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I am submitting herewith a thesis written by Alyson Hope Dodd Kennedy entitled "*Fully Informed Jury Association v. County of San Diego: A Practical Approach to Jury Nullification.*" I have examined the final paper copy of this thesis for form and content and recommend that it be accepted in partial fulfillment of the requirements for the degree of Master of Arts, with a major in Political Science.



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FULLY INFORMED JURY ASSOCIATION v. COUNTY OF SAN DIEGO:
A PRACTICAL APPROACH TO JURY NULLIFICATION

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DEDICATION

This thesis is dedicated to Dr. Steven Roberts for his constant support, guidance, and encouragement and for helping me believe in myself, and my parents, Bill Kennedy and Charlene Kennedy, without whom this would not have been possible.

Abstract

A jury in a criminal trial typically must make a decision about the guilt of a given defendant. Occasionally, the jury moves one step beyond this basic task and chooses to exercise its nullification power. That is, the jury decides that, according to the evidence, a given defendant is guilty of the crime with which he or she is charged, but that applying the law to that defendant would, essentially, not be doing justice.

While much is known about the process by which juries make decisions, the specific factors that encourage juries to engage in nullification and the circumstances under which they will elect to do so are, in some sense, a mystery. However, we cannot hope to understand when, why or how a jury may choose nullification without first understanding the history behind jury nullification and how it works or should work in practice. One way to gain such an understanding is to contrast the view of nullification advanced by its advocates, like the Fully Informed Jury Association, with the view of nullification adopted by the modern criminal justice system.

In 1995, in *Fully Informed Jury Association v. County of San Diego* the 9th Circuit Court of Appeals held that California had a compelling state interest in preventing FIJA from place newsletters in a newsstand within 50 yards of the San Diego County Courthouse. This case exemplifies the idea that the courts tend to cast the practice of jury nullification in terms of “juror lawlessness”. However, the courts’ view of jury nullification is misguided. While states likely have an interest in limiting instances of nullification, this interest cannot be characterized as compelling where jury nullification is properly understood.

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Chapter 1- Introduction

In the American legal system, the jury is generally regarded as a sort of bulwark that seeks to ensure that the government does not overexert its authority to unnecessarily persecute the individual being prosecuted for a crime. Generally, a jury in a criminal trial must make a decision about the guilt of a given defendant. Occasionally, the jury moves one step beyond this basic task and chooses to exercise its nullification power. That is, the jury decides that, according to the evidence, a given defendant is guilty of the crime with which he or she is charged, but that applying the law to that defendant would, in essence, not be doing justice. In instances of nullification, the jury is either making a statement about a social issue that reaches beyond a particular trial or finds applying the law in that particular instance offensive to its collective sense of morality. The resurgence of this phenomenon during the past two decades can be attributed, in part, to the activities of public interest groups, to the introduction of legislation into the legislatures of at least seven states requiring judges to present nullification as an option when giving instructions to the jury, and to the attention generated by the media when it has been suggested that jury nullification has occurred in high-profile cases, such as those involving O.J. Simpson or Dr. Jack Kevorkian.

While much is known about the process by which juries make decisions, the specific factors that encourage juries to engage in nullification and the circumstances under which they will elect to do so are, in some sense, a mystery. However, there is no hope of understanding when, why, or how a jury may choose nullification without first articulating a practical, proper definition of jury nullification and determining a

framework for how it should work in practice. An analysis of these considerations should offer some measure as to whether jury nullification is an artifact unfit for modern criminal justice or whether it may have still have some practical applications.

The debate surrounding jury nullification is not centered on the question of whether jurors *can* engage in nullification when reaching a verdict in a given trial but instead whether jurors *should*, under any circumstances, engage in nullification. Related to this question is whether jurors should be informed that nullification is an option and, if so, should trial judges be obligated to include this information in their instructions when charging the jury. This thesis does not attempt to elaborate the merits or disadvantages of informing jurors of their nullification power. Rather, this thesis has two separate but related objectives. The first objective is to trace the development of the doctrine of jury nullification in order to present a definition of nullification that is both consistent with the doctrine's history and is normatively justifiable in terms of justice and civil disobedience. Secondly, this thesis examines the activities of the Fully Informed Jury Association and argues that, while this group has an important message, its practices prevent it from being taken seriously, making some reforms necessary.

Historically, jury nullification represents an important facet of the criminal justice system, but since it is rarely publicized it is extremely likely that jurors do not know that nullification is among the options available for consideration by juries. For this reason, some public interest groups, like the Fully Informed Jury Association, attempt to educate potential jurors about their power to opt for nullification. The Fully Informed Jury Association (FIJA) has attempted to inform potential jurors of this power through a

variety of means, including picketing outside of courthouses, approaching potential jurors, leafleting, and distributing newsletters. While FIJA seemingly has good intentions, it also has several intrinsic flaws. Among its problems are the advocacy of an incorrect and inconsistent definition of jury nullification, a disconnect between the laws the organization actually opposes and the laws violated in cases in which they encourage nullification, a failure to coordinate activities and objectives between the national board and state offices, and a failure to articulate the instances in which jury nullification would be both appropriate and justifiable.

In 1996, the Ninth Circuit Court of Appeals in *Fully Informed Jury Association v. County of San Diego* held that California had a compelling state interest in preventing FIJA from placing newsletters in a newsstand within 50 yards of the San Diego County Courthouse. This ruling is interesting, in part, because of the activities in which members of FIJA were not engaged. Members of FIJA were not picketing outside the courthouse; they were not harassing potential jurors; they were not mounting a rowdy protest; they were not attempting to incite a riot; they were not causing a disturbance inside the courthouse itself. Rather, they were engaging in an activity normally protected by the First Amendment.

Fully Informed Jury Association v. County of San Diego exemplifies the idea that the courts tend to cast the practice of jury nullification in terms of “juror lawlessness”. This is not surprising nor should the courts be expected to define jury nullification in any other way. However, the courts’ view of jury nullification is misguided. Neither in history nor in practice has nullification been synonymous with lawlessness. Juror

lawlessness suggests that jurors are disregarding the applicable law in a given case absent any sort of rationale. By tracing the doctrine's history, examining how it works in practice, analyzing the rationale of those opposed to jury nullification, and considering possible normative justifications, it becomes clear that jury nullification has moral and ethical underpinnings. Further, it may be that instances of nullification can be regarded as expressions of the jury's, and thereby the community's, collective sense of justice. If this is the case, then the ruling in *Fully Informed Jury Association v. County of San Diego* is turned on its head. While states arguably have an interest in limiting instances of jury nullification, this interest cannot be characterized as compelling where jury nullification is properly understood.

Chapter 2- Jury Nullification: A History and Evolution

Introduction

Embodied in the Sixth Amendment to the United States Constitution is the right of every defendant in a criminal proceeding to be tried by a jury of his or her peers. In a sense, the jury lends a certain amount of legitimacy to criminal proceedings. Juries are intended to represent a cross-section of the community, so a jury verdict carries with it a certain expression of community standards with regard to the offense with which the defendant is charged. Aside from serving as an outlet for the articulation of community standards, the jury performs two other important functions. First, the jury is often regarded as a procedural safeguard against arbitrary governmental action. Arbitrary action on the part of the government could take many forms, ranging from overzealous prosecutors to the persecution of members of an unpopular minority. The jury, however, is always supposed to be impartial when deciding upon a verdict. In this way, the jury can protect a defendant who has been wrongly accused. Secondly, the jury is to act as the finder of fact. This implies that the jury is to weigh the evidence and then determine whether the prosecution has met its burden of proof as defined by the law. Given that juries are composed of laypeople rather than legal experts, their understanding of the law in a particular case is dependent upon explanations by the trial judge.

While this view of the role of the jury is widely accepted, this acceptance is not universal. Critics of this view contend that juries are supposed to decide matters of fact and law. This perspective is particularly controversial because it suggests that juries are free to disregard the trial judge's instructions on what a particular law says, how the

evidence presented may or may not support the conditions of that law, and how that law relates to a given defendant. Some argue, in part, that a jury that disregards the instructions of the trial judge is reaching verdict not based on the law but based on some other arbitrary and indefinable standard. When a jury reaches a verdict in this way, it is said to be engaging in jury nullification. This certainly sounds like a bad idea. However, it may be that jury nullification cannot be defined in such simple terms. Further, it may be that jury nullification is not a perversion of the role of the jury, but is instead only a different way of considering the importance of the jury to the criminal justice system. Understanding the far-reaching implications of this perspective requires a review of the evolution of the jury from its earliest days to its role in the criminal justice system in modern America.

The Common Law Jury and Jury Nullification

Like much of American criminal law, the use of juries in criminal trials has its roots in English common law. Prior to the 11th century, any person accused of a crime was subjected to trial by ordeal. Trial by ordeal assumed that if the defendant was innocent, God would intervene on his behalf. However, in 1215, Pope Innocent II abolished the use of ordeals in criminal trials, claiming that it was barbaric. This created a dilemma for the medieval criminal justice system. Since verdicts in criminal cases had always turned on an interpretation of the will of God, there were no other formal procedures for assessing a defendant's guilt or innocence. This problem was compounded by the fact that capital punishment was almost always the penalty for being

found guilty of any crime. After the abolition of trial by ordeal, judges were both reluctant and ill equipped to decide criminal cases. Further, there were no procedures for gathering evidence or procuring eyewitness testimony. Juries seemed a logical solution to these problems and became a necessary convenience in the administration of justice.

Early juries were composed of men who were chosen to participate in a trial for their knowledge of the defendant and of the facts surrounding the case. Intuitively, where there were gaps in the jurors' knowledge of either the defendant or the facts of the case, a verdict was reached on the basis of common sense. However, there were at least two problems with the jury system evident from its inception. First, jurors were in almost constant peril of being punished for their verdicts. If the court disagreed with a jury's verdict, jurors could be tried for perjury, their property could be confiscated, or they could be imprisoned for some indefinite period. Additionally, it was not unusual for courts to pressure a jury to change its verdict by imprisoning its members without food and water or by imposing hefty fines. Secondly, the law defined only broad categories of crimes. For example, the law did not recognize a distinction between premeditated murder and murder that is committed in self-defense. Moreover, even after the courts shifted from trial by ordeal to trial by jury, the penalty for being found guilty of any crime remained the same. Guilty defendants were sentenced to death, whether their crime was murder, treason, theft, or something less.

Much like modern juries, early juries were initially conceptualized by criminal courts as being the finders of fact. Early trial judges instructed the jury as to matters of law. However, the sentiment of early juries that capital punishment was not an

appropriate penalty for every crime led them to acquit many defendants, except those who were guilty of particularly heinous crimes. Juries in the 14th century were the first to make a distinction between “murder” and what today is regarded as “manslaughter”. They voiced this distinction by acquitting defendants when there were mitigating circumstances surrounding the crime; for example, a killing that was the result of self-defense (Green 1985, 33). This distinction was ultimately codified, in part, to raise the conviction rate. Further, juries were also likely to refuse to convict in cases where the defendant was charged with theft. In this way, they seemed to be sending a message that, while the community did not condone stealing, it felt that capital punishment was an inappropriate penalty (Green 1985, 63). It is important to note that by acquitting defendants under these circumstances, early juries were making decisions on matters of law, by deciding that the law was in some way inappropriate as applied to a particular defendant. That is, by acquitting certain defendants who were guilty according to the letter of the law, early juries were engaging in jury nullification.

One of the best-documented instances of early jury nullification is the trial of William Penn and William Mead in 1670. Penn and Mead were both Quakers, a religious group that was highly unpopular and, thus, oppressed by the government. As a move to hinder the Quakers from holding Sunday meetings, authorities padlocked the door to their meetinghouse on Grace Street in London. Finding they unable to get inside the building, Penn and Mead delivered a sermon to a crowd of several hundred in the middle of the street. Both were swiftly arrested and charged with two felonies- unlawful assembly and disturbing the peace. Again, any felony was considered a capital offense.

At their trial, Penn appealed to the jury. After pleading guilty to both counts, Penn argued in open court that the charge against him was illegal. Essentially, he claimed that, while the law may have been legal, its application, with respect to himself and Mead, was unjust. Penn asked the jury to disregard the law and return a verdict according to its conscience; the judge, of course, stressed in his instruction that the jury was only to consider the facts and determine whether Penn and Mead were guilty of violating the letter of the law. From the court's perspective, the proper verdict should have been fairly obvious given that both men had made admissions of guilt.

After deliberating for only a short time, the jury returned a verdict of "not guilty" for Mead and only found Penn guilty of speaking in public, a lesser charge. The judge was displeased and sent the jury back out to deliberate further. When the jury returned to the courtroom a second time, its verdict still had not changed. Growing frustrated, the judge imprisoned all twelve jurors and instructed that they should not be given anything to eat or drink until such time as they were willing to return a verdict acceptable to the court. After imprisonment and further deliberation, the jury returned "not guilty" verdicts for both Penn and Mead.

