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## Civil Disobedience in the Jury Room: Give Juries the Right to Go With Their Power<sup>1</sup>

*Robert J. Gallagher*<sup>2</sup>

This Comment will argue that jury nullification is not only a power enjoyed by juries throughout America, but a duty conferred on jurors, and a part of the criminal justice system that should be embraced, not hidden from sight. Part I will highlight the historical origins and justifications of jury nullification. It will also discuss jury nullification in its contemporary context. Part II will address some of the criticisms of jury nullification and provide responses to those criticisms. Finally, Part III will propose a framework for integrating jury nullification into the regular criminal justice process.

### **Part I**

Jury nullification has been defined as “a jury’s ability to acquit a criminal defendant despite finding facts that leave no reasonable doubt about violation of a criminal statute.”<sup>3</sup> Charges of jury nullification have run rampant following the trials of O. J. Simpson, Marion Barry, Dr. Jack Kevorkian, Lorena Bobbitt, and Bernhard Goetz, to name a few, with many in the media taking a dim view of the practice.<sup>4</sup> Commentators have claimed that jury nullification

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<sup>1</sup> This Comment was originally inspired by an editorial by Radley Balko, *Justice Often Served by Jury Nullification* (Aug. 1, 2005), <http://www.foxnews.com/story/0,2933,163877,00.html>.

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<sup>3</sup> Darryl K. Brown, *Jury Nullification Within the Rule of Law*, 81 MINN. L. REV. 1149, 1150 (1997).

<sup>4</sup> See, e.g., Joan Biskupic, *In Jury Rooms, A Form of Civil Protest Grows; Activists Registering Disdain For Laws With a ‘Not Guilty,’* WASH. POST, Feb. 8, 1999, at A1; Fred W. Lindecke, *Point of Law: Juries Entitled to Ignore It; The Power of Nullification Puts Activists, Jurists At Odds*, ST. LOUIS POST-DISPATCH, Oct. 25, 1995, at B5; Laura Mansnerus, *Under Fire, Jury System Faces Overhaul*, N.Y. TIMES, Nov. 4, 1995, at 9.

results in inconsistent application of laws, a diminishing respect for the law, and even anarchy.<sup>5</sup> Jury nullification is not a new phenomenon, however, and has served many purposes over the years.

### I.A

Earlier examples of jury nullification exist, but the concept took its first documented significant turn in 1670.<sup>6</sup> At that time, William Penn and William Mead were put on trial by the British Crown for preaching to an unlawful assembly.<sup>7</sup> The judge instructed the jury on the law, implying that they had to return a guilty verdict.<sup>8</sup> When, after deliberation, only eight of the twelve jurors voted to convict, the court threatened to punish the dissenters.<sup>9</sup> The jury then returned a verdict convicting Penn of preaching to an assembly, but refused to say whether or not the assembly was unlawful.<sup>10</sup> By doing so, the jury essentially acquitted both men.<sup>11</sup> The judge, exercising the power of attain, ordered the jurors locked up until such time as they either rendered a verdict acceptable to the court or paid fines.<sup>12</sup> The jury foreman, Bushell, filed a writ of habeas corpus seeking his release.<sup>13</sup> In *Bushell's Case*, Chief Justice of the Court, Sir John

<sup>5</sup> Lawrence W. Crispo, Jill M. Slansky & Geanene M. Yriarte, *Jury Nullification: Law Versus Anarchy*, 31 LOY. L.A. L. REV. 1, 3 (1997).

<sup>6</sup> See THEODORE F.T. PLUCKNETT, A CONCISE HISTORY OF THE COMMON LAW 133-34 (5th ed. 1956) (In 1544, an English jury refused to convict Sir Nicholas Throckmorton of high treason, despite overwhelming evidence against him.); cf. The Trial of William Penn and William Mead, at the Old Bailey, for a Tumultuous Assembly: 22 Car. 2 (London, 1670), reprinted in 6 T.B. HOWELL, A COMPLETE COLLECTION OF STATE TRIALS AND PROCEEDINGS FOR HIGH TREASON AND OTHER CRIMES AND MISDEMEANORS FROM THE EARLIEST PERIOD TO THE YEAR 1783, WITH NOTES AND OTHER ILLUSTRATIONS 951 (London, 1816) [hereinafter HOWELL] (recording the first documented instance of true jury nullification).

