

Jury Nullification: Its History and Practice

by Mary Claire Mulligan

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Throughout American history, jury nullification has tracked public sentiment. However, courts have not always embraced the concept, usually holding that, although it is within a jury's power to nullify, the jury has no right to be told of this power.

A jury has the power to nullify the law—to refuse to apply it—by voting for acquittal instead of conviction, in spite of a defendant's apparent legal guilt. Sometimes called “jury independence,” nullification often is based on a belief that the law, either generally or as applied in the specific case, is unfair, and that a conviction would be unjust. Nullification may result in outright acquittal or in a hung jury, which is likely to be more common, inasmuch as only one juror's decision to nullify is sufficient to cause a hung jury in a criminal case.

The use of jury nullification has ebbed and flowed since it was introduced in the United States in 1735. Jury nullification has provided a means by which jurors may oppose unpopular laws and overreaching prosecutions. However, it is difficult to say definitively whether a “not guilty” verdict is a result of nullification, because the deliberative process is deemed sacrosanct and the secrecy of the jury room is rarely invaded.

This article discusses the history of jury nullification in the United States and specifically in Colorado. It traces nullification law, reviews studies regarding why jurors nullify, and provides some practical considerations for the criminal lawyer.

Jury Nullification Arrives In America

The defendant, an immigrant who had been languishing in jail for months,

admitted his guilt but refused to name his accomplices in exchange for leniency. The prosecution's evidence was overwhelming. The victim was the Governor, who promptly appointed two trial judges to the case (as if one weren't enough). The original team of defense lawyers had been disbarred as a “reward” for their failed attempt to recuse the trial judges. Now the client was looking for new representation.

In the first documented case of jury nullification in America, an elderly Philadelphia lawyer named Andrew Hamilton won this disaster of a case in 1735.¹ The client was John Peter Zenger, who was charged with seditious libel for printing negative articles about the colonial Governor of New York. The *Zenger* case has been called the “first move in the American Revolution.”²

Many colonial New Yorkers considered the English Governor, William Cosby, to be greedy and corrupt. A group of them founded a newspaper, *The New York Weekly Journal*, primarily to oppose Cosby and his policies, and Zenger was hired as its publisher.³ Much to Cosby's dismay, the *Weekly Journal* sold like hotcakes. To shut it down, Chief Justice James DeLancey of New York, a Cosby appointee, twice tried and failed to indict Zenger for libel. The Governor then tried to get the colonial legislature to order Zenger's prosecution, again unsuccessfully. Finally, Cosby's hand-picked “Council” issued a warrant for Zenger's arrest, and he was eventually charged

by information—without a grand jury's review.

Unluckily for Zenger, DeLancey was one of the trial judges. He disbarred Zenger's original defense team and appointed in its place a young lawyer of his choosing. The clerk of the court and the sheriff tried to pack the jury with Cosby supporters.⁴

In a move worthy of Perry Mason,⁵ after the court-appointed counsel's opening statement, an elderly and bewigged lawyer was helped into a seat at counsel table. To the surprise of the judges and the assembled public, Andrew Hamilton announced that he would represent the defendant.⁶ Hamilton, a former attorney general of Pennsylvania, recorder of Philadelphia, and speaker of the Pennsylvania Assembly, was considered the ablest lawyer in the colonies.

At the time, the judge or judges in a libel trial would decide whether a writing was legally libelous. Thus, the only jury question was whether the defendant had published the alleged libel. The courts of that era did not recognize truth as a defense.

Hamilton immediately electrified the case by admitting that his client printed and published the *Weekly Journal*, throwing the prosecution's plans into disarray. He then stated that in Zenger's defense, he would prove the truth of the statements in the newspapers. Justice DeLancey did not want a parade of witnesses swearing to the corruptness and ineptitude of his patron, the Governor. Therefore, he ordered Hamilton not to argue truth as a defense. Justice DeLancey then instructed the jury that, because the facts of the case were clear, their duty under the law was to find the defendant guilty.

