RACE-BASED JURY NULLIFICATION: CASE-IN-CHIEF

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Chicago is my home town. I grew up here. I lived here until I was 18, all on the south side of the city. Growing up in a segregated neighborhood in a city that Martin Luther King Jr. called the most segregated he had ever seen,[1] I had one of the happiest childhoods imaginable. I was surrounded by caring family members, by teachers and neighbors who made me feel loved and capable and free. I was raised especially by my mother, but also by a village. When the time came for me to leave that village, I left proud and sure of my village and my people and myself. My journey took me to other places for college and for law school and then to the practice of law in the District of Columbia.

I was a Special Assistant United States Attorney in the District of Columbia. I represented the United States of America and used that power to put African-American people in prison. Like a lot of prosecutors, that pretty much was my job description. While at the U.S. Attorney's Office, I saw and did things that profoundly changed the way that I viewed my work as a prosecutor and my responsibilities as an African-American man.

African-Americans comprise more than 50 percent of the people in prison in the United States, even though they are only 12 percent of the country's population.[2] The criminal court of the District of Columbia is one of the blackest environments in which I have ever worked. There virtually all of the defendants are black. Well, that does not surprise you. I read the newspapers and watch TV. It does not surprise me either. What was wonderful for me was to see so many African-American judges, police officers, attorneys and especially jurors. Working in this community was the best part of my job.

I attended St. Ignatius College Prep a few blocks away from

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1. *See* Clarence Page, Commentary, *Welcome to the 'Hood: Racial Resegregation and its Roots*, CHI. TRIB., Feb. 2, 1997, § 19, at 1.

2. Paul Butler, *Racially Based Jury Nullification: Black Power in the Criminal Justice System*, 105 YALE L.J. 677, n. 109 (1995) (citing U.S. DEP'T. OF COMMERCE, ECONOMICS & STATISTICS ADMIN., BUREAU OF THE CENSUS, STATISTICAL ABSTRACT OF THE U.S. 1994 at 46 (1994)).

here, and then I matriculated to college and law school, which were also predominantly white institutions. I got a great education at all those places, but something happened. Something was lost. I became like a brother who, as Toni Morrison writes, has lost his ancient properties.[3]

In the blackness of the criminal court I regained those properties. I was reminded that African-Americans, like every other American ethnic group, are a great people. The fact that we survived slavery and apartheid and are still surviving the daily assaults of white supremacy is a testament to our character, to our village's teachings and to our strength. We are not a people who deserve what the criminal justice system tells us about ourselves: that the way to treat our problems is to punish us, and that the way to deal with the scars of slavery is to put us in prison. The reality is this: as we speak, one-third of African-American young men are under criminal justice supervision.[4] The reality is that, as we speak, over half of the women in state prison are African-American and over half of the men in federal and state prisons are African-American.

My journey took me to the academy. I teach criminal law. My students learned that prison is for people who are the most dangerous and the most immoral in our society. Is there anyone here who really believes that over half of the most immoral and dangerous people in the United States are African-American when they constitute only 12 percent of the population? When I look at those statistics, I think that punishment, prison, and criminal law have become the way that we treat the problems of the poor, especially poor African-American people. I think that is immoral. I am confident that one day we, as a society, will understand that, but African-American people cannot afford to wait that long. If the present rate of incarceration of African-Americans continues, by the year 2010 the majority of African-American men between the ages of 18 and 40 will be in prison, the *majority*.

Now, to prevent that kind of "just us" justice, I advocate a program of black self-help outside and inside the courtroom. Outside the courtroom self-help includes the kind of community-building efforts that many of us are already engaged in: mentoring, tutoring, after-school programs, providing legal and medical care to the poor, working with inmates, and taking better care of our families. Our ancestors taught the world that it takes a village to raise a child, and we need to increase those efforts one hundredfold. Inside the courtroom self-help includes the responsible use of

3. TONI MORRISON, TAR BABY (1981).

4. Butler, *supra* note 2, at n.109 (citing U.S. DEPT. OF COMMERCE, ECONOMICS & STATISTICS ADMIN., BUREAU OF THE CENSUS, STATISTICAL ABSTRACT OF THE U.S. 1994 at 13 (1994).

prosecutorial discretion, especially by black prosecutors. It also includes selective jury nullification for victimless crimes. I am going to spend the balance of my time talking about selective jury nullification because it is part of my solution to the unfairness in the criminal justice system.

