

Q: Should juries nullify laws they consider unjust or excessively punitive?

Yes: Juries can and should correct the overly broad use of criminal sanctions.

BY CLAY S. CONRAD



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against civil-rights workers in the Deep South, it is true that juries returned "not guilty" verdicts. However, it also is true that sometimes prosecutors regularly refused to pursue those cases, police refused to investigate or testify honestly in them and judges eviscerated the cases through discretionary rulings. The juries rarely were given cases justifying conviction — and then were scapegoated for failings elsewhere in the system.

Jury nullification occurs when a criminal-trial jury refuses to convict a defendant despite proof of guilt because the jurors believe the law is unjust or is being unjustly applied. According to studies, 3 to 4 percent of jury criminal trials involve jury nullification. There is no way to prevent jury nullification because juries never can be ordered to convict or be punished for acquitting someone. A jury acquittal, under the Constitution, is final.

Juries rarely nullify irresponsibly. Consider the acquittal of Sam Skinner, a California AIDS patient prosecuted for using marijuana. The marijuana helped counteract the devastating side effects of the drug AZT and kept Skinner from wasting away. Although Skinner admitted to the facts, the jury found him not guilty because they believed the prosecution was fundamentally unjust.

Sometimes juries find defendants guilty only of lesser offenses when they believe the punishment for the charged offense is excessive. In earlier times, British law made theft of 40 shillings or more a capital offense. Juries often undervalued property so as to spare the life of the accused — including one case in which a jury found ten £10 notes to be worth 39 shillings. Jack Kevorkian's latest trial involved just that sort of amelioration. The jury found him guilty of second-degree murder despite the facts because they believed a conviction for first-degree murder would be too great.

Alternatively, it often is argued that race and prejudice lead to jury nullification more often than do considerations of justice. As common as that argument is, it doesn't hold water. During the 1960s in the trials of some who participated in crimes

These contentions are proved by the fact that federal prosecutions for violations of civil-rights laws, involving the same cases, regularly ended in convictions — before juries selected from the same communities. Different judges, prosecutors and investigators — but the same jury pool. Obviously, any racist acquittals must be explained by something other than the juries.

A recent *National Law Journal* poll revealed that three in four Americans would nullify if they believed the court's instructions would lead to injustice. That only 3 to 4 percent of jury trials end in nullification verdicts shows that, in most cases, the law is just and justly applied. In exceptional, marginal or divisive cases, however, jurors often acquit in the interests of justice — just as the Founders of this country intended.

The Founders on both sides of the ratification debate believed trial by jury was necessary to prevent governmental overreaching. Thomas Jefferson said it was the only way to anchor government to constitutional principles. Alexander Hamilton said it was the surest protection of the people's liberties. Theophilus Parsons, first chief justice of Massachusetts, said in the Constitutional Convention: "The people themselves have it in their power effectually to resist usurpation, without being driven to an appeal to arms. An act of usurpation is not obligatory; it is not law; and any man may be justified in his resistance. Let him be considered as a criminal by the general government, yet only his fellow-citizens can convict him; they are his jury, and if they pronounce him innocent, not all the powers of Congress can hurt him; and innocent they certainly will pronounce him, if the supposed law he resisted was an act of usurpation."

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No: Don't give society's mavericks another tool to subvert the will of the people.

BY NANCY KING



King teaches law at Vanderbilt University and is author of the article, "Silencing Nullification Advocacy Inside the Jury Room and Outside the Courtroom."

Inviting jurors to acquit regardless of what the law says is a tempting cure-all for the law's ills. But cultivating jury nullification is a mistake. Like the peddler's elixir, jury nullification is just as likely to produce unpleasant side effects as it is to bring relief. The most compelling reasons to be wary of the practice of jury nullification are the very arguments its advocates trot out in its defense — history, democracy, fairness, political change and the Constitution itself.

