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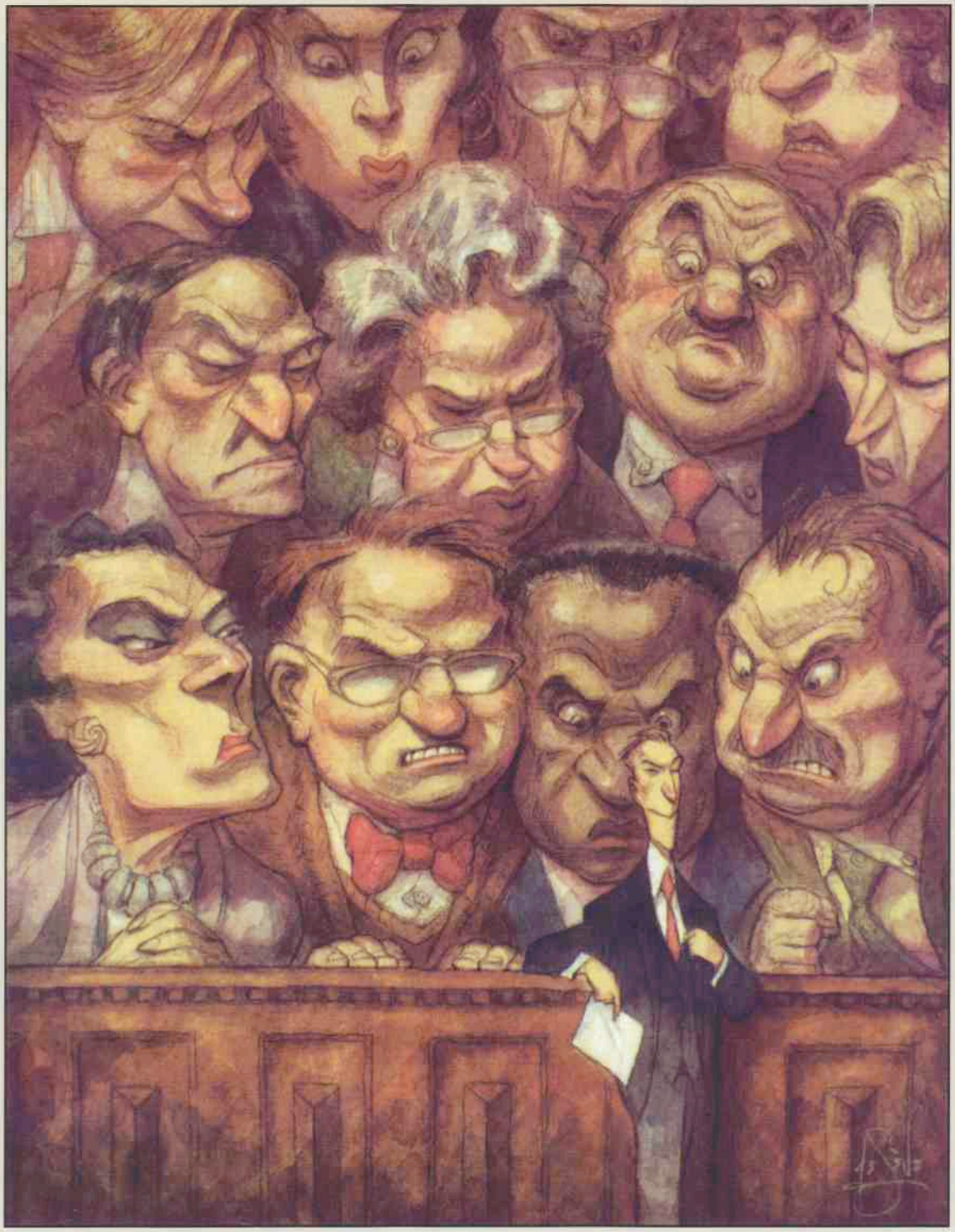

CONSIDERING JURY NULLIFICATION

CONSIDERING JURY "NULLIFICATION":
When May And Should A Jury Reject The Law To Do Justice

The Honorable Jack B. Weinstein

There seems to be a good deal of distress expressed today about perceived "jury nullification."[1] Nullification occurs when a jury—based on its own sense of justice or fairness—refuses to follow the law and convict in a particular case even though the facts seem to allow no other conclusion but guilt.[2] Such concerns about jury nullification in my district—the most densely populated district in the country after Washington, D.C.—are unwarranted.

The legitimacy of the jury process demands respect for its outcomes, whatever they may be. Attempting to distinguish between a "right" outcome—a verdict following the letter of the law—and a "wrong" one—a "nullification" verdict—can be dangerous, and this endeavor depends largely upon personal bias. Nullification is but one legitimate result in an appropriate constitutional process safeguarded by judges and the judicial system. When juries refuse to convict on the basis of what they think are unjust laws, they are performing their duty as jurors. Once judges and courthouse personnel have set the stage and parameters for fair decisionmaking, the result is not nullification but vindication of the process.

Current concern with jury nullification reflects disturbing trends in society. Racial disharmony and antagonism are perceived by some to threaten many institutions, including the jury.[3] This tendency has not been manifested in the Eastern District of New York. Our jurors—who are of many diverse ethnic groups and origins—are excellent. Our prosecutors tend to screen out those cases that are not significant from a law enforcement point of view and that might invite nullification.

Even if the problem should manifest itself here or elsewhere, it is neither necessary nor desirable to attempt to prevent nullification through strict controls. The jury room is not the place to counteract society's larger problems. Trial by jury retains its legitimacy precisely because of its long history of impermeability to the vicissitudes of politics and fashion.

There is the troubling question of whether juries should be informed that they have the power to nullify.[4] Fervent supporters of nullification seek a forthright instruction from the judge that the jury may disregard the charge and nullify the law.[5] Others oppose even the barest of hints from the judge that the jury may take that route and still arrive at a fair outcome.[6] It is my view that, although juries should not be instructed that they have the power to nullify, judges can and should exercise their discretion to allow nullification by flexibly applying the concepts of relevancy and prejudice and by admitting evidence bearing on moral values. Professor R. Kent Greenawalt's discussion of morality and law, referred to below, provides a useful model for the exercise of that discretion.[7]

II. DISCUSSION

Our jury system deserves admiration. My respect for it is based not on the fact that my juries and I generally reach the same result but on the meticulous and responsible process by which jurors follow the evidence, deliberate fully, and ask the right questions during deliberations. Some of the juries with which I have worked have devoted months to the most difficult scientific and criminal issues, effectively deciding the facts and assiduously following instructions on the law. Most trial judges are in this respect biased—they believe in the historical American jury system of which they are a part.

