Jury Nullification and the Bad Faith Juror

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Abstract

Jury nullification, that phenomenon whereby a jury returns a not-guilty verdict for a defendant it believes to be technically guilty of the alleged crime, is, obviously, a controversial issue. What is not a matter of controversy, however, is the fact that the law protects the jury's ability to behave this way. Much of the controversy therefore centers on whether juries ought to be informed of this ability to nullify free from legal redress. In this paper I examine a number of arguments both for and against the view that juries ought to be, in the words of the literature, *fully informed*.

In the end I conclude that there is significant empirical evidence to suggest that, rather than simply promoting justice and mercy, as proponents of the instruction argue, fully informing a jury has the unforeseen consequence of encouraging juries to behave in a manner I label *bad-faith*, and that such bad-faith juries in fact corrupt the principles of justice and fairness that are the cornerstones of the trial system.

Keywords: jury, jury nullification, fully-informed juries, jurors' rights, judicial instructions.

Jury Nullification refers to the actions of a jury in a criminal trial who, despite believing the defendant to be guilty of the crime charged, nevertheless return a verdict of not guilty. The jury's ability to do so without fear of redress is a well-established element of the criminal justice system.[1] This is

1. See, for example, *Horning v. District of Columbia*, 41 S.Ct. 53 (1920), where Holmes, J. stated: "[T]he jury has the power to bring in a verdict in the teeth of both law and facts"; *Morissette v. United States*, 342 U.S. 246, 275 , 72 S. Ct. 240, 256, 96 L. Ed. 288 (1952): "But juries are not bound by what seems inescapable logic to judges"; *United States v. Moylan*, 417 F.2d 1002, 1006 (4th Cir. 1969), *cert. denied*, 397 U.S. 910 (1970): "If the jury feels the law is unjust, we recognize the undisputed power of the jury to acquit, even if its verdict is contrary to the law as given by a judge, and contrary to the evidence... If the jury feels that the law under which the defendant is accused is unjust, or that exigent circumstances justified the actions of the accused, or for any

an important point: it is a well-established fact that nullifying jurors are behaving within the bounds of the law. Their verdict must be accepted; their liberty not at risk for nullifying. It is not surprising, of course, that such behaviour on the part of the jury elicits much controversy within the criminal justice system. After all, the idea of a jury intentionally freeing someone who is technically a criminal in all but verdict is *prima facie* troubling, to say the least. However, even those who see jury nullification to be a somewhat pernicious element of the jury system do not advocate trying to remove the ability to so act from the jury.[2]

One of the most active controversies regarding jury nullification, however, both in the courts and among legal theorists, centers on whether juries ought to be *informed* that they have this ability to nullify[3]. As the law currently stands in most North American criminal jurisdictions, a trial judge's instructions to the jury are to make no reference to the jury's ability to nullify.[4] While the constitutions of Maryland, Indiana, Oregon, and Georgia currently have provisions guaranteeing the right of jurors to "judge" or "determine" the law in "all criminal cases", it is by no means clear whether this implies a right to be explicitly informed that they may nullify. Broadly speaking then, the question surrounding judicial instructions to the jury regarding jury nullification is, as I said above, this: given that juries have the legally recognized ability to nullify free from redress, ought they to be so informed?

Proponents on both sides of the issue often tend to focus on *effects-based* arguments to support their views —arguments that balance the costs against the benefits of informing jurors of their privilege to nullify.[5] In this paper I propose to examine and endorse one effects-based argument against informing jurors of their privilege to nullify— an argument I call the *Bad-Faith* objection.

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reason which appeals to their logic or passion, the jury has the power to acquit, *and the courts must abide by that decision*" (emphasis added); *U.S. v. Dougherty*, 473 F.2d 1113, 1130 (D.C. Cir., 1972): "The jury has an 'unreviewable and irreversible power... to acquit in disregard of the instructions on the law given by the trial judge...".