Realizing that the jury was not going to return a "guilty" verdict for either Penn or Mead (which records indicate was the only verdict the court was willing to accept), the judge levied heavy fines against Penn, Mead, and all the jurors. Additionally, all were imprisoned until the fines were paid. Penn, Mead, and eight of the jurors paid their fines. The remaining four jurors remained in prison for several months, ultimately suing for their release in the Court of Common Pleas.

The American Jury and Jury Nullification

For colonists still under the rule of the British crown, jury nullification assumed a slightly different form. While it seems that juries in England engaged in nullification because they perceived inconsistencies between the severity of certain crimes and the severity of the penalty for being found guilty of those crimes, colonial juries engaged in jury nullification as a form of protest against a campaign to silence those critical of the government.

Enforcing laws against seditious libel became one convenient means for the government to silence its critics. Seditious libel, which is defined as criticism of the government or any public official, became a target for jury nullification. This is exemplified by the trial of John Peter Zenger.

A group of wealthy colonists in New York were interested in resisting Governor William Cosby's administration. They hired Zenger to publish a weekly newsletter as a tool for accomplishing this resistance. Zenger began publishing the *New York Weekly Journal*, which carried articles authored by colonists that were sharply critical of Cosby and his policies. In 1734, Zenger was arrested and charged with "printing and publishing seditious libel" (Dwyer 2002, 64). At his trial, Zenger's lawyer began by arguing that the question for the jury to consider was not whether Zenger had published the articles in question (this was indisputable) but whether the contents of the articles was actually libelous. The judge reminded Zenger's lawyer that truth was not a defense against charges of seditious libel, so Zenger's lawyer appealed to the jury on another level. He argued that the jury has a right to determine both matters of law and of fact. Again, the

judge corrected the lawyer, claiming that the court recognized the jury's role as limited to determining only matters of fact. However, the jury was persuaded by this argument and ultimately acquitted Zenger.

Following the trial, commercial printers published transcripts of the trial, with emphasis on the arguments made by Zenger's lawyer, and made them available throughout the colonies. As juries continued to acquit defendants, seditious libel became dead law. Dwyer (2002) and others have argued that events like this paved the way for the First Amendment.

Jury nullification continued to gain acceptance in America until the late 1800s. It was widely understood that a jury could interpret both the facts and the law in a given case. In fact, jurors were regularly instructed that they could render verdicts on the basis of conscience. However, industrialization, the post-Civil War climate, and an increase in the number of lawyers led to a demand for greater certainty in the law. There came to be a great deal of inconsistency in terms of the acceptance of jury nullification. In some courtrooms, jurors were told that verdicts according to conscience were permissible. In other courtrooms, however, jurors were directed to consider only the facts in light of the trial judge's instructions on the law. Ultimately, the antinullification view carried the day, culminating in the United States Supreme Court's decision in *Sparf v. United States*.

The Supreme Court and the Role of the Juror

In general, the Supreme Court has been largely silent on the issue of jury nullification. Perhaps this is not unexpected. When the Court has spoken, it has been to

encourage adherence to the rule of law and caution jurors to follow the instructions of the trial judge. The Court's view of the role of the juror with respect to nullification was detailed most clearly in *Sparf v. United States* (156 U.S. 51, 1895).

Sparf was one of three sailors accused of murdering a fellow crewmember while on a voyage to Tahiti. He was tried along with one other sailor, Hansen. At their trial, the defendants requested that the jury be given a specific set of instructions, among them that the jury could choose to find them guilty of manslaughter rather than murder. The trial court refused all of the defense's suggested jury instructions. In the end, Sparf and Hansen were found guilty of murder and sentenced to death. The Supreme Court heard the appeal on a writ of error.

In *Sparf*, the Court is asked to consider two questions, one specific and one general. First, the Court is asked to determine whether the lower court abused its authority by failing to instruct the jury that, though Sparf and Hansen were charged with murder, it could regard manslaughter as a lesser-included offense. This implies that the jury could have then chosen to convict one or both men of manslaughter rather than murder. However, the Court found that the trial court had not erred in its jury instructions because all the evidence clearly supported an indictment for murder against the two sailors. The evidence could not reasonably be construed in a more favorable way so as to allow Sparf and Hansen to be convicted only of manslaughter.

After dismissing the first question with little discussion, the Court develops an answer to the second, more general question in much more detail. The second question presented in *Sparf* is whether the jury is required to accept the trial judge's interpretation

of the law as binding. That is, whether the jury is free to interpret the law for itself or whether the jury must regard the trial judge's explanation of the law as controlling and limit its role to an analysis of the facts of a given case. The Court never answers this question directly. Instead, Justice Harlan, writing for the majority, concludes that juries have the power but not the right to engage in nullification (St. John 1997, 2563).

In reaching this conclusion, Justice Harlan cites as evidence the way the role of the jury is perceived in state courts as well as common law precedents, like *Bushel's Case*. Rather than finding *Bushel's Case* or other common law precedents as supportive of jury nullification, however, Harlan emphasizes the absence of a law expressly designating the jury as the sole interpreter of the law in a given case. Harlan continues by noting a variety of problems that might arise were the jury given a right to interpret the law for itself. For example, Harlan argues that there would be a lack of consistency in the administration of criminal law, that the appeals process would be frustrated, public and private safety would be compromised, and that the continued existence of the court system would be threatened.

In its ruling, the Court does not expressly forbid juries from interpreting the law for themselves; however, it urges jurors to accept the trial judge's interpretation of the law as legitimate and correct. If juries refuse to do this, it is argued, then only popular laws will be enforced. Often, unpopular laws are not necessarily unjust laws. Allowing juries to interpret the law would allow for a great many inconsistencies in the administration of justice and would prevent the courts from protecting the rights of individuals. Implicit in this idea is that any juror who might feel compelled to disregard

the trial judge's instructions on the law in favor of his or her own interpretation is being careless at best. While that juror may feel that a verdict according to the conscience is in the best interest of the defendant, allowing juries to vote on the basis of conscience rather than the law is in the worst interest of society as a whole. Harlan concludes that when a jury votes according its conscience rather than the law, it is encouraging the development of a government of men rather than a government of laws (*Sparf*, 103).

Jury Nullification and the States

The federal courts have not embraced jury nullification. Beginning with *Sparf* and persisting in more recent cases, like *United States v. Thomas* (Nos. 95-1337 et al, 1997, 2d.Cir.), federal courts have maintained that juries should limit their deliberations to weighing the facts of a given case rather than constructing their own interpretations of the law. States, on the other hand, have been generally more willing to give jurors greater latitude in figuring out the law for themselves. Three states (Georgia, Maryland, and Indiana) have "jury determination" amendments to their state constitutions that require trial judges, when charging a jury, to present nullification as one option that the jury may consider when reaching a verdict. Examining the way this type of jury instruction works in practice provides a useful contrast between the acceptance of jury nullification at in state and federal courts.

To be clear, federal courts have long held that juries have the power but not the right to engage in nullification. The striking difference between this perspective and the perspective embodied in the constitutions of Georgia, Maryland, and Indiana is that jury

nullification is elevated to the status of a right in these states (St. John 1997, 2569). While juries are free to choose nullification in the absence of a constitutional amendment or any sort of positive instruction from the trial judge, jury determination amendments are important not because they give jurors power that they would not have otherwise but because they inform jurors that nullification is an alternative to applying the law. Given that nullification is rarely publicized, it is extremely likely that the average juror is unaware that he or she need not accept and act upon the court's interpretation of the law. That courts are required to inform jurors of this alternative is noteworthy.

While nullification is recognized, at least in these three states, as a right possessed by juries, it is not an absolute right. State courts have interpreted jury determination amendments in such a way as to place restrictions on what might appear to be absolute jury power. Georgia courts have given the most narrow reading to this type of amendment. The Georgia constitution holds, in part, that "the jury shall be the judges of the law and the facts" (Art. I, Sec. 1). When this provision was adopted as part of the state's first constitution in 1777 (Art. XLI), it may have seemed that Georgia juries would be given great latitude to interpret the law for themselves. This sentiment was also embodied in the 1833 Penal Code (St. John 1997, 2569).

However, Georgia courts moved quickly to interpret the amendment in a way that did not allow juries such leeway. The 1880 decision in *Hill v. State* (64 Ga. 453) still defines jury power. Hill was on trial for murdering a man whom he believed was somehow romantically involved with his wife. The trial judge was concerned that the jury might excuse the murder, in part because Hill argued that he acted out of a desire to

protect his wife. When instructing the jury, the judge noted that state law would allow for an acquittal only if the evidence supported the suggestion that Hill's wife was facing imminent physical harm when Hill committed the murder. Further, the judge noted that while the jury was free to interpret "the law and the facts" for themselves, they should recognize that "the law is not wrong" (St. John 1997, 2568). Implicit in this instruction was the idea that the jury should feel obligated to convict Hill of murder, if they found the evidence did not support the suggestion that Hill acted to protect his wife from immediate harm. On appeal, the Georgia Supreme Court found that the trial judge had not erred in his instruction, concluding that the Georgia constitution did not provide jurors with any real power to interpret the law (St. John 1997, 2567-68).

Later courts noted that the decision in *Hill* offered an interpretation of the amendment that seemed contrary to the literal meaning of the amendment, but concluded, absent any analysis, that the *Hill* court was correct in its decision. *Hill* has never been overruled nor has the amendment ever been given an interpretation broader than that expressed in 1880.

In a provision not unlike Georgia's, Article 23 of the Maryland constitution provides that, "In the trial of all criminal cases, the Jury shall be the Judges of Law, as well as fact, except that the Court may pass upon the sufficiency of the evidence to sustain a conviction." Throughout the 1800s, Maryland juries were given broad authority to interpret the law independent of the trial judges' instructions largely because the Maryland constitution did little to distinguish between the role of the judge and the role of the jury. For example, jurors were permitted to make the types of decisions typically

left to judges, like interpreting a law so as to determine whether it was intended to apply to the particular act with which a defendant was charged (St. John 1997, 2570). However, the scope of Article 23 has been systematically diminished through a series of judicial decisions, rendering the provision little more than an artifact.

When presented with opportunities to interpret Article 23, judges began by construing the role of the jury in a more limited way, prohibiting juries from declaring statutes unconstitutional, ruling on the admissibility of evidence, or rendering verdicts that could serve as precedents. Judges were given the opportunity to limit the jury's role even further when, in the late 1940s, criminal defendants began to challenge Article 23 as a violation of their equal protection and due process rights (373 U.S. 83, 1963). The end of seemingly unbridled jury power came with the 1980 decision in *Stevenson v. State* (423 A.2d. 558), in which the Maryland Court of Appeals overruled the longstanding doctrine permitting criminal juries to regard the instructions of the trial judge as merely advisory.

The last vestige of the jury's power to act on interpretations of the law that differ from that given by the trial judge is embodied in Rule 4-325, which allows attorneys to argue for interpretations of the law that differ from that offered by the trial judge. This practice does little to undermine the trial judges' authority. First, the trial judge must determine whether there is any basis for an attorney to argue for a different interpretation of the law. Secondly, the judge may dissent from the attorney's argument in the form of an advisory instruction to the jury (Schefflin and Van Dyke 1980, 84).

While courts in Georgia and Maryland have cast the role of the jury in such a way that it can hardly be said that the constitution of either state actually favors nullification, the jury determination amendment of the Indiana constitution has been given a consistently broad, though sometimes contradictory, reading by state courts. The Indiana constitution provides that, “in all criminal cases, whatever, the jury shall have the right to determine the law and the facts” (Art. I, Sec. 19). As in Georgia and Maryland, Indiana courts have noted that the jury is not concerned with the constitutionality of a law, only its application. This means that juries cannot declare statutes unconstitutional, define or create crimes, or render a verdict that will be regarded as precedent.

The trend toward giving Section 19 a broad reading began in 1857 with *Lynch v. State* (9 Ind. 541, 1857). Here, the court held that the trial judge’s instructions were meant to “inform the jurors’ judgments not bind their consciences” (St. John 1997, 2572). The rule emerging from *Lynch* was curbed, though only slightly, in 1899 with *Bridgewater v. State* (55 N.E. 737, 1899). In *Bridgewater*, the Indiana Supreme Court ruled that, while trial judges must instruct jurors that they were the judges of “both the law and the facts”, trial judges were not required to give any further explanation as to the jury’s role. This meant the trial judge was not required to explicitly characterize his instructions as “advisory” when charging the jury.

As recently as 1967, the Indiana Supreme Court held that Section 19 “means exactly what it says” (*Holliday v. State*, 254 Ind. 85, 1967, as cited in Schefflin and Van Dyke 1980, 80). However, as trial judges continued to be frustrated with their inability to give binding instructions to the jury, the typical jury instruction became contradictory.

Now juries are told both that they can interpret the law for themselves and that they must follow the trial judges instructions. More specifically, jurors are instructed that, while free to determine the law for themselves, the court's interpretation of the law is the most appropriate (St. John 1997, 2572-73).

