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Judicial Nullification

MICHAEL J. SAKS*

You are the law. Not some book. Not the lawyers. Not a marble statute or the trappings of the court. Those are just the symbols of our desire to be just If we are to have faith in justice, we need only to believe in ourselves and act with justice. I believe there is justice in our hearts.

—From Paul Newman's closing argument in *The Verdict*¹

INTRODUCTION

In his opening remarks to the conference that gave rise to the papers in this issue, Newton Minow struck a chord that resonated with unusual strength and clarity across many of the succeeding speakers.² Mr. Minow observed that his wife and one of his daughters—two educated persons who lived many years in a legally literate home—recently had served as jurors and both had found the judges' instructions on the law to be incomprehensible. How could they apply the law if in effect they never were told what the law was? Subsequent speakers confirmed this observation both anecdotally and with reference to systematic empirical research on the question.

The thesis of this Article is that by effectively and persistently offering juries instructions that cannot be understood, judges regularly nullify the law. Judges have done so for centuries, and they are unlikely to stop. And perhaps they ought not to stop.

This Article will proceed in three steps. The first part briefly reviews some of the research findings concerning the communication of law to jurors through customary instruction by judges. The basic finding is that jurors generally are no more informed about the law with instruction from the bench than they are without such instruction. The second part discusses the import of those findings. In essence, the failure to instruct jurors nullifies the law and leaves jurors free to decide cases using their own intuitions about justice. Although reforms to improve communication from judge to jury are entirely feasible, such change rarely comes from judicial initiative, though it has come from other legal quarters. The third part considers possible explanations for the widespread practice of judicial nullification. Some of these explanations suggest that the practice serves useful functions that need to be preserved.

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1. *THE VERDICT* (Twentieth Century-Fox 1982).

2. *Communicating with Juries, Welcoming Remarks and Statement of the Issues, The Annenberg Washington Program Conference, April 10, 1992*, 68 *IND. L.J.* 1033, 1034 (statement of of Mr. Minow).

I. NULLIFICATION BY NON-INSTRUCTION

The basic notion of instructing juries on the law applicable to the case before them makes obvious sense. After seeing what evidence has been offered in a case and what legal issues have emerged, with the guidance of various sources of substantive law, the trial judge and attorneys, in adversarial collaboration, can fashion a correct statement of the law bearing on the case to present to the jury. Indeed, if we are to have a lay jury for all of the institutional³ and societal benefits⁴ it provides, then how other than educating them in the relevant law can we bring the law to bear on their decisions?

But that basic sound idea is accomplished with difficulty, if at all. Instructions often are lengthy and complex, because the issues in a case may be numerous, subtle, and complicated. Many legal concepts are obscure. And nearly all are rendered in language whose structure is confusing and whose words are abstruse.

In the first-year criminal law class I teach, if students seem especially perplexed by a legal concept, I sometimes provide them with a state's standard jury instruction on the point. "What could be more illuminating than to hear how the concept is explained to the lay people who are actually going to apply it in deciding a case?," I preface. Gross negligence. Recklessness. Premeditation. Causation. More often than not, the students find the instructions stunningly unhelpful. How, then, does a jury find them?⁵ Jerome

3. For example, the division of responsibility between judge (as decider of what evidence may come in or be kept out) and jury (as decider of the case on the basis of evidence that the judge finds fit to admit) permits a degree of evidence management that would not otherwise be possible. Other institutional benefits are discussed by HARRY KALVEN, JR. & HANS ZEISEL, *THE AMERICAN JURY* (1966) and VALERIE P. HANS & NEIL VIDMAR, *JUDGING THE JURY* (1986).

4. For example, the jury serves as a lightning rod for public discontent with any particular trial verdict, thus insulating the judiciary from individual and accumulated dissatisfaction. Other social functions are discussed in HANS & VIDMAR, *supra* note 3; KALVEN & ZEISEL, *supra* note 3; and Michael J. Saks, *Blaming the Jury*, 75 *GEO. L.J.* 693 (1986).

5. When the legal concepts are themselves confused, no amount of effort at clarification of language is going to help matters. For example, concerning the distinction between first- and second-degree murder, Herbert Wechsler and Jerome Michael had this to say: "The trial judge must solemnly distinguish in his charge between the two degrees in terms which frequently render them quite indistinguishable, a procedure which obviously confers on the jury a discretion to follow one aspect of the charge or the other, if not a valid excuse for neglecting the charge entirely." Herbert Wechsler & Jerome Michael, *A Rationale of the Law of Homicide I*, 37 *COLUM. L. REV.* 701, 709 (1937). Justice Cardozo concurred: "The . . . distinction is so obscure that no jury hearing it for the first time can fairly be expected to assimilate and understand it. I am not at all sure that I understand it myself after trying to apply it for many years and after diligent study of what has been written in the books." BENJAMIN CARDOZO, *Law and Literature*, in *LAW AND LITERATURE AND OTHER ESSAYS AND ADDRESSES* (1931). Problems of this sort are of a much different order than merely taking sensible concepts and fuzzing them up when telling jurors about them. Where the concepts themselves are unsound, judges employ a "mystifying cloud of words," to use Cardozo's phrase, to hide the absence of a workable legal distinction.