Hamilton argued that free men must defend themselves against tyranny, and that it was each juror's duty to follow his own conscience and not the judge's. He asked them to decide that the newspaper articles were not libelous in spite of the court's instruction that they were.⁷ Moved by Hamilton's eloquent arguments, the jury acquitted Zenger. This act by the jury signaled the beginnings in this country of both freedom of the press and jury nullification.

Jury Nullification in the United States

In 1794, in *Georgia v. Brailsford*,⁸ Chief Justice John Jay presided over a jury trial before the U.S. Supreme Court. He instructed the jury:

[O]n questions of fact, it is the province of the jury, on questions of law, it is the province of the court to decide. But 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.⁹

Thus, the Supreme Court acknowledged nullification as an acceptable practice.

However, the lower courts that considered the issue of nullification were ambivalent about its legality. In an 1804 case, *People v. Crosswell*,¹⁰ Alexander Hamilton (no relation to Andrew) defended a man who had been convicted of libeling Hamilton's old political rival, President Thomas Jefferson. Hamilton argued for a new trial on the basis that the trial court improperly instructed the jury that they could not judge the law of seditious libel—the same

charge Zenger faced. The New York Supreme Court was evenly split on whether Hamilton was correct.¹¹

Nullification began to fall into disfavor as revolutionary fervor faded with time. As early as 1820, two Quakers were barred from serving on a Rhode Island jury because the court believed that their religious beliefs would lead them to acquit where death was the only possible punishment.¹² Faced with juries acquitting guilty, but sympathetic, defendants to spare their lives, states began establishing different degrees of murder and eliminating mandatory capital punishment. In 1837, Tennessee became the first state to allow jurors to decide whether the death penalty was an appropriate sentence.¹³

The first major case in this country to deny jurors the right to nullify was *United States v. Battiste*,¹⁴ in which the U.S. District Court in Massachusetts held that

The Trial of William Penn

William Penn, better known to Americans as the founder of Pennsylvania, had a history of arrests in England for espousing his Quaker beliefs, which were extremely unpopular with the British government.¹ In 1670 London, he protested the authorities' closing of the Quaker meeting house by taking to the streets to preach. He was arrested along with a colleague named William Mead.²

Penn and Mead questioned the legality of their indictment when they were forced to represent themselves at trial. Castigating them for their impudence in seeking to "teach the Court what Law is," the judge told Penn several times to "stop his Mouth," before finally throwing him out of the courtroom. The judge then admonished Mead, "You deserve to have your Tongue cut out."³ (And we think we have tough judges!)

The jury eventually found the two "guilty of speaking in Gracechurch Street," but refused to include the words "to an unlawful assembly."⁴ The trial court would not accept this verdict; the Recorder of the Court stated, "Gentlemen, you shall not be dismissed till we have a Verdict, that the Court will accept; and you shall be lock'd up, without Meat, Drink, Fire, and Tobacco; you shall not think thus to abuse the Court; we will have a Verdict, by the help of God, or you shall starve for it."⁵ The court then adjourned until 7:00 the next morning, locking in the jury without "so much as a Chamberpot, tho' desired."⁶ The verdict remained the same the next morning and the next. Upon the court's refusal to accept this verdict, the foreman declared that the jury found both defendants not guilty.⁷ In response, the judge fined each juror forty marks and imprisoned them all for their failure to pay.⁸

NOTES

1. Penn and Mead, *The Tryal of William Penn and William Mead for Causing a Tumult* (first published 1719), Don C. Seitz, ed. (Boston, MA: Marshall Jones Co., 1919).

2. Conrad, *Jury Nullification: The Evolution of a Doctrine* (Durham, NC: Carolina Academic Press, 1998) at 25.

3. Penn and Mead, *supra*, note 1 at 11-17.

4. *Id.* at 23.

5. *Id.* at 24.

6. *Id.* at 20-26.

