury nullification instruction).

81. *Sparf and Hansen v. United States*, 156 U.S. 51 (1895).

82. Other federal cases have recognized the jury's power to nullify the law but not the right. See *United States v. Burkhart*, 501 F.2d 993 (6th Cir. 1974), *cert. denied*, 420 U.S. 946 (1975) (allowing defense counsel some leeway in persuading the jury to acquit out of considerations of mercy or obedience to a higher law despite initially ruling that there is no right to a jury nullification instruction); *United States v. Boardman*, 419 F.2d 110 (1st Cir. 1969), *cert. denied*, 397 U.S. 991 (1970) ("Today jurors may have the power to ignore the law, but their duty is to apply the law as interpreted by the court, and they should be so instructed.").

83. See *Sparf and Hansen*, 156 U.S. 51 (holding that trial judges have the right and duty to determine the law while the jurors determine the facts).

84. Scott, *supra* note 9, at 420. This view should be distinguished from the concept of jury nullification as used in the trials of Lilburne, Penn and Zenger. In these cases the laws under which the defendants were prosecuted were unconscionable and oppressive to the defendants' rights. *Id.* In modern cases, such as *Dougherty*, however, the concept of jury nullification was pursued as a mechanism by which the jury could acquit the defendants simply because it would be unjust to convict them, not because the laws under which they were tried were in any respect unconscionable or oppressive. *Id.*

85. *Id.* at 419-23.

the current debate is to augment, or frustrate, the other avenues of democratic participation established by our government; in other words, to transform criminal prosecutions into vehicles for political change."⁸⁶

Proponents of jury nullification, on the other hand, argue that jury nullification is as relevant today as it was 200 years ago.⁸⁷ According to this faction, the purpose of nullification is to promote justice by telling the jurors "that they have the power to act mercifully if they decide that applying the law to the defendant's act would lead to an unjust result."⁸⁸ Jury nullification today, then, although not necessary to protect individuals against government oppression, remains a useful tool for the sentiment of the community to be reflected in jury verdicts. Thus, proponents contend, the jury and its ability to nullify the law insures that the spirit of the law and not the letter of the law governs; that the rigidity of any general rule can be shaped to produce justice in a particular case; and, that common sense and community standards are reflected in jury verdicts.⁸⁹

This, then, is the crux of the jury nullification debate today—whether the jury, in light of its historical function and its proven abilities, should be able to impact public policy by its power to acquit defendants where it feels a conviction may violate public morality.⁹⁰ The issue has been debated numerous times in the last twenty years and the arguments on both sides are substantial.⁹¹ In

86. *Id.* at 420.

87. *See, e.g.,* Schefflin, *supra* note 1 (arguing that jurors are empowered to nullify the law in modern society).

88. Van Dyke, *supra* note 41, at 225.

89. *See* HARRY KALVEN, JR. & HANS ZEISEL, *THE AMERICAN JURY* 8-9 (1966) (discussing arguments in favor of and in opposition to jury trials); Schefflin, *supra* note 1, at 186 (discussing the function of the jury as the conscience of the community).

90. *See* Schefflin, *supra* note 1, at 181-89 (discussing the modern concept of jury nullification); Scott, *supra* note 9, at 419-23 (discussing the role of the jury as policy-makers); Van Dyke, *supra* note 41, at 231-33 (discussing deficiencies of juries in general).

91. Since this topic has been thoroughly debated in scholarly journals this note will not attempt to examine all the various theories for supporting or opposing jury nullification. *See* Becker, *supra* note 8, at 41 (arguing in favor of jury nullification as a process whereby a jury elects to suspend the law in order to achieve what the law intended, insuring that justice is done); M.D.A. Freeman, *Why Not a Jury Nullification Statute Here Too?*, *NEW L. J.* 304-06 (March 19, 1981) (arguing that a jury nullification statute is historically supported and will enable people to see the function of the jury more clearly); Schefflin, *supra* note 1, at 169 (advocating that the jury has the right to be told by the judge that they may refuse to apply the law to the defendant if in good conscience they believe that the defendant should be acquitted); Schefflin & Van Dyke, *supra* note 4, at 55 (arguing that issuing a jury nullification instruction allows the jury to operate in a

1991, however, a major development in the debate on jury nullification occurred: legislation was introduced in a number of states proposing statutes or constitutional amendments which, in varying language, would require judges to inform jurors of their right to nullify the law.⁹²

II. JURY NULLIFICATION LEGISLATION: CURRENT PROPOSALS

Nineteen-ninety and 1991 may come to be regarded as the high point in the modern debate on jury nullification. During this time legislation or constitutional amendments which would require judges to instruct jurors of their right to ignore the law and vote their consciences were introduced in seven states.⁹³ Several other states anticipate the introduction of similar legislation in coming legislative sessions.⁹⁴

Washington State Senate Bill 5356 was read for the first time before the Washington State Senate on January 29, 1991.⁹⁵ The

more honest and just fashion and that failing to issue such an instruction seriously weakens the concept of the jury, thereby impermissibly diluting the defendant's Sixth Amendment rights); Scott, *supra* note 9, at 419 (arguing that history does not support the theory that the right to nullify the law existed at common law); Simson, *supra* note 6, at 490 (arguing that the right of juries to nullify the law is not supported by history and, additionally, that the concept may be unconstitutional); Eleanor Tavris, *The Law of an Unwritten Law: A Common Sense View of Jury Nullification*, 11 W. ST. U. L. REV. 97, 114 (1983) (opposing the jury nullification instruction); Van Dyke, *supra* note 45, at 225 (arguing that justice would be better served if jurors were told that they have the power to act mercifully if they decide that applying the law to the defendant's act would lead to an unjust result).

92. Credit for these proposals must be given to FIJA — The Fully Informed Jury Association — a lobby organization which, in the first 18 months following its inception, made considerable strides toward its goal of having jurors informed of their right to ignore the law and vote their conscience.

93. See *FIJA News From the States*, THE FIJACTIVIST, Number 8 (Summer 1991), at 3-7, 20-23 (describing FIJA developments among the various states).

94. *Id.* (describing the progress of movements to get jury rights legislation enacted in various states).

95. S. 5356, 52nd Leg., 1991 Wash. Reg. Sess. Senate Bill 5356 would add new sections to chapters 10.04 and 10.46 of the Revised Code of Washington as follows:

(1) It is the natural right of every citizen of this state, when serving on a criminal trial jury, to judge both the law and the facts pertaining to the case before that jury, in order to determine whether justice will be serviced by applying the law to the defendant. It is mandatory that all jurors be informed of this right.

(2) Before the jury hears a case, and again before jury deliberation begins, the court shall inform the jurors of their rights in these words: "As jurors, your first responsibility is to decide whether the defendant has broken the law. If you decide that he has, but that you cannot in good conscience support a guilty verdict, you are not required to do so. To reach a verdict that you be-

proposed legislation suggests that juries should be instructed to judge the law and the facts in order to determine if justice will be served by applying the law to the defendant.⁹⁶ This reflects a significant departure from Washington's current jury instruction.⁹⁷ Presently, the pattern jury instructions to be issued in criminal jury trials inform the jury that it is their duty to determine the facts in the case from the evidence produced in court.⁹⁸ Jurors are then advised that they must accept the law from the court, regardless of their personal beliefs as to what the law is, or ought to be.⁹⁹ The jury is instructed to apply the law to the facts and in that way decide the case.¹⁰⁰ Senate Bill 5356 failed on March 6, 1991 in the Committee on Law and Justice.¹⁰¹

H.C.R. 2015 was introduced in the Arizona House of Representatives on February 13, 1991.¹⁰² H.C.R. 2015 would require the

lieve is just, each of you has the right to consider to what extent the defendant's actions have actually caused harm or otherwise violated your sense of right and wrong. If you believe justice requires it, you may also judge both the merits of the law under which he has been charged and the wisdom of applying that law to the defendant. Accordingly, for each charge against the defendant, even if review of the evidence strictly in terms of the law would indicate a guilty verdict, you have the right to find him innocent. The court cautions that with the exercise of this right comes full moral responsibility for the verdict you bring in."

(3) As part of their oath, the jurors shall affirm that they understand the information concerning their rights which this section requires the court to give them, and no party to the trial may be prevented from encouraging jurors to exercise this right. For the jurors to be so informed is declared to be part of the defendant's fundamental right to trial by jury, and failure to conduct any criminal trial in accordance with this section does not constitute harmless error, and is grounds for mistrial. No potential juror may be disqualified from serving on a jury because he expresses willingness to judge the law or its application, or to vote according to conscience.

Id.

96. *Id.*

97. Wash. Pattern Instr. Crim. 1.02. *See also* Senate Comm. on Law & Justice, Senate Bill 5356 Report to 52nd Leg. (Feb. 15, 1991).

98. Wash. Pattern Instr. Crim. 1.02. *See also* Senate Comm. on Law & Justice, Senate Bill 5356 Report to 52nd Leg. (Feb. 15, 1991).

99. Wash. Pattern Instr. Crim. 1.02. *See also* Senate Comm. on Law & Justice, Senate Bill 5356 Report to 52nd Leg. (Feb. 15, 1991).

100. Wash. Pattern Instr. Crim. 1.02. *See also* Senate Comm. on Law & Justice, Senate Bill 5356 Report to 52nd Leg. (Feb. 15, 1991).

101. *See infra* notes 133-39 (discussing the reasons why this bill was not enacted).

102. H.C.R. 2015, 40th Leg., 1991 Ariz. 1st Reg. Sess. proposed an amendment to Article VI, Section 27 of the Arizona State Constitution, relating to the authority of the jury to determine the law. The language of the proposed amendment is as follows:

Section 27. *Determination of law by juries; charge to all juries, reversal of causes for technical error; affirmation of understanding.*

judge, in any jury trial in which Arizona or one of its political subdivisions is a party, to inform the jurors that in addition to their responsibility to judge the facts of the case they have an inherent right to judge the law.¹⁰³ H.C.R. 2015 passed the House Judiciary Committee on March 12, 1991, unamended. This bill failed, however, in the House Rules Committee and was not presented to the Senate.¹⁰⁴

A jury rights bill, New York Senate Bill 1085, was introduced before the New York State Senate on January 22, 1991.¹⁰⁵ The

B. NOTWITHSTANDING ANY LAW TO THE CONTRARY, IN ANY JURY TRIAL IN WHICH THE STATE OR ONE OF ITS POLITICAL SUBDIVISIONS IS A PARTY THE JUDGE SHALL INFORM THE JURORS THAT IN ADDITION TO THEIR RESPONSIBILITY TO JUDGE THE FACTS OF THE CASE, THEY HAVE AN INHERENT RIGHT TO JUDGE THE LAW.

Id.

103. Comm. on Judiciary, H.C.R. 2015 Bill Summary, 40th Leg., 1st Reg. Session (Feb. 27, 1991). This amendment would reflect a significant departure from the present law in Arizona which requires that judges not charge the juries with respect to matters of fact but that they do tell the jurors what the applicable law is. ARIZ. CONST. art. VI, § 27.