Frank offered an answer in a case decided more than forty years ago:

[O]ften the judge must state [the law] to the jury with such niceties that many lawyers do not comprehend them, and it is impossible that the jury can. Judge Bok notes that "juries have the disadvantage of being treated like children while the testimony is going on, but then being doused with a kettleful of law during the charge that would make a third-year law student blanch."⁶

The comprehensibility of jury instructions has been tested empirically in a number of ways. Charrow and Charrow,⁷ a linguist and a lawyer, took a number of California jury instructions and rewrote them using principles for enhancing comprehension that had been developed by linguists and psycholinguists. Testing the standard versus the revised versions of these instructions, they confirmed that the revised versions imparted far more understanding.

Elwork, Sales, and Alfini⁸ carried out similar work on Michigan's instructions. Their comparative tests of the instructions were conducted in a more trial-like context. These researchers presented jurors with a videotaped civil trial, followed either by the standard or the revised instructions, or by no instruction at all. The researchers studied the jurors' abilities to evaluate the evidence and to reach what would be considered a legally correct verdict. Jurors provided with improved instructions did considerably better than jurors in the other two conditions. In fact, jurors receiving the standard instructions did no better than jurors receiving no instruction at all.

Severance and Loftus⁹ extended this genre of research to criminal trials. In addition, they had their revised instructions reviewed by panels of lawyers to evaluate whether the revised versions seemed vulnerable to reversal on appeal. Satisfied that the revisions would withstand legal scrutiny, they replicated the previous research with essentially the same results.

All told, there is broad agreement that judges do not actually instruct jurors in the law—if by instructing we mean communicating the law to the jurors and not merely performing a ritual where bewildering words are uttered in a jury's presence. Put differently, judges routinely nullify the law by rendering it meaningless, thereby compelling jurors to invent the law themselves.

6. *Skidmore v. Baltimore & O.R.R.*, 167 F.2d 54, 64 (2d Cir. 1948) (citation omitted).

7. Robert P. Charrow & Veda R. Charrow, *Making Legal Language Understandable: A Psycholinguistic Study of Jury Instructions*, 79 COLUM. L. REV. 1306 (1979).

8. AMIRAM ELWORK ET AL., *MAKING JURY INSTRUCTIONS UNDERSTANDABLE* (1982).

9. Laurence J. Severance & Elizabeth F. Loftus, *Improving the Ability of Jurors to Comprehend and Apply Criminal Jury Instructions*, 17 LAW & SOC'Y REV. 153 (1982).

II. IMPLICATIONS

If we place the judicial attitude toward jury nullification alongside the rule vacuums created by judges and filled by juries, we confront an exquisite puzzle. On the surface, it would appear that these are two threads that cannot be twined together. Although the law recognizes the power of juries to judge the law as well as the facts, and thereby to nullify the law, judicial decisions have sought to restrain that power with a very short leash.

In colonial times, the jury's power to return a verdict "in the teeth of both law and facts,"¹⁰ as Oliver Wendell Holmes once put it, was valued as a means of protecting citizens from unjust laws of the crown. Andrew Hamilton argued that where the law grants the *power* to do something, it unavoidably conveys as well the *right* to exercise that power.¹¹ In the celebrated trial of John Peter Zenger in 1735, Hamilton argued that truth should be a defense to libel, even though English law provided no such defense, and that jurors "are by law at liberty . . . to find both the law and the fact . . ." ¹² Zenger's jury returned a general verdict of not guilty, establishing the power of juries to nullify law and winning the praise of revolutionary leaders. Although the Zenger trial was on a charge of criminal libel, the case eventually led to "a widespread popular conviction at the time of the adoption of the Seventh Amendment that a jury in a civil case [also had] the right to 'decide the law.'" ¹³ The colonial view has been summarized as being

that jurors had a duty to find a verdict according to their own conscience, though in opposition to the direction of the court; that their power signified a right; that they were judges both of law and of fact in a criminal case, and not bound by the opinion of the court.¹⁴

10. *Homing v. District of Columbia*, 245 U.S. 135, 138 (1920) (Holmes, J.) (dictum).