2. For instance, Simson (1976), while arguing that jury nullification does more harm than good to the promotion of a just legal system nevertheless states that "any measures calculated to diminish significantly the scope of the jury's current power to nullify bear unacceptable repercussions for the system as a whole" (Simson, 1976: 524). See, also, *United States v. Datcher*, 830 F. Supp 411 (M.D. Tenn., 1993), at 412, where the court stated that "to deny a defendant the possibility of jury nullification would be to defeat the central purpose of the jury system".

3. See, for instance, A. Scheflin and J. Van Dyke (1980: 51); Barkan, S. (1983: 38); Horowitz I. (1985: 25); *United States v. Krzyske*, 836 F.2d 1013 (6th Cir. 1988); *State v. Hokanson*, 140 N.H. 719, 721 (1996); *U.S. v. Navarro-Vargas*, 05 C.D.O.S. 4311.

4. See, for instance, *Sparf v. United States*, 15 S.Ct. 273 (1895); *Horning v. District of Columbia*, 41 S.Ct. (1920); *United States v. Burkhart*, 501 F. 2d 993 (6th Cir. 1974); *United States v. Avery*, 717 F.2d 1020 (6th Cir. 1983), *cert. denied*, 466 U.S. 905 (1984).

5. For why I chose to describe jury nullification as a "privilege", see T. Hreno (2008).

Before I do so, however, I will briefly outline the main positions advanced by both sides of the nullification instruction debate. Any detailed analysis of these positions is, however, beyond the scope of this paper.

There are four main effects-based arguments put forth by those who support giving the nullification instruction to jurors. These are:

> *The Community Standards argument*. When a jury nullifies it is ensuring that the standards of the community are brought to bear on the administration of the criminal law.[6]
>
> *The Freedom from Government Oppression argument*. When a jury nullifies it is ensuring that the citizenry cannot and will not be victims of oppressive legislation or oppressive enforcement of otherwise acceptable legislation.[7]
>
> *The Mercy argument*. A nullifying jury is in a position to add an element of mercy to situations where a strict adherence to the law might otherwise be cruel.[8]
>
> *The Justice argument*. A nullifying jury is in a position to add an element of justice to situations where a strict adherence to the law might otherwise be unjust.[9]

These four arguments are actually of two broad types. The first two arguments —*Community* and *Oppression*— are in fact arguments for why the *jury* is a desirable institution. These arguments have the following form: One good thing about the jury is *x* (where *x* stands for, in this case, either the promotion of community standards or the protection from government oppres-

6. See, for instance, *Williams v. Florida*, 399 U.S. 78 (1970) at 100: "[T]he essential feature of a jury obviously lies in the interposition between the accused and his accuser of the commonsense judgment of a group of laymen, and in the community participation and shared responsibility that results from that group's determination of guilt or innocence".

7. See, for instance, Roscoe Pound says that "jury lawlessness is the greatest corrective of law in its actual administration. The will of the state at large imposed upon a reluctant community, the will of a majority imposed on a vigorous and determined minority, find the same obstacle in the local jury that formerly confronted kings and ministers" (R. Pound, 1910: 18).

8. See, for instance, *United States v. Dougherty,* 473 F.2d 1113 (D.C. Cir., 1972), at 1131-2: "Human frailty being what it is, a prosecutor disposed by unworthy motives could likely establish some basis in fact for bringing charges against anyone he wants to book, but the jury system operates in fact so that the jury will not convict when they empathize with the defendant".

9. See, for example, *United States v. Dougherty*, at 1142: "The doctrine [of nullification] permits the jury to bring to bear on the criminal process a sense of fairness and particularized justice. The drafters of legal rules cannot anticipate and take account of every case where a defendant's conduct is "unlawful" but not blameworthy, any more than they can draw a bold line between an accident and negligence. It is the jury... that must explore that subtle and elusive boundary".

sion). The jury can only *x* if it is also free to nullify in some cases. Since the nullification instruction promotes instances of nullification, the instruction ought to be given.

The second group of arguments —comprising the *Mercy* and *Justice* arguments— are really arguments in favour of *nullification* itself. Mercy and justice are good things, and are virtues that ought to be present in our criminal justice system, according to these arguments. A jury can only promote these virtues (when the law fails to do so) if it can nullify. Since the jury is more likely to nullify than otherwise if the nullification instruction is given in such situations, the instruction ought to be given.