<sup>7</sup> HOWELL, *supra* note 6, at 954-55.

<sup>8</sup> See *id.* at 960-61.

<sup>9</sup> *Id.* at 961.

<sup>10</sup> *Id.* at 962-63.

<sup>11</sup> Crispo et al., *supra* note 5, at 6.

<sup>12</sup> HOWELL, *supra* note 6, at 967-68.

<sup>13</sup> *Bushell's Case*, (1670) 1 Vaughan 135, (1912) 124 Eng. Rep. 1006 (C.P.D.).

Vaughan ruled that no jury could be punished for the verdict it reached by either attain or fine.<sup>14</sup> At that point, jury nullification was established in the common law.<sup>15</sup>

The jury's immunity from government reprisal for acquitting a defendant is one of the pillars of the American version of jury nullification.<sup>16</sup> The other is the prohibition against double jeopardy, whereby an acquittal is an absolute bar to appeal or retrial on the same charges.<sup>17</sup> In one of the few jury trials held before the Supreme Court, Chief Justice John Jay instructed the jury that "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."<sup>18</sup> Over the next century, American courts would turn away from this sentiment.

The first such move may have occurred in *Marbury v. Madison*, when the Court declared that "[i]t is emphatically the province and duty of the judicial department to say what the law is."<sup>19</sup> Later juries nullified the law in runaway slave cases based on the Fugitive Slave Acts and the controversy came to a head in the case of *United States v. Morris*.<sup>20</sup> When Morris was charged with aiding a slave's escape to Canada, his attorney told the jury that it could hold the law to be unconstitutional if it found that to be the case.<sup>21</sup> The court interrupted counsel's argument and held that juries do not have the right to decide questions of law.<sup>22</sup>

An even more severe blow to acquittal by jury nullification was dealt by the United States Supreme Court in the 1896 case, *Sparf v. United States*.<sup>23</sup> Responding to a question from

<sup>14</sup> *Id.* at 148, 124 Eng. Rep. at 1012; David D. Dorfman & Chris K. Iijima, *Fictions, Fault, and Forgiveness: Jury Nullification In a New Context*, 28 U. MICH. J.L. REFORM 861, 869 (1995).

<sup>15</sup> Dorfman & Iijima, *supra* note 14.

<sup>16</sup> R. Alex Morgan, Note, *Jury Nullification Should Be Made a Routine Part of the Criminal Justice System, But It Won't Be*, 29 ARIZ. ST. L.J. 1127, 1139 (1997).

<sup>17</sup> David C. Brody, *Sparf and Dougherty Revisited: Why the Court Should Instruct the Jury of Its Nullification Right*, 33 AM. CRIM. L. REV. 89, 90 (1995); *see also* U.S. CONST. amend. V.

<sup>18</sup> *Georgia v. Brailsford*, 3 U.S. 1, 4 (1794).

<sup>19</sup> *Marbury*, 5 U.S. 137, 177 (1803).

<sup>20</sup> 26 F. Cas. 1323 (C.C.D. Mass. 1851) (No. 15, 815).

<sup>21</sup> *Id.* at 1331.

<sup>22</sup> *Id.* at 1336.

<sup>23</sup> *Sparf*, 156 U.S. 51 (1895).

the jury during deliberations, the trial judge held that “a jury is expected to be governed by law, and the law it should receive from the court.”<sup>24</sup> On appeal, Justice John Marshall Harlan held that a jury has “the physical power to disregard the law, as laid down to them by the court. . . . [But not] the moral right to decide the law according to their own notions or pleasure.”<sup>25</sup> For Justice Harlan, the right of an accused person to be adjudged by a jury responding to the facts and the court as to the law was the accused’s “only protection.”<sup>26</sup> Thus the concept of a power without right was laid upon the jury nullification argument.<sup>27</sup>

