

## Issue 8

# Should Jurors Engage in Jury Nullification?

- *Jurors in a dry county find the local bootlegger not guilty.*
- *A prosecutor refuses to file charges because jurors will not convict in possession-of-marijuana cases.*
- *The subway vigilante Bernhard Goetz is acquitted of serious charges in the shooting of four black youths.*
- *In a verdict many find stunning, O. J. Simpson is acquitted of murdering his wife.*
- *Four Los Angles police officers are acquitted of the charges in the beating of Rodney King.*
- *Dr. Jack Kevorkian is acquitted of violating Michigan's assisted suicide law.*

These cases are often cited as examples of jury nullification. Raising the question “Was justice served in these cases?” highlights the difficulty of talking about this topic. Individually, each of these cases provokes disagreement over the correctness of the result. Collectively, these cases reveal competing definitions of the meaning of justice.

Jury nullification refers to the idea that juries have the right to refuse to apply the law in criminal cases despite facts that leave no reasonable doubt that the law was violated. In the United States, a trial involves a fundamental division of labor between judge and jury; the judge is the sole determiner of the law and jurors are the sole judge of the facts of the case. Under this formulation jurors are free to acquit if they find the evidence presented by the prosecution to be weak or unbelievable. They are not, however, allowed to vote not guilty because they do not like the law in question.

Jury research conclusively shows that juries introduce popular standards of justice into trials (Neubauer, 1999). By introducing community standards, lay jurors shape the law in ways that professionals sometimes find disagreeable. Thus, for centuries some American legal thinkers have denounced juries as enemies of an ordered legal system. More recently, though, others have championed the cause of jury nullification from a variety of perspectives, ranging from protesters (who point to injustices in specific cases) to anarchists (who have no use for modern-day government). Alas, even with a scorecard, it is hard to tell who the players are.

In outline form, the debate over jury nullification proceeds roughly along the following lines.

Pro	Con
Jury nullification restrains a lawless government.	Jury nullification undermines the rule of law.
The right to trial by jury creates the right to jury nullification.	Jurors have no constitutional right to vote their conscience.
Jurors should be told that they have a right to disregard the judge's instructions on the law.	Telling jurors that they have a "right" to disregard the judge will only produce untold mischief.
Jury nullification is freedom's shield.	Jury nullification is the anarchist's sword.

The article “Black Jurors: Right to Acquit?” argues that the huge numbers of black men in jail for drug crimes is the product of a white justice system. The author, Paul Butler (George Washington Law School) concludes that African-American jurors often have the moral justification to acquit guilty black defendants when the crime is victimless or nonviolent.

The article “Jury Nullification: A Perversion of Justice?” argues that jury nullification is rare. Nonetheless the author, Andrew Leipold, concludes that this is a dangerous power in the hands of unaccountable people.

### World Wide Web Exercises

Locate two or more Web sites that discuss jury nullification. Analyze these pages using the following questions: What types of cases are featured? How easy or difficult is it to find out information about the group? Do the arguments fall along classic ideological divisions summarized in the due process versus crime control model? Do these groups reflect a fully-fledged social movement, or do they appear to represent just a few isolated people?

Select a trial that received national attention and resulted in the jury voting for acquittal. Locate two or more articles that represent different views of the correctness of the verdict. Is the verdict best understood as the result of the actions of reasonable jurors, polarized ideological positions, or jury nullification?



### InfoTrac College Edition Exercises

Using the search term **jury nullification** select two or more articles that present differing views on the topic of jury nullification. Are the arguments similar to, or different from, those provided in the two readings?

Using the search term **jury** or **verdict** select two or more academic articles that analyze jury decision-making. Do the results of these studies tend to support one side or the other in the debate? Overall, does research suggest that jury nullification is a major issue, or do a few isolated cases tend to blow it out of proportion?

## *Black Jurors: Right to Acquit? (Jury Nullification)*

**Paul Butler**

In 1990 I was a Special Assistant United States Attorney in the District of Columbia. I prosecuted people accused of misdemeanor crimes, mainly the drug and gun cases that overwhelm the local courts of most American cities. As a federal prosecutor, I represented the United States of America and used that power to put people, mainly African-American men, in prison. I am also an African-American man. . . . During that time, I made two discoveries that profoundly changed the way I viewed my work as a prosecutor and my responsibilities as a black person.