Those who oppose giving the instruction do so, for the main part, on the grounds that a jury, left to its own discretion, simply cannot be trusted to act consistently with the principles of justice. Consider the reaction of the American courts. Leventhal, J., for instance, condemned jury nullification in *United States v. Dougherty,*[10] stating "[t]his so-called right of jury nullification is put forward in the name of democracy, but its explicit avowal *risks the ultimate logic of anarchy*".[11] There is, in general, a belief among some members of the judiciary that the practice and promotion of jury nullification will corrupt the pursuit of justice within the criminal justice system and subvert the rule of law in a very real and substantive manner. I refer to arguments of this type as *Anarchy Arguments*.[12]

I am willing, for the sake of argument, to grant to the pro-instruction side of the controversy that their reasoning has *prima facie* plausibility. The same, however, simply cannot be said for the anarchy argument. As I said earlier, any detailed examination of these arguments is beyond the scope of this paper. But a few words must be said regarding the failure of the *Anarchy Argument*.

Obviously, anarchy seems like the sort of thing to avoid in a justice system, so if giving the jury nullification instruction is in any way implicated in an increase in judicial anarchy, that would be a very serious indictment. But does the *Anarchy Argument* have merit? Will informing jurors of their nullificatory discretion promote anarchy and subvert the rule of law? Fortunately, we can look to the states of Maryland and Indiana, both of whom contain within their constitutions provisions for juries to be informed of their privi-

10. *Supra,* note 1.

11. *Ibid.,* at 1133 [emphasis added]; see also, *State v. McClanahan*, 212 Kan. 208, 216, 510 P.2d 153, (1973) at 159, where the court stated, in regard to jury nullification that "[d]isregard for the principles of established law creates anarchy and destroys the very protections which the law affords".

12. See A. Scheflin **and J. Van Dyke (1980: 85-90) for an in-depth discussion of this per**spective.

lege to nullify in criminal cases.[13] It seems reasonable, therefore, to assume that these states might serve as a kind of laboratory, as it were, in which to witness the operation of the nullification instruction.

Maryland's constitutional provision, for instance, states that "[i]n the trial of all criminal cases, the Jury shall be the Judges of Law, as well as of fact, except that the Court may pass upon the sufficiency of the evidence to sustain a conviction".[14] Because of this the following instruction is given to criminal jurors in Maryland

> 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 are the judges of the law as well as of the facts in the case. So that whatever I tell you about the law while it is intended to be helpful to you in reaching a just and proper verdict in the case, it is not binding upon you as members of the jury and you may accept or reject it. And you may apply the law as you apprehend it to be in the case.[15]

The Indiana State Constitution contains a similar provision, which states that "[in all criminal cases whatever, the jury shall have the right to determine the law and the facts".[16] The right of a jury to be so instructed was affirmed by the Indiana Supreme Court in 1967.[17]

While neither of these constitutional provisions make explicit reference to nullification, it is clear that this is what the concept of "judging the law" is meant to refer to. After all, to be in the position to judge the law is to be in the position to decide for one's self whether it would be appropriate to apply the law to the facts. In the words of the *Wiley*[18] decision, nothing the judge says regarding the law is binding upon the jury.

There is really not too much that can be said in response to the *Anarchy Argument* other than to point out that whatever the legal systems of Indiana and

13. The Georgia Constitution also has a similar provision which holds that "[i]n criminal cases... the jury shall be the judges of the law and the facts" (Art. I, sec. 1, para. 11, subsec. A) However, "it has long been settled that this language... means that jurors are "made absolutely and exclusively judges of the facts in the case [and] they are, in this sense only, judges of the law"", *Hall v. State*, 410 S.E.2d 448 (Ga., 1991) at 451 [quoting *Harris v. State*, 9 S.E.2d 183 (Ga., 1940)].

14. MD. CONST., Declaration of Rights, art. 23.

15. *Wyley v. Warden, Maryland Penitentiary*, 372 F.2d 742 (4th Cir., 1967) at 743, n. 1.