Mike Wallace did a segment on *60 Minutes* about my scholarship on jury nullification. He introduced his report by saying this is going to scare a lot of white people.[5] Now, I thought this was an interesting way to introduce a law review article. I see a lot of white people in the audience, so I encourage you to take a deep breath, draw close together and be brave. Fair warning?

In a few minutes I want to start talking about racially-based jury nullification. Before I get to nullification, though, I want to talk for a moment about something that is even more frightening. It is actually someone, someone whom we do not discuss as much as we should in environments like this, although we whisper about him among our friends. He is so frightening that we spend more money building cages for him than we do schools for our children. He is so scary that, to win a presidential election, George Bush ran TV commercials saying that Michael Dukakis had let one escape. I am speaking, of course, about the black criminal.

Who is he? From where does he come? Surely it must be the blackest of black lagoons for he is universally feared, is he not, for his omnipresence and his omnipotence? According to the Department of Justice, for virtually every crime African-Americans are disproportionately arrested, prosecuted, convicted and imprisoned.[6]

That is true of murder, manslaughter, rape, drug possession, drug distribution, theft and gambling. Why is that? Why do African-Americans commit so many crimes, or do they really? Maybe it is just discrimination that accounts for this apparent disproportionate black criminality. To give you a sense of the justice of selective nullification, I am going to describe quickly two racial critiques of American criminal justice: a liberal critique, and one that I call radical, although the radical critique is made by a lot of people who do not think of themselves as radical.

First, I will discuss the liberal racial critique of American justice. According to the critique, American criminal justice is racist because it is controlled primarily by white people who are unable

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5. *See 60 Minutes: Tipping the Scales* (CBS television broadcast, Mar. 10, 1996). "What you are about to see is going to infuriate a lot of you . . . ." Mike Wallace, *id.*

6. *See* MICHAEL TONRY, MALIGN NEGLECT: RACE, CRIME AND PUNISHMENT IN AMERICA 29-30 (1995); *see generally* Angela J. Davis, *Benign Neglect of Racism in the Criminal Justice System*, 94 MICH. L. REV. 1660 (1996) (citing MARC MAUER & TRACY HULING, YOUNG BLACK AMERICANS AND THE CRIMINAL JUSTICE SYSTEM: FIVE YEARS LATER 1 (1995)).

to escape the culture's dominant message of white supremacy. Therefore, white people are inevitably, even if unintentionally, prejudiced. These white actors include legislatures, police, prosecutors, judges and jurors. These white actors exercise their discretion to make and enforce the criminal law in a discriminatory fashion.

Sometimes this discrimination is overt, as in the case of people like Mark Fuhrman or the police officers who beat up Rodney King. Sometimes it is unintentional, such as a white juror who invariably credits the testimony of a white witness over a black witness. I think that the most persuasive case for the liberal critique is with drug cases. According to the Department of Justice, black people do not commit any more drug offenses than whites. They are about 12 percent of drug offenders, which is exactly proportionate to their share of the population.[7] Now, I know this does not surprise all of you who have been on college campuses, and if you think about it, it is probably consistent with our knowledge of the real world, too. African-American people in South Shore probably do not use drugs more than white people in Bridgeport or Cicero.

The Department of Justice agrees, and the conclusion is borne out by statistics. But get this: of people who are incarcerated for drug use, African-Americans are more than 70 percent. African-Americans are 12 percent of the offenders, but 74 percent of the people locked up for the offense.[8] That sounds like discrimination, and when I talk to my police and prosecutor friends, they agree that it is a kind of discrimination. However, many make the argument that it is discrimination that is good for the black community: it is *more* law enforcement, which is a *good* thing. When I talk about my proposal for nullification, we will come back to that idea. For now, understand that I think that drug offenses are the best argument for the liberal critique on American criminal justice.

However, I mentioned another critique, one that I called radical. What is this critique? What is the radical critique of why there are so many more blacks in prison than whites and other minorities? The radical critique does not discount the role of discrimination in accounting for this racial disparity, but it also does not say that most or all of the blame is due to discrimination. It offers a more structural fundamental explanation for black crime. What is the radical explanation for why so many African-Americans commit crime?