104. Letter from Louise Pyper, Administrative Assistant to the Chief Clerk, State of Arizona House of Representatives, to M. Kristine Creagan, Notes Editor, *Case Western Reserve Law Review* (Oct. 9, 1991) (on file with *Case Western Reserve Law Review*); see *infra* notes 149-53 and accompanying text (discussing the documented objections to this proposal).

105. S. 1085, 215 Leg., 1991-1992 N.Y. Reg. Sess. Senate Bill 1085 proposes to amend § 300.10 of New York's Criminal Procedure Law to read as follows:

In its charge, the court must state the fundamental legal principles applicable to criminal cases in general. Such principles include, but are not limited to, the presumption of the defendant's innocence, the requirement that guilt be proved beyond a reasonable doubt and that the jury may not, in determining the issue of guilt or innocence, consider or speculate concerning matters relating to sentence or punishment. Upon request of a defendant who did not testify in his own behalf, but not otherwise, the court must state that the fact that he did not testify is not a factor from which any inference unfavorable to the defendant may be drawn. The court must also state the material legal principles applicable to the particular case, and, so far as practicable, explain the application of the law to the facts, but it need not marshal or refer to the evidence to any greater extent than is necessary for such explanation. Upon request of a defendant, the court must also state that the jury has the final authority to decide whether or not to apply the law to the facts before it, that it is appropriate to bring into its deliberations the feelings of the community and its own feelings based on conscience, and that nothing would bar the jury from acquitting the defendant if it feels that the law, as applied to the facts, would produce an inequitable or unjust result.

Id.

Currently, the law of New York declares that the court will state the fundamental legal principles applicable to the particular case and, as far as is practicable will explain

proposed legislation would require the judge to inform the jurors of their right to vote their consciences if the defendant requests such an instruction.¹⁰⁶ As of the fall of 1991, no hearings had been held on Senate Bill 1085 and the bill was still pending.¹⁰⁷

Massachusetts is another state in which jury rights legislation has been introduced.¹⁰⁸ On January 2, 1991, Massachusetts Senate Bill 656 was introduced. This bill eventually died in the Senate Rules Committee and was reintroduced as Massachusetts Senate Bill 1406.¹⁰⁹ Both bills require that jury handbooks inform jurors of their obligation, right, and duty to judge according to their consciences in all cases.¹¹⁰ Massachusetts Senate Bill 656 died in committee in May of 1991.¹¹¹ As of October of 1991, Massachu-

the application of that law to the facts. See N.Y. CRIM. PROC. LAW § 300.10 (Consol. 1992).

106. S. 1085, 215 Leg., 1991-1992 N.Y. Reg. Sess.

107. Telephone Interview with clerk from office of Frank P. Romeo, Superintendent of Documents, N.Y. State Senate (Oct. 8, 1991).

108. S. 656, 176 Leg., 1991 Mass. Reg. Sess., S. 1406, 176 Leg., 1991 Mass. Reg. Sess.

109. Telephone Interview with clerk of Senate Judiciary Committee, Massachusetts State Senate (Oct. 8, 1991). The language of these bills is as follows:

Section 1. Inform jurors the nature and extent of their duties and responsibilities. The handbook for jurors shall inform jurors in all cases they have the historical, constitutional and natural right to judge not only liability, guilt or innocence of the defendant(s) under the law as charged but must also exercise their conscience in doing so and that if they determine in their conscience that the law as charged by the judge is unjust or wrongly applied to defendant(s). Jurors have the obligation, right and duty to judge according to their conscience.

Section 2. Educational materials and instructions shall inform grand jurors they have the historical, constitutional and natural right to judge not only the guilt or innocence of defendant(s), under the law as charged but must also exercise their conscience in doing so if they determine according to their conscience the law as charged in the indictment is unjust or wrongly applied to defendant(s) it is their obligation, right and duty not to retain an indictment according to their conscience.

Section 3. The orientation of jurors shall include informing the grand and trial jurors of their historical, constitutional and material right to judge not only liability, guilt or innocence of the defendant(s) but must also exercise their conscience that the law as charged is unjust or wrongly applied to defendant(s) it is their obligation, right and duty to judge according to their conscience or not to find a time bill as the case may be.

S. 656, 176 Leg., 1991 Mass. Reg. Sess., S. 1406, 176 Leg., 1991 Mass. Reg. Sess.

110. This proposal would be an addition to Chapter 234A of the Massachusetts General Law, which currently does not require such information to be provided. See MASS. GEN. L. ch. 234A (1991).

111. See *infra* note 156 and accompanying text (discussing documented objections to this proposal).

sets Senate Bill 1406 had been referred to the Senate Ways and Means Committee.¹¹² According to a spokesperson for the Senate Judiciary Committee, this bill also was recently killed in committee.¹¹³

A fifth state in which jury nullification legislation has been introduced is Louisiana.¹¹⁴ Louisiana House Bill 1682 would create a significant change in Louisiana law. At present, Louisiana law states that in criminal matters tried by jury, the court must charge the jury (1) as to the law applicable to the case; (2) that the jury is the judge of the law and of the facts on the question of guilt or innocence, but that it has the duty to accept and apply the law as given it by the court; and (3) that the jury alone shall determine the weight and credibility of the evidence.¹¹⁵ As proposed, Louisiana House Bill 1682 would require the judge to charge the jury that it may judge the merits of the law and the merits of its applicability to the defendant, or it may accept and apply the law as given by the court.¹¹⁶ H.B. 1682 died in the House Committee on Criminal Justice without a hearing.¹¹⁷

Tennessee House Bill 430, an act relating to informed juries, was filed for introduction on January 31, 1991.¹¹⁸ This bill pro-

112. S. 656 and S. 1406 Bill Summary, 176 Leg., 1991 Mass. Reg. Sess. (1991).

113. Telephone interview with Clerk of Senate Judiciary Committee, Massachusetts State Senate (Oct. 8, 1991).

114. H.B. 1682, 1991 La. Reg. Sess. Louisiana House Bill 1682, which was introduced in the Regular Session of the Louisiana House of Representatives in 1991, stated as its purpose:

To amend and reenact Code of Criminal Procedure Art. 802, relative to jury charges; to require the trial judge to inform the jury of their right to judge the merits and applicability of the law; and to provide for related matters. Be it enacted by the Legislature of Louisiana: Section 1. Code of Criminal Procedure Art. 802 is hereby amended and reenacted to read as follows:

ART. 802. General charge; scope. The court shall charge the jury:

- (1) as to the law applicable to the case;
- (2) That the jury is the judge of the law and of the facts on the question of guilt or innocence, that it may accept and apply the law as given by the court or it may judge the merits and application of the law; and
- (3) That the jury alone shall determine the weight and credibility of the evidence.

Id.

115. LA. CODE CRIM. PROC. ANN. art. 802 (West 1991).

116. H.B. 1682, 1991 La. Reg. Sess.

117. Telephone interview with Clerk from Legislative Services, Louisiana House of Representatives (Oct. 8, 1991).

118. H.B. 430, 97th General Assembly, 1991 Tenn. Reg. Sess. The bill reads as follows:

poses that jurors be informed of their right to nullify the law in all criminal cases and in civil trials in which the government or any of its agencies is a party¹¹⁹ Tennessee House Bill 430 and its companion bill, Senate Bill 1186, both passed several considerations and were referred to the respective Judiciary Committees.¹²⁰ These bills died in the Tennessee Rules Committee.¹²¹

Finally, jury rights legislation has also been introduced in Tex-

BE IT ENACTED BY THE GENERAL ASSEMBLY OF THE STATE OF TENNESSEE:

SECTION 1. The title of this act is and may be cited as "The Fully Informed Jury Act"

SECTION 2. Tennessee Code Annotated, Title 22, is amended by adding Section 3 as a new, appropriately designated section;

SECTION 3.

(a) In any criminal trial, the court must inform the jury of its right to judge both law and facts in reaching a verdict. The court must also inform civil trial jurors of their right to judge the law as well as the facts whenever the government or any agent of the government is a party to the trial.

Trial jurors must acknowledge by oath that they understand this right, and no party to the trial may be prevented from encouraging them to exercise it. No potential juror may be disqualified from serving on a jury because he expresses a willingness to judge the law or its application, or to vote according to conscience.

Failure to inform the jury, or any other infraction of these rules of procedure, is grounds for mistrial and another trial by jury.

(b) Before the jury hears a criminal case, and again before jury deliberation begins, the court shall inform the jurors of their rights in these words:

As jurors, your first responsibility is to decide whether the defendant has broken the law. If you decide that he has, but that you cannot in good conscience support a guilty verdict, you are not required to do so. To reach a verdict which you believe is just, each of you has the right to consider to what extent the defendant's actions have actually caused harm or otherwise violated your sense of right and wrong. If you believe justice requires it, you may also judge both the merits of the law under which he has been charged and the wisdom of applying that law to the defendant. Accordingly, for each charge against the defendant, even if review of the evidence strictly in terms of the law would indicate a guilty verdict, you have the right to find him innocent. The court cautions that with the exercise of this right comes full moral responsibility for the verdict you bring in.

Id.

119. *Id.* This proposal would amend Title 22 of the Tennessee Code Annotated which does not currently provide for any required instructions to jurors. TENN. CODE ANN. § 22 (1991).

120. See H. Journal, 97th General Assembly State of Tennessee, (Jan. 28-31 and Feb. 4-7, 1991); S. Journal, 97th General Assembly State of Tennessee, (Jan. 28-31, 1991).

121. Telephone Interview with Ann Alley, Tennessee State Library and Archives (Oct. 24, 1991). See *infra* notes 157-62 and accompanying text (discussing the apparent reasons why this proposal was not enacted).

as. Texas House Bill 25 was introduced before the House Committee on Criminal Jurisprudence in the Regular Session of the 72nd Legislature.¹²² It was intended to apply in both civil and criminal trials. This bill would empower juries to nullify the law as applied to the particular defendant before them, thus finding him not liable if the jury determined that a law was unjust or wrongly applied to the defendant.¹²³ A public hearing was held on Texas

122. H.B. 25, 72nd Leg., 1991 Tex. Reg. Sess. The bill was proposed as follows:
BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF TEXAS:

SECTION 1. Chapter 62, Government Code, is amended by adding Subchapter G to read as follows:

SUBCHAPTER G; JURY NULLIFICATION

Sec. 62.601. **POWER TO NULLIFY.** If a jury determines that a party is liable according to the law and that the law is unjust or wrongly applied to the party, the jury may nullify the applicable law as applied to the party and find the party not liable.

Sec. 62.602. **JURY INSTRUCTION.** Before jury deliberation, the court shall instruct the jury as follows: "If you determine that a party is liable according to the law, before reaching a verdict you may consider the motives of the party. If you find the law to be unjust or wrongly applied to the party, you may vote according to conscience and find the party not liable, regardless of the facts of the case."

Sec. 62.603. **DISQUALIFICATION PROHIBITED.** A potential juror may not be excused or disqualified from serving on a jury because the juror expresses a willingness to nullify law.