11. For discussions of the history of the evolution of jury nullification law in the United States, see *United States v. Krzyske*, 857 F.2d 1089 (6th Cir. 1988); *United States v. Dougherty*, 473 F.2d 1113, 1130-43 (D.C. Cir. 1972); *Zenith Radio Corp. v. Matsushita Elec. Indus. Corp.*, 478 F. Supp. 889 (E.D. Pa. 1979); MORTIMER R. KADISH & SANFORD H. KADISH, *DISCRETION TO DISOBEY* (1973); Mark DeWolfe Howe, *Juries as Judges of Criminal Law*, 52 HARV. L. REV. 582 (1939); Alan Schefflin & Jon Van Dyke, *Jury Nullification: The Contours of a Controversy*, 43 LAW & CONTEMP. PROBS. 51 (1980).

12. JAMES ALEXANDER, *A BRIEF NARRATIVE OF THE CASE AND TRIAL OF JOHN PETER ZENGER* (Stanley Katz ed., 1963).

13. *Zenith*, 478 F. Supp. at 940 n.90 (citation omitted).

14. *Dougherty*, 473 F.2d at 1132 (citing Howe, *supra* note 11). Commenting on this power of the jury in his diary in 1771, John Adams wrote:

Now, should the melancholy case arise that the judges should give their opinions to the jury against one of these fundamental principles, is a juror obliged to find his verdict generally, according to this direction or even to find the fact specially and submit the law to the court? Every man of any feeling or conscience, will answer no. It is not only his

This power remains part of the warp and woof of procedures that permit juries secret and unreviewable deliberations and that typically ask them to render only general verdicts.

Post-revolutionary American government inevitably revised its view of itself from rebel to ruler, and with that change came a less enthusiastic view of the power of juries to rewrite the government's laws. The first critical decision came in the 1835 case of *United States v. Battiste*,¹⁵ where Justice Story announced the notion that the jury's function lay in accepting the law given to it by the court and applying that law to the facts. This opinion took on increasing influence, culminating in *Sparf and Hansen v. United States*¹⁶ in 1895. *Sparf* established what remains the modern view of jury nullification, holding that

it is the duty of juries in criminal cases to take the law from the court and apply that law to the facts as they find them to be from the evidence. Upon the court rests the responsibility of declaring the law; upon the jury, the responsibility of applying the law so declared to the facts as they, upon their conscience, believe them to be.¹⁷

Thus, contrary to Hamilton's view, current law holds that while juries have the power to nullify, they have no corresponding right to exercise that power.¹⁸ "[J]ury nullification is just a power, not also a right."¹⁹ And certainly there is no right of a litigant to demand an instruction apprising jurors of their power to nullify.²⁰

right, but his duty, in that case to find the verdict according to his own best understanding, judgment, and conscience, though in direct opposition to the directions of the court.

LIFE AND WORKS OF JOHN ADAMS 253-55 (C.F. Adams ed., 1856).

15. 24 F. Cas. 1042 (C.C.D. Mass. 1835) (No. 14,545).

16. 156 U.S. 51 (1895).

17. *Id.* at 102.

18. See, e.g., *United States v. Kerley*, 838 F.2d 932 (7th Cir. 1988); *United States v. Anderson*, 716 F.2d 446 (7th Cir. 1983); *Dougherty*, 473 F.2d 1113.

In the division of responsibilities between judge and jury, the jurors have no prerogative to question in the slightest degree the law to be applied to an issue, as announced by the court in its instructions. Indeed, the jurors each swear to render a "true verdict" "according to the evidence and the law as given you by the Court."

United States v. Wooton, 518 F.2d 943, 946 (3d Cir. 1975) (footnote omitted).

19. *Kerley*, 838 F.2d 932.

20. Maryland is the sole exception. Article 23 of the Declaration of Rights of the Maryland Constitution provides: "In the trial of all criminal cases, the jury shall be the Judges of the Law, as well as of fact, except that the Court may pass upon the sufficiency of the evidence to sustain a conviction." MD. CONST., Declaration of Rights, art. 23.