One does not have to look back far into history to find a good reason for discouraging jury nullification. True, the colonists embraced the jury's power as a weapon against the king's oppressive laws. And, we're reminded, juries bravely blocked prosecutions of those who resisted the Fugitive Slave Act, Prohibition and the Vietnam War draft. But jury nullification has not been neatly confined to the rejection of "bad" law or the release of "good" defendants. A much less appealing pattern of jury lawlessness is also prominent in our nation's history. For generations juries have refused to convict or punish those who clearly are guilty of violence against unpopular victims, particularly African-Americans. The Klan Act, barring Ku Klux Klan sympathizers from juries after the Civil War, was passed because juries were exercising their "independence" to ignore civil-rights statutes. In Texas after the Civil War, prosecutors had to strike from juries those who "believe, morally, socially, politically, or religiously, that it is not murder for a white man to take the life of a [N]egro with malice aforethought." This is not a proud legacy. We should not assume that refusal to punish those who harm members of less popular groups is entirely behind us just because some juries, in some places, are more racially diverse than they used to be.

Racism, of course, is not the only risk. To invite nullification is to invite jurors to devise their own defenses to a criminal charge. All three branches of government may have labored to eliminate similar considerations from the assessment of guilt. Juries have acquitted defendants in rape cases after concluding that the victims deserved to be raped because of the way they dressed or acted. Jurors may acquit protesters who trespass, damage property or harm others if they conclude the defendants were right to bypass lawful means of redress. Jurors may believe that reasonable doubt is not a strong-enough burden of proof and require fingerprints or eyewitnesses before convicting. They may decide that certain conduct by the police should be a complete defense, oblivious of efforts by legislators and judges to craft remedies and regulations for police misconduct. Now, as in

the past, encouraging "good" nullification inevitably means encouraging "bad" nullification as well, because there is no way to second-guess a jury's acquittal once delivered.

It is not feasible to try to separate "good" nullification from "bad." Even nullification advocates cannot agree on what type of nullification is acceptable. One supporter would require nullification instructions only in cases involving non-

violent acts of civil disobedience where the defendant had "given serious thought" to legal means of accomplishing the same objective. Another would encourage jury pronouncements on the law only when the issue was the constitutionality of a criminal statute. A third insists that "true" nullification is limited to decisions "based on conscientious grounds." In a recent survey, college students were asked whether jury nullification included any combination of a set of possible reasons for acquittal, all of which the researchers believed were valid reasons for juries to nullify, such as, "The police wrongfully assaulted the defendant after he was arrested." When only 13 percent of those surveyed agreed that nullification included all of the reasons listed, the researchers concluded their subjects had a lot to learn about nullification. The response should suggest something else — that it is wishful thinking to assume that legislators or judges will be able to agree when jurors should ignore the law and when they should not.

One might support expanding the lawmaking role of the jury if one believes juries are an essential feature of our democracy, better at assessing whether a law is "just" or "unjust" than democratically elected legislators. But juries probably are much worse at this task. Unlike legislators or electors, jurors have no opportunity to investigate or research the merits of legislation. Carefully stripped of those who know anything about the type of case or conduct at stake, juries are insulated from the information they would need to make reliable judgments about the costs and benefits, the justice or the injustices, of a particular criminal prohibition. Nor can jurors seek out information during the case. The so-called "safety valve" of jury nullification, which exempts a defendant here and there from the reach of a controversial law, actually reduces the pressure for those opposed to a truly flawed statute to lobby for its repeal or amendment and deprives appellate courts of opportunities to declare its flaws.

Nullification's supporters point out that legislatures cannot anticipate unfair applications of the laws they enact, so jury nullification is needed for "fine-tuning." But jurors are not in any better position than judges or prosecutors to decide which defendants should be exempted from a law's reach. Again, jurors probably are much worse at this function because they lack critical information. Any juror who actually knows the defendant is excused from the jury. Jurors only can speculate on the penalty that would follow from their verdict. Unless the defendant testifies (and most defendants do not), the jury will never hear him *(continued on page 27)*

Many important colonial trials ended in nullification. American jurors knew they could refuse to enforce unjust laws. Early jurors routinely were informed by courts of their right to try the law as well as the fact, and lawyers regularly argued the merits of the law to the jury. The independent role of juries was well-accepted in early American law.

It was not until the mid-19th century that courts began to question the jury's independent voice. Judges attempted to bind juries to their instructions and began prohibiting lawyers from arguing law to the jury. The Supreme Court allowed such practices to stand, and today many judges wrongly believe they are forbidden to allow jury nullification to be discussed in court.