The status quo (whereby a jury was allowed to nullify, but the defendant was denied the ability to argue for nullification or to ask for instructions advising the jury that it had the power to nullify) continued throughout the twentieth century.<sup>28</sup> Juries repeatedly nullified in Prohibition cases during the 1920s, and nullification was not uncommon in cases in the South involving brutality against African American and civil rights workers in the 1960s.<sup>29</sup> The next major development came about in 1972, with the holding by the Circuit Court of the District of Columbia in *United States v. Dougherty*.<sup>30</sup>

In *Dougherty*, the defendants were tried for breaking into a Dow Chemicals facility<sup>31</sup> as part of a protest to the Vietnam War.<sup>32</sup> The defendants admitted the facts of the case and attempted to secure an acquittal based on what they viewed as the righteousness of their cause.<sup>33</sup> While acknowledging that jury nullification was appropriate in certain cases, the circuit court found no error in the trial judge’s refusal to instruct the jury about its right to acquit without

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<sup>24</sup> *Id.* at 62, n. 1.

<sup>25</sup> *Id.* at 74.

<sup>26</sup> *Id.*

<sup>27</sup> *Id.*

<sup>28</sup> See Crispo et al., *supra* note 5, at 12.

<sup>29</sup> *Id.*

<sup>30</sup> 473 F.2d 1113 (D.C. Cir. 1972).

<sup>31</sup> *Id.* at 1117.

<sup>32</sup> Crispo et al., *supra* note 5, at 12.

<sup>33</sup> *Dougherty*, 473 F.2d at 1120.

regard to the law and evidence.<sup>34</sup> The opinion in *Dougherty* has become the cited precedent for denying appeals brought when a request for jury instructions concerning nullification is refused.

## Part II

Chief Judge Bazelon dissented sharply in the *Dougherty* decision, and his critique of the majority's opinion is an excellent summarization of some of the arguments on both sides of the jury nullification question.<sup>35</sup> The *Dougherty* majority argued that an instruction about a jury's right to nullify would lead to anarchy and unnecessary difficulty in convicting guilty defendants.<sup>36</sup> The court also asserted that it would be redundant to instruct jurors of their "prerogative" to nullify because they would already know of this "prerogative."<sup>37</sup> This assertion, that it is unnecessary to instruct jurors about their power to ignore the court's instructions because they are already aware of that power,<sup>38</sup> is perhaps the most problematic rationale advanced by the *Dougherty* court.<sup>39</sup>

Chief Judge Bazelon noted in his dissent that this assumption "does not rest on any proposition of logic."<sup>40</sup> The majority cited no authority for this assumption,<sup>41</sup> and a study designed to determine whether the public knows it has the power to nullify the law in the teeth of a judge's instructions indicated that the public was unaware of this power.<sup>42</sup> This, then, underscores the gravest problem with allowing judges to refuse to instruct juries about their nullification power.<sup>43</sup> The current policy forces juries to decide when to exercise their

<sup>34</sup> *Id.* at 1136.

<sup>35</sup> See Brody, *supra* note 17, at 92.

<sup>36</sup> *Dougherty*, 473 F.2d at 1136.

<sup>37</sup> *Id.* at 1135.

<sup>38</sup> *Id.*

<sup>39</sup> See Brody, *supra* note 17, at 109.

<sup>40</sup> *Dougherty*, 473 F.2d at 1141 (Bazelon, J., dissenting).

<sup>41</sup> See Brody, *supra* note 17, at 109.

<sup>42</sup> David C. Brody & Craig Rivera, *Examining the Dougherty "All-Knowing Assumption"; Do Jurors Know About Their Jury Nullification Power?*, 33 CRIM. L. REV. 151, 165 (1995); see also Brody, *supra* note 17, at 109.

<sup>43</sup> Brody & Rivera, *supra* note 42, at 158.

nullification power without judicial guidance,<sup>44</sup> which runs the risk of resulting in precisely the disorder and anarchy cited by the majority in *Dougherty*<sup>45</sup> as a reason for denying the open existence of jury nullification.<sup>46</sup> Perhaps the most frightening possibility is that, without proper instructions about the power to acquit in spite of the law and evidence, some jurors might take it upon themselves to “nullify” by convicting a defendant based not on the evidence or the law, but on their own prejudices.<sup>47</sup> By refusing to instruct juries about their power to nullify, judges leave the law open to more interpretation, not less. In an area as vital as criminal jury trials, this possibility should be cause for concern.