For an especially interesting case on instructing jurors concerning their powers, see *United States v. Krzyske*, 857 F.2d 1089 (6th Cir. 1988), where jurors specifically asked the trial judge to explain nullification to them. This trial judge was put in the especially awkward position of having to conceal

Modern courts have grown comfortable with these strained notions. Consider the following illustrative judicial statements:

The existence of an unreviewable and unreversible power in the jury, to acquit in disregard of the instructions on the law given by the trial judge, has for many years co-existed with legal practice and precedent upholding instructions to the jury that they are required to follow the instructions of the court on all matters of law.²¹

Although jurors may indeed have the power to ignore the law, their duty is to apply the law as interpreted by the court and they should be so instructed.²²

There is remarkable irony in all this. The insistence that juries must "take the law as the judge gives it to them" presupposes that judges are giving juries some law. But, as we have seen, to a great extent, judges would be giving as much by saying nothing. This irony becomes all the more puzzling if we focus on the reasoning behind judges' ardent hostility to jury nullification:

I just don't see how we can claim to have a government under the law and then tell jurors they can define the law. It would be chaotic and completely inconsistent with the fundamental principles underlying our system. It would be a kind of dictatorship of the proletariat.²³

from the jury its powers even in response to a direct question from the jurors. The trial judge's decision to be less than candid in answer to the jury's question was upheld on appeal.

Alternatively, a complete and honest statement on the subject to a contemporary jury might be accomplished by replacing the word "right" with "power" in the following jury charge, which was given in 1794:

It may not be amiss, here, gentlemen, to remind you of the good old rule, that on questions of fact, it is the province of the jury; on questions of law, it is the province of the court to decide. But it must be observed, that by the same law, which recognizes this reasonable distribution of jurisdiction, you have nevertheless a right to take upon yourselves to judge of both, and to determine the law as well as the fact in controversy. On this, and on every other occasion, however, we have no doubt, you will pay that respect which is due to the opinion of the court: For, as on the one hand, it is presumed, that juries are the best judges of facts; it is on the other hand, presumable, that the courts are the best judges of law.

Chief Justice John Jay's charge to the jury in *Georgia v. Brailsford*, 3 U.S. (3 Dall.) 1, 4 (1794).

21. *Dougherty*, 473 F.2d at 1132.

22. *Krzsyste*, 836 F.2d at 1021 (quoting *United States v. Avery*, 717 F.2d 1020, 1027 (6th Cir. 1988)).

23. Katherine Bishop, *Diverse Group Wants Juries to Follow Natural Law*, N.Y. TIMES, Sept. 27, 1991, at B16 (quoting Judge William Schwarzer, former federal district judge, now director of the Federal Judicial Center) (responding to a reporter's questions about the efforts of "The Fully Informed Jury Association [FIJA] . . . formed two years ago to lobby for laws and state constitutional amendments that would force judges to inform juries of their 'inherent right' to judge not only the facts of a case, but also whether the law itself is unjust or misapplied").

We recognize and tolerate this as a worthwhile anomaly in the rule of law. But if this occasional departure from the general application of the law were to be institutionalized—if it were to become the rule rather than the tolerated departure from the rule, we would have a kind of anarchy; that is, a system in which the ultimate test of socially permissible conduct is, to a significant degree, the random reaction of a group of twelve people selected at random. Acceptance of this as the principle governing individual conduct which collides with the rules adopted by governmental processes would, of course, amount to rejection of law as the controlling principle of society.²⁴

[This] proposal would create a law-less society, not a lawless society, but a law-less society, a society without law, without regulations. That is a monstrosity. No such society has ever existed or ever will exist.²⁵

Public and private safety alike would be in peril, if the principle be established that juries in criminal cases may, of right, disregard the law as expounded to them by the court and become a law unto themselves. Under such a system, the principal function of the judge would be to preside and keep order while jurymen, untrained in the law, would determine questions affecting life, liberty, or property according to such legal principles as, in their judgement, were applicable to the particular case being tried.²⁶

Persistent reliance on incomprehensible jury instructions creates the very anarchy that these judges insist they abhor.²⁷ If judges really are concerned that jurors follow the law, they not only would tell them they must follow the law, they would communicate the law to the jurors in a way that offered some hope that jurors would understand and therefore follow it. Upon learning that their instructions effectively nullify the law, judges might set to work—with a horror equal to the thought of instructing a jury on its power to nullify—developing instructions that actually instruct. But judges do not. Indeed, as we soon shall see, they have generally moved in precisely the opposite direction.

24. *United States v. Simpson*, 460 F.2d 515, 519 n.12 (9th Cir. 1972) (quoting Justice Abe Fortas, comment from panel discussion, *Follow-Up/The Jury*, CENTER MAG., July-Aug. 1970, at 59, 61).

25. *Simpson*, 460 F.2d at 520 (quoting Judge Simon Rifkind, comment from panel discussion, *Follow-Up/The Jury*, CENTER MAG., July-Aug. 1970, at 59, 66).

26. *Sparf & Hansen v. United States*, 156 U.S. 51, 101 (1895).