A. Disobeying Unjust Laws

Nullification is British in origin,[8] yet quintessentially American. The power of the jury to nullify was approved in 1670 in Bushell's Case[9] when Chief Justice Vaughan released from jail British jurors who had had the audacity to ignore a trial judge and acquit William Penn of unlawful assembly.[10] Along with its sibling, civil disobedience, jury nullification was an integral feature of the birth of our nation.[11] The Boston Tea Party and the acquittal of dissident John Peter Zenger on charges of libel both might be called founding acts of civil disobedience and nullification.[12]

The American nullification tradition was ratified by the Supreme Court in *Sparf and Hansen v. United States*.[13] The Court recognized that judges had no recourse if jurors acquitted in the face of overwhelming inculpatory evidence and law.[14]

In the nineteenth century the practice of nullifying to avoid capital punishment for minor offenses became so widespread in England that Parliament eventually had to act to follow the jury's views in reducing the number of capital

crimes.[15] In the United States during that same period, the federal government feared that Northern juries would nullify the fugitive slave laws, while Southern juries were prone to nullify laws designed to prevent mistreatment of slaves.[16] In many states, the failure of numerous juries to find defendants guilty in the face of overwhelming evidence helped influence Congress and state legislatures to reject mandatory death penalty schemes.[17]

During the Vietnam-era disturbances, there was a good deal written on the right of citizens in a democracy to ignore "unjust" laws.[18] Martin Luther King, Jr. acted in the highest ideals of the nullification and civil disobedience tradition. Recall his eloquent letter from the Birmingham jail:

> An individual who breaks a law that conscience tells him is unjust, and willingly accepts the penalty . . . to arouse the conscience of the community over its injustice, is in reality expressing the very highest respect for the law . . . . It was "illegal" to aid and comfort a Jew in Hitler's Germany. But I am sure that if I had lived in Germany during that time I would have . . . comforted . . . the Jewish people.[19]

Recently, "pro choice" and "pro life" forces have mounted barricades in violation of injunction and statute.[20] When Americans feel deeply, they speak out and they act out. It is doubtful that juries would return convictions in these abortion clinic interdiction cases[21] Other modern moral dilemmas face citizens and jurors: How should we treat those who keep drugs for personal use? Should we punish battered women who strike back, harming or killing their batterers? Must tax protesters be prosecuted?

The heritage of refusing to obey laws regarded as unjust in their operations is honored today within all branches of the federal government, often for the "good of the Republic." Presidents and their minions, enthralled with a particular policy goal, sometimes violate laws, mislead Congress and the public, and try to cover it up.[22] Legislators sometimes consider themselves above their own rules and abuse their privileges. Members of the Supreme Court of the United States twist or ignore precedent in pursuit of higher views of justice. From time to time, the Courts of Appeals so distort the facts of cases that the trial judges cannot recognize the cases they tried. Finally, district court judges have been known to nullify when, for example, they seek to escape the rigors of guideline sentencing or when the outcome of a trial totally offends their sense of justice.[23]

The difficulty with any tendency to ignore laws is that whether a particular law is unjust may depend entirely on the view of the beholder. One person might feel compelled to disobey a judge's injunction and approach women at abortion clinics. Another might refuse to pay taxes. Our system of law is grounded on the general assumption that people will obey laws voluntarily. Chaos results if each person feels it appropriate without limit to pick and choose which laws to recognize.

This is one reason the jury system embodies group decision-making. It is unlikely that twelve persons chosen at random from the community will at the same time be struck with a collective will to ignore a just law or with the same burning political zeal. As Judge Bazelon wrote, dissenting in a case arising from the Vietnam War:

> I do not see any reason to assume that jurors will make rampantly abusive use of their power. Trust in the jury is, after all, one of the cornerstones of our entire criminal jurisprudence, and if that trust is without foundation we must re-examine a great deal more than just the nullification doctrine.[24]

Jurors help keep us sensitive to wrong, immoral, and unjust laws. Nullification arising from idealism is good for the American soul. It prevents the perversion of morality by an Eichmann who so conforms to the law as to compromise the individual's responsibility for developing and living in a way consonant with truth, justice, and love for fellow man.[25]

When our jurors retire to the jury room they understand their job is to find the just result and reach a consensus. Professor Uviller writes that "[m]ost former jurors report that the process of deliberation was unique in their experience. Never had they been in a situation where so many different sorts of people tried so hard for so long to reconcile such various views of reality—and with such remarkable success."[26] The exercise of the nullification power does not cast doubt on the jury process; rather, it reaffirms the liberty of a free society upon which it is based. "Jury

nullification, rather than destroying the law, is necessary to protect it."[27]

When jurors return with a "nullification" verdict, then, they have not in reality "nullified" anything: they have done their job. "[N]ullification is inherent in the jury's role as the conscience of the democratic community and a cushion between the citizens and overly harsh or arbitrary government criminal prosecution."[28] Juries are charged not with the task of blindly and mechanically applying the law, but of doing justice in light of the law, the evidence presented at trial, and their own knowledge of society and the world. To decide that some outcomes are just and some are not is not possible without drawing upon personal views.[29]

Given the procedural safeguards and requirements of group decisionmaking, we can remain confident that, first, instances of nullification will continue to be rare, and second, if twelve individuals decide to "nullify," they will have a good reason for so doing.

