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SYMPOSIUM

THE ROLE OF RACE-BASED JURY NULLIFICATION IN AMERICAN CRIMINAL JUSTICE

FOREWORD

TIMOTHY P. O'NEILL*

This issue of *The John Marshall Law Review* presents an important dialogue on the issue of jury nullification. It is an adaptation of the transcript of a program held last April 7 at The John Marshall Law School in Chicago featuring Professor Paul Butler, Associate Professor at the George Washington University School of Law; Professor Andrew Leipold, Associate Professor at the University of Illinois College of Law; and the Honorable Charles P. Kocoras of the United States District Court for the Northern District of Illinois. The specific area of discussion was Professor Butler's controversial proposal that African-American jurors should engage in jury nullification in cases in which an African-American defendant is charged with a victimless crime.¹ The broader topic, however, was what role—if any—jury nullification should play in the American criminal justice system.

Members of a criminal jury are repeatedly told that their solemn duty is to follow precisely the instructions provided by the trial judge. Yet all judges and lawyers know that, if a jury wishes to acquit, its members are free to ignore both facts and law. This is the doctrine of "jury nullification."

Jury nullification is a venerable doctrine. In fact, the English legal system and the American legal system can each point to a landmark case establishing the principle.

In 1670, William Penn's Quaker proselytizing led to his prosecution in London on charges of unlawful assembly.² The judge es-

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1. Paul Butler, *Racially Based Jury Nullification: Black Power in the Criminal Justice System*, 105 *YALE L.J.* 677 (1995).

2. See Andrew D. Leipold, *The Dangers of Race-Based Jury Nullification*,

entially directed the jury to find Penn guilty. Penn, on the other hand, argued that the jury should protect freedom of religion by going "behind" the law and acquitting despite the instructions. After the jury acquitted, the judge fined the jurors for ignoring his instructions. When one juror, Edward Bushell, refused to pay the fine, he was prosecuted.³ The Court of Common Pleas held for Bushell and established that a juror could never be punished for a verdict.⁴ This case became authority for the proposition that, even if a jury should ignore its instructions and acquit the defendant, there can be no legal sanction against any member of the jury.

The American counterpart is the libel trial of John Peter Zenger in New York in 1735.⁵ Zenger's attorney, Andrew Hamilton, urged the jury to ignore the judge's instructions and to acquit Zenger by finding that the common law allowed truth as a defense to seditious libel. The jury obliged. This is cited as the first famous American jury nullification case.

Yet jury nullification in America was not originally a celebration of the jury's power to flout the law. Rather, the doctrine went hand-in-glove with the common understanding that juries traditionally had the power to decide both questions of fact and law. There was strong evidence of this at both the state and federal level through the beginning of the twentieth century. Jeffrey Abramson's *We, The Jury* cites a 1794 case in which John Jay instructed a civil jury that it had the right to decide both issues of fact and law.⁶ It also cites an 1817 criminal case in which John Marshall gave a similar instruction to a criminal jury.⁷ In fact, it was not until 1895 that the United States Supreme Court finally held that a federal jury should decide only facts and not law. The Court in *Sparf and Hansen v. United States*,⁸ held that a federal jury could not become "a law unto themselves," but were bound to follow the law as given by the trial judge. Yet even today the state constitutions of both Maryland and Indiana provide that a criminal jury has the right to determine both law and facts.⁹

Throughout the nineteenth century, then, jury nullification in America could be explained as the jury's exercise of its prerogative to find both the facts and law in each case. Under this theory, ju-

44 UCLA L. REV. 109, 122-23, n.53 (1996).

3. Bushell's Case, 124 Eng. Rep. 1006 (C.P. 1670).

4. See Leipold, *supra* note 2, at n.53 (citing THOMAS A. GREEN, VERDICT ACCORDING TO CONSCIENCE: PERSPECTIVES ON THE ENGLISH CRIMINAL TRIAL JURY 1200-1800 (1985)).

5. See Butler, *supra* note 1, at 702-03; Leipold, *supra* note 2, at n.55.

6. JEFFREY ABRAMSON, WE THE JURY: THE JURY SYSTEM AND THE IDEAL OF DEMOCRACY 38-45 (1994) (citing *Georgia v. Brailsford*, 3 U.S. (3 Dall.) 1, 4 (1794) (Jay, C.J.)).

7. ABRAMSON, *supra* note 6, at 38-45.

8. 156 U.S. 51 (1895).

9. See IND. CONST. art. I, § 19; MD. CONST. (DECL. OF RIGHTS) art. XXIII.

ries before the *Sparf and Hanson* decision were not "nullifying" any law; on the contrary, their decisions actually *proclaimed* the law. The rise of the "law/fact" dichotomy limiting the power of American juries in the twentieth century, however, has necessitated a change in the jurisprudential basis for the rule. Now courts tend to view nullification as, in the words of the Seventh Circuit, "just a power, not also a right."¹⁰ Thus, a defendant has no right to tell the jury about the doctrine of nullification.¹¹

Yet if a defendant has no right to inform an individual jury of its right to nullify, what about informing citizens—potential jurors—on a broader scale? The Fully Informed Jury Association was founded in 1989 with the goal of protecting and *publicizing* the right of juries to nullify.¹² Even if a jury cannot be told of nullification inside a courtroom, the Association contends, there is nothing to prevent citizens from reading about it in newspaper advertisements.

Professor Paul Butler has brought this debate into the scholarly arena with his recent controversial article in the *Yale Law Journal*.¹³ Citing the huge number of African-Americans imprisoned because of drug convictions, Butler urges African-American jurors to re-think their legal responsibilities. He contends that in cases involving African-American defendants being tried for non-violent, *malum prohibitum*, "victimless" crimes, an African-American juror should begin deliberations with a presumption *in favor of jury nullification*. The goal would be to destroy the *status quo* and to substitute non-criminal ways of addressing antisocial conduct.

Professor Andrew Leipold views jury nullification in a very different light. In a recent article in the *Virginia Law Review*, he contends that the doctrine exerts more influence over the criminal justice system than one might expect.¹⁴ He argues that jury nullification imposes costs on the system even when it is *not* exercised because of procedural rules which exist to allow for its possible use by a jury. He avers, for example, that the possible use of jury nullification is the actual reason for our criminal procedure rules against special verdicts, judgments as a matter of law, and appeals by the prosecution. Additionally, he has published a response to Professor Butler's jury nullification proposal in which he argues against any program of race-based jury nullification.¹⁵

Judge Charles P. Kocoras, the final member of the panel, has

10. *United States v. Kerley*, 838 F.2d 932, 938 (7th Cir. 1988).

11. *See, e.g., United States v. Dougherty*, 473 F.2d 1113 (D.C. Cir. 1972).

12. ABRAMSON, *supra* note 6, at 57-58.

13. Butler, *supra* note 1.

14. Andrew D. Leipold, *Rethinking Jury Nullification*, 82 VA. L. REV. 253 (1996).

15. Leipold, *supra* note 2, at 116.

served as a Judge in United States District Court for the Northern District of Illinois for the last seventeen years. Prior to his appointment, he served as both First Assistant United States Attorney for the Northern District of Illinois, as well as Deputy Chief for the Criminal Division and Special Prosecution Division. He brings a wealth of insight and practical experience to the discussion.

Jury nullification has survived through several centuries of changes in legal theory. Does it deserve a place in the American justice system today? If so, what should be its role? These are just some of the questions addressed in the following discussion.