7. Postgate, *Murder, Piracy and Treason: A Selection of Notable English Trials* (Boston, MA: Houghton Mifflin Co., 1925) at 53.

8. Penn and Mead, *supra*, note 1 at 34. Bushel (or Bushell), a wealthy man, applied for a writ of *habeas corpus*, which declared illegal the trial court's order punishing the jurors. *Bushell's Case*, 6 Howell's State Trials 999 (1670).

although jurors had the power to nullify, they did not have the moral right to do so. The court stated that jury nullification led to uncertainty, because it would be impossible to ascertain the jury's interpretation of the law, and there was no remedy for a party injured by improper nullification.¹⁵

Nevertheless, some states clung to jury nullification as a valid defense of the individual against the government. In 1820, Connecticut legislators passed a law requiring that the judge could only state his "opinion" of the criminal law.¹⁶ In 1827, the Illinois criminal code provided that juries "shall be judges of the law and fact."¹⁷ Maryland and Indiana both revised their state constitutions in 1851 to guarantee a jury's right to nullify.¹⁸

By the mid-1800s, jury nullification emerged as a defense to certain types of unpopular charges. Northern jurors routinely nullified the Fugitive Slave Act of 1850 and acquitted those who assisted escaping slaves. In *United States v. Morris*,¹⁹ an African-American lawyer was charged with helping a client, a former slave, es-

cape from a Boston courtroom from which he was being extradited back to Virginia. Morris's lawyer argued that the jury should decide whether the Fugitive Slave Act was constitutional, regardless of the judge's opinion.²⁰ The court instructed the jury eloquently about the public scrutiny to which a judge's decision is held and about the need to enforce the law, however unpopular.²¹ Regardless, the jury returned a not-guilty verdict.²²

The state courts began differing on the legality of jury nullification. In 1849, Vermont held that juries had the power to nullify and that "such power is equivalent to right."²³ The Vermont Supreme Court discussed the jury's traditional role as protector of the individual against a corrupt and oppressive government and as a shield against judges who may favor the prosecution.²⁴

However, in 1855, in *Commonwealth v. Anthes*,²⁵ the Massachusetts Supreme Court held unconstitutional a law allowing juries to decide "both the fact and the law."²⁶ The Court held that it denied the defendant the right to certainty and to a

"government of laws and not of men."²⁷ As the 1800s waned, more state supreme courts followed, ruling jury nullification an unsound doctrine.²⁸

In 1895, the U.S. Supreme Court decided *Sparf v. United States*,²⁹ dealing a resounding blow to juror independence. Sparf and Hansen were two sailors charged with murder on the high seas. During their trial, at least one juror asked the court several times to clarify whether the defendants could be found guilty of manslaughter and if they would receive the death penalty if convicted of murder.

The trial court instructed the jury that "if a felonious homicide has been committed, of which you are to be the judges from the proof, there is nothing in this case to reduce it below the grade of murder."³⁰ The jury convicted Sparf and Hansen, who appealed partially because the jury should have been instructed that they could find the defendants not guilty in spite of the law. The Supreme Court held that juries have no right to judge the law. Instead, the law must be administered without confusion and uncertainty:

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Indeed, if a jury may rightfully disregard the direction of the court in matter of law, and determine for themselves what the law is in the particular case before them, it is difficult to perceive any legal ground upon which a verdict of conviction can be set aside by the court as being against law.³¹

The lengthy opinion catalogues the case law against jury nullification, and even questions the accuracy of the published text of *Brailsford*.³² Justice Gray, in dissent, called the jury “the chief security of the liberty of the citizen” against prejudice and oppression.³³

Most courts considering jury nullification in the United States tend to follow the holdings in *Battiste* and *Sparf*. According to these cases, jurors have the power to nullify, but the courts do not have to inform them about this power.