Sec. 62.604. **CONFLICT WITH TEXAS RULES OF CIVIL PROCEDURE.**

(a) To the extent that this subchapter conflicts with the Texas Rules of Civil Procedure, this subchapter controls.

(b) Notwithstanding Section 22.004, the supreme court may not amend or adopt rules in conflict with this subchapter.

SECTION 2. Article 36.13, Code of Criminal Procedure, is amended to read as follows:

Art. 36.13. **JURY IS JUDGE OF FACTS AND LAW.**

(a) Unless otherwise provided in this Code, the jury is the exclusive judge of the facts. The jury is bound to receive the law from the court and be governed thereby, except if a jury determines that a defendant is guilty according to the law and that the law is unjust or wrongly applied to the defendant, the jury may nullify the applicable law as applied to the defendant and find the defendant not guilty.

(b) Before jury deliberation, the judge shall instruct the jury as follows: "If you determine that the defendant is guilty according to the law, before reaching a verdict you may consider the motives of the defendant. If you find the law to be unjust or wrongly applied to the defendant, you may vote according to conscience and find the defendant not guilty, regardless of the facts of the case."

(c) A potential juror may not be excused or disqualified from serving on a jury because the juror expresses a willingness to nullify law.

Id.

123. *Id.* This proposal creates a significant change in the current law of Texas, which

House Bill 25 on February 12, 1991, before the Committee on Criminal Jurisprudence. The Committee voted not to pass the bill at this hearing.¹²⁴

As is apparent from these proposed statutes, the jury rights proposals have varied significantly from one state to another and from the law as it presently stands in each of these states. Thus far, none of these proposals has been enacted into law but it is anticipated that such legislation will soon be enacted in some states.¹²⁵

III. ANALYSIS

A. State Legislative Proceedings

Of the seven states where legislation was introduced last year, only two of these states, Washington and Texas, held formal public hearings which were taped or transcribed and, therefore, available for reference.

1. Washington Legislative Hearings

The hearings in Washington consisted primarily of people speaking in support of the jury rights legislation.¹²⁶ The major themes which emerged from this testimony were that juries do in fact have the right to nullify the law, that a nullification instruction would promote justice as opposed to simple lawfulness, and that a nullification instruction would enhance the separation of powers.¹²⁷

a. Arguments in Favor of the Washington Proposal

The first argument in support of the Washington proposal was raised by Richard Shepard, Esq., the chairman of the Coalition for

states that the jurors are the exclusive judges of the facts but that they are bound to receive and be governed by the law as pronounced by the court. TEX. CODE CRIM. PROC. CODE ANN. art. 36.13 (West 1991).

124. *Jury Nullification, Hearings on H.B. 25 before the Tex. H. Comm. on Crim. Jurisprudence*, 72nd Leg., 1991 Tex. Reg. Sess. (Feb. 12, 1991) (on tape). See *infra* notes 141-50 and accompanying text (discussing the hearings which were held regarding this bill and why it was not enacted).

125. *FIIA News From the States*, THE FIIACTIVIST, Number 8 (Summer 1991), at 3-7, 20-23 (describing the progress each state has made in enacting jury rights legislation).

126. *Jurors Right to Just Verdict: Hearings on S. 5356 Before the Law and Justice Committee*, 52nd Wash. State Leg., Reg. Sess. (Feb. 18, 1991) [hereinafter *Wash. Hearings*].

127. *Id.*

a Fully Informed Jury Amendment, who testified that the right to jury nullification was established in the Magna Carta and is firmly established in our common law tradition.¹²⁸ Secondly, Mr. Shepard argued that whether we recognize and inform jurors of their right to nullify the law depends on the view we adopt with respect to the purpose of the justice system.¹²⁹ In other words, the issue is one of justice versus lawfulness.¹³⁰ Mr. Shepard and DeAnn Pratt-Pullar, a representative of the Libertarian Party, both argued that the goal of the criminal justice system in Washington State, and presumably in the United States, is to promote justice.¹³¹ In order to accomplish justice, conformity with the spirit of the law — not the letter of the law — is critical. The proposed jury instruction would stress this concept of the jury's role by informing the jury that if the letter of law will result in an injustice, it should not be applied to the present case. Finally, Ms. Pratt-Pullar argued that a nullification instruction enhances the separation of powers by providing a check on the power of judges.¹³²

b. Arguments in Opposition to the Washington Proposal

In response to these arguments, the Washington State Senators expressed several troubling considerations. Senator Smith argued that providing a nullification instruction did not simply inform jurors of a right they already possessed but, in fact, expanded the power of the jury.¹³³ Smith argued that the legislature, not juries,

128. *Id.* (testimony of Richard Shepard).

129. *Id.*

130. *Id.* Mr. Shepard added to these basic arguments that jury nullification is democracy in its purest form. Jury nullification constitutes democracy in its purest form because it is the epitome of government by the people. Nullification, it is argued, provides accurate feedback to the legislators about the laws they have passed. In addition, it increases the public's respect for the laws by weeding out the unpopular and ineffective laws. *Id.*

131. *Id.* (statements of Richard Shepard and DeAnn Pratt-Pullar on behalf of the Libertarian Party).

132. *Id.* The jury will act as a check on judicial power as well as legislative authority by refusing to enforce laws they consider to be unjust or unconstitutional. *Id.*

133. *Id.*; see also Simson, *supra* note 6, at 503-07. Simson agrees with Senator Smith's characterization of the history of jury nullification, that juries never possessed the right to nullify the law, but, they possess simply the power to do so. Simson opines that there is a significant difference between the jury's right to decide the law and the jury's right to nullify the law. *Id.* To decide the law is to step into the shoes of judges and decide the law by the same standards as used by judges. *Id.* The right to nullify the law, however, is the right of the jury to define blameworthy conduct according to their own notions of justice. Nullifying the law is not concerned with the making of law but only with deciding whether punishing the particular defendant for what he has done would be fair. *Id.*

had the power to make laws, and thus, this instruction would give the jury powers outside of its purpose and authority¹³⁴ At the same time, Smith continued, the power of the legislature to make laws applicable to all the citizens of its state would be nullified.¹³⁵

Another issue raised by Senator Smith focused on the concept that nullification was not, as Mr. Shepard contended, democracy in its purest form, but rather was the antithesis of democracy A nullification instruction would allow twelve individuals, not elected as legislators or judges, and not representing a majority of any constituency, to make the law¹³⁶

The final argument raised in opposition to the proposed legislation by several of the senators, including Senators Smith and Hainer, contended that the proposed law would result in unwarranted convictions and acquittals. The fear, as expressed by the senators, is that a few unreasonable jurors will allow their personal prejudices to enter into their decisions, resulting in a conviction of those who are not guilty under the law or an acquittal of those

Conceding that there was a common law right in colonial times for juries to decide the law, Simson concludes that there is no evidence that the right to nullify the law existed at common law. *Id.*

134. Smith's theory that juries would be making laws if told they could nullify the law is based on the idea that every time a verdict is decided in court, law has been made, at least with respect to the parties to that case. *Wash. S. Hearings, supra* note 126. *But see* Simson, *supra* note 6, at 503-07 (distinguishing between the right to decide the law and to nullify the law). Simson argues that at common law juries had the right to decide the law, meaning they used the same standards a judge would to decide what the law should be. Simson denies, however, that juries had the right to nullify the law, or, in other words, to refuse to apply a valid law to a particular defendant due to considerations of fairness and justice. *Id.* According to Simson's characterization of the history of jury nullification, then, Smith's notion that the right to nullify the law is the right to make the law was not supported by colonial judges and lawmakers who obviously saw a significant difference between the right to make or decide law and the right to nullify the law. *Id.*

135. *Washington Senate Hearings, supra* note 126.

136. *Id.* Studies show that, in fact, juries are not the cross-section of society they were intended to be. "[T]he available research evidence has on the whole demonstrated how fundamentally unrepresentative of the wider community jurors tend to be." JOHN BALDWIN & MICHAEL MCCONVILLE, *JURY TRIALS* 91 (1979).

[I]n most courts in the United States significant segments of the population are still not included on juries as often as they would be in a completely random system aimed at impaneling a representative cross-section. Blue-collar workers, non-whites, the young, the elderly, and women are the groups most widely underrepresented on juries, and in many jurisdictions, the underrepresentation of these groups is substantial and dramatic.

JON M. VAN DYKE, *JURY SELECTION PROCEDURES: OUR UNCERTAIN COMMITMENT TO REPRESENTATIVE PANELS* 24 (1977).

who are guilty and for whom considerations of justice do not demand an acquittal.¹³⁷

In addition to arguments against nullification raised by members of the Washington Senate, the Superior Court Judge's Association for the State of Washington submitted a letter to the state legislature in opposition to the proposed legislation.¹³⁸ The grounds for opposition were stated as follows: "This bill creates a fundamentally inconsistent position for the court. The judge is sworn to uphold the law, and this bill requires the judge to instruct the jury to disregard the law"¹³⁹

The issues, then, which seem to have dominated the hearings on the jury rights bill in Washington are common law rights to nullify the law, justice versus lawfulness, enhancement of separation of powers, maintenance of democratic institutions, and finally, unwarranted convictions or acquittals by virtue of the nullification instruction. Similar issues arose in the hearings before the Texas House of Representatives.

2. Texas Legislative Hearings

The Texas proposal varies in several ways from the bill proposed in Washington. Most significantly, while the Washington bill would only require the nullification instruction to be given in criminal cases, the Texas proposal would require it in all cases, civil as well as criminal.¹⁴⁰

a. Arguments in Favor of the Texas Proposal

The arguments in favor of the Texas legislation are quite similar to those raised in the Washington hearings. The first argument

137. *Washington Senate Hearings*, *supra* note 126. Proponents of jury nullification respond to the first part of this argument by pointing out that a conviction is appealable and, therefore, if the evidence to support a conviction does not exist, it will be overturned on appeal. *Id.* (testimony of Richard Shepard). The second part of this argument, however, is justifiable. If a jury refuses to convict a person based on personal prejudices it is not appealable. The classic example of this problem is a jury who would refuse to convict a white man for killing a black man. *Id.*

138. Letter from James D. McCutcheon, Jr. to Senator Gary A. Nelson (March 4, 1991).

139. *Id.*

140. Compare S. 5356, 52nd Leg., 1991 Wash. Reg. Sess. with Texas H. 25, 72nd Leg., 1991 Texas Reg. Sess. The language of the Texas proposal does not distinguish between civil and criminal trials. See Texas H. 25. There was no question raised at the hearings that the proposed legislation would be applicable in all cases, both civil and criminal. *Hearings on Texas House Bill 25 Before the Committee on Criminal Jurisprudence*, 72nd Texas Leg., Regular Session (1991) [hereinafter *Texas Hearings*].

raised in support of the proposed jury rights legislation in Texas was that juries already have the right to nullify the law; the legislation, it was argued, would merely require judges to inform juries of this right and stop deceiving them.¹⁴¹ A second argument in support of this legislation is that it enhances democratic participation in the legislative process. By giving jurors the power of nullification, juries will be able to establish patterns of acquittals of charges brought pursuant to laws which they find to be unjust. This will be a source of feedback to the legislature. Thus, the power of nullification provides the people with a mechanism to make their opinions regarding specific laws known to their elected representatives.¹⁴²

b. Arguments in Opposition to the Texas Proposal

While the arguments advanced in support of the legislation were the same as those put forth in the Washington Senate hearings, the criticisms and arguments against the legislation in Texas were far more extensive. Some of the concerns expressed about the Texas legislation were similar to concerns raised about the proposed legislation in Washington: a concern about consistency among the application of the laws;¹⁴³ a concern that our system is intended to operate on the rule of law;¹⁴⁴ concerns over unwar-

141. This argument was raised by almost every person speaking in favor of this legislation. See *Texas Hearings*, *supra* note 140. There are two bases for this argument. The first is that the right to nullify is historically based in the common law. The second source for this argument is the Texas Constitution itself. Article I, § 8 of the Texas Constitution provides that juries in libel cases as in other cases have the right to determine the law. TEX. CONST. art. I, § 8. Proponents focus on the "as in other cases" language to argue that juries were given the right to nullify the law in the Constitution of Texas and that, therefore, this bill creates no new rights. *Texas Hearings*, *supra* note 140.

