

Jury Nullification: Should Jurors Ever Refuse to Follow the Law?

Jurors Should Be Permitted to Follow Their Consciences

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Jurors Should Always Follow the Law

Advocate: Mark Dwyer, Assistant District Attorney and Chief of the Appeals Bureau, New York County.

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When you serve on a jury in the United States, the judge may give you the following instruction:

Members of the jury, it will be your duty to find from the evidence what the facts are. You and you alone will be the judges of the law. I will then have to apply to those facts the law as the court will give you. You must follow that law whether you agree with it or not.

Through most of U.S. history, the courts followed the British tradition and could decide that a law (or its particular application) was unjust, and sometimes return a verdict of not guilty even if the jury thought the defendant violated the law. Of course, juries in the United States still sometimes convict when they believe that a law is unjust, and juries clearly have not always done that; but for the past several decades (with the exception of a

Maryland) juries have officially not been *supposed* to do so. It's easy to find cases where we might like the result of jury nullification (juries that refused to convict those who violated the Fugitive Slave Act by helping escaped slaves); but it's also easy to find results that are profoundly disturbing (the notorious refusal of southern all-white juries to convict for civil rights violations and even murders). Sometimes jury nullification occurs when jurors reject a specific law: nullification of laws requiring the return of fugitive slaves is a clear example. But jury nullification can also occur when jurors believe that the law is legitimate but special circumstances make conviction unjust; for example, if a defendant broke the law without knowledge or intent (such as a young man who brings a pocket knife to school without being aware that it is a banned item).

Points to Ponder

- A standard argument *against* jury nullification is that in a democracy, laws should be decided by *all* the people, through our elected representatives, and not by some small group of jurors. What do you think of that argument?
- If a law in our democracy was passed by an unjust or unfair process—for example, a law was passed because a group of lobbyists bribed members of Congress to pass the law, not because it was the will of the people—would that justify jury nullification of that law?
- Another argument against jury nullification is that every defendant has the right to be tried under the same law. If jurors in Miami do not like a law and decide to nullify it, while jurors in Jacksonville favor and uphold the law, then defendants in Jacksonville and Miami are not being treated equally. Is that a strong argument against jury nullification?
- David C. Brody (in “*Sparf and Dougherty* Revisited: Why the Court Should Instruct the Jury of its Nullification Right,” *American Criminal Law Review*, Volume 33 (1995)) proposed that judges give this instruction to juries:

While it is proper and advisable for you to follow the law as I give it, you are not required to do so. You must, however, keep in mind that we are a nation governed by laws. Refusal to follow the court's instructions as to the elements of the crime(s) charged should occur only in an extraordinary case. Unless finding the defendant guilty is repugnant to your sense of justice, you should follow the instruction on the law as given to you by the court.

Do you approve of that jury instruction? Is it too lenient, too strict, or just right?

Those who favor jury nullification believe it should be used only to prevent an unjust conviction of a defendant; but jury nullification should *never* be used to convict someone who is actually innocent under the law. For example, suppose that in our state there is no “good Samaritan” law; that is, no law requiring that one give assistance to those who are in danger or warn others of danger. While driving at dusk, Joe notices that a bridge has been washed

out; he stops his car and turns around, but makes no effort to warn a car he meets of the severe danger, and in the gathering darkness the driver's car plunges into the river and drowns. The jury concludes that Joe is not under the law; but they think he is morally repugnant, and that there should be a law against Joe's act, so they decide he should be convicted anyway. Advocates of jury nullification would insist that the jury acted *wrongly* following the law in this case, but that it may be right for the jury to *not* convict someone who has violated the law. Is that a consistent view?

Jurors Should Be Permitted to Follow Their Conscience

Jeffrey Abramson

... Philosophically, jury nullification is a close cousin to the theory of civil disobedience. In our own time, Martin Luther King, Jr., was a leading advocate for the view that individuals have a "moral responsibility to disobey unjust laws." But King accepted the state's authority to punish his acts of lawbreaking. In fact, willingness to accept punishment was a sign that the disobedience was a challenge to a particular unjust law and not to the state as a whole.

Jury nullification takes the classic theory of civil disobedience one step further by inviting the jury not to punish justified acts of lawbreaking. If the jury agrees that the broken law is unjust, then, say proponents of nullification, it should acquit rather than convict the defendant. The jury should

also acquit when it finds a law just but agrees that a conviction against the particular defendant would be unjust.

