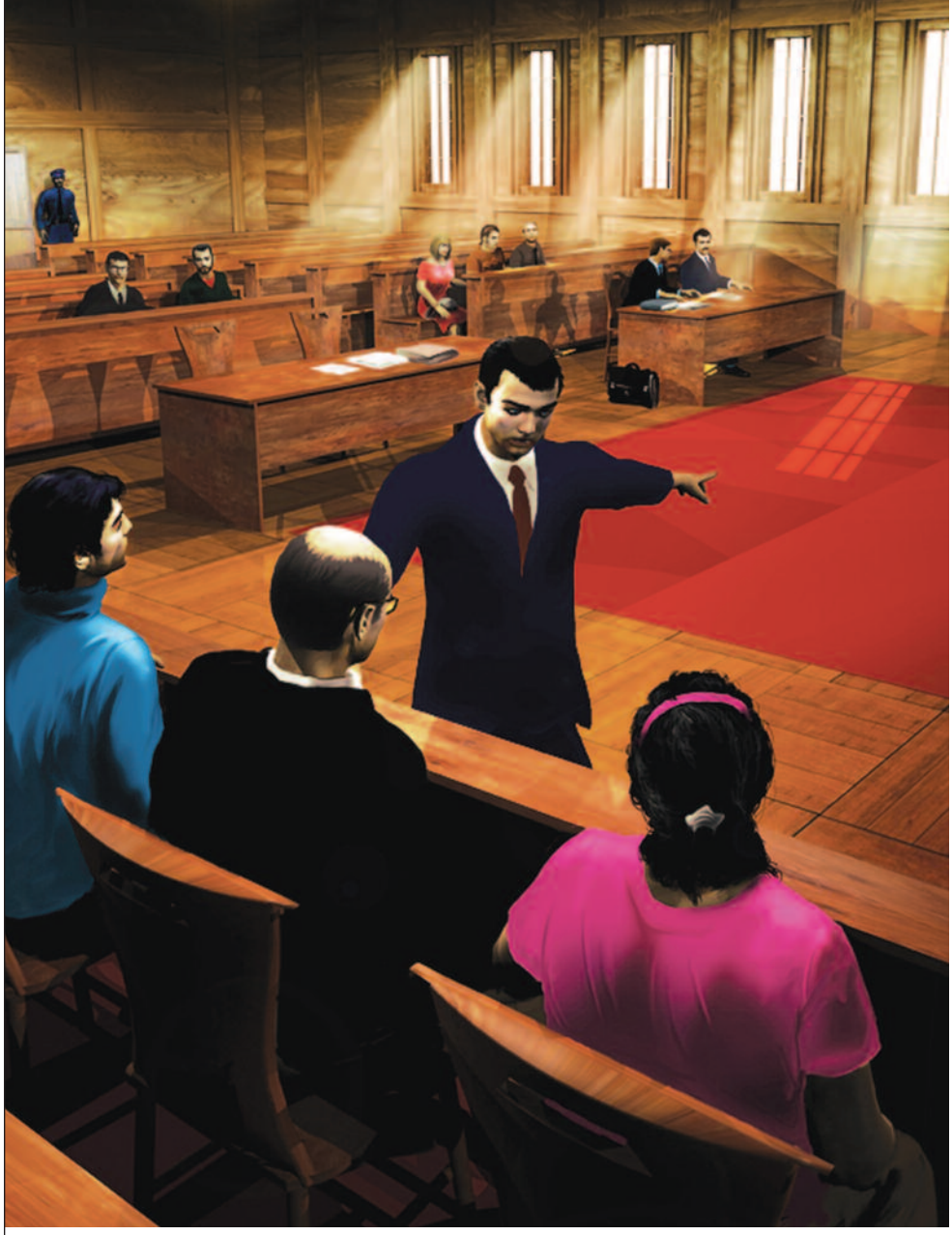

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Independent Juries: Liberty's Last Defense

BY PATRICK T. BARONE & BRITTANI N. BALDWIN

There is no dispute that American jurors have the right and responsibility of judging the facts in a criminal trial. But what about the law? Should they also be allowed to judge a law or societal practice that they believe to be unjust by returning a not guilty verdict when, perhaps, all of the elements of a crime have been proven?

A typical jury instruction in a criminal case may instruct that the jury may only decide questions of fact, and must take the law as the judge gives it. Jurors are instructed that they can only decide the truth and weight of the facts of the case, and apply the judge's law to these facts.