142. *Texas Hearings*, *supra* note 140 (testimony of Tom Glass).

143. Compare *Wash. Hearings*, *supra* note 126, with *Texas Hearings*, *supra* note 140. One of the first arguments raised by the Texas State Representatives against this legislation is that it will lessen consistency. Laws will no longer be applied across the board to all persons residing in the state but will, instead, be applied to some but not to others depending on the jury. The response to this argument was threefold. First, it was said that laws are not strictly and consistently enforced anyway because of such elements as prosecutorial discretion, jury discretion and police discretion. Second, nullification only occurs in rare cases so the consistency problem would not be widespread. Finally, it was stated that inconsistency should be preferred to the consistent application of bad law. *Texas Hearings*, *supra* note 140 (testimony of Greg Clark and Tom Glass). Bruce Baechler, representative for the Libertarian Party, also responded to this argument by Rep. Flouner, saying that the power of the legislature should be limited because only the citizenry should be all powerful. *Id.* (testimony of Bruce Baechler).

144. Compare *Wash. Hearings*, *supra* note 126, with *Texas Hearings*, *supra* note 140.

ranted convictions and the supposed remedy of appeal;¹⁴⁵ and concerns with jury nullification procedures.¹⁴⁶

In addition to these arguments, however, many of the concerns raised in the Texas hearings related to specific provisions in the Texas proposal and were, therefore, unique. First, the Texas proposal was criticized as being too broad because it would apply in both civil and criminal trials.¹⁴⁷ The purpose of nullification, it was argued, is to protect people from the government, not to release them from contractual obligations they voluntarily entered into with other private citizens.¹⁴⁸ A second problem specific to the Texas proposal was its impact on existing laws. Daniel Jordan, speaking on behalf of the Texas Association of Defense Counsel, argued that if this legislation was enacted many other laws and regulations, particularly the rules of civil and criminal procedure, would have to be changed.¹⁴⁹ In addition, a recognition that this is not a new right but rather already existed in the Texas State Constitution, as many of the bill's proponents argued, would constitute a reason for the reversal of all the cases previously tried under the present rules of procedure.¹⁵⁰

The rule of law is essential for the perception of fairness. Without the rule of law, a particular jury can enact tyranny in a particular case by depriving the parties involved of the right to have their case decided by the laws of the state. *Texas Hearings, supra* note 140 (testimony of Daniel Jordan, on behalf of Texas Association of Defense Counsel).

145. Compare *Wash. Senate Hearings, supra* note 126, with *Texas Hearings, supra* note 140. Mr. Daniel Jordan, on behalf of the Texas Association of Defense Counsel, in opposition to this legislation, argued that the purported protection against unwarranted convictions by virtue of the appeals process is not as safe as it appears. Mr. Jordan argues that in order to overturn a conviction on appeal, prejudice or harmful error must be shown. This could prove an extremely difficult task since there is no way of knowing what a jury is thinking when it makes a particular decision. A related problem raised by Mr. Jordan is that this instruction essentially tells jurors that they should let bias, prejudice and sympathies play a part in their decisions. Thus, the jury essentially becomes like a kang with no accountability and, therefore, no way to be reversed on appeal, although such elements have played a part in the verdict. See *Texas Hearings, supra* note 140.

146. Compare *Wash. Hearings, supra* note 126, with *Texas Hearings, supra* note 140. Another issue raised by Mr. Jordan is the problem of excusing jurors. Under this legislation no juror may be excused for expressing a willingness to nullify the law. The problem which arises, then, is that any juror who expresses such a sentiment will not be able to be excused either for cause or peremptorily because it would be difficult to prove that the exclusion was not a result of the juror's expressed belief in nullification. *Texas Hearings, supra* note 140 (testimony of Daniel Jordan).

147. *Texas Hearings, supra* note 140.

148. *Id.* (testimony of Tom Glass).

149. *Id.* (testimony of Daniel Jordan).

150. *Id.* (testimony of Daniel Jordan).

3. Legislative Proceedings in Other States

The only other states which maintained any sort of record or transcript of the hearings were Arizona and Massachusetts. The proposal in Arizona was for a constitutional amendment which would require judges to inform jurors of their inherent right to judge the law when the state or one of its political subdivisions was a party to the case.¹⁵¹ The main thrust of the argument in support of this resolution appears to be, once again, that nullification is a right that all jurors possess and of which they ought to be informed.¹⁵² In opposition to this proposal the following sentiments were expressed: that the law which was proposed is too broad and does not provide any standards for its application;¹⁵³ that this law is a threat to justice under the law;¹⁵⁴ and, that this resolution will not correct misapplication of the law.¹⁵⁵

Finally, in Massachusetts the following letter was submitted by Robert Bloom, Deputy Administrative Assistant to the Supreme Judicial Court of Massachusetts in opposition to the proposed jury rights legislation:

[The proposed legislation] would require that jury handbooks inform jurors of "their obligation, right, and duty, to judge according to their conscience."

In effect, these bills require the Judicial Branch of government to insert in court prepared handbooks a statement that jurors are obliged to nullify or disregard the law in certain situations. Such legislation would be disruptive of the good order of the administration of justice. It also may be unconstitutional under the Separation of Powers provision (Article 30) of the Massachusetts Constitution.

This office strongly opposes [this legislation].¹⁵⁶

151. See *supra* note 102 and accompanying text for the Arizona proposal.

152. *Hearing on H.C.R. 2015 Before the Arizona House of Representatives, Committee on the Judiciary*, 40th Leg., First Regular Session (March 11, 1991) (testimony of Richard Tompkins, State Coordinator, Fully Informed Jury Association, and Darlene Span).

153. *Id.* (testimony of Judge Noel Fidel, Court of Appeals). Judge Fidel is presently publishing a two year study on jury nullification in the *Arizona State University Law Journal*.

154. *Id.* (testimony of Dee Sirkis, on behalf of the League of Women Voters of Arizona). It is not apparent from the transcript summary of Ms. Sirkis' testimony precisely why she regards this proposal as a threat to justice.

155. *Id.* (response of John Taylor, Court of Appeals, representing the Legislative Committee of the Arizona Judicial Council, to a question posed by Rep. Horton).

156. Memorandum from Robert Bloom, Deputy Administrative Assistant of the Supreme

Thus, the opposition in Massachusetts appears to be based on the notion that the proposed legislation would not merely be disruptive of the administration of justice, but might possibly be in violation of the Massachusetts constitutional provision on the separation of powers.

New York, Louisiana, and Tennessee, the other states where jury nullification legislation was introduced last year, either did not hold hearings or failed to keep a record of the proceedings.¹⁵⁷ The same arguments raised with respect to the Arizona, Texas, Washington and Massachusetts proposals, however, would presumably be applicable to the proposals in New York, Louisiana and Tennessee. The preceding discussion indicates that many of the issues raised were common to all the states. The most important considerations in support of the legislation were: 1) that jurors already possessed the right to nullify the law by virtue of the common law and should, therefore, be informed of this right; and 2) that a nullification instruction would promote justice, democratic participation, and separation of power values.¹⁵⁸ In opposition to the proposals, the recurrent themes were: 1) that a nullification instruction would expand the powers of the jury while negating the power of the legislature to make laws applicable to all persons of a particular state, thereby decreasing consistency in application of the laws; 2) that such an instruction would actually be the antithesis of democracy; 3) that it may result in unwarranted convictions or acquittals with no effective remedy on appeal; and 4) that the proposed legislation will cause serious procedural problems in jury selection.¹⁵⁹ In addition to these common criticisms, criticisms which are specific to the legislation introduced, such as the breadth of the proposal,¹⁶⁰ its lack of standards,¹⁶¹ and the implications for existing state laws and decisions,¹⁶² have also been raised.

The common pros and cons which have been presented in the legislative hearings provide a basis for further assessment of the legislative proposals. Any proposed legislation ought to incorporate

Judicial Court of Massachusetts, to Senator Michael LoPresti, Chairman of the Joint Committee on the Judiciary (March 19, 1991) (citation omitted).

157. See *supra* notes 105-06, 116, and 118-19 and accompanying text (describing New York S. 1085, Louisiana H. 1682, and Tennessee H. 430, respectively).

158. See *supra* notes 128-32, 141-42, and 152 and accompanying text.

159. See *supra* notes 133-39, 143-50, and 153-55 and accompanying text.

160. See *supra* note 147 and accompanying text.

161. See *supra* note 153 and accompanying text.

162. See *supra* note 149 and accompanying text.

the good aspects of the past legislative proposals, while avoiding the pitfalls exposed by the criticisms.

B. Comparison of Proposed Legislation to Current Laws Enacted in Maryland and Indiana

Currently, there are two states, Maryland and Indiana, which require that a nullification instruction be given in particular cases.¹⁶³ Article XV, Section 5 of the Maryland Constitution states: "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."¹⁶⁴ As a result of this constitutional provision, the following instruction is usually given to juries in criminal cases:

Members of the jury, this is a criminal case and under the constitution and laws of the State of Maryland in a criminal case the jury are the judges of 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 the law as you apprehend it to be in the case.¹⁶⁵

In Indiana, Article I, Section 19 of the Indiana Constitution states: "In all criminal cases whatsoever, the jury shall have the right to determine the law and the facts."¹⁶⁶

1. Interpretation of the Maryland and Indiana Provisions

How these instructions work in practice in Indiana and Mary-

163. IND. CONST., art. I, § 19; MD. CONST., Declaration of Rights, art. XXIII. See Schefflin & Van Dyke, *supra* note 4, at 79 (discussing how jury nullification works in practice today in Maryland and Indiana, the only two states which allow it); Schefflin, *supra* note 1, at 201-02 (discussing the current state of the jury nullification doctrine and stating that only Maryland and Indiana presently have effective constitutional provisions giving jurors the right to determine the law as well as the facts). The state of Georgia also has a statutory provision preserving the right of the jury to decide the law: "[T]he jury shall be the judges of the law and the facts in the trial of all criminal cases and shall give a general verdict of 'guilty, or 'not guilty.'" GA. CODE ANN. § 17-9-2 (Michie 1990). The Georgia Supreme Court, however, has refused to interpret this provision as requiring or even allowing courts to tell jurors of their right to decide the law. See *Brown v. State*, 40 Ga. 689 (1870).

