3.3

Juries: Nullification

SHOULD JURORS BE INFORMED OF THE RIGHT OF JURY NULLIFICATION?

Learning Objectives

1. Know the definition of jury nullification.
2. Understand the historical background of jury nullification.
3. Know the law of jury nullification.
4. Comprehend the arguments for and against jury nullification.

OPPOSE INFORMING JURORS OF THE RIGHT OF JURY NULLIFICATION

Judge Harold Leventhal, majority opinion, *United States v. Dougherty*, 473 F.2d 1113 (D.C. App. 1972)

SUPPORT INFORMING JURORS OF THE RIGHT OF JURY NULLIFICATION

Judge David Bazelon, dissenting, *United States v. Dougherty*, 473 F.2d 1113 (D.C. App. 1972)

Introduction

Jury nullification is the conscious and deliberate decision of a jury to acquit a defendant despite the jury's awareness that the defendant is guilty based on the facts and on the law.

The English jury was transported to the American colonies. In perhaps the most famous and important jury trial in American history, John Peter Zenger, a German-born publisher and editor of the *New York Weekly Journal*, was prosecuted for seditious libel based on his articles critical of the English governor, William Cosby. A jury acquitted Zenger despite the judge's instructions that truth was not a defense. Zenger's lawyer, Alexander Hamilton, persuaded the jury that they were the "judges of the law" and possessed the authority to disregard a law that was contrary to their own sense of right and wrong.

The Zenger case established the jury as a bulwark of liberty against overly zealous prosecutors and affirmed that jurors possessed the authority to be guided by their own conscience in reaching a verdict. In the 1895 federal case of *Sparf and Hansen v. United States*, the U.S. Supreme Court limited the

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possibility of jury nullification when the Court held that there is a clear division of responsibility between judges and jurors. The jury is to apply the law as told to them by the judge to what they determine are the facts in the case. See *Sparf and Hansen v. United States*, 156 U.S. 51 (1895). Federal and state courts followed the decision of the U.S. Supreme Court in *Sparf and Hansen* and held that judges may not instruct jurors of their right to disregard the law and that lawyers may not argue to jurors that they have the right to disregard the law.

There nonetheless continue to be cases in which jurors defy judges and assert their right of nullification. Although jury nullification generally is viewed as a restraint on the excesses of government power, nullification verdicts may not always protect life and liberty. During the civil rights movement in the 1960s, southern all-white juries were notorious for acquitting whites charged with the murder of African Americans.

In *United States v. Dougherty*, a group of antiwar protesters was convicted of vandalizing the offices of Dow Chemical Company to protest the company's manufacture of napalm for use in the Vietnam War. A federal court of appeals affirmed the trial court's refusal to inform the jury of the right to nullify the law. See *United States v. Dougherty*, 472 F.2d 1113 (D.C. App. 1972). The next two selections focus on the debate in *Dougherty* between Judge Harold Leventhal of the District of Columbia Court of Appeals opposing jury nullification and Judge David Bazelon supporting jury nullification.

DEBATING JURY NULLIFICATION

OPPOSE INFORMING JURORS OF THE RIGHT OF JURY NULLIFICATION

Judge Harold Leventhal, majority opinion, United States v. Dougherty, *473 F.2d 1113 (D.C. App. 1972)*

Judge Leventhal was appointed to the District of Columbia Court of Appeals in 1965 by President Lyndon Johnson and passed away in 1979.

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. . . . This was, indeed, one of the points of clash between the contending forces staking out the direction of the government of the newly established Republic. . . . As the distrust of judges appointed and removable by the king receded, there came increasing acceptance that under a republic the protection of citizens lay not in recognizing the right of each jury to make its own law, but in following democratic processes for changing the law.

The so-called right of jury nullification is put forward in the name of liberty and democracy, but its explicit avowal risks the ultimate logic of anarchy. This is the concern voiced by Judge Sobeloff in *United States v. Moylan*, 417 F.2d 1002 (4th Cir. 1969), cert. denied 97 U.S. 910 (1970):

> To encourage individuals to make their own determinations as to which laws they will obey and which they will permit themselves as a matter of conscience to disobey is to invite chaos. No legal system could long survive if it gave every individual the option of disregarding with impunity any law which by his personal standard was judged morally untenable. Toleration of such conduct would not be democratic, as appellants claim, but inevitably anarchic.