There is an increasing perception that some African-American jurors vote to acquit black defendants for racial reasons, sometimes explained as the juror's desire not to send another black man to jail. There is considerable disagreement over whether it is appropriate for a black juror to do so. I now believe that, for pragmatic and political reasons, the black community is better off when some nonviolent lawbreakers remain in the community rather than go to prison. The decision as to what kind of conduct by African Americans ought to be punished is better made by African Americans, based on their understanding of the costs and benefits to their community, than by the traditional criminal justice process, which is controlled by white lawmakers and white law enforcers. . . .

Why would a black juror vote to let a guilty person go free? Assuming the juror is a rational, self-interested actor, she must believe that she is better off with the defendant out of prison than in

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prison. But how could any rational person believe that about a criminal?

Imagine a country in which a third of the young male citizens are under the supervision of the criminal justice system—either awaiting trial, in prison, or on probation or parole. Imagine a country in which two-thirds of the men can anticipate being arrested before they reach age thirty. Imagine a country in which there are more young men in prison than in college.

The country imagined above is a police state. When we think of a police state, we think of a society whose fundamental problem lies not with the citizens of the state but rather with the form of government, and with the powerful elites in whose interest the state exists. Similarly, racial critics of American criminal justice locate the problem not with the black prisoners but with the state and its actors and beneficiaries.

The black community also bears very real costs by having so many African Americans, particularly males, incarcerated or otherwise involved in the criminal justice system. These costs are both social and economic, and they include the large percentage of black children who live in female-headed, single-parent households; a perceived dearth of men "eligible" for marriage; the lack of male role models for black children, especially boys; the absence of wealth in the black community; and the large unemployment rate among black men.

According to a recent *USA Today/CNN/Gallup* poll, 66 percent of blacks believe that the criminal justice system is racist and only 32 percent believe it is not racist. . . . African-American jurors who

endorse these critiques are in a unique position to act on their beliefs when they sit in judgment of a black defendant. As jurors, they have the power to convict the accused person or to set him free. May the responsible exercise of that power include voting to free a black defendant who the juror believes is guilty? The answer is "yes" based on the legal doctrine known as jury nullification.

Jury nullification occurs when a jury acquits a defendant who it believes is guilty of the crime with which he is charged. In finding the defendant not guilty, the jury ignores the facts of the case and/or the judge's instructions regarding the law. Instead, the jury votes its conscience.

The prerogative of juries to nullify has been part of English and American law for centuries. There are well-known cases from the Revolutionary War era when American patriots were charged with political crimes by the British crown and acquitted by American juries. Black slaves who escaped to the North and were prosecuted for violation of the Fugitive Slave Law were freed by Northern juries with abolitionist sentiments. Some Southern juries refused to punish white violence against African Americans, especially black men accused of crimes against white women.

The Supreme Court has officially disapproved of jury nullification but has conceded that it has no power to prohibit jurors from engaging in it. . . . The criticism suggests that when twelve members of a jury vote their conscience instead of the law, they corrupt the rule of law and undermine the democratic principles that made the law.

There is no question that jury nullification is subversive of the rule of law. Nonetheless, most legal historians agree that it was morally appropriate in the cases of the white American revolutionaries and the runaway slaves. The issue, then, is whether African Americans today have the moral right to engage in this same subversion.

Most moral justifications of the obligation to obey the law are based on theories of "fair play." Citizens benefit from the rule of law; that is why it is just that they are burdened with the requirement to follow it. Yet most blacks are aware of countless historical examples in which African Americans were not afforded the benefit of the rule of law: think, for example, of the existence of

slavery in a republic purportedly dedicated to the proposition that all men are created equal, or the law's support of state-sponsored segregation even after the Fourteenth Amendment guaranteed blacks equal protection. That the rule of law ultimately corrected some of the large holes in the American fabric is evidence more of its malleability than its goodness; the rule of law previously had justified the holes.