27. At the same time, it also means that the world the FIJA seeks already exists. But neither the judiciary nor the FIJA seem to have noticed. Yet, since this has produced neither the chaos feared by the judges nor the widespread nullification sought by the FIJA, we might wonder why. The answer, I suspect, is that citizens' intuitions about justice closely parallel those of legislators and judges, especially in the context of concrete cases. When jurors do nullify, we can infer that judges usually agree with them—indeed, probably approve of their departures—because judges rarely exercise their power to set aside jury verdicts.

Judges are not entirely indifferent to the incomprehensibility of their instructions. In a recent example, the California Supreme Court in *Mitchell v. Gonzales*²⁸ invalidated that state's so-called proximate cause instruction²⁹ on the ground that it led to excessive confusion of jurors. The court made this finding citing Charrow and Charrow's research.³⁰ In an even more recent case, a federal court invalidated a state-imposed death sentence upon learning that as many as three-quarters of jury-eligible persons could not understand the trial court's "guidance" concerning when to impose death.³¹

But such invalidations of instructions are the exceptions that prove the rule. Despite research demonstrating the problems of instructions and ways to improve them, few invalidations occur.³² Indeed, a systematic look at law reform efforts to improve jury instructions conducted by Professor J. Alexander Tanford showed that judicial invalidation of jury instructions occurred even *less* frequently after the publication of research demonstrating the need for reform.³³ Tanford compared decisions made both before and after the dissemination of such research. He focused on two specific reforms that had been tested and found to be effective in enabling jurors to better understand the law: giving preliminary instructions (as well as instructing jurors at the end of trial) and providing a written copy of the instructions for jurors to take with them into their deliberations.

28. 819 P.2d 872 (Cal. 1991).

29. "So-called" because, as the court itself notes, "despite the use of the terms proximate cause and legal cause, BAJI Nos. 3.75 and 3.76 are instructions on cause-in-fact. Issues that are properly referred to as questions of proximate or legal cause are contained in other instructions." *Mitchell*, 819 P.2d at 873.

30. The California Supreme Court found:

The misunderstanding engendered by the term "proximate cause" has been documented. In a scholarly study of 14 jury instructions, BAJI No. 3.75 [the instruction at issue] produced proportionally the most misunderstanding among lay-persons. The study noted two significant problems with BAJI No. 3.75. First, because the phrase "natural and continuous sequence" precedes "the verb it is intended to modify, the construction leaves the listener with the impression that the cause itself is in a natural and continuous sequence. Inasmuch as a single 'cause' cannot be in a continuous sequence, the listener is befuddled." Second, in one experiment, "the term 'proximate cause' was misunderstood by 23% of the subjects . . . They interpreted it as 'approximate cause,' 'estimated cause,' or some fabrication."

Mitchell, 54 Cal. 3d at 1051 (footnote and citations omitted) (citing Charrow & Charrow, *supra* note 7).

31. Helene Cooper, *Child-Divorce Case Marks Legal Evolution*, WALL ST. J. Sept. 28, 1992, at B6 (reporting on United States *ex rel.* Free v. Peters, 778 F. Supp. 431 (N.D. Ill. 1991)).

32. The *Gonzales* case, for example, was decided twelve years after publication of the research. We can only wonder how many times California's "proximate cause" instruction was given to juries in the intervening years.

33. J. Alexander Tanford, *Law Reform By Courts, Legislatures, and Commissions Following Empirical Research on Jury Instructions*, 25 LAW & SOC'Y REV. 155 (1991).

Tanford found such before-and-after decisions had been made by appellate courts in 17 jurisdictions, by legislatures in 25 jurisdictions, and by rule-making commissions in 29 jurisdictions. His conclusion:

Courts have not only ignored the new data but actually have moved the law in the direction *opposite* to the suggestions of the social scientists. Legislatures generally have done nothing or moved slightly toward the suggested reforms. Commissions have made the most substantial changes, engaging in extensive reform of jury instruction procedures along the lines suggested by the research.³⁴

Interestingly, then, judges have been the *least* eager to see that juries receive instructions that are sufficiently informative so that jurors can in fact "follow the law as it is given to them by the judge."

Thus, the question confronting us is why judges insist on the power to interpret the law to jurors, on the obligation of jurors to follow the law, on the right of judges to conceal from jurors their power to nullify the law, but then keep the law a virtual secret from jurors so that they must decide cases on their own intuitions and equities? That is, why do judges nullify the law?

III. EXPLANATIONS

Why do judges nullify the law? For the present discussion, I reject out of hand the facile answer that judges are ignorant, backward, obsessed with avoiding reversal at any cost, or chronically slow to change. I assume the judiciary is as capable as any other branch of government in learning about a problem, the research on it, and the tested improvements. Moreover, Tanford's research shows that in spite of their explicit awareness, judges often choose not to adopt the indicated reforms or to move in a direction exactly contrary.

