CLIMATE DEFENSE PROJECT

Jury Nullification: What It Is (And Isn't)

An Overview for Activists and Attorneys

February 2024

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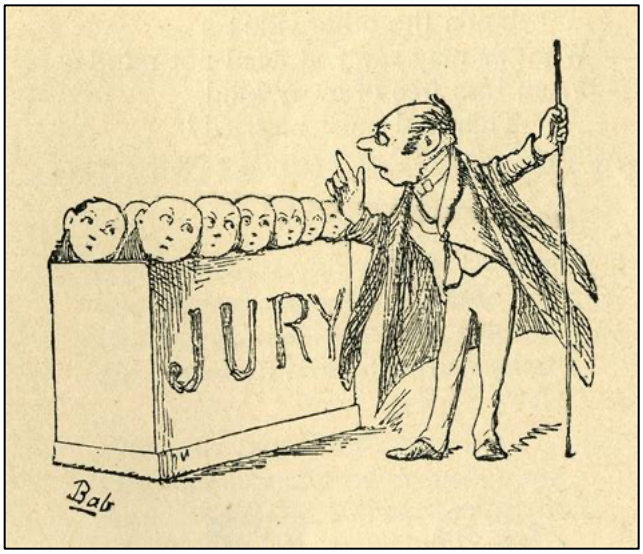

W. S. Gilbert's illustration for "Now, Jurymen, hear my advice" from Gilbert and Sullivan's Trial by Jury (Wikimedia Commons)

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I. What Jury Nullification Is (and Isn't)

Jury nullification "is a tool that allows jurors to find a defendant not guilty of breaking [a] law because they disagree with the law itself."[2] As its name suggests, jury nullification is an extra-legal remedy enabling juries to nullify laws they view as unjust, albeit temporarily. Historically, movements for liberation have used jury nullification to reclaim power over their legal systems. However, courts have confined this power over the years. The current status of jury nullification is something of a paradox, with courts having "an abiding respect for the *power* of the jury to nullify oppressive law, even if there is no express *right* on the part of the jury to do so."[3] In other words, "it is the jury's prerogative to disregard the law without actually committing an unlawful offense in doing so, and its exercise is literally illegitimate (contrary to law) but practically legitimate (allowed by law)."[4] While jury nullification and efforts to raise general public awareness of it are protected, it is not a legal defense that can be argued by defense teams in court.

There are two scenarios in which jury nullification can occur. The first scenario is complete nullification, in which the jury unanimously refuses to convict the defendant regardless of the evidence. The second scenario is when at least one juror refuses to convict, but not all jurors agree. This results in a hung jury—i.e., a situation where jurors are not able to reach a consensus even after long deliberation and, thus, the judge declares a mistrial (even though jury verdicts are supposed to be unanimous).[5] In this second scenario, the prosecutor decides whether to dismiss or retry the case.

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[2] Jordan Paul, How Courts Robbed Juries of a Powerful Tool for Doing Justice, Balls and Strikes (Oct. 7, 2021), https://ballsandstrikes.org/legal-culture/how-courts-robbed-juries-of-a-powerful-tool-for-doing-justice/.
[3] State v. Morgan Stanley & Co., Inc., 194 W.Va. 163, 459 S.E.2d 906 (1995) at 7.
[4] State v. Hooks, 752 N.W.2d 79 (Minn. Ct. App. 2008) at 86.
[5] *See, e.g.*, Naomi Gilens, It's Perfectly Constitutional to Talk About Jury Nullification, ACLU (Jan. 22, 2019), https://www.aclu.org/news/free-speech/its-perfectly-constitutional-talk-about-jury-nullification (discussing situations in which jury members "veto bad laws and hang the jury").

While jury nullification is sometimes confused with hung juries, they are not the same thing; juries can hang for reasons other than nullification.