Conclusion

Tracing the evolution of the jury and its role in the American criminal justice system accomplishes two things. First, it provides some background for discussing the purposes that the jury is intended to serve. Secondly, it shows that jury nullification is not a new phenomenon nor is it something foreign to American criminal justice. That jury nullification is a doctrine with deep roots that has persisted through the evolution of the modern criminal jury suggests that there may be something worthwhile about allowing juries to sit in judgment of the law.

Chapter 3- A Proper Definition of Jury Nullification

Introduction

To date, a single, all-inclusive definition of jury nullification does not exist. This may help explain why jury nullification is such a contentious and misunderstood subject. To the extent that nullification is debated, these debates reflect a variety of perspectives, often allowing their proponents, essentially, to talk past each other. Even where there is a shared, general definition of jury nullification, the absence of a more specific definition makes several things impossible. Namely, the lack of a clear definition makes it impossible to determine the circumstances, if any, under which jury nullification is appropriate or to predict when jury nullification may occur. Moreover, the lack of a clear definition increases the difficulty of identifying instances of jury nullification. A clear and complete definition of jury nullification accounts for the way jury nullification is defined according to at least four perspectives- historical, practical, legal, and academic.

Jury Nullification in History and Practice: A Summary

Chapter 2 provides a framework for understanding the way jury nullification has developed within the context of the criminal jury trial and also discussed how jury nullification occurs in state courts (i.e. in practice). In searching for a proper and complete definition of jury nullification, it is necessary to account for both of these perspectives as they serve as two major sources of empirical evidence regarding jury nullification.

Historically, jury nullification has been defined as permitting jurors to interpret the law for themselves, either in the absence of or in spite of the trial judge's instructions on the law. Often, juries engaged in nullification as a form of protest against an oppressive government, as exemplified by Zenger's trial. In addition to being regarded as form of protest, nullification was often considered an expression of the desires of the community. Lawmakers were responsive to instances of nullification; for example, a legal distinction was created between murder and manslaughter after juries continually acquitted defendants charged with murder when there was some significant mitigating factor, like self-defense. It is important to note that the presence of discernible patterns of nullification suggests that jurors did not engage in nullification in some arbitrary or haphazard manner. Rather, jurors were acting according to some standard. Typically, historians argue that when jurors opted for nullification, it was an expression of the community's conscience.

In order to understand how jury nullification works in practice in the context of the modern criminal justice system, it is most common to look to the states that have some sort of jury determination amendment in their state constitutions. While jurors in Georgia, Indiana, and Maryland are still instructed to act as the finders of the facts and the law, this broad instruction has been considerably narrowed through judicial interpretation. What might have given jurors a wide range of authority judge the law has been reduced to a relatively weak right. Missing from the state's approach to jury nullification is the suggestion of some sort of standard by which jurors might judge the

law. Certainly, there must be some guidelines for nullification if its practice is to be defended.

The Court's View of Jury Nullification: A Summary

Chapter 2 also outlines the position federal courts have assumed vis-à-vis jury nullification. The courts have been largely silent on this issue, but when they have spoken it has been to encourage jurors to adhere to the rule of law and follow the instructions given by the trial judge. Typically, jury nullification is cast by the courts in terms of “juror lawlessness”. This is not surprising nor should the courts be expected to define jury nullification in any other way. In *Sparf v. Hansen*, the Court asserts that rampant jury nullification will lead to the enforcement of only popular laws and also to the “government of men” with which the Founders were so concerned. This antinullification view has persisted in more recent cases like *United States v. Thomas*, in which a federal judge dismissed a juror whom he suspected was encouraging the other eleven jurors to engage in nullification.

However, the courts’ view of jury nullification is misguided. Neither in history nor in practice has jury nullification been synonymous with juror lawlessness. Juror lawlessness suggests that jurors are disregarding the applicable law in a given case absent any sort of rationale. By tracing the doctrine’s history, it becomes clear that jury nullification has moral and ethical underpinnings and that instances of nullification can be regarded as expressions of the jury’s collective sense of justice.

Defining Jury Nullification: A Review of the Literature

The literature on jury nullification attempts to identify some set of standards or guidelines under which jurors might engage in nullification. This is useful in terms of crafting a workable and practical definition of jury nullification that recognizes a set of circumstances within which its practice would be justifiable and appropriate. However, the literature is largely silent in pointing out actual examples of nullification. This is to be expected, however, given that there has yet to be an empirical study to identify those cases in which nullification is a likely outcome. The purpose of examining the literature on jury nullification, then, is not to identify specific instances of nullification but rather to identify an appropriate definition that incorporates a set of nullification guidelines.

Not everyone agrees that jury nullification is a good idea, meaning that some scholars argue that nullification is never justifiable. In conducting a cost-benefit analysis of nullification, Leipold argues that the costs of encouraging jurors to engage in nullification outweigh any benefits that might be derived from such action. He defines nullification as an acquittal based on the jury's sense of fairness or justice that occurs "when a defendant's guilt is clear beyond a reasonable doubt" (1996, 253). Further, Leipold claims that when a jury engages in nullification, "it ignores the judge's legal instructions and vetoes a legislative definition of culpable conduct" (1996, 254). Schefflin and Van Dyke offer a similar definition of nullification. They note that "jurors have the power to refuse to apply the law (or 'nullify') its effects in situations when the strict application of the law would lead to an unjust or inequitable result" (1980, 54).

St. John (1997) differs from both Leipold and Schefflin and Van Dyke in that he defines jury nullification as, essentially, jury lawmaking. However, this definition cannot be correct because it has several flaws. First, juries are not simply mini legislatures. A jury is a cross-section of the community that is impaneled for the purpose of assessing the guilt of a defendant in a criminal proceeding. A legislature is an elected body of representatives charged with the task of making public policy. The two are not the same nor do their functions overlap. A single jury verdict can never be said to set policy for an entire society in the same way as a single legislative act. The only way that a jury could ever determine public policy would be if jury verdicts could serve as precedents. This can never happen, bringing to bear an additional problem presented by St. John's definition. The suggestion that jury nullification is equivalent to lawmaking is problematic because a single jury verdict cannot permanently alter the law in any way. Further, a jury can never declare an amendment or statute unconstitutional.

That juries are not lawmaking entities, in contrast to St. John's suggestion, does not conflict with the assertion that patterns of jury nullification can lead to changes in the law. Historically, changes in the law have been brought about as legislatures responded to instances of jury nullification. By acquitting otherwise guilty defendants, juries likely sounded the call that a change in the law was necessary, but seeing that change occurred was dependent upon the actions of policymakers.

Butler (1995) offers perhaps the most comprehensive definition of jury nullification. Butler says that jury nullification occurs when a jury acquits an otherwise guilty defendant because the jury objects to the law the defendant is accused of violating

or because the jury objects to the application of a particular law to a particular defendant. When the jury engages in nullification, it is voting according to its conscience and refusing to be constrained by the judge's instructions, the evidence, or the facts of the case. While this is reminiscent of other definitions, like those offered by Leipold or Schefflin and Van Dyke, Butler actually goes one step farther by offering a framework to guide jurors considering in engaging in nullification.

Butler identifies three categories of crimes and argues that there are some circumstances under which jurors should evaluate the evidence with a presumption in favor of nullification (1995, 715). The first category identified by Butler is comprised of violent *malum in se* crimes, which include murder, rape, or assault. When a defendant is charged with this type of crime, Butler asserts, the jury should reach its verdict based only on the evidence. Nonviolent *malum in se* crimes, like theft or perjury, comprise the second category. When a defendant is charged with this type of crime, jurors should consider nullification as one option but there should never be a presumption in favor of it. The final category includes nonviolent *malum prohibitum* crimes, which are essentially "victimless" crimes, like simple possession of drugs or prostitution. Here, Butler claims, there should actually be a presumption in favor of nullification.

While this type of framework is useful in moving toward a definition of jury nullification that would allow for the identification of cases where nullification would be appropriate and justifiable, Butler's definition has one important limitation. Butler argues that African-American jurors should use this framework for jury nullification to acquit a greater number of African-American defendants. He contends that the African-

American community suffers from having too many of its young men incarcerated for nonviolent crimes. By the force of this logic, the African-American community is better off when some lawbreakers go free. The point here is that Butler does not intend for his definition of or framework for nullification to be all-inclusive; rather, he is offering nullification as an option to a specific groups of people to meet a specific set of ends.

A Proper Definition of Jury Nullification

A proper and practical definition of jury nullification reflects the doctrine's historic role in the American criminal justice system and offers a framework to guide jurors considering nullification. Such a definition would help to ensure that nullification does not become an arbitrary choice, resulting from confusion or misguided rebellion on the part of the juror. With this in mind, jury nullification occurs when a juror purposefully rejects the trial judge's interpretation of the law and votes to acquit a defendant who, according to the evidence, is guilty because the juror finds the law under which the defendant is charged somehow objectionable.

In order to offer a definition of jury nullification that is defensible, there must be a standard to guide jurors who are considering nullification. One way to accomplish this is to adopt a set of guidelines similar to those proposed by Butler. Toward that end, in cases involving either violent *malum in se* crimes or nonviolent *malum in se* crimes, jurors should consider the verdict based on the evidence and the trial judge's interpretation of the law alone. However, in cases involving *malum prohibitum* crimes, there should be a presumption in favor of nullification when the juror seeks to protest a

law or class of laws. The key here is that the jurors are protesting the law itself and not just its application to a particular defendant. While justice may be a consequence of nullification in this case, the true end for the jurors is protest by returning a verdict that sends a message. Every time a jury nullifies, it highlights a defect in the current law (Schefflin and Van Dyke 1980, 88). For example, a juror might feel compelled to protest laws proscribing the use of medical marijuana by terminally ill patients or anti-sodomy statutes by refusing to convict defendants charged under these laws. When nullification is regarded as an avenue to protest, it becomes a form of political speech.

Conclusion

This definition and subsequent framework reflects that notion that jury nullification has historically been understood as a form of protest against an oppressive government. Also, it is consistent with the suggestion that, in instances of nullification, the jury is attempting to send a message with its verdict about some issue larger than the instant case. Further, this definition offers some guidelines that seek to ensure that nullification is not arbitrary and imply that not every law would be a target for nullification. As Leipold notes, cases involving unpopular laws or government misconduct are not typical fare in criminal court. Cases like these, however, are often targets for nullification. This both minimizes the costs associated with nullification but maximizes the amount of attention instances of nullification can attract. Leipold contends that instances of nullification are akin to meteors hitting the earth: spectacular when they occur, but not common enough to cause undue concern (1996, 259).

Chapter 4- A Normative Approach to Jury Nullification: Rawls and the Original Position

Introduction

In one sense, the term “justice” is so abstract that it nearly defies definition. In another sense, “justice” brings to mind notions of equality, morality, and ethics. Most simply, justice can be thought of as an attempt to differentiate between right and wrong. However, this definition cannot be regarded as an end in itself; rather it is the questions raised by such a definition that permit the concept of justice to serve as a useful heuristic for evaluating social institutions. Further, it may be argued that since ideas about the nature of justice likely differ from one society to the next and even one person to the next, identifying an overarching conception of justice is as impossible as settling on its singular definition.

This sort of claim is unacceptable. Justice has long been recognized as an important goal for individuals, societies, and governments. Moreover, justice is touted as one of the goals of the American legal system, and there are numerous provisions in place to ensure the just treatment of individuals by the government. If one accepts the claim that justice is to be a goal of government as a social institution, it stands to reason that there is a way of thinking about this concept that moves beyond the abstract so as to make justice a practical, viable goal and outlines the manner by which justice may be achieved. The idea is not to argue in favor of a definitive theory of justice, because such a question could never be settled. Rather, the following is a starting point described by Rawls from which justice can be considered. Further, it will be shown that jury nullification can be contemplated in terms of justice based on Rawls’ ideas.

Rawls and *A Theory of Justice*

In *A Theory of Justice*, Rawls asks and answers the question, "What principles of justice would rational, self-interested individuals agree to in the original position of equality?" In order to answer this question, Rawls first discusses the role of justice in society. The purpose of justice is to ensure that an individual's fundamental interests are not sacrificed for the general welfare. This idea signals a rejection of the utilitarian notion that an increase in the greater good validates the sacrifices of a few (1999, 20). Individual liberties can never be used as bargaining tools.

A well-ordered society advances the desired ends of its members and is regulated by a public conception of justice, which is based on a compromise between individual concepts or perceptions of justice. A society's conception of justice is "a characteristic set of principles for assigning basic rights and duties and for determining the proper distribution of benefits and burdens of social cooperation" (1999, 5). While an individual's concept of justice may be influenced by his or her position in society, a society's conception of justice is to be free from prejudice. It is understood that everyone in a given society accepts the same principles of justice and that social institutions comply with these principles.