Race and Jury Nullification

A primary criticism of jury nullification in this century is that it sways with the political winds, whether positive or negative. One example of this is presumed nullification in cases of racial prejudice. Many onlookers believe that racial prejudice led to jury nullification in the acquittals of the police officers in the Rodney King beating trial.³⁴ Race also may have played a role in the trials of Byron De La Beckwith, who killed civil rights leader Medgar Evers in 1963. Two all-white juries in 1964 hung in spite of strong evidence against Beckwith, who was finally convicted of killing Evers thirty years after the murder.³⁵

Evidence of lynchings benefiting from jury nullification is anecdotal. For instance, few lynchings in the south were fully investigated and prosecuted, a situation one commentator has called “preemptive nullification.”³⁶ This may have been because the authorities themselves were not interested in bringing the killers to justice or they knew that a jury would refuse to convict.

A well-known and shocking case of racially-motivated nullification is that of Emmett Till, a 14-year-old African-American boy who allegedly whistled at a white woman in Mississippi in 1955. He was abducted, tortured, and killed; his body was dumped in the Tallahatchie River. Two white half-brothers were tried before an all-white jury. The local sheriff, Harold Strider, refused to help the prosecution and testified for the defense. When African-American reporters entered the courtroom, he greeted them with, “Hello, niggers.”³⁷ The brothers’ defense attorney

argued to the jury, “I know every last Anglo-Saxon one of you has the courage to acquit these men.”³⁸ They did just that. A new investigation into the case was finally opened in 2004 by the U.S. Justice Department.

Recent Jury Nullification Issues

In modern times, jurors have nullified the cases of Viet Nam war protesters, medical marijuana users, and battered women. In 1989, the Fully Informed Jury Association (“FIJA”) was formed to educate prospective jurors about their right to nullify the law.³⁹ FIJA has produced jurors’ rights pamphlets and distributed them outside notorious cases like those of the Branch Davidians, survivalist Randy Weaver, right-to-die advocate Dr. Jack Kevorkian, and Hollywood madam Heidi Fleiss.⁴⁰

FIJA’s message has been somewhat tainted by reports of its ties to far-right organizations and the militia movement.⁴¹ FIJA has been unsuccessful in its attempts to get jurors’ rights amendments passed in several states.⁴²

Even in states that have constitutional provisions guaranteeing the right of jury nullification, modern courts have repeatedly ruled against the doctrine.⁴³ However, the courts have routinely refused to violate the sanctity of the jury room and have stopped short of inquiring into jury deliberations, except in the most extreme circumstances. The Second Circuit, in *United States v. Thomas*,⁴⁴ held that a juror cannot be removed from a jury without proof “beyond doubt” that the juror intended to disregard the trial court’s instructions. According to the court, if there is any possibility that the juror is trying to apply the law, any inquiry into deliberations must stop.⁴⁵

The Law in Colorado

In a 1997 case, *People v. Kriho*,⁴⁶ a juror was convicted of contempt for not revealing her personal beliefs about drug laws and her past criminal history during *voir dire*. The prosecution’s case against her included evidence of juror deliberations. The Colorado Court of Appeals held that if there is any possibility a juror is basing his or her decision on the sufficiency of the evidence, courts should not inquire into jury deliberations. The court stated that this position protects jurors from intimidation and the fear of criminal charges based on a verdict that might be unpopu-

lar to the prosecution. Further, it prevents challenges to jurors and mistrial requests by defense lawyers who sense an imminent unfavorable verdict.⁴⁷

However, Colorado courts have been reluctant to specifically enunciate a clear position on nullification. The closest case has been *People v. Wilson*.⁴⁸ In that 1998 case, the Colorado Court of Appeals discussed varying states’ laws on both sides of the issue. The *Wilson* court, which ultimately held that it was not error for a prosecutor to tell a jury that they were duty-bound to follow the law, stated that “the issue of nullification is best avoided.”⁴⁹

Jury Nullification Studies

Courts in the United States are reluctant to question juries’ deliberative processes. Therefore, absent self-reporting by jurors, there is no way to know whether a not-guilty verdict is the result of nullification or of a thorough testing and rejection of the government’s case.