Jury nullification is also distinct from the necessity defense. The necessity defense is an ancient legal defense that is sometimes called the choice of evils defense. Used in political cases since at least the 1960s, the necessity defense argues that a defendant was justified in breaking a law to avert a greater harm. While the necessity defense can "promote jury nullification by providing the jury with a handy framework to negate duly enacted laws,"[6] it is a recognized legal defense that may be argued in court and incorporated into a jury instruction, unlike jury nullification. The necessity defense may be used only when certain criteria are met—generally, a clear and imminent danger, a reasonable expectation that the unlawful means chosen by the defendant would avert the harm and were less harmful, and the absence of reasonable lawful alternatives. For more information on the political necessity defense and its legal requirements, *see* Climate Defense Project, Climate Necessity Defense Case Guide.

II. A Very Brief History of Jury Nullification

Although courts have subsequently restricted how jury nullification can be used and discussed (see Section IV), it has a long history. In perhaps the most famous case of jury nullification in what is now the United States, Peter Zenger was acquitted of libel against the royal governor of New York in 1735 after just ten minutes of jury deliberation.[7] Though telling the truth was not a legal defense to libel at the time, the jury was compelled by Zenger's argument and nullified the law, paving the way for our

[6] John Alan Cohan, Civil Disobedience and the Necessity Defense, 6 Pierce L. Rev. 111 (2007) at 122, available at http://scholars.unh.edu/unh_lr/vol6/iss1/6.
[7] Anthony McCann, Shadowlands: Fear and Freedom at the Oregon Standoff, Bloomsbury Publishing (2019) at 234.

modern use of truth as a defense to libel.[8] The practice of jury nullification carried over as the United States formed its own legal system, with John Jay, the first Chief Justice of the Supreme Court, holding in the 1794 case Georgia v. Brailsford that the jury has the right to judge the law as well as the facts of the case.[9]

The political uses of jury nullification have waxed and waned over the course of American history; however, the colonial, abolitionist, post-bellum, and Vietnam War years represent four eras of prominent jury nullification use, wherein "juries were reluctant to convict political defendants."[10] Colonists' refusal to enforce English trade laws under the Navigation Acts led to the establishment of the vice-admiral system in 1696, leading to trials without juries.[11] These courts gained further jurisdiction in 1767, becoming one of the grievances cited in the Declaration of Independence.[12]

Functioning as a 'veto' of unjust prosecutions, jury nullification quickly became a tool of liberation movements. In response to the 1793 Fugitive Slave Act, which punished citizens who aided in the escape of enslaved people, juries in northern states began nullifying the federal law by refusing to convict formerly enslaved people or citizens who helped them relocate to states without slavery.[13] This practice of nullification became so widespread that it transcended the jury: states began passing laws prohibiting their employees from implementing the federal law, and the Supreme Court validated this practice in 1842, in a case called Prig v. Commonwealth of Pennsylvania.[14] However, following the passage of a new Fugitive Slave Law in 1850, a

[8] *Id.*
[9] 3 U.S. 1, 1 L. Ed. 483 (1794) at 3.
[10] Steven Barkan, Jury Nullification in Political Trials, SOCIAL PROBLEMS, Vol. 31, No. 1, (Oct. 1983) at 33, https://citeseerx.ist.psu.edu/viewdoc/download?doi=10.1.1.982.1702&rep=rep1&type=pdf.
[11] *Id.* at 32.
[12] *Id.*
[13] Radley Balko, Boston And Militarism: The Fugitive Slave Hearings, Huffington Post (May 1, 2013), https://www.huffpost.com/entry/boston-and-militarism-the_n_3193922.
[14] 41 U.S. 539, 10 L. Ed. 1060 (1842) at 17.

subsequent Supreme Court decision in 1858 relinquished the 1842 view of federalism enabling states to nullify federal laws.[15] Nonetheless, the Prig decision speaks to the extent to which jury nullification played a role in the abolition of slavery and, more broadly, influenced the U.S. legal system. During the post-bellum years, jury nullification continued to be used as a tool to "advance insurgent aims and hamper government efforts at social control."[16]