The state in which it is possible to identify true principles of justice and essentially move beyond differing concepts toward agreement on a single conception is in the original position. Parties in the original position are to agree upon principles of justice that will govern their associations with each other, assign basic fundamental rights, and also dictate the distribution of benefits by social institutions. The principles

accepted by parties in the original position are applicable to all future agreements between members of society and also are binding on social institutions.

Equality is the key to the original position. All parties in this state are equally uninformed as to the role each will assume once in society. More specifically, no one knows his or her eventual socioeconomic status, gender, race, talents, abilities, or any other characteristic that would distinguish one individual from another. Parties in this state of being equally uninformed are said to be behind a veil of ignorance (1999, 118-23), which ensures equality and prevents any one party from advocating principles that, in application, would allow one group to have an unfair advantage over another. The original position can be regarded as almost a pre-birth state. That is, parties in the original position are unborn in the sense that they have not experienced society as members of groups. While in this pre-birth state they are charged with creating the type of society into which they would like to be born.

While members of a society are equal while in the original position, they are not equal in society itself. People are born into different social positions. Some positions are more favorable than others. These positions act as starting points that will most likely determine the outcomes of individuals' lives. Those born into more favorable positions begin their lives with an advantage over those born into less favorable positions. This advantage seemingly allows certain individuals to attain a greater sum of the benefits of social cooperation. Further, social institutions tend to favor certain starting points over others in terms of allocating benefits. Without some overarching guidelines, individuals born into more favorable positions could conceivably acquire all or most of the benefits

derived from membership in a society, leaving those members born into the least favorable positions with nothing. This idea of different starting points implies that inequality in society is inherent and inevitable. Principles of justice are supposed to act as equalizers of sorts by requiring an equitable distribution of society's benefits. While justice can never require an equality of results for members of society, it can require an equality of opportunity.

While parties in the original position are free to select from any range of just principles, they will recognize a need to prioritize these principles. Rawls notes:

Now being rational, the persons in the original position recognize that they should consider the priority of these principles. For if they wish to establish agreed standards of adjudicating their claims on one another, they will need principles for assigning weights. They cannot assume that their intuitive judgments of priority will in general be the same; given their different positions in society they surely will not (1999, 37).

Rawls further suggests that the principles be placed in lexical order. This requires that the first principle be satisfied before proceeding to the second principle and that the second principle be satisfied before moving to the third and so on. One principle cannot be pursued until those that come before it have been fulfilled. The principle of equal liberty should come before any principle regulating social or economic inequality. This implies:

that the basic structure of society is to arrange the inequalities of wealth and authority in ways consistent with the equal liberties required by the preceding principle (1999, 38).

Society is inherently unequal, given that men are born into different social positions. The only just means of compensating for this inherent inequality that occurs when parties are no longer in the original position is through application of the difference

principle. The difference principle holds that inequalities are just only if they result in compensation or additional benefits for the least advantaged group (1999, 68-9). The most advantaged group should not become even better off unless there is a proportional benefit to the least advantaged group. This implies that one group should not benefit at the expense of another, and that a group with more advantages should not benefit at the expense of a group with fewer advantages. The principles of justice selected by parties in the original position should be such as to avoid further penalizing the least advantaged group simply on the grounds that they were born into lesser social positions. Further, no group can ever be required to compromise its basic rights or fundamental liberties as a condition of some bargaining process with another group.

The original position defines justice in terms of fairness. However, Rawls is clear that justice is not the same as fairness. Persons in the original position identify principles of justice in an even-handed manner without bias or prejudice and intend these principles to apply to all members of society in the same way. This set of principles can be regarded as one society's conception of justice. That these principles are consistently applicable to all members of society is fairness. It is this application that is fair, which is distinct from claiming that a universal concept of justice or one society's conception of justice is fair. Since the original position cannot be achieved in a literal sense, societies that satisfy the principles of justice as fairness come as close as possible to the ideal scheme the original position suggests.

The original position might seem a rather impractical, unworkable concept given that men cannot actually enter into a pre-birth state to determine the kind of society in

which they would ultimately like to live. Also, there is the issue of entrenched prejudices against certain less advantaged social groups that might preclude members of society from selecting principles of justice that are pure. According to Rawls, however, one can enter the original position at any time simply by excluding prejudice from decision-making.

Jury Nullification and the Original Position

The original position is a hypothetical situation. However, Rawls outlines a way, known as the four-stage sequence, in which the two principles of justice can be applied to existing political institutions. This moves the principles of justice beyond abstract discussion to concrete application. Before Rawls' theory can be related to jury nullification, it is necessary to briefly outline the four-stage sequence.

Rawls begins by noting that a citizen makes three kinds of judgments (1999, 171). First, a citizen makes a judgment as to the justice of legislation and social policies advanced by the government. Making this judgment does not require that the citizen agree with every piece of legislation or every policy. Secondly, the citizen makes judgment as to which constitutional arrangements are just means for reconciling competing claims. That is, the citizen evaluates which constitutional arrangements are just for reconciling disagreement over policies or laws among citizens. Finally, a citizen must be able to determine when there is no longer a political obligation to comply with the will of the majority. Rawls uses these considerations in the four-stage sequence, which is "a device for applying the principles of justice" (1999, 176).

Rawls initially supposes that once parties agree upon the principles of justice, they leave the original position to return to their places in society. Once in society, the parties judge social practices by the principles adopted in the original position. However, this process is not as simple as it might seem. Instead, Rawls argues that several intermediate stages take place in a definite sequence within this process. "Each stage is to represent an appropriate point of view from which certain kinds of questions are considered" (1999, 172). The level of knowledge available to the parties at each stage is commensurate with the level of knowledge that is necessary for the objectives of each stage to be completed (1999, 175).

The first stage involves a constitutional convention of sorts. Here, the parties are to define the powers of government and the basic rights of citizens and also decide how to mediate and cope with diverse political views. Since the parties have agreed upon a conception of justice, the veil of ignorance has been partially lifted revealing general characteristics about the society within which the parties will eventually become members. These general characteristics include the type of available natural resources, the level of economic development, and the political culture. Based on these general characteristics, the parties are to choose the most appropriate type of constitution that will lead to the enactment of the most just and appropriate legislation. According to Rawls:

[A] just constitution would be a just procedure arranged to insure a just outcome. The procedure would be the political process governed by the constitution, the outcome the body of enacted legislation, while the principles of justice would define an independent criteria for both procedure and outcome...[T]he first problem is to design a just procedure. To do this the liberties of equal citizenship must be incorporated into and protected by the constitution. These liberties include those of liberty of

conscience and freedom of thought, liberty of the person, and equal political rights (1999, 173).

Since perfect procedural justice is impossible, the parties must recognize that some procedures lead to a greater quantity of unjust laws than others. They should, therefore, choose the procedure that leads to the enactment of the fewest unjust laws. Legislation is enacted during the second stage. While the first stage reflects the first principle of justice, the difference principle is reflected in the second stage. Application of the difference principle requires “that social and economic policies be aimed at maximizing the long-term expectations of the least advantaged group” (1999, 175).

The rules are applied to society in the third stage by judges and administrators. By the time parties reach this stage, they have full knowledge of their individual circumstances since all the rules have been agreed upon.

The fourth stage deals with the limits of political obligation. It is here that the third consideration of every citizen comes into play, whether there is always a duty to comply with the majority and, if there is, how far this duty extends. As Rawls notes, civil disobedience and conscientious refusal occur in the fourth stage.

Jury nullification can be understood in terms of the original position as something that occurs in the fourth stage after the principles of justice have been agreed upon and put into practice. This thesis advances a definition that equates nullification to protest. However, protest can take many forms, ranging from simply speaking out against a law or policy to engaging in civil disobedience. In some circumstances, jury nullification is

only a way for jurors to voice their disapproval, but under a different set of circumstances nullification as protest can be considered civil disobedience.

Jury Nullification is Civil Disobedience

Jury nullification can be justified as an act of civil disobedience, at least under a particular set of circumstances. Before detailing these circumstances, however, it is necessary to first offer a general definition of civil disobedience and then outline a theory under which civil disobedience can be understood and justified. Finally, an interpretation of jury nullification as an act of civil disobedience will be offered.

In a basic sense, civil disobedience is defined as a deliberate but nonviolent breaking of the law in order to call attention to a law or class of laws of questionable legitimacy or morality (*Black's Law Dictionary*, 7th ed.). This definition is more or less echoed by Fortas, who defines civil disobedience as “peaceful, nonviolent disobedience of a law which is itself unjust and which the protester challenges as invalid or unconstitutional” (1968, 57).

Some contend that included in this definition is the requirement that the dissenters be willing to accept the punishment for breaching the law, however, this addendum may not always be included. For example, Greenawalt, while declining to offer an explicit definition, notes that the inclusion of a willingness to accept punishment on the part of the dissenter need not be included for the meaning of civil disobedience to be complete. These definitions can be regarded as starting points for understanding civil disobedience.

Greenawalt offers some additional criteria necessary for understanding civil disobedience. At the outset, Greenawalt notes that the continued functioning of society rests on compromise. Each individual cannot have exactly what he wants all the time. However, there comes a point where the law becomes so intolerable as to make compromise impossible. At such a point, civil disobedience can be regarded as a path to change when dissenters disobey the relevant law in a way that receives maximum notice and has maximum impact. He notes that civil disobedience is morally justifiable when there is a probability that its consequences will somehow be socially desirable (1970, 50). A second distinction that Greenawalt makes is that not every unlawful act can be considered civil disobedience. When a person breaks the law, he does so either to avoid its impact or to call attention to the law in order to encourage change (1970, 66). Instances of civil disobedience fall into the latter category. Civil disobedience occurs in response to a law which the dissenter finds objectionable.

Further there are two types of civil disobedience- direct and indirect. Direct civil disobedience occurs when the law breached by the dissenter is the same law to which the dissenter objects. Indirect civil disobedience, on the other hand, occurs when the law that is breached is not the one that the dissenter finds objectionable but, instead, is broken to call attention to a different law or policy to which the dissenter opposes. With regard to indirect civil disobedience, Greenawalt uses the example of a rally to protest racial discrimination (1970, 67). If protestors block a street and thus impede traffic, the law that is broken is some type of traffic law, to which the protestors likely have no objection. The policy to which the protestors actually object involves racial discrimination.

However, the protestors breached the traffic law in order to call attention to the discriminatory policy that they were in fact speaking out against.

Along with some basic definitions, a theory of civil disobedience is also necessary for understanding the ways by which jurors may be engaging in civil disobedience by opting for nullification. The theory put forth by Rawls in *A Theory of Justice* is useful for reaching this end. Since Rawls is both a philosopher and a theorist, he asks and answers his own questions. Initially, the following question is posed: At what point does compromise in the interest of society become impossible and the duty to comply with the law cease to be binding in view of the right to defend liberty and oppose injustice? In answering this question, Rawls' theory is intended to account for the role of civil disobedience within an orderly, legitimate democratic regime. The theory is intended for a "nearly just" society, one that has only a few blatant unjust laws. In such a society, civil disobedience is distinct from revolution; acts of civil disobedience are not attempts to overthrow the government but efforts to shed light on injustices perpetrated by it (Rawls 1999, 319-20).

A complete theory of civil disobedience is composed of three parts. First, a theory of civil disobedience offers a definition that distinguishes it from other types of dissent. To this end, Rawls defines civil disobedience as a public, nonviolent, political, and conscientious act contrary to law usually done with the aim of bringing about a change in the law or policies of the government. This definition allows for both direct and indirect instances of civil disobedience. True civil disobedience, according to Rawls, is an act that somehow resonates with the majority's sense of justice. That is, it is

couched in a public conception of justice that permits the majority to appreciate the injustice to which the dissenters are calling attention. Further, true civil disobedience is not based on claims of self-interest, religion, or morality but is based on a “commonly shared conception of justice that underlies the political order” (Rawls 1999, 321). Those engaging in civil disobedience do so not create a constitutional case or controversy to be settled by the courts; rather, even if the courts do weigh in to uphold the law, the dissenters are prepared to oppose it.

Rawls notes that one feature that distinguishes civil disobedience from other forms of dissent against the government and from revolution is that it is necessarily nonviolent. This quality is indispensable for two reasons. First, acts of civil disobedience are not threats of force because force overshadows the need to express profound convictions held by the dissenters. Civil disobedience is intended to call attention to injustice and those engaging in civil disobedience must be careful not to create chaos or disorder that might detract from their message. Secondly, civil disobedience is necessarily nonviolent because dissenters must express respect for a general rule of law even while breaking a particular law, if their message is to resonate with the majority’s conception of justice. Finally, civil disobedience must be committed in the open. This distinguishes it from revolutionary acts that may be committed secretly. Civil disobedience is public act that addresses public principles.