Maryland, which has a constitutional jury nullification provision, gives the following routine instruction:

Members of the jury, this is a criminal case, and under the Constitution and the laws of the State of Maryland, in a criminal case the jury is the judge of the law as well as of the facts in the case. So that whatever I tell you about the law, while it is intended to be helpful to you in reaching a just and proper verdict in the case, it is not binding upon you as members of the jury and you may accept or reject it. And you may apply the law as you apprehend it to be in the case.⁵⁰

A survey of Maryland trial judges revealed that most thought that the instruction had a minimal impact on verdicts and that juries usually followed the judge’s instructions.⁵¹

Scholars have studied mock jurors’ behavior when told of their power to nullify. Jurors who were given a “radical” jury nullification instruction tended to discuss the instruction and the defendant’s character more and the evidence less.⁵² They also tended to talk about their personal experiences more than juries that had not received the nullification instruction. Perhaps not surprisingly, the nullification-instruction juries acquitted more than control juries in euthanasia cases with sympathetic defendants. However, they convicted more often in drunk-driving cases.⁵³

Similarly, mock jurors were more likely to nullify if the defense lawyer brought up

nullification than if the judge presented it in the jury instructions. However, their tendency to nullify was reversed when a prosecutor challenged the defense lawyer's nullification arguments by objecting and reminding the jurors of their legal duty.⁵⁴

A 2003 study by the National Center for State Courts examined hung juries, surveying jurors to determine how frequently and why they nullified. The study reviewed cases in the cities of Los Angeles, New York, Phoenix, and Washington, D.C. The study concluded it was "unlikely that jury nullification plays a dominant role in the large majority of [hung jury] cases."⁵⁵ Jurors responsible for hung juries expressed concerns not only about the law's fairness and the fairness of the trial's outcome, but also about the evidence presented. Finally, the results showed that jurors considered so many variables in the decision-making process that race was not a significant factor in verdicts.

Practical Considerations

A prosecutor, when faced with a jury nullification argument, can usually rely

on the judge to remind jurors of their oaths to follow the law as given to them in the court's instructions. Defense practitioners may consider jury nullification as a tactic, albeit one of last resort. If so, they may consider the following.

First, the defense lawyer should make sure the case is appropriate for nullification. In other words, he or she should determine whether the client's situation is one that engenders outrage among ordinary citizens (not just among defense lawyers).

Second, the defense lawyer should explore ways to use a defense that is based on the law. For example, this might include entrapment, lack of *mens rea*, duress, or choice of evils. In the author's observation, defense lawyers rarely actually argue nullification, although most will admit to having at least one case where their defense was "essentially nullification."

Third, the best argument for nullification is to a "jury of one." The case's emotional impact may lead the prosecutor to do justice as opposed to merely seeking a conviction, thus obviating the need for a trial.

Fourth, a lawyer who argues that a jury should ignore the law may have ethical troubles.⁵⁶ Telling a jury to disobey the judge's instructions could be problematic, although there is a good faith argument that jurors have the power to nullify and that lawyers should be allowed to tell them about it. According to Colorado Rule of Professional Conduct 3.1, a "... lawyer for the defendant in a criminal proceeding ... may nevertheless so defend the proceeding as to require that every element of the case be established." However, it is not clear whether a defense attorney may argue nullification if every element of the prosecution's case is established and there is no other possible defense.