Well, there is a substantial literature on this subject, and the radical critique jumps off from this point. The answer to why there is so much black crime is rooted more in sociology than in ei-

7. *See* TONRY, *supra* note 6, at 28-30.
8. Butler, *supra* note 2, at n. 218.

ther psychology or biology. Prominent American criminologist Norval Morris says that "an adverse social and subcultural background is statistically more is criminogenic than psychosis."[9] How about that? So, unsurprisingly then, virtually all of the sociological theories predict high levels of African-American criminal behavior. A short quote, if you will indulge me, from Michael Tonry:

> Crime by young disadvantaged black men [does not] result primarily from their individual moral failures but from their misfortune of being born in places and times and under circumstances that make crime, drug use and gang membership look like reasonable choices, choices from a narrow range of not very attractive options.[10]

There is no other defensible explanation for why crime, delinquency and drug use are so extraordinarily more prevalent among disadvantaged minority youth than among other youth. Tonry says that "few outside the lunatic fringe believe or at least will argue that the reason is genetic or biological."[11]

A lot of conservatives will say that the explanation is because African-Americans have a culture of poverty, at least the low income ones do. However, even they say that that culture is shaped by environment, and that environment is shaped by slavery. Segregation is the legacy of that. So in sum, the radical critique says the disproportion in black crime rate is attributable to something other than black people being disproportionately evil. The something other is a squalid environment. It is a disease that presents a host of life-threatening symptoms, including crime, and it is a disease that no reasonable person would choose if she had a choice.

So those are two racial critiques of criminal justice. One interesting thing is what the liberal and the radical critiques do not say. They do not say that prison is a bad place for every African-American criminal. Rather, liberal critics tend to say that law enforcement in the white community should be leveled up to law enforcement in the black community. For example, white communities should have the same kind of police presence. Alternatively, these critics might say that law enforcement should be leveled down in black communities. For example, the government should not prosecute black drug users and sellers any more than it prosecutes white or Asian-American or Latino drug users and sellers.

Our radical critics, on the other hand, might encourage incarceration of African-Americans when it has some proven social benefit, some utilitarian benefit, usually like rehabilitation or incapacitation or sentencing with a proven deterrent effect. This is an important point because one almost never hears any racial

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9. Norval Morris, *Psychiatry and the Dangerous Criminal*, 41 S. Cal. L. Rev. 514, 520 (1968).

10. *See* TONRY, *supra* note 6.

11. *Id.*

critic saying that black murderers or rapists or child abusers should not be punished. That includes African-American jurors who engage in jury nullification. In fact, in my experience, black jurors are happy to send violent black criminals to prison, because these jurors, like most jurors, have good sense. It is almost always in the interests of the community to isolate dangerous people, even if the reason those people are dangerous might be due to circumstances beyond their control.

What are the costs to the black community of so much law enforcement? What are the costs of having one out of three of our young men under criminal justice supervision? Racial critics identify many costs: economic and social costs, including the lack of a black male presence particularly in the African-American community; the lack of male role models and male income; the perceived dearth or the lack of marriage-eligible African-American men, among others.[12] So when we start talking about specific cases in which nullification would occur, I will mention drug cases as one great example. You might say, "Well, that's not a victimless crime." I ask you to keep in mind that law enforcement is also not victimless. Law enforcement also has opportunity costs.

I mentioned that, when I was at the U.S. Attorney's office, things happened that profoundly changed me. The first was working with predominantly black juries in Washington, D.C. It is fashionable in some circles now to critique jurors, but you usually have a different perspective when you talk to people who have actually worked with jurors and prosecuted cases in front of jurors. It is an experience that I can say made me proud to be an American. It made me proud of our jury system. The seriousness and the diligence with which these jurors approached their work moved me. It made me proud.

When I was a rookie prosecutor, some of the experienced guys warned me about something that these jurors would do. They said that sometimes I would prove beyond a reasonable doubt that my defendant was guilty, and yet the jurors would acquit. The reason they would acquit is because they did not want to send another black man to prison. I was told that they would seldom do this in violent cases, but I would see a lot of it in drug cases. I would especially see it if the defendant looked young. It was a fact of life, and I should not use it as a reflection of my ability as a prosecutor. Sure enough, when I tried cases and watched my colleagues try cases I saw this phenomenon of jury nullification.