When a jury fails to follow this instruction, this act of defiance is called "jury nullification."[1] Jury nullification is the refusal of jurors to convict a defendant despite their belief in the defendant's guilt.[2] The jury is thus said to "judge the law," though more accurately the jury is judging the law's specific application, not its general validity. This divisive practice, once accepted, has become the unspoken secret of the American jury deliberation room. No longer may juries freely disregard laws that they believe to be unjust.

Jury Nullification: A Prominent Component of Early American Criminal Law

What options do jurors have when they disagree with a law, but recognize that the legal elements have been met? At the birth of the United States, the Founding Fathers asked themselves this very question, and although "jury nullification" had not yet been named, the concept easily became an integral part of the American criminal justice system.

When the Founding Fathers convened at the Constitutional Convention of 1774, 12 of the states represented had already drafted state constitutions.[3] Of the various provisions included in these constitutions, the only one that had been included in all was the right of a criminal defendant to a trial by jury.[4] Given the role that juries had played in resisting English authority, this was hardly surprising at the time.[5]

During the pre-Revolutionary period, it was not uncommon for juries to act as the voice of the people, using their implied authority of nullification to free defendants who opposed involvement of the British and convicting those who sympathized with it.[6] In fact, it might be persuasively argued that jury nullification was the raison d'être of the constitutional right to trial by jury.

The unrest of the people in those pre-Revolutionary times was clearly evidenced by a series of trials involving seditious libel. In the most famous of those trials, none other than Andrew Hamilton represented accused printer John Peter Zenger.[7] Zenger was the printer of the *New York Weekly Journal*, a politically charged publication. In one edition, Zenger criticized the governor for arbitrarily revoking defendants' right to trial by jury.[8] During

Zenger's trial, Hamilton had this to say to the judge, who insisted that the jury may only determine the issues of fact[9]:

> I know … the jury may do so; but I do likewise know they may do otherwise. I know they have the right beyond all dispute to determine both the law and the fact, and where they do not doubt of the law, they ought to do so. … [L]eaving it to the judgment of the Court whether the words are libelous or not in effect renders juries useless.[10]

The enduring conviction of the people to retain trial by jury was again made clear in 1776 when the Declaration of Independence listed a grievance against King George III for "depriving us … of the benefits of trial by jury."[11] Fifteen years later, with the ratification of the Sixth Amendment to the U.S. Constitution, "the right to a speedy and public trial, by an impartial jury"[12] finally and irrevocably became available to those accused in a criminal prosecution.

This right to trial by jury was held so dear that of all the rights the Constitution guarantees to the people, it is the only one that appears in both the original Constitution and the Bill of Rights.[13] Additionally, three of the amendments in the Bill of Rights make mention of trial by jury.[14] Yale Constitutional Law professor Akhil Reed Amar has accurately noted that "juries were at the heart of the Bill of Rights."[15]

It is clear that jury nullification was an important component of early American litigation.[16] The importance of this right was certainly recognized by the Founders[17] and, for a time, echoed vigorously by the Supreme Court.[18]

Proponents of the concept have struggled to understand what made it such an integral part of early American law, only to become a pariah of modern litigation. Some believe that it was simply a matter of necessity — lawyers and even law books were in short supply. Later, however, it seems that that this power of the jury became a symbol of trust in the public's sense of justice.[19]

Early in its history, the U.S. Supreme Court heard a very small number of jury trials. One of them, in 1794, was *Georgia v. Brailsford*.[20] In *Brailsford*, jurors were told that they were presumed to be the best judges of fact while judges were presumed to be the best judges of the law.[21] However, they were also told that "it must be observed, that by the same law, which recognizes this reasonable distribution of jurisdiction, you have nevertheless a right to take upon yourselves to judge of both, and to determine the law as well as the fact in controversy."[22]

Jury Nullification Through the Ages

Andrew J. Parmenter interestingly explains the history of jury nullification in the United States by describing various centuries of fluctuation.[23] Parmenter's description is based on a review of the case law during each period. Thus, the period of 1789–1895 is called "The Century of the Jury."[24] Parmenter explains that "if there was any doubt about the jury's right to judge the law after the adoption of the Sixth Amendment, this doubt was quickly laid to rest in the Supreme Court decision of *Georgia v. Brailsford*, where Chief Justice John Jay instructed that juries have the right to determine the law as well as the fact in controversy."[25]