The close of jury nullification's heyday in the 18th and 19th centuries seems to have coincided with the pro-labor use of jury nullification in labor disputes.[17] By the end of the 19th century, courts began to clamp down on jury nullification: in Sparf v. U.S. (1895), the Supreme Court held that judges have no obligation to inform juries of their ability to judge both law and fact and forbade defense teams from doing so.[18] Efforts to limit knowledge and use of jury nullification were also backed by prominent members of the American Bar Association, who feared that juries were becoming "too hostile to their clients and too sympathetic to the poor."[19]

Courts' efforts to block social change by restricting jury nullification crested again during the Vietnam War. The war was widely divisive, leading civil disobedients to block trains carrying bombs and break into plants to damages missiles,[20] and leading lawyers to view nullification as a potentially fruitful strategy in cases with sympathetic or ambivalent juries.[21] Though judges cited fears of "lawlessness" when preventing juries from learning of nullification, calling the power "an attack upon law itself" and "a monstrosity," it has been speculated that these decisions may have been

[15] Ableman v. Booth, 62 U.S. 506, 16 L. Ed. 169 (1858) at 10.
[16] Barkan, *supra* at note 8, at 38.
[17] *Id.* at 33.
[18] Sparf v. United States, 156 U.S. 51, 15 S. Ct. 273, 39 L. Ed. 343 (1895).
[19] Barkan, *supra* note 8, at 33.
[20] *Id.* at 36.
[21] *Id.* at 33.

deliberate attempts to impede antiwar efforts.[22] However, "the question of the real motives of judges who opposed informing juries in antiwar cases of their power to nullify is moot, for the ideological, social-control function of their opposition was the same nonetheless."[23]

In 1974, in United States v. Wiley, the Eighth Circuit concluded that defendants are not entitled to inform juries of their power to nullify even in cases where a defendant breaks a law but is "not blameworthy in the sense that he has not shocked the community conscience."[24] Likewise, the Fourth Circuit held in 1996 that a judge "may block defense attorneys' attempts to serenade the jury with a siren song of nullification."[25] One quantitative study of the use of jury nullification in the 20th century found it to be used in approximately nine percent of criminal cases, with the jury exercising its "very real power" to nullify sparingly because "it is officially told it has none."[26]

III. The Power and Potential of Jury Nullification

Whether jury nullification is used to subvert or reinforce systems of oppression varies with public sympathies across time and space. Jury nullification is "a double-edged sword, and arguments to inform juries of their power can both advance and impede social change efforts."[27] For instance, the 20th century saw widespread use of

[22] *Id.* at 37.
[23] *Id.* at 38.
[24] 503 F.2d 106 (8th Cir. 1974) at 106-107. *See also* United States v. Moylan, 417 F.2d 1002, 1009 (4th Cir. 1969), cert. denied, 397 U.S. 910, 90 S.Ct. 908, 25 L.Ed.2d 91 (1970).
[25] United States v. Muse, 83 F.3d 672 (4th Cir. 1996) at 677, citing See United States v. Sepulveda, 15 F.3d 1161, 1190 (1st Cir.1993).
[26] Barkan, *supra* note 8, at 33, citing Harry Kalven Jr. and Hans Zeisel, The American Jury, University of Chicago (1966) at 498.
[27] *Id.* at 39.

jury nullification to protect political protestors of the Vietnam War.[28] However, jury nullification was also used by southern juries in the 1960s to acquit those who murdered and beat civil rights activists.[29] These decisions have sometimes been used to prop up arguments against the use of jury nullification. In United States v. Thomas, a case involving a group of all-Black defendants, prosecutors accused the only Black juror of attempting jury nullification, slyly invoking the "1955 acquittal of J.W. Millam and Roy Bryant for the murder of fourteen-year-old Emmett Till" as a "shameful [example] of how nullification has been used to sanction murder and lynching."[30] However, advocates of jury nullification differentiate these white supremacist verdicts from jury nullification, viewing them as examples of institutional jury rigging rather than nullification."[31] Public sympathies toward both the defendant and the law in question will determine whether enhanced awareness of jury nullification will promote or hinder social change efforts in any given context.