So I had to recognize these two things that happened to me. The first again was this trust and confidence that I gained in jurors based on my experience dealing with them. The second was this idea that these same people would sometimes acquit people—

12. *See* Butler, *supra* note 2, at 694-95, nn.90-95

whom they knew were guilty— on the basis of a racial critique. For your information, we prosecutors in the District of Columbia did our jobs well. Nationally, 33 percent of young black men are under criminal justice supervision in the course of a year, but in the District of Columbia, that figure rises to 42 percent of young black men.[13] So it was trying to understand why African-Americans might selectively vote for acquittal as a critique of that problem that led me to the academy and to my study of nullification.

I want to briefly describe what jury nullification is. I will put it together with these racial critiques, and then I will be happy to listen to my esteemed colleagues respond. Well, what is jury nullification? Jury nullification is when a jury acquits a defendant whom it believes is guilty of the crime with which he is charged.[14] The jury acquits because it believes that the law or the penalty is unfair, either unfair in general or unfair as applied to the particular defendant.

Professor Andrew Leipold is a great scholar and a great historian of our jury system. Although he and I have some disagreement about the historical antecedents, I think we both agree that right now jury nullification is perfectly legal.[15] The power to nullify is based on the Double Jeopardy Clause,[16] but the historical privilege is based on the idea that jurors are an important and necessary check on government power. That is the history and animus of the jury system itself. For much of American history it was expected that jurors would judge the law as much as the facts. After the Industrial Revolution, courts started to get uncomfortable with this idea. In 1895, the Supreme Court held that jurors have the power to nullify, but they do not have the right to be instructed on this power.[17] So they can do it, but they cannot be told during the trial about this power that they have: that is still the law today.[18]

There are many, many examples of nullification. Take the runaway slave cases for example. It was a crime to run away if you were a slave, and it was a crime for a white person to help them. These were cases prosecuted in the North. Northern jurors, all of whom were white, would often nullify, even though the slaves and their helpers were officially criminals. They were 100

13. *See* TONRY, *supra* note 6, at 29-30.

14. Butler, *supra* note 2, at 700.

15. *Id.* at 703-04 (citing Sparf v. United States, 156 U.S. 51 (1895)).

16. U.S. CONST. amend. V (enforceable against the states through U.S. CONST. amend. XIV).

17. Butler, *supra* note 2, at 703-04 (citing *Sparf*, 156 U.S. 51, 74 (quoting U.S. v. Battiste, 24 F. Cas. 1042, 1043 (C.C.D. Mass. 1835) (No. 14,545))).

18. *But see id.* at n.147 (citing IND. CONST. art. I, § 19, MD. CONST. (DECL. OF RIGHTS) art. XXIII; discussing Indiana and Maryland statutes permitting nullification jury instructions).

percent guilty, but the white juries acquitted through nullification.

During prohibition, many people were arrested for possession and distribution of alcohol. Jurors who thought that punishment was an unwise way to handle the alcohol problem would often acquit, even though these defendants were one hundred percent guilty. A lot of people think that nullification helped end the unwise policy of alcohol prohibition.

Those, I think, are some of the positive historical examples, but there are some negative ones, too. White supremacists in the South refused to convict people who were guilty of violence against African-Americans and non-African-American civil rights lawyers. So what does that mean? That means that, like any power, jury nullification can be used for good or it can be used for evil. *U.S. v. Dougherty*[19] is one case from my circuit, the District of Columbia. There the U.S. Court of Appeals held that it did not approve of nullification on a widespread or systemic basis. However, the Court said that sometimes it is a necessary counter to case-hardened judges and arbitrary prosecutors.

Presently, I think sometimes we see nullification: the Kevorkian "suicide doctor" cases are a good example. Also, the recent case involving movie star Alec Baldwin who punched a tabloid photographer who was harassing him; Baldwin was one hundred percent guilty, but the jury acquitted him. As I mentioned earlier, Washington, D.C. jurors, as well as many other jurors, sometimes engage in nullification as a political protest and as a strategy of self-help.