One proposal, suggested by University of Colorado Law Professor H. Patrick Furman, would involve providing some legal restraints on jury nullification: defense counsel could raise the issue in a pretrial motion and attempt to establish some support for arguing it to a jury. The case should have specific facts that militate strongly in favor of the defendant. If the court rules that the case is one that is appropriate for the jury to consider nullifying, an instruction similar to the Mary-

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land instruction could be given. However, the instruction also should tell the jury that there is a presumption in favor of the law, which could be overcome only by circumstances that strongly indicate that justice would best be served by finding the defendant not guilty.⁵⁷

Such an approach might be appropriate, for example, in a case of innocent possession of a controlled substance. Imagine a scenario in which a mother flushes drugs she finds in her son's room instead of calling the police. The current state of Colorado law is that any knowing possession is illegal.⁵⁸ If a case such as this were prosecuted, the jury could decide whether the mother's actions were morally appropriate and, therefore, in their eyes, legal. Thus, nullification could be an effective tool for justice if given legal boundaries.⁵⁹

Conclusion

Jury nullification has traced a colorful path through American jurisprudence, reflecting the emotional and political opinions of the common man. Courts have been less likely to embrace juror independence, generally only doing so during times when jurors are seen as necessary protections against overreaching or unjust governments.

Colorado has recently embarked on widespread criminal jury reform to give jurors more ownership of their verdicts and to give the general public more confidence in the judicial system. For instance, jurors are now permitted to take notes and to ask questions of witnesses.⁶⁰ It may be a logical next step to advise jurors of their power to nullify the law.

NOTES

1. Alexander, *A Brief Narrative of the Case and Trial of John Peter Zenger; Printer of the New York Weekly Journal* (1736, reprinted, Cambridge, MA: Belknap Press of Harvard Univ. Press, 1963) (introduction by Stanley Nider Katz).

2. Postgate, *Murder, Piracy and Treason: A Selection of Notable English Trials* (Boston, MA: Houghton Mifflin Co., 1925) at 126.

3. *Id.* at 127-130; Alexander, *supra*, note 1 at 5-8 (introduction by Stanley Nider Katz).

4. Postgate, *supra*, note 2 at 130-133.

5. Mystery novelist Erle Stanley Gardner created the "Perry Mason" character in the 1930s.

6. Alexander, *supra*, note 1 at 22.

7. Postgate, *supra*, note 2 at 133-142.

8. *Brailsford*, 3 U.S. (3 Dall.) 1 (1794).

9. *Id.* at 4.

10. *Croswell*, 3 Johns.Cas. 336 (S.Ct.N.Y. 1804).

11. *Id.* at 362.

12. *U.S. v. Cornell*, 25 F.Cas. 650, 655 (C.C.D.R.I. 1820) ("Quakers entertain peculiar opinions on the subject of capital punishment.").

13. Conrad, *Jury Nullification: The Evolution of a Doctrine* (Durham, NC: Carolina Academic Press, 1998) at 208.

14. *Battiste*, 24 F.Cas. 1042 (D.Mass. 1835).

15. *Id.* at 1043.

16. Conrad, *supra*, note 13 at 88 n.90.

17. *Id.*

18. Md. Declaration of Rights Art. XXIII; Ind. Const. Art. I, § 19.

19. *Morris*, 26 F.Cas. 1323 (D.Mass. 1851).

20. Conrad, *supra*, note 13 at 82.

21. *Morris*, *supra*, note 19 at 1336.

22. Conrad, *supra*, note 13 at 82.

23. *State v. Croteau*, 23 Vt. 14, 45 (1849).

24. *Id.* at 21-22.

25. *Anthes*, 71 Mass. 185 (1855).

26. Mass. Acts & Resolves 1855, ch. 152.

27. *Anthes*, *supra*, note 25 at 224.

28. See, e.g., *State v. Burpee*, 65 Vt. 1 (1892); *Commonwealth v. McManus*, 143 Pa. 64 (1891); *State v. Wright*, 53 Me. 328 (1865).

29. *Sparf*, 156 U.S. 51 (1895).

30. *Id.* at 61-62 n.1.

31. *Id.* at 101.

32. *Brailsford*, *supra*, note 8.

33. *Id.* at 176-77.