Jury nullification is an old doctrine, promising to give a voice to the sometimes empty phrase "rendered according to conscience." Authorized to nullify, a jury might move from merely finding that the defendant violated the law to their deliberation about whether the defendant's claims raised by acts of civil disobedience are justified. Instead of mechanical application of the law because the law has been broken, a nullifying jury would have the justice of the cause for the law was violated. Some causes are grand, as was the case with the juries deliberated whether to convict under the Fugitive Slave Law a

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who helped runaway slaves attain freedom. At other times, the tension between law and conscience concerns lesser matters, such as enforcing liquor laws during Prohibition. But, for anyone who takes seriously the jury as a bridge between community values and the law, jury nullification is a strong plank. In essence, nullification empowers jurors to appeal to fundamental principles of justice over and above the written law.

There is, however, a vicious side to jury nullification that Americans know all too well. The moral case for the right foundered and sank over the issue of race. In the South especially, all-white juries repeatedly refused to convict whites charged with murdering blacks or civil rights workers of color. Few bothered to use the word "nullification" to describe the factor of the not guilty verdicts for Emmett Till's or Viola Liuzzo's murders, but it was also no secret that the verdicts flew in the face of both evidence and the law. As the sociologist Gunnar Myrdal noted in his study of American racism, the all-white jury became a tool for local racism and a prime obstacle to enforcement of national civil rights legislation. The obstacle was all the more solid because, in our system, a not guilty verdict is final and unreviewable.

This is not just a story about the distant past. In Mississippi in the late 1950s, a former Ku Klux Klan leader was reported plotting to murder a black man. He reportedly told an associate, "Don't worry. . . . No jury in Mississippi will convict someone over killing a nigger." The KKK leader was tried, but the jury deadlocking each time. In 1979, Ku Klux Klan gunmen opened

fire on marchers in an anti-Klan rally in Greensboro, North Carolina, organized by the Communist Workers' Party. Five marchers died. An all-white jury (including one juror who said, "It's less of a crime to kill communists") found the gunmen not guilty on all charges. The not guilty verdict barred any state retrial of the Klansmen on the same charges. (The Klansmen were subsequently tried in federal court on separate federal civil rights charges, but an all-white jury acquitted the defendants again in 1984.)

Episodes such as the Greensboro and Mississippi trials undercut any innocent faith in nullification to pardon defendants. Once we grant jurors the right to set conscience above law, we have to live with consciences we admire as well as those we despise. As one critic put it, an "invitation to jurors to vote their consciences is inevitably an invitation to greater parochialism. . . . Local biases . . . are legitimated and activated . . . immuniz[ing] criminal acts visited upon members of society's 'discrete and insular minorities.'"

Stripped of moral stature by its service to racism, the doctrine of nullification is in virtual eclipse today. Only two states, Indiana and Maryland, recognize the doctrine and require judges, upon the request of a defendant, to apprise the jury of its right to disregard the law in favor of an acquittal.

In every other state and in the federal system, the doctrine has passed into history. In California, Operation Rescue jurors heard, as all California jurors hear, that they had "a duty to apply the law as I give it to you to the facts as you determine them." The Massachusetts *Trial Juror's Handbook* states that the jury "decides the facts . . . [but] does *not* decide the rules of law to be applied to

the facts in the case. . . . The judge tells the jury the proper rules of law required to resolve the case." Pennsylvania's *Handbook for Jurors* is similar: "It is the jury's function to determine what facts are established by competent evidence [but it] is the judge's responsibility to tell . . . the jury the proper rules of law required to resolve the case. . . . [The] judge instructs the jury on the law which must guide and govern." During deliberations, "the jury is free to determine the procedures it will follow . . . as long as the judge's instructions are followed."

In some federal courts, the jury is greeted with an even more explicit statement of its duty to follow the law:

Ladies and gentlemen: You now are the jury in this case and I want to take a few minutes to tell you something about your duties as jurors. . . . It will be your duty to decide from the evidence what the facts are. You, and you alone, are the judges of the facts. You will hear the evidence, decide what the facts are, and then apply those facts to the law which I will give to you. That is how you will reach your verdict. *In doing so you must follow that law whether you agree with it or not* [emphasis added].