A second objective that a theory of civil disobedience achieves is elaborating the conditions under which civil disobedience is justified. Rawls argues that civil disobedience is be used to address only serious instances of injustice, namely those that

violate a commitment to equal liberty (the first principle of justice recognized by parties in the original position). Further, civil disobedience should be regarded as a last resort, utilized only after appeals to the majority have been ignored and attempts to affect change through traditional political channels have failed. Finally, Rawls notes that there is a limit to the amount of civil disobedience that any one society can tolerate. Too much rebellion, even if it is peaceful, threatens society's stability. Where many groups have the right to engage in civil disobedience, there should be a level of cooperation among the groups to regulate the amount of dissent.

Finally, Rawls' theory seeks to explain the role of civil disobedience in a democratic society. This role is twofold. First, those who engage in civil disobedience intend:

to address the sense of justice of the majority and serve fair notice that in one's sincere and considered opinion the conditions of free cooperation are being violated. We are appealing to others to reconsider, to put themselves in our position, and to recognize that they cannot expect us to acquiesce indefinitely in the terms they impose upon us (Rawls 1999, 335-36).

Rawls' theory assumes that there is a public conception of justice that will be recognized by members of the majority when confronted with an act of civil disobedience. Each individual's conception of justice may be slightly different, so long as everyone's conception is sufficiently similar so as to produce similar political judgments. The appeal that those engaging in civil disobedience make to the majority's conception of justice is crucial; absent this type of appeal, the majority may feel inclined to become more repressive in order to silence voices of dissent. Secondly, society is supposed to be a cooperative venture. This implies that those members of society who experience serious

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injustice are not required to bear it in silence. Civil disobedience, in that it often serves as a starting point to mitigating injustice, has a stabilizing effect on society as a whole. Rawls contends that, when practiced prudently, civil disobedience lends stability and legitimacy to the continued existence of just institutions.

Before relating Rawls' theory of civil disobedience to jury nullification, it is necessary to briefly evaluate the status of jury nullification in federal courts in light of the Court of Appeals for the Second Circuit's ruling in *United States v. Thomas* (1997. Nos. 95-1337 et al (2d.Cir.)).

In 1994, a group of 16 individuals were arrested on suspicion of drug trafficking. Ten of these individuals were tried together under federal narcotics law on 30 counts of conspiracy to possess and distribute cocaine and crack cocaine as well as actual possession and distribution of both substances. The jury found five defendants guilty on all counts and acquitted the remaining five defendants. On appeal, the defendants argue that the trial judge abused his discretion by dismissing one juror after the jury had retired to deliberate on the grounds that said juror intended to engage in nullification.

In *Thomas*, the court considered two questions. First, whether the advocating of jury nullification by a juror is misconduct constituting "just cause" for dismissal after the jury has begun deliberating under Rule 23(b) of the Federal Rules of Criminal Procedure; secondly, if advocating nullification is "just cause" for dismissal, what is the evidentiary standard that must be met prior to excusing the offending juror. Only the court's analysis of the first question is relevant here.

Rule 23(b) requires, in part, that “where the court finds it necessary to excuse a juror for just cause after the jury has retired to consider its verdict, in the discretion of the court a valid verdict may be returned by the remaining 11 jurors” (*Thomas* 1997, 5). With little analysis, the court answers the first question in the affirmative, holding that the advocacy of jury nullification by a juror in a federal trial is “just cause” for dismissal. The court asserts that such behavior is “an obvious violation of a juror’s oath and duty” (*Thomas* 1997, 1). The court’s decision seems to rest on the notion that jurors do not have an express right to engage in nullification. Further, the court maintains that trial judges should act to prevent nullification at every opportunity.

Jury nullification does not normally qualify as civil disobedience. One fundamental element of civil disobedience is the breaking of some law by those wishing to dissent. Further, if one accepts the definition of civil disobedience that requires that the dissenter be willing to accept punishment for breaking the law, then jury nullification cannot be considered civil disobedience because neither a jury nor individual jurors can be punished for a verdict. If nullification is not civil disobedience for juries, then it certainly cannot be so for individual jurors.

However, the ruling in *Thomas* indicates that nullification, at least in federal court, is illegal. While the only consequence for jurors found to be advocating nullification is dismissal, the language in *Thomas* indicates that nullification is clearly proscribed conduct. It is considered a violation of the juror’s oath, and trial judges are encouraged to nip instances of nullification in the bud.

Rawl's theory has several requirements in order for an instance of lawbreaking to be considered civil disobedience. First, it must be public act. Secondly, the act must be nonviolent. A third requirement is that the act be political in nature and have as its aim a change in a law or policy that the dissenter regards as seriously unjust. Finally, the act must resonate with the majority's conception of justice or, in the words of Rawls, must be such that it is clearly based in a "commonly shared conception of justice that underlies the political order" (Rawls 1999, 321).

If one accepts this thesis' definition of and framework for nullification, then instances of nullification in federal court under *Thomas* are also instances of civil disobedience. In order to test the veracity of this statement, Rawls' theory of civil disobedience is applied. Again, jury nullification occurs when a jury acquits an otherwise guilty defendant in order to protest the law under which the defendant is charged.

First, Rawls' theory requires that nullification be a public act if it is to be considered civil disobedience. The secrecy of jury deliberations seems to present a hurdle to satisfying this requirement. However, after a jury verdict is read, it becomes a matter of public record. Further, if a juror is dismissed after deliberations have begun, as happened in *Thomas*, it is likely that the Court of Appeals will have to address the dismissal in its opinion, if the defendants challenge the verdict reached in the lower court. If this occurs, then nullification becomes an explicit part of the trial record. Finally, after a trial over, jurors are free to explain their reasons for reaching a particular verdict to the media. If the jury engaged in nullification, its members will likely have the opportunity

to say so on the evening news or in the paper. While nullification may occur within the confines of the jury room, the verdict and perhaps certain aspects of the deliberation process can be made public. This may be enough to satisfy the first requirement of Rawls' theory.

Secondly, Rawls mandates that any act of civil disobedience must be nonviolent. It is difficult to imagine that jury deliberations could ever be violent. It seems reasonable to claim that nullification, at least inside the jury room, is always a nonviolent event.

Third, an act of civil disobedience must be political in nature and have as its aim a change in a law or policy. When jurors engage in nullification in order to protest some law or policy, nullification becomes something more than simply choosing to acquit a defendant in spite of the evidence. When nullification occurs in protest, it becomes political speech. Further, each time a jury nullifies a particular law, it is calling attention to some defect in that law. If juries consistently refuse to convict defendants under one particular law, one of two things may result. Either prosecutors will decline to prosecute persons accused of violating said law, rendering the law dead in effect, or the law itself will be changed through an act of the legislature, the executive, or referendum. When jurors engage in nullification in protest, their intent is to elicit a change in the law. The third prong of Rawls' theory is thus satisfied.

Finally, an act of civil disobedience must appeal to the majority's conception of justice. There have been occasions that laws were so blatantly unjust that juries refused to apply them. This was the case with seditious libel, fugitive slave laws, and laws relating to prohibition. That these laws are no longer in effect indicates that the majority

was made aware of their injustice. Jury nullification is one way to highlight deficiency in the law. When nullification is used in this way, it seems likely that the majority will recognize it again as it has before.

Conclusion

Contrary to the court's claim in *Thomas*, jury nullification as an act of protest does not violate the juror's oath or duty. As Rawls notes:

[I]f justified civil disobedience seems to threaten civic concord, the responsibility falls not upon those who protest but upon those whose abuse of authority and power justifies such opposition. For to employ the coercive apparatus of the state in order to maintain manifestly unjust institutions is itself a form of illegitimate force that men in due course have a right to resist (Rawls 1999, 342).

Chapter 5- “Jury Nullification is a Bad Idea”: An Explanation of the Antinullification Position

Introduction

The debate over jury nullification centers on one of two questions. First, while jurors have the power to engage in nullification, should they exercise this power? Secondly, should jurors be informed that nullification is one option available for their consideration during deliberations? The second question is not addressed in this thesis. With regard to the first question, opponents of jury nullification contend that it is never appropriate for a jury to engage in nullification. Adherents to this antinullification stance advance number of arguments in support of their claim. Some are not worth discussing, for example, the position of King and others that jury nullification is a nuisance (King 1998, 446-47). However, there are five core arguments that need to be explained in order to gain a more complete understanding of the controversy surrounding jury nullification.

Jury Nullification is Detrimental to Democracy

In one sense, this argument can be rephrased as “jury nullification will lead to anarchy” because those who advance this view do little to distinguish between cultivating anarchy and harming democracy. This position defines jury nullification essentially as “juror lawlessness” and contends that if jurors are free to determine the law for themselves that anarchy will result because nullification nurtures a disregard and disrespect for the law. Niedermeir, Horowitz, and Kerr (1999) have developed what they call chaos theory that necessarily embodies this viewpoint. Chaos theory holds that when

jurors are given a nullification instruction by the trial judge, they will feel free to allow their individual biases to have an undue impact on their verdict. When chaos theory prevails, advocates argue, ours becomes the government of men rather than of laws that the architects of the criminal justice system sought to guard against.

In another sense, antinullification advocates maintain that nullification permits a single jury to usurp the will of the majority as expressed in the law (Schefflin and Van Dyke 1980, 91). While isolated instances of nullification are not likely to pose much of a problem, nullification in the aggregate is problematic because the jury is not a majoritarian institution. One of the cornerstones of democracy is majority rule. Related to this is the implication that the law reflects the will of the majority and can only be changed following a shift in majority sentiment. Antinullification advocates assert that the jury is not truly representative of the community from which it is chosen and certainly not representative of the larger majority found in the state or nation. If this is true, then the jury is a minority that is able to undermine the will of the majority by refusing to apply the laws enacted with the majority's consent.

Ideally, the jury is a representative cross-section of the community from which it is drawn, but time, money, employment, and other circumstances often allow potential jurors to be excused from fulfilling their civic duty. Further, preemptory challenges made during voir dire permit lawyers to remove jurors from the jury pool for a variety of reasons. The jury that is ultimately impaneled may not mirror its community at all. Antinullification advocates then conclude that jury nullification can in no way be

construed as reflective of the conscience of the community when the jury itself is not reflective of the community.

This idea is compounded when the unanimity requirement is considered. Almost every state requires that jury verdicts in criminal trials be unanimous. Unanimous verdicts carry with them a certain amount of credibility because the twelve people charged with the task of weighing facts in a given case agreed on an outcome. Assume, briefly, that while a jury may not be representative of its community, at least one member of the majority group is impaneled as a juror. Even if the other eleven jurors represent a variety of minority viewpoints, juror number twelve is expected to speak for the majority. In this situation, a unanimous verdict reached by this jury may not accurately reflect the sentiment of the community. However, the unanimity of the verdict still lends it credibility and the verdict perceived as reflecting the will of community because at least one member of the majority participated in reaching it. Antinullification proponents maintain that, given the possibility for situations like this to occur, instances of nullification cannot be said to be expressive of the community's conscience. Instead, instances of nullification may only be examples of a hijacking of the criminal justice system by the minority, resulting in a perverted sort of minority rule.

Jury Nullification Permits Jurors to Act as Legislators

Jury nullification advocates often advance the view that jurors are in a much better position to know and express popular will than are legislators. While legislators are supposed to be representatives of the people, they may, in fact, be far removed from

their constituents and out of touch with the desires of those whose votes put them in office. Members of a jury, on the other hand, are the people (St. John 1997, 2577). Therefore, jurors are in the best position to represent the views of the people. One way that jurors might express popular sentiment is through nullification. The message that instances of nullification send is that “the people”, represented by the jury, find objectionable some feature of a particular law. When nullification occurs, jurors are, in effect, supplanting the will of the legislature with the will of the community.

Those opposed to nullification argue that, when this occurs, jurors are behaving as legislators; in nullifying the effects of one law, jurors are essentially replacing with a different “law” that they perceive as more appropriate. Antinullification advocates find this unacceptable for several reasons. First, legislators, unlike jurors, are elected. Since legislators must concern themselves with reelection, they are inclined to be responsive to the desires of their constituents. An unresponsive legislator is likely to find himself out of office come election time.

There is not a similar mechanism in place to oust jurors who do not represent the desires of the community from which they are selected. In fact, jurors are insulated in a way that legislators are not- jurors always deliberate in secret and are not required to explain a verdict nor can they be punished for it. Taking these things together suggests that jurors are granted some sort of protected status unavailable to legislators. Arguably, jurors are afforded this insulation because the criminal justice system has an interest in juries returning verdicts that are in accordance with the law.

Jurors should then respond to this interest with respect for the law. That is, jurors should feel bound to reach a verdict consistent with the court's interpretation of the law. The court does not look over the juror's shoulder; there is an expectation that each juror will be on his or her honor and follow the instructions of the trial judge (St. John 1997, 2583). Therefore, jurors who engage in nullification are acting in bad faith by refusing to do this.

The remedy for unresponsive legislators is in the election process. By electing new representatives, the people can bring about changes in the existing law. A bad law can be amended or repealed and replaced with a new, more acceptable law. A law enacted in bad faith is, at worst, temporary. However, in most circumstances, an acquittal reached in bad faith is forever.