American courts have not always been so reluctant to trust the conscientious judgments of juries. In the early years of this country, the Supreme Court itself occasionally heard cases with a jury. In 1794, Justice John Jay, for a unanimous Supreme Court, instructed a jury: "It may not be amiss, here, gentlemen, to remind you of the good old rule, that on questions of fact, it is the province of the jury, on questions of law, it is the province of the court to decide. But it must be observed that by the same law, which recognizes this reasonable distribution of jurisdiction, you have nevertheless a right to take upon yourselves to judge of both, and to determine the law as well as the fact in controversy. On this, and on every other occasion, however, we have no doubt, you will pay that respect, which is due to the opinion of the court: For, as on the one hand, it is presumed, that juries are the best judges of fact; it is, on the other hand, presumable, that the courts are the best judges of the law. But still both objects are lawfully within your power of decision."

These instructions meticulously delineate the roles of bench and jury. The court instructed the jury on a general rule, which allowed for exceptions. They admonished the jury to take their instructions with respect, yet acknowledged that the jury could not be bound by them. These instructions fostered juror independence and responsibility, not jury lawlessness or wanton disregard for the rights of the parties. Similar instructions could assist jurors in delivering fair, just verdicts today — making sure the law is applied in a manner in which the citizens of this country approve and giving us a legal system of which again we could be proud. The Fully Informed Jury Association, a Section 501(c)(3) [tax-exempt] educational organization with a mission to inform potential jurors of their right to nullify unjust laws, has provided model initiatives to allow for just such instructions. These initiatives have been introduced by legislators in more than a dozen states.

What would be the result of informing jurors about their power to nullify the law in the interests of justice? Perhaps bet-

ter questions would be: Is the criminal law applied more or less fairly in 1999 than it was in 1799? Is it more or less a source of social divisiveness and tension? Has the criminal sanction been wrested from providing social protection to become a tool for social engineering?

Criminal law often is a divisive factor in society. The nonsensical distinctions between powder and crack cocaine; enormous penalties for many minor crimes; unfair sentencing favoritism given to snitches (who serve a small fraction of the time given their underlings); criminalization of "wetlands" viola-

tions; regulatory, licensing and administrative infractions; and the often-mechanical application of law favored by prosecutors have resulted in a hodgepodge of injustices strung together without rhyme or reason. Apologists who claim a society must have rules miss the point — a just society has to have just rules. Juries, by refusing to enforce unjust rules, can help improve the law and the society it governs.

Courts usually pretend injustices under law cannot occur. They can and too often do. As Judge Thomas Wiseman noted, "Congress is not yet an infallible body incapable of passing tyrannical laws." Occasionally, jurors follow their instructions, then leave court in tears, ashamed of their verdict.

This sort of thing is not supposed to happen in America. It isn't justice. If being a juror means anything, it should mean never having to say you're sorry. If the law is just and justly applied, jurors should be proud of their verdict and confident that any sentences meted out are well-deserved. Then we will engender respect for the law because, as Justice Louis Brandeis observed, for the law to be respected it first must be respectable.

What happens when a jury nullifies a law? One factually guilty person is acquitted in the interests of justice. If a particular law frequently is nullified, the legislature should bring the law into conformity with the judgment of the community. If the law is being misapplied, the legislature may make the law more specific or prosecutors may quit applying it overbroadly. The law is improved, and injustices are prevented.

Does jury nullification lead to anarchy — or is it democracy in action, allowing citizens to participate in the administration of justice? The concept that jury nullification is anarchy has been bandied about without analysis or justification in the face of juries being given nullification instructions for the first century of this country's existence without collapse into anarchy. Jury nullification does not eliminate law — it regulates it, allowing the people's perception of justice, not the government's, to prevail. It takes a true authoritarian to call such vital citizen participation in governmental decision-making "anarchy."