B. The Perceived Problem

Jury nullification can take several forms. In Professor R. Kent Greenawalt's comprehensive discussion of the conflicts between law and morality, he points out that nullification, what he calls "amelioration" of the criminal process, takes place through non-prosecution, judge or jury nullification, and pardon.[30] Pardon or amnesty, one of the executive's forms of nullification, seldom is used for that purpose in this country.[31] A striking recent example was President Ford's action exonerating President Nixon.[32]

Judicial nullification through sentencing, directed verdicts, or findings on evidence is rare. It probably has some impact in prosecutions such as those during World War II for statutory rape, when the community was sympathetic toward young people involved in a romance, or in the prosecution of draft avoiders or card burners during the Vietnam War.[33] In civil cases, such as landlord-tenant disputes or evictions for mortgage defaults, judges stretch the law to some extent out of sympathy for the litigants and a sense of justice. And, as Professor Jerome Hall notes, English judges often cooperated with juries in circumventing the death penalty in simple larceny cases.[34] The reluctance of judges in the North to enforce fugitive slave laws is also well known.[35]

> ***Jurors have generally become more sophisticated about people and the law.***

By far the greatest nullification takes place as a result of decisions not to prosecute or to reduce charges.[36] Our prosecutors have enormous discretion because of the great number of crimes found in our over-expansive criminal laws. For example, prosecution for possession of marijuana for private use or for growing or dealing in small amounts is rare. The police also exercise discretion—at times invidiously—by failing to arrest, for example, in cases of suspected domestic violence.[37]

Compared to prosecutorial nullification, grand jury refusal to indict and petit jury refusal to find guilt are minor significance.[38] Jurors have generally become more sophisticated about people and the law. Our jurors are not obtuse. In the 1960s, FBI agents were regarded as infallible. During the Vietnam period, some of the younger jurors disbelieved them merely because they were agents. This generational gap was temporary. Now New York police and DEA agents tend to be more professional and believable. Their testimony generally is treated with critical but fair-minded neutrality.

Some jurors want to follow the law but think that the police and society are so biased that they find it difficult to consider law enforcement officers credible.[39] Our society is increasingly divided along racial, ethnic, economic, and social lines. We are facing difficulties unimagined ten or twenty years ago. There is an undercurrent of fear that the community has broken down.

Juries, which are drawn from a cross-section of the community, are not impervious to the problems outside the courtroom. Juries cannot be "the conscience of the community"[40] if there is no community. Will white jurors convict white police of brutality? Will African-American jurors convict African-American defendants for violent acts, particularly in conflicts with police? These are the fears behind the renewed interest in jury nullification.

Many consider the Rodney King verdict ample proof that such premonitions have been realized.

Others argue that such a verdict does not reflect the breakdown of the jury system or rampant nullification, but rather is "a case of an inept prosecution and a non-representative jury."[41] Not having seen and heard the evidence, I have no view on the outcome of that trial.

If more than negligible racial bias is infecting the courts, the disease has not yet reached the federal courts in the Eastern District of New York. The resentments of the poorest segments of our population have not yet created widespread observable distortions, but that may be because the poorest tend not to vote, are not on jury rolls, and therefore do not serve. But there are suspicions and racial tensions that are impossible to deny.

The problems we have inherited have certainly been exacerbated by a decade of greed and excessive attention to the acquisition of personal wealth at the expense of our civic duties. Increasingly we have turned into a nation of classes with limited power to escape inherited poverty and with circumscribed dreams of upward mobility. Something is amiss in our society when so many have lost faith in the visions of those, like Thurgood Marshall or Martin Luther King, Jr., who once led the valiant struggle to create genuine equality and integration.

In a sense, the possibility of nullification based upon race is not surprising. We are all citizens of a country conceived upon the most fundamental and terrible social division, that of the free person and the slave. Professor Judith Shklar eloquently wrote that "[citizenship in] America has in principle always been democratic, but only in principle. From the first the most radical claims for freedom and political equality were played out in counterpoint to chattel slavery, the most extreme form of servitude, the consequences of which still haunt us."[42] Legally, we are doing better with minorities, with women, with the disabled, and with family and sexual orientations once deemed unacceptable because out of the mainstream. The schisms in our country, though great, have not incapacitated our judicial institutions as have similar societal divisions in some areas of the world.

Given structural gaps and a lack of consensus, we could expect nullification to be much more prevalent in this country. This suggests that, first, more than some predict, our people are disciplined and accepting of the need for law to be applied without regard to race or creed; and second, centripetal social forces in society are much more powerful than the centrifugal. Bitter ethnic divisions and the absence of liberty would render juries unworkable in many countries; they still work in the United States.

The critical factor in avoiding nullification along racial and other structural schisms is to heal ourselves of the cancerous inequality of real opportunity that pervades much of our society. Our goal should be "to discover the cement to bond the heterogeneous strains into one nation, one polity, one civilization."[43]

Against this background, courts can take only small ameliorative steps. Even were the problems of race to affect the court system more visibly, nullification should not be prevented through strict jury controls. If society is sick, then the jury system may be infected, but society's problems cannot be solved by controlling what takes place in the jury room. The concept of trial by jury has remained consistent over this country's long history because it is almost impervious to petty concerns and even to the tides of popular belief.

C. Allowing Nullification Without Fostering It

Proceedings in the courtroom should encourage a sense that the participants are sharing in a search for justice. Seemingly trivial things such as the manner in which we greet the jurors, care for them during their time in the courthouse, and instruct them can be helpful. When respected as colleagues in a mutual search for truth, jurors tend to listen to judges and follow their advice. When pushed to accept a judge's view or when treated with disdain, they rebel.

When judges take further initiatives to prevent nullification beyond such simple housekeeping measures, they run a serious risk of interfering with the jury system and with defendants' constitutional rights.[44] For example, courts sometimes excuse potential jurors who appear prone to nullify, particularly in death penalty cases.[45] Federal Rule of Evidence 606(b) prohibits questioning jurors on the hows and whys of their decisions.[46] Jurors have a recognized privacy right.[47] Access to the jury room—opening the black box—would not likely decrease the level of jury nullification. Jurors could always internalize and rationalize their actions.

Limiting defense evidence on the grounds that it is irrelevant to a particular legal theory and may therefore prompt nullification is a dubious route. Defendants indicted for quasi-political acts, for example, are often not permitted to explain their reasons for acting since those reasons usually are not relevant to the legal case.[48] In my view these defendants are entitled to tell their story to the jury. The courtroom is their public forum. They should be permitted to explain their intent and state of mind as relevant to mens rea in the broadest sense.