These instructions illustrate the strict division of labor between judges deciding questions of law and juries deciding questions of fact. But, for all its familiarity, the idea that jurors must have nothing to do with the law marked a fundamental shift, a deep decline, in the democratic functions the jury once exercised in England and America. Well into the nineteenth

century, criminal juries frequently (civil juries occasionally) were instructed that the judge's statement of the law was not binding on them, that they could determine for themselves what the law was. Juries in England used this authority to become the first to extend legal protection to Quakers assembling in peaceable worship. Juries in American colonies found that newsmen had a lawful right to print "truthful" criticisms of government long before legislatures recognized truth as a defense in seditious libel cases. As late as the Civil War, defendants charged with violating the Fugitive Slave Act appealed to juries to judge the law invalid. Well-known examples such as these illustrate the substantial conditions that juries, equipped with the authority to decide questions of law, once maintained in upholding civil liberties.

The fact/law distinction, so emphasized in judges' instructions to juries today, is, however, a fiction that domesticates the behavior of jurors. Even critics of jury nullification concede that criminal juries have no raw power to pardon law-breakers because there is no device for removing a jury that insists on acquitting a defendant against the law. Opponents of jury nullification therefore focus on a technical distinction between conceded power to nullify and a denied right to nullify. They insist on this distinction because it has a major practical implication: judges should not instruct juries about nullification because it is not a power that jurors have any lawful right to exercise.

Much of the debate over jury nullification is about this formal distinction: whether to instruct or not. Detractors of jury nullification argue in favor of

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open instruction; anything less mis-
leads the jury about the full extent of
its powers and may produce convic-
tions a jury knowing about nullifica-
tion would have rejected as unjust.
Jurors who grudgingly convict because
they mistakenly believe that they have
no choice may feel deceived if they
learn after trial that they had the
power to acquit.

Critics retort that nullification
instructions conflict with instructions
that jurors that they are duty-bound to
apply the law whether they accept it
or not. Officially informing jurors
that they have the power to nullify
would confuse them; it would also
threaten the impartiality of justice
in the anarchy of conscience, as
jurors pick and choose against whom
to enforce the law. Open instruction
might even encourage jurors to nul-
lify by portraying nullification as a
right rather than a power. The present
management of keeping mum about
nullification may be hypocritical, but
ensures that jurors will nullify only
in extreme cases of conflict between
law and conscience.

The debate over nullification
instructions is important, but it some-
times obscures the overriding fact that
jurors continue to nullify, whether offi-
cially instructed about their options or
not. Ultimately, I think all sides must
accept that verdicts according to con-
science are so deeply entwined with
popular images of the jury that jurors
will follow their conscience rather than the
law in a good many cases, and the
invisible cases at that. . . .

Jury nullification lives on, even
officially banished from the
sacred list of jury rights. But its life is
prolonged because jurors are discouraged

from openly deliberating about the
justice of enforcing the law and are in-
stead forced frequently into struggle
gluing their views on the justice of the
case into "approved debate" about the evi-
dence or facts. But, if jurors ever
learned to nullify on the sly, would we not
be better to recognize in theory what
jurors do in practice? Would not the
quality of the debate about law versus
justice be better if jurors were told
that such debate was part of their
function, that we cherish trial by jury
precisely because we expect ordinary
citizens to repudiate laws, or instances
of law enforcement, that are repugnant
to their consciences? These are the
questions I wish to pursue, by revisiting
the history of jury nullification.

Nullification's Rise and Fall

Jury nullification grew out of a general
claim that jurors have the right to
decide all questions of law necessary to
reach a verdict. According to this broad
claim, jurors have the right to disregard
judicial instructions and arrive at their
own resolution of all contested matters
of law at trial.

Jurors' right to decide questions of
law gives them considerably greater
authority than jury nullification itself
requires. The right to nullify is narrow,
permitting jurors only the right not to
apply the law. The crucial significance of
this restriction is that juries can nullify
only to acquit, never to convict. By con-
trast, the right to decide questions of
law entitles jurors to apply their own
interpretation of the law to either the
detriment or the benefit of a defendant.