[Although] the statement that assertion of the jury's prerogative runs the risk of anarchy . . . contains an element of exaggeration, the existence of risk and danger, of significant magnitude, cannot be [denied]. In contrast, the advocates of jury "nullification" apparently assume that the articulation of the jury's power of nullification will not extend its use or extent, or will not do so significantly or obnoxiously. Can this assumption fairly be made? We know that a posted limit of 60 m.p.h. produces factual speeds 10 or even 15 miles greater, with an understanding all around that some "tolerance" is acceptable to the authorities, assuming conditions warrant. But can it be supposed that the speeds would stay substantially the same if the speed limit were put: Drive as fast as you think appropriate, without the posted limit as an anchor, a point of departure?

An equilibrium has evolved—with the jury acting as a "safety valve" for exceptional cases, without being a wildcat or runaway institution. . . . The way the jury operates may be radically altered if there is alteration in the way it is told to operate. The jury knows well enough that its prerogative is not limited to the choices articulated in the formal instructions of the court. The jury gets its understanding as to the arrangements in the legal system from more than one voice. There is the formal communication from the judge. There is the informal communication from the total culture—literature (novel, drama, film, and television); current comment (newspapers, magazines and television); conversation; and, of course, history and tradition. The totality of input generally convey adequately enough the idea of prerogative, of freedom in an occasional case to depart from what the judge says. Even indicators that would on their face

seem too weak to notice—like the fact that the judge tells the jury it must acquit (in case of reasonable doubt) but never tells the jury in so many words that it must convict—are a meaningful part of the jury's total input. Law is a system, and it is also a language, with secondary meanings that may be unrecorded yet are part of its life.

The limitation to informal input is . . . to avoid excess: the prerogative is reserved for the exceptional case, and the judge's instruction is retained as a generally effective constraint. . . . We cannot [deny] that occasionally jurors uninstructed as to the prerogative may feel themselves compelled to the point of rigidity. The danger of the excess rigidity that may now occasionally exist is not as great as the danger of removing the boundaries of constraint provided by the announced rules.

Moreover, to compel a juror involuntarily assigned to jury duty to assume the burdens of mini-legislator or judge, as is implicit in the doctrine of nullification, is to put untoward strains on the jury system. . . . That is an overwhelming responsibility, an extreme burden for the jurors' psyche. And it is not inappropriate to add that a juror called upon for an involuntary public service is entitled to the protection, when he takes action that he knows is right, but also knows is unpopular, either in the community at large or in his own particular grouping, that he can fairly put it to friends and neighbors that he was merely following the instructions of the court.

What makes for health as an occasional medicine would be disastrous as a daily diet. The fact that there is widespread existence of the jury's prerogative, and approval of its existence as a "necessary counter to case-hardened judges and arbitrary prosecutors," does not establish as an imperative that the jury must be informed by the judge of that power. . . . This requirement of independent jury conception confines the happening of the lawless jury to the occasional instance that does not violate, and viewed as an exception may even enhance, the over-all normative effect of the rule of law. An explicit instruction to a jury conveys an implied approval that runs the risk of degrading the legal structure requisite for true freedom, for an ordered liberty that protects against anarchy as well as tyranny.

The jury system provides flexibility for the consideration of interests of justice outside the formal rules of law. This embraces whatever extra the defendant conveys . . . [,] whether through demeanor or sincerity of justification. But it is subject to the overriding consideration that what is tolerable or even desirable as an informal, self-initiated exception, harbors grave dangers to the system if it is opened to expansion and intensification through incorporation in the judge's instruction.

SUPPORT INFORMING JURORS OF THE RIGHT OF JURY NULLIFICATION

Judge David Bazelon, dissenting, United States v. Dougherty, *473 F.2d 1113 (D.C. App. 1972)*

Judge Bazelon was appointed to the District of Columbia Court of Appeals in 1950 by President Harry Truman. He served from 1962 to 1978, then semiretired and served in that capacity until his death in 1993.

As the Court's opinion clearly acknowledges, there can be no doubt that the jury has "an unreviewable and unreversible power . . . to acquit in disregard of the instructions on the law given by the trial judge. . . ." More important, the Court apparently concedes—although in somewhat grudging terms—that the power of nullification is a "necessary counter to case-hardened judges and arbitrary prosecutors," and that exercise of the power may, in at least some instances, "enhance the over-all normative [moral] effect of the rule of law." The court majority could not withhold these concessions without failing to acknowledge the rationale that underlies the right to jury trial in criminal cases, and belittling some of the most legendary episodes in our political and jurisprudential history. Nullification is not a "defense" recognized by law, but

rather a mechanism that permits a jury, as community conscience, to disregard the strict requirements of law where it finds that those requirements cannot justly be applied in a particular case. . . .