The question whether juries should be informed that they have the power to nullify raises the most heated debate among judges and lawyers. Fervent supporters of nullification seek an outright instruction from the judge that the jury may disregard the charge and nullify the law.[49] Others oppose even hints from the judge that the jury may stray from the black letter of the law.[50] Still others take an intermediate position.[51]

I would not instruct juries on the power to nullify or not to nullify. Such an instruction is like telling children not to put beans in their noses. Most of them would not have thought of it had it not been suggested. As Judge Leventhal wrote:

> To tell [a juror] expressly of a nullification prerogative . . . is to inform him, in effect, that it is he who fashions the rule that condemns. That is an overwhelming responsibility, an extreme burden for the jurors' psyche.
>
> . . . An explicit instruction to a jury conveys an implied approval that runs the risk of degrading the legal structure requisite for true freedom, for an ordered liberty that protects against anarchy as well as tyranny.[52]

In relatively infrequent extreme cases, the jurors will be distressed and exercise the power themselves. Nullification should occur only after the jury has struggled with it, as occurred in the television documentary about jury deliberations, "Inside the Jury Room."[53] The jurors dissolved in tears when they returned to the jury room after delivering a nullification verdict.[54] The jury itself will "identify the case as establishing a call of high conscience . . . ."[55]

The judge may, and sometimes should, exercise some leniency in defining relevance in order to permit an argument for nullification. By construing relevance liberally, judges can admit evidence which might allow a jury to consider nullification sensibly. Jurors will then have the information and freedom necessary to ignore the judge's instructions to follow the law if the jurors think the law as applicable to the case before them is unjust.[56]

Often jurors will already have enough background so that they do not need any new information. Nullification of slavery in the North or defiance of Vietnam-era draft laws illustrate this. But the jury may be affected by the fact that a particular draft avoider may have had special reasons for his behavior which he would like to put before the jurors.

Addressing the jury or judge is the best chance a defendant may have to obtain publicity for his or her views. Arguably, the opportunity verges on a First Amendment right. A less stringent relevancy definition than the rigid and logical one in Rules 401, 402, and 403 of the Federal Rules of Evidence is justified in such cases.[57]

There is a danger, however. A defendant may so open the door to prejudicial material by the prosecution or so turn a simple issue-of-fact trial into a political debate as to warrant the court's employing a strict view of relevancy even where a reasonable nullification argument exists. Judges will have to use their discretion sensibly under the Rules.

The example in "Inside the Jury Room" illustrates, I believe, a justifiable approach to a liberal view of relevancy.[58] Under the law, the only relevant facts were whether the defendant had been convicted of a felony and whether he possessed a gun. Both facts had to be conceded by the defense. The court, however, allowed proof that the defendant had voluntarily turned the gun over to the sheriff, that his intelligence and schooling were limited, and that he wanted to be a detective and was under the impression that a person studying for this profession needed a gun. The jury refused to convict, presumably based on all of this information which was not relevant under the statute.[59] I believe the judge was sensible in admitting the evidence.

Some might argue that loosening the rules of evidence is inconsistent with providing the federal judges' standard instruction that the jury must accept the law as stated by the judge even if the jury disagrees with it and that the jury should (not must) find the defendant guilty if all elements of

(cont'd on page 29)

the case have been proved beyond a reasonable doubt.[60] Professor R. Kent Greenawalt presents a narrow and justifiable view of what the law should logically be and suggests that "[d]efendant's counsel can neither argue that the jury should disregard those instructions nor present evidence in favor of the proposition that the defendant should be acquitted despite violating the law."[61]

But pure logical analysis without regard for ameliorative techniques such as jury nullification is unsatisfactory. It fails to appreciate fully the purpose of procedure and technique in modifying the effects of substantive law.

Professor Greenawalt does concede, "a jury's obligation to apply the law could be outweighed by its duty to do what is morally just in an individual case."[62] If this is so, and I believe it is, then should the jury not have the data necessary to decide whether morality requires nullification? And, if the jury should have this data, how is it to be presented except through a loosening of relevancy rules in those cases where an issue of morality in conflict with law exists? The judge should recognize, at the request of counsel, the question of when such an issue of morality should be considered as having arisen.

As already suggested, jurors bring a good deal of information with them—about slavery, the Vietnam War, police abuses in the community, the prevalent use of alcohol (during Prohibition) and of marijuana in recent years. This common knowledge is probably the most typical basis for nullification. To this store of information is added defense counsel's insinuation of non-relevant considerations into the case. Finally, the judge may make a deliberate decision to loosen relevancy controls to allow nullification.

Professor Greenawalt describes, but would not tell the jury, what the limits of nullification should be:

> A juror should not acquit unless he is firmly convinced that a gross injustice would be done by conviction. . . . He must think that the actor was performing an act that was clearly justified or was exercising an undeniable moral right. Ordinarily, he would have to think either that the law on which the prosecution is based is itself highly unjust or that the particular circumstances of the case are so far outside what the legislature had in mind that the law's application in this case would be unconscionable.[63]

This statement is a good guide for the judge as to when relevancy should be liberally construed to admit evidence which might permit nullification by the jury.

In the main, the nullification threat, like so many of our democracy's inconsistencies and compromises, is one that we can live with because it is used sensibly by responsible jurors, judges, and lawyers to help make the system work. As in the apparent conflict between justice and mercy, the dilemma is bridged if we concede that there are times when the law should recognize that it is reasonable to temper one with the other.[64] So, too, nullification built into the system and conceded to be reasonable and appropriate at times becomes a proper exercise of power within the law, not a nullification of the law.

III. CONCLUSION

My view is simply summarized: jury nullification is not a substantial problem. Where it is a problem, it is probably because, first, the society is so sick that urgent remedial steps outside the courthouse are needed; second, trial judges have failed to provide the courthouse conditions under which jurors will decide within the confines of the law; or third, law enforcement is poor—that is to say, police and law enforcement agents are acting lawlessly or with racial bias, or prosecutors are not screening out poor cases or are not trying cases well.

Almost all jurors are doing just what we tell them to do—following the law not to find the defendant guilty unless each element of the crime has been proved beyond a reasonable doubt. Judges should permit jurors to hear the evidence that will allow them to reach a just result.

Some may not see this as a tidy view of the law. There is, however, a deep and profound sense of many Americans that they have the duty to revolt in large and small ways.[65] This is our ultimate protection against tyranny and injustice. Nullification is one of the peaceful barricades of freedom.

Endnotes

a. United States District Judge, Eastern District of New York. This essay expands on a speech originally delivered at the 1992 District of Columbia Circuit Conference in Williamsburg, Virginia. I acknowledge with thanks the able assistance of my law clerk, Jessica C. Vapnek.

1. *See, e.g.*, Terence Moran, *Maybe the Jury was White*, Conn. L. Trib., June 15, 1992, at 15 (discussing concern that Rodney King verdict reflected views of community, rather than adjudication of facts).