Logically speaking, it is possible
to defend jury nullification while
rejecting the notion that juries have

any general right to decide questions of law. After all, it is one thing for a judge to tell the jury what the applicable law is; it is quite another for the judge to require the jury to apply the law. But historically, jury nullification was debated as one example of the broader claim that jurors decided questions of law. The classic arguments came into English law in the middle of the seventeenth century, made by dissenting groups such as Levellers or Quakers on trial for treason, seditious libel, unlawful assembly, or disturbance of the peace. Defendants appealed to the jury to be "judges of the law," never quite specifying whether they were calling upon the jury to reject English law as unjust (to nullify it) or simply to find them innocent under existing laws (despite judicial instructions to the contrary). At any rate, the right of juries to decide questions of law became a rallying cry for political and religious minorities throughout the seventeenth century; in the colonies it turned local juries in times of crisis into centers of resistance to parliamentary law. . . .

In virtually every jurisdiction's handbook for jurors, the same mechanical description appears: find the facts, and reach a verdict by applying whatever the judge says about the law to those facts.

But the search for a strict division of labor between jury and judge creates a number of practical problems for trials today. First, . . . the division of labor does not hold up well in practice. The more we emphasize the remoteness of law from the experience of the average juror, the less credible it is that jurors receive sudden enlightenment on legal matters

simply by listening to the judge's furious, quick-paced, jargon-laced set instructions.

For instance, if I do not understand what differentiates murder from manslaughter in Massachusetts, I am unlikely to suddenly understand because a judge instructs that murder requires malice and that malice does not require any ill-will toward the victim but includes a deliberate purpose to injure without legal excuse or passion. Nor were jurors in the Bernhard Goetz trial likely to understand from the judge's instructions whether Goetz acted lawfully in self-defense, if I *mistakenly* thought he was facing a deadly attack. In a Philadelphia race-tearing trial in 1993, several jurors said that they did not believe the defendant guilty but voted to convict because they mistakenly thought a hung jury was unacceptable.

Legal realist critics have pointed out since the beginning of the century that modern jury procedures mask a charade: we have judges go through the motions of instructing jurors on the law and tell them they must abide by the instructions, but we suspect that jurors do not fathom the instructions and fall back on their own gut reactions or common sense in deciding how the case should come out. To anyone who has ever witnessed a judge instructing a jury, it is clear that the system does not even pretend that the instructions are meaningful. Rarely are jurors even provided with written copies of the instructions; little attempt is made to translate jargon into common language. Most annoying of all, juror questions about the instructions are usually rebuffed with verbal rereadings of the same instructions.

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The second difficulty, as our predecessors appreciated, is that the world outside the courtroom does not neatly divide questions of fact from questions of law. When we ask jurors to decide, as a matter of fact, whether the defendant acted with malice, we are asking them to make a complicated assessment of the nature of the defendant's mental state—an inquiry very different from finding facts in the "who did what, when, and where sense."

To label the defendant's behavior malicious is partly to find the historical facts, but it is also to render a judgment about its blameworthiness. Jurors are constantly presented with these mixed questions that jump the official law/fact boundary. This is true in negligence cases, where juries decide the fact of whether a defendant's behavior fell below the behavior expected of a reasonable person. It is true in obscenity cases, where juries apply "contemporary community standards" to decide the fact of whether the work in question is pornographic. So here too, against official theory, we have to admit that juries do what we say they are not equipped to do: they decide what the law means in "negligence" or "obscenity" or even "murder."

The practical impossibility of abiding by the fact/law distinction casts a shadow of doubt on the earnest attempts of American law to stamp out the tradition of jury nullification. History teaches us that jurors escape from all kinds of legal shackles designed to restrain consciences acquittals in criminal trials.

And this is the way it ought to be. Many of the arguments that the Supreme Court laid down in *Sparf* regarding juries of any right to decide

legal questions, have no relevance to what jury nullification is about—the right to set aside the law only to acquit, never to convict. As a doctrine, jury nullification poses no threat to the accused; it is in fact the time-honored way of permitting juries to leaven the law with leniency.

To permit juries to show mercy by not enforcing the law in a given case is hardly to destroy the fabric of a society under law. Indeed, putting pressure on jurors to convict against their conscience would seem to threaten the integrity of the law far more seriously. Our current system, in which we tell jurors they must apply the law in every case no matter how unjust the results seem to them, opens the chasm between law and popular beliefs that the jury system exists to prevent.