164. MD. CONST., Declaration of Rights, art. XXIII.

165. *Wyley v. Warden, Maryland Penitentiary*, 372 F.2d 742, 743 n.1 (4th Cir. 1967); Schefflin, *supra* note 1, at 202; Schefflin & Van Dyke, *supra* note 4, at 83.

166. IND. CONST., art. I, § 19.

land has been the subject of much scholarly research.¹⁶⁷ The nullification instruction in Indiana has not been shown to have wreaked havoc on the judicial process. To the contrary, jurors seem to be behaving responsibly.¹⁶⁸ There is no evidence of a higher acquittal rate or that judges are unhappy with the provision.¹⁶⁹ The appellate courts seem to be doing a good job of drawing a balance between the role of the juries and the rights of the accused.¹⁷⁰

The situation in Maryland appears to be largely the same.¹⁷¹

167. See, e.g., Schefflin & Van Dyke, *supra* note 4, at 80-85 (discussing how jury nullification works in practice today). The extent of the jury's right to determine questions of the constitutionality of a law under Indiana's nullification instruction provision is not entirely clear. Earlier cases held that the provision allowed juries to pass only on the applicability of a law but not on its constitutionality. See, e.g., *Sumpter v. State*, 306 N.E.2d 95, 102 (Ind. 1974), *cert. denied*, 425 U.S. 952 (1976). In *Taylor v. State*, 420 N.E.2d 1231 (Ind. 1981), however, the Indiana Supreme Court criticized *Sumpter*, concluding that it is proper for defense counsel to argue the constitutionality of the statute at issue to the jury. *Taylor*, 420 N.E.2d at 1233. Nevertheless, the court did not agree with the contention that the judge was required to give the jury instruction proffered by the defendant regarding the defense theory of the constitutionality of the law at issue. *Id.* The Indiana Supreme Court has also specifically rejected the jury's power, by virtue of the nullification instruction, to create new offenses or find a defendant guilty of a crime with which he has not been charged. *Denson v. State*, 330 N.E.2d 734, 737 (Ind. 1975); Schefflin & Van Dyke, *supra* note 4, at 80.

On several occasions, the Indiana courts have discussed the question of whether juries may convict defendants for a lesser offense when the evidence does not support a conviction for the offense charged. Current law holds that a defendant may only be convicted of a lesser offense when it is a lesser included offense. Schefflin & Van Dyke, *supra* note 4, at 81. See also *Holloway v. State*, 352 N.E.2d 523 (Ind. Ct. App. 1976) (holding that Indiana juries cannot alter the legislative requirements for convictions even when convicting for a lesser offense; thus, juries are only authorized to convict for a lesser included offense).

A fourth issue which has arisen in Indiana with respect to the nullification instruction is whether the court can give the jury mandatory instructions. The Indiana courts have held that the trial judge may not tell the jurors they must convict if they find certain facts but may explain the law to the jurors and give them guidelines and examples about how the law was meant to be applied. *Pritchard v. State*, 230 N.E.2d 416, 418-19 (Ind. 1967); *Powell v. State*, 312 N.E.2d 521 (Ind. Ct. App. 1974); Schefflin & Van Dyke, *supra* note 4, at 82. Jurors are also told they "have the right to determine and construe the law [themselves], although [their] determination may differ from [the judge's]." *Sankey v. State*, 301 N.E.2d 235, 239 (Ind. Ct. App. 1973). See also Schefflin & Van Dyke, *supra* note 4, at 82. Finally, the attorney's role in discussing the law with the jury has not yet been resolved in Indiana. *Id.*

168. Schefflin & Van Dyke, *supra* note 4, at 82.

169. *Id.*

170. *Id.*

171. The instruction, for instance, does not empower jurors to declare a statute unconstitutional or permit lawyers to argue to a jury that a statute is unconstitutional. *Franklin v. State*, 12 Md. 236 (1858). See also Schefflin & Van Dyke, *supra* note 4, at 83. Ad-

A survey of judges in Maryland reveals that most support the nullification instruction even if not in support of the theory of nullification, and that most believe its impact on jury decisions has been marginal.¹⁷² Professor Jacobsohn, who conducted this study, concludes that:

It appears, then, that the traditional deference to the judge's authority is not seriously, if at all, diminished by the advisory nature of judges' instructions in Maryland. Nevertheless, the fact that more than one out of every four judges believes that counsel's interpretations of the law constitute an important source of juror legal awareness calls attention to the difference between Maryland's practice and that of other jurisdictions.¹⁷³

In sum, the instruction in Maryland, at least from the judges' perspective, seems to have no real impact on conviction and acquittal rates, but has merely provided another source from which juries may obtain their idea of what the law is or requires.¹⁷⁴

The importance of these provisions and how they have worked in practice is key to understanding how the proposed legislation

ditionally, a number of safeguards have been built into the trial process to protect the accused from a jury that might act improperly. For instance, the trial judge decides all questions concerning the admissibility of evidence; if either party requests the judge to do so, he must provide the jury with an advisory instruction on the law; if the trial judge thinks insufficient evidence exists to support a jury verdict of guilty, he or she is empowered to issue a directed verdict of acquittal; and if the jury has misapplied the law to the prejudice of the accused, the trial judge can order a new trial. *Id.* at 82 (describing various safeguards which have been built into the trial process). The Supreme Court of Maryland can review the sufficiency of the evidence if the defendant argues on appeal that the jury's conviction is improper and the error was preserved at trial. *See Giles v. State*, 183 A.2d 359, 366 (1962), *appeal dismissed for want of a substantial federal question*, 372 U.S. 67 (1963). *See also Schefflin & Van Dyke, supra* note 4, at 83. Finally, attorneys are allowed to argue the law to the jury and to present any disagreement about the applicable law to the jurors for their resolution. *Lewis v. State*, 237 A.2d 73, 78 (Md. Ct. App. 1968). *See also Schefflin, supra* note 4, at 83. The judge may dispute the attorney's interpretation of the law, however, and present his own views of the law in an advisory instruction. *See Schanker v. State*, 116 A.2d 363, 366-67 (Md. 1955); *Slansky v. State*, 63 A.2d 599, 604 (Md. 1949). *See also Schefflin & Van Dyke, supra* note 4, at 83-84.

172. Gary J. Jacobsohn, *The Right to Disagree: Judges, Juries, and the Administration of Criminal Justice in Maryland*, 1976 WASH. U.L.Q. 571, 582-600. Of 44 judges surveyed, only three felt trial outcomes were frequently affected by the instruction and another eight felt that the outcome was occasionally affected. Only eight judges felt the instruction should be repealed. Of 36 judges responding to their personal opinion on nullification, 22 disapproved of it. *Id.*

173. *Id.* at 581.

174. *Id.* at 587.

discussed earlier would work in practice, and how it might be modified to work as successfully as it arguably has in Maryland and Indiana.¹⁷⁵

2. Comparison of Maryland and Indiana Provisions to Recent Legislative Proposals

The most obvious difference between the constitutional provisions of Indiana and Maryland, and some of the proposals introduced recently in other states, is the scope of the application of the nullification instruction. In Indiana and Maryland the application of the nullification instruction has been restricted to criminal trials.¹⁷⁶ In Arizona, Massachusetts, Tennessee and Texas the proposed nullification instructions would be applicable beyond just criminal jury trials.¹⁷⁷ In Arizona and Tennessee, the instruction would apply in any case in which the government is a party, civil or criminal.¹⁷⁸ In Massachusetts and Texas, the scope is even greater: the proposed legislation would require the nullification instruction to be given in all jury trials.¹⁷⁹ In Washington, New York, and Louisiana, however, the scope of the proposed legislation is essentially the same as the provisions in Maryland and Indiana, applicable only in criminal trials by jury.¹⁸⁰

The most critical difference, however, between the Maryland and Indiana provisions and the proposals introduced last year is in the explicitness of the nullification instruction. An explicitly worded instruction informs the jury directly that they have the authority to decide whether to apply a law to the defendant's conduct, that they may include in their deliberations their own feelings based on conscience, and that they may refuse to apply the applicable law to the defendant if they feel the result would be unjust.¹⁸¹ The

175. The constitutional provisions in Maryland and Indiana have been successful in that they have not resulted in the chaos or anarchy that nullification opponents predicted. See *supra* notes 159, 168 and accompanying text. The fact that judges perceive no real impact from the instruction indicates, however, that these provisions may not be successful from the viewpoint of jury nullification proponents.

176. See IND. CONST., art. I, § 19; MD. DECLARATION OF RIGHTS, § 25.

177. See *supra* notes 102, 109, 118, and 122 and accompanying text (setting forth the legislation proposed in these states).

178. See *supra* notes 102-04, 118-19 and accompanying text (discussing legislation proposed in Arizona and Tennessee).

179. See *supra* notes 109-13, 122-24 and accompanying text (discussing legislation proposed in Massachusetts and Texas).

180. See *supra* notes 95-101, 105-07, 116, and accompanying text (discussing legislation proposed in Washington, New York, and Louisiana).

181. According to Horowitz there are three elements to an explicit, or radical, nullifica-

Maryland instruction, in particular, is often regarded as vaguely worded.¹⁸² Washington, New York, Massachusetts, Tennessee and Texas proposed legislation which would appear to qualify as explicit jury nullification instructions,¹⁸³ while Arizona and Louisiana proposed language much more similar to that contained in the Maryland instruction.¹⁸⁴ Empirical research has proven that the explicitness of the nullification instruction has a definite impact on verdicts.¹⁸⁵

Another difference between the proposed legislation and the enacted legislation stems from the fact that the constitutional provisions of Indiana and Maryland are very general provisions or statements of the law¹⁸⁶ This has allowed the courts of these states to interpret the provisions and their applicability¹⁸⁷ In doing so, courts have been able to draw a balance between the fulfillment of the jury's role and protection of the defendant's rights.¹⁸⁸ By contrast, in much of the proposed legislation, it appears that the drafters are trying to cover all possible scenarios which might arise under such legislation. While this will provide a more ready answer in case of a dispute, it detracts from the flexibility which has proven beneficial in the application of the Maryland and Indiana

tion instruction:

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

Horowitz, *supra* note 4, at 30-31 (citations omitted).

182. *See id.* at 29 ("Proponents of the nullification doctrine feel that the Maryland instruction is too vaguely worded to have a substantial impact.")

183. *See supra* notes 95-101, 105-07, 109, 118-19, and 122-24 (discussing the proposed legislation).

184. Compare H.C.R. 2015, *supra* note 102 and H. 1682, *supra* note 114 with MD. CONST., Art. XV, § 5.

185. *See infra* notes 205, 215-17 and accompanying text (discussing the conclusions of the empirical research of Irwin A. Horowitz).

186. *See supra* notes 164-66 and accompanying text (explaining the constitutional provisions of Maryland and Indiana and their corresponding jury instructions).