2. Although there may be examples of nullification by conviction, as by a refusal to follow instructions on justification or the requirement of *mens rea*, the possibility seems to be remote in practice except as an expression of extreme prejudice based on race or the appalling nature of the issue. *See* Jon M. Van Dyke, *The Jury as a Political Institution*, 16 Cath. Law. 224, 238-39 (1970) (nullification by conviction is unlikely because courts can reverse convictions unsupported by facts and reason). *But see* Irwin A. Horowitt & Thomas E. Willging, *Changing Views of Jury Power*, 15 L. & Hum. Behav. 165, 172-73 (1991) (studies suggest juries receiving nullification instructions treat unsympathetic defendants more harshly than other juries). Such prejudicial convictions are, I believe, much rarer today than in times past, partly as a result of post-World War II improvements in our justice system and partly due to a society more tolerant of diversity. Nullification by conviction of a defendant who should under the law have been acquitted cannot be tolerated.

3. *See, e.g.*, L. A. Lawless, *The Nation*, May 18, 1992, at 651 ("Racial fears and prejudices are planted so firmly in [the Rodney King jury's] unconscious (not one of them was black) that nothing prejudicial need be said to produce the desired effect."); Daniel Klaidman, "Racial Politics in the Jury Room," *Legal Times*, Apr. 23, 1990, at 1 ("[a] D.C. Superior Court jury's acquittal ... offers a rare and palpable glimpse of how emotionally charged views on race have seeped into the ultimate sanctum of the criminal justice system—the jury room.").

4. This essay focuses on nullification in criminal cases, although it can occur in civil cases as well. *See generally* Roger W. Kirst, *The Jury's Historic Domain in Complex Cases*, 58 Wash. L. Rev. 1, 12 (1982) ("(jury] nullification argument has some value as a reminder of the American jury's political role, but it will not long be a defensible position in the complexity debate"); Noel Fidel, *Preeminently a Political Institution: The Right of Arizona Juries to Nullify the Law of Contributory Negligence*, 23 Ariz. St. L.J. 1, 6-7 (1991) (arguing that jury nullification is constitutionally embroidered into Arizona's law of torts").

5. One group, the Fully Informed Jury Association (FIJA), has lobbied several state legislatures for statutes requiring judges to inform juries of their powers of nullification. Katherine Bishop, "Diverse Group Wants Juries to Follow Natural Law," *N.Y. Times*, Sept. 27, 1991, at B16; *see also* William M. Kunstler, *Jury Nullification in Conscience Cases*, 10 Va. J. Int'l L. 71, 83 (1969) (juries should be told they have power to nullify); Alan W. Scheflin & Jon M. Van Dyke, *Merciful Juries: The Resilience of Jury Nullification*, 48 Wash. & Lee L. Rev. 165, 183 (1991) (same); Robert J. Stolt, Note, *Jury Nullification: The Forgotten Right*, 7 New Engl. L. Rev. 105, 120-22 (1971) (same).

6. *See, e.g.*, Gary J. Simson, *Jury Nullification in the American System: A Skeptical View*, 54 Tex. L. Rev. 488, 525 (1976) juries should not be instructed on their power to nullify); Eleanor Tavris, *The Law of an Unwritten Law: A Common Sense View of Jury Nullification*, 11 W. St. L. Rev. 97, 114-15 (1983)(same).

7. *See infra* notes 60-64 and accompanying text (discussing Professor Greenawalt's model).

8. Thomas Andrew Green, *Verdict According To Conscience, Perspectives On The English Criminal Trial Jury, 1200-1800* xviii (1985) ("[n]ullification begins in the medieval period with jury mitigation in routine felonies").

9. 124 Eng. Rep. 1006 (P.C. 1670).

10. *Id.*

11. For an in-depth historical view of jury nullification, *see* Mark DeWolfe Howe, *Juries as Judges of Criminal Law*, 52 Harv. L. Rev 582, 583-96 (1939); Alan Scheflin & Jon Van Dyke, *Jury Nullification: The Contours of a Controversy*, 43 Law & Contemp. Probs. 51, 56-63 (Autumn 1980).

12. *See* Scheflin & Van Dyke, *supra* note 11, at 57 (acquittal of Zenger is "most famous colonial example of jury nullification"); Steven M. Bauer & Peter J. Eckerstrom, *The State Made Me Do It: The Applicability of the Necessity Defense to Civil Disobedience*, 39 Stan. L. Rev. 1173, 1175-76 (1987) (Boston Tea Party began American tradition of civil disobedience).

13. 156 U.S. 51 (1895).

14. *Id.* at 80.

15. *See generally* Jerome Hall, *Theft, Law & Society* 127-32 (2d ed. 1952). "By the middle of the eighteenth century the practice of returning fictitious verdicts was so widespread that it was generally recognized as a typical feature of English administration of criminal justice." *Id.* at 127.

16. *See* Paul D. Carrington, *The Seventh Amendment: Some Bicentennial Reflections*, 1990 U. Chi. Legal F. 33, 45-46 (discussing federal concerns of jury nullification in the nineteenth century).

17. *See Woodson v. North Carolina*, 428 U.S. 280, 288-304 (1976) (discussing history); *McGautha v. California*, 402 U.S. 183, 199 (1971) ("legislatures ... forthrightly grant[ed] juries the discretion which they had been exercising in fact") (citation omitted); *see also Furman v. Georgia*, 408 U.S. 238, 333-42 (1972) (Marshall, J., concurring) (tracing history of the death penalty in United States). The Supreme Court recently considered mandatory sentencing schemes in *Walton v. Arizona*, 497 U.S. 639 (1990). In *Walton*, an Arizona statute provided for a separate sentencing hearing in first degree murder cases, at which the prosecution had the burden of proving the existence of aggravating circumstances and the defendant had the burden of proving the existence of mitigating circumstances. A majority of the Court held that this sentencing scheme did not violate the Sixth Amendment. *Id.* at 649. Further, a plurality held that the sentencing scheme did not violate the Eighth and Fourteenth Amendments. *Id.*

18. *See, e.g.*, Stanford Jay Rosen, *Civil Disobedience and Other Such Techniques: Law Making through Law Breaking*, 37 Geo. Wash. L. Rev. 435, 444 (1969) (discussing the importance of civil disobedience as a way of preventing violent dissent); Lawrence R. Velvel, *Freedom of Speech and the Draft Card Burning Cases*, 16 Kan. L. Rev. 149, 152 (1968) ("strong case" for protecting peaceful opposition to the Vietnam War and the draft); Stolt, *supra* note 5, at 119-20 (jury nullification needed to protect important right of civil disobedience).