These jurors, I think, are saying there are too many African-Americans whose problems are being treated by punishment. In Washington, D.C. 42 percent of young black men are under criminal justice supervision.[20] There has been a huge increase in this rate in recent years, and it is mainly due to the war on drugs. Violent crime in the United States, thank God, is decreasing, and yet every year the incarceration of African-Americans increases, all due to drug crimes. So in my article in the Yale Law Journal I proposed selective nullification.

Now, I am a former prosecutor. Nullification is a partial cure that I come to reluctantly and for moral reasons. To me it is not enough to say that there is a power to nullify; there also has to be some moral basis for this power. In the article I make several moral claims as to the power. I am going to quickly tell you about two.

One is this phenomenon of democratic domination. It is a critical race concept. The reason why I believe that African-American jurors have a moral claim to selective nullification is

19. 473 F.2d 1113 (D.C. Cir. 1972).
20. Butler, *supra* note 2, at n.73.

based on this idea that they do not effectively have a say; they do not have the say that they should in the making of the law. They are the victims of the tyranny of the majority. People as diverse as Owen Fiss and Lani Guinier have often made this argument.[21] Let me tell you how it works in the context of the criminal justice system. With every crime bill, the Black Political Caucus—the national one or the one in the state—will make the argument, "Hey, guys, instead of spending all this money building prisons, let's spend some money on rehabilitation, on job training, on education. Those are the root causes of crime." In the Black Political Caucus' belief, the white majority will just say no. It will be legislated away, as we saw happen in the two most recent crime bills. That is always the case. We know that there are better ways to stop crime than prison building, including, for example, financial incentives for kids to stay in school. Rand Corporation released a report that said you prevent more crime per dollar spent by giving kids money to stay in school than you do by building prisons.

The second most powerful way to stop crime is parental training, teaching some of these kids who are having babies how to be good parents. Studies show that such training prevents more crime than the deterrent effect of prison. Now, that does not shock a lot of you. It does not shock a lot of legislators either, but, unfortunately, the majority seems to prefer the punishment regime. We have certainly seen that with powder cocaine versus crack cocaine today. You all know the disparity: you get the same punishment for one gram of crack that you get for 100 grams of powder.[22] A lot of African-Americans and other people thought that that was unfair. The political majority's response to the African-American community was, "Well, if you don't like racially biased disparity, don't acquit crack dealers; what you ought to do is change the law." The way you change the federal sentencing law is to lobby the U.S. Sentencing Commission. At least that is the way you always did it before this proposal for jury nullification.

The Sentencing Commission was lobbied by civil rights groups, and they agreed that that disparity was unfair. They recommended to the U.S. Congress and to the President that the crack-versus-powder disparity be changed. However, for some reason the U.S. Congress and the President, Bill Clinton, just said no. They preferred the punishment regime. Again, this is typical when it comes to the way lawmakers deal with the criminal justice

21. *See* Butler, *supra* note 2, at nn.108-83 (citing Lani Guinier, *No Two Seats: The Elusive Quest For Political Equality*, 77 VA. L. REV 1413, 1479 (1991) and Owen M. Fiss, *Groups and the Equal Protection Clause*, 5 PHIL. & PUB. AFF. 107, 152 (1976)).

22. .*See id*, at n.103 (citing U.S. SENTENCING COMM'N, FEDERAL SENTENCING GUIDELINES MANUAL § 2D1.1(c) (1994), and various articles and cases discussing the disparity).

system as it applies to African-Americans. "Democratic domination"[23] is Derrick Bell's name for it, and for me it is a moral reason as to why nullification is appropriate.

The third moral claim African-Americans have to the power of jury nullification is what I call the symbolic role of black jurors. If you look at Supreme Court cases, they often have the occasion to discuss black jurors. They do so because of our country's sad history of excluding black people from juries. The Court said that is a bad thing because black jurors serve this symbolic function. Essentially they symbolize the fairness and the impartiality of the law. The Court says that excluding black jurors undermines public confidence in the criminal justice system. The Court has also found that black jurors are especially important in race-related cases.