16. IND. CONST. art. 1, § 19.

17. 248 Ind. 566, 230 N.E.2d 416 (1967). The court stated here that "[i]t appears to this Court that Art. I, § 19 taken in connection with the presumption of innocence is far from an outmoded, archaic, anachronism. Rather, despite its venerable age, it appears to be in the vanguard of modern thinking with regard to the full protection of the rights of the criminal defendant", At 421.

18. *Wyley v. Warden, Maryland Penitentiary* (743, n. 1).

Maryland may be known for, it is certainly not for juridical anarchy caused by jurors exercising their discretion to acquit contrary to the law. I don't pretend to have any figures to back this claim up, nor do I even claim to know how one might go about measuring such a thing as juror-caused juridical anarchy —if such a thing is even possible—. The point I'm trying to make here is that those who appeal to the *Anarchy Argument* tend to focus on what might happen if the nullification instruction were to become institutionalized, while ignoring its effects in those jurisdictions where it already is institutionalized.

There is, however, one consequence-based objection to the nullification instruction that I believe is not only successful (that is, it is both relevant and persuasive), but is also able to meet the challenges posed by the arguments in favour of the instruction. I call it the *Bad Faith* objection. Essentially, I contend that the nullification instruction can encourage jurors not only to nullify the law, but can also indirectly encourage them to "nullify" a great many of the procedural elements in place to ensure a fair and just trial. In essence, the nullification instruction has, I contend, the unforeseen, but unavoidable consequence of encouraging jurors to act in bad faith and in such a way so as to subvert the concept of a fair trial and increase the likelihood of unwarranted convictions. Let me explain.

The nullification instruction essentially informs jurors that they are free to disregard the judge's instructions regarding the law. In other words, the judge is saying something akin to: "I am going to give you an order regarding how the law in this case is to be interpreted. However, you are free not to follow that order". But given that instruction, what is to prevent the jury from wondering whether all such instructions from the bench are similarly discretionary in nature?.[19] Once a juror comes to the realization that she can ignore a particular judicial instruction free from reprimand, presumably she'll realize that what protects her from reprimand when she ignores the judge's instructions regarding the law will also protect her from reprimand when she ignores other judicial instructions. So how does this affect the notion of a free trial and how does this increase the likelihood of problematic convictions? To begin with, our notion of a fair trial includes, among other things, the presumption of innocence (included in this presumption is the idea that a defendant's decision not to testify in his or her defense is not to be taken as *prima facie* evidence of guilt), fair rules of evidence (based on traditional notions of legal relevance: if evidence does not make any element of the crime more or less likely, such evidence is legally irrelevant and is to be disregarded when considering culpabil-

19. There is a recursive nature to this problem. After all, the judge could inform the jurors that her instructions regarding the law are the only such instructions they are free to ignore, but again, once that door has been opened, what is to prevent a juror from wondering whether that order *too* is discretionary?

ity), and a burden on the prosecution to prove the defendant's guilt "beyond a reasonable doubt". All of these elements of a fair trial are given to the jury via instructions from the bench. If a juror is of the mind (correctly, I might add) that she can safely ignore any of these other judicial instructions then the very notion of a fair trial becomes corrupted. For instance, it is not entirely uncommon for evidence or testimony to be introduced in trial that is subsequently ruled to be inadmissible. In such situations a judge may simply instruct the jury to ignore such evidence or testimony and not let it play any part in their deliberations. But, of course, this is a judicial order, and of the type that can be safely ignored (unlike a judicial order to, say, answer questions during *voir dire* honestly and completely).[20] If this order is ignored, and the evidence or testimony in question *is* taken into consideration, then the defendant is not judged on evidence relevant to the alleged crime, but on extraneous facts. Of course, one might argue that the distinction between relevant and extraneous evidence is a question of law, and hence, such behaviour on the part of the jury is nothing more than an instance of nullification. But then consider the principle that the decision not to defend oneself on the stand is not to be taken as evidence of guilt. Judges give that particular order precisely because it is human nature to consider it suspicious when someone does not try to defend himself or herself. Jurors, too, have to struggle against that tendency, and it is a struggle that all agree ought to be encouraged, fostered and supported. Moreover, this principle is at the heart of the ideal that it is the prosecution's responsibility to prove guilt, not the defendant's responsibility to prove innocence. Again, the problem here is that once it becomes clear that one judicial instruction can be safely ignored, it soon becomes obvious that a great many others can as well. It is an established principle of our criminal justice system that the burden of proof rests with the prosecution. Will jurors feel they have the privilege to ignore this as well? I will return to this question.