### Part II.B- Other Criticisms of Jury Nullification

The argument that informing juries of their nullification power would break down the rule of law (i.e., lead to anarchy) is perhaps the most common charge leveled against jury nullification.<sup>48</sup> This accusation arises out of the belief that allowing the jury to nullify effectively places the jury above the society it is supposed to be serving, “since the legislature, not the jury, reflects the majoritarian view.”<sup>49</sup> This criticism unfairly characterizes jury nullification as allowing a jury to pass judgment on a *law*. In reality, a jury’s “nullification power allows it to decide whether the application of the law to the *particular circumstances of the case before it is just.*”<sup>50</sup> Elected legislators write laws that apply to large categories of citizens and generally

<sup>44</sup> See Brody, *supra* note 17, at 108.

<sup>45</sup> See *Dougherty*, 473 F.2d at 1136.

<sup>46</sup> Sheflin and Van Dyke ask, “Should the jury be told of its nullification power so it can exercise it wisely, or should we keep jurors mystified, hoping they will exercise power in extreme cases but withholding from them a full explanation of their responsibilities?” Allan W. Sheflin & Jon Van Dyke, *Jury Nullification: The Contours of a Controversy*, 43 LAW & CONTEMP. PROBS. 51, 68 (1980).

<sup>47</sup> See Brody, *supra* note 17, at 110.

<sup>48</sup> See Dorfman & Iijima, *supra* note 14, at 895.

<sup>49</sup> See *id.* at 896-97. See also Gary J. Simson, *Jury Nullification in the American System: A Skeptical View*, 54 TEX. L. REV. 488, 512 (1976) (arguing that nullification “frustrate[s] the people’s sense of justice” by allowing the jury to judge the law, and this in turn results in an undemocratic legal process).

<sup>50</sup> Dorfman & Iijima, *supra* note 14, at 895 (emphasis added).

define blameworthy actions. A jury sits in judgment of the application of those general rules to a particular set of facts.<sup>51</sup> This discretion seems to be one of the most cogent arguments for jury trials in the first place and should not be artificially limited.

There is discretion built into the legal system at all levels.<sup>52</sup> Police officers have the option to make an arrest or release an offender with a warning.<sup>53</sup> Prosecutors have the option to file charges or drop them.<sup>54</sup> Judges can reduce charges or dismiss them outright in the name of justice.<sup>55</sup> A jury's acquittal of a defendant who might be technically guilty of a crime under the law does not eviscerate the rule of law any more than when a police officer or prosecutor chooses not to arrest or prosecute a suspect before a case comes before the jury.<sup>56</sup>

Another argument made against giving juries instructions on their nullification power is that juror biases would lead to improper convictions or acquittals based on those prejudices.<sup>57</sup> This objection seems to misconstrue the nature of bias, however. As Chief Judge Bazelon explained in *Dougherty*:

It seems substantially more plausible to me to assume that the very opposite is true. The juror motivated by prejudice seems to me more likely to make spontaneous use of the power to nullify, and more likely to disregard the judge's exposition of the normally controlling legal standards. The conscientious juror, who could make a careful effort to consider the blameworthiness of the defendant's action in light of prevailing community values, is the one most likely to obey the judge's admonition that the jury enforce strict principles of law.<sup>58</sup>

So again, refusing to instruct juries on their power to nullify risks a result which is the opposite of that which was originally intended.

<sup>51</sup> *See id.*

<sup>52</sup> *Id.* at 896.

<sup>53</sup> *Id.*

<sup>54</sup> *Id.*

<sup>55</sup> *Id.*

<sup>56</sup> *Id.* at 896. *See also* KENNETH C. DAVIS, POLICE DISCRETION 1 (1975); KENNETH C. DAVIS, DISCRETIONARY JUSTICE: A PRELIMINARY INQUIRY 188 (1969).

<sup>57</sup> *Cf. Simpson, supra* note 49, at 514 (arguing that the possibility of local biases acting to immunize criminal acts against minorities should not be taken lightly).

<sup>58</sup> *United States v. Daugherty*, 473 F.2d 1113, 1141 (D.C. Cir. 1972) (Bazelon, C.J., dissenting).