As a defense against the violence of a carceral and deeply unequal legal system, jury nullification can be (and is) used as a tool of the oppressed. One in three Black men and one in six Latino men is incarcerated in his lifetime, compared to one in seventeen white men.[32] In *The New Jim Crow: Mass Incarceration in the Age of Colorblindness*, Michelle Alexander explained how the fabrication of the "war on drugs" has functioned to incarcerate Black Americans.[33] Parallel to Alexander's analysis of "colorblindness" in the law as a tool of white supremacy, Kimberlé Williams Crenshaw

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[28] *Id.* at 30.
[29] *Id.* at 39.
[30] United States v. Thomas, 116 F.3d 606 (2d Cir. 1997) at 616.
[31] Anthony McCann, Shadowlands: Fear and Freedom at the Oregon Standoff, Bloomsbury Publishing (2019) at 237.
[32] Hinton, Henderson, and Reed, An Unjust Burden: The Disparate Treatment of Black Americans in the Criminal Justice System, Vera Institute of Justice (2018). https://www.issuelab.org/resources/30758/30758.pdf
[33] Michelle Alexander, The New Jim Crow: Mass Incarceration in the Age of Colorblindness (The New Press) 2010.

coined the term "perspectivelessness" in 1994 to describe "the illusion by which the dominant perspective is made to appear neutral, ordinary, and beyond question."[34] In Crenshaw's analysis, the legal system suppresses non-dominant perspectives "by positing an analytical stance that has no specific cultural, political, or class characteristics."[35] As Duncan Kennedy pointed out in his 1982 law review article Legal Education and the Reproduction of Hierarchy, this perspectivelessness covertly serves as "ideological training for willing service in the hierarchies of the corporate welfare state."[36] Mari Matsuda described how communities of color see through this facade in her 1987 law review article Looking to the Bottom: Critical Legal Studies and Reparations:[37]

> When you are on trial for conspiracy to overthrow the government for teaching the deconstruction of law, your lawyer will want black people on your jury. Why? Because black jurors are more likely to understand what your lawyer will argue: that people in power sometimes abuse law to achieve their own ends, and that the prosecution's claim to neutral application of legal principles is false.

As with any tool that transfers the control of justice to non-legal community members, jury nullification has potential to disrupt the legal system's infliction of violence on disempowered groups. If "the master's tools will never dismantle the master's house"—if using such tools "may allow us temporarily to beat him at his own game, but . . . never enable us to bring about genuine change,"[38] in the words of Audre Lorde—then, as an extra-legal remedy, jury nullification may make possible what the law cannot achieve on its own.

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[34] Kimberlé Williams Crenshaw, Toward a Race-Conscious Pedagogy in Legal Education, 4 S. Cal. Rev. L. & Women's Stud. 33, 35 (1994).
[35] *Id.*
[36] 32 J. Legal Educ. 591 (1982) at 591.
[37] 22 Harv. C.R.-C.L. L. Rev. 323 (1987) at 323.
[38] Lorde, Audre. "The Master's Tools Will Never Dismantle the Master's House." 1984. Sister Outsider: Essays and Speeches. Ed. Berkeley, CA: Crossing Press. 111. 2007. Print.

Ultimately, says Matsuda, the "imagination of the academic philosopher cannot recreate the experience of life on the bottom."[39] As such, we must "look to the bottom," studying and learning directly from the voices of the least advantaged rather than speculating about "hypothetical world[s]."[40] Lorde posits that the only tools to dismantle the master's house are held by "those of us who have been forged in the crucibles of difference—those of us who are poor, who are lesbians, who are Black, who are older—[who] know that survival is not an academic skill."[41] Jury nullification furthers this goal by providing those who are disproportionately targeted under our carceral systems the opportunity to apply their own conceptions of justice and block oppressive applications of the law.