The Court has held in those cases, that "emotions in the affected community [are] inevitably heated and volatile."[24] So the potential presence of African-American jurors "calms the natives." That is my language, not the Court's. That is important, because again, it restores public confidence in the integrity of the criminal justice system that is necessary, the Court said, to preserve community peace. What about an African-American juror who endorses racial critiques of the American criminal justice system? She does not hold any confidence in the integrity of the system. So if she is aware of the implicit message that the Supreme Court says her presence sends, maybe she does not want to be the vehicle for that message.

Again, that brings us to selective nullification. For violent crimes, for crimes with victims, there should be no nullification. If the juror is convinced beyond a reasonable doubt in such cases, then she should convict and be happy to do so. In my experience prosecuting cases for violent crimes, Washington, D.C. jurors are happy to put those people in prison. It is in everybody's interests to get those people off the streets, and certainly these jurors are acting in their self interests. In Chicago, for example, jurors know that nullified, violent African-American criminals are not going to move to the largely white communities of Bridgeport or Cicero; they are going to move to the predominantly black South Shore, they are going to move to the primarily African-American West Side. Thus, these jurors have no interest in emancipating violent African-American criminals. The problem is that separating violent criminals from their communities is not the main use of prisons. Most people are in prison for nonviolent conduct.

A lot of people are imprisoned for drug offenses, and I think that jurors in those cases should consider nullification. For pos-

23. DERRICK BELL, RACE, RACISM AND AMERICAN LAW, 177 (3d ed. 1992).
24. Georgia v. McCollum, 505 U.S. 42, 49 (1992).

session cases, I encourage nullification. For distribution cases I do not encourage it, but I think it is an option that jurors should consider. Jurors should weigh factors that judges weigh now in the sentencing determination. For example, I would never encourage nullification for anyone who sells drugs to children. I might well suggest it for a nonviolent distributor of marijuana. There are two purposes of this selective nullification: black self-help, and, less importantly, political protest. The black self-help prevents people from being punished when there are better alternatives, as I discussed earlier.

The political protest part is to encourage an end to this madness of locking up African-Americans when white people do not get locked up for the identical crimes. Again, this is borne out by those drug statistics.[25] According to the Justice Department, black people do not use drugs any more than whites—it is just that African-Americans get locked up more for drug charges. People ask what the black community would look like if drug offenders were not incarcerated. We know the answer to that: it would look like the white community. Again, the white community does not resort to the punishment regime for dealing with drug problems. I agree with that. I think punishment is not a smart way to deal with substance abuse. I think that when it comes to law enforcement, what is good enough for white people is good enough for African-Americans.

I hope that nullification would encourage rehabilitation for non-criminal means of dealing with the problem. I do not like drugs. I wish people would not use them. I have seen them ruin people's lives. I might also add that I have seen alcohol ruin people's lives, but I also do not support locking up alcohol users and distributors. So I hope that nullification will spark the return of rehabilitation and crime prevention.

Attorney General Janet Reno, our country's chief law enforcement officer, was asked to rate American criminal justice on a scale of one to ten, with ten being the best possible system. She gave it a one. I tend to agree. That is why I have reluctantly come to endorse selective jury nullification. President Clinton, the day of the Million Man March, delivered a speech in which he said white people should think about how they would feel if one out of three young white men was locked up or on their way to being locked up.[26] We know, I think, that the answer would not be to continue this mad policy of punishment and incarceration.

So as Professor Leipold and Judge Kocoras come forward, I

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25. *See* TONRY, *supra* note 6.

26. *See* Butler, *supra* note 2, at n.218 (citing *Rift Between Blacks, Whites "Is Tearing at the Heart of America,"* WASH. POST, Oct. 17, 1995, at A13 (presenting a portion of President Clinton's speech)).

would like them to consider two questions. First, I ask "Is American criminal justice just?" To me the answer is obviously not. There are too many African-Americans in prison who do not belong there. Do you really think that 50 percent of the most dangerous and immoral people in the United States are black? That is what our justice system tells us about black people. If you do not agree with that, if you do not believe that, then you must agree that we need fundamental change.

The second question is, "If not jury nullification, then what?" I do not want to hear that African-Americans should write to Congress. We tried that. It did not work. The house that African-Americans live in is on fire, and when your house is on fire, you do not write to Congress. You do not ask the people who set the fire to put it out; you leave the building. That is what my proposal for selective jury nullification encourages.