Trial by jury, according to the Supreme Court, exists to pre-

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vent oppression by government. It is easy to see that an occasionally oppressive government does not like to have its powers limited. However, those of us who someday may find ourselves on the other side of the equation should be grateful that the Founders of this country had the foresight and wisdom to

install this safety valve, this elegant and time-tested mechanism to anchor our government to the principles of its Constitution. It would be a disgrace to those same Founders to be unwilling to utilize this safety valve today, when circumstances indicate it would be appropriate to do so. ●

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explain his side of the story nor learn whether he has a prior record. They may never learn of evidence suppressed because it was illegally obtained or because of other errors on the part of the prosecution. More importantly, because jurors decide only one case, they cannot compare the culpability of different defendants or assess the relative importance of enforcing a particular prohibition against a particular defendant. No doubt about it: Jurors are excellent fact finders and lie detectors. But when facts are not in issue and guilt is clear, the ability of jurors to reach sound decisions about when the law should be suspended and when it should be applied is questionable at best.

Jury nullification sometimes is touted as an effective political tool for those who have failed at the voting booth and on the legislative floor. There are two problems with this argument. First, if a group is not influential enough to obtain favorable legislation, it is not likely to secure a majority in the jury box. At most, jurors with dissenting views succeed in hanging the jury. But hung juries are a political dead end. The defendant is not spared; he can be tried again and convicted. More importantly, as a recent recommendation in California demonstrates, rising hung-jury rates inevitably lead to proposals to eliminate the unanimity requirement, proposals that if adopted would shut down minority viewpoints more effectively than any instruction against nullification ever could.

Even if a politically unsuccessful group finds strength in some local jury boxes, should we really be heartened by the prospect of being stuck with the decision of 12 people who have been encouraged to ignore the pronouncements of the state or nation's elected representatives? If there is a concentrated population of homophobes, racists or anti-Semites in my state, I, for one, do not want judges and lawyers encouraging jurors drawn from these communities to apply their own standards — standards that may vary with the victim's sexual orientation, race or religion. Local dissent, of course, is not limited to group-based views. People disagree strongly about a variety of laws — laws against possessing weapons, euthanasia, driving after a couple of drinks, the use of marijuana, slapping one's wife or children around or the dumping of paint or oil. There are places well-suited for resolving these disagreements: the legislature and the polling booth. Our democratic process should not be jettisoned arbitrarily by an unelected group of citizens who need never explain themselves.

Our democratic process should not be jettisoned so arbitrarily by an unelected group of citizens who need never to explain themselves.

Legislators and judges so far steadfastly have rejected repeated proposals to lower barriers to jury nullification because they understand that the costs of such changes would far outweigh any benefits they may bring. Other fundamental changes in our jury system, such as the Supreme Court's decision to ban race-based peremptory challenges as a violation of the equal-protection rights of potential jurors, have been preceded by sustained social, political and legal critique of the status quo. A similar groundswell to cede more power to those who sit in jury boxes in criminal cases has never existed and, fortunately, probably never will. ●

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Finally, the Constitution does not support an enhanced law-making role for juries. Jurors have no personal constitutional right to disregard the law — otherwise, they would not be required to take an oath to obey it. Nor do defendants have a constitutional right to insist that jurors be given the opportunity to disregard the law. True, judges cannot overturn a conviction or acquittal without the consent of the defendant (through appeal, motion or otherwise). But this rule is in place not because the Constitution considers the jury a superior lawmaker but because the Fifth Amendment prohibits the government from putting the defendant in jeopardy of life or limb more than once for the same offense. Judges also are barred from directing verdicts of guilt, but only because the Sixth Amendment guarantees to the defendant a jury's assessment of the facts.

Beyond what is necessary to protect these important interests of the accused, our refusal to tolerate jury nullification must not stray. Judges, for example, should continue

to avoid seating jurors who cannot or will not promise to follow the judge's instructions; continue to prohibit argument and deny instructions concerning defenses not supported by the evidence; continue to instruct jurors about the law and require them to follow these instructions; and continue to prohibit nullification advocates from approaching jurors with nullification propaganda (just as they bar prosecution sympathizers from lobbying the jury for conviction). Although each of these practices is designed to prevent jury nullification, each is constitutional because the Constitution does not protect jury nullification itself. It protects a defendant's right to fact-finding by a jury and to the finality of a verdict.

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