If the rule of law is a myth, or at least not valid for African Americans, the argument that jury nullification undermines it loses force. The black juror is simply another actor in the system, using her power to fashion a particular outcome. The juror's act of nullification—like the act of the citizen who dials 911 to report Ricky but not Bob, or the police officer who arrests Lisa but not Mary, or the prosecutor who charges Kwame but not Brad . . . —exposes the indeterminacy of law but does not in itself create it.

A similar argument can be made regarding the criticism that jury nullification is anti-democratic. This is precisely why many African Americans endorse it; it is perhaps the only legal power black people have to escape the tyranny of the majority. Black people have had to beg white decision-makers for most of the rights they have: the right not to be slaves, the right to vote, the right to attend an integrated school. Now black people are begging white people to preserve programs that help black children to eat and black businesses to survive. Jury nullification affords African Americans the power to determine justice for themselves, in individual cases, regardless of whether white people agree or even understand. At this point, African Americans should ask themselves whether the operation of the criminal law system in the United States advances the interests of black people. If it does not, the doctrine of jury nullification affords African-American jurors the opportunity to exercise the authority of the law over some African-American criminal defendants. In essence, black people can "opt out" of American criminal law.

How far should they go—completely to anarchy, or is there someplace between here and there that is safer than both? I propose the following:

African-American jurors should . . . exercise their power in the best interests of the black

community. In every case, the juror should be guided by her view of what is "just." (I have more faith, I should add, in the average black juror's idea of justice than I do in the idea that is embodied in the "rule of law.") In cases involving violent *malum in se* (inherently bad) crimes, such as murder, rape, and assault, jurors should consider the case strictly on the evidence presented, and if they believe the accused person is guilty, they should so vote. In cases involving non-violent, *malum prohibitum* (legally proscribed) offenses, including "victimless" crimes such as narcotics possession, there should be a presumption in favor of nullification. Finally, for nonviolent, *malum in se* crimes, such as theft or perjury, there need be no presumption in favor of nullification, but it ought to be an option the juror considers. A juror might vote for acquittal, for example, when a poor woman steals from Tiffany's but not when the same woman steals from her next-door neighbor.

How would a juror decide individual cases under my proposal? Easy cases would include a defendant who has possessed crack cocaine and an abusive husband who kills his wife. The former should be acquitted and the latter should go to prison.

Difficult scenarios would include the drug dealer who operates in the ghetto and the thief who burglarizes the home of a rich white family. Under my proposal, nullification is presumed in

the first case because drug distribution is a nonviolent *malum prohibitum* offense. Is nullification morally justifiable here? It depends. There is no question that encouraging people to engage in self-destructive behavior is evil; the question the juror should ask herself is whether the remedy is less evil. (The juror should also remember that the criminal law does not punish those ghetto drug dealers who cause the most injury: liquor store owners.)

As for the burglar who steals from the rich white family, the case is troubling, first of all, because the conduct is so clearly "wrong." Since it is a non-violent *malum in se* crime, there is no presumption in favor of nullification, but it is an option for consideration. Here again, the facts of the case are relevant. For example, if the offense was committed to support a drug habit, I think there is a moral case to be made for nullification, at least until such time as access to drug-rehabilitation services is available to all....

I concede that the justice my proposal achieves is rough. It is as susceptible to human foibles as the jury system. But I am sufficiently optimistic that my proposal will be only an intermediate plan, a stopping point between the status quo and real justice. To get to that better, middle ground, I hope that this essay will encourage African Americans to use responsibly the power they already have.

# Jury Nullification: A Perversion of Justice?

Andrew D. Leipold

There has been a lot of discussion about jury nullification lately. When juries acquitted O.J. Simpson (in his criminal trial) and the Los Angeles police officers who beat Rodney King, there were loud and sharp claims in newspapers and coffee shops that these verdicts were based on racial prejudice, class bias, an irrational desire to punish the police, or naivete about police practices, not on the evidence presented. . . .