Secondly, that nullification gives jurors the power to behave as legislators is objectionable because, at best, a single jury is only representative of the community from which it is selected. However, criminal laws are not made on a community-by-community basis. Rather, criminal laws are formulated for entire states or an entire nation. Given the norms of jury selection, it is impossible that a single jury will be representative of an entire state or an entire nation. As was noted earlier, one of the cornerstones of democracy is majority rule, and the jury is minoritarian not majoritarian institution. A minority should never be permitted to "nullify the effects" of a law enacted by a majority (Schefflin and Van Dyke 1980, 54).

A final argument advanced by antinullification advocates involves the status of the jury in relation to other players in the criminal justice process. The jury is one of

several players in the criminal justice process, with the legislature, executive, prosecutor, and judge rounding out the cast of characters. Nullification advocates maintain that the jury's status is equal to that of the legislature (who writes the criminal code), the executive (who might sign some or all criminal statutes into law), the prosecutor (who decided to charge and bring to trial a given defendant), and the judge (who allows the prosecutor to proceed with a trial) (St. John 1997, 2585). The jury's role is to assess the guilt of a given defendant in light of a particular law. When a jury engages in nullification, it is essentially exercising a sort of veto power against one of the other government actors. When a jury exercises its veto power, it is using its discretion to grant a defendant mercy.

This line of reasoning, however, does not convince antinullification advocates. They maintain that the jury's status is subordinate to that of other government actors, thereby requiring that the jury take its cues when interpreting the law from one of its superiors, like the judge. It is here that antinullification advocates argue that nullification can never be construed as mercy. At any point from the time a law was enacted to the time a particular defendant accused of violating that law goes to trial, a government actor whose status is superior to that of the jury's can act so as to grant a defendant mercy. For example, the legislature could have chosen to define a crime in such a way that the defendant's conduct would not be considered criminal or the prosecutor could decide not to prosecute a given defendant. Antinullification advocates conclude that the criminal justice system is already stacked in favor of the defendant and that the defendant already enjoys sufficient protection absent the possibility of nullification.

Jury Nullification is Antithetical to the Rule of Law

Related to the suggestion that jury nullification cultivates anarchy is the argument that nullification is contrary to the rule of law. This is true for at least three reasons. First, jury nullification increases the degree to which jury verdicts are subjective. Arguably, there is a certain amount of subjectivity involved in any verdict. Clark notes that jurors are influenced by a variety of “extra legal” factors that are completely divorced from the trial itself, such as the physical attractiveness of the defendant (2000, 48-53). Clark further argues that these extra legal factors have a tendency to impact jury verdicts. However, the rule of law is an objective standard by which a defendant’s guilt or innocence can be judged. Jury nullification encourages jurors to disregard this objective standard, resulting in verdicts that are arbitrary.

Further, the rule of law requires a consistent application of the law from one case to the next. Jury nullification offers no guarantee of this type of consistency. The arbitrary basis for one jury verdict will likely be very different from the arbitrary basis for another jury verdict. A consistent application of the rule of law acts a sort of check against this type of human error.

Secondly, as Justice Harlan noted in *Sparf*, simply because a law is unpopular in no way implies that it is also unjust. By removing or disregarding the objective standard by which defendants should be judged, jury nullification encourages the enforcement of only popular laws. This, according to Harlan, invites peril by allowing for a government of men rather than laws (*Sparf* 1895, 103).

Finally, it is the duty of the courts to protect the rights of minorities. Jury nullification advocates argue that this alone justifies informing jurors of their nullification power as well as encouraging them to exercise it. However, there are already numerous safeguards built into our framework of government that prevent the majority from oppressing or taking advantage of the minority. It is likely that the person who finds himself a member of the minority in one instance will find himself in the majority at some later time. This implies that only those minorities situated in some unique circumstance deserve additional special protection from the courts.

The law has consistently recognized special protection only for those minorities that are “discrete and insular” (J. Stone, *United States v. Carolene Products* 1938, 304 U.S. 144). The term “discrete and insular minority” as come to imply, roughly, those groups that are excluded from the political process. However, jury nullification could lead to the protection of minorities that are not discrete and insular, according to opponents. Without adherence to the rule of law, the courts could become a haven for those undeserving of its protection.

Jury Nullification Cannot Guarantee Due Process

It is often assumed that nullification can work only in favor of the defendant. At least this is the position advanced by most nullification advocates. However, as nullification opponents are quick to point out, there have been occasions when defendants have appealed on the grounds that the jury engaged in nullification to their detriment. Such appeals are most common in states where trial judges instruct the jury that they may

opt for nullification when reaching their verdict. While nullification advocates like to claim only that nullification presents the jury the opportunity to exercise mercy, it is also possible for a jury to exact vengeance via nullification. For example, a jury may choose to convict a defendant who has committed some particularly heinous or reprehensible act, regardless of whether the prosecution has met its burden of proof. Horowitz, in particular, has found that jurors are more likely to seek revenge against especially repugnant defendants when they are explicitly instructed as to their power to nullify the law. According to Horowitz, this encourages the jurors to consider legally irrelevant factors when choosing a verdict, such as personal animus for the defendant (1988, 450).

Jury Nullification is Dangerous due to an Absence of Error-Correcting Mechanisms

When a defendant is convicted, there is always the possibility that the conviction will be overturned on appeal. The implication here is that if a jury wrongly convicts a defendant, there are mechanisms in place under which said defendant can seek relief. This is not true when a jury wrongly acquits a defendant. As those opposed to nullification are quick to point out, there are not error-correcting mechanisms in place if a jury fails to convict a defendant who is clearly guilty.

While it is difficult to know how often erroneous appeals occur, it is likely that a jury wrongly acquits at least some of the time. There are a variety of possible explanations for this, including that the jury was simply confused. That is, the jury may have mistakenly acquitted the defendant because the trial judge's instructions on the law were misleading or difficult to understand. Juries are never held responsible for the

verdict nor can individual jurors be bound to explain it, so it is not outside the realm of possibility to suggest that juries mistakenly acquit some defendants some of the time.

However, nullification opponents assert that the sole culprit for erroneous acquittals is nullification. It is difficult to allege that this claim is wholly inaccurate because no contradictory evidence is available. However, no evidence to support this claim is available either. Nonetheless, those opposed to nullification note that it is this uncertainty that points to a need to stifle any talk of nullification in the jury room. That is, nullification opponents contend that if there is the slightest possibility that a jury might wrongly acquit a guilty defendant, then this is enough to prohibit nullification altogether. An erroneous conviction may be overturned on appeal; an erroneous acquittal cannot, in most cases, be reversed.

Conclusion

Those who assume a position antagonistic to jury nullification claim that it is just a bad idea to permit jurors to disregard the law. They argue that nullification poses a danger to democracy, is threat to the sanctity of the rule of law, and impermissibly invites laypeople to legislate from the jury box. Further, they assert that the absence of error-correcting mechanisms and no guarantee of due process should be sufficient to prohibit nullification altogether. However, as the succeeding chapters illustrate, many of these claims falter where jury nullification is properly understood.

Chapter 6- Answering the Critics- Why Jury Nullification is Important

Introduction

Opponents to jury nullification assert that instances of nullification foreshadow anarchy, herald the downfall of due process and democracy, and cultivate disrespect and disregard for the rule of law. In short, jury nullification is just a bad idea. However, it is possible that the critics are mistaken. Perhaps jury nullification is more than an artifact unfit for modern criminal justice. Perhaps there is a way to define and practice jury nullification so that it helps the American legal system achieve its goals of justice and fairness for all. Jury nullification advocates allege that these things are possible.

Advocates claim that there are two key features of jury nullification that the critics ignore. First, allowing jurors the freedom to engage in nullification is not the same as giving them carte blanche to select any outcome that suits their fancy. There are guidelines for nullification and circumstances under which it is both appropriate and justifiable. Secondly, nullification is not one of the norms of jury behavior; it does not happen every day. Upwards of 90% of all criminal cases end in a plea bargain. Of the remaining roughly 10% of cases, nullification will not typically be warranted or even seriously considered as a possible outcome in every case. Advocates claim that acquittals arising from nullification are rare.

Advocates typically contend that jury nullification occurs when a jury chooses to follow its collective conscience to acquit an otherwise guilty defendant either because the jury somehow objects to the law under which the defendant is charged or because the jury finds that the application of a particular law to a particular defendant would not

result in justice. Justifying such a broad definition has its problems. In fact, the critics claim that justifying such a general definition cannot be done to a sufficient or even adequate degree of satisfaction. In response to the critics, it may be that a more focused definition is needed. This would allow for the argument that there is at least one set of circumstances under which nullification is necessary, desirable, and appropriate, which, in turn, would refute the critics' blanket suggestion that jury nullification can never be anything but a bad idea.

For the purposes of this thesis, jury nullification is not so broadly defined. Here, nullification occurs when a jury chooses to acquit an otherwise guilty defendant because the jurors are protesting either a particular law or class of laws. Jury nullification is an act of protest and becomes synonymous with political speech. In this chapter, the ways by which jury nullification advocates respond to their critics will be briefly explained, first in general terms and then with regard to the specific definition contemplated by this thesis.

Jury Nullification is Good for Democracy

As Schefflin and Van Dyke note, those opposed to nullification sensationalize what jury nullification actually means. Jury nullification does not permit a jury to render an arbitrary verdict or one that is reached on a whim. Further, nullification is not a license for the jury to make up the law as it goes. Jury verdicts never create new laws. Instead, nullification permits a jury to "suspend a particular law in a particular instance for a particular defendant in the interest of justice" (Schefflin and Van Dyke 1980, 85).

Advocates maintain the jury nullification actually enhances the democratic process by allowing for the inclusion of community standards in the criminal justice process. In this way, nullification permits criminal law to actually become a law of the people. That is, nullification is an opportunity for direct democracy.

In most instances, the legislative process is not accessible to laypeople. This means that the average person does not have any direct input as to the laws that dictate his conduct. At best, this person is reliant on a responsive representative who will enact laws that are in his interest. Jury nullification encourages citizens as jury members to reflect critically on the law or laws they are being asked to apply. While juries cannot make law, nullification still offers jurors an opportunity to assess directly at least some small portion of the criminal code. Democratic government relies on an involved and responsive populace. Any opportunity involve the average person more fully in his own government should be encouraged.

Certainly, there are instances in which direct democracy is undesirable. However, this is not such an instance. There is little danger that one juror, representing a minority viewpoint, will succeed in holding the majority hostage because almost every state requires that jury verdicts in criminal trials be unanimous. In cases where a single juror stands for a minority perspective, it is more likely that there will be some sort of compromise between that member and the majority in the interest of a unanimous verdict.

Finally, the majority is should protect the interests of the minority. However, the Framers' attempts to protect minority rights often work better as pieces of a larger abstract theory than in terms of actual constitutional guarantees (Butler 1995, 709-10).

Just as majority rule is one of the cornerstones of democracy, so is the freedom to speak out in protest against one's government. If jury nullification means nothing else than political speech and is nothing more than protest against a government that seems to be overstepping its bounds, then this is enough to justify its existence and continued use in America's courtrooms.

The Founders clearly regarded free speech as important to the survival of the nation; it is one of the first enumerated rights included in the Constitution. Dworkin notes that free speech is vital to democracy and that, while some constraints are necessarily placed around this right, the best way to provide opportunities for unfettered expression is "to permit anyone who wished to address the public to do so, in whatever way and a whatever length he wishes, no matter how unpopular or unworthy the government or other citizens deem his message to be" (Dworkin 2000, 358). Further, while no Bill of Rights guarantee is absolute and the courts have placed restrictions around the Free Speech provision, the right to political speech has continually been protected. When a jury chooses nullification because it objects to a particular law regardless of whom the defendant may be, nullification becomes an avenue to protest.

Occasionally, a jury may engage in nullification to express a political viewpoint with which the majority disagrees. For example, a jury could choose to acquit a defendant who is a terminally ill patient on trial for using marijuana as medicine. The distinction between the definition advanced by this thesis and a more general definition of jury nullification is that the characteristics of individual defendants play no part in the jury's decision to nullify. With more general definitions of nullification, there is always

the possibility that the jury will engage in nullification as an act of mercy or because it feels that the defendant is being wrongly prosecuted. Here, however, it is recommended that jury nullification is defensible, if nowhere else, than when the jury is protesting some law. In the above example, the jury might choose to acquit because it finds possession laws objectionable not simply because it is sympathetic to the defendant. Democratic government relies on a degree of political tolerance. This implies that minority viewpoints deserve expression even when, perhaps especially when, the majority disagrees.