Thus, we are left with a doctrine that may "enhance the over-all normative effect of the rule of law," but, at the same time, one that must in the view of the court majority not only be concealed from the jury, but also effectively condemned in the jury's presence. Plainly, the justification for this sleight-of-hand lies in a fear that an occasionally noble doctrine will, if acknowledged, often be put to ignoble and abusive purposes—or, to borrow the Court's phrase, will "run the risk of anarchy." . . . To be sure, there are abusive purposes . . . to which the doctrine might be put. The Court assumes that these abuses are most likely to occur if the doctrine is formally described to the jury by argument or instruction. That assumption, it should be clear, does not rest on any proposition of logic. It is nothing more or less than a prediction of how jurors will react to the judge's instruction or argument by counsel. And since we have no empirical data to measure the validity of the prediction, we must rely on our own rough judgments of its plausibility.

My own view rests on the premise that nullification can and should serve an important function in the criminal process. . . . The doctrine 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. . . . It is the jury—as spokesman for the community's sense of values—that must explore that subtle and elusive boundary. . . .

The very essence of the jury's function is its role as spokesman for the community conscience in determining whether or not blame can be imposed. I do not see any reason to assume that jurors will make rampantly abusive use of their power. Trust in the jury is, after all, one of the cornerstones of our entire criminal jurisprudence, and if that trust is without foundation we must re-examine a great deal more than just the nullification doctrine. Nevertheless, some abuse can be anticipated. If a jury refuses to apply strictly the controlling principles of law, it may—in conflict with values shared by the larger community—convict a defendant because of prejudice against him, or acquit a defendant because of sympathy for him and prejudice against his victim. Our fear of unjust conviction is plainly understandable. But it is hard for me to see how a nullification instruction could enhance the likelihood of that result. The instruction would speak in terms of acquittal, not conviction, and it would provide no comfort to a juror determined to convict a defendant in defiance of the law or the facts of the case. Indeed, unless the jurors ignored the nullification instruction they could not convict on the grounds of prejudice alone. . . .

As for the problem of unjust acquittal, it is important to recognize the strong internal check that constrains the jury's willingness to acquit. Where defendants seem dangerous, juries are unlikely to exercise their nullification power, whether or not an explicit instruction is offered. Of course, that check will not prevent the acquittal of a defendant who may be blameworthy and dangerous except in the jaundiced eyes of a jury motivated by a perverse and sectarian sense of values. . . . In any case, the real problem in this situation is not the nullification doctrine, but the values and prejudice that prompt the acquittal. And the solution is not to condemn the nullification power, but to spotlight the prejudice and parochial values that underlie the verdict in the hope that public outcry will force a re-examination of those values, and deter their implementation in subsequent cases. Surely nothing is gained by the pretense that the jurors lack the power to nullify, since that pretense deprives them of the opportunity to hear the very instruction that might compel them to confront their responsibility.

One often-cited abuse of the nullification power is the acquittal by bigoted juries of whites who commit crimes (lynching, for example) against blacks. That repellent practice cannot be directly arrested without jeopardizing important constitutional protections—the double jeopardy bar and the jury's power of nullification. But the revulsion and sense of shame fostered by that practice fueled the civil rights movement, which in turn made possible the enactment of major civil rights legislation. That same movement spurred

on the revitalization of the equal protection clause and, in particular, the recognition of the right to be tried before a jury selected without bias. The lessons we learned from these abuses helped to create a climate in which such abuses could not so easily thrive.

Moreover, it is not only the abuses of nullification that can inform our understanding of the community's values and standards of blameworthiness. The noble uses of the power—the uses that "enhance the over-all normative effect of the rule of law"—also provide an important input to our evaluation of the substantive standards of the criminal law. The reluctance of juries to hold defendants responsible for unmistakable violations of the prohibition laws [prohibiting the sale of alcohol] told us much about the morality of those laws and about the "criminality" of the conduct they proscribed. And the same can be said of the acquittals returned under the fugitive slave law as well as contemporary gaming and liquor laws.