187. *See supra* notes 167-74 and accompanying text (discussing how the Maryland and Indiana provisions have been applied in practice).

188. *See supra* notes 167, 171 and accompanying text (discussing how the courts have interpreted the constitutional provisions in Maryland and Indiana).

provisions, and has also spawned much of the criticism of these proposals.¹⁸⁹

In addition, there are a few other elements included in the recently proposed legislation and visibly absent from the enacted Indiana and Maryland constitutional provisions. For instance, neither the Indiana or Maryland provisions make reference to the ability of attorneys or judges to excuse a juror who expresses a willingness to nullify the law¹⁹⁰ On the other hand, the legislation proposed in Washington, Tennessee and Texas all contain provisions stating that a juror may not be disqualified for expressing a willingness to nullify the law¹⁹¹ This aspect of the legislation was presented as one of the more troublesome provisions of the law in the Texas House of Representatives hearings on the bill.¹⁹²

3. Relevance of Comparing the Enacted Legislation to the Proposed Legislation

There are several lessons to be learned from the Maryland and Indiana instructions and how they have worked in practice. First, neither of these provisions have spawned much, if any, controversy; to the contrary, they have both operated apparently without incident.¹⁹³ This tends to refute the claims of jury nullification opponents that jury nullification instructions will result in chaos and anarchy¹⁹⁴ On the other hand, the fact that the instruction has had no perceptible impact indicates that it is not having the effect desired by jury nullification proponents.¹⁹⁵

The differences pointed out above between the Maryland and Indiana provisions and the legislation proposed in 1991 are helpful in evaluating why the Maryland and Indiana provisions have had this effect and in determining what changes must be incorporated in any future proposals. First, the lack of detail in the Maryland and Indiana provisions appears to account for the lack of contro-

189. *See supra* text accompanying notes 148-50 (criticizing particular provisions of the proposed legislation). Of the legislative proposals made in 1991, only Arizona and Louisiana have maintained the more general and less detailed approach taken by Maryland and Indiana. *See supra* notes 95, 102, 105, 109, 114, 118, and 122 (detailing the language of the legislative proposals in the seven states introducing jury rights legislation in 1991).

190. *See supra* notes 164-66 and accompanying text.

191. *See supra* notes 95, 118, 122 and accompanying text.

192. *See supra* note 146.

193. *See supra* notes 167-74 and accompanying text.

194. *See supra* note 8 and accompanying text.

195. *See supra* notes 168-74 and accompanying text.

versy and the smooth operation of these provisions.¹⁹⁶ Second, the vagueness of the Maryland and Indiana provisions accounts for its lack of effectiveness from the proponents' point of view¹⁹⁷

In conclusion, the experiences of Maryland and Indiana with jury nullification instructions demonstrate that, in order to achieve the results desired by jury nullification proponents but avoid the chaos predicted by opponents, any future legislative proposals must contain both a more explicit jury nullification instruction and a less detailed approach to how the legislation will work in practice.

C. Empirical Studies on Jury Nullification Instructions

Of the research that has been undertaken, two studies seem particularly applicable to the jury nullification issue.¹⁹⁸ The first is a study conducted by Irwin A. Horowitz in the early 1980's "aimed at providing empirical data for the following question: will the jury operate in a manner which is different than its normal functioning if given explicit nullification instructions?"¹⁹⁹ The second study was also conducted by Horowitz, several years later.²⁰⁰ This study "was conducted to determine the effects of nullification information to the jury from judge's instructions and lawyers' arguments on juries' verdicts and decision making."²⁰¹ The results of these studies will provide insight into some of the more subtle problems with various types of nullification instruction schemes and present alternative means for accomplishing the ultimate purpose of drafting an appropriate legislative proposal for a jury nullification instruction.

In his first study concerning the operation of juries when given explicit nullification instructions, Horowitz divided forty-five six-person juries into nine experimental groups.²⁰² Three different nullification instructions were then combined with three different types of criminal cases and each group was given one of the com-

196. See *supra* notes 186-88 and accompanying text.

197. See *infra* notes 206-17 and accompanying text.

198. Both of these studies were conducted by Irwin A. Horowitz of the University of Toledo Department of Psychology. The author has not discovered any other articles which refer to the studies by Mr. Horowitz and cannot personally vouch for their scholarly value.

199. Horowitz, *supra* note 4, at 25.

200. Irwin A. Horowitz, *Jury Nullification: The Impact of Judicial Instructions, Arguments, and Challenges on Jury Decision Making*, 12 LAW & HUM. BEHAV. 439 (1988).

201. *Id.*

202. Horowitz, *supra* note 4, at 31.

binations.²⁰³ The three types of criminal cases used in this study were a euthanasia case, a murder case, and a drunk driving case.²⁰⁴ The three instructions administered consisted of a Standard Pattern Instruction, the Maryland Instruction, and a Radical Nullification Instruction.²⁰⁵

The results of the study showed that the verdicts handed down by juries given the radical nullification instruction differed signifi-

203. *Id.* at 30.

204. In the euthanasia case, a nurse was being tried for the "mercy" killing of a terminal cancer patient. Although the nurse was portrayed in very sympathetic terms, the evidence presented made clear that the nurse had deliberately ended her patient's life. In addition, there was testimony from the patient's wife indicating her husband's tremendous suffering and his hope that he would soon die. The murder case involved the killing of a grocery store owner during a robbery. The defendant was arrested near the store with the cash register receipts still in his pockets. Additionally, witnesses were able to identify the defendant as the robber. In the third case, a drunk driving case involving vehicular homicide, a male college student killed one pedestrian and seriously injured another while driving home from a party where he had been seen to consume several alcoholic beverages. In his favor, however, the evidence showed that the accident took place at about one o'clock on a foggy morning, on a freeway exit which may not have been adequately lit. The victims were walking along the shoulder of the road, dressed in dark clothes, carrying a gas can. Yet, the evidence also showed that the victims were thrown over 100 feet from the point of impact, indicating that the defendant was driving very fast at the time of the accident. Horowitz, *supra* note 4, at 31.

205. *Id.* at 30. The Standard Pattern Instructions were taken from the Ohio Pattern Jury Instructions and do not refer to nullification at all. *Id.* The Maryland Instructions employed the Pattern Maryland Instructions and do contain a nullification instruction, though vague. *Id.* The Maryland Instruction states:

Members of the Jury, this is a criminal case and under the Constitution and laws of the State of Maryland in a criminal case the jury are the judges [sic] 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 the law as you apprehend it to be in the case.

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

Finally, the Radical Nullification Instructions are the most explicit as to the jury's power to nullify the law. This instruction tells the jurors the following:

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

Horowitz, *supra* note 4, at 30-31. This instruction is based on a proposal by Jon Van Dyke. Van Dyke, *supra* note 45, at 241.

cantly from those reached by juries given either the standard pattern instruction or the Maryland instruction in both the euthanasia case and the drunk driving case.²⁰⁶ In the euthanasia case, the jurors given the radical nullification instruction acquitted the defendant more often than the jurors given the standard pattern instruction or the Maryland instruction.²⁰⁷ The juries given the standard pattern instruction and Maryland instruction differed only slightly and insignificantly in their verdicts in the euthanasia case.²⁰⁸

The other case in which the instruction had a significant effect on the verdict was in the drunk driving case. The effect in this case, however, is both surprising and disturbing. The jurors given the radical nullification instruction convicted more often in this case than either the jurors given the standard pattern instructions or the Maryland instructions, who convicted at the same rate.²⁰⁹ Horowitz observes:

If, in fact, the higher verdict scores (more guilt-prone scores), and the absence of a not guilty verdict by any of the five [radical nullification instruction] juries, are due to the receipt of the nullification instructions, then we can see that juries "liberated" by appeals to their conscience may impose more or less severe penalties than is common depending upon the nature of the case.²¹⁰

206. Horowitz, *supra* note 4, at 32.

207. *Id.*

208. *Id.*

209. *Id.* The table set out below reflects the actual differences in verdict scores among the different groups. Each juror was asked initially to rank the defendant's guilt or innocence on a scale of 1 to 6, with 1 = evidence well below a reasonable doubt, 2 = evidence moderately below a reasonable doubt, 3 = evidence slightly below a reasonable doubt, 4 = evidence slightly above a reasonable doubt, 5 = evidence moderately above a reasonable doubt, and 6 = evidence well above a reasonable doubt. The jury as a group, then, reached a consensus as to the appropriate scale value. These values were averaged with those of the other juries in the group to reach the values reflected below.

Cases	Instructions		
	SPI	MI	RNI
Murder	5.0	4.8	5.4
Drunk Driving	4.2	4.2	5.4
Euthanasia	4.2	3.8	2.6

Horowitz concluded that the only significant differences reflected above were the differences between the RNI (Radical Nullification Instructions) jurors and the SPI (Standard Pattern Instructions) jurors and the MI (Maryland Instructions) jurors in the drunk driving and euthanasia cases. *Id.*

210. *Id.* at 35. This result is disturbing because it indicates that the fears of jury nul-

The other trend evidenced by this study is that juries in receipt of radical nullification instructions do in fact function differently than juries which are given either the standard pattern or the Maryland instructions.²¹¹ The content analysis of the jury deliberations indicate that while radical nullification instruction juries are aware of the nullification instructions, Maryland instruction juries do not appear to be any more aware of the nullification possibility inherent in their instructions than the standard pattern instruction juries.²¹² Additionally, the radical nullification instruction juries in both the drunk driving and euthanasia case spent significantly more time than either the standard pattern instruction juries or the Maryland instruction juries discussing the nullification instruction and, to a lesser degree, the character of the defendant, and significantly less time discussing the evidence in the case.²¹³ Finally, both the radical nullification instruction juries and the Maryland instruction juries spent significantly more time in deliberations relating personal experiences to the case than the standard pattern instruction juries did.²¹⁴

Essentially, the results of this study indicate three important effects of jury nullification instructions on how juries function. First, in general, juries given radical nullification instructions do function differently than juries not given such instructions.²¹⁵ Second, juries which are given radical nullification instructions do give significantly different verdicts in some instances.²¹⁶ Finally, radical nullification instruction juries focus more heavily in their deliberations on such factors as personal experiences and defendant characteristics.²¹⁷

lification critics — that a jury nullification instruction will result in wrongful convictions — may not be completely unwarranted. Although the conviction in the drunk driving case does not appear unwarranted, the fact that jurors in receipt of radical nullification instructions convicted at a higher rate than other jurors does indicate that the jurors allowed their personal feelings and prejudices about drunk driving to affect their decision to convict the defendant rather than simply to acquit as the instruction provides.

211. *Id.* at 34.

212. *Id.*

213. *Id.* at 33.

214. *Id.* at 34.

215. *Id.* at 35.

216. *Id.*

217. *Id.* at 35-36. As discussed *supra* at notes 206-14 and accompanying text, the Maryland and the standard pattern instructions tended to yield the same or similar results in most cases, leading one to conclude that, in general, the Maryland instruction has no significant effect on jury functioning or verdicts. This conclusion is supported by the judicial survey in Maryland as well. See *supra* notes 172-74 and accompanying text.