The decision in the 1895 case, *Sparf & Hansen v. United States*,[26] brought with it an end to "The Century of the Jury," and ushered in "The Century of the Judge (1886-1990)."[27] In *Sparf*, Justice Harlan ended almost a hundred years of relatively free exercise or jury nullification by holding that the court's determination of the law and the jury's determination of the facts "cannot be confounded or disregarded without endangering the stability of public justice, as well as the security of private and personal rights."[28]

After the decision written by Justice Harlan in *Sparf*, the use of jury nullification decreased drastically.[29] Courts seemed eager to end what many considered an "archaic, outmoded, and atrocious" practice.[30] But perhaps a more careful interpretation of *Sparf* was in order. The holding of the Court did not preclude judges from giving nullification orders in all circumstances; it only stated that it was not reversible error for an attorney to instruct the jury that it would be wrong to disregard the court's instruction of law.[31]

Parmenter goes on to describe the 1990s as "A Decade of Debate," citing nullification verdicts handed out in the Rodney King,[32] O.J. Simpson,[33] and Jack Kevorkian[34] cases. In the Simpson case, the defendant's attorney, Johnny Cochran, was well aware that the *Sparf* holding did not expressly prevent jury nullification, and he pleaded with the jury to send a message:

> You … police the police. You police them by your verdict. You are the ones to send the message. Nobody else is going to do it in this society. They don't have the courage. Nobody has the courage. They have a bunch of people running around with no courage to do what is right, except individual citizens. You … are the ones in war; you are the ones on the front line.[35]

It would be very difficult to say with certainty whether the jury acquitted O.J. Simpson because the prosecution failed to prove its case, or if it was an example of "symbolic" nullification. The decision of the case was so polarizing that many people remember where they were when they heard the verdict. It might well be argued that the O.J. Simpson verdict was the most well-known example of jury nullification in recent times.

So We Know Juries Nullify, but Why?

In addressing the issue of jury nullification, young lawyer Arie Rubenstein observed that nullification can and does happen for any number of reasons.[36] He recognized and classified the most common. "Classical" jury nullification is, perhaps, the type that first comes to mind when a lawyer considers the concept. Classical jury nullification occurs when the jury believes that the law itself, or perhaps the mandated punishment, is not just.[37] "As applied" jury nullification is a little bit different. Jurors do not believe that the law itself is unjust, just its application in the case at bar.[38] Most people have a sense of how they believe their laws should be applied, and deviation from these preconceptions does not always sit well with juries. The most extreme example of this in the realm of jury nullification is "symbolic" nullification. When this happens, the members of the jury do not necessarily disagree with the law or its application; their decision, instead, is intended

Why has jury nullification fallen out of favor with the courts?

solely to send a message. This message may be directed at the court participants, the government, or society in general. Oft-argued as an example of symbolic jury nullification is the acquittal of O.J. Simpson.[39] It is believed by some that the intent of the jury was to send a strong message opposing improper police conduct.[40]

Early in U.S. history, jury nullification was at the very heart of the desire to maintain the right to trial by jury. Nullification was seen as a way to unhitch the yoke of British tyranny from the necks of the colonists. But as the United States grew secure in its own laws, jury nullification became less significant. And while a jury's power to nullify may currently be on the wane, a jury yet has the power to render a verdict "in the teeth of both law and facts."[41]

As a Nation "For the People, by the People," Jury Nullification Is Still Necessary

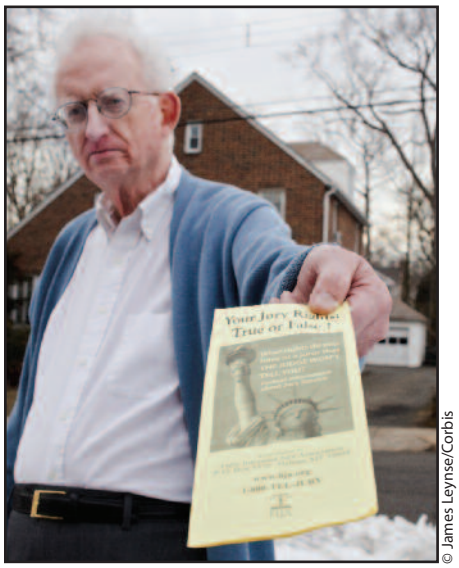
It is common knowledge that juries are responsible for returning the verdict, but it is usually the province of law schools to teach attorneys the rules that jurors must follow to reach that verdict. How often do lawyers think about, much less really understand, the constitutional role the jury is fulfilling? Furthermore, why did the Founders consider the right to a jury trial so essential to a properly limited government?