A final objection to informing a jury of its nullification power is that a jury that chooses to nullify spontaneously has somehow rendered a verdict that is purer and less corrupt than verdicts rendered by those juries that are given instructions regarding nullification.<sup>59</sup> If juries are allowed to nullify, but are not told they can do so, they will choose to do so only under extreme circumstances. This goes hand in hand with the argument that if juries are told they have the power to nullify, they will choose to do so too readily.<sup>60</sup> Both contentions are overcome with a similar line of reasoning.

First, prosecutorial arguments are sufficient to curb juror bias in the face of pleas for nullification, as evidenced by mock jury studies conducted by Professor Irwin Horowitz, in which juries were given both explicit nullification instructions and typical non-nullification charges.<sup>61</sup> The states of Maryland<sup>62</sup> and Indiana<sup>63</sup> further illustrate the point. A typical jury instruction in Maryland reads:

Members of the jury, this is a criminal case and under the Constitution and Laws of the State of Maryland in a criminal case the jury are the judges of the law as well as of the facts in the case. So that whatever I tell you about the law while it is intended to be helpful to you in reaching a just and proper verdict in this 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.<sup>64</sup>

<sup>59</sup> See *id.* at 1141; see also MORTIMER R. KADISH & SANFORD H. KADISH, *DISCRETION TO DISOBEY: A STUDY OF LAWFUL DEPARTURES FROM LEGAL RULES* 35, 59-66 (1973).

<sup>60</sup> Cf. Crispo et al., *supra* note 5, at 51 (discussing the use of voir dire in determining a juror's propensity towards nullification).

<sup>61</sup> Irwin I. Horowitz, *Jury Nullification: The Impact of Judicial Instructions, Arguments, and Challenges on Jury Decision Making*, 12 *LAW & HUM. BEHAV.* 439, 451 (1988).

<sup>62</sup> Maryland's Constitution states that "[i]n the trial of all criminal cases, the Jury shall be the Judges of Law, as well as of fact ..." MD. CONST. Declaration of Rights art. 23 (amended 1992). Interestingly, the problem of unjust convictions resulting from jury nullification is addressed in the same section as the line continues, "... except that the Court may pass upon the sufficiency of the evidence to sustain a conviction."

<sup>63</sup> IND. CONST. art. I, § 19 reads: "In all criminal cases . . . the jury shall have the right to determine the law and the facts."

<sup>64</sup> See *Wyley v. Warden, Maryland Penitentiary*, 372 F.2d 742, 743 n.1 (4th Cir. 1967), *cert. denied*, 389 U.S. 863 (1967).

An empirical study on the Maryland courts has not shown any substantial disruption to its criminal justice system.<sup>65</sup> This study has also shown that judges in Maryland disagree with the verdicts rendered by the state's juries at a rate only marginally higher than the national average.<sup>66</sup> A survey of the acquittal rates of thirteen jurisdictions throughout the United States found that the rate of acquittals in Indianapolis, where juries are given nullification instructions, was actually lower than the composite average of the jurisdictions examined.<sup>67</sup> These studies may not be dispositive of the fact that jury nullification has none of the negative consequences cited by its detractors; but they do support the proposition that allegations of anarchy and overuse of nullification may be overstated.

### Part III

The court in *United States v. Datcher* said:

Argument against allowing the jury to hear information that might lead to nullification evinces a fear that the jury might actually serve its primary purpose, that is, it evinces a fear that the community might in fact think a law unjust. The government, whose duty it is to seek justice and not merely conviction . . . should not shy away from having a jury know the full facts and law of a case. Argument equating jury nullification with anarchy misses the point that in our criminal justice system the law as stated by a judge is secondary to the justice as meted out by a jury of the defendant's peers. We have established the jury as the final arbiter of truth and justice in our criminal justice system . . . .<sup>68</sup>

The Framers of America's Constitution were not only resolved that criminal defendants should have the right to trial by jury,<sup>69</sup> but they were united in their belief that ordinary citizens sitting

<sup>65</sup> See Gary C. Jacobsohn, *The Right to Disagree: Judges, Juries, and the Administration of Criminal Justice in Maryland*, 1976 WASH U. L. Q. 571, 582-600 (1976) (finding that 47.7% of Maryland judges believe that the nullification instruction has no observable impact on jury verdicts).