Horowitz's second study focused on the effects of nullification information from judge's instructions and lawyer's arguments on juries' verdicts and decision making.²¹⁸ The study divided one-hundred-forty-four six-person juries into groups of twenty-four.²¹⁹ Thus, there were six juries each who heard the same one of the twenty-four possible scenarios. The variables in this research were, first, whether the instruction was received from the judge or by means of lawyer's arguments; second, whether the argument or instruction made reference to the possibility of jury nullification; third, the three different types of criminal cases presented; and, finally, the presence or absence of challenges to nullification information.²²⁰

The three criminal case variables involved in this study were a drunk driving case, a euthanasia case, and an illegal possession of a weapon case.²²¹ The judicial instructions variable was either the standard pattern instructions, based on Ohio Pattern Jury Instructions, or the radical nullification instructions, based on Van Dyke's 1970 proposal.²²² The lawyer's arguments variable reflected whether the defense attorney did or did not make reference to a nullification defense.²²³ In the non-nullification defense, attorneys made no reference to a nullification argument while those lawyers employing a nullification defense made references to nullification power in both opening and closing statements.²²⁴ The nullification argument essentially paraphrased the first two parts of the judge's

218. Horowitz, *supra* note 194, at 439.

219. *Id.* at 439, 445.

220. *Id.* at 442.

221. *Id.* at 443. The euthanasia and drunk driving cases were the same as were used in the previously discussed study. *See supra* note 198. The illegal possession of a weapon case was adapted from a PBS broadcast in 1986 of an actual jury deliberation in a trial involving the illegal possession of a firearm. In this case, the defendant is a convicted felon who has for the nine years since his release from prison maintained an impeccable record. The defendant purchases a revolver after enrolling in a mail order correspondence course to become a private detective he saw advertised in a magazine. The defendant, while in the local courthouse observing how real detectives act, told a police officer about the badge and gun he had purchased. The officer told the defendant to go home and bring the gun back to the courthouse. Upon doing so, he was arrested. Evidence was produced at trial indicating that the defendant functioned at about the level of an elementary school child. Horowitz, *supra* note 200, at 143-44.

222. *Id.* at 144. *See supra* note 181 and 205 for the form of the radical nullification instruction.

223. Horowitz, *supra* note 200, at 444.

224. *Id.*

nullification instruction.²²⁵ Thus, it informed jurors that they had the final authority to decide whether or not to apply a given law to the defendant, and that they represented the community and, therefore, it would be appropriate for them to bring into their deliberations the feelings of the community and their own feelings based on their individual conscience.²²⁶

The final variable was the challenge. In each of the cases "the prosecutor[] either did or did not remind the jurors, in both opening and closing statements, of their obligations to follow the law regardless of their personal sentiments, despite any insinuations they may hear to the contrary"²²⁷ The prosecutor then challenged the nullification argument whenever it was made by the defense. Because "the design did not permit the judge to rule directly on the objection," the judge merely told the jurors that they may consider the prosecutor's objection in their deliberations.²²⁸

The results of this study indicate that the nullification information definitely does affect juries' confidence in their verdicts.²²⁹ Regardless of whether the nullification information is issued by the judge's instructions or by the lawyer's arguments, it clearly affects the jurors' attitudes regarding the verdicts rendered in the case. When the lawyer makes the nullification argument, however, in two of the three cases it had a more significant effect on the jurors' level of confidence in the verdicts than did the judge's instruction.²³⁰

The first case in which the lawyer versus judge distinction had some impact was the drunk driving case. In this case the lawyer's nullification argument actually resulted in a more confident guilty verdict than in any of the other scenarios.²³¹ Beyond the lawyer

225. *Id.*

226. *Id.*

227. *Id.* at 444-45.

228. *Id.* at 445.

229. *Id.* at 450.

230. *Id.* at 446.

231. The following chart reflects the difference in the verdict scores in the drunk driving case depending on whether the lawyer or the judge informed the jury of the possibility of nullification. (The verdict scores operate the same in this study as in the previously discussed study. *See supra* note 209.)

<i>Nullification by Judge</i>		<i>Standard Instruction</i>	
Lawyer Nullification	None	Lawyer Nullification	None
4.83	4.67	5.17	4.50

(No challenges were made by the prosecution in these cases.)

Horowitz, *supra* note 200, at 446

versus judge distinction, this result also confirms the finding in the previously discussed study that a radical nullification instruction has the opposite of the desired effect and results in higher conviction rates in certain types of cases.²³²

The second case in which the lawyer versus judge distinction had an impact was in the illegal possession case. In this scenario, the strongest not guilty verdict resulted when both the judge in his instructions and the defense attorney in his arguments informed the jury of the possibility of nullification. The next strongest not guilty verdict resulted when the lawyer alone argued nullification. The result in that scenario was a considerably lower verdict score than when the judge alone informed the jury of their right to nullify the law.²³³

Finally, in the euthanasia case, the lawyer versus judge distinction was irrelevant when either one informed the jury of their right to nullify alone. When both the judge and the lawyer, however, informed the jury about nullification, the verdict was again a significantly stronger not guilty verdict.²³⁴

The second finding of this research is that challenges to nullification arguments sharply curtailed the tendency of the juries to nullify.²³⁵ The assertion of a challenge had an impact in all three types of cases. In the euthanasia and illegal possession cases, juries were generally less confident in their decision to acquit when prosecutors objected to nullification arguments and reminded the jury of their obligation to apply the law as explained to them by the

Thus, when the lawyer alone makes a nullification argument and there are no challenges to it, the jurors' confidence in the guilty verdict is much stronger than when the judge alone gives the nullification instruction, than when both the judge and the lawyer inform the jury about nullification, and particularly than when no nullification information at all is given to the jury.

232. *Id.* at 450.

233.

Illegal Possession

<i>Nullification by Judge</i>		<i>Standard Instruction</i>	
Lawyer Nullification	None	Lawyer Nullification	None
1.80	3.67	2.83	4.00

(No challenges were made by the prosecution in any of these cases.)

Id. at 446.

234.

Euthanasia

<i>Nullification by Judge</i>		<i>Standard Instruction</i>	
Lawyer Nullification	None	Lawyer Nullification	None
2.50	3.30	3.30	3.70

(No challenges were made by the prosecution in any of these cases.)

Id.

235. *Id.* at 451.

judge. In the drunk driving case, the juries handed down less harsh verdicts under the challenge condition.²³⁶ The objection or challenge by the prosecutor in drunk driving cases, then, would tend to alleviate the problem identified earlier of juries giving harsher verdicts than deserved when given nullification information in particular cases.²³⁷

The third finding in this study confirms a finding in Horowitz's earlier research. The study indicates that the juries which received nullification information in both the euthanasia and illegal possession cases spent less time deliberating on the evidence and more time discussing the jurors' own concepts of what was just rather than merely lawful under the circumstances.²³⁸ The juries in these cases apparently "concluded that the evidence favoring conviction was not the relevant or crucial factor" in reaching a verdict.²³⁹

In general, this study indicates that "when juries are given unfettered nullification arguments or instructions, they are more likely to act upon their sentiments or parochial biases."²⁴⁰ The source of the nullification information, whether issued by the judge or the lawyer, appears to not only affect the verdict rendered, but, in two of the three cases, also affected the juries' confidence in that verdict.²⁴¹ A challenge to nullification by the prosecutor was shown to be sufficient to curtail the juries' desire to be liberated from the evidence and reduced the juries' confidence in their ver-

236.	<i>Nullification by Judge</i>		<i>Standard Instruction</i>	
	Lawyer Null.	None	Lawyer Null.	None
<i>Drunk Driving</i>				
Challenge	4.17	4.17	4.67	4.0
None	4.83	4.67	5.17	4.50
<i>Euthanasia</i>				
Challenge	3.83	3.83	4.00	4.33
None	2.50	3.30	3.30	3.70
<i>Illegal Possession</i>				
Challenge	3.00	3.17	3.17	4.17
None	1.80	3.67	2.83	4.00

Id.

237. The cases which Horowitz judges to be prone to such a phenomenon are those in which the jury perceived the defendants as dangerous. *Id.*

238. *Id.* at 452.

239. *Id.*

240. *Id.*

241. See *supra* notes 227-30 and accompanying text.

dicts.²⁴² Finally, this study confirmed several earlier findings: first, that nullification arguments have a reverse effect in cases where the defendant is perceived as dangerous,²⁴³ and, second, that juries who receive nullification information spend less time deliberating about the evidence and more time discussing such issues as defendant characteristics, related personal experiences and concepts of justice versus lawfulness.²⁴⁴

D. Proposal

On the basis of the various benefits and problems with the legislative proposals discussed previously, if a jury nullification statute is to have any realistic chance of being enacted and of having the desired effect on jury functioning it should be worded in the following manner:²⁴⁵

IN ALL CRIMINAL TRIALS AND CIVIL TRIALS TO WHICH THE STATE OR ANY OF ITS AGENCIES IS A PARTY, THE DEFENSE MAY, AT ITS DISCRETION, INFORM THE JURORS THAT THEY HAVE THE FINAL AUTHORITY TO DECIDE WHETHER OR NOT TO APPLY A GIVEN LAW TO THE ACTS OF THE DEFENDANT ON TRIAL BEFORE THEM; THAT THE JURORS ARE THE REPRESENTATIVES OF THE COMMUNITY AND AS SUCH IT IS APPROPRIATE FOR THEM TO BRING INTO THEIR DELIBERATIONS THE FEELINGS OF THE COMMUNITY AND THEIR OWN FEELINGS BASED ON CONSCIENCE; AND, THAT NOTHING WILL PREVENT THE JURORS FROM ACQUITTING THE DEFENDANT IF THEY FEEL THAT APPLYING THE LAW IN THE PARTICULAR CIRCUMSTANCES BEFORE THEM WOULD PRODUCE AN INEQUITABLE OR UNJUST RESULT. THE SPIRIT WHICH SHOULD GUIDE THE DEFENSE ATTORNEY'S EXERCISE OF HIS/HER DISCRETION TO INFORM THE JURORS OF THEIR RIGHT TO NULLIFY THE

242. See *supra* notes 235-37 and accompanying text.

243. See *supra* notes 232-34.

244. See *supra* notes 238-39 and accompanying text.

245. The author wishes to reiterate that her support for the concept of jury nullification is limited to situations in which it may be argued that applying the law would produce an unjust result. The following proposal is worded in a manner that is believed to be consistent with this view of jury nullification.