To answer these questions, it is helpful to remember that the U.S. government is made up of three co-equal entities — the judicial, executive, and legislative branches.[42] A system of checks and balances ensures that these branches do not grow too powerful or otherwise abuse their powers.[43] The jury system is one of these checks and balances.

Because the government exists to serve the people, there has always been a question of what role citizens may directly play in their own governance. On this topic, Thomas Jefferson wrote: "Were I called upon to decide, whether the people had best be omitted in the legislative or judiciary department, I would say it is better to leave them out of the legislative. The execution of the laws is more important than the making of them."[44]

It would seem that the final act in this "execution" of the criminal law happens when the jury returns its verdict. Thus, as Jefferson suggested, jury service is a way for citizens to directly participate in the execution, rather than the making, of laws. If Jefferson's premise is accepted, it seems that criminal juries are a sort of hybrid, possessing the ability to judge the law and in doing so determine its appropriate execution. So how much influence can, or should, the judiciary have in limiting or otherwise influencing the jury's right to nullify? Said differently, as "keepers of the law," what role do judges have in explaining or denying nullification?

Proponents of jury nullification feel that it should be permissible to inform the jury of their right to nullify,[45] especially in cases where defendants may be technically guilty but are morally blameless.[46] Those opposed to jury nullification have argued that juries are not savvy enough to make findings of law. But research suggests that juries are more sophisticated than the court might assume.[47]



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Julian P. Heicklen, 78, an advocate for jury nullification, at his home in New Jersey. He believes that juries can come to a verdict in spite of the evidence or instructions of a judge. After handing out pamphlets outside courthouses, Heicklen was indicted for jury tampering.

One of the foremost proponents of jury nullification is Michael Dann, a retired Arizona judge. Judge Dann feels that jury instructions are currently designed to prevent juries from exercising their prerogative to vote their conscience.[48] In fact, a recent study found that 75 percent of Americans polled would indeed vote their conscience if they felt that following jury instructions would lead to an unjust verdict.[49] Juries are instructed that they must convict if the applicable standard of proof is attained,[50] but this is not the only option. Juries have extraordinary latitude in the making of their decisions. There would be no legal consequence to them returning a not guilty verdict.[51]

Why then, when jury nullification has had such an enduring and accepted role in criminal trials, has it fallen so drastically out of favor with the courts? Today, juries will not be told that they have the power to nullify the law. Lawyers and judges in the modern era must agree on the law that is to be applied; agree to a general meaning of that law; and, through jury instructions, convey both to the jury. It is vehemently argued that there should be no mention to members of the jury of their ability to consider the option of nullification. Any deviation from this model is met with, at the very least, apprehension. And sometimes the reaction is much more hostile.

In 2011, New Jersey resident Julian Heicklen was indicted on charges of jury tampering for handing out pamphlets on the steps of the courthouse and telling passersby about the option of jury nullification.[52] The 78-year-old retired Pennsylvania State University chemistry professor made clear that he never targeted actual jurors in ongoing cases.[53] Instead, Heicklen would simply stand on the steps handing out literature to anyone who wanted it, hoping that there might be jurors among them.[54] While the prosecutors on the case refused to comment, one former prosecutor stated that Heicklen's activities could confuse and mislead jurors.[55]

Maintaining Ethics When Using Jury Nullification: It Can Be Done

To see the harm that reckless jury nullification can cause, one need only look back 50 or 60 years. The Civil Rights Era became a clear and resounding example of jury nullification at its worst, when racist Southerners refused to convict defendants who had perpetrated heinous crimes against civil rights activists. There can be no argument that care must be taken when considering nullification, because juries can be used to enhance and augment the power of the elite rather than to limit it.

With this proviso, however, jury nullification can be a critical and necessary limitation on a legislative branch of government bent on promulgating, and a judiciary bent on enforcing, ever more overreaching criminal laws — including an increasing plethora of intentless crimes and those in which the government attempts to proscribe behavior that is not obviously seen by the public at large as dangerous or criminal.