19. Martin Luther King, Jr., Letter from a Birmingham Jail, in *Christian Century*, June 12, 1963, at 80, reprinted in Robert T. Hall, *Morality And Disobedience* 767-73 (1971).

20. *See, e.g.*, John W. Whitebread, *Civil Disobedience and Operation Rescue: A Historical & Theoretical Analysis*, 48 Wash. & Lee L. Rev. 77, 107-22 (1991) (criticizing the tactics of Operation Rescue); Eric Harrison, "Kansas Protesters Defy Court, Block Abortion Clinic," *L.A. Times*, Aug. 10, 1991, at A1 (discussing the Operation Rescue demonstration in Wichita, Kansas).

21. However, efforts to advocate jury nullification in these cases have sparked controversy. For example, in January 1990, the publisher of the *San Diego Reader* placed an ad in his newspaper urging jury nullification of pro-life protesters who violate statutes or injunctions as part of their demonstrations against abortion. The National Organization of Women immediately responded by requesting that major advertisers pull their ads from the paper. A board member of the local chapter of NOW stated, "We think [the publisher] is doing something self-serving as well as threatening to our legal system." Michael Granberry, "NOW Urges Advertisers to Drop Reader," *L.A. Times*, Feb. 3, 1990, at B1.

22. The verdicts in the trial of Lieutenant Colonel Oliver North might be considered by some to be nullification verdicts: he was convicted of three felonies concerning cover-ups of earlier activities, but acquitted on the nine counts concerning his activities in Nicaragua. The jury arguably disregarded the dangers of encouraging the executive to ignore congressional limitations. *See also* Louis B. Schwartz, *"Innocence"—A Dialogue with Professor Sundby*, 41 Hastings L.J. 153, 155-56 (1989) (discussing the presumption of innocence in criminal procedures).

23. Recently, when a district court judge refused to let a guilty verdict stand and ordered a new trial because he "could not abide the police [officers' perjured] testimony," the government accused him of acting as the "Thirteenth Juror." The circuit court reversed the order, finding that perjury alone was not enough to upset the conviction. *See, e.g.*, Joel Cohen, *Does the Justice System Bear False Witness?*, N.Y. L.J., Sept. 8, 1992, at 2 (discussing *United States v. Sanchez*, 969 F.2d 1409 (2d Cir. 1992)).

24. *United States v. Dougherty*, 473 F.2d 1113, 1142 (D.C. Cir. 1972) (Bazelon, J., dissenting).

25. *See* Hannah Arendt, *Eichmann In Jerusalem: A Report On The Banality Of Evil* 3 (1964) (reporting on the trial of Adolf Eichmann in Jerusalem for his crimes during World War II).

26. H. Richard Uviller, *Acquitting the Guilty: Two Case Studies on Jury Misgivings and the Misunderstood Standard of Proof*, 2 Crim. L.F. 1, 21 (1990) (citation omitted); *see also* Nancy S. Marder, Note, *Gender Dynamics and Jury Deliberations*, 96 Yale L.J. 593, 594-98 (1987) (discussing the role of gender in jury deliberations and the danger that female members participate less actively than male counterparts).

27. Scheflin & Van Dyke, *supra* note 11, at 89.

28. Milton Heumann & Lance Cassak, *Not-So-Blissful Ignorance: Informing Jurors About Punishment in Mandatory Sentencing Cases*, 20 Am. Crim. L. Rev. 343, 386 (1983) (citation omitted).

29. *See* Uviller, *supra* note 26, at 1-6 (discussing concepts of true and false verdicts); *cf.* Akhil Reed Amar, *The Bill of Rights as a Constitution*, 100 Yale L.J. 1131, 1191-95 (1991) (distinguishing between refusing to follow laws thought unjust and laws thought unconstitutional); Michael Polanyi, *The Study Of Man* (1959). Polanyi writes:

> Mental passions are a desire for truth, or more generally, for things of intrinsic excellence. . . . The theory of personal knowledge says that . . . a valid choice can be made by submitting to one's own sense of responsibility. Herein lies the self-compulsion by which, in the ideal case of a purely mental achievement, the utmost straining of every clue pointing towards the true solution finally imposes a particular choice upon the chooser. In view of the unspecifiability of the particulars on which such a decision will be based, it is heavily affected by the participation of the person pouring himself into these particulars and may in fact represent a major feat of his originality. Yet since this act is called forth by the agent's utmost submission to his intimations of reality. It does not abridge the universal intent of its own outcome. Such are the assumptions of

human responsibility and such the spiritual foundations on which a free society is conceivable.

Id. at 62-63. *See also* Ernest L. Weinrib, *Law as a Kantian Idea of Reason*, 87 Colum. L. Rev. 472, 494-95 (1987):

The duty of juridical honor is incumbent on the free will as a law of its own being, and it is expressed in the imperative "Do not make yourself into a mere means for others, but be at the same time an end for them." Kant conceived of juridical honor as a kind of defensive imperialism, whereby the actor, to realize his nature as a bundle of self-determining energy, presses out into the world and thus resists the pressures that other actors exert upon him.

30. R. Kent Greenawalt, *Conflicts Of Law And Morality* 349-73 (1987); *see also* Kenneth C. Davis, *Discretionary Justice* 189-214 (1969) (discussing immense discretion held by prosecutors to refuse to prosecute); Green, *supra* note 8, at 28-64 (discussing the early history of jury nullification in England, in which juries exercised discretion by refusing to convict when they felt the death sentence too severe); Mortimer Kadish & Sanford Hadish, *Discretion To Disobey* 51 (1973) (explaining the moral legitimacy of juries departing from the law when the law is contrary to justice); George C. Christie, *Lawful Departures from Legal Rules: "Jury Nullification" and Legitimated Disobedience*, 62 Cal. L. Rev. 1289, 1289-1310 (1974) (criticizing the reasoning of Discretion to Disobey).

31. *See* Daniel T. Kobil, *The Quality of Mercy Strained: Wresting the Pardoning Power from the King*, 69 Tex. L. Rev. 569, 602 (1991) (use of the pardon is declining and, even when used, is normally used post-sentence to rehabilitate person's criminal record).