This is not to deny that jury nullification sometimes goes badly . . . There is no denying, as the Supreme Court said in another context, that "the power to be lenient is the power to discriminate." It is for this reason that the Massachusetts affiliate of the American Civil Liberties Union (ACLU) took a firm stance against a bill, introduced in the state legislature in 1991, that would have amended the jury trial handbook to inform jurors that they could acquit "according to their conscience" if they felt "the law as charged by the judge is unjust or wrongly applied to the defendant(s)." The ACLU chapter believed that "jurors often manage to control their own strong prejudices because the judge tells them they must." Its fear was that jury nullification would be an open invitation for jurors to unleash their prejudices in the name of conscience.

The ACLU affiliate's stance against jury nullification is a succinct expression of the collapsed faith in the virtue of jurors that drives the declining role of jurors at trial. In that group's judgment, jury nullification encourages jurors not to rise above law to consult fundamental justice but to fall below law into brute bias. One is left to wonder whether the rejection of jury nullification is not a rejection of the idea of the jury altogether.

Suppose we were to inform jurors that nullification is an option. Is the Massachusetts chapter of the ACLU right to fear dire consequences—a sudden bursting of prejudice through legal dikes? In the two states that do instruct about nullification—Indiana and Maryland—judges have not detected any dramatic rise in the frequency of nullification. Alan Schefflin and Jon Van Dyke, the leading scholars of jury nullification, reported recently on an empirical study where the effect of jury nullification instructions on mock jurors depended on the issue involved. Juries given nullification instructions were not more likely to acquit a college student charged with driving drunk and killing a pedestrian; in fact, they were less likely to acquit than juries given standard instructions. On the other hand, receiving a nullification instruction did increase the number of mock juries that acquitted a nurse charged with the mercy killing of a terminally ill cancer patient. It is encouraging that nullification instructions left the mock jurors able to distinguish the merits of pardoning the nurse and not acquitting the drunk driver.

In 1983, a California murder trial demonstrated the dwarfing of deliberation that comes from denying juries the

right to nullify. A seventeen-year-old boy shot and killed a marijuana farmer during a botched attempt to steal crops from the farm. In accordance with the felony murder rule, the judge instructed the jury that a killing committed during armed robbery could be considered first-degree murder. After deliberating some time, the jury returned to ask the judge a question. The judge was compelled to find the defendant guilty of first-degree murder that the killing occurred during an armed robbery. At this point, only one forthright answer should have been appraised of the right to nullify.

Clearly, the jury was troubled by the issue of the consequences of the felony murder rule. The judge was searching for a way to convict the defendant of less than first-degree murder. In reacting to the felony murder rule, the jury was behaving strangely but rationally with sentiments that have been found in many other states to abate the use of the rule by 1983. But the judge, silent about nullification, repeated the instruction that murder is first-degree murder if the judge was not originally to volunteer information about nullification, surely he answered correctly when the jury brought its issue on its own. An endless deliberation was cut off, it appears to have been cut off when the jury returned a first-degree conviction.

Whether such a verdict represented the jury's considered judgment of the case, we will never know. That the California Supreme Court

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upheld the conviction but reduced the punishment to that for second-degree murder, finding the punishment of first-degree murder to be so "grossly disproportionate to the offense" in the case as to constitute cruel and unusual punishment. Thus, the Court ended up reaching exactly the judgment the jury was not permitted to make. . . .

Either openly displayed or hidden, nullification remains a timeless strategy for jurors seeking to bring law into line with their conscience.

This reconciliation is what the jury system is about, for better or worse. Official disapproval of jury nullification may drive it underground. . . . But, as long as we have juries, we will have nullification and verdicts according to conscience. Some of those verdicts will outrage us, others will inspire us. But always nullification will give us the full drama of democracy, as citizen-jurors assume on our behalf the task of deliberating about law in relation to justice. ■

Jurors Should Always Follow the Law

Mark Dwyer

or not in favor of letting juries nullify the meaning of the law. Obviously, it is simply a fact that they can do it when they want to. But I don't think that it is a good principle to instruct the jurors and remind them they can do that. There are some philosophical reasons and some practical reasons for my views. Let me share a few of those with you.