It seems obvious that the nullification instruction *might* encourage jurors to disregard important judicial instructions regarding the procedural and substantive constraints embedded in the notion a fair trial. The standard elements of a fair trial (objective rules of evidence, the presumption of innocence, and the burden of proof resting with the prosecution) are all safeguards put in place in an attempt to minimize the possibility of wrongful convictions. The fact of the matter is, however, that such safeguards are, in effect, discretionary. That is, the jury can ignore all or some of them with complete impunity.[21] When juries ignore such judicial instructions regarding

20. Ignoring this order would most likely result in a charge of perjury.

21. Of course, some redress is available to those convicted as a result of this in the form of appeals, but since juries do not issue written decisions, nor are their deliberations monitored, it is not at all clear that such an avenue is effectively open to most. We simply do not know most of the time why a jury decided to convict.

the law it is not hard to imagine that in some instances their deliberations might tend towards a guilty verdict even in cases where a strict application of the law might demand the opposite verdict. This is, obviously, cause for concern. After all, while many of the proponents of the nullification instruction argue that the jury's privilege to behave in such a manner is more than simply an oversight, that it is, in fact, a design feature of the jury system,[22] the same simply cannot be said about the "privilege".[23] to ignore judicial instructions regarding the procedural and substantive elements of a fair trial. No one could possibly argue that this is either a design feature of the jury system or a positive element thereof.

Let's be clear here. My objection is not that jury nullification will lead to more unjust convictions. Nullification, by definition, can only result in acquittals. Rather, the claim I am making is that the nullification instruction itself might lead to more unjust convictions by indirectly encouraging jurors to ignore judicial instructions that are designed to guarantee a fair trial. Hence, this objection directly implicates the nullification instruction, though not the institution of jury nullification itself.[24]

Of course, up to this point my arguments have been speculative in nature: the jury *might* behave in a bad-faith manner to the detriment of justice and fairness if given the nullification instruction. But *would* jurors actually behave this way. For any pragmatic approach to this issue, that is the relevant question.[25] I claim that there is reason to worry that, indeed, they would. Moreover, my claim isn't merely that juries who receive the nullification instruction might thereby convict more often (though this would be worrisome enough); I also argue that they will return guilty verdicts precisely in those cases where it is particularly important that all of the rules of a fair trial are maintained. In particular, I am referring to those cases where there is high degree of moral opprobrium and revulsion attached to the alleged crime. Consider a scenario where the defendant was accused of, say, pedophilia. Let us suppose that the evidence presented at trial was circumstantial at best, and that after the defense made its case it seemed unlikely that the burden of proof could be met. In these sorts of situations one might worry that the knee-jerk reactions nearly all of us have of "where there's smoke there's fire", and "better safe than sorry", might very well combine in the minds of the jurors so as over-ride the judicial instructions regarding the burden of proof

22. See, for instance, A. Scheflin and J. Van-Dyke (1980).

23. If that's the proper way to describe it.

24. This is different from the anarchy objection we have been looking at heretofore where the practice of jury nullification itself was seen to be the problem and the instruction was only implicated to the degree that it promoted instances of jury nullification.

25. Of course, even the speculative challenge is cause for concern. We ought not to be too comfortable with the idea of juries that might behave this way.

in a way that, I will argue, would not happen if the defendant was being accused of some more morally neutral crime, such as, say, income tax evasion. That is, the jurors might very well convict the defendant even though if the case were identical in every respect except that the crime alleged was, in some sense, morally neutral (*e. g.*, income tax evasion) they would not. While this concern is somewhat speculative in nature, it is fairly well enough established to have found voice in many of the procedural elements of the jury trial. This is why the bench issues orders to the jury cautioning them against being unduly influenced by the nature of the charge; this is why jurors are vetted during *voir dire* to ensure that they can evaluate the evidence free of prejudice (victims of sexual assault, for example, do not generally get to be jurors on cases involving sexual assault). While this sort of "moral prejudice" is perhaps unavoidable, giving the nullification instruction, I intend to show, will only exacerbate this problem. As I mentioned above, it is a short logical leap from the realization that one judicial order can be safely ignored to the realization that a great many others can be as well.