LAW AS APPLIED IN THE CASE BEFORE THEM IS ANALOGOUS TO HIS/HER ETHICAL RESPONSIBILITIES AS AN OFFICER OF THE COURT AND MEMBER OF THE BAR, UNDER MODEL CODE 7-102(A)(1) AND (2), AND MODEL RULE 3.1, NOT TO ADVANCE A CLAIM THAT IS UNWARRANTED UNDER EXISTING LAW

There are four unique features to this legislative proposal. First, it would be limited in the scope of its application to criminal trials and civil trials to which the state or one of its agencies is a party. This is important because it serves to best promote the policies behind jury nullification. The two key purposes of jury nullification are to promote justice and to protect individuals from oppressive or overly aggressive government.²⁴⁶ If jury nullification is applied in a civil case, it will serve merely as an escape route for people who have willingly entered into agreements or who, by their negligence, have harmed another person. Jury nullification would serve as a mechanism by which such people can avoid the legal consequences of their actions. This cannot be said to promote justice and, since the government is not directly involved, such a result could not be justified as a protective measure.²⁴⁷ In criminal trials and civil trials to which the government is a party, on the other hand, the policies of justice and protection may be promoted by jury nullification. In such cases, the government is the opponent of the individual. The second policy of protection, then, is automatically served. Justice can also be promoted in such cases by jurors refusing to enforce the law as established by the government where the result is likely to be inequitable. Thus, the purposes and policies behind jury nullification are served when it is applied in criminal trials and civil trials to which the state is a party, but not in other civil trials. For this reason, the scope of applicability of the nullification instruction should be restricted.

The second unique feature of this proposed legislation is that it places the power to inform the jurors of their right to nullify the law in the hands of the defense attorney. This route, as opposed to

246. Van Dyke, *supra* note 45, at 225-27. See *supra* text accompanying notes 87-89 for a discussion of the view that reaching a just result, even if not strictly adhering to the letter of the law, is one policy behind jury nullification.

247. See *supra* notes 147-48 and accompanying text for similar arguments raised in the Texas legislative hearings against a nullification instruction applicable in all cases, civil and criminal.

the usual mechanism of requiring the judge to inform the jurors of their right to nullify in the instructions, is preferable for several reasons. First, many of the objections to the legislative proposals introduced in 1991 focused on the fact that judges felt statutes requiring them to inform jurors of their right to disregard the law placed them in a compromising position. Instead of upholding the law as they were sworn to do, the judges would now have to tell jurors they could choose to ignore this law. Many judges expressed discomfort with the apparent conflict in their duties and objected to the proposed legislation as a result.²⁴⁸ The second reason for placing the responsibility for informing jurors of their right to nullify the law on defense attorneys instead of judges was in order to allow the advancement of the argument to be discretionary without significantly increasing the problem of appeals. If a judge was given the discretion to inform jurors of the right to nullify in appropriate cases, every time the instruction was not issued the decision would be appealed. In contrast, if the defense attorney is given the discretion to advance the nullification argument in appropriate cases, there are objective standards provided in the legislation by which to measure his discretion and, therefore, to evaluate his conduct in case of appeal.

The final reason for giving the defense attorney this right to advance nullification as opposed to the judge is because empirical studies have demonstrated that a nullification argument by the lawyer is equally as and, in some cases, more effective than a nullification instruction by the judge.²⁴⁹ Since there is no significant diminution in the effect of the nullification argument when made by the attorney, placing the responsibility for advancing the nullification claim with the defense attorney would strike the proper balance. It is equally as effective while not causing judges to feel they are compromising their duties or causing a possible explosion in appeals.

The third unique feature of this proposal is that it makes the lawyer's responsibility to inform jurors of their right to nullify the law discretionary. The right to advance a nullification claim should be discretionary in criminal trials and civil trials to which the government is a party because of the results of empirical studies which show that the jury is prone to misuse this power in particu-

248. See *supra* notes 138-39 and accompanying text.

249. See *supra* notes 229-34 and accompanying text.

lar types of cases.²⁵⁰ In cases where the jury perceives the defendant as dangerous, they show a propensity to convict at a higher rate when in receipt of a nullification instruction or argument than when they haven't been informed of their right to nullify.²⁵¹ It is not appropriate or even advantageous to raise the nullification argument in all criminal trials or civil trials to which the government is a party. In order to safeguard against the tendency of the jury to misuse the power to nullify in some cases, the decision to advance the nullification argument should be placed in the defense attorney's discretion. To guide the attorney in the exercise of his discretion, the proposed legislation provides a standard which the attorney should keep in mind before raising a nullification argument. This standard is analogous to the lawyer's professional responsibility requirements as set out in Model Code 7-102(A)(1) and (2) and Model Rule 3.1.²⁵² The general idea of these rules is that a lawyer may not advance a claim or defense which is unwarranted by the facts or the law unless he can make a good faith argument for the extension, modification or reversal of the existing law. Essentially, this means that a lawyer may not raise unwarranted claims or arguments before the court.²⁵³ Thus, applying the stan-

250. See *supra* notes 209-10, 243 and accompanying text.

251. *Id.*

252. The MODEL CODE OF PROFESSIONAL RESPONSIBILITY DR 7-102 (1980): Representing a Client Within the Bounds of the Law states:

(A) In his representation of a client, a lawyer shall not:

(1) File a suit, assert a position, conduct a defense, or take other action on behalf of his client when he knows or when it is obvious that such action would serve merely to harass or maliciously injure another.

(2) Knowingly advance a claim or defense that is unwarranted under existing law, except that he may advance such claim or defense if it can be supported by good faith argument for an extension, modification or reversal of existing law.

The MODEL RULES OF PROFESSIONAL CONDUCT Rule 3.1 (1983): Meritorious Claims and Contentions states:

A lawyer shall not bring or defend a proceeding, or assert or controvert an issue therein, unless there is a basis for doing so that is not frivolous, which includes a good faith argument for an extension, modification or reversal of existing law. A lawyer for the defendant in a criminal proceeding, or the respondent in a proceeding that could result in incarceration, may nevertheless so defend the proceeding as to require that every element of the case be established.

253. See MODEL RULES OF PROFESSIONAL CONDUCT Rule 3.1 cmt. (1983) (stating that an action is frivolous "if the lawyer is unable either to make a good faith argument on the merits of the action taken or to support the action taken by a good faith argument for an extension, modification or reversal of existing law").

standard set forth in the rules of professional responsibility and made applicable by the statute to the jury's power to nullify, a lawyer should not advance a claim of nullification when it is unwarranted by the facts and law of the particular case. The standards on professional responsibility, then, provide one yardstick by which a lawyer can measure whether to exercise his discretion to advance a claim for jury nullification.

There is, however, another, perhaps more practical, guide for the lawyer's exercise of discretion. This guide is common sense. Since several studies have shown that when nullification is advanced in an inappropriate case (where the defendant is perceived as dangerous by the jury), juries are prone to judge the defendant more harshly, a skillful attorney will not attempt to raise the nullification argument except when it is truly warranted by the facts.²⁵⁴ The fact that studies show that jurors in such cases are more likely to convict and to judge the defendant more harshly overall when in receipt of the nullification information should act as a very powerful deterrent for lawyers who would advance the claim in every case. In addition, it would probably deter lawyers from arguing nullification even in somewhat questionable cases, where the situation is not completely right for nullification. The end result should be that skillful lawyers will only argue nullification to the jury in cases where nullification is truly warranted by the facts of the case.

The final unique feature of this proposal is that it uses the more specific jury nullification instruction as opposed to the rather vague language employed by Maryland and Indiana in their present instructions. The empirical studies presented previously reveal that jurors given the more specific nullification instruction acquitted at a significantly higher rate in appropriate cases than jurors who received the Maryland instructions. In fact, jurors given the vague nullification instruction of Maryland differed only very slightly in their acquittal rate from jurors who were not given any nullification information at all.²⁵⁵ In addition, the survey conducted of Maryland judges confirms that, at least in the minds of the judges, the vague nullification instruction has no real effect on verdicts.²⁵⁶ If the point of the nullification argument is not to simply

254. See *supra* notes 209-10, 243 and accompanying text.

255. See *supra* note 209.

256. See *supra* notes 172-74 and accompanying text (discussing the perceived impact of the nullification instruction in Maryland on jury verdicts).

acknowledge the jurors' supposedly historical right to judge the law as well as the facts, but to actually encourage jurors to promote justice and protect individuals from government oppression by their verdicts, then the more specific jury nullification information is necessary to achieve this result.

Although these features appear to rectify most of the major concerns regarding the legislative proposals discussed earlier, elements present in some of the other proposals which proved problematic have also been eliminated.²⁵⁷ For example, jury selection procedures and hierarchy of statutes provisions have not been included. Many objections were made to these provisions and they are not necessary to the proper functioning of the instruction. This proposal is also a relatively simple expression of the law rather than a detailed attempt to cover all possible issues which may arise under it. This characteristic has proved beneficial in both Maryland and Indiana by providing the courts with the flexibility to establish the appropriate balance between fulfillment of the jury's role and protection of the defendant's rights.²⁵⁸

Some of the other issues raised in opposition to the proposed legislation are more accurately described as objections to the concept of jury nullification. Whether the right to nullify the law existed at common law, whether jury nullification impedes the democratic process, and whether it would cause serious consistency problems are all issues which cannot be resolved in a statute.

IV CONCLUSION

Whether or not one accepts the concept of jury nullification as supported by history and, therefore, an integral part of the American democratic system of government, or even simply as a desirable mechanism by which community sentiment can be injected into the judicial process, in reality jurors will nullify the law when they are unable, in good conscience, to condemn a person's acts.²⁵⁹ Although this tendency has probably existed for a long time, since the politically turbulent 1960s and 1970s more and more people have advocated legitimizing this tendency by informing jurors directly that they not only have the *power* to nullify the

257. See *supra* notes 126-62 and accompanying text.

258. See *supra* notes 186-89 and accompanying text.

259. See *supra* note 7 and accompanying text.

law, but the *right* to do so as well.²⁶⁰ This movement peaked in recent years with the introduction of jury nullification legislation in several states.²⁶¹ These proposals, however, have all been deficient in one manner or another.²⁶²

By comparing the proposed legislation and the documented objections to these proposals with the experiences of Maryland and Indiana, which currently have jury nullification provisions, it became obvious that one of the greatest drawbacks of the proposed legislation was the pervasive detail included in the proposals.²⁶³ The empirical studies on the function of jury nullification instructions then revealed that, in order to liberate juries sufficiently to promote justice through their verdicts, a very explicit nullification instruction was needed.²⁶⁴ The proposed legislation accounts for these factors and provides for a jury nullification scheme which will encourage jurors to consider notions of justice in reaching a verdict by informing them of their right to nullify the law in explicit language, while avoiding the pervasive details which have proven so troublesome in recent proposals.²⁶⁵

The purpose of this proposal is to provide an alternative model for future jury nullification statutes. The unique features of this proposal are an attempt to resolve many of the common objections to and actual problems with current nullification proposals while, simultaneously, promoting the true purposes of jury nullification. Although this proposal cannot resolve the underlying philosophical problems many have with the concept of jury nullification, this proposal is a model which, if the philosophical doubts against jury nullification are ever resolved, will work better in practice and more efficiently achieve the desired results than any of the statutes which have been proposed thus far.

M. KRISTINE CREAGAN

260. See *supra* notes 90-92 and accompanying text.

261. See *supra* notes 93-125 (presenting the legislation proposed in these states).

262. See *supra* notes 126-62.

263. See *supra* notes 186-97.

264. See *supra* notes 206-17.

265. See *supra* notes 245-58.