You and I elect the legislators that make our laws; you and I elect the judges and prosecutors to enforce our laws. When someone, even a juror, nullifies existing law, he is nullifying *our* laws, which we are free to change, if we choose them. But we are entitled to ask others to respect the laws as long as

they remain in force. We don't live in the days of John Peter Zenger, where a royal governor was enforcing the rule of the King of England. We live in a society where we may change the law if we think it unjust. If we think that those who abet suicide do not deserve to be punished then we can change the laws. If we think battered wives should be free to shoot their husbands, then we can say that is a defense under the law. If people believe that certain principles should be enacted into the law, then they can vote for representatives who will enact those principles into the law.

The question for us is whether any group of twelve people, chosen

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through an imperfect system of jury selection to judge a particular case, should be free to ignore our law and impose their own view of how society should be run. I think it is democratic to impose the law rather than their individual views. . . .

I don't think there is a need to encourage this minority of twelve to upset the rule of law. The practical consequences will be far more deleterious than advantageous. You can, of course, conjure up some difficult issues such as abetting suicide, but frankly I have not seen a suicide abettor prosecuted in New York State, certainly not in New York County, since I've been around. We don't have that many wives who kill their husbands either, whether battered or otherwise. Frankly, I think those who do it should be punished. But for every one of those cases, if you disagree with me, I can give other situations where you are likely to feel differently about the ability of juries to nullify what is our law.

Suppose, for example, someone in Suffolk County should burn down an abortion clinic. I take it under this proposal that those jurors in Suffolk County who consider the case would be asked to consider whether they believe abortion is murder, even though that is not the law of the land, and it is therefore justifiable to burn down abortion clinics. . . . I don't think that's a good idea.

If you look at Alabama in the 1960s and posit federal civil rights violations, you wouldn't want those jurors told that they may reflect community sentiments and override the law that would otherwise govern a criminal case. If it is necessary that a principle like the ability to kill one's spouse be recognized, then let's recognize it in legislation. Let's not

have juries randomly decide what are going to recognize it in a case.

The last thing I want to see is an individual trial where a jury instruction might be given that the proposed instruction is not to cover only those cases where the defendant has a philosophical disagreement with a statute. This is to be an instruction that any defendant can get. If you give a jury that they can feel sympathy for the defendant, which is exactly what we now tell jurors, the judge now charges the jury that sympathy has no place in their deliberations. They are only to consider the facts.

But how would this work in the trial in the jury room? I would ask: "Which laws do we agree with and which do we not agree with? Which laws do we impose the burden of proof in? Should we impose a different standard of proof? Do we agree that affirmative defense should be an affirmative defense or should it be so-called an affirmative government ought to disprove beyond a reasonable doubt? Which laws do we like and which do we dislike? Does one defendant like a nice guy for whom we have sympathy into our verdict, or do we have sympathy for the codefendant who did the same thing? Only after these considerations, the jury try to figure out whether or not one committed a crime. I think that is what jurors are supposed to do."

What are the implications of this instruction have for earlier instructions in the trial? I assume that an instruction that can determine a criminal case should be one that the parties can agree on. So the defendant could argue that the jury has sympathy and the prosecutors could argue that safe streets require a

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If we are going to determine matters this way, how are we going to get the facts before jurors so that they can make this type of judgment? If, for example, the defendant appears to be a first offender to the jurors, do we let them know, when on appeal for their sympathy is charged, that he actually has a long record? What does that have to do with the jury's fairly considering whether he committed a particular crime?

Judges considering motions and legislators determining what laws to

pass have access to a wide variety of information that doesn't belong before a jury in a criminal trial. This proposal would allow jurors to be informed of and judge irrelevancies, and this is not what jurors do best. The end result is that the rule of law would be sacrificed to the whims of a few citizens. I think the results would wreak harm, since the rule of law protects minorities against the majority. Arbitrariness and injustice would be introduced into the criminal justice system. This is a bad idea. . . .

The Continuing Debate

What Is New

In San Francisco in early 2003, Ed Rosenthal was convicted in a federal court on federal charges of marijuana cultivation and conspiracy to grow and distribute marijuana. Jurors did not know that Rosenthal was growing marijuana for the relief of patients suffering from cancer, cerebral palsy, and other severe illnesses, and that his activities (though in violation of federal law) were legal under California's Compassionate Use Statute (which California voters had passed as Proposition 215), and that Rosenthal had been deputized by the City of Oakland to provide medical marijuana for patients unable to grow their own. Jurors were told by the judge that they must follow the law, and under the provisions of the federal Controlled Substances Act, Rosenthal was clearly guilty. After they heard more details of the case (that had been kept from them during the trial), some of the jurors—who had returned a unanimous verdict of guilty—called a press conference to denounce the verdict. The foreman of the jury, Charles Sackett, concluded that the jury reached the wrong verdict, and said he believes that if the jurors had known about jury nullification the verdict would have been not guilty.