This leads me to suspect that the explanation for judicial nullification lies in its institutional importance, which encompasses several underlying functions. These functions may not be evident to the judges themselves, whose choices may be driven by forces of which they are not entirely aware, but which are nonetheless real. I want to explore several possible institutional functions of judicial nullification, all of which lead, to a greater or lesser extent, to the conclusion that judicial nullification of the law in jury trials is an important feature of the trial system that perhaps should be preserved, rather than reformed. At the least, radical clarification of instructions probably

34. *Id.* at 157 (emphasis in original).

should not be undertaken without careful thought about the wider institutional effects of doing so.

A. Judicial Control

One possibility is that judicial nullification may be a tool that gives judges increased control over the outcomes of individual cases. The practice of giving jurors meaningless instructions need not be uniform across cases. Judges may vary the instructions, or their amplification upon them, so that in certain kinds of cases they may choose to be more, and in others less, clear and thereby bring the law more or less fully to bear. In that way, judges exert more, not less, influence over the verdict.

Where the judge believes that the desired outcome of the case would be impeded by the law, the judge can nullify the law and allow the jury to use its equities to reach the result the judge desires. On the other hand, when the judge believes the law would lead the jurors to the correct conclusion in a case, the court has a variety of means at its disposal, each varying in its subtlety. Making the law more accessible to the jury is but one of the more subtle of these tools. A less subtle device, for example, would be to use a special verdict, reserving the application of law to itself. The least subtle device would be to enter a judgement notwithstanding the verdict.

In addition, incomprehensible instructions provide a better medium on which a judge may communicate nonverbally his or her views of how a case should be decided. While English judges may comment on the evidence, in most American jurisdictions, judges may not do so. American judges have a more subtle implement: nonverbal behavior. It has been found that judges' nonverbal behavior varies with the judge's views of a case, and juries detect these nonverbal cues and tend to decide cases in line with them.³⁵ The clearer the evidence, and the clearer the law, the less influence the judge's nonverbal signals will have. The judge can control the ambiguity of the law through the process of instruction. Moreover, the judge's nonverbal messages can be effectively sent during the giving of instructions.

The point is not that judges are trying to nullify the law in any diabolical way. The law's influence is mediated through the judge, and judges may recognize cases where following the letter of the law would lead to results contrary to the law's true intent. In such instances, judicial nullification is

35. See Peter D. Blanck et al., Note, *The Appearance of Justice: Judges' Verbal and Nonverbal Behavior in Criminal Jury Trials*, 38 STAN. L. REV. 89 (1985); Allen Hart, *Expectancies in the Courtroom: Judicial Nonverbal Behavior and Influence*, J. PERSONALITY & SOC. PSYCHOL. (forthcoming 1993).

useful, because telling the jury explicitly about its nullification power would undercut some or much of the judge's control. Empirical research on the effects of explicit nullification instruction reveals that whether telling the jury of its power to nullify influences the jury's verdict depends on the extent of the instruction and the type of case.³⁶

Leaving the jury entirely to its own equities would never enhance the judge's control. This is because there are three basic choices of "law" for the jury to follow. One is what the law *is*. Second is what the jury *thinks* the law is. Third is what the jury thinks the law of the case *should be*. Clear instruction on the law leads juries to the first. Judicial nullification leads juries to the second. And jury nullification leads to the third. Thus, juries are still under substantial judicial control only when they are not given radically explicit nullification instructions.³⁷

B. Reinforcement of the Adversary System

An alternative explanation of the practice of judicial nullification is that it enhances the power of the parties to try their own cases. It may be that judges, who are supposed to give instructions on the law, effectively do not instruct. At the same time, it may be that lawyers, who are not supposed to give legal instructions, do instruct. In their closing arguments, and to some degree in their opening statements, most or many lawyers tell jurors the law on which the judge is expected to instruct them. Moreover, informal instruction by lawyers as a part of their arguments is likely to be offered with greater clarity as well as with an adversarial purpose.

If this is what happens, it may be that jurors in actual trials are better informed than the research has thus far managed to detect.³⁸ Moreover, permitting jurors to learn of the law this way allows parties, through their

36. Irwin A. Horowitz, *Jury Nullification: The Impact of Judicial Instructions, Arguments, and Challenges on Jury Decision Making*, 12 LAW & HUM. BEHAV. 439 (1988). Horowitz gave experimental juries three types of instructions: Standard Ohio instructions (no reference to nullification), Maryland instructions (apprising jurors of their power to decide the law), and specially drafted radical nullification instructions (urging jurors to appreciate their power to express community sentiment, their own conscience, and encouraged jurors to exercise, in appropriate cases, their historic power to ignore the law). The three different instructions produced the same results in a murder case. The radical nullification instructions produced more acquittals in a euthanasia case and more convictions in a drunk driving case. The Ohio and Maryland instructions produced similar verdicts in all three cases.