32. *See Pardon of Richard M. Nixon and Related Matters: Hearings Before the Subcomm. on Criminal Justice of the House Comm. on the Judiciary*, 93d Cong., 2d Sess. 151 (1974) (statement of President Gerald Ford); *see also* Editorial, "A Bush Pardon Now: Unforgivable," *N.Y. Times*, Nov. 12, 1992, at A24 (urging then-President Bush not to pardon any defendants charged in the Iran-contra investigation because it would prompt suspicion of his involvement).

33. *See* Irwin A. Horowitz, *Jury Nullification: The Impact of Judicial Instructions, Arguments, and Challenges on Jury Decision Making*, 12 L. & Hum. Behav. 439, 441 (1988) ("The evidence reveals that juries convicted at a higher rate in draft evasion cases when a war was popular than when the war (Vietnam and Korea) lost public support.").

34. *See* Hall, *supra* note 15, at 80-92.

35. *See* William W. Fisher III, *Ideology, Religion, and Constitutional Protection of Private Property*, 39 Emory L.J. 65, 121-31 (1990) (discussing actions taken in Northern courts to avoid enforcing Fugitive Slave laws).

36. *See* Alan Scheflin, *Jury Nullification: The Right to Say No*, 45 S. Cal. L. Rev. 168, 181 (1972) (arguing that jury nullification as an exercise of juror discretion "may be a useful check on prosecutorial indiscretion"). Compare the German system of lack of discretion described in Davis, *supra* note 30, at 191: Professor Davis suggested review of prosecutors by administrative appeals, supervision by an outsider and increased judicial authority.

37. *See* Thomas Bell, "Support Grows for Domestic Violence Curbs," *Wash. Post*, June 21, 1990, at J1 (group lobbies for mandatory arrest of batterers); Tom Coakley, "Man Allegedly Detailed Fatal Stabbing of Wife," *Boston Globe*, July 18, 1992, at 19 (police failed to arrest suspect for whom warrant issued, and eight days later the suspect killed his wife).

(cont'd on page 33)

(Badie v. Bank of America cont'd)

b. The judge and jury are neutral decision makers. Neither is dependent upon the parties to litigation for income. This neutrality is designed to ensure to the greatest extent possible that perjury will be recognized and a just decision rendered. By contrast, arbitrators under the AAA rules are paid equally by the parties unless there is an agreement to the contrary. Arbitrators are not required by law to take an oath of fairness and impartiality. Institutional litigants whose contracts relegate all disputes to arbitration are the major source of income for many arbitrators. Many serve repeatedly as arbitrators for institutional clients. *See e.g. Kaiser Foundation Hospitals, Inc. v. Superior Court (Coburn)*, 19 Cal.App.4th 513 (1993). Neutral decision making is not and cannot be guaranteed under those circumstances. The likelihood that the testimony of a witness who regularly appears on behalf of an institutional client will be perceived as perjurious is necessarily diminished.

c. In judicial proceedings, witnesses are sworn to tell the truth, and the testimony admitted is carefully circumscribed by long-standing rules of evidence. In arbitration proceedings, under California Code of Civil Procedure § 1282.2(d), witnesses need be sworn only on request of a party, and the rules of evidence do not apply.

d. In judicial proceedings, the trier of fact, whether that is the court or the jury, is required to follow the law, and appellate review for errors of law or insufficiency of credible evidence is available on appeal. Further, the relief accorded by the court in a judicial proceeding is limited to that allowed by common law or applicable statutes.

By contrast, in an arbitration, no record need be kept. The content of a witness's testimony is not preserved and thus not open to post-hearing scrutiny by third parties. A witness may therefore give conflicting testimony in separate arbitration proceedings without fear of exposure. *Moore v. Conliffe* 7 Cal.4th 634, 663-64, 29 Cal.Rptr.2d 152, 871 P.2d 204 (dissenting opinion).

Further, the California Supreme Court has recently held in *Advanced Micro Devices, Inc. v. Intel Corporation*, 9 Cal.4th 362, 36 Cal.Rptr.2d 581, 885 P.2d 994 (1995), that where an arbitrator awards a remedy not authorized by law, it is not reviewable.

2. *First Options of Chicago, Inc. v. Kaplan*, 514 U.S. ____, 115 S.Ct. 1920, 1924 (1995); *Mastrobuono v. Shearson Lehman Hutton, Inc.*, 514 U.S. ___, 115 S.Ct. 1212, 1216-1217 n. 9 (1995); *Allied Bruce Terminix Cos. v. Dobson*, 513 U.S. ___, 115 S.Ct. 834, 837-38 (1995).

3. *Volt Information Sciences, Inc. v. Board of Trustees of Leland Stanford, Jr. Univ.*, 489 U.S. 468, 470 (1989).

4. *Moncharsh v. Heily & Blase* (1992) 3 Cal.4th 1.

IN MEMORIAM

We wish to honor the friends and members we lost this year

Ray A. Barlow, Louisiana
William C. Beatty, West Virginia
Robert J. Cooney, Illinois
George F. Douglas, Jr., Pennsylvania
Robert F. Dunlap, Southern New Jersey
Baxter H. Finch, Georgia
Ted P. Flahive, Austin
Michael A. Fogarty, Tampa
James E. Ingram, San Antonio
John S. Langan, Sr., Indiana
Morris C. Proenza, Miami
Vincent R. Ruocco, San Francisco
Hon. Harold L. Ryan, Idaho
Hon. John M. Sapunor, Sacramento
Robert F. Taylor, Connecticut
CL Vineyard, San Bernardino/Riverside

(Nullification cont'd)

38. *Compare* James Bennet, "Juries Reflect Fears of Crime," *N.Y. Times*, Aug. 25, 1992, at B3 (describing a few instances of grand jury and petit jury decisions treating defendants who kill to defend themselves or their families with compassion because of "growing tendency of juries and prosecutors to recognize the terrible strain that fear of urban crime can place on people who would otherwise obey the law") with Davis, *supra* note 30, at 189-214 (describing widespread and relatively unchecked prosecutorial discretion).