34. Butler, "Racially Based Jury Nullification: Black Power in the Criminal Justice System," 105 *Yale L.J.* 677, 696, 722 (1995). Professor Butler advocates racial nullification by African American jurors. He argues that the jurors should decide for themselves whether the African American community is better off when someone who commits a minor, non-violent crime remains within the community instead of going to prison. If so, they should vote "not guilty" in spite of the evidence.

35. Conrad, *supra*, note 13 at 168. Beckwith apparently had jury nullification literature distributed outside his third trial, to no avail. *Id.*

36. *Id.* at 174.

37. *Id.* at 180, citing Whitfield, *A Death in the Delta: The Story of Emmett Till* (New York, NY: Free Press, 1988) at 43.

38. Conrad, *supra*, note 13 at 179, citing Thernstrom, *America in Black and White: One Nation, Indivisible* (New York, NY: Simon & Schuster, 1999) at 515.

39. The Fully Informed Jury Association website is <http://www.fija.org>.

40. Conrad, *supra*, note 13 at 159.

41. *Id.* at 160, citing Lambert, "More Angry Men: Militias are Joining Jury-Power Activists to Fight Government," *Wall Street J.* (May 25, 1995).

42. Note, "Jury Nullification: Assessing Recent Legislative Developments," 43 *Case W.*

Res. L.Rev. 1101 (1993). Among the states that considered "fully informed jury" laws, but ultimately rejected them, were Arizona, Louisiana, Massachusetts, New York, Tennessee, Texas, and Washington.

43. See, e.g., *Beavers v. State*, 236 Ind. 549 (1957); *Thomas v. State*, 29 Md.App. 45 (1975); *Montgomery v. State*, 292 Md. 84 (1981); *Kansas v. McClanahan*, 212 Kan. 208 (1973).

44. *Thomas*, 116 F.3d 606 (2d Cir. 1997).

45. *Id.* at 621-22.

46. *Kriho*, 996 P.2d 158 (Colo.App. 1997).

47. *Id.* at 167-68.

48. *Wilson*, 972 P.2d 701 (Colo.App. 1998).

49. *Id.* at 706.

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

51. Jacobsohn, "The Right to Disagree: Judges, Juries, and the Administration of Criminal Justice in Maryland," 1976 *Wash. U. L.Q.* 571, 585-87.

52. Horowitz, "Jury Nullification: The Impact of Judicial Instructions, Arguments, and Challenges on Jury Decision Making," 12 *Law & Hum. Behav.* 439, 444 (1988). In one study, jurors were given two different sets of instructions: (1) a standard, non-nullification instruction; or (2) a nullification instruction that stated, ". . . [W]hile you must give respectful attention to the laws[,] you have the final authority to decide whether or not to apply a given law to the acts of the defendant on trial. . . . [Y]ou represent (the community) and . . . it is appropriate to bring into your deliberation the feelings of the community and your own feelings based on your conscience. . . . [N]othing would bar [you] from acquitting the defendant if [you] feel that the law, as applied to the fact situation before [you,] would produce an inequitable or unjust verdict." The first two parts of the latter instruction are similar to those allowed in Georgia, Indiana, and Maryland; the third part was a "radical" nullification instruction. *Id.* at 444. See also Horowitz, "The Effect of Jury Nullification Instruction on Verdicts and Jury Functioning in Criminal Trials," 9 *Law & Hum. Behav.* 25 (1985).

53. *Id.*

54. *Id.*

55. Hannaford-Agor and Hans, "Nullification at Work? A Glimpse from the National Center for State Courts Study of Hung Juries," 78 *Chicago-Kent L.Rev.* 1249, 1276 (2003).

56. Conversation with H. Patrick Furman, Clinical Professor and Director of Clinical Programs, University of Colorado School of Law (July 19, 2004).

57. *Id.*

58. *People v. Barry*, 888 P.2d 327 (Colo.App. 1994).

59. Furman, *supra*, note 56.

60. Kourlis and Leopold, "Colorado Jury Reform," 29 *The Colorado Lawyer* 21 (Feb. 2000). ■