Paul Butler of George Washington University Law School, has helped fuel the debate. . . . These events and discussions have led some people to the brink of despair about juries: "It seems like guilt or innocence doesn't matter anymore," they think. "Today, trials are about politics and about power; the only thing that matters is who is on the jury."

It would be easy to draw this conclusion from watching the nightly news—easy, but wrong. The truth is that juries rarely acquit against the evidence, at least in serious cases. Most jurors are quite sensible and recognize that, if they acquit a factually guilty defendant, they may be turning a dangerous person loose, perhaps into their own neighborhoods. Juries may be merciful, but they are not stupid. More to the point, most garden-variety street crimes don't raise any issues that might lead a jury to nullify. Most crime is intraracial, so any ethnic kinship a jury might feel for the defendant is blunted by the greater sympathy for the victim. Most crimes also have no political overtones or present obvious examples of police misconduct or prosecutorial overreaching. Perhaps most im-

portantly, the majority of criminal cases never go before a jury. Most criminal charges end in a guilty plea prior to trial, often as a result of an agreement between the prosecutor and defendant. While it is true that prosecutors sometimes offer an attractive plea bargain because they are worried about what a jury will do (what lawyers euphemistically refer to as the "risks of litigation"), instances of nullification are rare enough that most plea agreements probably don't change much.

While the instances of jury nullification are small, the problems created by the existence of the nullification doctrine are very large. . . .

I think that the main reason we bar prosecutors from making an appeal from an acquittal is to protect the jury's power to nullify. We are so anxious to preserve the jury's discretion to nullify in the occasional case that we put up with other, probably more numerous, acquittals that are the product of bad legal rulings at trial. This, I would argue, is the real cost of jury nullification—not the convictions that are lost when the jury deliberately acquits against the evidence, but those lost when the jury wants to convict, but erroneously is prevented by the trial court from doing so.

## The Right that Isn't

The notion that juries can acquit a defendant for any reason at all is older than our nation. By the late 17th century, English judges had decided that jurors must be left to their own devices and consciences when rendering verdicts, and the idea traveled with the colonists to America. The concept of a supremely powerful jury found a welcome home

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Source: *USA Today* (Magazine), September, 1997 v126.  
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here. It gave the colonists the power to convict those who misbehaved, while still nullifying the charges against those who broke what many colonists felt were oppressive laws. At the time, the jury's right to "find the law"—to decide for itself what the criminal law should be—was quite logical. Judges often were untrained in the law, making them no better than jurors at interpreting and applying the often-complex common law. As a result, there was a great deal of writing in the decades around the Revolutionary War that seemed to support a "right" of the jury to acquit someone against the evidence.

Yet, if the framers of the Constitution and the Bill of Rights thought that nullification was an important part of the right to trial by jury, they were awfully quiet about it. There is very little in the debates surrounding the drafting or ratification to suggest that they even thought about the issue, much less intended to incorporate it in the Constitution. While the Supreme Court, in construing the constitutional right to a jury, has been curiously closed-mouthed about the topic, the one time the Court spoke clearly, it decisively stated that a jury's power to nullify does not mean that a defendant has the right to be tried before a jury with that power. In the 1895 decision of *Sparf and Hansen v. United States*, the Court laid the groundwork for the rule that still prevails in most of the country—judges are not required to tell juries that they have the power to acquit against the evidence nor are they required to let lawyers argue to the jury in favor of nullification. The message is clear—even if courts can't stop juries from nullifying, they are under no legal obligation to help juries exercise the power.

Just because something is not protected constitutionally does not make it a bad idea. In many cases, I think that jury nullification is an excellent concept. If I were on the jury of the man accused of helping his wife commit suicide and I believed he did it out of love for the victim, I would vote to acquit in a heartbeat. Prosecutors are not infallible. At times, they make bad judgments; occasionally, they are mean-spirited; and sometimes, they get so used to the unending stream of bad people and violent acts they miss the human and moral

dimension of actions that normally are crimes. So, even if I had the power to prevent all juries from acquitting against the evidence, I probably would not use it.