<sup>66</sup> See *id.* at 585.

<sup>67</sup> BUREAU OF JUSTICE STATISTICS, U.S. DEP'T OF JUSTICE, *THE PROSECUTION OF FELONY ARRESTS*, (1980, 1981, 1982, 1986, 1987). The average acquittal rate, excluding Indianapolis, was 26%. The acquittal rate in Indianapolis, where juries were given instructions on nullification, was 24%.

<sup>68</sup> 830 F.Supp. 411, 415 (M.D. Tenn. 1993).

<sup>69</sup> U.S. CONST. art. III, § 2, cl. 3 ("The Trial of all Crimes, except in Cases of Impeachment, shall be by jury . . ."); U.S. CONST. amend. VI ("In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial,

on juries should be able to judge the law as well as the facts of a case.<sup>70</sup> Juries should not only have the power to nullify; they, *as well as the defendants they pass judgment on*, should have the right to know this power exists. Commentators have suggested various ways to work jury nullification out of the shadows and into the open light of the criminal justice system. It seems that a combination of several suggestions might work the best.

Based on the studies of Maryland and Indiana, some commentators have suggested simply using a jury instruction similar to that used in Maryland.<sup>71</sup> There is no reason to think that adopting a similar instruction would be likely to significantly degrade the criminal justice system of any jurisdiction that adopted it. Furthermore, adoption of such an instruction would likely have the benefit of erasing the “see-no-evil, hear-no-evil” stance that the judiciary has seemingly taken on this point.

Dorfman and Iijima propose a complicated system of deliberation where the verdict is bifurcated and the jury passes judgment on the facts and the law.<sup>72</sup> Their proposed framework requires different verdicts of guilty, not guilty, or “at an impasse,” based on different vote totals during the bifurcated process.<sup>73</sup> This portion of their suggested solution seems unworkably complex; however, their proposal of a “notice requirement” does warrant further examination.<sup>74</sup> Dorfman and Iijima propose that, as a matter of procedure, the prosecution must be given adequate opportunity to prepare its counternullification argument, as it would be given in the case of an alibi or non-responsibility defense.<sup>75</sup> This would allow for a proper discussion in front

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by an impartial jury . . .”).

<sup>70</sup> Alexander Hamilton wrote: “The friends and adversaries of the plan of the convention, if they agree in nothing else, concur at least in the value they set upon the trial by jury: Or if there is any difference between them it consists in this; the former regard it as a valuable safeguard to liberty, the latter represent it as the very palladium of free government.” THE FEDERALIST NO. 83, at 499 (Clinton Rossiter ed. 1961).

<sup>71</sup> See Brody, *supra* note 17, at 121.

<sup>72</sup> See Dorfman and Iijima, *supra* note 14, at 919-23.

<sup>73</sup> See *id.* at 921-22.

<sup>74</sup> *Id.* at 923-25.

<sup>75</sup> *Id.* at 923.

of the jury about the merits of the defendant's claim. Taken in the light of Professor Horowitz's finding that prosecutorial arguments were effective at countering nullification defenses, such a procedure would be unlikely to result in an unacceptable increase in the percentage of guilty defendants acquitted.<sup>76</sup> This procedural framework would mesh well with M. Kristine Creagan's suggestion that defense counsel provide the jury with information about nullification during closing arguments.<sup>77</sup>

However the system is modified, it is necessary that *some* improvement take place. Jury trials are too important to the criminal process, and the stakes are too high, to allow juries to deliberate without being fully informed of their powers.

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<sup>76</sup> See Horowitz, *supra* note 61.

<sup>77</sup> See M. Kristine Creagan, Note, *Jury Nullification: Assessing Recent Legislative Developments*, 43 CASE W. RES. L. REV. 1101, 1144-48 (1993). *But see* Morgan, *supra* note 16, at 1141 n.99 (pointing out that Creagan neglects to acknowledge that her proposal, to be successful, would require a change in judge's instructions, when judge's routinely warn jurors against nullification).