Determining a jurisdiction's position

on the issue of whether to instruct jurors of their ability to exercise nullification is often as simple as typing a few words into Lexis or Westlaw. It is more difficult, perhaps, to know if and when it is ethical.

It would be rash for a defense attorney to argue that nullification is appropriate in every case. It is a practice that must be used and considered only in the factual context of a particular case or defendant. Consider, for example, an article written by law professor Paul Butler. In his article entitled *Racially Based Jury Nullification: Black Power in the Criminal Justice System,*[56] Professor Butler argued that "the race of a black defendant is sometimes a legally and morally appropriate factor for jurors to consider in reaching a verdict of not guilty or for an individual juror to consider in refusing to vote for conviction."[57] While the article did seem to have the benefit of bringing the issue of nullification to the attention of courts across the country, it was met with a great deal of apprehension. Fearful, perhaps, of its reckless application, courts became eager to establish precedent that nullification would not be tolerated. In *United States v. Thomas*, the court made clear that "[n]ullification is, by definition, a violation of a juror's oath to apply the law as instructed by the court."[58]

Jury nullification can be a critical and necessary limitation on overreaching criminal laws.

Since nullification has been considered a "violation of a juror's oath,"[59] and it is well known that "neither the court nor counsel should encourage jurors to violate their oath,"[60] practitioners must take care when attempting to utilize jury nullification. A lawyer's attempt (often in closing argument) must strike a perfect balance between not "mak[ing] arguments calculated to appeal to the prejudices of the jury"[61] and fulfilling the foremost obligation to the client — "actin[ing] with commitment and dedication to the interests of the client and with zeal in advocacy upon the client's behalf."[62]

Because there are very few states that allow affirmative nullification arguments or instructions, informing members of the jury of their ability to nullify must be done with some finesse. When appropriate, it is the zealous advocate's obligation to inform the jury that improper or even immoral prosecutions do not have to be tolerated. They must be told that the decision of what is improper or immoral can be their decision to make.

In a Senate hearing held in October 2011, Supreme Court Justice Antonin Scalia was asked about his opinion of the jury in checking governmental power. He responded that it would not be inappropriate for jurors to "ignore the law" if the law "is producing terrible results."[63] The people of the United States, in their role as jurors, have found that on a number of occasions, "terrible results" were indeed being produced. Jury nullification has continued, throughout history, to right society's perception of wrong. Northern jurors used their authority to nullify when they refused to convict runaway slaves under the fugitive slave laws. Later, jurors were largely responsible for the end of

Prohibition. More recently, American jurors have "judged the law" criminalizing homosexual conduct by refusing to convict citizens based on consensual conduct that happened in one's home. In such cases nullification ought to be embraced. Armed with this historical perspective, defense counsel can help members of the jury understand that they are indeed liberty's last defense.