Some Problems with the “Juror as Legislator” Model

Antinullification advocates claim that nullification permits the jury to act as a mini legislature. This can occur in one of two ways. Either the jury, in opting for nullification, substitutes its will in place of the law enacted by the legislature or the jury checks the behavior of other government actors by engaging in nullification. Either way, antinullification advocates argue, the jury is a minoritarian institution and, therefore, should not be permitted to impose its will on the majority.

Nullification advocates note that there are some problems with the “juror as legislature” model. First, nullification does not permit jurors to “make” law. A jury verdict can never be understood as creating a new law or fundamentally altering an old one. Nullification, as Schefflin and Van Dyke note, only permits a jury to suspend an existing law. Notably, suspending a law is quite distinct from creating a new one because a jury can never overrule an existing law. Further, a jury verdict in one trial never serves

as a precedent in another. The effects of any single verdict do not extend beyond the trial to which it applies.

Those in favor of nullification contend that nullification is necessary because other government actors may not be at liberty to use their discretion to a defendant's advantage. This suggestion runs contrary to the argument advanced by those opposed to nullification, that at any point another actor in the criminal justice system (the legislature, executive, prosecutor, or judge) could exercise leniency to prevent a particular defendant from facing prosecution. Nullification advocates note, however, that sometimes this is not possible. Public pressure or a great deal of publicity may essentially force that hand of the other players in the criminal justice process. Perhaps a prosecutor feels pressure to prosecute a particular defendant in response to some kind of public outcry or due to the nature of the crime with which the defendant is charged. When circumstances are such that other public officials cannot act mercifully, it is necessary that the jury be so empowered. The jury is the only player in the political justice process that is somehow insulated and perhaps immune from public pressure. They can render a merciful verdict for a given defendant when mercy is available nowhere else.

With regard to equating jury nullification with political speech, it is often the case that public officials are not free to respond to some minority viewpoints given pressure from the majority. They are in office, in fact, to represent the majority's interests. This implies that even if a significant portion of the citizenry feels that a law is somehow wrong, so long as that portion is not a majority, the law will not change. The jury, however, can serve as an outlet for the expression of these minority viewpoints. Jury

nullification can only have an impact in the aggregate. That is, when multiple juries acquit defendants charged under the same law, it can be said that nullification is, in fact, highlighting some objectionable feature of that law. By engaging in nullification, jurors can protest a particular law by refusing to apply it and call attention to a viewpoint that might not otherwise be heard.

Jury Nullification Offers Equity as a Check against the Rule of Law

“The law on the books is often very different from the law in practice” (Schefflin and Van Dyke 1980, 88). There is a certain danger that the law will become too far-removed from what the public finds acceptable. Jury nullification keeps the law from becoming too rigid by offering jurors the opportunity to check the rule of law with a dose of equity. That is, jury nullification is most likely to occur in cases involving facts that were obviously not anticipated when the law was written (Schefflin and Van Dyke 1980, 910). The legislature is not omnipotent. They cannot be expected to craft laws fitting for every conceivable situation. There will be times when a defendant may be charged for violating a law whose conduct the law was not intended to cover. Because laws are typically intended to be rules of general applicability, there is a need for flexibility. Jury nullification allows the law to bend when necessary and is an appropriate response when the majority overreaches.

Those opposed to nullification contend that nullification only encourages disregard and disrespect for the rule of law. They argue that the rule of law is an objective framework by which every defendant should be judged. Further, when jurors

engage in nullification and render a verdict that deviates from the rule of law, they are removing the objective criterion that seeks to ensure that every defendant is judged fairly by being judged by the same standard.

Butler takes the assumption that the rule of law is an objective standard that must be revered and should always guide jury verdicts and turns it on its head. Butler contends that the rule of law is a myth (Butler 1995, 706-8). Butler provides evidence for this claim by citing critical legal theory. Critical legal theory holds, in relevant part, that any result can be derived from the existing legal doctrine in any and every case. Further, “the law is indeterminate and incapable of neutral interpretation” (Butler 1995, 707). According to critical legal theorists, the assertion that the rule of law is some objective standard is insidious. Instead, the rule of law is relative; it can be construed to mean just about anything. Butler continues, “When judges ‘decide’ cases, they ‘choose’ legal principles to reach a particular outcome” (Butler 1995, 707). Further, neutrality in the law is both impossible and undesirable because no single general legal principle can produce a just outcome in every case. The jury, then, is but another actor in the criminal justice system. When it nullifies, it is using its power to fashion a particular outcome. Jury nullification “exposes the indeterminacy of the law but does not create it” (Butler 1995, 708).

Another way to understand how nullification offers equity as a check against the rule of law is that when the law has become too far-removed from what the citizenry finds acceptable, nullification presents an opportunity for protest. Some might contend that the proper manner for those opposed to a particular law or policy to voice their

discontent is through traditional political channels- by lobbying, voting, and contacting their representatives in the state legislature or in Congress. However, the traditional political channels occasionally fail. The ability to succeed in changing the law in this way assumes that everyone has access. Even in modern America, there are segments of the population that lack political power and access to decisionmakers and have no way to attain either. When the traditional political channels fail to elicit change, jury nullification offers another way for those dissatisfied with some aspect of the current law to be heard.

Jurors are not intended to be tools of the state and they do not surrender their right to free speech upon entering a courtroom. Moreover, the more often a jury engages in nullification, the more it calls attention to some defect in the current law. Nullification is a more effective act of protest than picketing or petitioning or holding a rally. Rather than simply talking about a need for change, jurors who engage in nullification are acting in way that creates change, even if that change is only on a small scale, for a particular defendant in a particular trial.

Jury Nullification does not Violate Due Process

Those who argue that jury nullification is a bad idea contend that nullification does not always work in favor of the defendant. That is, the jury is just as likely to use its nullification power to exact vengeance as it is to grant mercy. When juries convict defendants whose guilt has not been proven beyond a reasonable doubt, they are violating the defendant's guarantee of due process. Certainly, there is a likelihood that the

conviction will be overturned on appeal, but this does not justify subjecting an innocent person to a taxing appeals process. To the extent that a defendant may not succeed on appeal, jury nullification invites the possibility that innocent defendants will be wrongfully punished.

Nullification advocates assert that nullification is permissible only when it serves to further the goals of the legal system. Arguably, such goals include sending criminals, not innocent people, to prison to pay for their crimes. As Conrad notes:

Many of the defendants facing trial in criminal courtrooms across America are no threat to their neighbors. They are harmless violators of victimless crime laws, tax laws, regulatory laws, licensing laws, or political protestors. They are mercy killers who have assisted a loved one to end his or her suffering, only to be put through a second round of torture as their personal tragedy is played out in court and in the press. They are peaceful gun owners who wish to be equipped to protect themselves, if need be. They are cancer, AIDS, glaucoma, and multiple sclerosis (MS) patients who grow and smoke marijuana to alleviate their suffering. They are battered women who after years of abuse, stand up to their batterers. These are not the people who prey upon society, these are the people society preys upon (1998, 143).

Moreover, a proper jury instruction that includes nullification also stipulates that the jury must not convict unless convinced of the defendant's guilt beyond a reasonable doubt. If the jury is actually representative of the community, "the prejudices of individual jurors should cancel each other out to produce a just outcome" (Schefflin and Van Dyke 1980, 94).

The Criminal Justice System Should Favor the Defendant

A final argument put forth by those opposed to nullification involves the absence of error-correcting devices if a jury wrongly acquits a defendant. If a jury wrongly

convicts a defendant, there is always the possibility of a directed verdict to reverse the conviction or the opportunity to appeal. However, when a jury engages in nullification and hands down an acquittal that flies in the face of the evidence, double jeopardy attaches and that defendant cannot be forced to stand trial again. To put this differently, the defendant has avenues of recourse unavailable to the prosecution in the instance of an unsatisfactory verdict. Antinullification advocates maintain that the criminal justice system is already inordinately stacked in the defendant's favor, making nullification unnecessary and unwise.

Nullification advocates claim that the criminal justice system should be stacked in favor of the defendant. After all, prosecutors have almost limitless resources that are unmatched by the average criminal defendant. This seems to suggest that the prosecution has every opportunity to "get it right" and that there is essentially no excuse for a prosecutor's failure to carry his burden of proof where the defendant is in fact guilty. Further, nullification does not occur every day, making any advantage defendants may enjoy by leaving the option to nullify open to juries is at best incremental.

As a final answer to those who rail about juries mistakenly acquitting defendants, Schefflin and Van Dyke note that one of the hallmarks of American government is the idea that people should be free to govern themselves within the bounds of the Constitution (1980, 95-6). At times, the law may become oppressive, stifling the freedoms it was intended to protect. When this happens, juries must be free to protest such laws by engaging in nullification. Certainly, there may be occasions where a jury, acting in good faith, mistakenly acquits a defendant. However, freedom includes the

liberty to make mistakes. If juries sometime err in acquitting the wrong defendants, this must be regarded simply as one of the costs of self-government.

Conclusion

Perhaps the critics are wrong. It may be that jury nullification is not such a bad idea after all. It may be that nullification does not pose a severe threat to democracy, does not give a minority undue power over the majority, and does not violate a defendant's expectation of due process. In some way, nullification may even be regarded as a necessary opportunity for equity or as an act of civil disobedience. However, allowing for the possibility that the opponents of jury nullification have some valid claims, a narrow definition of nullification and a limit on the circumstances under which it is appropriate may calm the fears of some.

Chapter 7- *Fully Informed Jury Association v. County of San Diego*: Analysis and Criticism

Introduction

Jury nullification is an important facet of the criminal justice system, but since it is rarely publicized it is extremely likely that jurors do not know that nullification is among the options available for their consideration. Currently only three states have constitutional amendments requiring trial judges to inform juries of their power to nullify the law. However, even these amendments have been given a narrow reading by the courts. As a result, some public interest groups, like the Fully Informed Jury Association (FIJA), attempt to educate potential jurors about the jury's nullification power. FIJA recognizes the value of jury nullification and has attempted to inform potential jurors of this power through a variety of means, including picketing outside of courthouses, sponsoring a 1-800 hotline for jurors with questions about nullification, leafleting, and distributing newsletters.

In 1996, in *Fully Informed Jury Association v. County of San Diego* (1996 U.S. App. LEXIS 4254), the Court of Appeals for the Ninth Circuit held that California has a compelling state interest in preventing FIJA from placing newsletters in newsstands within 50 yards of the San Diego County Courthouse. This ruling is interesting for a variety of reasons, not the least of which is that members of FIJA were engaged in an activity normally protected within the purview of the First Amendment. FIJA's practices, however, make rulings like this defensible. While the state arguably has an interest in limiting instances of nullification, this interest cannot be characterized as compelling where jury nullification is properly understood.

A Brief History of the Fully Informed Jury Association

FIJA began as an outgrowth of the Montana Libertarian Party in 1979 and was recognized as national organization in 1989. Currently, FIJA boasts state-level organizations in 49 states. FIJA is classified as a 501(c)3 nonprofit, which means that its sole purposes are education and research. This nonprofit status prevents FIJA National from engaging in any sort of lobbying efforts, which are left to the state organizations. However, there is relatively little contact between the national organization and the state organizations. The primary purposes of state organizations are lobbying and fundraising, with state organizations receiving no financial support and little guidance from the national organization.

FIJA's membership is remarkably diverse. The organization seems to attract people from across the political spectrum, including NRA supporters as well as gun control advocates, pro-life and pro-choice activists, those who support the legalization of marijuana, those who want to return prayer to public schools, and those, from both the far left and far right, who hope to overthrow the government (Haynie 1997, 344).

FIJA exists to inform jurors of their power to engage in nullification. However, FIJA does not offer a clear definition of nullification, maintaining only that jurors are free to be the judges of the law and the facts. State-level organizations offer varying explanations for the meaning of nullification, including that jurors are free to vote their consciences or in accordance with individual notions of morality or justice. While FIJA advocates the use of nullification in both civil and criminal trials, its efforts tend to be concentrated more on encouraging nullification in criminal court. State-level

organizations seek to spread the word about nullification and inform jurors of their power through a variety of means, including protesting, picketing, holding rallies, distributing leaflets, newsletters, and fliers, lobbying, and creating rowdy disturbances in courtrooms during jury selection (Haynie 1997, 346-50). Additionally, FIJA National sponsors a nullification hotline (1-800-TEL-JURY) that jurors are encouraged call if they have questions and makes available bumper stickers, t-shirts, and videotapes to the public as well as its activists.

In the "Juror's Handbook", FIJA outlines in slightly more detail its reasons for believing that nullification is important. This position may be summarized as follows. The jury, it seems, is actually far more powerful than the Congress, the president, or the Supreme Court because of its ability to nullify the law. This is the primary reason nullification is frowned upon by the government. During the course of a criminal trial, the judge's role is not that of interpreter of the law. Instead, the judge is only the referee and the jury acts as the source of authority on the meaning of the law. Every defendant has a constitutional right to have his fate decided by a jury; even if the evidence of his guilt is indisputable, an acquittal is a related expectation of this right, if acquitting said defendant is what the jury chooses to do.