This is a significant challenge to the nullification instruction. If such an instruction is given, the worry goes, we might well end up with is a justice system whereby the type of crime a defendant is charged with, or the sort of person a defendant is, will end up playing a substantial and material role in the jury's decision whether to convict or acquit. And whatever this may be, it is certainly not justice.[26]

As I said above, I do not intend for this to be a merely speculative claim. Fortunately, there is empirical evidence that confirms what I have been saying. Irwin Horowitz, in "The Effect of Jury Nullification Instruction on Verdicts and Jury Functioning in Criminal Trials" (Horowitz, 1985), conducted a study designed specifically to answer the following question: "Will the jury operate in a manner which is different than its normal function if given explicit nullification instructions?" (Horowitz, 1985: 25). His findings were unambiguous and compelling, and prove ultimately to be detrimental to those who endorse the nullification instruction. The Horowitz study involved 45 mock juries, 270 jurors, and three different criminal cases. The mock juries were divided into three groups of 15 each with each group hearing a different criminal case (murder, drunk driving involving vehicular homicide, and euthanasia). Finally, each group was further divided into 3 groups of 5 mock juries, with each of these smaller groups hearing a different instruction from the bench regarding the proper purview of their authority in the case at hand. Two of these groups received standard pattern juror instructions in

26. Whatever the Legal Realist might say about the nature of law, no one argues that the law is improved morally or pragmatically when such prejudice is procedurally encouraged or tolerated.

use today. The third group received explicit nullification instruction, or, as Horowitz labeled them, *Radical Nullification Instructions (RNI)*. Jurors were told that: i) "although they are a public body bound to give respectful attention to the laws, they have final authority to decide whether or not to apply a given law to the acts of the defendant on trial before them" (Horowitz, 1985: 30); ii) "they represent (the community) and that it is appropriate to bring into their deliberations the feelings of the community and their own feelings based on conscience" (*ibid.,* 30-1); and "nothing would bar them from acquitting the defendant if they feel the law, as applied to the fact situation before them, would produce an inequitable or unjust result" (*ibid.,* 31).

After the juries heard their respective cases and related instructions, they retired to the jury-room to deliberate. These deliberations were recorded and later analyzed. This analysis yielded the following findings. RNI juries spent more time discussing the implications of the nullification instruction than did either of the other two jury types. What is alarming is that RNI juries spent significantly less time considering the evidence against the accused than did either of the other two jury types. We can see exactly why this is alarming by looking at the verdicts these different juries returned. For the murder case there was no difference —all returned guilty verdicts— the evidence "clearly indicat[ed] the defendant's guilt" (*ibid.*). There were substantial differences between all three juries in the euthanasia case. A full 80% of the RNI juries returned not guilty verdicts, whereas the number of not guilty verdicts for the other two juries was between 40% and 20%. This is in keeping, of course, with what proponents of the nullification instruction assume will occur. Euthanasia is certainly illegal, but many people are nonetheless sympathetic to its practice in some situations.[27]

The drunk driving case, however, is a different story. Here, while both standard pattern jury types returned not guilty verdicts 40% of the time, the RNI juries, on the other hand, voted to convict in every instance. This is particularly distressing because these same RNI juries also spent less time deliberating upon the evidence than did either of the other jury types. Thus, the RNI jury was more likely to condemn a defendant accused of drunk driving, and spend less time deliberating on the evidence when doing so. Why? Recall that these deliberations were monitored, and as Horowitz explains it:

> In the drunk driving case, RNI juries were more apt to convict the defendant of reckless vehicular homicide [than the other juries]... There was, however, at least a suggestive trend in the jury operating under RNI that the defendant, as [an alleged] drunk driver, *was perceived quite unfavourably*.