37. *Id.* at 452.

38. Follow-up research should test whether jurors who receive implicit instructions on the law during arguments from lawyers are better informed than those who receive only judges' instructions. Compare Blanck et al., *supra* note 35 (focusing on the effects of nonverbal communication during judges' instructions), and Hart, *supra* note 35 with Horowitz, *supra* note 36 (using lawyers' arguments).

advocates, more control over the trial's presentation, which is consistent with the theory of the adversary system.³⁹ Since arguments by lawyers are neither evidence nor instruction, they are not subject to challenge for error and review on appeal. The trial judge is free to concentrate on presenting law that serves only the formal requirements of technical accuracy, thereby focusing on avoiding reversible error.

Allowing lawyers to do the actual instructing and allowing judges to focus on avoiding formal error serves several important values and goals of the trial process. First, it reinforces the adversarial nature of our legal system by increasing party control and judicial passivity. Second, it increases the efficiency of trials by dividing the task of instruction in such a way that the lawyers can educate jurors without risk of reversal and judges can concentrate on making technically correct pronouncements to the institution of law and the larger community.

If this reading of the process is correct, we might expect in the future to see judicial instruction improve in clarity and strengthen in effect as judges wrest increased control from lawyers as the trend toward more active judicial management of trials continues.⁴⁰

C. Historical Inertia

By "historical inertia" I mean something more important than "this is how we've always done it." As we all know, common-law judges developed a variety of devices to soften the impact of harsh English law. A recent suggestion has been made that incomprehensible jury instructions may have been one of those devices.⁴¹ If jurors didn't know exactly what the Bloody Code defined to be crimes, for example, judicial nullification of the law would liberate the jurors to exercise their own intuitions to do justice in the case before them. These same judicial instincts may continue in modern jury instructions. Unjust laws or unjust applications can be blunted. If the facts are clear and the law is just,⁴² then it may not matter whether the instructions are given clearly or not, because the jury is likely to come to the same conclusion with or without the instructions.

39. JOHN THIBAUT & LAURENS WALKER, *PROCEDURAL JUSTICE: A PSYCHOLOGICAL ANALYSIS* 22-27 (1975).

40. Judith Resnik, *Managerial Judges*, 96 HARV. L. REV. 374 (1982).

41. STEPHAN LANDSMAN, *The Civil Jury in America: Scenes from an Unappreciated History*, in *THE FUTURE OF THE CIVIL JURY* (R. Litan and M. Whitehead eds., 1993).

42. Especially as seen from the viewpoint of public opinion.

D. Clear General Principles and Unfettered Tailoring

Elsewhere I have discussed the theory that the trial system needs to operate within a certain range of clarity and ambiguity without foundering on the rocks of too much uncertainty or too much clarity.⁴³ I referred to this as providing a picture of trial outcomes that is shaded an "optimal gray." If the law were to become too uncertain, not only would it provide no guidance, but (to take the extreme situation of becoming totally random) no cases would be brought to trial. If a trial were nothing more than a coin toss, litigants could decide to toss that coin more cheaply on their own than by submitting cases for trial. But if no cases came to trial, the judicial process would lack the raw material out of which the law evolves.⁴⁴

At the other extreme, if the law were so clear and trial outcomes so predictable as to leave no doubt in the minds of attorneys, all cases would settle and, once again, no cases would come to trial. The courts and, to a degree, legislatures, would be deprived of their sample of disputes upon which to build the law. Therefore, the first thing that is accomplished by giving instructions of limited clarity is to help maintain the necessary optimal gray of the litigation process.

But that is not all that is accomplished. The audience for jury instructions may not be juries at all. The real audience may be the legal community. Instructions that make sense to lawyers and judges—especially when they are ritualistically repeated at trials and in appellate opinions—help to reinforce among the legal community the law's doctrinal principles. It is those general doctrines on which lawyers advise clients and that guide the negotiated settlement of disputes. But those general principles have less application to the relatively tiny proportion of cases that actually come to trial. Something (probably a variety of things) distinguishes cases that come to trial from cases that settle. Those differences are responsible for their failure to settle, in spite of considerable incentives for lawyers and clients to want to settle. Many of the tried cases' unique features are likely to be the factual circumstances of the dispute.