Every law is oppressive. Prosecution is synonymous with persecution. The suggestions that nullification should be reserved for special circumstances or that nullification is not an everyday occurrence in criminal court are both conspiracies propagated by the government to limit instances of nullification altogether.

Fully Informed Jury Association v. County of San Diego

After San Diego required the Fully Informed Jury Association to remove its newsstands from the sidewalk in front of the San Diego County Courthouse, FIJA brought suit, challenging the constitutionality of General Order 102093 and General Order 2-14-94 under 42 U.S.C §1983. When the district court denied a request for preliminary injunctive relief, FIJA appealed. However, the organization did not fare any better on appeal. The Court of Appeals for the Ninth Circuit found that the state has a compelling interest in preventing FIJA from placing its newsletters in newsstands within 50 yards of the San Diego County Courthouse.

In an extraordinarily brief opinion, the court first addressed General Order 102093, which prohibits:

the distribution or attempted distribution of any written materials tending to influence, interfere, or impede the lawful discharge of the duties of a trial juror, and communication or attempt so to communicate with any person summoned, drawn, or serving as a trial juror in these courts for purposes of so influencing, interfering, or impeding the lawful discharge of the duties of a trial juror in or within 50 yards of any public entrance to the facilities within which Courts conduct jury trials within this County (*FIJA* 1996, 2).

The court maintained that the state has a compelling interest in “protecting the integrity of the jury system” and that General Order 102093 is narrowly tailored to achieve that end. No analysis or explanation is offered that might indicate the rationale behind this conclusion.

Turning immediately to the second regulation, General Order 2-14-94, which requires:

[all] vendors and distributors of newspapers distributed from newsracks currently placed on the sidewalk bordering the front entrance of the San Diego County Courthouse [to] remove said newsracks to another location within two weeks (*FIJA* 1996, 2).

Again, absent any explanation, the court states that this is a content neutral regulation and identifies the compelling state interest as the need to secure the area around the courthouse. Since courts can take “supervisory and administrative actions necessary to implement its judicial functions”, this regulation too passes constitutional muster.

There are a number of problems with this decision. This ruling is interesting, in part, because of the activities in which members of FIJA were not engaged. They were not picketing outside the courthouse. They were not threatening potential jurors. They were not mounting a rowdy protest nor were they attempting to incite a riot. They were not acting so as to endanger passersby. Further, the FIJA activists were not causing a disturbance inside the courthouse itself. Rather, they were engaged in an activity normally protected by the First Amendment.

Putting this aside, there are still other causes for concern with this ruling. The court fails to make clear exactly how allowing FIJA to maintain its newsstand would threaten the integrity of the jury system. Nor is it clear how removing the newsstand from sidewalk bordering the courthouse would help improve security. Certainly, placing a newsletter in a newsstand is much less confrontational than placing activists outside the courthouse to approach citizens reporting for jury duty. Further, maintaining a newsstand has to create less of a disturbance and be of less concern for law enforcement than mounting a protest. Finally, it is uncertain how banning FIJA’s newsstand helps the court implement its “judicial functions”.

The court's reasoning does not seem to make sense. At the root of these discrepancies is the concern that court held that both of these regulations survive strict scrutiny. However, strict scrutiny requires a tight fit between ends and means. That is, strict scrutiny requires that the state have an exceedingly valid reason for restricting some activity and that the restriction imposed by the state be as narrowly tailored as is possible. Such a tight fit seems to be absent here.

Further, the court calls General Order 2-14-94 a content neutral restriction. However, the court fails to mention whether any organization besides FIJA was maintaining newsstand outside the courthouse when this regulation was enacted. Haynie suggests that FIJA was the only group impacted by General Order 2-14-94 (1997, 345). If this is true, then while the restriction may be content neutral on its face, it may be anything but neutral in application.

In order to bolster its case, the court cites three Supreme Court decisions, *Burson v. Freeman*, *Cox v. Louisiana*, and *Ward v. Rock Against Racism*, as precedents. However, each case can be distinguished from *Fully Informed Jury Association v. County of San Diego (FIJA)*.

In *Burson v. Freeman* (1992, 504 U.S. 191), the Court considers a Tennessee statute aimed at preventing campaigning within 100 feet of a polling place. Noting that Tennessee has a compelling interest in preventing voter intimidation and election fraud, the Court found the statute to be an appropriate means for satisfying this interest. The Court allows that if the state required that the restricted zone around a polling place be

too large, then it might impermissibly burden the right to engage in political speech. However, Tennessee's 100-foot periphery does not create such a burden.

Burson v. Freeman is a plurality, not a majority, opinion. When an opinion does not achieve majority status, it cannot properly be viewed as setting a precedent. Putting this aside, however, *Burson* can be distinguished from *FIJA*. Approaching potential voters is fundamentally different from maintaining a newsstand on the sidewalk outside a courthouse. Voters who experience harassment or intimidation upon arrival at a polling place might choose to simply leave without voting. This would not only impact voter turnout, but would also prevent the harassed individuals from exercising a constitutional right. Further, intimidating potential voters could impact the outcome of given election and might be used as a strategic measure to prevent the supporters for one's opponent from voting. A newsstand cannot be said to have this effect. Any person entering the courthouse who does not wish to read *FIJA*'s newsletter is free to walk by, unmolested. Moreover, those summoned for jury duty do not have the luxury of failing to show up in court, absent being excused by the judge. Intimidated potential jurors, unlike intimidated potential voters, cannot simply go home.

A second case cited by the *FIJA* court as precedent is *Cox v. Louisiana* (1965, 379 U.S. 559). At issue in *Cox* is whether a statute barring picketing "near" a courthouse violates the Free Speech provision of the First Amendment and the Due Process Clause of the Fourteenth Amendment. Writing for a majority, Justice Goldberg applies the clear and present danger test. He concludes that states have a compelling interest in protecting

their justice systems from undue strain that might be created by having protesters too near courthouses.

The facts of the *Cox* case are not sufficiently similar to those of *FIJA* to allow *Cox* to serve as a precedent. There is a difference between allowing protesters near a courthouse and permitting a newsstand to be near a courthouse. Arguably, protesters may be confrontational and seek to bully those leaving or entering the courthouse. A newsstand can be neither confrontational nor threatening in this way. There may be an additional concern that permitting a protest too near a courthouse would disrupt the court's daily activities. However, a newsstand alone cannot create a similar type of disturbance. *Cox* can be distinguished from *FIJA* because the activity which the Court seeks to regulate in one is in essence different from the activity which the court seeks to regulate in the other.

The *FIJA* court also cites *Ward v. Rock Against Racism* (1989, 491 U.S. 781) as a final precedent. In this case, Rock Against Racism (RAR) sponsored an annual concert in Central Park consisting of both music and speeches calling for an end to racial prejudice. Due to several complaints that the music was too loud, New York City enacted a set of sound-amplification guidelines and insisted on providing a sound technician familiar with these guidelines to work at the concert. RAR filed suit, alleging that the guidelines were facially invalid under the First Amendment and seeking damages and declaratory relief. The Court held that the city's guidelines were reasonable because the intent was to regulate noise levels rather restrict speech. Further, the guidelines "left

open other adequate channels of communication” and, thus, were not in violation of the Constitution (*Ward* 1989, 802-3).

Regulating noise at a rock concert seems to fall under the purview of a public nuisance ordinance rather than the First Amendment. The Court seems to suggest this by noting that the city’s guidelines were valid without reference to the content of the regulated speech. The issue in *FIJA*, however, is the regulation of political speech not the regulation of noise levels. The presence of a newsstand outside a courthouse can hardly be said to create a public nuisance or disturb the peace. Restricting political speech has much greater consequences than requiring musicians to sing and play more quietly. The two cannot be regulated as if they are one in the same.

Ward is distinguishable from *FIJA* on another level as well. RAR was permitted to continue holding its concerts in Central Park, so long as it complied with the sound-amplification guidelines. *FIJA*, however, was not permitted to maintain its newsstand in the same location. The newsstand was relocated; the concert was not. While sound-amplification guidelines left open the same channels of communication available to RAR before the guidelines were enacted, requiring *FIJA* to move its newsstand denied the organization access to the same channels of communications that were available prior to the enactment of General Order 2-14-94.

Conclusion

While the state likely has an interest in limiting instances of nullification, this interest cannot be characterized as compelling based on the evidence offered in *Fully*

Informed Jury Association v. County of San Diego. To demonstrate a compelling interest, the state would need, in the very least, to show that nullification is so prevalent that it seriously undermines the integrity and effectiveness of the jury system. Further, if General Orders 102093 and 2-14-94 are to be portrayed as narrowly tailored, the state would also need to demonstrate that the impact of the newsletters was so substantial that the jury pool had become infected with jurors unwilling to convict any defendant, regardless of the persuasive quality of the evidence. In addition, the state might also need to show that the newsletters were the primary source from which jurors were learning about nullification. The state demonstrated none of these things in *FIJA*, resulting in a ruling that is hardly defensible.

Chapter 8- Conclusions: FIJA's Inherent Potential

Jury nullification has a long history in the American criminal justice system. The meaning of nullification has evolved from one that required juries to judge both the law and the facts to the idea that juries can vote according to a collective conscience in the interest of justice, fairness, or morality. However, the modern understanding of nullification is both incomplete and difficult to justify. For this reason, it may be appropriate to suggest a set of guidelines for jurors interested in opting for nullification. To this end, jury nullification occurs when a juror purposefully rejects the trial judge's interpretation of the law and votes to acquit an otherwise guilty defendant because the juror finds the law under which the defendant is charged somehow objectionable. Jurors should be cautioned that nullification is not appropriate in every case. It is appropriate, however, as vehicle for protest against a law or class of laws. This understanding remains true to nullification's history since juries once nullified the law as an expression of protest against an oppressive government. Further, this definition allows nullification to be justifiable in terms of theories of justice and civil disobedience. Finally, defining nullification as protest introduces the added safeguard that nullification will not be an arbitrary choice on the part of the juror nor will it become an everyday occurrence in courtrooms across America.

Related to offering a justifiable definition of jury nullification is suggesting some possible ways that FIJA might reform its practices. FIJA has at least four problems that prevent the public from taking its message seriously and that help justify rulings like the one in *Fully Informed Jury Association v. County of San Diego*. First, FIJA fails to offer

a consistent definition of nullification. FIJA National maintains that nullification is only the result of jurors interpreting the law for themselves. State-level organizations define nullification in a variety of ways, ranging from the jury's "lawmaking" power, to a veto power over government acts, to a verdict according to conscience or community standards. Such broad and inconsistent definitions are difficult to justify. Worse, however, is that those opposed to nullification are free to define it as "juror lawlessness" in the absence of a clear consistent definition by FIJA. FIJA errs in allowing its opponents to define its cause.

Secondly, there is often a disconnect between the laws opposed by FIJA activists and the laws at issue in trials where activists protest and encourage the jury to nullify. Haynie notes, for example, that FIJA activists protested at the trial of some of the members of the Branch Davidians, charged in the deaths of federal agents when the FBI raided their compound in Waco, Texas (Haynie 1997, 351). According to FIJA activists, they were present at the trial to protest gun-control laws. However, the Branch Davidians were standing trial for murder not for weapons violations. That FIJA activists were advocating acquittal, again presented their opponents with an opportunity to construe FIJA and its efforts negatively. Following instances like this, FIJA's opponents allege that the organization advocates lawlessness and a willingness to let murders and other violent offenders go free.

Another problem FIJA experiences results from the failure to coordinate activities and objectives between state-level organizations and FIJA National. Aside from lacking a clear and consistent definition of nullification, FIJA National does not oversee or advise

the activities of state-level organizations. This includes lobbying efforts. The result is that state-level organizations are often aimless. Further, lobbying efforts have been largely ineffective, due to a lack of experience and political savvy. FIJA National cites as one of its primary goals lobbying state legislatures to enact jury determination statutes. If FIJA were serious about this goal, it would provide some training or assistance to state-level activists attempting to lobby their state governments.

Finally, FIJA makes no effort to articulate the instances in which nullification would be both appropriate and justifiable. It cannot be true that every law is oppressive, as FIJA argues. As an organization, FIJA represents an extreme and rather unpopular point of view. In order to gain support, it needs to move toward a more moderate position. One way to do this would be to adopt a definition of nullification advanced by this thesis. If FIJA defined nullification as an instance of protest against a particular law, it would effectively refute several arguments made by opponents. Namely, such a definition defies the argument that nullification lacks any sort of standard to guide jurors, making it dangerous. Further, a more nuanced definition of nullification would allow FIJA activists to assert that instances of nullification would be rare and, thus, unlikely to lead to chaos or anarchy. Finally, if FIJA adopted a definition similar to that advanced here, it could couch its efforts in terms of democracy. Few would dispute that one privilege of living under a democratic government is protest. If FIJA could resolve these problems, it should be free to publicize its message within the parameters of speech protected by the First Amendment.

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