27. The jurors in the euthanasia case heard testimony from the deceased's wife that he had suffered great pain and had hoped for death to occur.

> Current campaigns aimed at curbing drunk driving have received a good deal of publicity... at the time this study took place (*ibid.* emphasis added).

In other words, the jurors felt a certain amount of moral condemnation towards the accused. And while we can speculate that perhaps all of the jurors felt this way, the fact remains that only the jurors who received the nullification instruction were more apt to let this influence their verdict and thus more apt to disregard or downplay any exculpatory evidence, and pay less attention to the principals regarding burden of proof when returning a verdict (*ibid.,* 33). Put another way, the nullification instruction, in some contexts, leads to more convictions —convictions based, not entirely on the evidence, but also on the moral nature of alleged crime—. What is of note for my argument is that at no point in the trial or jury deliberations regarding drunk driving did the issue of whether the law was just arise. Thus, whatever effect the nullification instruction had on the jurors in those trials, it must have been in some arena of discourse beyond "whether or not to apply a given law to the acts of the defendant on trial before them". After all, the *actual* acts of the defendant received less attention and consideration than demonstrated by the other juries. Thus, RNI juries must be considering other factors when deliberating on culpability, and importantly, ignoring the trial judge's instructions regarding such things as rules of evidence. Obviously, one must be wary of drawing too many conclusions from the results of one social experiment. But the fact remains that Horowitz has supplied empirical data to a debate heretofore devoid of it, and the data does not look good for those who support informing the jury of nullification.

I think it is now time to revisit the arguments made earlier in defense of giving the nullification instruction. Recall that I chose not to take issue with the conclusion offered by advocates of this position. However, I believe we must weigh these benefits against the costs of giving the instruction. In doing so, a few points become immediately obvious. First, while the nullification instruction can certainly bring the standards of the community to bear on the administration of the criminal law, it can do so to the detriment of the accused, and not just to her benefit —regardless of her innocence—.[28] Secondly, while the nullification instruction can help ensure that the citizenry will not be victimized by unwarranted state action, it cannot ensure that individual defendants will not be victimized by unwarranted "moral prejudice" on the part of the jury. As a matter of fact, giving the instruction is almost a guarantee that some defendants *will be* victimized by unwarranted moral prejudice on the part of the jury. Third,

28. It is important to bear in mind that the objection is not that nullification will work to the detriment of the accused. Rather, the complaint is that the nullification instruction will do so, albeit indirectly.

while the nullification instruction can add an element of mercy to the administration of the law, it is equally clear that giving the instruction can also add an extra-legal element of malice to the administration of the law. Finally, while the nullification instruction can add an element of justice to situations where a strict adherence to the law might otherwise be unjust, it can also, as we have seen, promote great injustices. Whatever crimes a person may be accused of, the moral nature of said crimes ought never to be a factor in the determination of her guilt or innocence. This is the very antithesis of justice. If Horowitz's conclusions are accurate then clearly whatever advantages to the administration of the law are realized by giving the nullification instruction are outweighed by the very real disadvantage that such an instruction can, and does, also promote unjust guilty verdicts. Such an instruction, in other words, encourages jurors to deliberate in bad faith to the detriment of the accused. While the actual act of jury nullification can only operate in a liberty enhancing way (*i. e.,* can only result in acquittals), the nullification *instruction* has the unfortunate consequence of potentially limiting liberties unduly in other unforeseen ways. Hence, to those who see justice and fairness to be essential to our criminal justice system, the jury nullification instruction must be viewed as a potential area of conflict with those values. To put this another way: there seems to be, at the heart of the justice and mercy arguments in favour of nullification, a view consistent with that old saw that it is better for ten guilty men to go free than for one innocent man to be jailed. Perhaps this is true. Regardless, the reality of the jury nullification is that more guilty defendants will go free *and* more innocent defendants will be jailed.[29] Even if the likelihood of unjust convictions is small, such a risk seems inconsistent at best with that particular calculus of justice.

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29. And no one argues that it is better for ten guilty men to go free *and* for one innocent man to be jailed.