39. *See* Editorial, "The Crown Heights Acquittal," *N.Y. Times*, Oct. 31, 1992, at A20 (describing a Brooklyn jury's acquittal of a black youth accused of murdering a Hasidic scholar as a "powerful warning about the dangers of allowing many citizens to lose faith in the police"); Shawn G. Kennedy, "Accused and Police Given Equal Weight, Poll Finds," *N.Y. Times*, Feb. 15, 1993, at A8 (survey of jurors by *National Law Journal* revealed that 51% were as likely to believe defendants as to believe police officers and 70% stated that police officers' testimony would not carry more weight); *see also United States v. Sanusi*, No. CR 92-110, 1992 U.S. Dist. Lexis 17741, at 33 (E.D.N.Y. Nov. 23, 1992) (invitation to CBS by Secret Service to accompany them on a search of defendant's home may provide the jury with the basis for a not guilty verdict).

40. *United States v. Spock*, 416 F.2d 165, 182 (1st Cir. 1969).

41. Scheflin & Van Dyke, *supra* note 11, at 94 n. 173 (using as an example the acquittal of former Supervisor Dan White in the murder of San Francisco Mayor and Supervisor).

42. Judith Shklar, *American Citizenship: The Quest For Inclusion* 1 (1991).

43. Leslie Gordon Fagen, *Preface to Simon Rifkind*, at 90, *On The 90S* iii (1992) (quoting Judge Rifkind).

44. *Cf.* Chaya Weinberg-Brodt, Note, *Jury Nullification and Jury-Control Procedures*, 65 N.Y.U. L. Rev. 825, 841-46 (1990) (proposing a defendant-centered rather than jury-entered view of nullification).

45. *Cf.* Scott W. Howe, *Resolving the Conflict in the Capital Sentencing Cases: A Desert-Oriented Theory of Regulation*, 26 Ga. L. Rev. 323, 418 (1992) ("[r]egulating capital sentencing under the Eighth Amendment requires a standard to determine when a death sentence in an individual case is just").

46. Federal Rule of Evidence 606(b) states:

> Upon an inquiry into the validity of a verdict or indictment, a juror may not testify as to any matter or statement occurring during the course of the jury's deliberations or to the effect of anything upon that or any other juror's mind or emotions as influencing the juror to assent to or dissent from the verdict or indictment or concerning the juror's mental processes in connection therewith, except that a juror may testify on the question of whether extraneous prejudicial information was improperly brought to the jury's attention or whether any outside influence was improperly brought to bear on any juror. Nor may a juror's affidavit or evidence of any statement by the juror concerning a matter about which the juror would be precluded from testifying be received for these purposes.
>
> Fed. R. Evid. 606(b).

47. *See* Marc O. Litt, *"Citizen Soldiers" or Anonymous Justice: Reconciling the Sixth Amendment Right of the Accused, the First Amendment Right of the Media and the Privacy Right of Jurors*, 25 Colum. J.L. & Soc. Probs. 371,389-98(1992) (discussing the contours of a juror's right to privacy).

48. *See* Weinberg-Brodt, *supra* note 44, at 857-65 (discussing examples, such as *United States v. Montgomery*, 772 F.2d 733 (11th Cir. 1985), in which trespassers at a nuclear facility were forbidden from explaining implications of nuclear power and nuclear weapons because the sole purpose of the evidence was to cause nullification).

49. *See generally* Kunstler, *supra* note 5, at 83 juries should be told they have power to nullify); Scheflin & Van Dyke, *supra* note 11, at 111 (same); *see also* Heumann & Cassak, *supra* note 28, at 386-89 (considering possible constitutional right to inform jury of mandatory sentencing scheme or of its power to nullify).

50. *See, e.g.*, John E. Coons, *Consistency*, 75 Cal. L. Rev. 59, 79 (1987) ("[when] jurors ignore their instructions and smuggle in their private preferences, thereby defeating the intent of legislative and judicial rules [t]hey simply violate their oath to uphold the law"); Simson, *supra* note 6, at 490 (arguing that nullification is neither historically nor functionally appropriate); Uviller, *supra* note 26, at 43 ("juries ... need not reach the blissful state of perfect certainty in order to render a true verdict according to the evidence").

51. *See, e.g., United States v. Dougherty*, 473 F.2d at 1135-37 jurors perceive the power to nullify through informal channels and overall culture but they should not be informed outright since they might not reserve it for rare cases).

52. *Id.* at 1136-37.

53. *Frontline*, #410 (WGBH Boston, Apr. 8, 1986).

54. *See Judicial Conference—Second Circuit*, 141 F.R.D. 573, 660-61 (Sept. 7, 1991) (discussing the videotape).

55. *United States v. Dougherty*, 473 F.2d at 1136.

56. *Accord* Kadish & Kadish, *supra* note 30, at 66; Paul H. Robinson, *Legality and Discretion in the Distribution of Criminal Sanctions*, 25 Harv. J. On Legis. 393, 403-04 (1988) (nullification occurs when there is a strong moral component of the decision and the jury perceives that applying rules would conflict with its normative sense of justice).

57. Rule 401 defines relevant evidence as "evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." Fed. R. Evid. 401. Relevant evidence is generally admissible. Fed. R. Evid. 402. Rule 403 limits this general rule by providing that "Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence." Fed. R. Evid. 403.

58. *See supra* notes 53-54 and accompanying text (discussing the videotape).

59. *See Frontline*, *supra* note 53.

60. *See, e.g.*, 1 Hon. Leonard B. Sand et al., *Modern Federal Jury Instructions: Criminal* 2-5 (1988) ("You should not, any of you, be concerned about the wisdom of any rule that I state. Regardless of any opinion that you may have as to what the law may be—or ought to be—it would violate your sworn duty to base a verdict upon any other view of the law than that which I give you.").

61. Greenwalt, *supra* note 30, at 361; *see also id.* at 367 ("no evidence or argument in the possibility of nullification should be permitted").

62. *Id.* at 364.

63. *Id.* at 365. For the full text of Greenawalt's statement, with further refinements, *see id.*

64. *Cf.* H. L. A. Hart, *Punishment And Responsibility* 24 (1968) (Even though "like cases" should be "treated alike," "[j]ustice requires that those who have special difficulties to face in keeping the law which they have broken should be punished less."). *See also* Norman Lamm, *"Peace And Truth": Strategies For Their Reconciliation—A Meditation In Reverences, Righteousness And Rahamanut, Essays In Memory Of Rabbi Dr. Leo Jung* 193-99 (Jacob J. Schacter ed., 1992).

65. *Cf.* John Locke, *Second Treatise Of Government* 107-24 (C.B. McPherson ed., 1980) (discussing dissolution of government as the ultimate nullification).