Notes

1. *United States v. Powell*, 469 U.S. 57, 65 (1984).
2. *Id.*
3. Leonard W. Levy, Essays on the Making of the Constitution 258, 269 (2d ed. 1987).
4. *Id.*
5. Albert W. Alschuler, *A Brief History of Criminal Jury in the United States*, 61 U. Chi. L. Rev. 867, 871 (1994).
6. *Id.* at 874.
7. James Alexander, A Brief Narrative of the Case and Trial of John Peter Zenger, Printer of the New York Weekly Journal (1963).
8. *Id.*
9. *Id.* at 78 (Chief Justice DeLancey stated that "the jury may find that Zenger printed and published those papers, and leave it to the Court to judge whether they are libelous; you know this is very common; it is the nature of a special verdict, where the jury leave the matter of law to the Court.").
10. *Id.*
11. Declaration of Independence, 1 Stat. 1 (1776).
12. USCA Const. amend. VI-Jury Trials.
13. *See* U.S. Const. art. III, § 2, cl. 3 ("The trial of all Crimes … shall be by jury"); *id.* amend. VI ("In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed[.]").
14. U.S. Const. amend. V, VI, VII.
15. Akhil Reed Amar, *The Bill of Rights as a Constitution*, 100 Yale L.J. 1131, 1183 (1991).
16. *See supra* note 4.
17. *See* Alan Scheflin & Jon Van Dyke, *Jury Nullification: The Contours of a Controversy*, Law & Contempt. Probs. 51, 57-58 (Autumn 1980) (discussing the acceptance of nullification by the Founders).
18. *See infra*, note 20 and accompanying text.
19. *See* Richard E. Ellis, The Jeffersonian Crisis: Court and Politics in the Young Republic 115 (1971) (citing an early New Hampshire case in which the justice very deferentially instructed the jury that "[a] clear head and an honest heart are [worth] more than all the law of the lawyers").
20. *Georgia v. Brailsford*, 3 U.S. 1 (1794).
21. *Id.* at 4.
22. *Id.*
23. *See generally* Andrew J. Parmenter, *Nullifying the Jury: 'The Judicial Oligarchy' Declares War on Jury Nullification*, 46 Washburn L.J. 379 (2007).
24. *Id.* at 385.
25. *Id.*
26. *Sparf v. United States*, 156 U.S. 51 (1895).
27. Parmenter, *supra* note 23, at 385.
28. *Id.* at 107.
29. Many states suddenly struck down the practice of informing juries that they could judge the law as well as the facts. *See, e.g., Pierson v. States*, 12 Ala. 149 (1847); *Pleasant v. State*, 13 Ark. 360 (1852); and *State v. Buckley*, 40 Conn. 246 (1873).
30. Clay S. Conrad, *Jury Nullification as a Defense Strategy*, 2 Tex F. on C.L. & C.R. 1, 15 (1997).
31. *Sparf*, 156 U.S. at 106.
32. Parmenter, *supra* note 23, at 393.
33. *Id.* at 394.
34. *Id.* at 393.
35. John T. Reed, Comment, *Penn, Zender, and O.J.: Jury Nullification — Justice of the 'Wacko Fringe's' Attempt to Further It's Anti-Government Agenda?*, 34 Duq. L. Rev. 1125, 1125 (1996).
36. Arie M. Rubenstein, *Verdicts of Conscience: Nullification and the Modern Jury Trial*, 106 Colum. L. Rev. 959, 962 (2006).
37. *Id.*
38. *Id.*
39. *California v. Simpson*, Case No. BA097211 (Los Angeles Cnty., Cal. Sup. Ct., Oct. 3, 1995) (unpublished).
40. *See* Irwin A. Horowitz, *Jury Nullification: Legal and Psychological Perspectives*, 66 Brook. L. Rev. 1207, 1211 (2001).
41. *Horning v. District of Columbia*, 254 U.S. 135, 138 (1920).
42. *Compare* U.S. Const. art. I (describing the role of Congress), *id.* art. II (describing the role of the president), and *Id.* art. III (describing the role of the judiciary).
43. *Id.*
44. Letter of Jefferson to L'Abbe Armond, July 19, 1789, in 3 Works of Thomas Jefferson 81, 82 (Wash. ed. 1854).
45. *See generally* Clay S. Conrad, Jury Nullification: The Evolution of a Doctrine 167-205 (1998).
46. *Id.* at 171-73.
47. Alan W. Scheflin, *Jury Nullification: The Right to Say No*, 45 S. Cal. L. Rev. 168, 170 (1972).
48. B. Michael Dann, *'Must Find the Defendant Guilty,' Jury Instructions Violate the Sixth Amendment*, 91 Judicature 12 (July-Aug. 2007).
49. Will Lester, *Many Would Use Own Judgment as Jurors*, The Commercial Appeal (Memphis), Oct. 24, 1995, at A5.
50. *Dann* at 14.
51. *Id.*
52. Benjamin Weiser, *Jury Nullification Advocate Is Indicted*, N.Y. Times, Feb. 25, 2011, http://www.nytimes.com/2011/02/26/nyregion/26jury.html?_r=2&hp& (last visited Nov. 2, 2012).
53. *Id.*
54. *Id.*
55. *Id.*
56. Paul Butler, *Racially Based Jury Nullification: Black Power in the Criminal Justice System*, 105 Yale L.J. 677 (1995).
57. *Id.* at 679.
58. *United States v. Thomas*, 116 F.3d 606, 614 (2d Cir. 1997).
59. *Id.*
60. *United States v. Trujilo*, 714 F.2d 102, 106 (11th Cir. 1983).
61. American Bar Association Standards for Criminal Justice, 4-7.7.
62. Model Rules of Prof'l Conduct R. 1.3, cmt. 1.
63. Paul Butler, *Jurors Need to Know That They Can Say No*, N.Y. Times, Dec. 20, 2011, http:/www.nytimes.com/2011/12/21/opinion/jurors-can-say-no.html?_r=1&emc=eta1 (last visited April 16, 2011).

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