Nevertheless, jury nullification is a dangerous power, and when any power is left in the hands of an unaccountable group, there is cause for worry. . . . First, we don't know how the power is used. Because juries almost never explain their verdicts, it is impossible to say how often nullification occurs. Our inability to determine when and why it does also means that we do not know how often juries use this power for good ends rather than evil ones. For every case where a jury acts morally and shows mercy, there may be another where a jury acquits because of hatred toward the victim or favoritism to the defendant. It takes strong faith in human nature to support a doctrine like jury nullification, knowing that the decision to set someone free can be made on a whim or based on prejudice.

In most cases, of course, a decision to nullify will be neither good nor evil; the morality and wisdom of the decision will depend on our individual views. Some will cheer when an abortion clinic protester is acquitted against the evidence, others will despair; some will think justice is done when a man who assaulted a homosexual couple is convicted only of the lowest possible charge (another form of nullification), others will see it as a hateful sign of the times; and many will be shocked when an accused rapist or wife beater is set free because the jury believed that the victim was asking for it. What we think doesn't matter, though. If we want juries with the unreviewable power to acquit when the charges are unfair, we must accept juries that have the power to make decisions others find distasteful and stupid.

Second, juries often don't have enough evidence to make a reasoned nullification decision. Even if we take a kinder view toward juries, there still are reasons to be troubled by the breadth of their discretion. If a jury is to make a reasoned nullification decision, there is certain information it needs to have. Let's say a jury has before it a simple drug possession case by a college-bound high school senior. The evidence looks strong, but

the thought of ruining a promising future troubles the jurors. The young man had only a small amount of drugs, looks remorseful, and has a supportive family with him in court. Rather than send another teenager to jail, the jury decides to nullify.

If the jury's perception were accurate, perhaps it made the right call. The problem is what a jury sees might not be the full story. The jurors might not learn that the defendant has had scrapes with the law before, that he is a troublemaker at home and at school, and that, in fact, the police found a load of drugs in the car, which were not introduced at trial because the car was searched illegally. If the jury had known these things, its feelings of mercy quickly might have evaporated. However, there usually will be no evidence introduced of these other facts because they are irrelevant to the technical question of guilt or innocence. Stated differently, because the jury has no right to nullify, evidence that might inform the exercise of that power usually is not admitted at trial, nor are defense lawyers usually permitted to make overt appeals to the nullification power. Juries therefore make the nullification decision in the dark, letting some go free who are not worthy of mercy and convicting some who might be more deserving of it.

Third, encouraging nullification encourages lawlessness. The urge to nullify may tug at our hearts because it is so easy to imagine cases where we would do so ourselves if we were jurors. Consider a woman who is walking alone when she is surrounded by a gang of thugs. The terrified woman brandishes a gun and the gangsters flee, but as they do, she shoots one, causing great bodily harm. In many states, the woman could be prosecuted for assault with a deadly weapon be-

cause once the thugs turned and ran, she no longer had the right to use deadly force in self-defense. Yet, many of us would not be troubled with such legal niceties and would cheerfully acquit if given the chance.

In more reflective moments, though, we should wonder why we let a jury make this decision. We have an elected legislature to pass laws and elected or appointed judges to interpret them. The wisdom of the people's representatives has been that when a person no longer is in danger, he or she may not use force in self-defense. That decision may be right or wrong, but it was arrived at through a legitimate, representative process. Why, then, should the jury be able to ignore that mandate because they sympathize with the woman and detest thugs? The jury is unelected, unaccountable, and has no obligation to think through the effect an acquittal will have on others. Perhaps it will be that thugs will accost fewer women; perhaps the effect will be to blur the line further between legitimate self-defense and vigilantism.

Reasonable people can disagree on the proper reach of the criminal laws. Nevertheless, the place for them to disagree is in public, where the reasons for expansions and contractions of the laws can be scrutinized and debated by those who will be affected by the verdicts juries reach. It is enough that we ask juries to decide whether the defendant before them is guilty of the crime charged. To expect them to make a reasoned decision on the wisdom of the law itself, with virtually none of the information that normally would be required in making such a decision, calls for more wisdom from most juries than fairly can be expected. . . .