IV. How Jury Nullification Can Be Used Today

As mentioned above, a decision by some but not all members of the jury to nullify can result in a mistrial.[42] Since the prosecutor can decide to retry the case following a mistrial, jury nullification does not guarantee acquittal. However, many cases are not re-tried, and, as also discussed above, jury nullification can further important political goals in certain cases, particularly for disadvantaged communities. How can advocates make use of jury nullification, then? The answer is that advocates must limit themselves to promoting general public awareness of jury nullification rather than bringing it to the attention of prospective jurors in particular cases.

[39] *Id.*
[40] *Id.*
[41] Lorde, *supra* at note 36, at 111.
[42] *See supra* at 2.

Despite jurors' inherent and longstanding power to nullify, defense teams are restricted from discussing jury nullification in particular cases.[43] Efforts to raise awareness of jury nullification must take place outside of the courtroom. In 2019, a Colorado court found that constitutional free speech protected defendants who distributed pamphlets raising awareness of jury nullification in a plaza outside a Denver courthouse. Because the defendants' "sole motive appears to have been to provide information about jury nullification generally" and they did not "attempt to discuss a particular case with any of the jurors they met, nor did their literature address any specific, identifiable case," their jury tampering charges were dismissed.[44]

This ruling builds on recent precedent from other jurisdictions. In 2012, a New York District Court dismissed federal charges of jury tampering when a member of the Fully Informed Jury Association (FIJA) distributed pamphlets outside a courthouse raising awareness of the "right of a jury to render a verdict on the basis of the law as well as the facts."[45] The court differentiated this case from Turney v. Pugh, a 2005 case in which a FIJA member was found guilty of jury tampering under an Alaska law. Key to this decision was the fact that Turney had shared jury nullification awareness messages in a courthouse with members of a jury pool (i.e., potential jurors), including with three individuals wearing badges identifying them as jurors.[46] Thus, again, activists, lawyers, and organizers interested in promoting jury nullification should be mindful that doing so is constitutionally protected speech, but only when not used in particular cases or directed at identifiable prospective jurors.

Advocates of jury nullification are not the only targets of judges and prosecutors seeking to restrict its use; jurors themselves may sometimes face accusations of

[43] *See supra* at 5.
[44] People v. Iannicelli, 2019 CO 80 at 396.
[45] United States v. Heicklen, 858 F. Supp. 2d 256 (S.D.N.Y. 2012) at 260.
[46] 400 F.3d 1197 (9th Cir. 2005) at 1198.

impropriety, albeit not criminal charges. In U.S. v. Thomas, "Juror No. 5" was the only Black juror and the only juror who refused to convict the all-Black defendants in the case. This juror became a target for prosecutors, who sought dismissal of the juror under an accusation of attempted jury nullification. The defense objected that the prosecution's challenge was racially motivated, but the district court sided with the prosecution, dismissing Juror No. 5. The appellate court reversed the district court's decision—not out of deference for the legally protected power of jury nullification, but because "the record evidence raised the possibility that the juror's view on the merits of the case was motivated by doubts about the defendants' guilt, rather than by an intent to nullify the law."[47]

In summary, jury nullification is a paradoxical and somewhat illusory legal tool that nonetheless carries liberatory potential. Its utility is dependent on jury members' awareness of its existence. Critics contend that raising awareness of jury nullification promotes lawlessness and that it does not inherently advance progressive movements, since it can be used to acquit any and all criminal defendants, including those who enact violence. However, given the conservative tilt of the law and the highly racialized, carceral nature of the criminal legal system in particular, it is reasonable to view jury nullification as a tool of the powerless. Under the right circumstances, jury nullification can disrupt harmful systems and restore determinations of justice to the communities who need it most.

[47] United States v. Thomas, 116 F.3d 606 (2d Cir. 1997) at 608-09.