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RACE-BASED JURY NULLIFICATION: REBUTTAL (PART B)

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The doctrine of jury nullification is antithetical to the rule of law, to the way we govern and judge ourselves, and ultimately to a society in which law and order are revered principles. The words "jury nullification" sound innocent enough, but in truth they stand for the proposition that citizens need only follow the laws they agree with and not those they choose to violate. Should a substantial number of citizens subscribe to its appeal, a state of anarchy will inevitably result. Should only a minority adhere to that principle, an unjust society will obtain.

Under our system of justice, whether federal or state, all jurors take an oath to discharge the same legal obligation: to apply the law as declared by the Court. The Court's declaration includes these mandates to jurors:

Regardless of any opinion *you* may have as to what the law *ought* to be, you must base your verdict upon the law given by me. It is your duty to determine the facts from the *evidence* in this case. You are to apply the law given to you in these instructions to the facts and in this way decide the case.¹

Simply and directly put, an appeal to jury nullification is an attempt to cause jurors to violate their oaths to decide cases solely on the evidence and to follow the Court's instructions. Why is something so basic to our system of governance, following the law, such a good thing for all of its citizens, including its minority citizens? It is because every person who arrogates unto himself the right to ignore society's laws, and his obligations as a citizen, cannot expect any other citizen to act differently. Those who pick and choose which laws to follow lose their moral right to complain when others similarly violate laws they disagree with and dislike. The minority citizen who knowingly and intentionally violates some laws loses the moral high ground to the majority citizen who does exactly the same.

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1. Fed. Crim. Jury Instructions of the 7th Cir., Instruction No. 1.01 (1980), reprinted in EDWARD J. DEVITT, ET AL., FEDERAL JURY PRACTICE & INSTRUCTIONS § 12.01 (West, 1992) (italics added).

Jury nullification is also a self-defeating exercise. Under this system of governance, he who has the power can rule and decide, and that is justification enough. The pages of history and the abuses of naked power it chronicles shows the emptiness of that teaching.

My own ancestry is Greek, and it is appropriate to look to that little country from which most of our democratic principles and institutions originated. It was part of the Golden Age of Greece that produced the genius of the notion that man is fit to govern himself, that there are none among us who has a special birthright and can claim power by virtue of it. Think also of the genius that says you should pick your governors from among yourselves, and that there are no divine limitations in making the choice.

It was later so simply and so eloquently described in the following words: "All men are created equal."² Translated, this means no man can impose his will on society, only on his own say so. Equally fundamental to an ordered society is the principle that the conduct of human affairs must be based on the primacy of reason and that this conclusion is an inviolate law of nature. It is this last idea that most closely reflects our system of justice in this country.

Our courts need to be citadels of reason and justice for all. A court should be the one place in our broad society where law and evidence are paramount, where issues and cases are decided on objective merit and objective reason. A court is the one place where height, weight, color, ethnic origin and other subjective characteristics or qualities do not and should not matter. When the obligation to reason and analyze objectively is abdicated in favor of the naked exercise of power based on subjective beliefs, we have lost much.

Those who disagree with the laws of Congress or state legislators, whether in the majority or not, are free to vocalize their opposition and agitate for change. I know, Professor Butler, you disagree with that. However, the Constitution guarantees that. It is not only the orderly way to do business, it is the best way. The argument of reason is superior to the unlawful exercise of a juror's power. As to the argument that society's laws are selectively enforced, the Constitution provides safeguards for that very eventuality.

This is not a right without a remedy, and the case books are testament to that fact. For each citizen to act solely as he or she chooses is to ignore the necessity to promote the general welfare. It is to say, "I will enact and enforce my own laws and views and ignore the governmental structures put in place to address the needs of all society." History teaches that greater power trumps

2. THE DECLARATION OF INDEPENDENCE para. 2 (U.S. 1776).

lesser power. Jury nullification, the unlawful exercise of power, will be trumped by other unlawful exercises of power. Jury nullification begets jury nullification, no matter its color. It is wrong to encourage it, wrong to engage in it and wrong in the results it produces. Reason and good will of all our citizens, when called upon to serve as jurors, will prevail over so empty a doctrine, and my own experience confirms this.

I am a great believer in the jury system and the proper exercise of jury power. Jury nullification, at bottom, is a doctrine so flawed that it cannot and will not stand. I do not want to address the particulars of Professor Butler because under the format of the program he is entitled to comment on us, but I do have a question. I do not understand and do not agree with, quite frankly, the proposition that drug distribution is a victimless crime. I know you are careful to distinguish between drug possession and drug distribution. However, I have been on the Bench for sixteen years and I do not remember the last drug possession case I have seen. The ones I have seen are drug distribution cases.

I have seen the horrors of drug addiction, and I have seen what addicts do to get money to buy drugs. I have also seen the enormous profits inspired by drug sales and the violence that ensues from claiming the same turf. So on the particular point that I think was propagated—that in some cases, some drug crimes are victimless crimes—I take great exception to; my experience reflects quite the contrary. I also wonder what it says to a drug defendant who stands before a jury of his peers, irrespective of color, and is acquitted when he knows he violated the law he has been charged with violating? What does that say to him about deterring him from future conduct? Does it say anything at all?

Now, I do not disagree that we have a lot of problems in this country. I probably would be the first to agree with Professor Butler that we have a lot of people doing a lot of long time for drug violations, toward what end I am not sure. However, it is no answer to say we are going to decide that nullification is the right answer to rectify these problems of society, particularly the very long sentences under the Sentencing Guidelines from some of these drug cases. Rather, we must find some other way of addressing these problems. I do distance myself from the doctrine of jury nullification. I think it is morally bankrupt and it is unsupportable for that reason.