43. Michael J. Saks, *Enhancing and Restraining Accuracy in Adjudication*, 51 *LAW & CONTEMP. PROBS.* 243 (1988). In that article, I offered evidence showing that jury verdicts are far more predictable than is assumed, and that they can be made even more so, but that judges seem to make choices calculated to prevent growth in predictability and sometimes to reduce the predictability. Additional evidence is provided in Michael J. Saks, *Do We Really Know Anything About the Behavior of the Tort Litigation System—And Why Not?*, 140 *U. PA. L. REV.* 1147 (1992).

44. In modern times, this is less critical, of course. But the change is more a matter of degree than of kind. Even legislated law still evolves through judicial interpretation.

A poor fit between a dispute's facts and the applicable law means that either the jury will have to perform a procrustean feat in order to fit the law to the facts, or the courts will have to modify the law repeatedly in order to deal in principled ways with a stream of *sui generis* cases. The first of these options would entail giving jurors clear but ill-fitting law. That would be a terrible solution because it would do little to help the jury solve the problem before it and would highlight areas where the law lacks normative relevance to disputes. This option is no better, and perhaps worse, than giving juries incomprehensible instructions. The second option would entail a deepening complexification of the law in order to adapt it to infrequent situations. The latter option would be highly inefficient.⁴⁵ Also, the more parsed and precise the law is, the more complex it becomes, and the more incomprehensible to judges and lawyers. In short, the principled alternatives to judicial nullification would be to develop far more complicated laws to produce the same decisions "under law" or to rigidly follow the law to verdicts that strike most judges and jurors as unjust.

Such an arrangement could hardly be improved upon, and is an example of the law's hidden genius. The institution of the jury permits the law to have it both ways. By instructing juries in the law, and insisting that they are duty-bound to follow that law, we reinforce the consistency and uniformity of the abstract law. By instructing juries in a way that makes it impossible for them to understand what the law is, we increase the likelihood that they will do particularized justice in the concrete case before them.⁴⁶ The ninety-five percent or more of cases that are dismissed or settled will be decided in light of the abstract law.⁴⁷ The five percent or fewer that are decided at trial will receive individualized justice. In this way, the law is able at once to provide both uniformity and flexibility—a profound achievement.

In sum, by giving incomprehensible instructions, the law accomplishes several important goals: reinforcing general doctrine, keeping law from becoming intolerably complex, helping to maintain the fiction of essential unpredictability, and tailoring decisions in *sui generis* cases to the unique circumstances of those cases.

45. Though it reflects the growth of the common law writ small (or, perhaps, writ detailed). But at some point we have to decide that the ever-deepening detail of rules has to stop.

46. Instructions forbidding bias will still be heard and understood—or should be made to be heard and understood—so that the goal of decision making based on characteristics of the dispute and not on the disputants, is not weakened.

47. Abstract law will also be used to advise clients.

CONCLUSION

That jury instructions are largely incomprehensible has been evident for quite some time. Linguistic and psychological research seems to confirm what was intuitively obvious to many judges and lawyers—and certainly to members of the public comprising juries. Whether the law is nullified by juries or by judges, the effect is much the same: cases are loosened from the moorings that might be supplied by the substantive law.

That such judicial nullification (or its equivalent, carried out by juries) usually has no great ill effects is evidenced by the fact that most judges agree most of the time with the jury's verdict.⁴⁸ Thus, it would appear that the intuitions of a group of lay jurors regarding justice generally correspond to the policies of the law, or at least of trial judges.⁴⁹ From this it follows that calls for explicit instruction to jurors on their power to nullify are superfluous, while judicial fears of anarchy at the hands of jurors if they were thus advised are extravagant.

I have advanced a number of possible explanations for judicial nullification, each seeking to identify the utility that might inhere in a practice that would seem so destructive to the law, yet which remains so widespread and resistant to change. Not only do each of these explanations suggest a potential value to a seemingly counter-productive practice, each puts a surprisingly tidy wrapper around the litigation process, which probably can never be anything other than messy and difficult. An additional function of such packaging is that by concealing the disarray within it, it permits people to work their way through their arduous decisions and emerge feeling reasonably good about the process and therefore about the decision.

A final implication of this analysis is that we ought not to clarify jury instructions too hastily on the assumption that clearer must be better. In doing that, we might unwittingly damage important functions and delicate balances, and make certain institutional goals more difficult to achieve. Where improved instructions are introduced, their effects ought to be evaluated with reference to the sorts of functions that have been discussed in this Article. If we were to evaluate only the improved comprehension of instructions, we might miss the harm clarification might do.

48. See KALVEN & ZEISEL, *supra* note 3 (showing high level of concordance between judges' and juries' verdicts, and that judges attribute most of the discordance to factors other than jury disagreement with the law).

49. Where the law and the equities are poles apart, lawyers would be well-advised to take their case before a judge rather than a jury. They need not be advised, however, because this is already what they do.