Here, the defendants have no quarrel with the general validity of the law under which they have been charged. They did not simply refuse to obey a government edict that they considered illegal, and whose illegality they expected to demonstrate in a judicial proceeding. Rather, they attempted to protest government action by interfering with others—specifically, the Dow Chemical Company. . . . If revulsion against the war in Southeast Asia has reached a point where a jury would be unwilling to convict a defendant for commission of the acts alleged here, we would be far better advised to ponder the implications of that result than to spend our time devising stratagems which let us pretend that the power of nullification does not even exist.

SUMMARY OF THE ARGUMENTS

Judge Harold Leventhal concludes that a failure to inform jurors of the right of nullification is necessary to prevent the rule of law from degenerating into anarchy. Providing a nullification instruction to jurors would result in an unacceptable number of trial verdicts being based on the personal views of jurors or on the personality or characteristics of defendants rather than on the requirements of the law.

Jurors receive information from various informal sources that communicate that in an exceptional instance they may exercise nullification to check the excesses of overly zealous prosecutors or unjust laws. Nullification in the occasional case serves to maintain the legitimacy of the criminal justice system. The extension of nullification from the isolated case to a regular feature of the criminal justice system, however, would undermine the legitimacy of the legal system.

Saddling jurors with the obligation to act as "legislators" and evaluate the merits of the law in a given case would burden jurors with a responsibility that individuals who are required to serve on juries should not be asked to assume. The fact that jurors follow the law serves to protect them against community criticism of their verdicts.

Judge David Bazelon endorses nullification as a mechanism to preserve democracy and to resist the enforcement of unjust laws. Judge Bazelon heralds nullification as the great corrective to the excesses of prosecutors and laws that are unfair and in need of correction. There is no demonstrable basis for concluding that informing jurors of the right of nullification will result in the regular disregard of the law. The law, when jurors are not informed of their right of nullification, loses legitimacy.

Legislators cannot anticipate every possible situation that may arise, and nullification allows jurors to adjust the law to achieve a just result. For example, there may be an instance in which assisted suicide in the view of jurors is justifiable. There of course is a possibility that jurors may acquit an individual based on their biased or bigoted views. This abuse of nullification alerts society to the attitudes that need to be challenged and corrected and is a catalyst for reform.

QUESTIONS FOR DISCUSSION

1. What is the relationship between jury nullification and the role of the jury as a check on the power of prosecutors and as a representative of community attitudes?
2. Do you agree that jurors are aware of their prerogative to exercise nullification and to acquit a defendant despite the absence of a nullification instruction?
3. Why does Judge Leventhal argue that informing jurors of the right of nullification will impose too great a burden on jurors?
4. Is there a danger that jurors will exercise nullification and acquit an obviously guilty individual? Why does Judge Bazelon not view this as a serious concern?
5. Do you believe that jury nullification is a threat to the maintenance of a democratic society in the United States in which individuals are to change the laws through elections, lobbying, and influencing public opinion? How does Judge Bazelon answer this concern?
6. Why does Judge Bazelon contend that nullification enhances the rule of law and calls attention to laws that should be amended or revoked?
7. Should jurors be informed of the right of jury nullification by the judge, and should the lawyers be permitted to make reference to nullification in their closing arguments at trial?

3.3 You Decide

Former prosecutor Professor Paul Butler of Georgetown University has called for what he terms *strategic nullification* to reduce the mass incarceration of African Americans and to communicate the need for fundamental reform in the criminal justice system. Professor Butler urged African American jurors to refuse to convict African American defendants prosecuted for possession of small amounts of drugs for personal use, or for selling a small amount of drugs to consenting adults. He noted that African Americans are singled out for arrest and prosecution for drug crimes and that nothing is accomplished by sending yet another young African American to jail when there are more African American young men in prison than in college. Do you agree with Professor Butler?

WEB RESOURCES

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Headlee, Celeste. (2013, November 4). Jury nullification: Acquitting based on principle. *NPR*. Retrieved from http://www.npr.org/templates/story/story.php?storyId=242990498

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Sullum, Jacob. (2015). Denver's unconstitutional harassment of jury nullification activists. *Reason*. Retrieved from http://reason.com/archives/2015/09/02/denvers-unconstitutional-harassment-of-j

An account of efforts to prevent protesters from distributing information about jury nullification in front of the Denver courthouse.