In 2003, a bill was introduced in the New Hampshire Legislature that would require judges to instruct juries that jurors have a right to find a defendant not guilty even when there is sufficient evidence to establish that the defendant is guilty under the law. The bill passed the New Hampshire House by vote of 249–149, but failed in the Senate.

Where to Find More

J. and Hansen v. U.S., 156 U.S. 51, October Term, 1894, is the U.S. Supreme Court case in which the Court ruled that judges need not tell jurors of their power to nullify law by judging both fact and law. Justices Gray and Shiras wrote the dissent. (This case can be found at www.Oyez.org.)

Alan W. Schefflin, "Jury Nullification: The Right to Say No," *So. California Law Review*, Volume 45 (1972): 168–226, is an excellent source for the legal history of jury nullification; see also Alan Schefflin and Jon Van Dyke, "Jury Nullification: Contours of the Controversy," *Law and Contemporary Problems*, Volume 43, Number 4 (Autumn 1980): 51–115; Irwin A. Horowitz and Thomas Willging, "Changing Views of Jury Power: The Nullification Debate, 1787–1988," in *Law and Human Behavior*, Volume 15, Number 1 (1991): 1–15; Paula Di Perna, *Juries on Trial: Faces of American Justice* (New York: Dembner Books, 1984); and William L. Dwyer, *In the Hands of the People: Trial Jury's Origins, Triumphs, Troubles and Future in American Democracy* (New York: St. Martin's Press, 2002), Chapter 5. David A. Pepper, "Nullification: Modern-Day Misuse of the Right to Decide the Law," *Case Western Reserve Law Review*, Volume 50, Number 3 (Spring 2000): 599–644, argues that advocates of jury nullification have misinterpreted the history of jury nullification in the United States.

Richard St. John argues against jury nullification in "License to Nullify: Democratic and Constitutional Deficiencies of Authorized Jury Lawlessness," *Yale Law Journal*, Volume 106 (June 1997): 2563–2597. Other opponents of jury nullification are Erick J. Haynie, "Populism, Free Speech, and the Rule of Law: The 'Fully Informed' Jury Movement and Its Implications," *The Journal of Criminal Law & Criminology*, Volume 88, Number 1 (1998); and Gary J. Simons, "Jury Nullification in the American System: A Skeptical View," *Texas Law Review*, Volume 54 (1976).

Among supporters of jury nullification are Jack B. Weinstein, "Consent to Jury Nullification: When May and Should a Jury Reject the Law to do Justice?" *American Criminal Law Review*, Volume 30, Number 2 (1993): 239–254; Alan W. Schefflin and Jon M. Van Dyke, "Merciful Juries: The Resilience of Jury Nullification," *Washington & Lee Law Review*, Volume 48 (1991); and Conrad, *Jury Nullification: The Evolution of a Doctrine* (Durham, NC: Carolina Academic Press, 1998).

Arie M. Rubenstein, "Verdicts of Conscience: Nullification and the Jury Trial," *Columbia Law Review*, Volume 106 (2006): 959–993, proposes an interesting compromise solution to the controversy over jury nullification. J. King, "Silencing Nullification Advocacy Inside the Jury Room and Outside the Courtroom," *University of Chicago Law Review*, Volume 65: 433–501, provides an excellent study of the current law as well as current controversies related to jury nullification.

Jury Ethics: Juror Conduct and Jury Dynamics, edited by John Klein and James P. Levine (Boulder, CO: Paradigm Publishers, 2006), contains excellent papers on jury nullification; see especially Chapter 3, which contains Neil Finkel, "Jurors' Duties, Obligations, and Rights: The Ethical/Moral Balance of Discretion," with a response by Adina Schwartz; Chapter 4, "The Constitutional and Ethical Implications of 'Must-Find-the-Defendant-Guilty' Jury Instructions," by B. Michael Dann, and the response by Shari Seidman Diamond; and