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RACE-BASED JURY NULLIFICATION: SURREBUTTAL

PAUL D. BUTLER

I want to be brief in my responses so that we can have a lot of time for discussion. I will answer the last question first: "Is drug distribution a victimless crime? Does it not cause a lot of injury? And what about deterrence?" Well, what about deterrence?

We now have the most severe drug sentences that we have ever had. More people are being punished and are going to jail longer for drugs than ever in our history, and it does not seem to be having much of a deterrent effect. I bet any of you would know where you can go and get some marijuana or cocaine right now if you wanted to, even though, again, these drug laws are very severe. So I am not convinced that there is much of a deterrent effect.

"Is it a victimless crime? Do people who use cocaine or alcohol, especially sellers, not cause so much injury when they ought to be punished?" Well, in some instances when drug pushers sell to children, I think that there are victims and I advocate punishment. However, we have to understand that if injury is our measure of who deserves to be punished, then we really ought to be locking up alcohol distributors and tobacco distributors. My God, those people are mass murderers. By any measure of injury I know, alcohol and tobacco cause more injury than all hard drugs combined. Whether you measure injury as deaths, as dysfunctional families or as lost economic productivity, alcohol and tobacco are the worst. Yet most of us do not think it is a good idea to deal with that problem by putting alcohol and tobacco sellers in prison, in cages.

As Professor Leipold said, if my proposal is exercised widely by African-American jurors, then jurors will start being struck either peremptorily or for cause by prosecutors. It is an interesting point to make this afternoon, because this morning I was on a CNN program in which we discussed recent revelations by a D.A. in Philadelphia. A tape was released of this D.A. making an argument in a training session that black jurors should be struck from juries. He made this argument about six or seven years ago when jury nullification was only a glint in my eye. Many prosecutors, for reasons related not only to jury nullification, think that it is a good strategic decision to get rid of black jurors. Again, they

think of that, even in the absence of jury nullification. A lot of people think that even with reasonable doubt, black jurors analyze evidence differently from whites. What is reasonable to an African-American may not be reasonable to a white person. So again, I think that this desire, as *Batson v. Kentucky*¹ and its progeny tell us, to strike black jurors is a phenomenon that is independent of jury nullification, although I can see that it is exacerbated by jury nullification.

As to Professor Leipold's philosophical objections, he says that there is no moral basis for complaining about bad jury nullification if good jury nullification is used. He claims there is no moral basis for a distinction. I do not think that is right. I have talked to thousands of people about jury nullification. I often asked this question: "How many of you think that it was wrong in the fugitive slave cases for those jurors to acquit?" Again, those African-American slaves were 100 percent guilty. The Fugitive Slave Act had been enacted by the democratic process and affirmed by the Supreme Court in the *Dred Scott v. Sanford*² decision. It was a perfectly legal and constitutional law, and yet white, northern jurors subverted the law. However, how many of us now think that was immoral? We can make that distinction. We can say that was good jury nullification, even though in the case of Byron de la Beckwith, the man who murdered Medgar Evers, that was bad jury nullification.³ There is a principled way for distinguishing between good jury nullification and bad jury nullification.

His Honor says that jury nullification is subversive of the rule of law. I agree, I think. In fact, I think that is what I like about it. The rule of law, it seems to me now, suggests that the way to deal with the problem of African-Americans is to punish them. The way to treat predictable reactions to the legacy of slavery and apartheid, the scars of white supremacy, is to put people in cages. If that is what the rule of law suggests, then I think that it needs subversion. Is that anarchy? Will it lead to anarchy, or does anarchy exist now?

Professor Leipold and the Judge both make the argument that the Court should be color-blind. His Honor says that subjective characteristics should not matter. The professor says that whether you go to prison or not should not depend upon the color of your skin. Unfortunately, it is American criminal justice that has weighed in favor of that cruel apartheid, not jury nullification. The question is whether the solution can be color-blind when the

1. 476 U.S. 79 (1986).

2. 60 U.S. (19 How.) 393, 404-07 (1857).

3. See *United States v. Thomas*, No. 95-1337, 1997 WL 280000, at *10 (2d Cir. May 20, 1997) (citing DAVID HALBERSTAM, *THE FIFTIES* 431-41 (1993); JUAN WILLIAMS, *EYES ON THE PRIZE: AMERICA'S CIVIL RIGHTS YEARS, 1954-1965* at 38-57, 221-25 (1987)).

problem is not. I think that if the problem is race, then we need a racial remedy.

Finally, the Judge says that this is not a problem without a remedy. There is a remedy, even if it is one that I am not excited about: writing to Congress, to petition the legislature. While I agree it is a remedy, and while I agree that eventually American criminal justice will get it, I also think that it took 200 years for the majority to understand that slavery was wrong. It took 100 years for the body politic to understand that American apartheid was immoral. How long will it take to understand that this punishment regime is evil? How long should African-Americans have to wait? How many black people in prison is too many?

Even Clarence Thomas said that when he looked out of his office window and he saw the African-American men filing into criminal court in chains, he said to himself, "There, but for the grace of God, go I." But the determination of who marches into criminal court in chains should not be so fortuitous. It should not depend so much upon race and class. As long as it does, then I will advocate black self-help by any means necessary, including jury nullification.

